

CONSTRUCTION INDUSTRY SAFETY COALITION

VIA Electronic Mail – OIRA submission@omb.eop.gov

February 27, 2024

Office of Information and Regulatory Affairs
1800 F. Street, N.W.
Washington, D.C. 20405

RE: Notice of Proposed Rulemaking on Worker Walkaround Representative Designation Process; Docket No. OSHA-2023-0008

To whom it may concern:

Thank you for meeting today with members of the Construction Industry Safety Coalition (CISC or the Coalition) as part of the Executive Order 12866 public stakeholder process. In the comments CISC previously submitted,¹ the Coalition outlined the grave concerns its members have regarding OSHA's proposed Worker Walkaround rule.

As explained further today, the CISC has procedural and substantive concerns with the NPRM. First, the Coalition is concerned the comment period failed to allow meaningful participation from affected stakeholders. Several CISC members requested a 60-day extension of time² due to concerns the original comment period did not allow sufficient time for the regulated community to analyze the proposed rule, assess the potential impact of its changes, and draft comprehensive responses to the proposed rule. While OSHA did grant a brief two-week extension, the Coalition believes the additional time was inadequate given the complexities of the proposed rule. As a result, the CISC is concerned that OSHA has not fully considered the impacts the proposed rule will have on those covered by the regulation.

Regarding the NPRM itself, OSHA's proposed rule is a misguided attempt to clarify who may qualify as an authorized employee representative(s) during an OSHA site inspection. The proposed regulation falls far short of its stated purpose, offering no clarity whatsoever on the relevant issues. Instead, the proposed rule will result in significant and substantial risks to employers, especially on construction sites, which cannot be covered by a one-size-fits-all approach that potentially allows nearly anyone to act as an authorized employee representative.

The proposed rule creates an untenable situation on multi-employer jobsites, prevalent throughout the construction industry. Under OSHA's multi-employer enforcement doctrine, OSHA regularly opens 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 their own third-party representative to participate in the inspection. Not only would this allow persons unrelated to the alleged and relevant controlling, exposing, creating and correcting employers to participate in the inspection, the proposed rule fails to understand that the employer who is subject to an inspection, such as a general contractor, does not always retain authority to grant persons access to a jobsite. In this regard, the NPRM fails to

¹ See <https://www.regulations.gov/comment/OSHA-2023-0008-1955>.

² See <https://www.regulations.gov/comment/OSHA-2023-0008-0015>.

provide protections in the event that an authorized third-party representative is injured or otherwise creates liability issues during the inspection.

More broadly, the CISC questions why OSHA's proposed rule is even necessary. Employee participation, which the NPRM purportedly intends to address, is sufficiently addressed under the current regulatory regime. Furthermore, the proposed rule conflicts with OSHA's longstanding guidance that, historically, has limited participation in an inspection to employees of the employer or, in limited circumstances, to industrial hygienists or safety engineers. OSHA now seeks to not only rescind this well-established guidance but proposes to codify an **unfettered right on the part of employees** to select anyone to participate in the inspection without any cognizable reason to do so. Such a result dilutes and undermines OSHA's sole and only Congressionally mandated purpose, which is to uphold federal standards for workplace health and safety.

The proposed rule also conflicts with the NLRA. On unionized worksites, the NPRM unequivocally permits a worker or union representative to accompany an OSHA inspector during an inspection process, regardless of whether the individual has been lawfully recognized as an authorized employee representative pursuant to the process defined in the NLRA and the precedent set by the Supreme Court of the United States. This is legally unsustainable. Moreover, on nonunionized worksites, the NPRM potentially violates the wishes of workers pursuant to Section 7 of the NLRA in that it could allow union organizers, whom employees may **not** wish to represent them, unfettered access to employer property, thereby bypassing the NLRA.

Furthermore, the proposed rule has created such confusion over its implementation that it has become unconstitutionally vague. The NPRM does not provide clear criteria as to the identity or qualifications required of a third-party employee designated representative. The decision whether a third-party qualifies as an employee representative is vested solely in the CSHO, without any guidance regarding how the CSHO should verify or assess the individual's purported qualifications. Employers have no say in this decision and no mechanism to object to the selected individual. Likewise, the NPRM offers no clarity on what authority or access third parties allowed to participate in an inspection will have. The NPRM fails to specify what types of information a third party may access during the inspection, what input a third party may provide during an inspection, or the limits of a third party's ability to participate in or influence settlement discussions. Absent specific guidelines as to how the designated representative will be qualified and parameters limiting the authority of a third party, 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.

Again, we appreciate the opportunity to meet with you. For the reasons discussed above and those articulated in more detail in the CISC comments, the CISC strongly recommends that OSHA withdraw the NPRM.

Sincerely,

The Construction Industry Safety Coalition