



By Electronic Submission

November 13, 2023

The Honorable Douglas Parker  
Assistant Secretary  
Occupational Safety and Health Administration  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

***Re: Notice of Proposed Rulemaking, “Worker Walkaround Representative Designation Process” (RIN 1218-AD45) (88 Fed. Reg. 59825, Aug. 30, 2023)***

Dear Assistant Secretary Parker,

The National Association of Wholesaler-Distributors (“NAW”) respectfully submits these comments in response to the Occupational Safety and Health Administration’s (“OSHA”) Notice of Proposed Rulemaking (“NPRM”) with respect to proposed changes to the worker walkaround representative designation process.

### **About NAW and the Wholesale Distribution Industry**

NAW is the “national voice of wholesale distribution,” an association comprised of employers of all sizes and national, regional, state, and local line-of-trade associations spanning the \$8 trillion wholesale distribution industry that employs over 6 million workers in the United States. Approximately 35,000 enterprises with almost 150,000 places of business in all 50 states and the District of Columbia are affiliated with NAW.

Wholesale distribution is a business-to-business industry: wholesaler-distributors purchase inventory, generally from manufacturers, and sell it to their customers, generally retailers. Wholesaler-distributors buy inventory in large quantities, warehouse it, break it down into the quantities their customers want (called “breaking bulk”), and ship to those customers. Distinct from warehouse logistics companies, which move someone else’s product from seller to buyer, wholesaler-distributors purchase inventory, take title to it, then re-sell it to customers.

Most wholesaler-distributors are small- to mid-sized private companies, and, except for the largest companies, few have recognized name brands like the manufacturers and retailers which are their supply chain partners. Wholesale distribution’s role in the economy is often

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underestimated, but the industry contributes approximately one-third of U.S. gross domestic product and is essential to our economic supply chain.

### **NAW's Comments in Response to OSHA's Proposed Rule**

The wholesale distribution industry covers a wide range of products and services, which all have unique characteristics and require different considerations to ensure a safe and healthy work environment. NAW's member companies' priority is the safety and health of their employees and our members share OSHA's mission to assure a safe and healthful workplace; however, the proposed rule will do nothing to further the mission. Our comments below outline our concerns with the proposed rule. NAW requests that OSHA withdraw the proposed rule.

#### Proposed Rule Fails to Improve Workplace Safety

Under the proposed rule, OSHA seeks to amend its regulations to allow, in essence, more third-parties to enter an employer's facility and accompany the Compliance Safety and Health Officers (CSHOs) on inspections. Under current regulations, OSHA allows employees to choose a co-worker to represent them during a workplace walkaround or a non-employee third-party in limited but justifiable circumstances. In the current regulatory text, those exceptions are a third-party with safety expertise, such as an industrial hygienist or a safety engineer.<sup>1</sup> These exceptions have worked for years without issue. They show a balanced approach between ensuring that OSHA has the expertise to conduct thorough inspections and ensuring that the legitimate privacy interests of employers are protected.

However, OSHA is proposing to change the language to say, "The representative(s) authorized by employees may be an employee of the employer or a third party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why their participation is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace."<sup>2</sup>

The proposal does not discuss what is "reasonably necessary" to aid in an effective inspection; instead, it leaves it up to the CSHO's discretion. The CSHO is not likely to want to challenge the employee's choice for representation for the risk of receiving criticism. It leaves employers with no options other than to challenge the CSHO decision by going through the warrant process. The change in regulation will likely increase warrants as employers want to protect their property rights. Employers want to engage with the CSHO productively, but they

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<sup>1</sup> See, 29 CFR 1903.8.

<sup>2</sup> See, 88 Fed. Reg. 59833-59834.

must also ensure they are protecting their property and not opening themselves up to liability. The proposal will result in more delayed safety inspections, which does not serve the interest of the agency or the employer.

OSHA's proposed rule provides very little practical guidance about how the changes to the regulation would work. Instead, it states that the CSHO will decide whether the employee's third-party representative can participate in the inspection. OSHA should have provided the public with all the information to ensure it receives thoughtful comments. Instead, stakeholders must make educated guesses as to how, in practice, this would work for a CSHO. The public has no opportunity even to share concerns about how the agency ultimately decides to interpret the regulation. Lastly, this puts CSHOs in a very unfair position, as they will have additional burdens placed on them that are unrelated to their training and expertise.

Finally, the proposed rule opens non-union employers up to have a union representative or community organizer in their facility if chosen by an employee and deemed reasonable by the CSHO. The motives of the third-party individual representing the employees may have nothing to do with the OSHA inspection; instead, they may have ulterior motives, such as conducting a union organizing campaign. OSHA is supposed to be a neutral enforcement agency; however, by making these changes, the agency is putting itself into the middle of labor disputes.

#### Proposed Rule Violates Employer Property Rights, Endangers Trade Secrets and Increases Liability Risks

The proposed rule also violates employer property rights by inviting third-parties to accompany CHSOs on inspections. Generally, the public has no right to access an employer's private workplace. OSHA is risking inflicting unreasonable searches on employers without any available remedy, except forcing employers to engage in a potentially costly legal proceeding forcing OSHA to obtain a warrant for the inspection. If Congress had intended to give OSHA a broad right to force employers to allow third-party access to their property during inspections, it could have done so in the OSH Act. However, the OSH Act shows no such congressional intent.

If the third-party is allowed into the facility by the CHSO, the proposal does not address the additional liability risks it places on the employer. Different facilities have different risks, including injury, sabotage, or other risks. For example, a facility that holds food and drugs must ensure that the product is not tampered with for the safety of the general public. Many facilities require strict site access controls on who is allowed within the facility to ensure the safety of the employees inside and the general public who ultimately consumes the product. OSHA does not consider this in their proposed rule.

There are operations and trade secrets at facilities that also need to be considered. For example, in the wholesale distribution industry, employers use different types of technologies for inventory control, product racking, packaging, storage and internal transportation technologies; these are considered trade secrets companies want to protect for their competitive edge. Furthermore, even the amount of staff within a facility can be a trade secret as that can impact how they ultimately run their business and the price of the product. Should a CSHO allow a third-party that works at a competitor's warehouse into the facility, they would have access to trade secrets upon entering the facility. OSHA does not address how the CSHOs would determine if there is a trade secret present and ensure it remains confidential.

#### Proposed Rule Conflicts with the National Labor Relations Act

The proposed rule bypasses the National Labor Relations Act (NLRA), which is responsible for the procedures to establish union representation. Congress created the National Labor Relations Board to administer the rules around representation and collective bargaining, not OSHA. Under the NLRA, unions must demonstrate that a majority of the employees support representation before an employer can recognize the union as the employees' representative. However, under OSHA's proposal, a union representative could access the employer's facility without going through the necessary procedures and instead only having one employee designate them as their employee representative. The proposal infringes on employee rights to reject collective bargaining.

#### OSHA's Alternative Proposals Are Bad Policy

In the NPRM, OSHA solicits feedback on three questions around the potential modification of the "reasonably necessary" requirement.<sup>3</sup> The proposed alternatives are bad policy and exceed OSHA's statutory authority therefore OSHA should not follow any of those modifications. The proposed alternatives would create even more problems to an already problematic proposal. OSHA should not make any of the suggested changes asked in the questions and should withdraw and abandon the proposed rule as it is flawed.

#### OSHA Failed to Identify Employer Burdens and Costs

Finally, OSHA has failed to adequately and appropriately estimate employer costs and burdens. OSHA states, "this proposed rule imposes no new burden on employers and does not require them to take any action to comply."<sup>4</sup> It is disingenuous of the agency to make this statement as this proposal will certainly result in additional burdens and costs on the employer. If an employer finds out a third-party representative wants to join in the inspection

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<sup>3</sup> See, 88 Fed. Reg. 59833.

<sup>4</sup> See, 88 Fed. Reg. 59831.

process, the employer will likely seek outside counsel to ensure their property rights are not violated. Outside counsel could recommend joining the walkaround or requesting the agency get a warrant; this would be an added cost and burden on the employer. It is important to note this burden will also hurt small businesses the most as they have limited resources. OSHA is required to estimate the costs and impacts of proposed regulations; however, the agency failed to consider the additional burdens that will be placed on employers in the proposal.

### Conclusion

For all the reasons above and in the comments filed by the Coalition for Workplace Safety (CWS), NAW urges OSHA to withdraw the proposal. The proposal alters the employer's relationship with the CSHO from one of cooperation and mutual desire to maintain a safe work environment, to one of caution and concern about private property rights, trade secrets and protecting their workplace and employees from third-party individuals who might have ulterior motives. The proposal does not serve anyone that is interested in furthering workplace safety; instead, it focuses on labor organizing. It ultimately undermines the credibility of OSHA by putting it in the middle of labor disputes rather than ensuring it remains a neutral enforcement agency.

Thank you for your consideration of NAW's views.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian Wild". The signature is stylized and cursive.

Brian Wild  
Chief Government Relations Officer  
National Association of Wholesaler-Distributors