Meltzer, Lippe, Goldstein & Breitstone, LLP

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OSHA Drastically Expands Its "Walkaround Rule," Which Now Allows Unions and Other Third-Parties to Join Onsite Inspections

On April 1, 2024, the Occupational Safety and Health Administration ("OSHA") published its final Worker Walkaround Representative Designation Process Rule (the "Walkaround Rule") in the Federal Register. This new Walkaround Rule detailed below took effect May 31, 2024. To provide context, OSHA allows representatives of both an employer and employee(s) to accompany the OSHA inspector during a physical inspection ("Walkaround") of an employer's jobsite. The current (soon to be old) version of the Walkaround Rule explicitly limited an employee representative to current employees only.

The new Walkaround Rule now explicitly contradicts this old standard by providing that "representative(s) authorized by employee(s) may be an employee or a **third party** (emphasis added)." Thus, under the new Rule, employees now have the right to choose who represents them during OSHA onsite inspections. This includes allowing the employee to designate unions, labor activists and other third parties as his or her representative, which thereby provides these third parties access to private worksites during an OSHA inspection.

Indeed, the new Rule's language seemingly allows for anyone requested by an employee to join the OSHA Walkaround. In this regard, the Rule expands the requirement of who may be "reasonably necessary" to joining an inspection by: (i) eliminating the industrial hygienist or a safety engineer (examples of individuals who might be "reasonably necessary"); and (ii) instead, generally providing that nonemployees may join inspections "if, in the judgment of" of the Inspection Officer the third-party representative is "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace…." As provided for in OSHA's explanatory examples, anyone who can make an employee feel more "comfortable" during an inspection might now be included as "reasonably necessary."

Further, the new Walkaround Rule explicitly disregards the federal labor relations procedures enacted under the National Labor Relations Act ("NLRA") requiring that, prior to acting as an employee's "authorized representative," a union must be approved by the majority of employees via an election. OSHA's new Rule seems to explicitly contradict this premise, as it now provides that "the NLRA's requirements for majority support would not apply to a union representative accompanying OSHA in a non-union workplace, as this representative would not be engaged in collective bargaining." Just as concerning, the final Rule contains no guidance on how an OSHA Inspector should navigate potentially competing requests by employees for an "authorized representative."

In light of the foregoing, this new Walkaround Rule has drastic implications for employers, including Organizing Efforts, Privacy/Confidentiality Concerns and Onsite Safety/Liability Concerns. In particular, OSHA's new Rule could provide unions and other third parties access to private employer worksites, including access to nonunionized worksites they would otherwise be denied under federal labor law. It also could allow access to company confidential trade secret, and proprietary information as non-employees (potentially working for competitors) could participate in Walkarounds. Further, employers can subject themselves to potential additional liability and/or expense in the form of exposing third parties to hazards at the worksite during the inspection itself.

What should employers do to address these issues? While there are several potential opportunities for action, a few of the more critical ones are discussed below.

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LOCATIONS

Long Island
190 Willis Avenue
Mineola, NY 11501
516.747.0300

New York City
70 East 55th Street
New York, NY 10022
212.201.1720

Boca Raton
2500 N Military Trail
Boca Raton, FL 33431
561.989.1605

First, an employer should know their rights. Regardless of OSHA regulations, employers still maintain Constitutional and State Property protections; nothing in the new rule can alter that. OSHA can still only inspect worksites with the employer's consent absent a warrant. Therefore, employers can still control how OSHA accesses company property, including limiting the areas covered during a Walkaround.

Second, employers should revise their OSHA inspection policies (to the extent not already done so), particularly as they apply to an initial inspection. Specifically, employers should institute the following procedures as they pertain to Walkarounds: (i) Managers/Supervisors should not be permitted to interview with OSHA inspectors on the date of initial inspection; (ii) employers should limit the documentation initially provided to OSHA to only that required, i.e. the OSHA 300, 300A, and 301 logs/summaries (with other documents held in reserve); (iii) the OSHA inspector should be allowed to inspect only the area(s) of complaint, referral or emphasis, instead of being allowed to "walkaround" the entire premises; and (iv) all employees should refrain from engaging in high-hazard activities while the OSHA inspector is present.

Third, employers should also ensure additional protections for trade secrets. In this regard, employers must ensure that on-site supervisors are aware of which areas contain trade secrets or confidential information and must insist that no third party be provided access to these areas. To the extent the OSHA investigator does view these areas, any photos or notes of same should be marked "trade secret."

Given the drastic revisions to the Walkaround Rule, and the potential implications upon employers, it is incumbent upon employers to understand their rights if OSHA arrives at the worksite for an inspection. This includes developing a plan before being asked to allow a non-employee to accompany an inspector. Employers with questions relative to the foregoing including how best to develop a Walkaround plan; how to limit potential hazards to otherwise limit exposure to "Walkaround" inspections; how to understand the ramifications that might result if an employer pushes the agency representatives to demand a warrant; and/or how to navigate potential union intrusion into a workplace under the guise of representation at a Walkaround, are encouraged to reach out to your Meltzer Lippe advisor or contact Christopher P. Hampton, head of the Occupational Safety and Health Act (OSHA) Compliance Practice at Meltzer, Lippe, Goldstein & Breitstone, LLP.