

TESTIMONY

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SHAREHOLDER

LITTLER MENDELSON, PC

ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

AND ASSOCIATED BUILDERS AND CONTRACTORS, INC.

**“OSHA’S REGULATORY AGENDA: CHANGING LONG-STANDING POLICIES OUTSIDE THE PUBLIC
RULEMAKING PROCESS”**

FEBRUARY 4, 2014

BEFORE THE

**U.S. HOUSE OF REPRESENTATIVE COMMITTEE ON EDUCATION AND THE WORKFORCE,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

Chairman Walberg, Ranking Member Courtney, and members of the U.S. House Committee on Education and the Workforce, thank you for the opportunity to testify before you at today’s hearing.

My name is Maury Baskin and I am a Shareholder in the Washington, D.C. office of Littler Mendelson, P.C. Today, I am testifying on behalf of The National Association of Manufacturers (The NAM) and Associated Builders and Contractors (ABC). We appreciate the opportunity to testify before the Committee today on the issue of the Occupational Safety and Health Administration (OSHA)’s Letter of Interpretation allowing union agents and community organizers for the first time to accompany safety inspectors into non-union facilities, issued on February 21, 2013.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, provides the largest economic impact of any major sector, and accounts for two-thirds of private sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and creates jobs across the United States.

Associated Builders and Contractors (ABC) is a national construction industry trade association representing 22,000 chapter members. Founded on the merit shop philosophy, ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically, profitably and for the betterment of the communities in which ABC and its members work.

How OSHA's New Letter of Interpretation (LOI) Changed The Rules

On February 21, 2013, without any prior public notice, OSHA for the first time issued a Letter of Interpretation (LOI) declaring that non-union employers may be compelled to allow outside union agents and/or community representatives to accompany OSHA inspectors onto the employers' premises, without any showing that the union or community organizer represents a majority of the employer's employees. According to the letter, an unspecified (non-majority) number of employees in the non-union workplace may designate an outside union or community organization as their representative for safety inspection purposes, even though a majority of the workers have failed to authorize the union as their representative for any purpose. The LOI was issued by Richard Fairfax, then Deputy Assistant Secretary of OSHA and addressed to Steve Sallman, Health and Safety Specialist with the United Steelworkers Union. The new LOI was not publicly released until April 5, 2013.

The LOI contradicts the plain language of OSHA's governing statute ("the OSH Act") and the National Labor Relations Act (the "NLRA"). Section 8 of the OSH Act provides:

Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace....

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." OSHA's published regulation implementing the OSH Act, 29 C.F.R. 1903.8(c), states:

The representative authorized by employees shall be an employee 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.

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." The Commission has limited such status to unions recognized through the NLRB process.¹

¹ These OSHA regulations are quite different from the regulation promulgated by MSHA, reflecting differences between mining and other industries. MSHA's regulation, published after notice and

Consistent with these regulations, OSHA's Field Operations Manual (FOM) and its predecessor the Field Inspection Reference Manual (FIRM) have long titled the section on inspection accompaniment: "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 co-workers in the walk-around. If selection of an employee is impractical, inspectors are directed to conduct interviews with a reasonable number of employees during the walk-around.

OSHA has for decades consistently interpreted the law, the regulations and the Field Operations Manual 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 (NLRB) - until the LOI issued last year.

The new LOI states for the first time that an unspecified number of employees in a "non-union workplace" (a workplace where no union has been certified or recognized as the representative of a majority of employees), may nevertheless designate an outside union, or even a "community organization" whose focus is anything but the safety or health of a workplace, as their representative for safety inspection purposes. The new LOI contradicts the foregoing law and regulations and past OSHA guidance.

By issuing the new LOI, OSHA reversed its long-standing interpretation of the Act, without providing any prior opportunity for the public to comment on the new policy, OSHA has left manufacturers and employers as a whole with no administrative remedy and has opened up

comment, defined representatives of miners to include "any person or organization which represents two or more miners." No similar definition appears in any OSHA regulation.

employers to harassment from outside organizations. This is neither the intent of an OSHA inspection, nor is it appropriate under the previous interpretations of the regulations and the law. As a result of the new LOI, the possibilities for disruption in the workplace by any group who may have a gripe with an employer are limitless.

The NAM and ABC believe OSHA's new LOI constitutes a significant and potentially unlawful change in agency policy that does nothing to promote workplace safety and has a substantial negative impact on the rights of employers and their employees.

The New OSHA LOI Violates The Administrative Procedure Act

As explained above, OSHA chose to issue the LOI without any advance public notice or opportunity for comment. By acting in this unilateral way, OSHA changed substantive, longstanding policy without any opportunity for employers to challenge the LOI within OSHA itself, either through rulemaking or at the OSHA Review Commission. Most importantly, by failing to go through the required notice and comment procedure, OSHA violated the Administrative Procedure Act (APA).

The APA clearly states that an agency seeking to change one of its rules must first provide the public with notice and opportunity to comment upon it. The only relevant exceptions to this notice and comment requirement arise when an agency acts through an "interpretive" (as opposed to legislative) rule, or a statement of general policy that is not deemed to be a rule at all.

The D.C. Circuit has struck down many other agency changes that were held out as merely interpretive. The judicial standard is that when an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has, in

effect, amended its rule, something it may not accomplish [under the APA] without notice and comment.

It is clear that OSHA gave its inspection regulation a definitive interpretation limiting union access to those facilities where the union has been authorized by a majority of employees. It is equally clear that the new LOI significantly revised that interpretation and that the agency has in effect substantially changed its published rule. For each of these reasons, we believe that if and when a court is asked to review OSHA's LOI, it will find that OSHA has violated the APA.

The New OSHA LOI Is Bad Policy

This is bad policy for several reasons. First, it undermines the rule of law, which is improper for any government agency charged with *enforcing* the law. Second, by allowing outside union agents and community organizers access to non-union employers' private property, OSHA is injecting itself into labor management disputes and casting doubt on its status as a *neutral* enforcer of the law.

In our experience, union agents and community representatives who are engaged in organizing activity frequently use the OSHA complaint process as a weapon against employers, particularly in so-called corporate campaigns. The outside union agents have a biased agenda, which is to find problems in the employer's workplace that can be exploited, not to improve worker safety. OSHA should not take sides in promoting union organizing agendas to the detriment of management.

Unlike the 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 non-union employees nor do they have any special expertise in the non-union workplace. In the incidents that have come to our attention where the new LOI has been applied, there was certainly no claim that the union agent had any special expertise except as an organizer. This is a totally improper reason for allowing outside agents to accompany OSHA safety inspectors.

In addition, the NLRB processes of authorizing majority representation by unions have been developed over the past 80 years for good reasons, in order to strike the right balance between labor, management and employee rights. OSHA's new LOI runs roughshod over the rights of employers and also ignores the rights of the majority of employees who have not authorized any union to represent them.

Likewise, by allowing a non-majority community organization to participate in a walk-around, the new LOI could distract the OSHA inspector from his primary purpose – workplace safety. Many community organizations, like the union organizers with whom they often collaborate, have their own biased agendas that are not focused on safety or health. These outside agendas include environmental disputes, wage claims, and many other causes. Involvement of such organizations in a safety inspection could lead to significant disruption of the workplace for reasons having nothing to do OSHA's inspection objectives.

Employers who are confronted with an OSHA inspector accompanied by an outside union agent or community organization are faced with a Hobson's choice. If they object to allowing the third party agent into their facility, they may rightly fear retaliation by the OSHA inspector. If they allow the third party outsider into the workplace, then they are giving up their private property rights and allowing someone into their premises who does not have the company's best interests at heart and who may actually want to do harm to the company. The company may also be exposing trade secrets, and at a minimum the employer's privacy rights

are being infringed. Finally, there are some unsettled liability issues connected with allowing a third party into a private workspace, if there is in fact a safety hazard on the premises.

Conclusion

For each of the reasons set forth above, Congress should take appropriate action to require OSHA to withdraw the LOI and return to the previous longstanding policy. Regardless of any additional Congressional action, OSHA should voluntarily withdraw the LOI in order 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. Thank you for the opportunity to testify today, and I look forward to your questions.