



**NATIONAL COUNCIL FOR
OCCUPATIONAL SAFETY AND HEALTH**
CONSEJO NACIONAL DE SALUD Y SEGURIDAD OCUPACIONAL



November 13, 2023

Douglas Parker
Assistant Secretary for Occupational Safety and Health U.S. Department of Labor
Occupational Safety and Health Administration
200 Constitution Ave., N.W.
Washington, D.C. 20210

Submitted via regulations.gov

RE: Worker Walkaround Representative Designation Process (Docket No. OSHA–2023–0008)

Dear Assistant Secretary for Occupational Safety and Health Parker,

We are writing in support of a strong Walkaround Representative Designation Process rule that will enshrine workers’ right to select their own representative to accompany OSHA during the walkaround process. We write as organizations that represent, train, and/or support workers in high-hazard jobs: including Black, Brown, and immigrant workers who are steered into the dirtiest and most dangerous jobs and are most likely to face retaliation from their employers when they speak up for their health, safety, and rights. Many of our organizations have special expertise in worker health and safety and frequently support workers who have been hurt, encountered hazards on the job, or are engaging in an OSHA investigation process.

Together, we have a strong interest in OSHA’s role and responsibility in safeguarding workers’ statutory rights, including the right to a safe and healthy workplace. We believe the proposed rule -- Worker Walkaround Representative Designation Process (Docket No. OSHA– 2023–0008) -- will improve OSHA’s ability to effectively conduct its inspections, and gather evidence of worksite hazards affecting the lives and wellbeing of workers, including our members and constituents. We also believe it could be modified to do so even more effectively.

Workers understand best how work is actually performed, rather than how it is planned. They have critical information that no one else has about workplace practices, hazards, and conditions. This is true in the context of normal workplace operations, and when operations are not operating as they regularly function, which is when workers are at the

greatest risk of being injured or killed.¹ (Including when operations fail, are changed by management, or run less than designed or in ways not as optimal as designed.)

Employers often work very hard to ensure that OSHA inspectors do not get exposure to or see what is known as “plain view hazards” or violations of safety and health laws that are in plain sight.² The main way that OSHA can expand the scope of their inspection is through worker involvement and testimony. If a worker or a worker’s representative participates in the walk-around inspection with the OSHA official, they can point out other areas in the worksite that put workers at risk of injury, illness or death. Workers are also a key source of information about prior incidents related to injuries and illnesses and have unique insight into management’s awareness of health and safety violations and hazardous conditions and practices. This information is critical to OSHA for establishing the employer’s knowledge of hazards and can influence the outcome of violations and whether they should be considered for a willful category among other uses of that information.

OSHA’s Compliance Safety and Health Officers’ (CSHO’s) abilities to conduct comprehensive inspections clearly rely on worker voice and input. Oftentimes, however, getting this information during workplace inspections and investigations requires the support of a trusted intermediary. That’s because workers who labor under the most dangerous conditions also face the greatest barriers to, and risks from, speaking to OSHA about work practices and hazards. Widespread retaliation and the disproportionate level of retaliation experienced by Black, Latinx, immigrant, and low-wage workers are well documented.^{3 4 5} Compounding the chilling effect of retaliation is the simple fact that these are the same workers who are most likely to experience linguistic and cultural barriers when trying to speak with OSHA staff.

¹ E.g. Bourassa, Dominic & Gauthier, François & Abdounour, Georges. (2015). Equipment failures and their contribution to industrial incidents and accidents in the manufacturing industry. *International journal of occupational safety and ergonomics: JOSE*. 22. 1-23. 10.1080/10803548.2015.1116814.

² In 2016, for example, during an inspection of a Mar-Jac poultry facility in Gainesville, Georgia, an attorney for the facility advised an OSHA investigator that she could walk across the facility to view an injured worker’s locker and tools if she put a cardboard box over her head. (Waldman, Peter and Mehrotra, Kartikay

“America’s Worst Graveyard Shift is Grinding Up Workers.” Bloomberg News. Dec. 29, 2017. Available at: <https://www.bloomberg.com/news/features/2017-12-29/america-s-worst-graveyard-shift-is-grinding-up-workers>

³ National Employment Law Project. (June 2020). Data Brief: Silenced About COVID-19 in the Workplace. Available at: <https://www.nelp.org/publication/silenced-covid-19-workplace/>

⁴ Alexander, Charlotte S. and Arthi Prasad. Bottom-Up Workplace Law Enforcement: An Empirical Analysis. *Indiana Law Journal*. Vol. 89:1069. Available at: <https://ilj.law.indiana.edu/articles/8-Alexander-Prasad.pdf>

⁵ Raise the Floor Alliance and National Economic & Social Rights Initiative. (November 2016). Challenging the Business of Fear: Ending Retaliation, Enforcing Workers’ Rights.

Years of experience has shown us that when workers are accompanied by a trusted community, labor, or legal representative, they can more easily overcome the threat of retaliation and other barriers to give OSHA the information it needs for a comprehensive inspection. The presence of a representative chosen by workers helps ensure workers can participate in the process without experiencing retaliation; and such representatives can offer safety expertise and advocacy and improve communication and collaboration - which can include offering interpretation. **Walkaround representatives are a crucial part of any OSHA inspection.**

For these reasons, we support the issuance of a new rule on this subject: and also offer suggestions for language that will even better accomplish the desired goal of full and effective inspections. In that spirit, we offer the following comments:

1. We fully agree with the assertion in the Summary section that “[e]mployee representation during the inspection is critically important to ensuring OSHA obtains the necessary information about worksite conditions and hazards.” Workers are the eyes and ears on the shop floor, and are in the best position to provide OSHA with the inspection information it needs regarding the presence of hazards, the frequency and duration of worker exposure to them, and the employer’s awareness of both hazards and exposures.

2. We also fully agree with the first revised sentence that provides: “The representative(s) authorized by employees may be an employee of the employer or a third party.”

3. Regarding the second revised sentence, we have a number of comments and suggestions. The sentence as proposed provides:

“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 their participation is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (e.g., because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills).”

The situations we most frequently encounter are described among the preamble’s examples: Specifically, “[t]here may... be circumstances where employees are not fluent in English (or another language spoken by the CSHO) and want a trusted representative to allow for open and effective communication with the CSHO regarding workplace conditions.”

And, in addition: “In other situations, employees may be reluctant to speak directly or candidly with government officials for a number of reasons. For example, some workers, such as immigrants, refugees, or other vulnerable workers, may be unfamiliar with OSHA and the agency's inspection process, face cultural barriers, or fear that their employer will retaliate against them for speaking to OSHA. In these situations, employees may not feel comfortable participating in OSHA's inspection without a trusted presence, which would negatively affect the CSHO's ability to obtain important information about workplace hazards and conditions. Worker advocacy organizations, labor organization representatives, consultants, or attorneys who are experienced in interacting with government officials or have relevant cultural competencies may be authorized by employees to represent them on walkaround inspections.”

Again, our organizations can attest that the participation of a respected, culturally and linguistically competent representative of the employees, like a worker center or community organization leader who the employees know and trust, is critically important to ensuring that the CSHO obtains the information needed for a complete and thorough inspection, for the reasons presented in the preamble section quoted above.

4. We would like to respond to Question 1 in Section XII of the preamble. The question is as follows:

“Should OSHA defer to the 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)? Why or why not? Please provide any relevant information, examples, considerations, and/or data to support your position.”

We answer this question in the affirmative. OSHA **should** defer to the employees' selection of a representative to aid the inspection when the representative is a third party. First, 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.**” (emphasis added)

The Act does not qualify the right of the workers' representative to participate in the walkaround only “if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why their participation is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace,” as the proposed rule does. The only qualifier stipulated in the statute is that the purpose of the representative's participation is to **aid the inspection.**

We believe the statute's language properly determines when the employees' selected representative has a right to participate in the inspection: that is, when their purpose is to aid the inspection. It is not when their participation is "reasonably necessary to the conduct of an effective and thorough inspection," as determined in the judgment of the CSHO. This adds an extra hurdle the employees' representative needs to clear before qualifying. And, whether they clear it or not is in the sole discretion of the CSHO. Nothing in the statute suggests that this is the appropriate test.

We believe the *workers'* judgment in selecting their trusted representative is the appropriate judgment to be honored. The CSHO would have no considered, independent basis for determining whether the selected representative's participation will be "reasonably necessary to the conduct of an effective and thorough inspection" without conducting some kind of "good cause" inquiry before arriving at a judgment. The better, less onerous course, and the one more respectful of the workers -- whose safety and health is on the line -- is to honor their choice as to *whom they believe will aid them* in conveying to OSHA the information it seeks regarding the conditions under which they work.

Nothing in the above recommendation would undercut the CSHO's authority "to deny individuals from participating in the inspection if their conduct interferes with a fair and orderly inspection process." [29 CFR 1903.8\(d\)](#).

In sum, we believe a rule more consistent with the language and intent of section 8(e), and informed by (now withdrawn) Field Operations Manual (FOM) CPL 02-00-159, should read:

c) 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 shall be permitted to accompany the Compliance Safety and Health Officer during the inspection for the purpose of aiding such inspection, including by helping the compliance officer receive valuable health and safety information from workers who may not be able or willing to provide such information absent the representative."

This formulation would include the types of assistance given as examples in the proposed rule's parenthetical, which states: (e.g., because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills). It would also include crucial types of assistance the preamble acknowledges, but the parenthetical omits, such as being a "trusted presence" with "relevant cultural competencies" and/or experience "interacting with government officials." Each of these types of assistance are invaluable aids to an effective and thorough inspection, especially recognizing, as the preamble does, that "some workers,

such as immigrants, refugees, or other vulnerable workers, may be unfamiliar with OSHA and the agency's inspection process, face cultural barriers, or fear that their employer will retaliate against them for speaking to OSHA.”

It is these workers who often labor in the most dangerous conditions, and yet face the greatest obstacles to speaking up. They, along with other workers who don't face the same challenges, deserve to have the representative of their choice assist them, and assist OSHA, on the walkaround. We believe the revised language suggested above effectively accomplishes that purpose, and better reflects the plain language of the statute.

Thank you for the opportunity to present our views on the proposed rule.

Sincerely,

National Council for Occupational Safety and Health (National COSH)
A Better Balance
Beyond the Bars
Border Workers United
California Coalition for Worker Power
Center for Progressive Reform
Centro de los Derechos del Migrante, Inc.
Cincinnati Interfaith Workers' Center
Connecticut Council on Occupational Safety and Health (ConnectiCOSH)
El Vínculo Hispano
FarmSTAND
Fe y Justicia Worker Center
Food Chain Worker Alliance
Government Accountability Project
Heartland Center for Jobs & Freedom
IATSE Local 415
Illinois COSH
Indiana Community Action Poverty Institute
Jobs with Justice East Tennessee
Jobs With Justice Education Fund
Justice at Work Pennsylvania
Justice for Migrant Women
Justice in Motion
Kalmanovitz Initiative for Labor and the Working Poor
Knox Area Workers' Memorial Day Committee
Maine Labor Group on Health
Marked By Covid

Massachusetts Coalition for Occupational Safety and Health (MassCOSH)
MDC Consulting
Metrowest Worker Center - Casa
Midstate Council on Occupational Safety and Health
Mississippi Workers' Center for Human Rights
National Center for Law and Economic Justice
National Employment Lawyers Association
National Immigration Law Center
New Hampshire Coalition for Occupational Safety and Health (NHCOSH)
New Jersey Work Environment Council (NJWEC)
New Labor
New York Committee for Occupational Safety and Health (NYCOSH)
Northeast NY Coalition for Occupational Safety and Health
Northwest Workers' Justice Project
Oregon Nurses Association
Oxfam America
Pacifica Social Justice
Philadelphia Project on Occupational Safety and Health (PhilaPOSH)
Pineros y Campesinos Unidos del Noroeste (PCUN)
PowerSwitch Action
Rhode Island Committee on Occupational Safety and Health (RICOSH)
Safe Harbor Law, LLC
SafeWork Washington
Santa Clara County Wage Theft Coalition
South Florida COSH (project of South Florida Interfaith Worker Justice)
Southern California Coalition for Occupational Safety and Health (SoCalCOSH)
Sugar Law Center for Economic & Social Justice
Sur Legal Collaborative
The Mississippi Workers' Center for Human Rights
The National Institute for Workers' Rights
Warehouse Worker Resource Center
We Count!
Western New York Council on Occupational Safety and Health (WNYCOSH)
Western North Carolina Workers' Center
Wisconsin Committee on Occupational Safety and Health (WisCOSH)
Worker Justice Center of New York
Workers Defense Project
Workers' Safety and Health Coalition of Central New York
Workplace Fairness
Worksafe