

Fed-OSHA Rulemaking

New Rule Lets Non-Employees Join Inspections

A NEW DEPARTMENT of Labor rule change clarifies the rights of employees to appoint an outside representative to accompany OSHA officers during workplace inspections.

OSHA inspections usually occur after a workplace has had a safety-related incident or a whistleblower has reported suspected safety violations. Attorneys representing employers say the new rule, which took effect May 31, could be problematic for businesses trying to keep inspections free of disruptions.

Advocates for employers worry that external observers may use their new ability to collect information that can be used to convince employees to join a union.

They also see a potential for other adversaries to join the inspections in search of employer failures. These might include disgruntled former employees, plaintiffs' attorneys, potential expert witnesses or injured workers' family members.

OSHA stressed that the final decision as to whether to permit a third party representative to join the inspection is up to the OSHA

compliance safety and health officer that conducts the inspection. Either the employer or workers may appeal to the CSHO to reject a representative, but the CSHO decides.

In its response to public comments, OSHA emphasized the importance of employee representation to gathering necessary information about worksite conditions and hazards.

It also noted that the rule does not limit third party representatives to union representatives; third parties' ability to participate will be based on their knowledge, skills or experience.

"Third party representatives' sole purpose onsite is to aid OSHA's inspection," it wrote, "and CSHOs have authority to deny the right of accompaniment to third parties who do not do that or who interfere with a fair and orderly inspection."

Supporters of the rule argued that third parties may:

- Have important technical or subject matter expertise.
- Have language skills and cultural knowledge.
- Increase employees' trust in the inspections.
- Improve inspections of multi-employer worksites, such as construction sites.
- Balance the rights of employers and employees.

The takeaway

Employers may be more likely to face litigation and a difficult discovery process after an accident under the new rule, legal pundits say.

Some observers recommend that employers stand ready to object to participation from plaintiffs' attorneys who may not have much workplace safety expertise but who know how to fish for clients.

It will be important that they evaluate the need for a particular third party to participate in the inspection.

Employer groups are expected to challenge the new rule in court. A court might issue an injunction preventing the rule's enforcement during litigation.

That is uncertain, however, so employers should be prepared now to permit third parties to join OSHA inspectors on their premises if workers request it. ❖



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Employers Must Develop Emergency Response Procedures

Emergency response – Employers must develop emergency response procedures, which must include:

- An effective communication system to allow workers to contact a supervisor or emergency services.
- Steps for responding to signs and symptoms of heat illness, including first aid and providing emergency medical services.
- Emergency response procedures for severe heat illness.
- Monitoring employees exhibiting signs of heat illness, and not leaving them alone without offering them on-site first aid or medical services.

Training – Employees and supervisors will need to be trained on:

- Personal risk factors for heat illness.
- Their employer's procedures for complying with the regulations.
- The importance of frequent water consumption.

The takeaway

As mentioned, at this point there is no definitive date for these regulations taking effect, but Cal/OSHA insists they will be ready before summer starts in late June. ❖