

WPAC members' comments on proposed OSHA walkaround rule, 88 Fed. Reg. 59825 (8/30/2023)

The undersigned all served as members of the Whistleblower Protection Advisory Committee (WPAC), the federal advisory committee established to advise OSHA regarding whistleblower issues during the Obama Administration. At the request of the Assistant Secretary, we developed Recommended Practices for Anti-Retaliation Programs; these were subsequently issued as guidelines by OSHA and can be found [here](#) on the OSHA website. We had extensive discussions during multiple meetings regarding the various whistleblower programs, with a primary focus on Section 11(c) of the Occupational Safety and Health Act. In addition, during open comment periods during our regular meetings, we heard from workers and others who testified to the frequency of retaliation when workers raise safety concerns.

What we learned as members of WPAC – and this is confirmed by an extensive research literature – is that both retaliation and fear of retaliation are common, and that this will inhibit the willingness of workers to come forward to raise safety concerns. We provide these brief comments to focus only the question of how best to assure workers that they will be free of retaliation so that they will cooperate fully with the Compliance Safety and Health Officers (CSHOs) during inspections.

We believe that it is essential that workers be able to raise safety concerns – and participate in workplace inspections – without fear of retaliation. In order to achieve this, we believe that **Question 1 in the NPRM should be answered in the affirmative:** that is, the CSHO should defer to the employees' selection of their representative without a requirement that the CSHO find the chosen representative reasonably necessary for the conduct of the inspection.

CSHOs conduct workplace inspections when safety complaints are filed with OSHA or when a workplace is otherwise designated for inspection. CSHOs are permitted to talk with the employees, and they can conduct these interviews privately. See OSH Act § 8(a)(2). As noted in OSHA's Field Operations Manual (FOM), "The purpose of such interviews is to obtain whatever information CSHOs deem necessary or useful in carrying out inspections effectively." See FOM, Chap. 3, Inspection Procedures, Interviews of Non-Managerial Employees.

The problem is that many workers are simply not in a position to assess whether they will be protected from retaliation if they talk freely with a CSHO. A representative who is chosen by the employees can assist workers to evaluate the situation, to understand the importance of their statements, and to provide essential translation in the language spoken by the worker. The representative may also be able to follow up with the workers to determine whether any retaliation has occurred after the inspection – and provide necessary assistance in filing a complaint with OSHA if this has occurred.

Given the importance of this role in ensuring effective inspections, we believe that it makes sense to allow the employees to select their representative without any interference by OSHA or the CSHO – just as the employer is entitled to select its representative. This means that the representative need not be an employee – their key characteristic is that they be someone trusted by the employees – and that the representative should not have to meet other criteria in order to be included.

You ask the following question in the Preamble to the proposed rule: "Should OSHA defer to the employees' selection of a representative to aid the inspection when the representative is a third party (i.e., remove the requirement for third-party representatives to be reasonably necessary to the inspection)?" It would be difficult for a CSHO to evaluate the extent to which workers fear retaliation, and therefore might not be forthcoming regarding concerns that they may have about relevant safety and health hazards.

This suggests to us that *any* representative chosen by the employees should be regarded as reasonably necessary for an inspection. We would therefore answer the question in the affirmative: yes, remove the requirement that the CSHO evaluate whether a third-party representative is reasonably necessary for the inspection.

In fact, the statute itself creates no such requirement: it talks only of representatives of the employers and employees: “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.” OSH Act § 8(e). The statute does not distinguish between employees and third parties for the roles of representative of either employer or employee, nor does it create different requirements for employer and employee representatives.

We realize that there may be concerns that are raised regarding the integrity of the inspection process when third parties are included, or about the appropriate protection of employers’ rights. But the existing regulations provide adequate protection of both the process and of employers’ interests. Notably, the current regulations, for which no revision is proposed, firmly puts the CSHO in charge of inspections and questioning of persons 29 C.F.R. §1903.8(a)]; give the CSHO the authority to resolve disputes that may arise [§1903.8(b)]; give the CSHO the right “to deny the right of accompaniment ...to any person whose conduct interferes with a fair and orderly inspection” [§1903.8(e)]; and further explicitly allow the CSHO to protect trade secrets as well as national security [§1903.8(e)].

Given the overall authority of the CSHO, and the need to provide reassurance to employees to encourage their participation in the inspection process, we urge that OSHA adopt a final rule that allows for the broadest possible scope for selection of employee representatives and eliminates the language in the proposed regulation that allows the CSHO to exercise judgment regarding whether “good cause has been shown why their participation is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace.”

Thank you for your attention.

Emily Spieler
Chair, WPAC
Professor of Law & Dean Emeritus
Northeastern University

Jon Brock
Member, WPAC
Jonathan Brock,
Emeritus Associate Professor
Evans School of Public Affairs, University of Washington

Marcia Narine Weldon
Member, WPAC
CEO, Founder, Illuminating Wisdom
Sunny Isles Beach FL

Billie Garde
Member, WPAC
Whistle blower advocate
Clifford & Garde, LLP
Washington DC

Jennifer (JJ) Rosenbaum
Member, WPAC
Executive Director
Global Labor Justice- International Labor Rights Forum

Eric Frumin
Member, WPAC
Safety and Health Director
Strategic Organizing Center

Nancy Lessin
Member, WPAC
United Steelworkers – Tony Mazzocchi Center (retired)