

OSHA issues interpretation letter on employee representation during inspections

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In an interpretation letter to the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, dated February 21, 2013, Deputy Assistant Secretary of Labor Richard E. Fairfax wrote that under the federal Occupational Safety and Health Act, the Act's implementing regulations, and OSHA's Field Operations Manual, an employee representative may engage in certain actions on behalf of employees with respect to OSHA enforcement, even if that representative is not an employee of the employer and is not a labor union with a collective bargaining agreement with the employer.

Mr. Fairfax wrote that a third party representative may file a complaint on behalf of employees, request workplace inspections, and participate in informal conferences about citations. However, he also said that employees could 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.

In other words, a third party would be permitted to enter the employer's place of business to act as the employee's representative during the inspection.

While Mr. Fairfax pointed out that such an employee representative would have to be authorized by or chosen by the employees to act as their representative, he did not say how OSHA or the employer could determine if such a person was actually authorized or chosen by the employees.

Must it be a majority of the employees who chose the representative, or only a vocal minority, or even one?

The answer is not clear. He points out that, by law, the Secretary of Labor or his/her representative, namely the compliance officer conducting the inspection, has the right to determine who may participate in the inspection.

So it appears that the compliance officer has total discretion to make this decision.

The letter was written in response to an inquiry from the union and can be found at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&cp_id=28604.

Both the federal statute, 29 U.S.C. §657(e), and its Kentucky counterpart, KRS 338.111, say that an authorized representative of the employees shall be given an opportunity to accompany the compliance officer during the inspection.

It goes on to say, however, that if there is no authorized representative available at the time of the inspection, then the compliance officer shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

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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