



November 13, 2023

VIA ELECTRONIC SUBMISSION

Hon. Douglas L. Parker  
Assistant Secretary of Labor for Occupational Safety and Health  
U.S. Occupational Safety and Health Administration  
200 Constitution Ave. NW  
Washington, D.C. 20010

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

Dear Assistant Secretary Parker:

On behalf of the American Road & Transportation Builders Association (ARTBA) and our more than 8,000 members in the transportation construction industry, we respectfully submit the following comments to the Occupational Safety and Health Administration (OSHA) on its proposed "Worker Walkaround Representative Designation Process" regulation.<sup>1</sup>

ARTBA's members have been tasked with deploying the bulk of record federal investments within the Infrastructure Investment & Jobs Act, which President Biden signed into law almost exactly two years ago. ARTBA members seek to deliver projects safely, efficiently and cost-effectively.

Because safety is the top priority for ARTBA and its members, we maintain a strong working relationship with OSHA and have always respected the core purpose of the agency to ensure the safety of workers and worksites. Regrettably, OSHA's current proposal is not in keeping with that mission and spirit. Instead, it would create significant and unnecessary challenges for employers, distracting from the core purpose of worksite safety. In fact, the proposal appears inappropriately intended to promote unrelated policy priorities, risking a severe undermining of both OSHA's credibility and its inspective processes. For these reasons and those detailed below, ARTBA respectfully recommends that OSHA rescind this rule.

### **Background**

ARTBA represents members in all facets of the transportation construction industry, including contractors, materials suppliers, state and local transportation agencies, planning and design firms, safety and equipment manufacturers and more. The top priority for ARTBA and its members is safety. Accordingly, our association has enjoyed a long and productive relationship with OSHA to

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<sup>1</sup> Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825, (August 30, 2023).



further our mutual objectives. It should also be noted that our members operate in both union and non-union environments, and we have consulted with both sectors in the preparation of these comments.

OSHA's proposed rule would revise the current language regarding when a third-party is allowed to accompany an OSHA inspector during a worksite inspection. Currently, the Occupational Safety and Health Act<sup>2</sup> allows a representative of the employer and/or a representative authorized by employees to accompany an OSHA inspector during a physical inspection of a workplace.<sup>3</sup> Third parties are permitted to serve as an employees' representative when "good cause" has been shown for their participation.<sup>4</sup>

OSHA's proposal would expand eligibility of those who could accompany inspectors. First, OSHA proposes that employees may authorize either an employee of the or any third party designee "reasonably necessary to aid in the inspection."<sup>5</sup> The agency alleges that modifying the standard from "good cause" to "reasonably necessary" is consistent with court precedence.<sup>6</sup> Second, OSHA would eliminate language pertaining to the skills and knowledge required for that individual accompanying an inspector, instead stating that the authorized individual be reasonably necessary to the conduct of a thorough inspection simply by virtue of their knowledge, skills, or experience.<sup>7</sup> OSHA does not offer any additional parameters for this third party's conduct while at the job site or otherwise.

### **ARTBA's Comments on the Proposal**

#### OSHA's proposed revision is not needed and does not help enhance workplace safety.

According to OSHA, this proposal is intended to improve workplace inspections by allowing employees' selection of third parties to accompany inspectors. However, the current rule and its longstanding interpretation already allow for a third party designated by employees to accompany an OSHA inspector when *good cause* is shown, while also incorporating important safeguards that the agency now wants to eliminate.<sup>8</sup>

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<sup>2</sup> 29 U.S.C. § 657 (e).

<sup>3</sup> Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825, (August 30, 2023).

<sup>4</sup> *Id.* at 59827.

<sup>5</sup> *Id.* at 59829.

<sup>6</sup> See *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 211 L. Ed. 2d 448 (2022).

<sup>7</sup> 88 Fed. Reg. 59825 at 59829.

<sup>8</sup> *Supra* note 4.



It is OSHA's practice to demonstrate a need for a new rule when addressing industry failure relating to safety and health. The agency has justified a new or revised regulation with relevant statistics and demonstrated harms, backed by examples. This new proposal fails to demonstrate any scenario in which an employee's representative was denied access to an inspection. OSHA does not provide any empirical evidence of harm or failure that needs to be addressed by issuing a new regulation.

Furthermore, the proposed changes would actually harm this process. The rule raises serious concerns about the motivation for an inspection and undermines the expertise and credibility of the inspector. It diminishes OSHA's reputation as a safety advocate and distracts from the real purpose of the visit by opening the door to those with divergent agendas.

- a. OSHA must retain language that demonstrates the purpose for having the third party on site.*

This proposed rule would remove longstanding language enumerating the types of designated third parties "reasonably necessary" to include in the inspection (e.g., industrial hygienists and safety engineers). Such qualifiers demonstrate the level of sophistication and integrity needed to enhance the value of safety inspections. Instead, OSHA would allow virtually any third party to participate in the inspection, regardless of whether they have any training or knowledge of safety procedures. This practice would provide opportunities for individuals – particularly those with motivations unrelated to workplace safety or assisting the inspection in good faith – to access an employer's sensitive business information without recourse. Examples could include representatives of labor unions, law firms, or even competitors of the employer. These individuals would serve no credible purpose, while indulging policy priorities unrelated to the OSHA inspection process.

These third parties could attempt to influence the OSHA inspector, distract from the inspection, and/or inject thoughts and opinions outside its scope. Furthermore, they could undermine the credibility of the OSHA inspector and their final product. The purpose of an OSHA inspection is to monitor the safety of the jobsite. A third party with no expertise in the safety principles the inspector is assessing adds no value to the inspection. Moreover, as noted, these third parties may participate to further their own purposes, unrelated to safety objectives. ARTBA members have shared past experiences with bad actors attempting to access their job sites for reasons unrelated to worker safety and health, including seeking proprietary information or evading privacy safeguards in place to protect both the employer and employees. OSHA would become a conduit for those seeking entry to a jobsite for those purposes. The proposed rule would politicize and damage the credibility of an agency created to protect worker safety and health on an objective basis.



- b. OSHA must retain defined parameters for third parties that are granted access to jobsites.*

This rulemaking offers no parameters for third parties provided access to a jobsite. Instead, these guidelines are left to individual OSHA inspectors. The lack of clarity within the rule makes it ripe for misapplication and inconsistency. OSHA offers no guidelines for what third parties can and cannot do once they gain access to a jobsite. For example, will these third parties be able to wear clothing that promotes a labor union, law firm, or competitor? Will there be limitations on materials they can or cannot distribute? Will they have access to employees and confidential business information? Without limitations in these areas, third parties may attempt to further their own agendas through the inspection, including advertising business services, union messaging, and/or seeking information to use against the employer. For OSHA to maintain its integrity, the agency must avoid the perception of helping facilitate these types of activities, and instead should only allow those third parties who can demonstrate a legitimate purpose for being present, as is provided in the existing rule.

In the case of non-unionized jobsites, the federal government does not have authority to assist or facilitate their unionization. At a minimum, OSHA must make clear in this rulemaking that it will not permit a union representative to be present at a non-union facility. To do otherwise would betray an ulterior motive for this rulemaking and conflict with established principles of labor law.

- c. Third parties with inadequate expertise can endanger a jobsite.*

Third parties without knowledge of the complexities of a transportation construction job site add nothing to the value of a safety inspection. Moreover, they pose a safety risk to themselves and others through their lack of expertise in the protocols unique to those jobsites. It is disconcerting and – once again – raises suspicions about the true motivation of this proposal when OSHA has provided no information about potential liabilities for injuries of these third parties on a job site. Especially if these incidents occur due to their own negligence or lack of awareness. It should not be an employer's responsibility to train a third party in necessary, standard safety protocols simply to participate in an inspection. This scenario also underscores the illogicality of including such an individual in the inspective process.

## **Conclusion**

This proposed OSHA rule appears to be an overtly political attempt at policymaking by an agency charged with objective implementation of safety principles. It seems intended to further the priorities of individuals and organizations with no legitimate relationship to safety inspections. The



proposal also provides no credible justification for overturning current and longstanding interpretation of the “walkaround” process, while lacking clarity in key aspects.

ARTBA members remain committed to ensuring the safety of their employees on transportation construction jobsites. Unfortunately, the OSHA proposal will not further this critical objective. For the many reasons described, the agency should rescind this proposal.

If you have any questions or require additional information, please contact Brad Sant, senior vice president for safety and education, by email at [bsant@artba.org](mailto:bsant@artba.org) or Prianka Sharma, vice president and counsel for regulatory affairs, by email at [psharma@artba.org](mailto:psharma@artba.org). Thank you for considering the views of ARTBA’s members on this important matter.

Sincerely,

/s/

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/s/

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