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Client Update

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OSHA Allows Outside Union Organizers Access to Non-Union Facilities During OSHA Inspections

The Occupational Safety and Health Administration (OSHA) has published a letter of interpretation that addresses the issue of allowing outsiders access to a private workplace. Specifically, OSHA intends to allow any person to represent employees and accompany OSHA compliance officers during safety and health inspections of a work site. Thus, non-union employees can select anyone, including an outside or union representative, to accompany OSHA compliance officers during safety and health inspections of an employer's work site.

OSHA issued the interpretation letter in response to a request from Steve Sallman, a health and safety specialist with the Steelworkers Union. Sallman asked whether, under OSHA rules, workers at a non-unionized workplace could authorize an individual affiliated with a union to act as their representative. This involvement would include "representing the employee(s) as a personal representative" and "accompanying the employee on an OSHA inspection" in a non-unionized workplace.

According to OSHA's interpretation letter, non-union employees can select a person who is affiliated with a union or a community organization to act as their "personal representative" in filing complaints on the employees' behalf, requesting workplace inspections, participating in informal conferences to discuss citations and challenging the citations being contested by an employer. The interpretation letter goes on to state, "a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative."

Claiming that this has always been its view, OSHA points to the federal Occupational Safety and Health Act of 1970 (OSH Act), the Secretary's regulations implementing the OSH Act and OSHA's Field Operations Manual. According to OSHA, all three sources "recognize the role of an 'employee representative' who may represent employees' interests in enforcement-related matters." Deputy Assistant Secretary of Labor for OSHA Richard Fairfax, who is retiring from the agency this year, insists that union representatives are welcome, even at union-free work sites

where they have no official standing or representative role. OSHA allows workers at establishments without collective bargaining agreements to designate who will act on their behalf during inspections.

Although OSHA claims that its interpretation is consistent with past practices, regulation 29 CFR 1903.8(c) states that “the representative authorized by the employees shall be an employee of the employer.” The regulation goes on to state that a third party who is not an employee must have relevant knowledge, such as an industrial hygienist or a safety engineer. The published response to Sallman’s question did not include those examples of qualified individuals as provided in the regulation, and also failed to explain when there would ever be “good cause” to allow a non-employee union representative to represent employees during an OSHA inspection.

We fear that the interpretation may encourage unions to use OSHA complaints and inspections as an organizing tool to gain access to an employer’s facility and exposure to its employees. We also have concern that this access could include proprietary information. Furthermore, the presence of a union organizer accompanying an OSHA compliance officer could potentially convey a message to non-union employees that the union has real power and is therefore beneficial to employee interests.

This policy created so many questions from employers that a U.S. House of Representatives Subcommittee on Workforce Protections met earlier this year to address some of the concerns.

OSHA’s interpretation raises several questions for businesses not yet addressed by the agency. How is the appropriate employee representative determined and who makes this determination? Can there be multiple employee representatives? What protections does an employer have regarding the release of trade secrets or any other similar confidential matters to such an employee representative? What types of agreements can the employer require of the representative to ensure confidentiality?

This will not be the final word on this subject and employers must stay up to date on the policy and how it is being carried out. It provides yet another reason for non-union employers that want to protect their businesses to be proactive with workplace training to maintain a union-free workplace. For answers to your own questions, please contact Peter Bennett (pbennett@thebennettlawfirm.com) or Rick Finberg (rfinberg@thebennettlawfirm.com) of The Bennett Law Firm.