



November 13, 2023

The Honorable Douglas Parker  
Assistant Secretary  
Occupational Safety and Health Administration  
U.S. Department of Labor  
200 Constitution Ave., N.W.  
Washington, DC 20210

By electronic submission: [www.regulations.gov](http://www.regulations.gov)

RE: Worker Walkaround Representative Designation Process Proposed Rule; Docket No. OSHA-2023-0008; 88 Fed. Reg. 59825 (August 30, 2023)

These comments are submitted on behalf of the Coalition for Workplace Safety (“CWS”) and the 74 undersigned organizations (“the Commenters”), pursuant to the Occupational Safety and Health Administration’s Notice of Proposed Rulemaking regarding the Worker Walkaround Representative Designation Process under the OSH Act, 88 Fed. Reg. 59825 (Aug. 30, 2023) (“Proposed Rule”). For the reasons outlined below, the Commenters urge OSHA to withdraw the proposed rule entirely. OSHA should focus on its goal of promoting workplace safety, not labor organizing, and the Proposed Rule is more likely to interfere with OSHA inspections than enhance them.

CWS comprises associations and employers focused on improving workplace safety through cooperation, assistance, transparency, clarity and accountability. CWS includes associations and employers across a range of sizes from very small businesses to larger companies.

### **Comments**

CWS shares OSHA’s goal of maintaining safe and healthful American workplaces, but the Proposed Rule fails to further that aim. By amending its regulations to allow more third-parties to enter an employer’s worksite<sup>1</sup> and accompany Compliance Safety and Health Officers (“CSHOs”) on inspections, OSHA diminishes its credibility as a neutral enforcement agency, discourages employer cooperation in the inspection process and disregards employer property rights. Alarming, the proposed regulation suggests OSHA believes it lacks sufficient competence to conduct thorough inspections on its own.

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<sup>1</sup> The current regulations allow non-employee third parties in narrow, but justifiable, exceptions such as industrial hygienists and safety engineers. See, 29 C.F.R. 1903.8.

Most importantly, the proposed rule would allow third-parties with ulterior motives to take advantage of OSHA’s legitimate enforcement processes to further their unrelated interests, which very likely could be hostile to the employer. The context of this proposed rule explains the trepidations and concerns of employers—it is the successor to a Letter of Interpretation issued by the Obama administration at the request of the United Steelworkers to permit a union representative to be designated an employee representative at a non-union workplace. That LOI was withdrawn by Secretary of Labor Alex Acosta and now OSHA seeks to impose the same approach through this rulemaking. Because of the anticipated scenario where the new regulation is used by a union seeking access to a non-union workplace during an organizing campaign, the proposed rule would place additional burdens on CSHOs to resolve disputes that have nothing to do with occupational safety and health. Accordingly, as the proposed rule does not further the interests of workplace safety, OSHA should abandon it.

**1. The Proposed Rule Exceeds OSHA’s Statutory Authority By Placing an Undue Burden on Employers and Impermissibly Weakening the Requirement that Party Representatives Must Aid in an Inspection.**

Section 8 of the OSH Act grants OSHA the authority to inspect and investigate places of employment “with a minimum burden upon employers.” 29 U.S.C. § 657(d). It further authorizes OSHA to issue regulations allowing a representative “authorized by his employees” to accompany OSHA during the physical inspection of any workplace “for the purpose of aiding such inspection.” 29 U.S.C. § 657(e). Under current regulations, employees may choose a co-worker to represent them during a workplace walkaround or, when reasonably necessary, they may seek representation by a third party with safety expertise. These regulations serve the interests of workplace safety and recognize a reasonable balance between employer privacy and property rights and employee rights to participate with representation in the OSHA process.

The proposed rule lacks the necessary guardrails to protect employer privacy interests and exceeds OSHA’s authority under the Act. It allows for employees to select a third-party representative when “good cause has been shown why their participation is reasonably necessary to the conduct of an effective and thorough inspection of the workplace.” 88 Fed. Reg. 59834. This regulatory language appears to impose several pre-conditions on the authorization of a third-party representative. First, the employees bear the burden to show “good cause” for the inclusion of the third party. Second, the CSHO must determine their participation is “reasonably necessary” to conduct an effective inspection. But the proposed rule is toothless – it contains no mechanisms to enforce the “good cause” or “reasonably necessary” requirements beyond the CSHO’s discretion. As a result, it puts employers at the mercy of the CSHO’s unfettered subjective decision making about the meaning of “good cause” or “reasonable necessity.” It provides employers no recourse – aside from the warrant process – to challenge the CSHOs determinations. Because of that, such limitations on third-party access in the proposed rule are illusory in practice.

The proposed rule further strays from OSHA’s statutory authorization because it broadly defines the types of representatives that purportedly “aid” an inspection. Specifically, the proposed rule suggests that CSHOs should determine that a third party can aid in an inspection if they have “experience with...conditions in the workplace *or similar workplaces*, or language

skills.” *Id.* (emphasis added). This language vastly expands the universe of potential third-party representatives. It suggests a CSHO could welcome a third-party representative for a tour of an employer’s facility merely because that third party has, at some point, worked in or visited a similar workplace. And this assumes the CSHO is willing to inquire about the qualifications of an employee’s choice for a representative. The more likely scenario is that the CSHO is not going to risk the criticism of challenging the qualifications of an employee’s choice for representative. Even if the CSHO makes the inquiry, general knowledge or experience in similar workplaces, of course, does not qualify someone to aid in a safety inspection. Similarly, the proposed rule suggests that OSHA could allow an unrelated, unvetted third party on a walkaround inspection if he or she speaks any foreign language that the CSHO does not know. While translators may well aid in certain OSHA inspections where many employees do not speak English, the breadth of the proposed rule again fails to place any reasonable limits on the criteria that would be used to determine when a translator will actually serve the interest of aiding an inspection.

OSHA’s disregard for the limits placed on its regulatory authority is further revealed in the three questions it poses at the end of its request for comments, which suggest it could abandon or modify both the “good cause” and “reasonably necessary” qualifiers in the proposed rule. These proposals, addressed more directly at the conclusion of CWS’s comment, reveal OSHA’s failure to prioritize utility and workplace safety in the proposed rule. Instead, they suggest an “access at all costs” approach to the OSHA process that may further the Administration’s political interests, but clearly exceeds OSHA’s delegated powers.

The Supreme Court recently reined in OSHA’s power to stray outside of its workplace safety purposes. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109 (2022). In striking down OSHA’s vax-or-test rule for COVID-19, the Court reiterated that OSHA’s standards must be “reasonably necessary or appropriate to provide safe or healthful employment.” *Id.* at 114. The proposed rule similarly exceeds OSHA’s statutory authority because it is not tailored to serve interests of workplace safety.

## **2. The Proposed Rule Conflicts with the National Labor Relations Act, Lacks Necessary Structure to Determine Who Qualifies as an “Authorized Representative” and Fails to Account for the Right of Employees to Reject Representation.**

The proposed rule borrows “authorized representative” language from the National Labor Relations Act without any of the procedural safeguards that exist in the context of union organizing. This presents major problems. First, OSHA’s expansive interpretation of the “authorized representative” in the context of 29 C.F.R. 1908.3 inappropriately departs from the Department of Labor’s definition of the same term in its regulations establishing the Occupational Safety and Health Review Commission. Second, Congress created the National Labor Relations Board to administer the nation’s rules regarding exclusive representation and collective bargaining, not OSHA. OSHA does not have the expertise or authority to meddle in the relationship between employees and any authorized representative they may chose (or reject) for their mutual aid and protection. Third, even if OSHA could usurp the role of the NLRB and regulate third-party employee representatives, the proposed rule lacks any reasoned criteria to determine how employees establish their “authorized representative,” how an employer may test

that authorization and what employees may do if they prefer not to have representation from a third party regarding their working conditions.

First, OSHA's broad view of the term "authorized employee representative" as used in the OSH Act departs from the Department of Labor's own definition of the same term in different parts of its regulations. The statutory basis for OSHA's rulemaking regarding authorized employee representatives on walkarounds comes from 29 U.S.C. § 657(e), captioned "Employers and *authorized employee representatives* to accompany Secretary or his authorized representative on inspection of workplace." (emphasis added) It states:

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. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

"Authorized employee representative" is a term of art with a particular, limited meaning. The Department of Labor defines "authorized employee representative" under 29 C.F.R. 2200.1, which outlines the duties and authority of the Occupational Safety and Health Review Commission. "Authorized employee representative" means "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees who are members of the collective bargaining unit." *Id.* It does not mean any representative selected by a subset of employees or an individual employee for the limited purpose of an OSHA inspection. This definition is consistent with the language of the OSH Act, which clearly contemplates the existence of one "representative authorized by his employees" at a given worksite.

This suggests that Congress envisioned two scenarios for inspections – one for a represented workplace and one for unrepresented workers. Given both the language of the statute and the Department of Labor's own, conflicting definition of "authorized employee representative," OSHA's proposal to expand even further the types of permissible representatives who can attend a walkaround inspection should not pass muster under *Chevron* or similar standards of review. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (deferring to agency interpretations of ambiguous statutes only when reasonable); *Chao v. Occupational Safety & Health Rev. Comm'n*, 540 F.3d 519, 523 (6th Cir. 2008) (discussing application of *Chevron* deference to OSHA regulations).

The overexpansion of an "authorized employee representative" infringes on employee rights to reject collective representation. The NLRA provides employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. But just as

importantly, it provides the equivalent right “to refrain from any or all of such activities.” *Id.* To respect employee rights to choose or reject collective representation, the NLRB created procedures to assess whether a proposed “authorized representative” actually enjoys the support of the relevant employees.

OSHA’s authorized representative procedures contain no such structure. Instead, the current regulations provide CSHOs full discretion to determine whether employees have any authorized representative, and the identity of that representative. 29 C.F.R. § 1903.8(b). Under current rules, this informal determination of a representative presents only limited problems because employees have only two choices for representatives – a fellow employee or an outside party consulted specifically because of their safety expertise, like an industrial hygienist or safety engineer. Given those limited options, it is easy for a CSHO to determine whether and who employees have selected as their authorized representative.

The proposed rule presents much more complicated possibilities. Take, for example, a non-union workforce in the warehousing industry. Two rival unions have organized other employer facilities around the country and both seek to represent the employees at the facility subject to an OSHA inspection. As soon as the CSHO shows up for the inspection, employee supporters of each union contact their preferred representatives to hurry over and serve as authorized representatives for the walkaround. And, to complicate this scenario further, OSHA’s authorization for the inspection is a complaint lodged by a current employee who also has a pending EEOC discrimination charge. The complainant brings his personal attorney to the site and seeks to have the attorney serve as his representative for the walkaround. Who serves as the representative? Would the CSHO wait for all of these potential representatives to arrive before conducting the inspection? Can all three representatives attend the inspection? Can a representative arrive late and join mid-inspection? What happens when the CSHO speaks to employees who claim none of the three representatives are authorized representatives? Or, what if one of the representatives is from an activist group that campaigns for shutting down the business or certain of its distributed products?

The answers to these questions have significant implications for the employer, as opening up their workplace to any such representative poses unique business risks unrelated to OSHA’s enforcement purpose. The lack of any structure or defined guardrails for third-party representative status renders the rule impermissibly imprecise and prejudicial to employer rights under both the NLRA and the OSH Act.

Moreover, the proposed rule creates a real risk that OSHA will substitute its judgment about an authorized representative for the right of employees to reject such representative. Employees seeking union representation often raise their voices loudest. Meanwhile, a silent majority may sit quietly on the sidelines, preferring self-representation, but avoiding conflict with their co-workers. Under the proposed rule, a CSHO is likely to hear from the vocal minority and determine a third-party union representative or community organizer represents the employees, when in fact they enjoy only limited support. Based on that determination, the representative will receive preferred access to the employer’s facility and the ability to advocate for outcomes that most employees may not want. This is precisely the result that the NLRB’s election procedures seek to avoid, but OSHA’s proposed rule allows. OSHA’s transparent

attempt to bolster union organizing through its walkaround proposal simultaneously tramples on employee rights to reject such representation.

### **3. The Proposed Rule Violates Employer Property Rights and Presents Fourth Amendment Issues.**

The proposed rule violates important employer property rights that OSHA must balance with its legitimate enforcement priorities. The OSH Act disclaims any intent to “enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees” with respect to workplace injuries. 29 U.S.C. § 653(b)(4). By its terms, then, the Act would preserve employers’ state law private property rights as a general matter. In general, members of the public have no right to access an employer’s private workplace. The Supreme Court recognized these property rights shortly after the passage of the OSH Act by holding OSHA subject to the Fourth Amendment’s warrant requirements. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314, 98 S. Ct. 1816, 1821, 56 L. Ed. 2d 305 (1978) (finding “[w]ithout a warrant [a CSHO] stands in no better position than a member of the public”). The Supreme Court has also held that the Fourth Amendment does not allow law enforcement to bring along any visitors it chooses on an otherwise lawful search. *Wilson v. Layne*, 526 U.S. 603 (1999) (finding Fourth Amendment prohibited police from bringing news media into private homes while executing search warrants). Thus, OSHA’s proposed rule unquestionably invades an employer’s general, common law right to exclude disinterested parties from their private property.

By inviting a third party to accompany CSHOs on an inspection, OSHA risks inflicting unreasonable searches on employers without any available remedy. The Fourth Amendment’s exclusionary rule protects employers from OSHA if it obtains an improper warrant. *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1071 (11th Cir. 1982). But if OSHA allows improper third party access to private areas of an employer’s property, no exclusionary rule can cure the violation. If a union organizer gets exclusive access to employees through an OSHA inspection and uses that information to further their organizing campaign, or an employee-side attorney discovers facts that can lead to a new lawsuit, courts cannot fix the damage done to the employer through exclusion of evidence in an OSHRC proceeding.

State trespass law also allows employers the right to exclude persons from their private property. The concept of trespass includes an implicit property owner right to expel unwelcome visitors. Of course, property rights give way to legitimate law enforcement purposes, like OSHA’s. Here, though, when “aiding” the inspection becomes so attenuated that it could include a third party who once shopped at the site, this “assistance” does not meaningfully further that law enforcement purpose. Employers under the proposed regulation will be forced to give up their rights to exclude members of the public from their facilities. Nothing in the statute or legislative history suggests Congress intended to grant OSHA such broad authority to interfere with an employer’s state law property rights. If anything, the statute’s statement about “minimum burden” to employers suggests the opposite intent. 29 U.S.C. § 657(d).

Both state and federal courts have addressed the issue of third party property access in similar federal regulatory contexts. In *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 195 (1978), the Supreme Court held that employers could enforce

state trespass law to exclude picketers from their private property, even where the picketers' conduct was arguably protected by the NLRA. The Court reasoned that federal preemption did not completely displace state laws of general applicability that Congress did not expressly intend to preempt. Thus, in *Sears*, the Court permitted the employer to seek state intervention in the union's trespass activities, even though the union could have claimed a right under federal law to access the employer's property.

In a similar case, the Maryland Court of Appeals recently determined Wal-Mart could enforce its state law private property right to exclude union organizers engaged in confrontational picketing under the local-interest exception to federal preemption. *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 228 Md. App. 203, 224, 137 A.3d 355, 368 (2016), *aff'd*, 453 Md. 482, 162 A.3d 909 (2017). The Court found "a state's power to regulate and sanction, by civil actions for trespass and nuisance, conduct that violates or interferes with the private property rights of its citizens is deeply rooted in local feeling and responsibility." *Id.* It further determined that the nature of the controversy – unauthorized access to the employer's property – was a unique controversy separate from any federal labor rights. Thus, the Court upheld an injunction barring access to Wal-Mart's property by union organizers.

These cases make clear that federal law should not override state property rights and trespass laws without clear Congressional intent. If Congress intended to grant OSHA a broad right to force employers to allow third party access to their property during OSHA inspections, then it could have provided as much in the OSH Act. *See Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 583, 98 S. Ct. 2505, 2521, 57 L. Ed. 2d 428 (1978) (Rehnquist, J., dissenting) (finding that Congress has Commerce Clause power to invade employer property rights, but "if Congress intended to do so, such a legislative intention should be found in some definite and unmistakable expression"). But Congress has expressed no such clear intent. Only Section 8(a)'s right to inspect and Section 8(e)'s reference to attendance by "a representative authorized by his employees," grant OSHA authority to invade state property law. And that right is limited – the statute contemplates "a" representative (not multiple) and requires authorization by employees. Given the significant property interests at stake, OSHA needs more than these limited expressions of Congressional authorization to violate employer property rights through the proposed rule.

#### **4. The Proposed Rule Complicates and Weakens the Act's Protection of Employer Trade Secrets and Increases Employer Liability Risks.**

The proposed rule also will endanger employer trade secrets and subject employers to increased liability risk based on the presence of outside third parties. OSHA's efforts to protect such rights in the proposed rule are not sufficiently strong or comprehensive. The OSH Act purports to protect employer trade secrets, stating "any information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection...which contains or might reveal a trade secret...shall be considered confidential." 29 U.S.C. § 664. OSHA's regulations establish trade secret protection through 29 C.F.R. 1903.9, which allows the employer to designate its own definition of trade secret areas and demand that any worker walkaround representative allowed in such areas "be an employee in that [trade secret] area or an employee authorized by the employer to enter that area."

The preamble to the proposed rule indicates that OSHA does not intend to reduce these trade secret protections for employers. See, 88 Fed. Reg. 59830-31. But it is not clear how the proposed rule and Section 1903.9 can co-exist in practice. Many manufacturing employers, for example, protect their entire method of production as a trade secret, along with component parts of the process. See, e.g., *United Steelworkers of Am., AFL-CIO-CLC v. Auchter*, 763 F.2d 728, 740 (3d Cir. 1985) (finding OSH Act protected information that qualifies as trade secrets under state law); *Hertz v. Luzenac Grp.*, 576 F.3d 1103, 1109 (10th Cir. 2009) (acknowledging company’s “production process as a whole” can qualify as trade secret under Colorado law); *CPG Prod. Corp. v. Mego Corp.*, 502 F. Supp. 42, 44 (S.D. Ohio 1980) (finding “methods of production, the design of the production line for the stretchable toy figure, the combination of various pieces of equipment for use on the production line, the sources of such equipment” all qualified as trade secrets under Ohio law).

Undoubtedly, then, conflict will emerge between an employer’s right to exclude non-employee representatives from trade secrets areas and employees’ proposed right to invite non-employee third parties to attend walkaround inspections. How will CSHOs assess an employer’s trade secret claims? How will third parties respond when denied access to an employer’s facility on the basis of trade secrets? Will OSHA scrutinize employer designation of sensitive areas more closely because it may deprive employees of third-party representation during an inspection? The proposed rule fails to grapple with these practical issues that will certainly emerge if it is implemented, as trade secrets are yet another area of property rights that will be curtailed.

Additionally, by forcing employers to allow outside parties into their facilities, OSHA creates additional liability risks for employers.<sup>2</sup> At the simplest level, a third-party representative may slip and fall while attending a walkaround. Suddenly, an employer may face a costly lawsuit based on an uninvited third-party representative that OSHA welcomed to an inspection. More specifically, what if an employer manufacturers drugs or other sensitive products that require strict site access controls? How does OSHA intend to protect the interests of employers against the potential that third-party representatives put their business at risk? The proposed rule fails to address these concerns in any meaningful way, and leaves employers to bear all of this additional risk without any reasonable recourse other than requiring a warrant.

## **5. The Proposed Rule Discourages Employer Cooperation with OSHA and Creates Administrative Burdens that Will Slow Down Inspections.**

CWS and OSHA agree that cooperation and efficiency serve the interests of workplace safety. If hazards exist in a workplace, it serves all parties for the employer and OSHA to work together to abate them quickly. Under current regulations, OSHA and employers can meet those

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<sup>2</sup> Notably, OSHA claims the proposed rule would “not introduce a new or expanded burden on employers” and “does not impose any costs on employers.” 88 Fed. Reg. at 59831. That conclusion is absurd on its face. The proposed rule will create significant additional costs for employers, including additional legal consultation costs, provision of additional PPE and increased potential liability associated with the presence of third-party representatives (whether because of injury, sabotage or other risks). OSHA’s failure to meaningfully consider these additional costs undermines OSHA’s mandatory economic analysis certification.



goals through rapid response investigations and consent inspections. The proposed rule puts that efficiency and cooperation in jeopardy, and without a solid safety-related justification.

According to its own data, OSHA conducted 31,820 inspections in FY 2022. OSHA can perform such a high volume of inspections annually because of employer cooperation. Most employers do not require OSHA to obtain a warrant for a CSHO to conduct a walkaround inspection of their worksite. Generally, employers recognize that harmonious relationships with OSHA are good for business and often result in safer worksites. But if consenting to an OSHA inspection means allowing a third-party union representative, a social activist, a conspiracy blogger, a plaintiff's attorney, or someone hostile to the interests of the employer onto an employer's property, thereby subjecting employers to intrusions and attendant risks unrelated to OSHA's inspection, then it follows more employers will withhold their consent and force OSHA to petition courts to obtain warrants. As a result, it will take OSHA longer to access worksites and correct any hazards, all in the name of allowing private property access to a third party who is not required to have relevant safety expertise. That outcome does not serve anyone truly interested in efficiently abating hazards and promoting workplace safety.

This concern is not merely theoretical – it is documented in the case law. *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 336 (7th Cir. 1995). In *Caterpillar Inc.*, an employer consented to inspection by a CSHO, but objected to the presence of a striking union worker as the authorized representative. Rather than conducting the inspection immediately, OSHA elected to pursue a warrant allowing the presence of the striking employee. OSHA ultimately obtained the warrant, but the administrative and legal process delayed the inspection by 45 days.<sup>3</sup> Additionally, the Court issued a narrow warrant that precluded the CSHO from visiting areas of the facility the employer may have otherwise allowed. This scenario is very likely to occur with much greater frequency if OSHA adopts the proposed rule.

The proposed rule also adds administrative burdens to any warrant process. OSHA will not only need to prove its authority to access the employer's property, but it will also need to show that any requested third party access is reasonably necessary to the conduct of an effective inspection. How will OSHA make that showing? Will it present evidence that the third party can assist in the inspection? If so, what type of evidence? If OSHA truly believes that a third party is "reasonably necessary" to conduct an inspection, doesn't that imply that OSHA itself cannot conduct an effective inspection for that site? And doesn't that undermine the authority for an inspection in the first place, e.g., the CSHO needs help to identify hazards so perhaps no hazard exists in the first place? If an employer moves to quash a subpoena granting third party access to its site, will the court hold hearings on the third party's credentials, its representative status or any employer trade secret claims? Unquestionably, expanding the regulations allowing third party site access will result in expansion of inspection-related litigation to cover issues that have nothing to do with maintaining a safe workplace.

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<sup>3</sup> As discussed above, the Supreme Court has limited law enforcement's right to bring visitors to accompany it in executing lawful warrants. *Wilson v. Layne*, 526 U.S. 603 (1999). Given the vagueness in the proposed rule about the role of third-party representatives, and the lack of reasoned criteria about when CSHOs should determine such representatives are necessary to further a law enforcement purpose, CWS submits that, absent employer consent, OSHA would need to obtain specific warrant authority for any third-party representatives or risk Fourth Amendment violations.

If OSHA grants permission or obtains a warrant for third-party employee representatives to attend a walkaround, then it follows employers will also exercise their statutory right to representation under Section 1903.8(a). Under present conditions, most walkaround inspections involve only employees of the employer and members of on-site management. But if OSHA insists on allowing third-party representatives for employees, employers will seek to reduce the threats posed by such parties during an adversary inspection process. More employers will seek legal representation during walkaround inspections, increasing costs to employers and complicating the walkaround process. In the process, cooperative and trusting relationships between CSHOs, Area Directors and safety-conscious employers will suffer. Even if employers have built up trust with the agency, they will not stand idly by while third-parties parade through their worksite looking for opportunities to further an agenda hostile to the interests of the company.

Finally, the proposed rule places additional burdens on CSHOs unrelated to their training and expertise. CSHOs are safety experts, not adjudicators of disputes over workplace representation. Indeed, the current Field Operations Manual instructs CSHOs to avoid being engaged in workplace labor disputes. See Field Operations Manual, Ch. 3 (IV) (H) (2)(c). In addition to making a determination as to whether a third-party representative is “reasonably necessary to the conduct of an effective and thorough inspection”, the proposed rule adds several responsibilities to their jobs, including determining whether employees want a third-party representative, who that representative is, and how to respond if employers withhold consent to an inspection on the basis of a purported third-party representative.<sup>4</sup> It will also require them to analyze employer trade secret claims and resolve them on the spot. OSHA will need to train CSHOs on these new responsibilities, which will cost the agency time and money that it could otherwise spend to further its workplace safety goals in more direct and tangible ways. And even with training, CSHOs will face additional pressures from employees, employers and third parties that do not exist under the current rule. OSHA should carefully consider whether it wants to subject its already limited pool of CSHOs to these additional job requirements, and whether such change would negatively impact employee retention.

## **6. OSHA Cannot Remove or Weaken the “Reasonably Necessary” Requirement.**

As discussed above, OSHA requested comments on three proposed questions about potential modifications to the proposed rule. OSHA should not follow any of these alternative proposals because they represent bad policy, exacerbate the existing problems with the proposed rule and exceed OSHA’s statutory authority.

First, OSHA sought comments on whether it should “defer” to the employees’ selection of a third-party representative. Second, it asked if it should retain the “reasonably necessary language as proposed, but add a presumption that a third-party representative...is reasonably

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<sup>4</sup> After publication of the proposed rule (and one day after the initial deadline for comments), OSHA and the NLRB announced a Memorandum of Understanding “to facilitate interagency cooperation and coordination.” The MOU again indicates OSHA’s ideological shift away from its legitimate workplace safety purposes to further the interests of organized labor. The MOU creates even more opportunities for labor unions or organizers to use OSHA as a means to achieve union organizing objectives.

necessary.” Third, OSHA asked whether it should expand the criteria to allow third-party representatives when the CSHO determines that such participation would “aid employees in effectively exercising their rights under the OSH Act.” CWS answers “No” to all of these questions because they would create even more problems than the already problematic proposed rule. While OSHA should not make any of the changes suggested by these questions, the proposed rule is fatally flawed as is and must be withdrawn. Making any changes suggested by these questions would remove any semblance of guardrails OSHA pretends are in place to limit third-party representation and access to a company’s workplace.

### **Conclusion**

In remarks to Congress on September 27, Assistant Secretary Parker pitched the proposed rule as an “effective and practical” approach to encourage “more worker participation” in the OSHA process. Secretary Parker missed the mark on all counts. The proposed rule is anything but practical – it contains no defined guardrails to prevent unions, attorneys or other third-parties from using the OSHA inspection process for their personal benefit. It includes no guidance on how CHSOs should determine who qualifies as the “authorized representative” of the employees, or what to do when competing third parties claim interests in an inspection. Rather than encourage “more worker participation,” it creates an opportunity for vocal minorities to push actual workers out of the walkaround process in favor of non-employee third party representatives. And rather than support employee free choice in choosing their workplace representatives, it imposes third-party representation even in workplaces where employees may have rejected union representation. Finally, it would add burdens to CSHOs and make them the arbiter of who would qualify as an employee representative—a role they are not in a position to play.

Because the proposed rule fails to improve workplace safety and undermines OSHA’s credibility by imposing workplace access to otherwise uninvited third parties, CWS strongly opposes the rule and urges OSHA to withdraw it.

Agricultural Retailers Association  
Air Conditioning Contractors of America  
Alliance for Chemical Distribution  
American Apparel & Footwear Association  
American Bakers Association  
American Coke and Coal Chemicals Institute  
American Foundry Society  
American Hotel and Lodging Association  
American Pipeline Contractors Association  
American Road & Transportation Builders Association  
American Supply Association  
American Trucking Associations  
Associated Builders and Contractors  
Associated Equipment Distributors

Associated General Contractors of America  
Associated Wire Rope Fabricators  
Construction Industry Round Table  
Distribution Contractors Association  
FMI – The Food Industry Association  
Foodservice Equipment Distributors Association  
Global Cold Chain Alliance  
HR Policy Association  
Independent Electrical Contractors  
Independent Lubricant Manufacturers Association  
Industrial Fasteners Institute  
International Dairy Foods Association  
International Foodservice Distributors Association  
International Warehouse Logistics Association  
Job Creators Network  
Manufactured Housing Institute (MHI)  
Manufacturer & Business Association  
MEMA, The Vehicle Suppliers Association  
National Armored Car Association  
National Asphalt Pavement Association  
National Association of Home Builders  
National Association of Wholesaler-Distributors.  
National Automobile Dealers Association  
National Club Association  
National Cotton Ginners Association  
National Council of Chain Restaurants  
National Grocers Association  
National Lumber & Building Material Dealers Association  
National Public Employer Labor Relations Association  
National Ready Mixed Concrete Association  
National Retail Federation  
National RV Dealers Association  
National Stone, Sand & Gravel Association  
National Tooling and Machining Association  
National Utility Contractors Association  
Non-Ferrous Founders' Society  
North American Meat Institute  
Pennsylvania Food Merchants Association  
Plastics Pipe Institute  
Power & Communication Contractors Association  
Precision Machined Products Association  
Precision Metalforming Association  
PRINTING United Alliance  
Reusable Industrial Packaging Association  
Small Business & Entrepreneurship Council  
SNAC International

Technology & Manufacturing Association  
Textile Care Allied Trades Association  
The Air Conditioning Contractors of America  
The Alliance for Chemical Distribution  
The US Chamber of Commerce  
Tile Roofing Industry Alliance  
Tree Care Industry Association  
TRSA – The Linen, Uniform and Facility Services Association  
Truck Renting and Leasing Association  
US Poultry & Egg Association  
Vulcan Inc  
Water and Sewer Distributors of America  
Window & Door Manufacturers Association  
World Millwork Alliance