November 13, 2023

By Electronic Submission (www.regulations.gov)

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

Re: Proposed Rule: Worker Walkaround Representative Designation Process (RIN: 1218-AD45) (88 Fed. Reg. 59825, August 30, 2023) Docket Number OSHA-2023-0008

Dear Assistant Secretary Parker:

The International Foodservice Distributors Association (IFDA) submits these comments in response to the above-referenced notice of proposed rulemaking (Proposed Rule), published in the Federal Register on August 30, 2023, by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (DOL or Department). While IFDA appreciates that OSHA extended the comment period, we continue to be concerned that OSHA's Proposed Rule will have significant consequences for IFDA members and their employees, and we strongly urge the Department not to move forward with the proposal.

IFDA is the premier trade association representing foodservice distributors throughout the United States and around the world. IFDA members play a crucial role in the foodservice supply chain, delivering food and related products to restaurants, K-12 schools, hospitals and care facilities, hotels and resorts, U.S. military bases and government facilities, and other operations that make meals away from home possible. The industry generates $382 billion dollars in sales, employs 431,000 people, and operates 17,100 distribution centers in all 50 states and the District of Columbia. In addition, 86% of foodservice distribution companies are family-owned.

I. The Proposed Rule's Vast Expansion of Third-Party Participation in OSHA Inspections Disrupts the Inspection Process and Creates Safety Risks for the Employer and the Employee

OSHA's Proposed Rule purports to "aid OSHA's workplace inspections by better enabling employees to select a representative of their choice to accompany the Compliance

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Safety and Health Officer (CSHO) during a physical workplace inspection."[1] However, the proposal removes clear, sensible limitations on OSHA's authority to allow third parties to accompany CSHOs on walkaround inspections. The current regulation states:

> "The representative(s) authorized by employees ***shall*** be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection."[2] [emphasis added].

The Proposed Rule eliminates the overarching principle that the employees' representative, in most cases, should be an employee of the employer and gives the CSHO overly broad discretion to allow a wide variety of third parties to participate in an OSHA workplace inspection. In particular, the Proposed Rule notes these individuals could be representatives from a worker advocacy group, community organization, or a labor union, among others, but the breadth of OSHA's proposed regulation seems to consider that the third-party representative could be virtually anyone.

These third parties could easily disrupt the CSHO's inspection process in a variety of ways. For example, they could deviate from established OSHA procedures, interfere in witness interviews, or weigh in with their own commentary. Third parties could also needlessly complicate an inspection by taking their own pictures, intimidating employees, or opining on what is and is not safe, regardless of the applicable regulations and without any training. A third-party representative could also seek access to the site to gain information inappropriately to support a workers' compensation claim (or to identify areas ripe for workers' compensation claims) or to observe how a time clock is used to make a wage-and-hour legal claim. A third-party participant's access to the worksite could also unduly prejudice an employer by exposing its workforce to union solicitation.

The Proposed Rule also creates potential safety risks for the employer and the employee. First, introduction of third parties, of inevitably varying levels of safety and health expertise, can create serious safety risks, and, in turn, liability risks, for the employer, employees, the CSHO, and the third-party representative. For example, a third-party representative with no affiliation with the worksite, and who does not have an appropriate level of industry experience or adequate safety training, could easily be injured or accidently cause an injury to an employer's workers. OSHA's position is that employees who work around equipment must be trained on the hazards of the area prior to beginning work.[3] Involving in an inspection a third-party representative who does not have any training on the employer's equipment and who may not have any authorized OSHA training (such as OSHA's 10-Hour or 30-Hour training or training CSHOs are required to undergo for certain types of inspections, such as workplace violence training), puts the safety of that individual and the safety of others into question.

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[1] Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825 (proposed Aug. 30, 2023).
[2] 29 C.F.R. § 1903.8(c)
[3] *See* Occupational Safety and Health Administration, Training Requirements in OSHA Standards, OSHA 2254-09R 2015, *available at* https://www.osha.gov/sites/default/files/publications/osha2254.pdf.

In addition, the safety risks at stake include workplace violence concerns. Disgruntled former employees, applicants, family members, or others could utilize this regulation to surreptitiously gain access to a worksite they would otherwise be barred from entering. As a result, everyone at the worksite could be at risk, including the CSHO. Allowing these risks runs counter to OSHA's mission to "ensure safe and healthful working conditions for workers."

Finally, the Proposed Rule gives no guidance as to whether OSHA expects its liability insurance, or the employer's workers' compensation or other liability insurance, to cover injuries or illnesses involving these newly allowed third-party participants.

II. The Proposed Rule Jeopardizes Confidential Business Information and Would Delay the OSHA Inspection Process

The broad discretion of the CSHO to grant third-party access to businesses exposes employers to the unauthorized disclosure of confidential business information or other information not intended for public consumption. While the Proposed Rule's preamble and an existing OSHA regulation recognize employers may request that areas of a facility containing trade secrets be off-limits to third-party representatives,[4] this provision is not sufficient. First, it is limited to trade secrets—not broader confidential business information—and therefore will inevitably lead to on-the-ground conflict between the employer, the CSHO, and the third-party representative about what are trade secrets. In addition, allowing a third-party representative onto the worksite could expose an employer's warehouse designs, equipment, procedures, patents, and other confidential information to competitors, or the public at-large, which could have major economic consequences. Confidential information can include information such as the layout of the facility, staffing, large pieces of equipment, materials used, and other information that cannot be easily kept away from a third-party representative.

Accordingly, employers may no longer voluntarily allow OSHA onsite. Instead, they could demand OSHA obtain a warrant and challenge OSHA's efforts to bring third parties onto worksites, particularly where a legitimate purpose cannot be demonstrated. These disputes will ultimately be subject to the decision of a judge. As a result, OSHA's inspections will be delayed and unnecessarily prolonged.

III. OSHA Should Not Remove the "Reasonably Necessary" Standard

The existing regulation requires that a third party's participation in an inspection be "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace…."[5] While the Proposed Rule keeps this language intact, OSHA asked for comment on whether to remove it. This language must remain.

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[4] 29 C.F.R. § 1903.9(d) ("Upon the request of an employer, any authorized representative of employees under §1903.8 in an area containing trade secrets shall be an employee in that area or an employee authorized by the employer to enter that area…."); Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825 (proposed Aug. 30, 2023) ("[T]he proposed revisions do not affect other provisions of section 1903 that limit participation in walkaround inspections, such as…the employer's right to limit entry of employee authorized representatives into areas of the workplace that contain trade secrets (29 CFR 1903.9(d))").

[5] 29 C.F.R. § 1903.8(c).

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In fact, OSHA's suggestion to remove it is at odds with your recent testimony before Congress. On September 28, 2023, you testified before the House Education and the Workforce Committee on a multitude of OSHA issues, including the Proposed Rule. You had the following exchange with Chairwoman Foxx about the proposal:

> FOXX: …In its latest proposed rule, OSHA is rewriting the agency's regulation to allow third parties to accompany OSHA inspectors during a job site inspection.
>
> This expands those who can participate beyond safety engineers and industrial hygienists as outlined under current regulations. Under the proposed rule, a third party could include a representative from a worker advocacy group, community organization or labor union. What sense does it make for OSHA to allow individuals who know nothing about workforce -- workplace safety to accompany inspectors at a job site?
>
> PARKER: Well, the rule is currently proposed, ma'am. Thank you for the question, and welcome to the subcommittee. The rule as currently proposed would not have that effect. The rule currently has been construed by some to limit participation to employees of the employer as the representative of workers that can participate in inspection.
>
> And so even a union official who was the international safety representative had great expertise in health and safety, those individuals have been excluded by employers from inspections because they're not an employee of the employer. And so we're trying to fix that. It's a common sense issue so that if a union has a representative who's a health and safety expert, they can participate. We have also expanded...
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> FOXX: But they have to be an expert in the area. Is that correct? Is that the way it's going to be?
>
> PARKER: They have to be able to make a contribution to the inspection so that could be through...
>
> FOXX: ***But that - well, there's a difference in that, and what you just said. They have to be an expert in the area?*** [emphasis added].
>
> PARKER: ***That's correct.*** I was just giving one example. [emphasis added].
>
> FOXX: OK.
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> PARKER: The rule itself is a little broader than that.
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> FOXX: But is that rule intended to help union organizing campaigns?
>
> PARKER: No, ma'am. ***Our only focus is on health and safety.*** [emphasis added].

Your explanation to Chairwoman Foxx implies that, when a third-party representative is not an employee of the employer, OSHA intends to limit third-party participation to necessary

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health and safety experts. Therefore, to remove the existing requirement that the third party be "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace" would be contrary to congressional testimony.

IV. The Proposed Rule Lacks Implementation Guidance and Limiting Principles

Notwithstanding the aforementioned substantive concerns, the Proposed Rule lacks guidance or proposed language on how third-party representatives may be selected by the employees and any limiting principles on the number of representatives who may be selected. This will lead to confusion for both employees and employers. While an existing OSHA regulation indicates that the CSHO has the authority to resolve disputes as to who is the authorized employee representative,[6] there is no process suggested for how representatives of the employees may be initially selected. For example, can one employee select a representative, or must at least two employees be involved? The OSH Act[7] and language throughout the preamble and Proposed Rule use the term "employees," but this issue needs clarification.

Additional practical questions that arise from the Proposed Rule include: What if there is a conflict among employees as to whom to select? Are employees who do not participate in the selection notified that a representative has been selected on their behalf? Is there a process for employees to disagree with a selected representative that would help inform the CSHO's ability to resolve any dispute? And, is there any limit on how many employee representatives could be involved in an inspection? The preamble itself suggests multiple representatives could be involved. This sets up a potential conflict between competing unions and advocacy groups. These are practical issues that have not been addressed in the Proposed Rule and are likely to arise. The public should know how OSHA views these issues and be able to comment on them before any such regulation is put in place.

Conclusion

For these aforementioned reasons, IFDA urges DOL to withdraw the current proposal. Again, we appreciate OSHA's extension of the comment period and the opportunity to submit these comments.

Respectfully submitted,

Mala Parker

Mala Parker
Vice President, Policy & Government Affairs

[6] 29 CFR 1903.8(b) ("Compliance Safety and Health Officers shall have authority to resolve all disputes as to who is the representative authorized by the employer and employees for the purpose of this section.")
[7] 29 U.S.C. 657(e) ("Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his ***employees*** shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace….") (emphasis added).

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