



**Henderson Brothers**

# OSHA Announces Final Rule Effective May 31, 2024

## THIRD PARTY EMPLOYEE WALKAROUND REPRESENTATIVES

It's essential to understand your rights in the event of an OSHA visit to your worksite and to have a plan in place before you're tasked with permitting a non-employee to accompany an inspector.

OSHA revealed its conclusive regulation on March 29, 2024, outlining the rights of employees to designate a third-party representative to accompany OSHA Inspectors during workplace compliance investigations.

### Ruling Summary

The Occupational Safety and Health Act grants both employers and employees the authority to designate a representative to accompany OSHA officials during workplace inspections. The recently finalized rule affirms that, in accordance with the law, employees have the option to designate either a fellow employee or a third-party non-employee as their representative.

These third-party representatives may participate in inspections OSHA officials if the official deems their involvement beneficial to the inspection process. OSHA, however, maintains that there must be valid reasons demonstrating that the third-party representative is essential to facilitating a thorough and effective inspection of the workplace. Furthermore, the final rule states that third-party participation may be considered based on the OSHA official's perception of the representative's relevant expertise, experience, or language proficiency concerning alleged workplace hazards or conditions.

### What Employers Should Know

#### Review Your Protocols for OSHA Inspection Arrivals

Develop a Strategy for OSHA Arrival and Inspection:

- Formulate a plan for OSHA's arrival at your workplace. For instance, assign a supervisory employee as the designated contact person upon OSHA's arrival, and ensure that the OSHA inspector adheres to the scope of the inspection.
- Designate a manager or coordinator to accompany each OSHA compliance officer throughout the inspection, except during interviews with non-supervisory employees who do not request a manager's presence. Consider whether to utilize the safety manager for this role.
- Ensure readiness to capture side-by-side photos, conduct sampling, and perform tests upon OSHA's request.

#### Understand Strategies for Navigating an OSHA Inspection

- Provide federal OSHA with only essential documents such as OSHA 300 logs, 300A summaries, 301 forms, and relevant safety data sheets (SDS) on the initial day of inspection.
- Direct the OSHA inspector directly to and from the location of the referral, complaint, or relevant area specified in an emphasis program inspection.
- Ensure that employees abstain from engaging in any high-risk activities while OSHA is present.

#### Create or Reinforce a Safety Committee

- If your workplace currently lacks a safety committee, it's advisable to initiate one as soon as possible.
- This committee could potentially fulfill the role of a "representative" during walkaround inspections, and employees may opt to designate a safety committee member as their representative.
- Be mindful of the National Labor Relations Act and potential concerns regarding unfair labor practices when establishing safety committees.



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*Third-party participation may be considered based on the OSHA official's perception of the employee representative's relevant experience.*

### **Safeguard Your Confidential Information**

- It is crucial to prioritize ensuring that site management is aware of which areas of the worksite contain trade secrets or other confidential commercial information that should not be accessible to third parties.
- In such areas, it is imperative to enforce restrictions against third-party access, and any photos taken by OSHA should be clearly marked as "trade secret."

### **Determine Whether the Consequences of Refusal Justify Restricting Access to Third-Party Representatives at Your Workplace**

- You may opt to decline requests for third-party accompaniment during OSHA inspections. One approach is to inform the OSHA compliance officer that while they may proceed with their inspection, you have chosen to prohibit entry to any third party.
- Under the Fourth Amendment, you possess the right to refuse a walkaround inspection on any grounds and require OSHA to obtain a warrant for their inspection.
- It is advisable to seek legal advice to determine if refusing entry is the appropriate course of action for your situation.



John Aliveto, CSP, ARM  
Risk Control Specialist  
Henderson Brothers

412-754-3227  
[jbaliveto@hb1893.com](mailto:jbaliveto@hb1893.com)

**Please contact Henderson Brothers for more information.**