November 13, 2023

VIA ELECTRONIC SUBMISSION

Douglas L. Parker
Assistant Secretary of Labor for Occupational Safety and Health
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Docket No. OSHA-2023-0008, Comments on OSHA's Worker Walkaround Representative Designation Process, RIN 1218-AD45

Dear Assistant Secretary Parker:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor's Occupational Safety and Health Administration in response to the above-referenced proposed rule published in the Federal Register on Aug. 30, at 88 Fed. Reg. 59825.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 22,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private-sector customers.[1]

The vast majority of ABC's contractor members are also small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)[2] and industry workforce employment (nearly 81% of the construction

[1] For example, ABC's 33rd Excellence in Construction Awards program from 2023.
[2] U.S. Census Bureau 2021 County Business Patterns: https://data.census.gov/table?q=CBP2021.CB2100CBP&tid=CBP2021.CB2100CBP&hidePreview=true and https://www.census.gov/programs-surveys/cbp/data/tables.html.

industry is employed by small businesses).[3] In fact, construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United States and account for 69% all construction industry employment.[4] In addition, the vast majority of small businesses are not unionized in the construction industry.

ABC and its chapters strive to provide all members with the knowledge and tools to achieve the highest standard for health, safety, wellness and environment in the construction industry. It is ABC's mission to ensure all of our construction workers go home in the same—or better—condition than when they arrived on the jobsite every day.

OSHA can have a bigger impact on jobsite safety by fostering positive partnerships with employers and promoting safety practices that produce results. According to ABC's 2023 Safety Performance Report, top-performing STEP participants achieved a 688% improvement in safety performance compared to the U.S. Bureau of Labor Statistics construction industry average in 2022.[5]

ABC shares the concerns and recommendations provided in extensive comments filed to this docket by the Construction Industry Safety Coalition[6] and the Coalition for Workplace Safety[7] and incorporates them into this letter by reference.

ABC's Comments in Opposition to the Proposed Rule

ABC is extremely disappointed and concerned that OSHA is moving forward with a proposed rule that would allow employees to choose a third-party representative, such as an outside union representative or community activist, to accompany an OSHA safety inspector into nonunion workplaces. Unfortunately, the Biden administration is trying to revive a failed Obama-era initiative,[8] which was bad policy then and is bad policy now.

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[3] 2022 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2022), at page 4, https://advocacy.sba.gov/wp-content/uploads/2022/08/Small-Business-Economic-Profile-US.pdf.

[4] U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States and Selected Geographies: 2021, available at https://data.census.gov/table/CBP2021.CB2100CBP?q=CBP2021.CB2100CBP&hidePreview=true.

[5] ABC 2023 Safety Performance Report, available at https://www.abc.org/spr.

[6] See https://www.buildingsafely.org/about-cisc/.

[7] See https://workingforsafety.com/about-cws/.

[8] See Feb. 21, 2013, letter of interpretation to Steve Sallman from Richard Fairfax, Deputy Assistant Secretary of OSHA at https://www.regulations.gov/document/OSHA-2023-0008-0003, which endorsed union representatives and other nonemployee third parties accompanying OSHA inspectors on walkaround inspections at nonunion workplaces. OSHA eventually rescinded the letter of interpretation on April 25, 2017.

OSHA's current regulations have long permitted an employee to accompany the agency's officers on inspections, and third parties have only been allowed to accompany an inspector when "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."[9]

This longstanding interpretation permits OSHA to balance access to outside expertise when necessary and employer property rights, including the right to protect proprietary and confidential information that could be exposed during facility inspections. In overstepping its statutory authority, OSHA abandons this balance in the proposed rule, which will have a substantial negative impact on the rights of employers and their employees.

Under the proposed rule, there is no restriction on the number of different third-party representatives that may be present for a single inspection nor on how many employees may request different representatives. Additionally, the rule fails to provide any safety expertise criteria for the selection of third-party representatives. It also gives no guidance on how OSHA or an inspector should approve these requests or what is "reasonably necessary."

OSHA states that "these changes will ensure employees are able to select trusted and knowledgeable representatives of their choice, leading to more effective inspections."[10] Yet, the agency fails to explain how the change in policy will increase workplace safety. Instead, the proposed rule does nothing to promote workplace safety, casts doubt on OSHA's status as a neutral enforcer of the law and places undue burdens on merit shop contractors.

As explained in more detail below, ABC urges OSHA to withdraw this poorly conceived rule.

1) OSHA Lacks the Statutory Authority to Issue This Proposed Rule, Which Does Nothing to Increase Workplace Safety

The proposed rule contradicts the plain language of the Occupational Safety and Health Act and the National Labor Relations Act, along with OSHA's Field Operations Manual, and instead promotes the Biden administration's "all-of-government" approach to encouraging unions and collective bargaining.[11]

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[9] 29 C.F.R. § 1903.8(c).
[10] 88 Fed. Reg. 59829.
[11] See https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/17/the-white-house-task-force-on-worker-organizing-and-empowermentupdate-on-implementation-of-approved-actions/#:~:text=The%20Task%20Force%2C%20led%20by,government%20as%20a%20model%20employer.

The proposal allows anyone and everyone to become an authorized employee representative, such as outside union agents and community organizers. However, for decades OSHA has consistently interpreted the law, the regulations and the FOM to allow a safety inspector to be accompanied by a labor union only where such a union has been certified or recognized as representing the employees of the employer under procedures established by the National Labor Relations Board.

Under the proposed rule, OSHA's expansive interpretation of the term "authorized employee representative" as used in the OSH Act, departs from the agency's own definition of the same term in different parts of its regulations.

The statutory basis for OSHA's rulemaking regarding "authorized employee representatives" on walkarounds comes from Section 8(e) of the OSH Act, 29 U.S.C. 657(e), which provides that, "subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by its employees shall be given an opportunity to accompany [the CSHO] for the purpose of aiding such inspection."[12]

In addition to the foregoing violations of the governing statute, OSHA's proposed change in its walkaround policy is arbitrary and capricious in violation of the Administrative Procedure Act, 5 USC 702. Agency reversals such as this have long been found to violate the APA "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Under OSHA's current regulation implementing the OSH Act, 29 CFR. 1903.8(c), "authorized employee representative" is defined as "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." This longstanding interpretation permits OSHA to balance access to outside expertise when necessary and employer property rights.

In addition, the OSHA Review Commission's regulation, 29 C.F.R. 2200.1(g), defines an "authorized employee representative" to mean "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees."

[12] 29 U.S.C. § 657(e).

The definition of “authorized employee representative” in 29 C.F.R. 2200.1(g) is consistent with the language of the OSH Act, which clearly contemplates the existence of one “representative authorized by his employees” at a given worksite. The Commission has limited such status to unions recognized through the NLRB process.

Consistent with these regulations, OSHA’s FOM and its predecessor the Field Inspection Reference Manual have long titled the section on inspection accompaniment as, “Employees represented by a certified or authorized bargaining agent.” Another section of the FOM addresses what an OSHA inspector should do where there is “No Certified or Recognized Bargaining Agent.” The FOM directs OSHA inspectors to determine if other employees of the employer would suitably represent the interests of coworkers in the walkaround. If selection of an employee is impractical, inspectors are directed to conduct interviews with a reasonable number of employees during the walkaround.

The proposed rule’s overexpansion of the concept of an “authorized employee representative” infringes on employee rights to reject collective representation. Section 9 of the NLRA makes clear that only a union that has been chosen by a majority of employees in an appropriate bargaining unit can claim to be an “authorized representative.” To respect employee rights to choose or reject collective representation, the NLRB created procedures to assess whether a proposed “authorized representative” actually enjoys the support of the relevant employees. OSHA’s authorized representative procedures contain no such structure.

OSHA’s proposal places no limit on how many employees could request an outside third party as their representative for safety inspection purposes. And in a nonunion workplace this could include an outside union, or even a community organizer whose focus is outside the scope of the safety or health of a workplace.

OSHA’s sole and only congressionally mandated purpose is to uphold federal standards for workplace health and safety. Instead, the proposed rule dilutes and undermines OSHA’s stated purpose by allowing nonemployee third parties to have unbridled and unrestricted responsibility and authority during the inspection process. This is neither the intent of an OSHA inspection, nor is it appropriate under the previous interpretations of the regulations and the law. The possibilities for disruption in the workplace by any group that may have a grievance with an employer are endless.

The proposed rule should be withdrawn since it contradicts the foregoing law and regulations and past OSHA guidance. Further, the change in policy does nothing to promote workplace safety and has a substantial negative impact on the rights of employers and their employees.

2) The Proposed Rule Casts Doubts on OSHA's Status as a Neutral Enforcer of the Law And Places Undue Burdens on Merit Shop Contractors

OSHA should not take sides in promoting union organizing agendas to the detriment of management. By allowing outside union agents and community organizers access to nonunion employers' private property, OSHA is injecting itself into labor-management disputes and casting doubt on its status as a neutral enforcer of the law. Unfortunately, union agents and community representatives who are engaged in organizing activity often have a biased agenda, which is to find issues in the employer's workplace that can be exploited, not to improve worker safety. This creates a substantial undue burden on nonunionized workplaces that may have to accept without recourse their employees' decision to bring in union organizers during an inspection.

Unlike a situation where a union does represent a majority of the workers and has a collective bargaining relationship, outside union agents and community organizers have no duty to represent the interests of nonunion employees, nor do they have any special expertise in the nonunion workplace, except as an organizer. This is a totally improper reason for allowing outside agents to accompany OSHA safety inspectors.

Not only does the proposed rule negatively impact the rights of employers, it also ignores the rights of the majority of employees who have not authorized any union to represent them. If one employee wants someone from the union to participate in the inspection, but there has already been a unionization vote that was rejected, the union individual's participation directly contradicts the choice of the remainder of employees.[13]

Likewise, by allowing a nonmajority community organizer to participate in a walkaround, the proposal could distract the OSHA safety inspector from their primary purpose of workplace safety. Community organizers, like the union organizers with whom they often collaborate, have their own agendas that are not focused on safety or health. These outside agendas include zoning or environmental disputes, wage claims and many other causes that are well outside OSHA's jurisdiction. Involvement of such organizations in a safety inspection could lead to significant disruption of the workplace for reasons having nothing to do with OSHA's inspection objectives.

Notably, on Oct. 31, the NLRB and OSHA announced that the agencies had executed a memorandum of understanding "to strengthen the agencies' partnership to promote safe and healthy workplaces through protecting worker voice."[14] The MOU directly displays bias of the agency that would inhibit conducting a neutral evaluation of what is

[13] See Section 7 of the NLRA, which states "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities."

[14] See https://www.osha.gov/laws-regs/mou/2023-10-31.

"reasonably necessary." The MOU envisions opportunities for the NLRB and OSHA to conduct coordinated investigations and inspections "in appropriate cases and to the extent allowable under law." This proposed rule in conjunction with the MOU will absolutely provide grounds for an inspector to override the employees' decision to be a nonunion workplace. It is highly likely, even with a nonunion worksite, that the NLRB may be engaged to have a joint coordinated inspection involving both agencies, where without the walkaround rule, the NLRB would have no authority or means to investigate. Indeed, the MOU increases the pressure on OSHA inspectors to allow nonaffiliated union representatives to join their walkaround inspections, further challenging what is reasonably necessary in the context of the agency's proposed agenda.

Because the proposed rule has the potential of allowing anyone on the jobsite, construction employers are faced with serious safety concerns. OSHA's rule poses unnecessary risk to the individual joining the inspection and others on the jobsite if the authorized person is not trained or equipped to safely walk a construction jobsite. The rule does not include any requirement that the authorized person be trained, equipped or conduct themselves to the same standards as OSHA safety inspectors. Further, the proposal fails to answer who is legally responsible if the third party gets injured during the inspection or harms someone else.

Also, the proposed rule fails to provide any safety expertise criteria for the selection of third-party representatives. The inspector has unfettered discretion under "reasonably necessary" because it is a subjective standard. If the inspector decides they want a competitor's employee (union or nonunion) to walk around, the only objection the employer can make is to ask the inspector to get a warrant. There could be unfair competition created by these inspectors and there is no limitation or consequence to the agency.

Of further concern is the fact that there is no restriction on the number of different third-party representatives that may be present for a single inspection, nor on how many employees may request different representatives. The proposal gives no guidance on how an inspector should prioritize, approve or manage these requests. It is also unclear whether the third-party representative would be acting as an agent of OSHA or an agent of some other entity.

Finally, members of the public have no right to access an employer's private workplace, in general. For example, shortly after the passage of the OSH Act, the U.S. Supreme Court recognized these property rights by holding OSHA subject to the Fourth Amendment's warrant requirements.[15] The proposed rule fails to acknowledge an employer's general, common-law right to exclude disinterested parties from their private property. OSHA must balance important employer property rights with its legitimate

[15] *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314, 98 S. Ct. 1816, 1821, 56 L. Ed. 2d 305 (1978) (finding "[w]ithout a warrant [a CSHO] stands in no better position than a member of the public").

enforcement priorities. Trade secrets are yet another area of property rights that will be curtailed under the proposed rule.

ABC urges OSHA to withdraw this misguided proposed rule to avoid needless infringement on the rights of employers and the majority of their workers who have not chosen the outside third party as their authorized representative. OSHA should instead focus on promoting jobsite health and safety by building strong relationships with employers and promoting effective health and safety practices, instead of inserting itself into divisive unionization efforts and creating undue burdens on merit shop contractors.

Conclusion

For the reasons outlined above, as well as those in comments filed by the CISC and CWS, ABC urges OSHA to withdraw this proposed rule.

Respectfully Submitted,

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