

## **OSHA NOW PERMITS UNION ORGANIZER TO ACCOMPANY OSHA COMPLIANCE OFFICER DURING WALK AROUND INSPECTION IN NON-UNION FACILITY**

OSHA has literally opened the door for union organizers to enter an employer's non-union facility during an OSHA walkaround inspection. In a February 21, 2013 interpretation letter, Richard E. Fairfax, OSHA's Deputy Assistant Secretary, opined that employees without a collective bargaining agreement may designate a person affiliated with a union or community organization to act on their behalf as a walkaround representative. Mr. Fairfax opined that the OSH Act, specifically, 29 U.S.C. § 657(e), authorizes participation in the walkaround portion of an OSHA inspection by "a representative authorized by the employer's employees." Mr. Fairfax further attempts to support his opinion by citing to the underlying OSHA regulations, 29 C.F.R. § 1903.8, which explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such a representative is "reasonably necessary to the conduct of an effective and thorough inspection."

Mr. Fairfax's interpretative letter conveniently fails to acknowledge that permitting a non-employee to participate in the walkaround inspection is an exception to the express part of the regulation that provides that "[t]he representative(s) authorized by employees shall be an employee(s) of the employer." Further, Mr. Fairfax fails to acknowledge that the exception permits only those third parties with special expertise or knowledge to participate in a walkaround inspection, such as a hygienist or a safety engineer. OSHA's interpretative letter fails to clarify what special skill or knowledge a union or community organizer may bring to the inspection.

OSHA's interpretative letter also fails to clarify when an alleged "employee representative" is "authorized" by the employees. Can a minority faction of employees claim that an union organizer is their "authorized" representative when other employees may object to such individual as their authorized representative? It appears that OSHA's interpretative letter takes a very liberal interpretation of who is or can be an "authorized" employee representative. If an employer is confronted with this scenario, should it halt the inspection and provide the compliance officer the option of conducting the walkaround without the

union organizer or should the employer require OSHA to seek a warrant if the compliance officer insists that he or she will only conduct the walkaround if the union organizer is permitted to accompany the compliance officer? Obviously, these significant issues, as well as others, should be discussed with experienced legal counsel prior to permitting an OSHA compliance officer to proceed with a walkaround inspection under such circumstances.