Labor and Employment Alert: OSHA Changes Direction and No Longer Allows Non-employee Union Reps on Safety Inspections

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The Occupational Safety and Health Administration (OSHA) no longer asserts that non-employee union representatives have the right to attend workplace safety inspections. OSHA's position change is a victory for the National Federation of Independent Businesses (NFIB), which had sued OSHA in federal district court in Texas over this policy.

The Occupational Safety and Health Act gives OSHA the right to inspect workplaces and gives employees the right to have a representative present at the workplace inspection. Under OSHA's regulations, the representative authorized by employees must be an employee of the employer. However, the OSHA Compliance Safety and Health Officer conducting the inspection may permit a non-employee ("such as an industrial hygienist or a safety engineer") who is reasonably necessary to an effective and thorough physical inspection of the workplace to be present. The regulations do not refer to or mention a union representative.

In February 2013, OSHA issued a Standard Interpretation Letter containing policies for safety walk-arounds in response to an inquiry from a union official as to whether a worker at a non-union workplace could authorize a person affiliated with a union to act as his representative. The Letter stated, "It is OSHA's view that representatives are reasonably necessary when they will make a positive contribution to a thorough and effective inspection." Given this, the Letter concluded that an employee could authorize a person affiliated with a union to act as his representative even if that person was not employed by the employer.

A member of the NFIB claimed that its business was required to permit non-employee union representatives to be present for OSHA safety walk-arounds. The business objected but was required to permit the union representatives in is workplace based on the Letter. NFIB sued OSHA on its member's behalf on two grounds: first, that the Letter was a legislative rule promulgated without going through the required formal rulemaking process; and, second, that the Letter was contrary to the OSH Act and therefore exceeded OSHA's statutory authority. OSHA

filed a motion to dismiss the NFIB's lawsuit.

OSHA claimed that the Letter were merely an "interpretative rule exempt from the notice and comment" rulemaking. The Court, however, found that the Letter "flatly contradicts a prior legislative rule as to whether the employee representative must himself be an employee." Even if OSHA can show that union representatives should be permitted on walk-arounds, the OSH Act is clear that such a person cannot be designated as an employee's representative unless the person is employed by the employer. As a result, the Court refused to dismiss the lawsuit on this basis. At the same time, the Court rejected the NFIB's second claim that the Letter exceeded OSHA's authority (presumably, allowing non-employee union representatives to attend walk-arounds would have been lawful had OSHA adopted that requirement through formal rulemaking).

On April 27, 2017, the NFIB voluntarily dismissed its lawsuit because OSHA indicated to the NFIB that the Letter – and, hence, the challenged inspection policy – would be rescinded. The Letter is still posted on OSHA's website along with this disclaimer: "**NOTICE:** This is an OSHA Archive Document, and may no longer represent OSHA Policy. It is presented here as historical content, for research and review purposes only." Contact your Vorys lawyer if you have questions about OSHA and workplace inspections.