

LABOR & EMPLOYMENT LAW

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OSHA Interpretation Letter Allows Non-Union Employees to Designate Union Personnel as “Representative” During OSHA Inspection

In a recently released [Interpretation letter](#) (dated Feb. 21, 2013 but not released to the public until April 5, 2013), OSHA has stated that anyone may be designated by workers at a non-union facility as their “representative” during an OSHA inspection, even a union representative. While OSHA claims that this is just a policy clarification of current regulations, this represents a significant departure from previous interpretations.

Current OSHA regulations grant a union with a collective bargaining agreement in place the right to accompany the OSHA inspector during an inspection. With respect to non-union employers, the OSH Act provides that the inspector may “consult with a reasonable number of employees concerning matters of health and safety.” 29 U.S.C. § 657(e). OSHA’s own regulations go on to say that “the representative authorized by employees shall be an employee(s) of the employer.” 29 C.F.R. § 1903.8(c) (emphasis added). However, if “good cause” is shown, the OSHA inspector has discretion to permit a non-employee representative if “it is reasonably necessary to the conduct of an effective and thorough inspection.”

While this regulation has been around for years, OSHA has not interpreted it to permit small groups of employees from their non-union employer to designate a non-employee third party as their representative during an OSHA inspection. This new interpretation letter appears to condone this concept which would be left to the individual OSHA inspector’s own judgment to interpret.

This represents a significant expansion of the existing regulations and OSHA’s own internal Field Operations Manual (FOM) into the arena of labor and management relations under the National Labor Relations Act. The concept of being required to recognize a “representative” of less than a majority of your workforce is troubling at best. Employers are well advised to consult with qualified counsel to discuss how to handle this situation in advance of the actual inspection request.

HIGHLIGHTS

An OSHA Interpretation Letter states that anyone may be designated by workers at a non-union facility as their “representative” during an OSHA inspection

This policy represents a significant departure from previous interpretations

Employers should consider consulting with counsel to discuss how to handle this situation in advance of the actual inspection request

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