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Comments on RIN 1218-AD45: Worker Walkaround Representative Designation Process

Submitted at: <https://www.federalregister.gov/documents/2023/08/30/2023-18695/worker-walkaround-representative-designation-process>.

Dear Mr. Parker,

The National Employment Law Project (“NELP”), Fair Work Center & Working Washington, and the National Legal Advocacy Network (NLAN) submit these comments in support of the Occupational Safety and Health Administration (“OSHA”) proposed rulemaking clarifying the situations in which workers may be represented by non-employee third parties during OSHA worksite inspections.¹ The revised regulations will better enable workers to select representatives of their choice to accompany the OSHA Compliance Safety and Health Officer (“CSHO”) on such inspections, ensuring that OSHA is able to obtain critical information about worksite conditions and hazards, keeping workplaces across the country safer. The rule will also empower workers reluctant to speak out, offer some protection from employer retaliation, and help workers in dangerous, low-wage workplaces to build solidarity.

NELP is a non-profit research and policy organization with over 50 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees receive the basic workplace protections guaranteed in our nation’s labor and employment laws, including protection from health and safety hazards at work. NELP works closely with worker centers and community-based organizations across the country who stand to benefit directly if their members are permitted to have a representative of their choice join a walkaround.

Along with several of our worker center partners, we write in support of the proposed rule.

¹ *Worker Walkaround Representative Designation Process*, 88 Fed. Reg. 59825 (Aug. 30, 2023).

I. NELP Supports Expanded Worker Walkaround Representation

We submit this comment in response to OSHA’s proposed Worker Walkaround Representative Designation Process rule.

The proposed rule offers clear opportunities for better enforcement of OSHA standards in workplaces across the country, promising to improve health and safety for millions of American workers across a range of industries. Where workers are permitted to have representatives of their choosing participate in health & safety enforcement, employer compliance and OSHA enforcement are likely to be much stronger. Represented workers are also more likely to be engaged in ongoing monitoring of worksite safety, and better protected from the possibility of employer retaliation. For all these reasons, we support the proposed rule, but also write to offer suggestions for how it could be strengthened before final promulgation.

A. The Statutory and Regulatory Background

The key innovation of this rule is the loosening of the limitations on who may serve as a third-party representative accompanying OSHA inspectors on a worksite walkaround. Section 8(e) of the OSH Act grants workers a qualified right to have a representative accompany OSHA during the physical inspection of a workplace. 29 U.S.C. 657(e).

OSHA’s current rules require that the representative “shall be an employee of the employer.” 29 CFR Section 1903.8(c). An exception to that general rule exists where, in the judgment of the CSHO, “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...” Id. Under this rule, workers who wish to be represented by third-party non-employees have only been able to do so under limited circumstances.

Although this regulatory section has not been amended since first promulgated in 1971, a few interpretive letters and guidance documents have clarified some of the narrow situations in which third-party non-employees may serve as worker representatives.² OSHA has interpreted its regulations on a case-by-case basis to permit certain third-party representatives authorized by employees to accompany OSHA inspectors on the walkaround inspection when reasonably necessary. That includes health and safety professionals, like the industrial hygienists and safety engineers referenced in the regulations, and union representatives at unionized worksites. But workers in unorganized workplaces have nonetheless continued to find it difficult to get a representative of their choice—or a representative of any kind—approved to accompany an OSHA inspector on a worksite walkaround.

² See, e.g., Sallman Letter; Racic Letter; 2015 FOM. All are cited in the proposed rule. See 88 Fed. Reg. 59827.

It should not be so difficult. The limitations on who can serve as a third-party representative are not required by statute. The OSH Act “merely provides that the employee’s representative must be authorized by the employees, not that the representative must also be an employee of the employer.” *Nat’l Fed’n of Indep. Bus. v. Dougherty*, No. 3:16-cv-2568-D, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017).

Fifty years after the promulgation of the initial rules under this section, OSHA is now properly updating its regulations to recognize the reality of health and safety enforcement in modern workplaces.

B. The Proposed Rule

The first sentence of the revised rule provides that “[t]he representative(s) authorized by employees may be an employee of the employer *or a third party*” (emphasis added).³ As OSHA now recognizes, the right of workers to have walkaround representation by representatives of their choice is paramount, regardless of whether they wish to be represented by other employees or by a third-party non-employee. The preamble to the proposed rule states: “Employee representation during the inspection is critically important to ensuring OSHA obtains the necessary information about worksite conditions and hazards.”⁴

Nobody is better situated to understand and identify health and safety problems at a worksite than the workers themselves. They are the eyes and ears on the shop floor, and can provide critical information to the CSHO about the presence of hazards, the frequency and duration of worker exposure to them, and the employer’s awareness of hazards and exposures. Where direct worker participation in the walkaround process is impossible or impractical—because the workers cannot communicate readily in English, because they fear employer retaliation, because they are a new employee due to high turnover or injury of coworkers, or for any other reason—workers should be able to choose a representative to join the walkaround.

In its revised regulation, OSHA is also proposing to omit its reference to industrial hygienists and safety engineers as examples of acceptable third-party representatives. This is not intended to signal that industrial hygienists and safety engineers would not be appropriate third-party representatives, but rather to suggest that the universe of possible third-party representatives is much broader. OSHA instead hopes to shift the focus from professional discipline to the “knowledge, skills, [and] experience” of the proposed representative.

We commend this shift of emphasis. While professional health and safety experts clearly have an important role to play in worksite inspections, so do interpreters, community advocates, worker center organizers, and lawyers. Just as unionized workers at a worksite

³ 87 Fed. Reg. 59826

⁴ *Id.*

with an active collective bargaining agreement have the right to a union representative, unorganized workers should have a similar right.

II. The Importance of Third-Party Worker Walkaround Representation

A. Worker Center Representatives, Community Advocates, and Interpreters Make for More Effective Communication

One major impediment to effective OSHA enforcement on worksites is poor communication between workers onsite and OSHA inspectors sent to investigate. As described in the proposed rulemaking, many workers at certain worksites are not fluent in English and need language assistance to communicate effectively.⁵ Without an interpreter present, the CSHO is likely to lose critical details about the nature of the health and safety hazards onsite. This is especially true among low-wage workers in some of the most dangerous industries—warehousing and manufacturing,⁶ meatpacking and poultry processing,⁷ and agriculture—where the workforce consists overwhelmingly of immigrant non-English speakers. Many of these industries have high turnover or are staffed by temp agencies, which promotes high turnover and increases the risks to workers, who too often are improperly trained and face high danger.⁸

In order for OSHA to effectively enforce health and safety standards, the CSHO should automatically have a governmental interpreter accompany them during the walkaround if they do not speak the same language as the affected workers. But affected workers should also be able to designate a trusted walkaround representative, who may also have language and cultural competency skills.

Further, poor communication between workers onsite and OSHA inspectors is not solely a function of language access. OSHA compliance officers may lack the cultural competence, community knowledge, and existing relationships with workers that are necessary to facilitate trust and frank communication. Worker-chosen third-party representatives, on the other hand, are very likely to have exactly these skills, and therefore have a critical role to play in ensuring compliance officers can adequately identify workplace hazards.

⁵ See 87 Fed. Reg. 59830.

⁶ See, e.g., Jason Rowe, *New Jersey's Supply Chain Pain: Warehouse and Logistics Work Under Wal-Mart and Other Big Box Retailers*, NEW LABOR (2012), https://www.nelp.org/wp-content/uploads/2015/03/NJ_Supply_ChainPain_Report.pdf; Jason Sturna, et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, POLICY MATTERS: A QUARTERLY PUBLICATION OF THE UNIVERSITY OF CALIFORNIA, RIVERSIDE (2012).

⁷ See *infra* notes 10-13.

⁸ Michael Grabell, Jeff Larson & Olga Pierce, *Temporary Work, Lasting Harm*, PROPUBLICA (Dec. 18, 2013), <https://www.propublica.org/article/temporary-work-lasting-harm>.

B. Represented Workers Are More Likely to Speak Up in the Face of Possible Retaliation

Another major impediment to health and safety enforcement is the fear that many workers have that, if they report health and safety violations or workplace hazards, their employer will respond by retaliating.

While OSHA's 11(c) retaliation provisions in theory protect workers who speak out about health and safety conditions from employer retaliation, in practice they do not.⁹ Public data from the first six months of the pandemic show this in stark terms.¹⁰ Of the nearly 2,000 COVID-related retaliation complaints filed before August 2020, only 35 complaints—just two percent—were resolved in that period. Most of the complaints were dismissed or resolved without investigation.¹¹

And the fear of retaliation is especially acute for the underpaid immigrant workers who labor in some of the most dangerous worksites. Not only do they have to worry about losing their job, but many also may fear possible adverse immigration consequences. With the fear of deportation hanging over their heads, these workers who most need OSHA enforcement are often reluctant to speak out.

From our extensive experience partnering with worker centers supporting such workers, we can attest that the participation of a trusted community representative makes a critical difference. Workers who feel protected and empowered are more likely to speak up—and OSHA is therefore more likely to obtain the information it needs for a complete and thorough inspection.

III. Worker Centers and Community Organizations as Worker Representatives

Many of the worker centers NELP supports have organizers and lawyers on staff who are uniquely well-positioned to serve as third-party representatives during OSHA walkarounds. They can help facilitate effective communication between the workers onsite and the CSHO during the inspection. Not only do many have language skills and cultural competency, but they also often have pre-existing knowledge themselves of industry and worksite hazards, learned from prior conversations with workers. Several of NELP's closest worker center partners have members who need OSHA protections the most, working in agriculture, construction, poultry and meatpacking, home care, and warehouse jobs.

Permitting employee-designated representatives can greatly increase worker faith that their health and safety concerns will be taken seriously by a government inspector. This is

⁹ According to a Worksafe report, the OSHA retaliation law “doesn't work very well.” “Employers are more likely to take advantage of the more vulnerable, low-wage, immigrant workers who often lack union protections.” See *Whistleblower Protection from Retaliation—OSHA 11(c)*, WORKSAFE (last accessed Nov. 13, 2023), available at https://worksafe.org/file_download/inline/a5dfd4e9-f815-4ff6-8a03-0054086c34e0.

¹⁰ Deborah Berkowitz & Shayla Thompson, *OSHA Must Protect COVID Whistleblowers Who File Retaliation Complaints*, NAT'L EMP. L. PROJECT (Oct. 2020), <https://www.nelp.org/publication/osha-failed-protect-whistleblowers-filed-covid-retaliation-complaints/>.

¹¹ *Id.*

especially true for vulnerable workers who may have a deep-seated mistrust of government or the employer; if they can arrange for a trusted third-party representative to participate in a government sanctioned process grounded in fairness, it can improve trust and belief among workers that their rights are taken seriously.

Fair Work Center: Agricultural Workers in Eastern Washington

This is true, for example, of Fair Work Center (FWC) in Eastern Washington, who support a wide range of agricultural workers in the Yakima Valley. A significant portion of those workers are employees in the region's large fruit and vegetable packing houses. They are subject to rampant workplace mistreatment, including underpayment, discrimination, and the denial of sick leave.

Significantly, these workplaces are also very dangerous. The workers regularly tell FWC about unguarded equipment, electrical hazards, standing water, work spaces that are boiling hot or freezing cold, and packing lines that move so fast they suffer serious ergonomic injuries. But workers often find strength in numbers when they come together to demand fixes to these threats to their health and safety, and their collective advocacy is an effective means of building solidarity with other employees who might be reluctant to take a stand on issues of pay or discrimination.

From the perspective of worker-advocates at FWC, the ability to participate in formal inspections by occupational safety and health inspectors offers clear opportunities for building power and strengthening compliance at worksites. The presence of organizers or lawyers on the walkaround would make visible to workers this network of support that they might not otherwise see, demonstrating the power of collective action. The regulatory recognition of the right of advocates at worker centers like FWC to serve as walkaround representatives promises to help workers build power, and to make OSHA enforcement more effective.

The BLACK Initiative: Poultry Plant Workers in North Carolina

The benefits of this rule are also plainly visible to our partners at the BLACK Initiative, a worker center focused on organizing Black workers in poultry plants in North Carolina. The poultry industry is notoriously dangerous. Workers who feed, care, and slaughter chickens for multinational meat-production companies often toil in unsafe working conditions, suffering staggeringly high rates of work-related injury and illness—rates 60 percent higher than the average industry.¹²

For example, at a Tyson Foods processing plant in Texas, OSHA found that the company had failed to install basic safety guards on hazardous machinery, leaving employees exposed to the risk of amputation, and had failed to train workers on the risks of a highly

¹² *USDA Allows Poultry Plants to Raise Line Speeds, Exacerbating Risk of COVID-19 Outbreaks and Injury*, NAT'L EMP. L. PROJECT (Jun. 2020), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-USDA-Poultry-Line-Speed-Increases-Exacerbate-COVID-19-Risk.pdf>.

dangerous acid used in the facility.¹³ Last year at a poultry plant in Gainesville, Georgia, six workers were killed when a toxic chemical leaked from the plant’s freezer.¹⁴ Work conditions are especially dangerous in subcontracted workplaces, where hard-to-trace staffing agencies funnel Black and immigrant workers to poultry plants run by companies like Tyson.¹⁵

Better, and more strategic, worker-informed OSHA enforcement in these workplaces is critical. Having worker center staff serve as walkaround representatives can help build relationships between OSHA officials and worker centers, so that OSHA can more effectively and strategically enforce workplace health and safety standards. And in subcontracted workplaces, it is especially important to have worker representatives who understand the multi-employer dynamics—and who may even be employees of a lead firm of a different subcontractor—as they could play a critical role in aiding an inspection.

IV. Suggested Amendments to the Proposed Rule

A. “Reasonably Necessary” Requirement

Our principal objection to the proposed rule is the unnecessary limiting language that qualifies the right of workers to choose a third-party non-employee to represent them during the walkaround.

In Section XII, OSHA poses the following question: “Should OSHA defer to employees’ selection of a representative to aid the inspection when the representative is a third party (i.e., remove the requirement for third party representatives to be reasonably necessary to the inspection)?” We think the answer is clearly yes. OSHA should defer to the employees’ selection of a representative, as long as their presence during the walkaround is “for the purpose of aiding such inspection.”

First, there is no statutory basis for the “reasonably necessary” requirement. Section 8(e) of the OSH Act states that “a representative authorized by [the employer’s] employees shall be given an opportunity to accompany the Secretary...during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection.” 29 U.S.C. 657(e). The statute’s only qualifier is that the purpose of the representative’s participation is *to aid the inspection*; not, as the rule would have it, that their participation be “*reasonably necessary* to the conduct of an effective and thorough inspection.”

¹³ Bryce Covert, *Tyson Foods Fined \$263,000 Over Unsafe Working Conditions in Poultry Plant*, WORKPLACE FAIRNESS (Aug. 26, 2016), available at <https://www.workplacefairness.org/blog/2016/08/26/tyson-foods-fined-263000-over-unsafe-working-conditions-in-poultry-plant>.

¹⁴ Luis Feliz Leon, *Life and Death in the Poultry Capital of the World*, THE NATION (Feb. 2021), available at <https://www.thenation.com/article/society/poultry-plant-georgia>.

¹⁵ Tina Vasquez, *The Incalculable Cost of Cheap Chicken—and the Hidden Industry That Shoulders It*, TYPE INVESTIGATIONS (Jul. 20, 2021), available at <https://www.typeinvestigations.org/investigation/2021/07/20/cost-of-cheap-chicken>.

Second, inserting additional qualifying language into the regulatory text promises to make it substantially more difficult for workers to get representatives of their choosing than it need be. Workers are already likely to face significant headwinds in finding and nominating a representative to join an inspection—they will need to understand the law and be informed as to what kinds of third-parties might be able to serve as a representative.

More importantly, time is of the essence. OSHA walkarounds are often scheduled very quickly after a complaint is filed or an incident takes place. If workers are required to first seek permission to have a representative present, and to prove that their presence is “reasonably necessary”, the result may well be a significant delay in when the walkaround takes place, or that OSHA will not have adequate time to process the request before the walkaround, leaving workers unrepresented.

In short, the “reasonably necessary” requirement is neither statutorily required, nor does it further the stated purpose of this rulemaking. OSHA should heed the choice of workers—whose health and safety is on the line—as to whom they believe will represent their interests during the worksite inspection.

To be clear, under this amended rule, the CSHO would retain the authority to reject proposed third-party representatives if, in its view, their participation is not for the purpose of aiding the inspection. But rather than requiring affirmative approval according to an onerous standard, this rule would afford deference to workers’ chosen representatives, and apply a presumption that their presence is helpful.

For these reasons, we write in qualified support of the proposed rule.

Sincerely,

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