



DATE: April 4, 2024
TO: PRR, OSH Forum
FROM: Helen Cleary
RE: **FINAL RULE: Worker Walkaround Representative Designation Process**

On April 1, 2024, OSHA published its **Final Rule: Worker Walkaround Representative Designation Process in the [Federal Register](#) ([pdf version](#))**. OSHA also published a [Press Release](#) which states, in part,

"The Occupational Safety and Health Act gives the employer and employees the right to authorize a representative to accompany OSHA officials during a workplace inspection. **The final rule clarifies that, consistent with the law, workers may authorize another employee to serve as their representative or select a non-employee.** For a non-employee representative to accompany the compliance officer in a workplace, **they must be reasonably necessary to conduct an effective and thorough inspection.**" [emphasis added]

Effective Date

The rule is effective May 31, 2024. States with State OSH Plans will need to adopt a regulation that is at least as effective or identical within 6 months of promulgation.

Guidance

[OSHA has published](#) guidance in: [Frequently Asked Questions: Worker Walkaround Designation Process \(Walkaround\) Rule](#).

Overview of the Rule

In the final rule, OSHA states that the Final Rule has a narrow purpose, makes two changes to [§1903.8\(c\)](#) and clarifies:

1. That the representative authorized by employees may be an employee of the employer or a third party; this is consistent with Section 8(e) of the OSH Act.
2. The "...third-party representative authorized by employees may have a variety of skills, knowledge, or experience that could aid the CSHO's inspection." The skills are not limited to the skills of an industrial hygienist or safety engineer. (As the current regulatory text states.); this is consistent with OSHA's long-standing practice.

The revision will not change the CSHO's authority to determine third party participation provided in [§1903.8\(a\),\(b\),\(d\)](#), including the authority to deny participation that may disrupt or interfere with the inspection. It also does not remove the employer's right to request certain areas of the workplace be off-limits to the representatives that do not work in the area, due to trade secrets ([§1903.9](#)).

The Final Rule further states that: "Employee representation is vital to thorough and effective OSHA inspections, and OSHA finds these changes will improve the effectiveness of OSHA inspections and benefit employees' health and safety. OSHA determined that the rule appropriately recognizes employees' statutory right to a walkaround representative and OSHA's need for thorough and effective inspections while still protecting employers' privacy and property interests."

In addition, OSHA concluded the standard will not increase employers' costs or compliance burdens.

Differences between the current text and revision are highlighted in yellow and ~~strikethrough~~.

Current language, §1903.8(c) Representatives of employers and employees

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.~~

Final Language §1903.8(c) Representatives of employers and employees

The representative(s) authorized by employees may be an employee of the employer or a third party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

Background

In 2013, OSHA issued a letter of interpretation that stated third-party, non-employees could accompany the inspection if the inspector had good cause and the third-party “...is reasonably necessary to the conduct of an effective and thorough physical inspection...” A legal challenge was filed arguing that the letter of interpretation re-wrote the regulation without following the Administrative Procedures Act notice and comment rulemaking process.

In January 2023, OSHA began the official rulemaking process to revise the language and align with its 2013 interpretation. On August 30, 2023, OSHA published the Notice of Proposed Rulemaking (NPRM).

Stakeholder Comments

On November 13, 2023, [PRR submitted written comments](#) detailing our concern with the changes including allowing third parties to “participate” during inspections. Many employer stakeholders highlighted similar concerns.

The preamble in the Final Rule addresses stakeholder criticism and support received in submitted comments to the NPRM. The following statements in the Final Rule provide an overview of stakeholder positions.

Employer Stakeholder Criticism:

“Many organizations representing employers contended that the rule represents a significant change to OSHA’s procedures and will facilitate union organizing. Among other arguments, these organizations generally argued that the rule:

- (1) conflicts with the OSH Act and existing OSHA regulations;
- (2) infringes on employers’ Constitutional rights, particularly property rights;
- (3) imposes substantial costs, particularly for small businesses; and
- (4) will be difficult for OSHA to administer.

Employee Stakeholder Support

“...organizations representing employees praised the rule for encouraging employee representation, ensuring thorough and effective inspections, and promoting workers’ safety and health. Some organizations representing employees also argued that OSHA should eliminate the “good cause” and “reasonably necessary” requirement for third parties.



OSHA's Response to Comments

OSHA considered the issues raised and determined the revision aligns with the OSH Act, clarifies the current text, improves employee representation during the inspection process, is vital to improving the effectiveness of OSHA inspections, and will improve worker health and safety.

In response to stakeholder concerns, **OSHA made one change to the text** that was proposed in the August 2023 NPRM – **the Agency removed the use of "participation" and used "accompaniment."**

Legal challenges to the standard are expected.
