

Navigating OSHA's Expanded Worker Walkaround Rule

Recycled Materials Association Webinar

May 22, 2024



Recycled Materials
Association
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Union Intrusion: New OSHA Walkaround Rule

Presented to ReMA

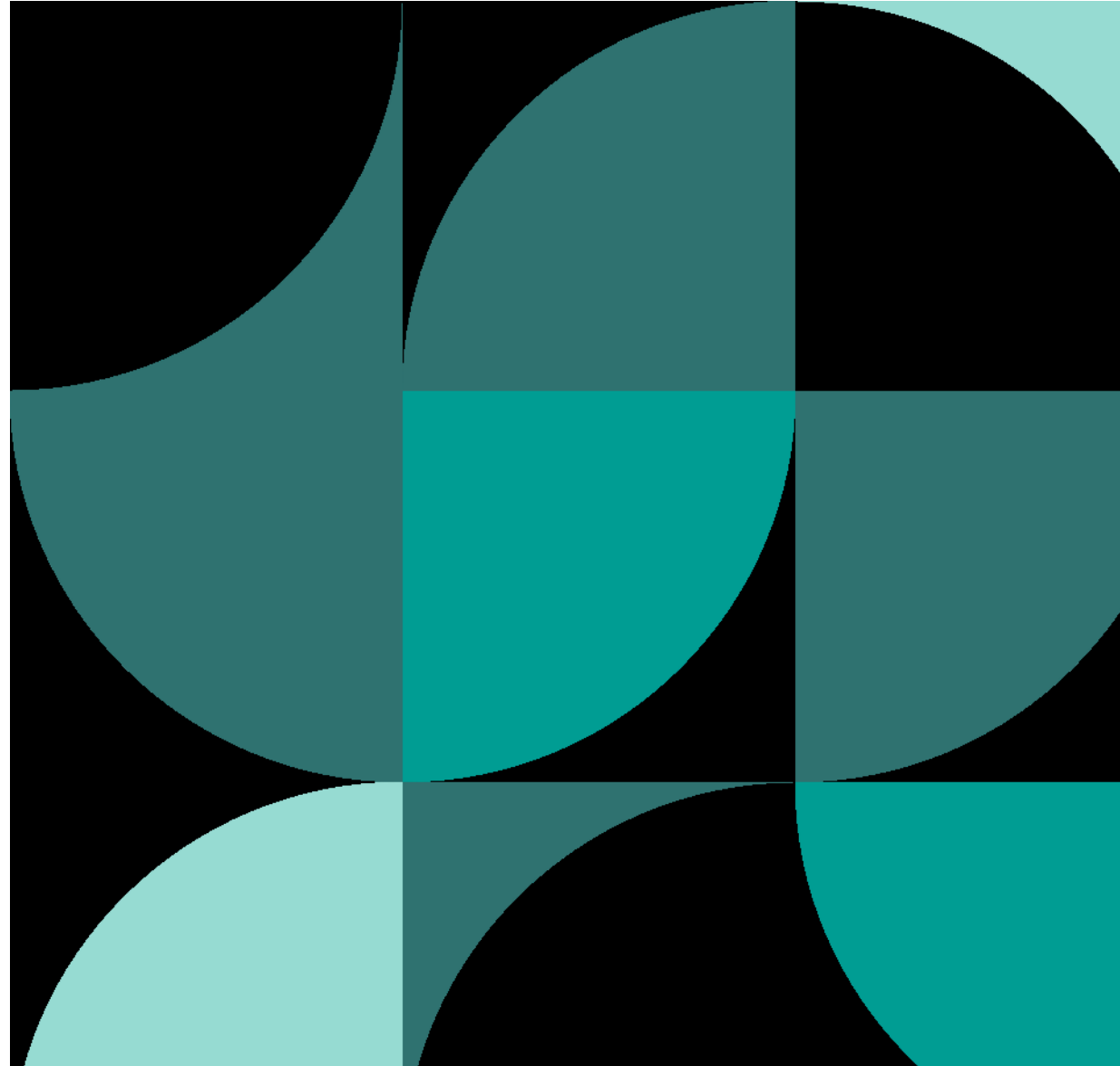
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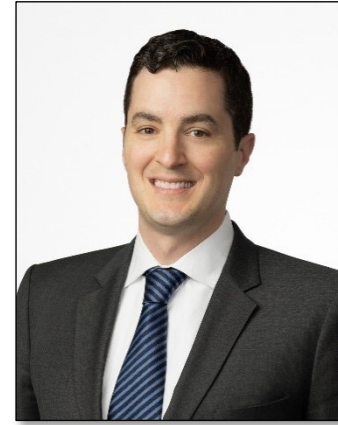
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Program Objectives

- Existing Union Rights During OSHA Inspection
- New Expanded Walkaround Rule
- Effective Date and Court Challenge
- Inspection Management
- Options and Defenses for Addressing Third Party Representative
- Answer Your Questions

Existing Union Walkaround Rules

- Employee Representatives May Accompany OSHA During Inspection
 - “Representative authorized by employees” to accompany “during the physical inspection”
 - CSHO may permit “additional representatives”, including for each “phase”
- Employer's right to limit entry of employee authorized representatives into areas of the workplace that contain trade secrets.
- Minimum Burden Doctrine
 - No unreasonable disruption to the operations of establishment

Existing Union Walkaround Rules

- Third Parties
 - General Rule – “Representative(s) authorized by employees shall be an employee(s) of the employer”
 - Exception – third party who is not an employee is reasonably necessary to the conduct of an effective and thorough physical inspection
 - Examples of “industrial hygienist or a safety engineer”
- Disputes
 - OSHA Compliance Officer has authority to ‘resolve all disputes’ as to who is representative.
 - Consult with a “reasonable number of employees”

Additional Union Rights During OSHA Inspection

- Union Safety Investigation
 - Employee interviews
- *Weingarten* Rights During Safety Investigations
- Union Access to Attorney Notes and Other Attorney-Client Privileged Information?
- Provisions of Collective Bargaining Agreement May Expand Rights

Third Party Walkaround Rule – What’s New in the Law

- New General Rule
 - “The representative(s) authorized by employees may be an employee of the employer or a third party.”
- Broadening grounds for when CSHO can use judgement to determine third party representative is “reasonably necessary”
- Eliminates reference to “industrial hygienist or safety engineer”
- Adds “(including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills)”

Effective Date and Court Challenge

- Rule effective on May 31, 2024
- *Chamber of Commerce v. OSHA*, No. 24-271 (W.D. Texas)
 - Filed May 21, 2024
 - Requests Injunction
 - Argues that OSHA exceeds statutory authority, violates Fifth Amendment, violates APA
 - Cites to ruling striking Obama-era workaround rule. *NFIB v. Dougherty*, No. 3:16-CV-2568-D, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017)
- No ruling yet

Basic Inspection Management – Opening Conference

- When OSHA Arrives:
 - Politely receive the compliance officer.
 - Show compliance officer to trailer or private area.
 - First impression is important.
 - Immediately notify the point person.
 - Point person takes control of the inspection is responsible for all communications with Compliance Officer and shadows Compliance Officer throughout inspection.
 - Determine basis of inspection
 - Determine rationale for third party representative on site

Legal Defenses and Bases to Push Back

- Advance Notice?
- Third party's suitability, skills, experience
- Method of selection at a non-represented workplace
- Trade secrets and confidential information
- Compliance with lawful worksite rules
 - Confidentiality agreements
- During Walkaround - Disruption?

What Happens if We Keep them Out

- CSHO shall terminate the inspection” or narrow it to areas, topics, and materials to which the employer does not object.
- CSHO must report the employer’s refusal – and the reason for it – to their Area Director, who will discuss it with OSHA’s attorneys at the Solicitor’s Office.
- Warrants

Inspection Management – Make a Plan

- Increased enforcement and penalties make inspection management more critical than ever.
- The most effective defenses are developed Before and During an OSHA inspection, not after the inspection
 - Why?
- Inspection Plan – Basic Blocking Tackling
 - 1) Point person and backup/weekend person (Murphy’s Law is that accidents will happen during the night shift and on weekends).
 - 2) Playbook for how to deal with third party representative

thank
you

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Thank You

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