



# OSHA 30/30<sup>®</sup>

A thirty minute update  
on OSHA law every thirty days

with  
**Manesh Rath**

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## OSHA ‘Walkaround Rule’: What it Means for Your Work Site

April 24, 2024

# Manesh Rath

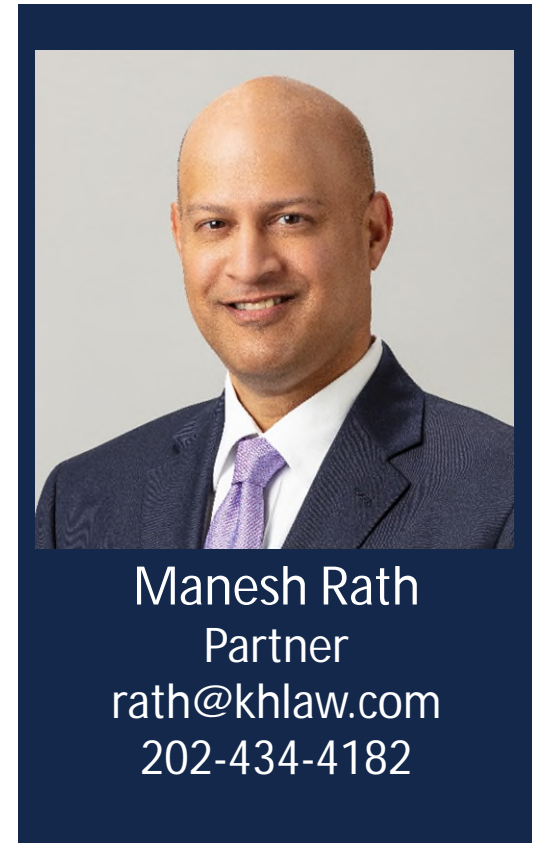


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

Mr. Rath served on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016 through 2024, and in 2023, selected in his field as Lawyer of the Year; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



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# Taylor Johnson



Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.



# Topics to Be Discussed

- ◆ Walkaround Rule: Final Rule Overview
- ◆ Union Representatives on a Non-Unionized Worksite
- ◆ When is a Third-Party Representative “Authorized” and “Reasonably Necessary?”
- ◆ Denying a Third-Party Representative Access to the Worksite
- ◆ What Employers Should Do

# Legal Background: Accompaniment On Inspections

- ◆ Section 8(e) of the OSH Act grants a *representative authorized by employees* the opportunity to accompany OSHA during the physical inspection of the workplace for the *purpose of aiding the inspection*. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

# Walkaround Rule: Final Rule Overview

- ◆ Final rule published in the *Federal Register* on April 1, 2024
- ◆ OSHA released FAQ on April 8, 2024
- ◆ Employees have the right to designate a non-employee third-party to be their representative during an OSHA inspection (**potentially more than 1**)
- ◆ Rule will take effect on May 31, 2024
- ◆ Two notable changes from the proposed rule



# Walkaround Rule: Final Rule Overview



- ◆ Change from third-party “participation” to “accompaniment” in the final rule
  - ◇ OSHA noted that the term was changed due to commentor concerns that the employee representative had a role in conducting the inspection
- ◆ “Communication skills” added to list of skills that would justify a third-party to accompany the inspector
  - ◇ OSHA noted that interpretation skills for employees with limited English proficiency, and the utilization of cultural competence and prior relationships with workers are all examples of “communication skills”

# Walkaround Rule: Final Rule Overview



## Old 29 CFR 1903.8:

"The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection."

## New 29 CFR 1903.8

"The representative(s) authorized by employees may be an employee of the employer or a third party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills)."



# Union Representatives on a Non-Unionized Worksite



- ◆ In response to comments, OSHA disagreed that the rule would lead to improper influence by union officials or be “weaponized” against employers
- ◆ Any union solicitation, such as handing out union authorization cards, would not aid the inspection and would be grounds to deny accompaniment
- ◆ OSHA found that “union organizing, political activity, or misconduct are unlikely during a walkaround”
- ◆ Any third-party walkaround representative is subject to the “good cause” and “reasonably necessary” requirement

# How is a Representative Deemed “Authorized” by Employees?

- ◆ Several ways that employees can inform OSHA of a walkaround representative
  - ◇ Upon receipt of a complaint (with reference to a designated representative)
  - ◇ During the opening conference
  - ◇ During the walkaround
  - ◇ During employee interviews
- ◆ No set number of employees required to authorize a representative – however in workplaces with more than one employee, more than one employee is required
- ◆ CSHOs can not designate a third party as an authorized employee representative without a request or designation by employees.



# Is a Third-Party Representative “Reasonably Necessary?”

- ◆ Third-party representatives are "reasonably necessary" when they will make a **positive contribution** to a thorough and effective inspection
- ◆ CSHO determines if representative is reasonably necessary by inquiring about his/her knowledge, skills, experience, etc.
- ◆ Questions about the representative's familiarity with the equipment, machinery, work processes, industry, consensus standards or hazards that are present in the workplace
- ◆ In all cases, the third party must aid the inspection



# When can a Third-Party Representative be Denied Access to a Worksite?



- ◆ Conduct of third-party representative can't interfere with a fair and orderly inspection
  - ◆ Preventing the CSHO from interviewing employees in private.
  - ◆ Failing to stay with the CSHO during the walkaround, such as wandering away from the inspection or going into unauthorized areas.
- ◆ Employer has the right to limit entry of authorized representatives into areas of the workplace that contain trade secrets
- ◆ Employer has the right to prevent unreasonable disruption of the operations of the employer's establishment

# What Employers Should Do

- ◆ Verify that the third-party representative has been authorized by more than one employee
- ◆ Verify that the CHSO has instructed the third-party representative to abstain from discussing matters unrelated to the inspection with employees during the inspection
- ◆ Make CSHO identify the positive contribution that will aid in the inspection
- ◆ Is it necessary?
- ◆ Apply normal visitor policies to third-party representative
  - ◇ Confidentiality agreement
  - ◇ Areas that third party can't access due to trade secrets
  - ◇ PPE – treat them like any other visitors
  - ◇ Security clearance or background check

# What Employers Should Do (Continued)

- ◆ Ensure that inspection is not delayed by more than 1 hour when waiting for the representative
- ◆ Third-party representatives should only be present during the following:
  - ◇ Opening conference
  - ◇ Walkaround inspection
  - ◇ Private employee interviews **ONLY** when they are asked to be there by the employee themselves
  - ◇ Closing conference



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**Thank You**



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