

# OSHA Clarifies Employee Representative Rights in Workplace Inspections with New Rule

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The U.S. Department of Labor recently published a final rule clarifying the rights of employees to authorize a representative to accompany an Occupational Safety and Health Administration (“OSHA”) compliance officer during an inspection of their workplace. This new rule is effective on May 31, 2024.

## Background

The Occupational Safety and Health Act (OSH Act) grants employees the right to have a representative present during OSHA inspections. This right is enshrined in Section 8(e) of the Act. One of Section 8(e)’s implementing regulations, 29 CFR 1903.8(c), provides that a representative authorized by employees “shall be an employee of the employer.” However, the regulation also creates an exception for third-party representatives when “in the judgment of the Compliance Safety and Health Officer, good cause has been shown” why the third party is “reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace.” The regulation points to two non-exhaustive examples - an industrial hygienist and a safety engineer. Further, an OSHA Standard Interpretation Letter concludes that an employee could authorize a person affiliated with a union or community organization to act as a third-party representative as such representatives make “a positive contribution to a thorough and effective inspection.”

A recent court decision challenged this interpretation in allowing union representatives, finding that OSHA’s existing regulation only permitted “employees of the employer” to be an authorized representative.<sup>[1]</sup> In the court’s rationale, because 29 CFR 1903.8(c) explicitly states in the first sentence that an employee representative “shall be employees of the employer,” it rejected OSHA’s interpretation in giving broad latitude to third-party representatives as “flatly contradict[ing]” the regulation.<sup>[2]</sup> The court reasoned that “even if OSHA can show that union representatives *should* be permitted on walkarounds, 1903.8(c) is clear that such a person cannot be designated as an employee’s representative unless the person is employed by the employer.” Arguably, a non-employee union third-party representative would not be “reasonably and necessary” to conduct an effective and thorough inspection, as they do not appear to have special expertise, such as that of an industrial hygienist or safety engineer, to which 1903.8(c) refers.

Hence, the new rule was necessary to clarify the perceived conflict between the OSH Act and its interpretation found in 1903.8(c) and OSHA’s Interpretation Letter.

## The New Rule: Clarifying Employee Representation

The new rule makes two changes to 29 CFR 1903.8(c). First, in response to the court’s decision, it clarifies that employee representatives can be either an employee of the company or a third-party

representative (like a union representative). Second, consistent with OSHA's longstanding practice, it clarifies that third-party representatives authorized by employees may have a variety of skills, knowledge, or experience that could aid an inspection. However, the right to have a third-party present is not absolute. The Compliance Safety and Health Officer conducting the inspection can still deny accompaniment if the third-party representative cannot show "good cause" for their presence during the inspection. This should ensure that third-party representatives contribute meaningfully to the inspection process.

## **OSHA's Rationale**

OSHA defends the clarifying rule as necessary to ensure thorough inspections. They argue that employee representation, regardless of whether it's a fellow worker or a third party like a union representative, is vital for a comprehensive inspection process. Additionally, OSHA maintains that the new rule doesn't impose any additional burdens on employers. Inspections will still require consent or a warrant and will be conducted in a reasonable manner, protecting employer rights.

## **Employer's Action Items**

With the new rule in place, employers should take several steps to protect their rights during an inspection.

1. Review Your Procedures. Employers can benefit from proactive steps to ensure a smooth OSHA inspection, such as developing a plan and designating a knowledgeable employee familiar with relevant policies and OSHA procedures. This employee should be prepared to request the compliance officer's credentials and the purpose of the inspection. While not always available, copies of the complaints prompting the inspection should be requested. Finally, the designated employee should inquire about the employer's right to have legal counsel accompany the inspector during the inspection.
2. Employer Consent and Protections Remain. Even with the new rule, employer consent is still necessary for OSHA to conduct a worksite inspection (absent a warrant). Furthermore, employers can protect trade secrets or confidential information by informing the OSHA investigator that certain areas are restricted to the third-party representative and request that any photographs taken in those areas be designated "confidential-trade secret," in accordance with OSHA regulation, 29 CFR 1903.9.

**For more information, contact a member of Benesch's Labor & Employment Practice Group.**

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[1] *Nat'l Fed'n of Indep. Bus. v. Dougherty*, No. 3:16-CV-2568-D, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017)

[2] *Id.* at 11.