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November 13, 2023

Douglas Parker

Assistant Secretary for Occupational Safety and Health

U.S. Department of Labor

200 Constitution Ave., N.W.

Washington, DC 20210

Re: OSHA's Proposed Rule on Worker Walkaround Representative Designation Process (Docket ID: OSHA-2023-0008)

Dear Mr. Parker:

The AFL-CIO, a federation of 60 national unions, representing 12.5 million working people in the United States, welcomes the opportunity to comment on OSHA's proposed rule on the Worker Walkaround Representative Designation Process. The AFL-CIO has long supported worker participation at every stage of addressing hazards in the workplace and welcomes the Occupational Safety and Health Administration (OSHA) clarifying the process for designating worker representatives during OSHA enforcement investigations.

Our comments strongly support OSHA moving quickly to finalize this important rule; we also provide recommendations for the agency to strengthen the regulation and examples from previous OSHA investigations that support these recommendations and give OSHA insight to the impact of such a rule.

I. Background of the Proposed Rule

OSHA conducts walkaround inspections of workplaces to ensure workers are not exposed to dangerous working conditions. During these inspections,

OSHA permits employees to have representatives present “in order to aid in the inspection and provide an appropriate degree of involvement of employees themselves in the physical inspection of their own places of employment.” S. Rep. No. 91-1282 91st Cong., 2nd Sess. 11 (1970), reprinted in Legislative History of the Occupational Safety and Health Act of 1970 at 151 (Comm. Print 1971) (hereinafter Legislative History).

But, in recent years, OSHA’s authority to permit an employee to select a nonemployee as the worker’s representative during the inspection has been the subject of litigation. The current rule governing employee choice of representative states that:

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 [hereinafter “CSHO”] during the inspection.

29 C.F.R. § 1903.8(c).

Thus, while the 1971 regulation provides that the employee representative “shall be an employee(s) of the employer,” that restriction is subject to an exception if the CSHO determines the third party is “reasonably necessary to the conduct of an effective and thorough physical inspection.”

In a 2013 letter of interpretation, OSHA stated that an employee could authorize a non-employee affiliated with their union as a walk-around representative. *See* Docket ID OSHA–2023–0008–0003. This guidance was challenged by the National Federation of Independent Business (NFIB) as inconsistent with the existing OSHA regulation and the OSH Act in *Nat’l Fed’n of Indep. Bus. v. Dougherty*, No. 3:16–CV–2568–D, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017) (hereinafter *NFIB*). While the court agreed with NFIB that the letter was inconsistent with 29 C.F.R. § 1903.8(c), the court found that the guidance was not inconsistent with the OSH Act and so it did not exceed OSHA’s rulemaking authority. *Id.* at *11-*12. Thus, OSHA could not implement the policy outlined in the letter as informal guidance, but OSHA had the authority to do so through formal notice and comment rulemaking.

We commend OSHA for initiating that rulemaking.

II. OSHA Should Strengthen the Language of the Rule

While OSHA has commendably initiated the rulemaking proceeding the NFIB concluded was necessary, the language of the proposed rule is not adequate to protect employees’ right to choose a representative during the walkaround inspection in several respects.

A. The language of the OSH Act and its legislative history makes clear that the employee representative does not have to be an employee of the employer.

The relevant section of the OSH Act provides:

Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection.

29 USC § 657(e).

The language of the Act contains no requirement that the employer's *or* the employees' representative be an employee of the same employer. Rather, the OSH Act gives employers *and* employees the same right to choose a representative to attend a walkaround inspection.

Further, the language of the Act strongly suggests that the representative may be a non-employee. The Act states that "a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary . . ." 29 U.S.C. § 657(e). If this language was meant to imply that the representative must be an employee of the same employer or must be an employee of the employer absent some specific findings, surely Congress would have expressly stated that the representative must be a fellow employee or a co-worker. By making no mention of the representatives' employee status, the Act makes clear that employees are free to choose representatives without regard to their employee status.

Indisputably, the plain language of the Act places no greater restriction on who employees may choose as their representative than it does on who the employer may choose. The existing regulation and the new, proposed rule, on the other hand, only place restrictions on *employees'* choice of representative, creating unequal access to the right granted both parties by the OSH Act. While employees must either choose a fellow employee or a representative that is "reasonably necessary" to the inspection, employers may choose third party representatives without showing that they are reasonably necessary.

An Act created "to protect working people from occupational safety and health hazards," NPRM at 59828, certainly does not place a higher burden upon them in choosing a representative than it does on their employers. Given the important purposes a representative may serve in advocating for employees cited in the NPRM, giving a CSHO

discretion to exclude an employee's third-party representative as not "reasonably necessary" is contrary to the plain terms of the Act.

The courts have agreed that the OSH Act does not require that the employee representative be an employee of the employer. The court in *Matter of Establishment Inspection of Caterpillar Inc.* noted that "the plain language of § 8(e) permits private parties to accompany OSHA inspectors." 55 F.3d 334, 338 (7th Cir. 1995); *see also NFIB* at *12 ("[T]he Act merely provides that the employee's representative must be authorized by the employee, not that the representative must be an employee of the employer.") The only restriction placed on the right to select a walkaround representative is that this right is "[s]ubject to regulations issued by the Secretary." 29 USC § 657(e). But the Secretary does not have authority to impose limitations on employees' rights that are inconsistent with the Act.

This construction of the OSH Act is strongly supported by judicial construction of the almost identical provision of the Federal Mine Health and Safety Act of 1977, 30 U.S.C. § 813(f), to allow for unrestricted employee choice of walkaround representatives. *See Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1262 (D.C. Cir. 1994); *Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447 (10th Cir. 1990). The Mine Act provides:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. . . .

30 U.S.C. 813(f).

Similar to the Mine Act, the virtually identical language in the OSH Act "does not expressly bar non-employees from serving as . . . representatives." *Kerr-McGee*, 40 F.3d at 1262. As the court in *Kerr-McGee* stated, "[o]bviously, if Congress had intended to restrict the meaning of 'miners' representatives' in the 1977 Act, it could have done so in the statute or at least mentioned its views in the legislative history." 40 F.3d at 1263. Based on the lack of restrictive language in the Mine Act, the Tenth Circuit found that it "confers upon the miners the right to authorize a representative for walkaround purposes *without any limitation* on the employment status of the representative." *Utah Power & Light*, 897 F.2d at 450.

The legislative history of the OSH Act also supports the proposition that Congress intended to allow employees to choose representatives who are not employees of the same employer. During debates over the bill which became the Act, members of Congress discussed whether to give employees the right to choose their representative during inspections. *NPRM* at

59828 (citing Comments of Congressperson William J. Scherle of Iowa, Legislative History at 1224; Comments of Congressperson Michel of Illinois, *id.* at 1057). Members of Congress expressed concern that allowing employee representatives on walk arounds would place an undue burden on employers and cause tension in labor relations. Legislative History at 1050 (comments of Representative Michel); Proposed Amendment No. 1056 and explanation, reprinted in Legislative History at 370-72. These concerns led to proposed amendments, including one that would have only allowed an employee representative to accompany an inspection if the employer brought a representative. Steiger-Sikes Proposed Amendment, H.R. 19200, 21st Cong., 2d. Sess. (1970), reprinted in Legislative History at 782-83; *see also* Proposed Amendment No. 1056, reprinted in Legislative History at 370-72.

But, as the NPRM explained, those concerns (and the related proposed amendments) were “rejected, and Section 8(e) of the OSH Act reflects Congress’ considered judgment of the best way to strike the balance between employers’ concerns about workplace disruptions and the critical importance of employee representation in the inspection process.” NPRM at 59829. One member of Congress stated:

This section [of the final bill] reflects a fair and practical resolution of the conflicting viewpoint of employers who fear that an unlimited right of employees to accompany inspectors could lead to disruption of production operations and, the viewpoint of employees who urgently believe they need their representatives to participate and assist in the inspection which is so important to their continued protection on their job.

I think this is an important point. Certainly no one knows better than the working man what the conditions are, where the failures are, where the hazards are, and particularly where there are safety hazards. The opportunity to have the working man himself and a representative of other working men accompanying inspectors is manifestly wise and fair, and in arriving at the objectives of this legislation I think it is one of the key provisions of the bill presented to the Senate by the committee.

Comments of Senator Williams, reprinted in Legislative History at 430.

Thus, Congress determined that employer concerns and employee rights were properly balanced by allowing for employee representatives to aid in inspections without restricting whom employees may choose. The OSHA regulation should reflect this by allowing employees to determine who will best represent them during an inspection.

Workers are uniquely empowered by the ability to choose their own representative. The simple act of workers collectively determining the individuals that best represents their interests helps to level the playing field with their employer in addressing dangerous working conditions,

providing workers the opportunity to meaningfully participate in the investigation in the same way employers can. Additionally, CSHO's upholding the workers' right to choose their representative without hesitation at the beginning of the inspection process fosters trust between the workers and the CSHO.

The final regulation must defer to the workers' selection of a representative. It is inarguable that worker participation improves OSHA investigations by increasing the CSHO's knowledge of the workplace and hazards. Worker participation is enhanced by the presence of a worker advocate through increasing trust, increasing knowledge and expertise, providing language justice, protecting workers from retaliation, and empowering workers in the investigation process to create a safer workplace. Workers' belief that their chosen representative will support them is sufficient reason to find that the representative will aid the investigation. This belief can be presumed as the workers have chosen the person or persons as representation. In essence, there is no distinction between deferring to workers' choice of representatives and finding that the workers' choice is reasonably necessary to aid the OSHA investigation.

Clarifying the regulation by removing the words "reasonably necessary" will ensure that the full benefits of the workers' choice is not limited by misinterpretation or CSHO variability, aligning with the purpose and language of the OSH Act. CSHOs should not be tasked with evaluating whether a workers' representative is reasonably necessary or aids the inspection. Not only is it a task that is inappropriate under the OSH Act, it is an impossible task.

In fact, there is precedent in OSHA's own regulations for honoring workers' selection of a representative. The regulations specific to federal agencies state without qualification that a representative chosen by the workers can participate in the workplace inspection. There are no requirements for the representative to be anything other than selected by the employees and the representative can only be denied participation if they interfere with a fair and orderly inspection or if they are not authorized to have access to facilities classified in the interest of national security. Additionally, the regulation explicitly states that the workers' representatives may be different individuals during different phases of the inspection.

Safety and health inspectors shall be in charge of inspections and may interview any employee in private if the inspector deems it necessary. A representative of the official in charge of a workplace and a representative of employees shall be given an opportunity to accompany Safety and Health Inspectors during the physical inspection of any workplace, both to aid the inspection and to provide such representatives with more detailed knowledge of any existing or potential unsafe or unhealthful working conditions. The representative of employees shall be selected by the employees. Additional representatives of the official in charge and additional representatives of employees may accompany the Safety and Health Inspectors if it is determined by the inspector that such

additional representatives will further aid the inspection. Different representatives of the employer and employees may be allowed to accompany the Inspector during each different phase of an inspection.

Safety and health inspectors shall be authorized to deny the right of accompaniment under this section to any person whose participation interferes with a fair and orderly inspection.

With regard to facilities classified in the interest of national security, only persons authorized to have access to such facilities shall be allowed to accompany a Safety and Health Inspector in such areas.

29 C.F.R. § 1960.27(a)-(c).

The rule under consideration should similarly not restrict employees' choice of representative to employees of the same employer, even subject to exceptions. The AFL-CIO strongly supports OSHA's deference to the employees' selection of representative to aid the inspection when the representative is a third party. Both employees and employers should be explicitly granted the equal and independent authority to select their own representative, whether an employee of the employer or a third party. The final rule should simply provide, "The representative(s) authorized by employers and employees, respectively, may be an employee of the employer or a third party."

B. The Act does not authorize OSHA to second-guess the employees' judgment that their selected representative will "aid" the inspection.

The text of the Act also does not suggest that OSHA must make any finding concerning the necessity of the employees' chosen representative to the inspection process. The phrase "for the purpose of aiding such inspection" most reasonably relates to the employees' and employer's purposes for selecting a particular representative and provides no authority for OSHA to second-guess the selection. The selection of the employees' representative is properly within the discretion of employees, based on their belief that the representative will aid in the inspection. Because Congress did not state that OSHA should make a finding concerning the need for the selected representative, it is clear that the employees' belief that the selected representative will aid the inspection is sufficient and should govern.¹

¹ We note here that one Congressman made the following comment with regard what is now the relevant language in the OSH Act:

Additionally, because the proposed rule gives significant discretion to CSHOs, there may be inconsistency in the approval of third-party representatives. *See, e.g., NPRM* at 59830 (“The CSHO *may* determine such third-party representatives are reasonably necessary to the conduct of an effective and thorough physical workplace inspection.”) (Emphasis added). This could be especially problematic in cases where employees are hesitant to advocate for themselves for fear of reprisal or simply not practiced at advocating for themselves and thus may be unable to explain why their chosen representative is reasonably necessary.

If employees select a representative, it can reasonably be presumed that the employees believe the representative will aid in the investigation. If the final regulation is not our preferred regulatory language provided in Section A, the rule language should be amended to read, “When the representative(s) authorized by employees is not an employee of the employer, the Compliance Safety and Health Officer shall presume that the employees reasonably believe that the representative’s participation is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace.”

C. The restrictive term “reasonably necessary” is unduly narrow.

The OSH Act does not require that employer or employee representatives be necessary to the inspection or even reasonably necessary. Rather, the Act requires only that they “aid” the inspection. Being necessary to or even reasonably necessary to the inspection is a higher standard than merely aiding the inspection. OSHA should not impose a higher standard on employees’ choice of representative than is imposed by the Act or than is imposed on employers. The prior subsection of the regulations, 29 C.F.R. § 1903.8(a), uses the statutory language to describe the requirement for employer and employee representatives and subsection 1903.8(c) should also. This further supports our preferred language in Section A or the alternative in Section B.

Subsection 8(e) requires the Secretary, in inspecting a facility, to make use of the knowledge of employees or their representatives by allowing them to accompany him and/or consult with him throughout the inspection. This provision, as well as a similar provision in the House bill, is intended as a specific aid to the Secretary and should be utilized by him for that purpose.”

Statements of Rep. Steiger, Legislative History at 1218-19. Although Representative Steiger urged the Secretary to make use of the employees’ representative to aid in the inspection, he in no way suggested that a finding that the representative would do so should be a prerequisite to permitting such a representative to accompany employees

D. The examples of when a third-party representative is reasonably necessary should be broadened.

The proposed rule gives three examples of when third-parties would be “reasonably necessary” to the inspection. The list is too limited. The language should be amended to both make explicit that the list is non-exhaustive and to broaden the set of examples. The examples should not be used to exclude representatives and must only be provided as informational examples. If included, the language in the proposed rule’s parenthetical should be amended to read, “(e.g., because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills or because the employees may be more comfortable and forthcoming with the Compliance Safety and Health Officer if the representative is present or for other reasons).”

E. Workers’ designated representatives must have a right to be present throughout the entire OSHA investigation.

Worker participation is essential throughout the OSHA investigation process, not only during the walkaround inspection. Therefore, it is essential that workers have the right to select representatives and have those representatives present throughout the entire process, including follow up.

The chosen representative may not be the same person for each stage of the investigation. For example, workers may choose their local health and safety representative to walk around with the CSHO to help identify hazards and improve the CSHO’s understanding of the tasks performed during their work shift. For interviews, workers may choose the representative they most trust to share sensitive information they fear could result in retaliation. During the opening and closing conference and follow up stages, the workers may choose to have a national union representative or other worker advocate to help guide them through the OSHA investigation and appeal process. This is not uncommon in previous cases. Worker representatives should be included to the fullest extent possible in each stage of the full investigation and workers must have the right to choose the person whom they feel best represents them at each stage.

Additionally, the workers’ representative may need to be more than one individual to adequately represent the workers. For example, the CSHO may need to interview workers from multiple shifts or areas of the workplace and the population of workers may differ between shifts or occupations. These differences may result in the need to have different representatives. It can be reasonably foreseen that some workers may choose a representative that provides translation and cultural competency that other workers do not require and that other workers may choose a different representative. For example, workers on the night shift have been shown to have different workplace exposures than daytime workers and are often people of color even when

day shift workers are not. It is important for CSHOs to understand that all workers may not have the same backgrounds and comfort with the same representative and the CSHO should defer to the workers' choices to ensure inclusivity, prevent discrimination, and adequately understand all workers' safety and health concerns.

This practice must be maintained throughout the entire investigation process, and the CSHO should be understanding that it is not always practical for the workers' chosen representative to be present at the beginning of each step of the process. Advanced, reasonable notice of an inspection is rarely given and that frequently leads to a delay in the designated representative appearing for the opening conference, inspection or closing conference, even if the representative has been pre-selected by workers.

F. Existing rules adequately protect legitimate employer interests.

Even without placing restrictions on the employees' choice of representative, the OSH Act and existing regulations create sufficient safeguards for employers who are concerned about the conduct of employees' third-party walkaround representatives. As the court pointed out in *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F. 3d 334, 339-40 (7th Cir. 1995), the employer can force OSHA to seek a warrant and challenge that warrant in court or ask the court to impose restrictions in the warrant. And CSHOs can require a party or a party's representative to leave an inspection if they are impeding the investigation and can take steps necessary to protect trade secrets. 29 C.F.R. §§ 1903.8(d) and 1903.9. The Fourth Amendment finally requires that the terms of the inspection be reasonable overall. See *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). As the NPRM points out, "[E]mployers also maintain the right to request that areas of the facility containing trade secrets be off-limits to the representatives authorized by employee(s) who do not work in that particular part of the facility." *Id.* at 59830-31. These existing provisions are adequate to "counter [an employer's] fears of abuses by employee representatives" and to "protect both employee and employer interests." *Caterpillar*, 55 F.3d at 340. Additional restrictions on employees' choice of a third party representative are not necessary in order to fully protect employer interests.

G. OSHA has the authority to adopt such a rule.

OSHA has both general rulemaking authority and the specific authority to adopt a rule amended as we propose. OSHA has the authority to adopt rules governing walkaround inspections and employer and employee representation during walkaround inspections. 29 U.S.C. §§ 657(e) and (g); *see also* NPRM at 59828. Indeed, Congress expected OSHA to adopt rules governing the selection of employee representatives. *See* H. Rep. No. 91-1291 (1970) at 22. ("Although questions may arise as to who would be considered a duly authorized representative

of employees, the Committee expects the Secretary of Labor to determine this question by promulgating regulations to act as guidelines for an inspector.”)

Given its broad rulemaking authority and specific authority in this area, OSHA can issue a final rule modified as we suggest above consistent with the OSH Act.

III. Worker participation in OSHA investigations through designation of representatives has not occurred as intended under the law.

The AFL-CIO strongly supports OSHA’s effort to clarify the rule implementing employees’ right select a representative of their choice, regardless of whether the representative is an employee of the employer, to accompany the CSHO during an inspection. Clarification is necessary to avoid frustration of that right as has occurred in the past.

Of course, employers control workers’ wages, hours and working conditions. Retaliation for voicing safety and health concerns is illegal under the OSH Act, yet the burden to file a complaint and provide proof is on the worker. This imbalance of power often influences workers’ decisions to report, discuss or otherwise share safety concerns, past practices and other vital information during an OSHA investigation.

In past OSHA investigations, employers have prevented workers from being accompanied by their chosen walkaround representative. This has occurred in non-union workplaces when the employer took the position that the chosen representative was not allowed in the workplace, and the workers did not feel that they could assert their rights. This has occurred even when the chosen representative understood the employees’ right to select a representative to participate in the walkaround inspection, but chose not to participate in order not to cause further intimidation of or retaliation against the workers when the representative nor the CSHO would not be present to provide anti-retaliation support. This has also occurred in union workplaces, where the CSHO has deferred to the employer’s refusal to allow the workers’ chosen walkaround representative to participate. When this occurs, it reinforces the imbalance of power between the employer and the workers, and makes workers less likely to feel comfortable speaking frankly to the CSHO.

Many times, the designated representatives allow the investigation to move forward without them in order to prevent delays in the CSHO’s access to the workplace, so that an employer does not have time to alter the worksite to eliminate hazards before the walkaround

inspection. Too often, workers have to choose between the benefits of representation and an immediate inspection that will reveal actual working conditions.²

Employers have provided many reasons for interfering with the designation of a worker representative to participate in OSHA investigations. Employers have attempted to discourage involvement of worker representatives by stating that the representative is not covered by the employer's insurance policy or that there are trade secrets that will be exposed during the inspection (and thus they need time to draft and have executed confidentiality agreements). Employers have also claimed, particularly during fatality investigations, that all parts of the investigation are covered by attorney/client privilege due to legal action that has or may be initiated by the family of a deceased worker. A clearer rule implementing workers' right to select a representative will discourage employers from advancing these specious claims. Additionally, training and implementation of the final regulation should provide information and procedures to CSHOs to navigate these claims and encourage communication with workers and their representatives.

Workers who do not speak English at all or as their primary language are less likely to know their rights, and therefore are less likely to voice safety and health concerns or speak openly to CSHOs. There have been times when a CSHO has arrived at a workplace and has been unable to speak to the workers due to language barriers. In some instances, when an agency translator was not available, CSHOs have relied on bilingual managers to translate for workers and relay the information needed in the inspection. At a minimum, this leads to a bias in the information the manager relays to OSHA and prevents workers from openly sharing information with the CSHO. But managers serving as translators can also intimidate workers and lead to retaliation against workers for their statements or willingness to cooperate in the investigation. Again, a clearer rule implementing workers' right to select a representative will prevent these practices.

IV. Worker participation in OSHA inspections through a designated representative makes workplaces safer.

The benefits for workplace safety of having workers' chosen representatives involved in the inspection are clear. A worker representative can provide expertise, experience, language justice, empowerment, protection, and general trust.

² Additionally, workers report that they have participated in OSHA investigations where the employer hand-picked the workers for the CSHO to speak to. This is not always done with the knowledge of the CSHO, but has resulted in a biased view of the working conditions.

A. Designated representatives are individuals that workers trust to help them participate in an OSHA investigation.

As OSHA has explained, workers may be reluctant to speak directly or candidly with government officials due to fear of their employer's reaction. NPRM at 59830. Many employers discourage workers from engaging with OSHA and exercising their right to participate in an OSHA inspection. Many workers have shared that their employer told them that the government was there to get them in trouble, could fine them personally, and that this could result in their losing their job. These employer tactics result in the spreading of fear among workers to speak to government officials, especially among workers who are unaware of their right to raise concerns with a CSHO without retaliation. This dynamic, while true for all workers, is especially true for immigrant workers, refugees and other vulnerable workers. Some immigrant workers are not only afraid to speak to government officials for fear of retaliation or loss of a job, but for fear of losing their ability to stay and work in the United States.

The fear of retaliation for participating in an OSHA investigation remains even when workers have the protection of union representation. Additional assurances by a trusted individual are necessary to encourage workers to openly communicate throughout an investigation. Informed workers understand that they must bear the burden of proof in a whistleblower case and that carrying that burden is particularly challenging when the employer commits small, difficult to document, types of retaliation.

Workers trust the representatives that they choose to accompany them during an inspection. This trust makes a large difference with respect to workers' willingness to speak openly to a CSHO about their safety and health concerns and employers' past practices that can be determinative to the outcome of an investigation. Despite the CSHO's expertise in the OSHA investigation process, CSHOs can only inform workers of their rights, which may not be sufficient for workers to exercise those rights and address the barriers to participation where fear of retaliation is a significant concern. Additionally, worker representatives can privately identify when workers feel intimidated from speaking up by the employer and relay information to the CSHO without fear of reprisal themselves. Below are examples of the value added to the investigation process by the presence of a trusted worker representative.

- At the beginning of an OSHA investigation, several managers and their legal representation outnumbered local union representatives who were employed by the employer. The intimidating scenario made local union representatives reluctant to speak up and counter claims made by management that attributed a workplace fatality solely to the worker's failure to follow a workplace policy. The local union representatives were not aware that they could privately speak to the CSHO and management attempted to prevent them from discovering they had that right. The national union representative's arrival at the OSHA investigation provided the local representatives the confidence to speak to the CSHO about the pattern of not controlling the hazard that resulted in the fatal injury.

- A CSHO was interviewing a worker with the workers' chosen representative present, a safety and health specialist from the national union. The worker appeared hesitant to speak and responded to initial questions with brief answers. The workers' representative stepped in with reassurance, reassuring the worker that it was safe to talk to the CSHO and to share important information. The representative explained that this was the opportunity for the worker to talk freely, and that, if any retaliation occurred, the union would ensure that a whistleblower complaint and grievance was filed. Empowered by support from the trusted representative, the worker spoke openly to the CSHO about the employer's past practices and the inadequacy of training, resulting in serious citations.
- During an investigation at a non-union workplace, the members of a largely immigrant workforce were extremely fearful of speaking to the CSHO. However, the workers had been guided by a representative in the community on how to file an OSHA complaint and that they had a right to choose an individual to represent them during the investigation. The workers chose a faith leader who many knew personally and who could translate for them. The workers were more willing to speak with the CSHO in a private setting with their trusted designated representative and share their concerns.
- The fear of retaliation for participating in an OSHA investigation remains prevalent even when workers have both union protections and a designated representative for the investigation. Additional assurances by a trusted individual are necessary to encourage workers to openly communicate throughout an investigation. Informed workers understand that they must bear the burden of proof for a whistleblower case and it is particularly challenging when the employer commits small, difficult to document, types of retaliation.

B. Designated representatives are individuals with specific, relevant safety and health experience

Workers may choose to designate a representative who has specific, relevant safety and health expertise. The expertise may be specific to a particular workplace, employer, hazard or industry. While CSHOs are generally the foremost safety and health inspection experts, they cannot possibly have specific knowledge about every hazard, task, occupation, employer or industry relevant to every investigation. Worker representatives can supply that expertise and can also keep track of patterns of hazards within and across industries, providing context to individual OSHA investigations and informing interventions.

Below are examples that illustrate how designated worker representatives have brought specific forms of expertise to inspections and thereby enhanced investigations.

- During a fatality investigation at an electrical utility workplace, the CSHO had primary expertise in utilities other than electrical utilities. The designated workers' representative from the national union, with specialized knowledge of electrical utilities, played a crucial role in collaborating with the CSHO. The representative quickly identified the relevant codes and standards specific to electrical work, including standards not originally adopted by OSHA, and provided context on the specific tasks. The CSHO was able to conduct a more thorough investigation more efficiently thanks to the industry-specific knowledge provided by the workers' representative.
- The local safety and health representative used their specific knowledge of the workplace to inform the CSHO of inconsistencies in the working environment that they were observing and the working conditions that existed when there was not an active inspection, including the proper use of machine guarding not normally in place. Their insights into the daily work allowed them to identify hazards the managers were trying to conceal. They were also able to explain how production had been intentionally decreased to portray a false impression of a safer working environment for the CSHO.
- In a non-union workplace investigation, workers chose a representative for their safety and health expertise gained as a union safety and health representative. Unfortunately, the representative was prevented from participating in the walkaround inspection after the employer protested and the representative and CSHO decided not to delay the inspection. Regardless, the representative was able to utilize their industry-specific knowledge to share the measures that have been successfully implemented in similar workplaces to control the hazards identified by the CSHO. This collaborative effort helped the CSHO acquire necessary evidence that the hazards were recognizable and there were feasible and useful control measures available.
- The state level union representative was designated by the workers during the investigation, and had familiarity with the employer's past practices and areas where improper recordkeeping and documentation had occurred. They were able to share this information with the CSHO to help identify patterns of behavior by the employer leading to serious recordkeeping citations.
- The workers' chosen representative had specific knowledge of the workforce, enabling them to identify specific workers who would be valuable for the CSHO to interview, including the unidentified worker who filed the complaint. They were also able to arrange confidential interviews in a private space where the workers felt comfortable. As a result, this approach provided access to workers that were not on-site when the CSHO arrived but who had valuable information about the working conditions during other shifts.
- In some cases, the workers' chosen representative has had expertise concerning other federal agency safety and health regulations and how they intersect with OSHA

standards. This has been particularly valuable in industries such as transportation and energy, where there are multiple agencies with jurisdictions over safety and health such as the Department of Transportation, Federal Aviation Administration, Department of Energy, and OSHA.

- Non-union workers at a multi-employer worksite, where a union represented other workers on-site, designated a union agent as their walkaround representative. During the inspection, the workers' chosen representative was able to provide information on the workplace respiratory protection practices, as all the employers operated using similar procedures. This insight helped expose violations of the respiratory protection standard and recordkeeping requirements.
- Before the investigation, workers had been misled about their employer's responsibility under OSHA standards, and thus lacked awareness of what information would be valuable to the CSHO. The workers had been intentionally misinformed that under the respiratory protection standard, a seal check was equivalent to a fit check. The workers' chosen representative was able to quickly identify the issue due to their familiarity with the employer's past practices and the OSHA requirements. The CSHO was then able to request documentation that substantiated a violation.
- Workers collectively selected a national union representative to advocate on their behalf during a fatality investigation. The representative had knowledge and documentation of the employer's past practices that contributed to the fatality. Unfortunately, there had been numerous near-miss incidents and injuries at other work locations. The knowledge and documentation provided by the representative resulted in not only citations, but a robust settlement agreement that required corporate-wide program improvements to change the working environment.³

³ Similarly, the benefits to representation described during OSHA investigations have also been seen during MSHA inspections. After the Upper Big Branch mining disaster, a disaster that occurred at a non-union mine, miners selected representation by the United Mine Workers of America (UMWA) to assist them throughout the inspection process. Due to the involvement of the UMWA during the walkaround inspection and other portions of the investigation, the agency was able to hold the employer accountable for their workplace culture that resulted in 29 fatalities and two injuries by issuing the largest citation in agency history, including 369 citations, 21 flagrant citations, and criminal charges.

C. Designated representatives are individuals familiar with the OSHA investigatory process

Workers may choose a representative who has deep familiarity with the OSHA investigation process. Workers, regardless of union status, even those holding an elected local union office, usually do not encounter OSHA in their workplace and do not know the process followed in an OSHA investigation. Given federal OSHA's current resources, it would take the agency 190 years to inspect every workplace under its jurisdiction once.⁴ Especially during a fatality or catastrophe investigation when workers, including local union officers, are navigating complex emotions, trauma and logistics following the loss of a coworker, friend and/or community member and, often, after witnessing such events, local unions are often not familiar with the investigation process. However, workers' representatives can have experience navigating not only a routine OSHA investigation, but sensitive fatality and catastrophe investigations in collaboration with CSHOs, local workers and other agencies. This representative can help the workers understand the process themselves and facilitate confidence for the workers to fully participate in the investigation.

Additionally, worker representatives help identify diverse group of workers for CSHOs to speak with in order to aid the investigation. This may include contractors, sub-contractors, temporary workers, those not actively working due to an injury (that may be very relevant to the investigation at-hand), and workers who were fired or retaliated against.

Below are stories to illustrate how this knowledge has benefited an inspection.

- Employees and local union officers, having no prior experience with an OSHA inspection, were deeply affected by the loss of their close coworker. They were grappling with shock and grief, which extended to themselves, the grieving family, and their other coworkers. The national union's safety and health representative was designated by the workers and was a seasoned participant in OSHA investigations, including fatality investigations. This experienced representative navigated the workers through every step of the process from opening to closing conference. The CSHO expressed gratitude for the assistance, recognizing the representative's critical role in helping the workers actively participate during the particularly sensitive time.
- The workers' chosen representative, using their familiarity with the OSHA investigation process, proactively identified and collected documentation that would be useful to the CSHO in advance of the inspection. Upon the CSHO's arrival, the information was provided to facilitate a smoother and more efficient inspection process.
- Knowledge of the OSHA process allowed the workers' chosen representative to pre-arrange both a space and a diverse group of workers to speak to the CSHO after the

⁴ AFL-CIO. *Death on the Job: The Toll of Neglect*. 32nd Edition. April 2023. Retrieved from: [AFLCIO.org/reports/death-job-toll-neglect-2023](https://aflcio.org/reports/death-job-toll-neglect-2023).

investigation began. This thoughtful preparation in advance of the inspection helped the CSHO receive a comprehensive perspective of the working conditions, while saving valuable time for the CSHO.

D. Designated representatives provide language justice for all workers to ensure their voices are heard.

Workers may choose a representative that both understands their language *and* has cultural competency and the trust of the workers to help them understand the investigation process and translate their safety and health experiences for the CSHO. Our comments above discussed the hesitancy immigrant workers have to speak to government officials and explained the harm, even unintentional, that occurs when members of management are used as translators during investigations. The designated translator may not have specific safety and health expertise or experience participating in an OSHA investigation -- they may be a faith leader, community leader, or worker advocate—but nevertheless they provide a unique expertise of cultural competency. Cultural competency goes beyond linguistic accuracy and ensures messages are delivered effectively through the navigation of idiomatic expressions, cultural references, and sensitive topics. This prevents misunderstandings and miscommunications, and is thus vital to ensuring the OSHA investigation is comprehensive and unbiased. Additionally, it fosters an inclusive approach to fact finding and encourages workers from diverse background to fully participate in OSHA investigations and identify trends. Even as compared to highly qualified government translators, a worker’s chosen translator has the advantages of trust and cultural competence.

Conclusion: OSHA must expeditiously issue and implement this final rule

Our comments have provided substantial evidence that the ability for workers’ chosen representatives to participate in OSHA investigations significantly benefits the safety and health of workers at a workplace under investigation as is the intention of the OSH Act.

This regulatory clarification must and can be issued swiftly and there should not be a delay in implementation of the final rule. State OSHA plans must also adopt this important federal OSHA rule without delay and within the timeframe they are required to under the law.

Additionally, federal and state OSHA programs must plan ahead to train CSHOs on the implementation of a final rule, specifically, on the procedures to follow when they face employer resistance to permitting employees’ chosen representative into the workplace so that they can ensure both a timely inspection and worker representation. This will help ensure practical responses in the field and ensure these rights are effectuated.