June 12, 2013

The Honorable David Michaels, PhD, MPH
Assistant Secretary
Occupational Safety and Health Administration
United States Department of Labor
200 Constitution Avenue, NW, Room S2315
Washington, DC 20210

By electronic transmission

RE: Letter of Interpretation Endorsing Union Representatives on Walk-Around Inspections at Non-Union Workplaces

Dear Dr. Michaels:

OSHA's February 21, 2013 letter of interpretation addressed to Mr. Steve Sallman of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (LOI) that explicitly endorses union representatives and other non-employee third parties accompanying OSHA inspectors on walk-around inspections at non-union workplaces is very alarming. It has quickly become a matter of high concern among members of the Coalition for Workplace Safety, their employers, and attorneys representing employers on OSHA issues. Similarly, the LOI is also generating significant anxiety among companies, and the attorneys representing them, who are concerned about being targeted by unions in either the organizing or contract negotiating contexts. In addition to being inconsistent with the statute and regulations, this letter of interpretation is bad policy implemented through a non-transparent closed process.

The overwhelming consensus is that this will undermine the safety focus of these inspections and turn them into opportunities for unions or other parties with agendas contrary to the employer to enhance campaigns against the employer, gain entry to the employer's premises to develop more information for the campaign, or even glean proprietary information. It will place OSHA in the middle of organizing drives or labor contract negotiations and will put the Compliance Safety and Health Officer (CSHO) in an untenable position: either he/she rejects the employee's request to have a union representative on the walk-around, contrary to this letter of interpretation, or he/she permits it, which would make OSHA appear to be taking sides in an organizing campaign contrary to the Field Operations Manual.

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Other complications of this policy are making sure the union representative, community organizer, or third party has adequate workplace safety protection, does not present a risk to the safety or security of the facility, and does not have access to confidential business information. Many workplaces have explicit policies preventing anyone not specifically authorized from entering the workplace. Is the employer expected to provide PPE for a non-employee to accompany a CSHO on a walk-around inspection? How is the employer to know whether this individual has adequate knowledge of the potential hazards that may be present? Who is responsible if the third party non-employee is injured? Who is responsible for conducting background screening of the third party for security risk, criminal background, and other factors, especially in facilities that are subject to Department of Homeland Security regulation? Since there will be no workers' compensation coverage for the non-employee third party, can the employer require the third party to sign a waiver holding the employer harmless for any injury or other consequence of being in the workplace?

While the statute and regulations permit employees to designate a representative to accompany the OSHA inspector, they do so in the context of the representatives being included "for the purpose of aiding such inspection." (29 U.S.C. 657 (e)). OSHA's letter would permit union representatives, or other third parties, to accompany OSHA inspectors on walk-around inspections at any workplace, including those without a union, for reasons far beyond this context, indeed without any relationship to this context.

OSHA's regulations are clear that the employee representative must also be an employee of the company: "The representative(s) authorized by employees shall be an employee(s) of the employer." (29 CFR 1903.8(c), emphasis added). The only circumstances under which a non-employee would be included in the inspection process would be "if in the judgment of the CSHO, 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 during the inspection." (29 CFR 1903.8 (c), emphasis added). In the more than 40 years since 29 CFR 1903.8 was issued[1], during which time OSHA has conducted approximately 30,000 – 40,000 inspections *per year*, the agency has consistently followed a practice of bringing in (neutral) third parties to participate in inspections *only* when that third party had special expertise that was beyond what the CSHO possessed and was "necessary to the conduct of an effective and thorough physical inspection of the workplace." These third parties were selected by OSHA, *not* the employees, to be part of the inspection.

The letter of interpretation ignores the explicit requirement indicated by "shall be an employee"[2] and focuses on the narrow circumstances in which non-employees have been used by OSHA. However, the letter expands those circumstances well beyond the context of

[1] See, 36 Fed. Reg. 17850, September 4, 1971.

[2] The letter of interpretation dismisses this by noting that "the regulation acknowledges that most employee representatives will be employees of the employer being inspected." "Most employee representatives will be employees" is not at all consistent with the regulatory mandate that employee representatives "shall be employee(s) of the employer." The LOI language suggests that whether employee representatives are also employees of the employer is a matter of chance rather than a requirement.

providing for someone who can aid the inspection, and puts the selection in the hands of the employee rather than OSHA, while also diminishing the CSHO's ability to control who is involved in the inspection, thereby substantively altering the meaning of 29 CFR 1903.8(c):

> Therefore, a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative so long as the individual has been authorized by the employees to serve as their representative….
>
> The Secretary's regulations, 29 C.F.R. § 1903.8, qualify the walkaround right somewhat, but only in order to allow OSHA to manage its inspections effectively.
> (Letter to Steve Sallman, February 21, 2013, page 2, emphasis added.)

Finally, the Field Operations Manual gives CSHOs explicit instructions to avoid creating the impression that OSHA is taking sides in any labor dispute during unprogrammed inspections such as those occurring because of an accident, fatality or complaint: "During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute." (Field Operations Manual, Chap. 3, (IV)(H)(2)(c), emphasis added). Allowing union representatives to accompany a CSHO during an inspection triggered by a complaint, such as what happens during organizing campaigns and during contract negotiations, would be absolutely contrary to this instruction.

The fact that this significant change in policy was done through a letter of interpretation and not a rulemaking, although it substantively changes the regulation, means that affected parties had no opportunity to provide input, and OSHA had no obligation to present any data or evidence demonstrating the need for this change. Using this approach to circumvent the protections of the rulemaking process undermines this administration's claims of transparency and openness in its policy setting.

We understand the letter of interpretation was not reviewed by the Secretary's office, which also raises questions about whether any office outside of OSHA had an opportunity to review this and to consider the problems it will create and the overt bias it exposes. In addition, this letter was issued (but not made public) barely two months after the request was submitted. For OSHA to respond so quickly raises questions about whether the agency knew in advance the request was being submitted.

Accordingly, rather than inappropriately attempting to amend by interpretation a final rule to create new rights that are inconsistent with the emphasis on workplace safety that should characterize OSHA inspections, and the way the rule has been interpreted and implemented by OSHA in the well over a million inspections it has conducted over the past 42 years, the letter should be withdrawn. If OSHA believes this approach is worth pursuing, the only way for the agency to proceed is to engage in a full rulemaking process to modify 29 CFR 1903.8(c). To discuss this further please contact any of the names listed on the first page of this letter.

Sincerely,

American Bakers Association
American Beverage Association
American Chemistry Council
American Composites Manufacturers Association
American Council of Engineering Companies
American Feed Industry Association
American Foundry Society
American Petroleum Institute
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors
Associated Wire Rope Fabricators
California Cotton Ginners Association
California Cotton Growers Association
Can Manufacturers Institute
Corn Refiners Association
Flexible Packaging Association
Food Marketing Institute
Forging Industry Association
Heating, Air-Conditioning & Refrigeration Distributors International
Hilex Poly
Independent Electrical Contractors
Industrial Fasteners Institute
Industrial Minerals Association – North America
Institute of Makers of Explosives
International Foodservice Distributors Association
International Liquid Terminals Association (ILTA)
LeadingAge
Motor & Equipment Manufacturers Association
National Association for Surface Finishing
National Association of Chemical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Chicken Council
National Council of Chain Restaurants
National Grain and Feed Association
National Oilseed Processors Association
National Retail Federation
National Roofing Contractors Association
National Stone, Sand & Gravel Association
National Systems Contractors Association
National Tooling and Machining Association
National Turkey Federation

National Utility Contractors Association
NFIB
Non-Ferrous Founders' Society
North American Die Casting Association
Precision Machined Products Association
Precision Metalforming Association
Retail Industry Leaders Association
Texas Cotton Ginners Association
Textile Rental Services Association
U.S. Chamber of Commerce
U.S. Poultry & Egg Association
Western Agricultural Processors Association

CC: Dominic Mancini, Acting Administrator, Office of Information and Regulatory Affairs
Rep. John Kline, Chairman, House Committee on Education and the Workforce
Rep. Tim Walberg, Chairman, Subcommittee on Workforce Protections, House Committee on Education and the Workforce
Sen. Lamar Alexander, Ranking Member, Senate Committee on Health, Education, Labor and Pensions
Sen. Johnny Isakson, Ranking Member, Subcommittee on Employment and Workplace Safety, Senate Committee on Health, Education, Labor and Pensions