ELECTRONICALLY SUBMITTED VIA REGULATIONS.GOV (November 10, 2023)

The Honorable Doug Parker
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Construction Industry Safety Coalition
Comments to NPRM on Worker Walkaround Representative Designation Process
Docket No. OSHA-2023-0008

Dear Mr. Parker:

The Construction Industry Safety Coalition ("CISC" or the "Coalition") respectfully submits these comments in response to the Occupational Safety and Health Administration's ("OSHA" or the "Agency") Notice of Proposed Rulemaking ("NPRM" or the "proposed rule") concerning the Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825 (August 30, 2023).

The CISC is comprised of 30 trade associations representing virtually every aspect of the construction industry. The CISC was formed several years ago to provide data and information to OSHA on regulatory, interpretive, and policy initiatives. The CISC speaks for small, medium, and large contractors, general contractors, subcontractors, and union contractors alike. The CISC represents all sectors of the construction industry, including commercial building, heavy industrial production, home building, road repair, specialty trade contractors, construction equipment manufacturers, and material suppliers.

The CISC has its roots in a long-standing group of construction industry trade associations who for decades have met to discuss safety and health initiatives in the construction industry. The Construction Association Safety and Health Information Network ("CASHIN") has historically been involved in employee safety and health matters. CASHIN members meet periodically to discuss injury and illness trends in construction, outreach and assistance, and OSHA initiatives that impact the construction industry.

In the course of its review of this NPRM, CISC has identified several areas of serious concern for its members. OSHA's proposed rule seeks to amend its Representatives of Employers and Employees regulation in an attempt to clarify that authorized employee representative(s) may include employees of the employer or a "third-party" and that such "third-party" employee representative(s) may accompany Compliance Safety and Health Officers ("CSHO") during site inspections when they are "reasonably necessary" to aid in the inspection. OSHA further proposes (what it believes to be) clarifications of the relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces of third-party representative(s) authorized by employees who may be reasonably necessary to the conduct of

a CSHO's inspection of the workplace. The stated purpose of the proposed rule is to aid workplace inspections "by better enabling employees to select a representative of their choice to accompany the CSHO during a physical workplace inspection." As explained in more detail below, the proposed regulation offers no clarity on the relevant issues and will result in significant and substantial risks to employers, which will not result in "better" workplace inspections. This is especially true on construction sites, many of which cannot be covered by a one-size-fits-all approach that potentially allows "just anyone" to act as a designated employee representative.

I. The NPRM Creates Unique Risks for Multi-Employer Construction Jobsites

Construction jobsites are unique due to the multi-employer nature of the worksites. Multi-employer jobsites may have multiple subcontracting entities and suppliers, all with their own employees, policies, and procedures. These entities are working under the direction of a general contractor, who is responsible under OSHA's current multi-employer enforcement policy for overall safety onsite. This creates unique safety concerns not adequately addressed by the proposed rule. Under OSHA's multi-employer enforcement doctrine, OSHA will routinely open an inspection of multiple onsite entities under the direction of a single general contractor. OSHA's proposed rule would allow the employees of each entity to designate a third-party representative to assist in the inspection. This is an untenable situation. This would necessarily allow persons unrelated to the alleged and relevant controlling, exposing, creating and correcting employers to participate in the inspection simply because they are allowed onsite.

General contractors are required to keep control of worksite access and must routinely seek approval from the owner in order to allow persons access to a jobsite. The proposed rule fails to address issues of ownership and control for purposes of the Fourth Amendment. It is not always the employer subject to an inspection who has authority to allow persons access, and this is particularly true in the construction industry.

The proposed rule ostensibly allows OSHA to invite anyone onto the jobsite, yet fails to address the knowledge or qualifications necessary of these designated third parties. Accordingly, employers are given a Hobson's choice. They must either face potential liability arising from injury to unknown third parties or face regulatory action for objecting to the inspection in light of these concerns.

In this regard, the NPRM fails to provide protections in the event that an authorized third-party representative is injured. Such a representative may not have worker's compensation coverage if they are not acting in the course and scope of employment with a given onsite employer. Absent worker's compensation, the third party's recourse would be to file a suit in tort,

including punitive damages, against every employer onsite. The potential harm to small subcontractors or construction employers is very high.[1]

OSHA has failed to address the allocation of responsibility for the conduct of designated third parties. The NPRM fails to address who is responsible for the provision of personal protective equipment and safety (including heat), let alone provide adequate remedies and protections for employers to address liability issues, running the gamut from property damage, personal injury, workplace violence and trade secret appropriation.

II. The Proposed Rule is Unnecessary Because Current Regulations Already Provide for Employee Participation

OSHA's proposed rule is an exercise in overreach because it does not address an actual concern. OSHA purports to address the issue of active employee participation during the inspection process by ensuring that "employees are able to select trusted and knowledgeable representatives of their choice." CISC respectfully submits that OSHA is improperly seeking to address a nonexistent issue.

Employee participation is adequately addressed under the current regulatory regime. Employees are empowered to file complaints with OSHA, including anonymously. Employees are further provided protections from retaliation. During inspections non-management employees are entitled to speak with CSHOs in private, and CSHOs routinely engage in such interviews which regularly form the basis for their citations. Additionally, employee identities are redacted from OSHA files to the extent provided by law. Finally, designated employee representatives (i.e., union representatives) are given notice and opportunity to participate in all stages of the inspection. In summary, OSHA has failed to identify an actual harm to be addressed, resulting in administrative overreach.

III. The Proposed Rule Conflicts with Longstanding Agency Guidance and the Purposes of the OSH Act

Without justification, the proposed rule upends OSHA enforcement policy and guidance on whom should be allowed entry onto private property and participation in a government inspection. The proposed rule creates gray areas and fails to provide a procedure to protect both employee rights and employer rights to due process and lawful search and seizure.

OSHA has previously limited participation in an inspection to employees of the employer or, in limited circumstances, to industrial hygienists or safety engineers whose presence is reasonably necessary, as determined by the CSHO, to conduct an effective inspection:

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[1] The NPRM fails to absolve construction employers from state-imposed rules of statutory employment. Statutory employment, when applicable, holds upstream employers liable for worker's compensation whenever downstream employees are injured, when conditions apply.

> 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]

Pursuant to that interpretation, "reasonably necessary" means that the third party representative will make a "positive contribution to a thorough and effective inspection" based on the representative's experience and skill, as when, for example, a translator is required. OSHA now seeks to not only rescind this longstanding and relied upon interpretation but proposes to codify an **unfettered right on the part of employees** to select anyone to participate in the inspection. OSHA has failed to identify a cognizable reason to allow employees to designate a non-employee to participate as their representative or how to ensure that the designee's interest aligns with the purposes of the OSH Act. The rule could ostensibly allow attorneys, workplace advocacy groups and the press to participate in an inspection and imposes an untenable burden on both the employer and the CSHO to gatekeep the designation—including ensuring that the designee truly has the best interest of employees in mind.

The proposed rule interferes with, dilutes and undermines OSHA's sole and only Congressionally mandated purpose, which is to uphold federal standards for workplace health and safety, because it allows non-employee third parties to have unbridled and unrestricted responsibility and authority during the inspection process. In furtherance of the OSH Act, and in alignment with OSHA's limited regulatory jurisdiction, current regulations permit existing employees to accompany CHSO's during inspections. Third-party participation has been limited to "good cause," based on CSHO necessity, e.g., a translator or industrial hygienist selected by the government. OSHA's proposed rule abandons these jurisdictional limitations and vests employees with a new right heretofore not present in the OSH Act—the right to designate non-employee participants to partake in the inspection absent the requisite factual finding by OSHA that their presence is necessary to OSHA's directive and within the legislature's statutory delegation of regulatory authority.

This defect is made evident in the way in which the proposed rule conflicts or renders inoperable OSHA's Field Operations Manual. Specifically, OSHA fails to address how the designation process will be implemented in the context of stated OSHA inspection procedures.

Specifically:

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[2] February 21, 2013, Letter of Interpretation to Mr. Steve Sallman.

- CSHO's are required to advise employers that an employee representative must be given an opportunity to participate. In that regard, CSHO's are required to determine as soon as possible after arrival whether the workers at the inspected worksite are represented and, if so, shall ensure that employee representatives are afforded the opportunity to participate in all phases of the inspection.

  The NPRM fails to address how a CSHO is to identify if the employees have designated a third-party representative, or when, or how employees are to be given the opportunity to designate such a representative.

  It is therefore unclear how OSHA intends the proposed rule to be implemented in the context of an unannounced inspection without prior notice.

- Plants or establishments can be inspected regardless of the existence of labor disputes, such as work stoppages, strikes, or picketing. If the CSHO identifies an unanticipated labor dispute at a proposed inspection worksite, the Area Director or designee shall be consulted before any contact is made.

  Under current rules, CSHO's need only inform a known bargaining representative of their intent to conduct an inspection. The NPRM ostensibly affords employees additional rights and leverage in this context without analysis, comment, or factual basis.

- OSHA's current procedures state that programmed inspections can be deferred during a strike or labor dispute, either between a recognized union and the employer or between two unions competing for bargaining rights in the establishment.

  The NPRM fails to address how a CSHO is to address a dispute between employees in selecting a non-party representative when determining whether to proceed with an election. OSHA is needlessly inserting itself into labor situations outside of its jurisdiction.

- OSHA's current procedures require that a CSHO conduct an inspection in a manner to avoid unnecessary personal exposure to hazards. The NPRM fails to address how a CSHO is to protect third parties from personal exposure, particularly where there is no express consideration of third-party knowledge of the worksite or its specific hazards.

- Current OSHA policy states that employees at multi-employer worksites can have multiple representatives, all of whom can accompany the CSHO during the inspection if the CSHO determines they will aid, and not interfere with, the inspection. Current regulations vest the CSHO with the authority to deny any representative whose conduct interferes with a fair and orderly inspection.

  The NPRM fails to address how a CSHO is to balance the right of employees to designate "anyone" as a representative with the CSHO's purported authority to deny representation to anyone who is interfering with a fair and orderly inspection.

- OSHA's polices state that the highest-ranking union official or union employee representative is to designate who will participation in the walkaround. The CSHO is empowered to resolve all disputes between the employer and the employees in this regard. Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for OSHA inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on the walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with reasonable number of employees during the walkaround.

  The NPRM fails to address how CSHO's are to make a determination over disputes between employees as to the designation of their representatives, let alone between employers and employees when the designee is a third party.

As set forth above, OSHA's proposed rule will impact the fair and orderly conduct of OSHA inspections. OSHA's current procedures make sense under current guidance—the CSHO is to arrive on site and request identification of known employee representatives—whether union, safety committee members or otherwise. The persons identified are known to other employees and the employer. The NPRM proposes a rule change which will inject uncertainty into the process. Employees will somehow have to designate a representative on the spot and without meaningful debate and discussion—which is crucial when the designee is a non-employee. Employers will have to accept a stranger to the worksite on property and are given no meaningful method to object. Presumably, the failure to consent to the presence of a designee will result in OSHA seeking a warrant as to the inspection in total. It is unclear how the courts will react to an inspection conducted over a partial objection—this NPRM is a serious and real deprivation of employer rights.

IV. The NPRM Conflicts with the NLRA

The OSH Act currently permits authorized employee representatives to join in OSHA inspections. However, the NLRA and applicable precedent from the Supreme Court of the United States already defines when a union can lawfully represent employees, who can access employer facilities, and the limits regarding both. *See, e.g.,* 29 U.S.C. § 159; *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956)[3]. Yet OSHA's stated intent with this NPRM is to "clarify the rights of workers and certified bargaining units to specify a worker or union representative to accompany an OSHA inspector during the inspection process / facility walkaround, regardless of whether the representative is an employee of the employer, if in the judgment of the CSHO such person is reasonably necessary to an effective and thorough physical inspection." This position not only expands the clear language of 29 CFR §1903.8(c) (allowing for "an industrial hygienist or a safety engineer"), but is also legally unsustainable, as OSHA does not have the authority to create a new category of authorized representatives outside of the process already set up in the NLRA and the Supreme Court of the United States.

The proposed rule also conflicts with federal labor law, is contrary to the principles of workplace democracy, and potentially violates the wishes of the workers pursuant to Section 7 of the NLRA, which explicitly establishes workers' "right to refrain from any or all" such activities. By potentially allowing union organizers, whom the employees may not want to represent them, unfettered access to employer property[4], the proposed rule would bypass the NLRA and state property laws, which normally regulate such access and establish limits on the time, place, and manner of outside access to private employer property. The proposed rule would also bypass the NLRA's procedures for establishing union representation, which require unions to demonstrate that a majority of the employees support representation before an employer can recognize the union (or another representative designated or selected for collective bargaining) as the employees' representative. *See, e.g.,* 29 U.S.C. § 159; *Cemex Constr. Materials Pac., LLC*, 372 NLRB No. 130 (Aug. 25, 2023). Under the NPRM, even if a majority of the employees do not wish to be represented by a union, if even one employee asks that an outside union organizer be permitted to participate in the OSHA inspection, a CSHO could decide to allow the union to represent the entire workforce as it pertains to the inspection, against the majority's wishes. Indeed, there is no limitation on how many employees could request a non-employee, third-party representative for the inspection, leaving the door open to employees requesting representatives from competing unions. This creates a

[3] The NLRA defines when a union lawfully represents employees, and they generally have to be certified by the NLRB following an employee election or a voluntary recognition.

[4] As explained in more detail below, CISC and its members can only presume that an authorized employee representative has unlimited access to the property and employer materials, because there is nothing in the NPRM that places any limit on the representative's authority.

substantial undue burden on non-unionized workplaces that may have to accept without recourse their employees' decision to bring in union organizers during an inspection.

V. The NPRM Is Unconstitutionally Vague

The NPRM has created confusion over implementation. As further discussed below, the NPRM raises the following critical questions:

(1) How do employees go about selecting a representative for an inspection?

(2) Must employers be notified on who the employees are considering to be their representative?

(3) Are employers allowed to respond to the employee's selected representative?

(4) Does the CSHO meet with employees to discuss the selection process and who the employees selected?

(5) Does the CSHO accept any information, including objections, offered by the employer during the selection process?

(6) What obligations do the employer have to the selected representative once they are part of the inspection?

(7) Does the selected representative only participate in the walk round, or during the entire inspection?

(8) Is the designated represented representative afforded copies of discovery and/or notice and participatory rights in the appeal?

The NPRM does not provide requisite notice of what is required to comply and will be unconstitutionally vague on its face and as applied.

A. Anyone and Everyone Could Be the Third-Party Representative(s)

The NPRM does not provide clear criteria as to the identity or qualifications of a third-party employee designated representative.

In that regard, the NPRM:

(a) does not limit who employees can select as their representative, meaning that employees can select any non-employee, up to and including a plaintiff's personal injury attorney or an individual from a public interest group, to be their representative;

(b) vests the ability to assess whether the third party can join into the inspection is afforded solely to the CSHO (who may have no knowledge of the worksite) – the employer has no say in the matter;

(c) allows employees to select as many representatives as they want;

(d) does not provide employers with a right and procedure to challenge a CSHO's determination that the third party (or parties) "may be reasonably necessary" to the inspection;

(e) does not provide the employer a right and procedure to object to the selected representative;

(f) does not provide the employer (or the CSHO or objecting employees) with a procedure to verify or assess the purported qualifications of the selected third-party; and,

(g) does not provide a definite definition of what it takes to show "good cause" for why a non-employee third party is reasonably necessary to the inspection. Simply put, under the NPRM employers must blindly accept the employees' authorized representative and leave their concerns in the hands of the CSHO, who is actively trying to determine whether there are violative conditions on the jobsite.

In the face of this complexity, the NPRM vaguely and defectively provides that the CSHO will consider "a range of factors when determining who can participate" in an inspection. Absent specific guidelines as to how the designated representative will be qualified, the NPRM creates uncertainty and remains unhinged to OSHA's regulatory purpose—*i.e.*, the proposed rule is not a reasonable interpretation of the OSH Act enabling statutes.

V. The NPRM Offers No Clarity on what Authority or Access Third Parties Allowed into Inspections Have

Allowing an employee-selected third party onto a jobsite to assist with an inspection poses a serious concern for the CISC and its members; there is no indication as to what authority the third party will have upon entering the worksite.

The NPRM fails to specify what types of information a third party may access during the inspection. The unspecified, and apparently unrestricted, level of access raises serious concerns given a CSHO's ability to request and review confidential and sensitive information. Further, the NRPM does not address what input a third party may provide during an inspection.

A process for addressing disputes or differences in opinion between the CSHO and the third party is not raised. This could lead to unresolvable disputes that could seriously impact the outcome of the inspection.

Lastly, the NPRM is silent regarding a third party's ability to participate in or influence settlement discussions. The potential for a non-employee third party to impact or block settlement outcomes is incredibly concerning.

Absent parameters setting forth what a third party may or may not do during an inspection, third participation levels will vary wildly from inspection to inspection based on factors that may include personality, personal agenda and the skill and experience (or lack thereof) of the third party. This will impact inspection outcomes in ways we cannot yet foresee.

Conclusion

The CISC appreciates the opportunity to comment on this proposal. However, for all of the forgoing reasons, the CISC strongly recommends that OSHA withdraw the NPRM. If OSHA does not withdraw the NPRM, then the CISC urges the agency to hold informal public hearings on this proposal because the rule impacts everyone—all employers, all employees, and state agencies. Because the current NPRM does not and cannot address all of these issues, mere comments are insufficient. Accordingly, OSHA must hold hearings to gather necessary input on all of these issues.