

PUBLICATION

Employers Take Notice: OSHA and NLRB Join Forces for Workplace Safety Investigations

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On Tuesday, October 31, 2023, the Occupational Safety and Health Administration (OSHA) and the National Labor Relations Board (NLRB) published a Memorandum of Understanding (2023 MOU) to facilitate interagency cooperation and strengthen the agencies' partnership to promote safe and healthy workplaces (Oct. 31, 2023 Memorandum of Understanding). Both the Occupational Safety and Health Act (OSH Act) and the National Labor Relations Act (NLRA) protect employees' efforts to improve or bring about change to their workplaces with respect to health and safety, including specifically an employee's right to complain to management about unhealthy or unsafe work conditions. Of course, the NLRA protects employees' right to form a union, among other things.

While OSHA and the NLRB have historically engaged in cooperative efforts and have entered into prior MOUs, the 2023 MOU expands that cooperation and "strengthen[s] the agencies' partnership to promote safe and healthy workplaces through protecting worker voice." The 2023 MOU provides for outreach that would explain federal anti-retaliation protections, cross-training of staff at each agency, broader interagency communication and information sharing, and coordinated investigations and enforcement with respect to statutory violations, particularly anti-retaliation provisions. The 2023 MOU is intended to enable OSHA and the NLRB to cooperate more effectively and efficiently in order to strengthen enforcement efforts, thus bolstering protections for workers to speak out about unsafe working conditions. The NLRB contends that improved interagency collaboration will assist in minimizing compliance burdens on employers. Yet, the cross-training of the NLRB and OSHA inspectors suggests that each agency will be expanding its scope of inquiry moving forward. The 2023 MOU is just one in a series of MOUs that the NLRB has entered into as part of an "interagency coordination initiative" which is intended to "ensure that the rights of workers in this country are protected and that violations of their rights are swiftly remedied."

The initial outreach efforts, aimed at increasing awareness of the rights and remedies available under federal law, include a fact sheet jointly created by the agencies, "[Building Safe & Healthy Workplaces by Promoting Worker Voice](#)." This joint fact sheet touts that "unions can add tremendous value to health and safety programs at all stages." Interestingly, this 2023 MOU and fact sheet comes at a time when OSHA is also proposing to expand its Representatives of Employers and Employees regulation to allow a third-party representative, which would include a union representative, to accompany an inspector during the walkaround inspection. ([Proposed OSHA Walkaround Rule](#)). The current regulation limits the employee representative to individuals who are an employee of the employer being inspected. The proposed rule also clarifies that a third-party employee representative may be "reasonably necessary" to the inspection of the workplace "because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills," making it clear that the prior examples of an industrial hygienist or safety engineer are not the only third-party options. OSHA contends that the proposed change regarding employee representation will assist OSHA in obtaining necessary information about worksite conditions and hazards. However, there is significant concern that this new rule will empower unions to promote their involvement in OSHA inspections in nonunion facilities as a means of obtaining access to the facility and its employees in order to encourage union organizing. OSHA is still in the public comment phase, which ends on November 13, 2023, ([Extension of Public Comment Period](#)). Once OSHA reviews and evaluates the public comments, OSHA will finalize and

publish the final rule in the Federal Register with an effective date specified in the rule. This is generally no earlier than six months from the publication date of the proposed rule, which was August 30, 2023.

The 2023 MOU comes during a time of historically high rates of unionization and union organizing activity. Unions attempting to organize a workplace often will assist employees in filing administrative complaints with government agencies, such as OSHA, in order to garner support among workers. The 2023 MOU may indeed incentivize union organizers to file OSHA complaints in order to gain access to the workplace in furtherance of their organizing efforts.

How Should Employers Respond to These Developments?

- Employers should prepare themselves to navigate inspections implicating both NLRB and OSHA regulations.
- Employers should cross-train appropriate management on the relevant aspects of the OSH Act and the NLRA, particularly the anti-retaliation provisions contained in both.
- In the event the proposed Representatives of Employers and Employees regulation becomes a final rule without change, employers should check the credentials of anyone participating in an OSHA walkaround inspection. If an individual does not have agency credentials, request that the inspector clarify the basis for the determination that the third party is reasonably necessary to conduct a thorough and effective investigation before consenting to the third party's participation.
- It is prudent for employers to implement proactive measures to ensure positive employee satisfaction and create an environment in which employees would not be likely to sign union authorization cards.

Regardless of these changes, employers should make sure they are prepared for how they will handle an OSHA inspection, particularly since no advance notice is permitted. Employers should designate a management employee who is responsible for meeting an inspector when they arrive at the facility. The designated manager should stay with the inspector at all times, take diligent notes throughout the inspection, take photographs of anything that the inspector photographs, and potentially split samples, if applicable.

For further information regarding the 2023 MOU, the proposed changes to the Representatives of Employers and Employees regulation, or general information on how to handle an OSHA inspection, please reach out to [Louis J. Cannon Jr.](#), [Erika L. Hughes](#), or [Ashley Meredith Strittmatter](#).