

## OSHA inspections a new union organizing advantage

In this space in the previous issue, attorney George I.J. Miller of the **Wyatt, Tarrant & Combs** law firm in Louisville reported on OSHA's recent (Feb. 21, 2013) Letter of Interpretation on employee representation during inspections.

In a departure from a longstanding practice, through its new interpretation, OSHA says any employee in a company may obtain a third-party representative to file a complaint on his or her behalf, request a workplace inspection, represent them during inspections and participate in informal conferences about citations.

The letter authorizes an employee to designate someone affiliated with a union or a community organization, for example, to act as their representative during a walk-around inspection by an OSHA inspector at a non-union workplace.

Well, it didn't take long for employer law firms around the nation to begin posting warnings to employers on blogs and in legal newsletters.

**Ogletree Deakin** posted online that under "OSHA's interpretation, non-union employees can select a person who is affiliated with a union or a community organization to act as their 'personal representative' in filing complaints on the employees' behalf, requesting workplace inspections, participating in informal conferences to discuss citations, and challenging the abatement period in citations being contested by an employer. ... [and] 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."

The law firm conducted an informal poll of experienced workplace safety and traditional labor attorneys at its 40-office firm, and "all confirmed that they has never encountered a situation where OSHA has ... permitted a non-employee union representative to participate in an inspection, informal conference, or any other aspect of an OSHA matter."

The firm concluded that "there is no legal or policy basis for OSHA to intercede on behalf of a union in an organizing campaign by allowing union representatives the authority — and apparently power — to

assist an OSHA compliance officer during an inspection." OSHA should continue its longstanding policy of avoiding intervention in labor relations disputes, **Ogletree Deakin** said.

Another law firm, **Krukowski & Costello**, wrote, "Until now, OSHA's policy has been to allow union representatives to be the 'authorized employee representative' only in situations involving a unionized workplace. ... [and] many have viewed the new OSHA policy ... as an additional effort by the current administration to further ease workplace access for labor unions, giving them more opportunities to get audiences inside non-union workplaces in order to organize them." And the firm advised employers with non-union workplaces to have a standard operating procedure in place to respond to any request for an outside non-employee union organizer or official to act as an authorized employee representative during on OSHA process.

Further, the law firm of **Fisher & Phillips** wrote, "Under this expansive interpretation (which fails to specifically define who is "a person" affiliated with a union or community representative), not only can union organizers be designated as the "employee representative" but also individuals such as community activists or perhaps even plaintiff lawyers could participate in an OSHA inspection on behalf of some of the employees."

**Ballard, Rosenberg, Golper & Savitt**, a west coast law firm, said, "This broadened interpretation no doubt will encourage unions to use OSHA complaints and inspections to obtain access to employers' facilities and employees for purposes of organizing."

Mr. Miller of **Wyatt Tarrant & Combs** noted: "In practice, at least in non-union workplaces in Kentucky, this consultation appears to consist of confidential interviews with employees rather than any kind of group meeting with employees, and it does not involve any non-management employee or employees accompanying the compliance officer on the walk-around part of the inspection.▲

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