

Final Rule Clarifies Employee Representation During OSHA Inspections Webpage

<https://www.osha.gov/worker-walkaround/final-rule>

Worker Walkaround Designation Process (Walkaround) Rule Frequently Asked Questions (FAQs)

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What is the "Walkaround" final rule about?

Under Section 8(e) of the OSH Act, employees and employers have the right to have a representative accompany OSHA Compliance Officers (CSHOs) during physical inspections of worksites for the purpose of aiding such inspections. The OSHA regulations that describe this right are under 29 CFR 1903.8. The current changes to the regulation clarify that, like employers, employees have the right to designate a non-employee third party to be their representative. The regulation places certain conditions on third-party employee representatives to ensure their presence aids the inspection

Why is OSHA doing this rulemaking?

A 2017 court decision found that OSHA's practice of permitting third parties to be employee walkaround representatives was a valid interpretation of the Act but was not consistent with the regulation as then written. As such, OSHA is revising this regulation to reinstate its longstanding practice to permit third parties to be employee walkaround representatives. Employee representation is vital to thorough and effective OSHA inspections. This rule will improve OSHA inspections and benefit employee safety and health

What did 29 CFR 1903.8(c) say before it was revised by this rulemaking?

Prior to this rulemaking, 29 CFR 1903.8(c) stated, "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."

What does 29 CFR 1903.8(c) say now?

The final rule provides:

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 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 accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

The revisions in the Walkaround final rule clarify that:

- the representative(s) authorized by employees may be an employee of the employer or a non-employee third party;
- employees' options for third-party representation during OSHA inspections are not limited to persons with formal credentials such as an industrial hygienist or safety engineer;
- a third-party representative authorized by employees may be reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace by virtue of their knowledge, skills, or experience. This can include, for example, technical knowledge or practical experience about the processes and hazards of

the type present in the workplace, or language and communication skills that facilitate the gathering of information from employees

What must employers do to comply with the final rule?

29 CFR 1903.8(c) is a regulation concerning employees' statutory right to designate a walkaround representative during a physical inspection of a workplace. It is not a safety and health standard and does not impose any compliance obligations for employers

Under certain circumstances, can a third party asserting representative status be denied access to the walkaround?

Yes. This final rule does not:

- change the CSHO's authority to determine whether a third party has been authorized by employees to be their walkaround representative (29 CFR 1903.8(b)).
- affect other provisions of section 1903 that limit participation in walkaround inspections, such as the CSHO's authority to prevent an individual from participating in the walkaround inspection if their conduct interferes with a fair and orderly inspection (29 CFR 1903.8(d)); or
- affect 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)).

As always, the conduct of OSHA's inspections must preclude unreasonable disruption of the operations of employer's establishment (29 CFR 1903.7(d)).

How do CSHOs determine whether employees have a walkaround representative?

There are a number of different methods by which a CSHO may ascertain whether employees have a walkaround representative, e.g., upon receipt of a complaint (with reference to a designated representative), during the opening conference, during the walkaround, or during employee interviews. For example:

- OSHA may determine that employees are represented by a labor organization or third-party representative at the complaint stage. When OSHA receives a complaint, the OSHA complaint form asks whether the individual filing the complaint is an authorized representative of employees.
- CSHOs also determine whether employees have authorized a walkaround representative as soon as possible after arrival at the facility. Generally, the CSHO asks the employer during the opening conference if the facility is represented by a union and/or if employees have an employee representative.
- CSHOs may ask employees if there is an employee walkaround representative anytime during the walkaround inspection.
- CSHOs may ask employees whether there is an employee walkaround representative during employee interviews.

What is the process by which employees can designate a representative?

There is no single or required process by which employees designate a walkaround representative. However, there are several ways that employees can inform OSHA that they have a walkaround representative (whether that representative is an employee or a third party). For example:

- Per existing long-standing policy in OSHA's Field Operations Manual (FOM), CPL-02-00-164, Chapter 3, in workplaces where employees are represented by a certified or recognized collective bargaining agent, the highest-ranking union official or union employee representative on-site designates who participates in the walkaround.
- Employees can designate an authorized employee representative when they authorize them to file a complaint on their behalf.

- Employee members of an established safety committee or employees at large can designate the employee walkaround representative per OSHA's FOM, CPL 02-00-164, Chapter 3.
- Employees can also inform the CSHO during the walkaround inspection or during interviews that they have an authorized employee representative.
- An authorized employee representative can also inform the CSHO or OSHA Area Office that they represent employees

How many employees are required to authorize a walkaround representative? A majority of the workforce or the department at issue in the inspection, for example? Can a single employee authorize the representative?

No set number of employees are required to authorize an employee walkaround representative. It is not necessary for all, or even a majority, of employees to authorize the walkaround representative. However, in a workplace with more than one employee, more than one employee would be needed to authorize the walkaround representative

Can a CSHO designate a third party as an authorized employee representative without a request or designation by employees?

No, CSHOs do not designate a third party as an authorized employee representative without a request or designation by employees

Is there a way for employees or the employer to object to a walkaround representative?

Employees and the employer can object to a representative by raising any concerns about the identified representative with the CSHO. The CSHO has the authority to resolve all disputes as to who is the representative authorized by the employer and employees for the purpose of 29 CFR 1903.8. The CSHO will seek to resolve any employee or employer objections consistent with OSHA's FOM, CPL-02-00-164, Chapter 3.

How many walkaround representatives can there be on an inspection?

Under 29 CFR 1903.8(a), one employee and one employer representative shall accompany the CSHO on the inspection, but the CSHO may permit additional employer representatives and additional authorized employee representatives if the additional representatives will further aid the inspection. A different employer and employee representative may accompany the CSHO during each different phase of an inspection if this will not interfere with the conduct of the inspection.

Per OSHA's FOM, where more than one employer is present or in situations where groups of employees have different representatives, it is acceptable to have a different employer/employee representative for different phases of the inspection.

If several employee walkaround representatives are identified, how will the CSHO determine who may accompany the CSHO on the inspection?

If several employee walkaround representatives are identified, the CSHO considers the particular knowledge, skills, or experience of the representatives and whether the additional representatives would further aid the inspection. The CSHO routinely confers with the employees who designate representatives and seeks information necessary for determining how particular individuals will aid in the inspection.

In a unionized workplace, can employees designate a representative who is not affiliated with their union?

If employees are represented by a certified or recognized collective bargaining agent, the highest-ranking union official or union employee representative on-site will designate who will participate in the walkaround inspection. See OSHA's FOM, CPL 02-00-164, Chapter 3. However, if the CSHO determines that an additional walkaround representative would further aid the inspection, the CSHO may permit an additional representative authorized by employees on the walkaround inspection, even if that individual is not affiliated with the union. While this is not a common occurrence, there may be inspections where multiple employee walkaround representatives need to be

present, such as multi-employer worksites, if employees designate someone in addition to their union representative.

If the additional walkaround representative is a third party, the CSHO would need to determine if good cause has been shown why accompaniment by the third party is reasonably necessary to the conduct of an effective and thorough physical workplace inspection. The CSHO should consult with the Area or Regional Office on unique requests. In determining whether the additional third-party representative is reasonably necessary and would further aid the inspection, CSHOs will take care to avoid being interjected into labor relations disputes between unions and if they believe any disruption is occurring, they may pause the inspection and reassess accompaniment

How will a CSHO determine if a third-party employee representative is reasonably necessary and whether good cause has been shown?

CSHOs determine whether good cause has been shown why a third-party representative is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace by inquiring about the representative's knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or any relevant language or communication skills, among other things. This could include questions about the representative's familiarity with the equipment, machinery, work processes, industry, consensus standards or hazards that are present in the workplace, and any specialized safety and health expertise. It could also include language or communication skills that will facilitate the engagement of the employees.

Third-party representatives are "reasonably necessary" when they will make a positive contribution to a thorough and effective inspection. CSHOs will speak with employees and the employees' designated representative to determine whether the representative is reasonably necessary. In all cases, the third party must aid the inspection. CSHOs have discretion to determine whether good cause has been shown why a third-party employee representative is reasonably necessary to the inspection.

Will CSHOs vet a third-party employee representative's qualifications?

CSHOs inquire about the representative's knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or any relevant language or communication skills. CSHOs follow standard procedures in obtaining a representative's contact information, including the representative's name, address, telephone number, and email address, which is included in the case file. It would not be expected that the CSHO obtain any additional information from the third-party employee representative than would be requested of other employee or employer representatives.

If employees or the employer have concerns about the third-party employee representative's knowledge, skills, or experience, or whether the third-party representative would aid the inspection, they may raise those concerns to the CSHO. The CSHO, however, has the ultimate authority to determine whether and which representatives may accompany the CSHO on the walkaround inspection, see 29 CFR 1903.8(a)-(d)

What is the role of a walkaround representative?

The role of a walkaround representative is to accompany the CSHO for the purposes of aiding OSHA's physical inspection of the workplace. The representative may aid the inspection in various ways, such as by explaining equipment processes or operations and policies and procedures. The employee representative may also aid the inspection by providing interpretation during an informal interview.

Can a walkaround representative accompany the CSHO in all aspects of the inspection?

The walkaround representative is permitted to accompany the CSHO during the walkaround inspection and participate in the opening and closing conferences. The CSHO may conduct informal employee interviews during the walkaround inspection and conduct private formal interviews separate from the walkaround. Employee and

employer representatives are not present for private interviews unless the employee requests the presence of the representative.

Can an employee walkaround representative ask questions and take photos or measurements during the inspection?

Under the OSH Act, the walkaround representative's role in the walkaround is to aid the inspection. To that end, the walkaround representative may ask clarifying questions to ensure understanding of the specific item and/or topic of discussion. Because the CSHO takes photographs and measurements, a representative generally does not aid the inspection by taking photos and measurements. However, representatives may take their own photos and measurements if expressly permitted by the employer or another entity that controls the worksite if not the employer, or under the terms of a collective bargaining agreement, provided such conduct does not interfere with the CSHO's inspection.

The employee walkaround representative shall be advised that, during the inspection, matters unrelated to the inspection shall not be discussed with employees. See OSHA's FOM, CPL 02-00-164, Chapter 3. An employee representative whose conduct interferes with a fair and orderly inspection, which includes any activity not directly related to conducting an effective and thorough physical inspection of the workplace, may be denied from accompanying in the inspection. See § 1903.8(d) and OSHA's FOM, CPL 02-00-164, Chapter 3. Additional rights and responsibilities of the authorized employee representatives during an OSHA inspection are covered in section 8 of the OSH Act, 29 CFR Part 1903, and OSHA's substance-specific standards. Related rights and responsibilities may be contained in the National Labor Relations Act (and related labor-management statutes), and any applicable collective bargaining agreement.

What type of walkaround representative behavior could interfere with the inspection?

During the opening conference, the CSHO sets the ground rules for the inspection and makes clear that employee and employer representatives may not disrupt or interfere with a fair and orderly inspection. As explained in OSHA's FOM, CPL 02-00-164, Chapter 3, the employee representative shall be advised that, during the inspection, matters unrelated to the inspection shall not be discussed with employees.

The CSHO may deny the right of accompaniment to any person whose conduct interferes with a fair and orderly inspection. See § 1903.8(d). Interfering or disruptive conduct is conduct that delays or impedes the inspection. In addition, any activity not directly related to conducting an effective and thorough physical inspection of the workplace is also deemed to interfere with a fair and orderly inspection. Below is a non-exhaustive list of examples of behavior that may interfere with OSHA's inspection:

- Preventing the CSHO from taking essential photographs, video recordings, or surface or air monitoring.
- Preventing the CSHO from interviewing employees in private.
- Resisting or interfering with employee or employer representative involvement in the inspection.
- Failing to stay with the CSHO during the walkaround, such as wandering away from the inspection or going into unauthorized areas.
- Taking unauthorized photographs or videos.
- Solicitation, such as handing out union authorization cards.
- Distributing or handing out any material without the CSHO's review and consent.
- Failing to comply with the ground rules of the inspection.

This list is not exhaustive, as other conduct may also interfere with the inspection depending on the context and the nature of the conduct.

Is a third-party walkaround representative permitted to wear clothing promoting a union?

OSHA does not place limitations on representatives' clothing, and must exercise care in making subjective or anticipatory determinations about what could interfere with an inspection. However, if an employer objects to a third-party representative's clothing on the basis that it disrupts or interferes with the inspection, OSHA will attempt to resolve the issue. Wearing clothing with a union name or logo would not ordinarily interfere with the inspection. If disruption or interference occurs, the CSHO shall contact the Area Director or designee as to whether to suspend the walkaround inspection or take other action. See §1903.8(d)

What does a CSHO do if a walkaround representative interferes with the inspection?

The CSHO will attempt to resolve concerns over any interfering conduct. If disruption or interference occurs, the CSHO will contact the Area Director or designee as to whether to exclude a representative from the inspection, suspend the walkaround inspection, or take other action. See OSHA's FOM, CPL 02-00-164, Chapter 3. Depending on the severity and nature of the interference and/or behavior, a warning may suffice in some instances. In other instances, immediate denial of accompaniment in the inspection may be required

Will OSHA delay its inspection if employees request a third-party representative who needs time to travel to the workplace?

OSHA will afford both employer and employee representatives, including third-party representatives, a reasonable amount of time to travel to the inspection site, unless an inspection cannot be delayed as described below. For employer representatives, OSHA's FOM, CPL 02-00-164, Chapter 3, Section IV.1.b currently states, "The inspection shall not be delayed unreasonably to await the arrival of the employer representative. If the employer representative is coming from off-site, the inspection should not be delayed in excess of one hour." This policy will also apply to employee representatives.

If an inspection is delayed awaiting the arrival of an employer or employee representative, OSHA reserves the right to perform other inspection work, such as but not limited to reviewing records, during this period.

In certain inspections, it may not be appropriate to delay the start of the inspection to wait for a representative. Such inspections include but are not limited to:

- Inspections involving imminent danger.
- Inspections involving fatalities or catastrophes, particularly where a delay would impact OSHA's ability to gather or preserve evidence.
- Inspections where shift changes require OSHA to begin an inspection at a certain time.
- Inspections where a delay in opening the inspection could result in disruptions, such as but not limited to disruptions to business operations, public safety and welfare, transportation, etc.

Will OSHA give third-party representatives advance notice of an inspection?

"Advance notice" refers to when the Area Office sets up a specific date or time with the employer for the CSHO to begin an inspection. Section 17(f) of the Act, as well as OSHA's regulation at 29 CFR 1903.6, contain a general prohibition against giving advance notice of inspections, except as authorized by the Secretary or the Secretary's designee. OSHA generally does not provide advance notice of an inspection to either employer or employee representatives.

As OSHA's FOM, CPL 02-00-164, Chapter 3, Section IV.D.1. explains, advance notice is generally prohibited because the OSH Act regulates many conditions that could be subject to speedy alteration or disguise. However, there are some limited exceptions to this general prohibition. As set forth in OSHA's FOM, CPL 02-00-164, Chapter 3, Section IV.D.1.a, advance notice can be given only with the authorization of the OSHA Area Director or designee and only in the following situations:

- In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible.
- When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary.
- To ensure the presence of employer and employee representatives or other appropriate personnel who are needed to aid in the inspection; and
- When giving advance notice would enhance the probability of an effective and thorough inspection (e.g., in complex fatality investigations).

Providing advance notice with respect to employee representation applies only if there is a known employee representative. Advance notice to employees will not be required in the absence of such a representative

Can an employer impose its worksite rules and policies on a third-party representative? For example, can an employer conduct a background check on a third party? Can an employer require a third-party representative to be fit tested/wear a respirator?

OSHA understands that employers may have worksite rules and policies for both employees and visitors to their worksites. During the opening conference, the CSHO inquires about any worksite rules and policies the employer has that are relevant to the inspection, such as rules and policies related to:

- Personal protective equipment.
- Areas requiring special precautions for using equipment (e.g., cameras, phones).
- Safety orientations or briefings for visitors.
- Emergency evacuation procedures; and
- Any other worksite conditions and/or policies relevant to the inspection.

OSHA anticipates that third-party representatives will generally have to comply with employers' established lawful rules and policies, as long as those rules and policies apply equally to all visitors and are not implemented or enforced in a way so as to interfere with an employee representative's right to accompany the CSHO during OSHA's physical inspection of the workplace. For example, third-party employee representatives may be required to be fit tested and to wear a respirator. Some workplaces, such as chemical plants and Department of Homeland security facilities, may have additional security or entry requirements that also apply to visitors to the worksite.

However, if an employer applies their rules and/or policies in a discriminatory manner (e.g., only requiring third-party employee representatives to have background checks but not for other visitors to the property), such conduct could be considered obstructive and constitute interference with the inspection. If compliance with a facially lawful rule or policy places an unreasonable barrier to CSHO or third-party access to the worksite, it could constitute employer interference with an inspection. Such determination would be made on a case-by-case basis, taking into account the business purpose for the policy. Employers may need to consult other laws, regulations, and any applicable collective bargaining agreements to determine the appropriateness of rules and policies

Can an employer require a walkaround representative to sign a confidentiality agreement?

OSHA anticipates that a third-party representative will generally have to comply with employers' established lawful rules and policies, as long as those rules and policies apply equally to all visitors and do not interfere with an employee representative's right to accompany the CSHO during OSHA's physical inspection of the workplace. An employer may require a third-party representative to sign a reasonable confidentiality agreement, limited to the use of the confidential information learned in the inspection, on the same terms as it requires of other visitors. However, the agreement may not restrict the representative's ability to discuss information with OSHA or employees affected by the inspection, or restrict the representative's participation in any future enforcement proceedings. Employers may need to consult other laws, regulations, and any applicable collective bargaining agreements to determine the appropriateness of such agreements.

Were there public comments submitted in response to this rulemaking?

Yes, OSHA received 11,529 timely comments that were posted to the docket. These comments were both in favor of the rule and opposed to it, ranging from requests to withdraw the rule entirely to criticism that the rule does not go far enough to ensure that employees are able to select a representative of their choice.

Was there a public hearing for this rulemaking?

No. As explained in the proposed rule, because this rulemaking involves a regulation rather than a standard, it is governed by the notice and comment requirements in the APA (5 U.S.C. 553) rather than section 6 of the OSH Act (29 U.S.C. 655) and 29 CFR 1911.11.

Therefore, the OSH Act's requirement to hold an informal public hearing (29 U.S.C. 655(b)(3)) on a proposed rule, when requested, did not apply to this rulemaking.

How can I access the Walkaround final rule?

The final rule is accessible from hyperlinks on www.osha.gov and www.reginfo.gov by referencing document ID number OSHA-2023-0008.

(Note: These FAQs will be updated periodically based on OSHA's experience in implementing this regulation and to answer stakeholder questions. Stakeholders should periodically check these FAQs for updated guidance.)