U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

November 13, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Douglas L. Parker
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Worker Walkaround Representative Designation Process ("Worker Walkaround") Rule [Docket No. OSHA-2023-0008] (RIN 1218-AD45)

Dear Assistant Secretary Parker:

On August 30, 2023, the Occupational Safety and Health Administration (OSHA) published its proposed "*Worker Walkaround Representative Designation Process*" ("*Worker Walkaround*") rule in the Federal Register.[1] OSHA's proposed rule would clarify that the representative(s) authorized by the employees to accompany an OSHA inspector during an inspection may be an employee of the employer or a third party if, in the judgement of the OSHA inspector, good cause has been shown why their "participation" is reasonably necessary to conduct an effective and thorough inspection because of their relevant knowledge, skills, experience, or language skills with hazards or conditions in the workplace or similar workplaces.[2] The proposed rule essentially codifies OSHA's earlier interpretation of the regulation in the so-called "Fairfax Memo"[3] that was overturned by a federal court in the *NFIB v. Dougerty* decision.[4] OSHA has certified that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

[1] 88 Fed. Reg. 59825 (proposed Aug. 30, 2023).
[2] *Id.* at 59833-34 (emphasis added).
[3] U.S. Dep't of Lab., Occupational Safety & Health Admin., *Standard Interpretation Letter for Standard Numbers 1903.8, 1903.11, 1952.10, and 1903.20* (Feb. 21, 2013), https://www.osha.gov/laws-regs/standardinterpretations/2013-02-21.
[4] Nat'l Fed'n of Indep. Bus. v. Dougherty, 2017 U.S. Dist. LEXIS 15915 (N.D. Tex. 2017).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),[5] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[6] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.[7] Additionally, section 609 of the RFA requires the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau to conduct special outreach efforts through a review panel.[8] The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.[9] If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.[10] The agency must provide a statement of factual basis that adequately supports its certification.[11]

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[12] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.[13]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[14]

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[5] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[6] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[7] 5 U.S.C. § 603.
[8] *Id.* § 609.
[9] *Id.*
[10] *Id.* § 605(b).
[11] *Id.*
[12] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[13] *Id.*
[14] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

B. Background

Section 8(e) of the Occupational Safety and Health Act (OSH Act) grants a representative of the employer and a representative authorized by the employees the opportunity to accompany OSHA inspectors during a physical inspection of the workplace for the purpose of aiding the inspection.[15] OSHA's rules implementing this provision at 29 CFR § 1903.8 were adopted in 1971, and state that the representatives authorized by the employees shall be an employee(s) of the employer. However, a non-employee third-party representative(s) can accompany the inspector if, in the judgement of the compliance officer, there is good cause why accompaniment by a non-employee third-party is reasonably necessary to conduct an effective and thorough physical inspection of the workplace. The regulation cites as examples an industrial hygienist or a safety engineer.[16] It has been commonly understood that a union representative in a union workplace could act as the non-employee third-party representative, but that in a non-union workplace the third-party representative had to be an employee of the employer in most instances.

In 2013, OSHA issued a letter of interpretation (known as the "Fairfax Memo") stating that a third-party union representative in a worksite without a collective bargaining agreement could act on behalf of employees as long as they are authorized by the employees. OSHA clarified that while the employee representative would normally be an employee of the employer being inspected, a non-employee third party could be reasonably necessary based on making a "positive contribution" such as having a particular skillset or experience (or be bilingual or multilingual). This new interpretation was struck down in *NFIB v. Dougherty* (N.D. TX 2017) in 2017 as being inconsistent with OSHA's regulation and OSHA's failure to promulgate it through notice and comment rulemaking.

On August 30, 2023, OSHA published its proposed "Worker Walkaround" rule that addresses the court's decision. It would amend OSHA's current rules to clarify that the representative(s) authorized by employees to "accompany" an OSHA inspector may be an employee of the employer or a third party, and that such third-party employee representative(s) may accompany OSHA if there is "good cause" and their "participation" is "reasonably necessary to aid in the inspection."[17] OSHA also discusses the relevant knowledge, skills, or experience (including communicative skills) of third-party representative(s) authorized by employees with hazards or conditions in the workplace or similar workplaces.

II. Advocacy's Small Business Concerns

In response to publication of the proposed rule, Advocacy hosted a small business regulatory roundtable on the proposed rule on October 25, 2023, to discuss the proposed rule and obtain small business feedback on it. Representatives from OSHA and the Solicitor of Labor's office provided a background briefing on the proposed rule, and small business representatives discussed their concerns with it. Nearly 90 small business representatives, as well as a number of

[15] 29 U.S.C. § 657.

[16] The OSHA inspector is also authorized to resolve disputes as to who is the representative authorized by the employer and employees and deny accompaniment to any person whose conduct interferes with a fair and orderly inspection.

[17] Advocacy notes that OSHA adds the term "participate" to the "accompany" language. *See* Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825, 59834 (proposed Aug. 30, 2023).

union representatives, labor advocates, and agency staff, attended the roundtable. A number of small business representatives objected to the proposed rule, arguing that the proposed rule exceeds OSHA's statutory authority and will impose clear and quantifiable costs of screening, processing, and accompanying these additional third parties into the workplace during the inspection and related activities.

OSHA has certified (without further analysis) under the Regulatory Flexibility Act that the proposed rule "does not impose costs of compliance on employers."[18] OSHA clarifies in its Executive Order 12866 discussion that because the rule does not require employers to adopt policies for screening, processing, and accompanying third parties into the workplace (it merely establishes the conditions under which they are allowed), "any associated costs with [these policies and activities] are therefore not attributable to this proposed rule."[19] However, most or all employers have third-party guest or visitor screening, processing, and accompanying policies in place (and virtually no employers allow outside visitors or third-parties unaccompanied access to their workplaces and facilities). Therefore, these changes will result in the expenditure of resources (even if arguably small) by employers that they would otherwise not incur.

A. OSHA's Certification Under the RFA is Improper

OSHA's certification under the RFA that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities is improper because OSHA has failed to consider the direct and foreseeable costs that small employers would incur as a result of the rule. Specifically, OSHA's proposed rule envisions various new categories of non-employee third-party representatives, beyond qualified safety and health experts, who will now join OSHA inspectors during workplace inspections. This includes the potential for multiple non-employee third-party representatives of varying backgrounds and disciplines on any given inspection.[20] In fact, OSHA states in the preamble that, "[i]n OSHA's experience, there are a multitude of third parties who might serve as representatives authorized by employees for the purposes of the OSHA walkaround inspection."[21] OSHA describes these new third parties as union representatives and business agents, safety and health specialists, worker advisory groups, community organizations, safety organizations and safety councils, safety professionals, equipment manufacturers' technical representatives, various entities associated with multi-employer worksites, trusted representatives, bilingual representatives and interpreters, and consultants and attorneys.[22]

Accordingly, it appears obvious that the rule will result in costs that flow directly and predictably from the proposed rule. OSHA must assess these costs, including the costs of screening, processing, and accompanying the additional non-employee third-party representative(s) during the inspection and related activities. From the roundtable and discussion with small entity representatives, these costs to employers potentially include:

- advanced planning and coordination,
- providing additional screening and security,

[18] *Id.* at 59,831.
[19] *Id.*
[20] *Id.* at 59,830.
[21] *Id.* at 59,831.
[22] *Id.*

- revising third-party access policies and procedures,
- training employees on new third-party visitor protocols,
- obtaining additional legal advice and consultation,
- providing additional protections for confidential business information,
- preparing additional non-disclosure and other forms,
- providing additional staff and experts (including possible outside experts) to correspond to the variety of non-employee third-party participants during inspections and related activities,
- potential liability for injuries to third parties during their presence at the workplace and during the inspection,
- purchasing additional insurance, and
- providing additional personal protective and other safety and health equipment.

There is little doubt from OSHA's discussion that the proposed rule would increase the number of non-employee third-party representatives present in the workplace during an OSHA inspection. Several small business representatives also suggested that the new non-employee third-party representatives seem more like agents of OSHA and the Department of Labor than authorized representatives of the employees. Also, OSHA's proposed rule states that the non-employee third-party representatives may "participate" in the inspection and not simply "accompany" the inspector.[23] Advocacy recommends that OSHA clearly explain the criteria for accompanying OSHA, what this new third-party "participation" will entail, and how it will impact small employers.

B. OSHA Should Re-Assess the Impact of the Proposed Rule on Small Employers

While the cost of OSHA's proposed rule may arguably be small in many instances, it is incorrect for OSHA to say there are "no costs" associated with the proposed rule when there clearly are costs that flow directly and foreseeably from the rule. As such, Advocacy recommends that OSHA revise and republish its RFA analysis with a valid assessment of small entity impacts.

To do this, Advocacy recommends that OSHA perform a threshold analysis as discussed in Advocacy's *RFA Guide for Federal Agencies*.[24] Under such an analysis, OSHA would assess the costs that various types of employers (or typical employers) would be expected to incur (or what they are likely to do) in order to comply with the new inspection dynamics. The direct costs of the rule are the resources that affected small entities would expend as a result of the rule and because they are subject to the rule. OSHA would then compare these new costs to the financial characteristics of these firms in terms of time, the impact to their revenue, or some other metric. The agency would then determine whether these added costs represent a significant economic impact on some number or a certain percent of firms. Finally, the agency would determine whether a substantial number of small entities would experience a significant economic impact.

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[23] Further, it appears to naturally flow from the proposed regulation that these non-employee third-party representatives will, for purposes of planning, be given advance notice of the inspection so they can arrange to meet the inspector at the workplace, when notice of the inspection is supposed to be strictly confidential.

[24] *See* U.S. SMALL BUS. ADMIN., OFF. OF ADVOC., A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT (Aug. 2017), https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf.

Based on this analysis, the agency would either properly certify the rule (and include this analysis as the factual basis) or prepare an Initial Regulatory Flexibility Analysis (IRFA).

Importantly, if OSHA does not know or cannot factually estimate the added costs to small entities, OSHA cannot certify the rule and must prepare and publish an IRFA for public comment. Further, in OSHA's case, that would also trigger the requirement to convene a Small Business Advocacy Review panel under 5 U.S.C § 609(b) before proceeding with a proposed rule. Both the panel and analysis would require a consideration of significant regulatory alternatives that achieve the agency's objectives while minimizing costs to small entities (e.g., limiting non-employee third parties to those with essential technical safety and health expertise needed for the inspection). Either way, Advocacy recommends that OSHA conduct additional outreach to small entity employers to better understand the impact of the proposed rule before proceeding. Advocacy would welcome the opportunity to help facilitate such outreach.

Conclusion

Thank you for the opportunity to comment on OSHA's proposed "Worker Walkaround" rule. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. To that end, Advocacy hopes these comments are helpful and constructive. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 or bruce.lundegren@sba.gov if you have any questions or require additional information.

Sincerely,

//signed//

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

//signed//

Bruce E. Lundegren
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Copy to: The Honorable Richard L. Revesz, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget