OSHA OPENS DOOR TO UNION ORGANIZING DURING INSPECTIONS

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Union organizers arguably now have a new weapon—the opportunity to participate in OSHA inspections as a "representative" of a non-unionized workforce.

Employees have long had the right under 29 C.F.R. § 1903.8(a) to have a "representative authorized by [the] employees" to accompany the Compliance Safety and Health Officer (CSHO) during the course of a physical inspection. One of the first questions asked by a CSHO at the outset of an inspection is whether the workforce is unionized or non-unionized. If unionized, a shop steward or other unionized employee will be offered an opportunity to participate in the inspection. If the facility is non-union, the CSHO's inquiry generally ended there and the inspection proceeded because there was no authorized employee representative. However, OSHA recently attempted to alter these commonly understood rules.

On February 21, 2013, the Deputy Assistant Secretary of Labor for Occupational Safety and Health, Richard E. Fairfax, issued a letter of interpretation that responded to two questions posed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union:

1) "May *one or more workers* designate a person who is affiliated with a union *without a collective bargaining agreement at their workplace* or with a community organization to act as their 'personal representative' for OSH Act purposes?" (Emphasis added.)

2) "May *workers* at a worksite *without a collective bargaining agreement* designate a person affiliated with a union or a community organization to act on their behalf as a walkaround representative?" (Emphasis added.)

Deputy Fairfax responded "yes" to both questions. He justified his response by citing 29 C.F.R. § 1903, 29 U.S.C. § 657 and several other provisions that make reference to the role of the employee representatives in making complaints, participating in informal conferences, and contesting abatement. Deputy Fairfax, however, repeatedly glossed over and ignored the word "authorized" in his discussion of the statute and regulations. He also downplayed the significance of 29 C.F.R. § 1903.8 (c), which he only partially quoted, perhaps because it directly conflicts with his stated interpretation. Section 1903.8(c) in full states as follows:

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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. (Emphasis added.)

Curiously, Deputy Fairfax also cited OSHA's field operations manual for the proposition that "an employee representative may include any person acting in a *bona fide* representative capacity, including nonprofit groups or organizations." (Emphasis added.) Left conspicuously unexplained is how the designation of an outside union or community organization by just a few workers is sufficient to make that outside entity an "authorized" or "bona fide" representative of the workforce generally. Indeed, the letter of interpretation offers only that the outsider may serve as a walkaround representative on behalf of employees "so long as the individual has been authorized by the employees to serve as their representative."

Of additional significance is Deputy Fairfax's withdrawal of a March 7, 2003, pronouncement, which posited that a non-union employee who has filed a complaint does not necessarily have the right to participate in the ensuing inspection. But Deputy Fairfax's new letter of interpretation implies that an outside entity can file a complaint to OSHA, be designated as an employee representative by little more than one or two employees, and thereafter serve as a representative of all employees for purposes of participating in the ensuing inspection. The interpretation goes too far, no doubt to the delight of unions.

The letter of interpretation tees up this matter for a major battle between employers, union organizers, and OSHA. On its face, the letter has numerous practical and legal problems that render it unworkable, confusing, and of questionable validity. For example, where there is no union, what is the standard and threshold by which one must determine that a non-unionized workforce has selected "a representative of their own choosing [to] participate in the inspection," as Deputy Fairfax assumes can be done? From where do these employees derive a right to have a representative from the outside world enter the employer's private property without the employer's consent? And what about the majority of workers who do not want this entity to represent their interests? The written regulations use the word "authorized" representative for a reason. Deputy Fairfax's lesser, vague standard for identifying an employee representative and suggestions as to the existence of other implied rights seem at odds with the Fourth Amendment and the union recognition and collective bargaining requirements of the National Labor Relations Act. The pronouncements purport to bestow on union organizers a significant weapon through the back door, thereby avoiding necessary amendments of the regulatory language through a proper, formal rulemaking process—one that would engender traditional debate, stakeholder input, and identification of limitations and conflicts with other statutes and constitutional rights. As a result, the letter of interpretation is a boon to no one but unions. By concluding that a handful of workers is enough to designate an outsider as a representative of all employees, Deputy Fairfax has conferred an undue advantage on union organizers. They are incentivized to file, or find a sympathetic employee to file, OSHA safety complaints purely as an organizing tactic to facilitate union organizers' access to the facility and its employees. Safety is merely the key to the door.

In the wake of this letter of interpretation, non-unionized employers need to maintain a heightened awareness to union organizing activity. Where that activity is occurring or likely to occur, do not be surprised if a CSHO soon knocks on your door to investigate a safety complaint and quickly suggests that a union desires to participate as the employee representative, even where there has been no employee vote and there is no collective bargaining agreement. If that happens, your first step should be to pick up the phone. Hodgson Russ attorneys are here to help.

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