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EDUCATION AND THE WORKFORCE
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November 13, 2023

The Honorable Julie Su
Acting Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

RE: Worker Walkaround Representative Designation Process (RIN 1219-AD45, Docket No. OSHA-2023-0008)

Dear Acting Secretary Su:

I submit these comments on the proposed rule published by the Occupational Safety and Health Administration (OSHA or Agency) of the U.S. Department of Labor (DOL) to improve implementation of workers' rights under the *Occupational Safety and Health Act of 1970* (OSH Act) to have a representative of their choosing accompany OSHA inspectors during "walkarounds," or physical inspections of workplaces (Proposed Rule).¹

I support OSHA's plan to clarify in regulation workers' rights to select a third party from the community rather than a fellow employee to serve as their representative. I applaud OSHA's vision of expanding its instruction to the OSHA inspectorate about the potential positive contributions to an inspection from third-party worker representatives. Broadly speaking, I urge OSHA to expand that instruction much further. I also urge OSHA to reconsider the mistaken presumption animating both its current regulations and the Proposed Rule that OSHA should exercise a screening function over workers' right to representation. I recommend that OSHA design its regulations to maximize worker representation by paralleling the rules adopted by OSHA's sibling DOL agency, the Mine Safety and Health Administration (MSHA), pursuant to the *Federal Mine Safety and Health Act of 1977* (Mine Act).

¹ Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59,825 (Aug. 30, 2023) [hereinafter Proposed Rule]. For readability, these comments will refer to OSHA Compliance Safety and Health Officers or CSHOs as "inspectors."

I. OSHA SHOULD MAXIMIZE WORKERS' RIGHTS BY DEFAULTING TO INCLUSION OF WORKERS' REPRESENTATIVES IN WALKAROUNDS.

Instead of tentatively advising the field that there is a broader set of circumstances in which OSHA could allow employees to have third-party representatives join the inspector's walkaround, OSHA should more boldly maximize workers' rights by defaulting to accepting workers' choice of representative, whether for the walkaround or any other part of the enforcement and contest process. The alternative that I propose is not only consistent with the plain language of the OSH Act and Congress's clear intent to empower workers in an otherwise lopsided relationship with the employer but, further, is an approach that would correct a culture of fear in many workplaces, better respect workers' own assessment of their needs, and be easier for OSHA to implement.

A. The OSH Act requires OSHA to include workers' representatives on par with employers' representatives.

OSHA has interpreted section 8(e) of the OSH Act to give itself a screening function over workers' choice—but not any parallel screening function over choice by employers—to turn to a third party (that is, someone who is not a fellow employee) as their representative in the walkaround. OSHA's current regulation allows OSHA inspectors to reject a third-party employee representative if the inspector determines there is no "good cause" for the third party at all:

The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the [inspector] good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the [inspector] during the inspection.²

The Proposed Rule maintains this screening function.³

The OSH Act does not, however, grant OSHA this authority. Section 8(e) directs that "a representative of the employer and a representative authorized by his employees *shall* be given an opportunity to accompany" an inspector during a walkaround.⁴ It is well established that the word *shall* is used to express a mandatory duty, in contrast with the permissive and discretionary authority expressed by the alternative auxiliary verb *may*.⁵ Had Congress intended to grant

² 29 C.F.R. § 1903.8(c).

³ Proposed Rule, *supra* note 1, at 59,830 ("The proposed revisions to paragraph (c) do not change the existing precondition that the [inspector] must determine that any third-party employee representative's participation is reasonably necessary to the conduct of an effective and thorough inspection.").

⁴ OSH Act § 8(e) (emphasis added).

⁵ 73 AM. JUR. 2D *Statutes* § 135.

OSHA this screening function, it would have made OSHA's discretion explicit by using the word *may*.

The source of the error is likely a misreading of a key sentence in section 8(e). The first sentence of the subsection provides, in relevant part, the following:

Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace ... for the purpose of aiding such inspection.⁶

OSHA appears to construe the first clause ("Subject to regulations issued by the Secretary") and last clause ("for the purpose of aiding such inspection") as allowing OSHA to grant or withhold workers' right to representation based on the Agency's determination of whether a representative would contribute some knowledge or skill that would aid the inspection. This reading ignores the mandatory nature of the word *shall* and effectively rewrites it as *may*.

This misreading violates the "cardinal principle of statutory construction that a statute should, upon the whole, be construed so that, if possible, no ... word is rendered superfluous, void, or insignificant."⁷ OSHA should instead proceed from the assumption that "[e]ach word, phrase, or expression in a statute must be read as if it were deliberately chosen."⁸ Accordingly, a proper reading of this sentence would give meaning to not just those two clauses but also the mandatory duty to give employee and employer representatives an opportunity to join the walkaround. OSHA must, therefore, interpret section 8(e) as requiring the Agency to offer employees' representatives the opportunity to accompany inspectors during a walkaround, regardless of any individual inspector's opinion about whether the inspector's work will be aided by the presence of the representative. OSHA certainly retains the ability to set rules for the conduct of the walkaround for the representatives of both employers and employees, but the opportunity to participate must be given.

Moreover, OSHA must refrain from developing regulations that treat employers and employees differently. In neither current regulations nor the Proposed Rule does OSHA assert any authority to subject an *employer's* decision to elect outside representation to the "good cause" screening it applies to *employees'* choice. Section 8(e) does not, however, distinguish between employees' and employers' rights. Instead, it clearly states that *both* "a representative of the employer *and* a representative authorized by his employees shall be given an opportunity" to join the walkaround.⁹ Congress granted workers a right equal to that of their employer to have representation on a walkaround; OSHA should not subvert Congress's intent by making workers' right (and only their right) to representation subject to an inspector's whims.

⁶ OSHA Act § 8(e).

⁷ *Id.* § 98 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 122 S. Ct. 441 (2001)).

⁸ *Id.* § 110.

⁹ OSH Act § 8(e) (emphasis added).

B. A default rule for including workers' representatives would improve inspections by fostering workers' trust in the process.

OSHA signals in the Proposed Rule that workers have valuable information to offer inspectors during walkarounds that will improve the effectiveness of an inspection.¹⁰ Given the fear that many workers have of participating openly in improving their conditions of employment and OSHA's longstanding struggles to implement anti-retaliation protections effectively, OSHA would realize its objective of improving inspections by adopting rules on representation rights that workers could predictably rely upon.

The drafters of the OSH Act recognized the risks that workers face in any effort to improve their conditions of employment. In fact, they wrote anti-retaliation protections into the OSH Act because they feared that workers acting to improve their health and safety would face the risk of not only adverse employment actions but also actual physical violence.¹¹ The vision of violent backlash against workers may seem to be a relic of history, but the use of force and even outright enslavement are still a feature of some workers' employment in the 21st Century.¹²

Fear stalks the workplace even where employers are not so extreme. According to a 2014 study, 43 percent of workers surveyed who experienced issues with workplace conditions did not report to OSHA because of a "fear of retaliation and a belief that nothing will be done."¹³

¹⁰ Proposed Rule, *supra* note 1, at 59, 829-59, 830.

¹¹ Taylor v. Brighton Corp., 616 F.2d 256, 260-62 (6th Cir. 1980).

¹² See, e.g., Gavin Off & Aaron Sánchez-Guerra, *Migrant Farmworkers Help NC Farms Survive. But Some End Up Abused, Lawsuits Say.*, CHARLOTTE OBS. (Oct. 12, 2023), <https://www.charlotteobserver.com/news/state/north-carolina/article280018484.html>; Tina Vásquez, *There Is Slavery in the Fields of North Carolina*, PRISM REPORTS (Aug. 29, 2023), <https://prismreports.org/2023/08/29/slavery-fields-north-carolina-h-2a/>; Emma Ockerman, *Migrant Woman Says She Was Repeatedly Raped in 'Modern-Day' Slavery Ring in Georgia*, VICE (Apr. 5, 2022), <https://www.vice.com/en/article/qjb5jx/georgia-modern-day-slavery-rape>; Emma Ockerman, *Farm Workers Were Trafficked and Threatened With a Gun in South Carolina, Feds Say*, VICE (Jan. 21, 2022), <https://www.vice.com/en/article/m7v38x/south-carolina-balcazar-human-trafficking-farm-workers>; *Growing Wave of Brutal Modern-Day Slavery Operations in Agriculture Prompts Renewed Calls for Expansion of Fair Food Program*, COAL. OF IMMOK. WRKS. (Jan. 11, 2022), <https://ciw-online.org/blog/2022/01/growing-wave-of-brutal-modern-day-slavery-operations-in-agriculture-prompts-renewed-calls-for-expansion-of-fair-food-program/>; Lautaro Grinspan, *'This Has Been Happening for a Long Time': Modern-Day Slavery Uncovered in South Georgia*, ATL. J.-CONST. (Dec. 3, 2021), <https://www.ajc.com/news/this-has-been-happening-for-a-long-time-modern-day-slavery-uncovered-in-ga/SHBHTDDTTBG3BCPSVCB3GQ66BQ/>; U.S. Dep't of Justice, *Human Smuggling, Forced Labor Among Allegations in South Georgia Federal Indictment*, DOJ.gov (Nov. 22, 2021), <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment>; Jessica Garrison, Ken Bensinger & Jeremy Singer-Vine, *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BUZZFEED NEWS (July 24, 2015), <https://www.buzzfeednews.com/article/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f#.gbow33exN>; Ben Montgomery, *Florida Farm Workers Tell How Drugs, Debt Bind Them in Modern Slavery*, TAMPA BAY TIMES (May 12, 2012), <https://www.tampabay.com/news/publicsafety/crime/florida-farm-workers-tell-how-drugs-debt-bind-them-in-modern-slavery/1229662/>; Katrina vanden Heuvel, *The Nation: Florida's Modern Slavery ... The Museum*, NPR (Mar. 29, 2010), <https://www.npr.org/templates/story/story.php?storyId=125296794>. See also generally *Anti-Slavery Program*, COAL. OF IMMOK. WRKS., <https://ciw-online.org/slavery/> (last viewed Nov. 7, 2023).

¹³ Emily A. Spieler, *Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act*, 32 ABA J. LAB. & EMP. L. 1, 3 n.11 (citing Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1073 (2014)).

Unfortunately, those fears are well-founded. Of the almost two dozen whistleblower laws that OSHA administers,¹⁴ most complaints the Agency receives are of violations of the anti-retaliation protections of the OSH Act itself.¹⁵ In FY 2022, claims of retaliation for exercising rights under the OSH Act amounted to 77 percent of filed whistleblower claims.¹⁶

The OSH Act's protection against retaliation for speaking out about health and safety issues is weak policy that is weakly implemented. Compared to "the myriad of federal whistleblower and anti-retaliation laws," writes Professor Emily Spieler, the OSH Act's anti-retaliation provision "stands out ... as an extraordinarily weak statute."¹⁷ Among its deficiencies are a narrow 30-day statute of limitations, the lack of a "kick-out" provision enabling workers to pursue their own claims in courts after exhausting administrative remedies, and the Solicitor of Labor's option to simply drop a case it opts not to pursue, leaving workers without recourse.¹⁸ Settlements are typically small, fail to fully compensate workers for lost wages, and lack enough heft to disincentivize employers from retaliating against workers.¹⁹ The Agency has been criticized multiple times over a span of decades for insufficient management of the whistleblower program, such as failing to conduct thorough investigations.²⁰ OSHA took steps during the Obama Administration to improve its handling of retaliation complaints,²¹ but the program is understaffed and—even before the COVID-19 pandemic—has long struggled with a backlog of cases.²² Recent reforms, such as implementing a whistleblower complaint intake pilot program

¹⁴ Occ. Safety & Health Admin., *Whistleblower Protection*, WHISTLEBLOWERS.GOV, <https://www.whistleblowers.gov/about-us> (last viewed Nov. 7, 2023).

¹⁵ *Id.* at 6 ("Notably, section 11(c) cases constituted 61% of all whistleblower cases docketed by OSHA over the most recent ten-year period, dwarfing the number of complaints filed under each of the other twenty-one whistleblower statutes within OSHA's investigatory jurisdiction.")

¹⁶ REBECCA REINDEL & M.K. FLETCHER, AFL-CIO, *DEATH ON THE JOB: THE TOLL OF NEGLECT* 92 (32d ed. 2023)

¹⁷ Spieler, *supra* note 13, at 4.

¹⁸ *Id.* at 5-7; REINDEL & FLETCHER, *supra* note 16, at 93-94.

¹⁹ Spieler, *supra* note 13, at 10.

²⁰ OFF. OF INSP. GEN., U.S. DEP'T OF LAB., 02-15-202-10-105, *OSHA NEEDS TO CONTINUE TO STRENGTHEN ITS WHISTLEBLOWER PROT. PROGRAMS* (2015), <https://www.oig.dol.gov/public/reports/oa/2015/02-15-202-10-105.pdf>; GOV'T ACCOUNTABILITY OFFICE, GAO-10-722, *WHISTLEBLOWER PROT.: SUSTAINED MANAGEMENT ATTENTION NEEDED TO ADDRESS LONG-STANDING PROGRAM WEAKNESSES* (Aug. 17, 2010); OFF. OF INSP. GEN., U.S. DEP'T OF LAB., 02-10-202-10-105, *COMPLAINANTS DID NOT ALWAYS RECEIVE APPROPRIATE INVESTIGATIONS UNDER THE WHISTLEBLOWER PROTECTION PROGRAM* (2010), <http://www.oig.dol.gov/public/reports/oa/2010/02-10-202-10-105.pdf>; OFF. OF INSP. GEN., U.S. DEP'T OF LAB., 05-97-107-10-105, *WHISTLEBLOWER PROTECTION UNDER SECTION 11(C) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT (1997)*, https://www.oig.dol.gov/public/reports/oa/pre_1998/05-97-107-10-105s.htm.

²¹ Spieler, *supra* note 13, at 15-17.

²² David Sparkman, *Backlog Hinders OSHA's Handling of COVID-19 Complaints*, EHS TODAY (Oct. 2, 2020), <https://www.ehstoday.com/covid19/article/21143644/backlog-hinders-oshas-handling-of-covid19-complaints>; David Sparkman, *OSHA Whistleblower Liability Expands for Employers*, EHS TODAY (Mar. 24, 2020), <https://www.ehstoday.com/standards/osha/article/21126904/osha-whistleblower-liability-expands-for-employers>; James L. Curtis & Meagan Newman, *Hoping to Reduce the Backlog, OSHA Announces ADR Program for Whistleblower Claims*, WKPL. SAFETY & ENVTL. L. ALERT BLOG (Oct. 8, 2012), <https://www.environmentalsafetyupdate.com/2012/10/hoping-to-reduce-the-backlog-osha-announces-adr-program-for-whistleblower-claims/>.

and making the complaint process more accessible and user-friendly, are starting to improve the backlog, but it is still substantial.²³

Workers of color are significantly more likely than white peers to report being too worried about retaliation to address safety and health hazards, and Black workers specifically were twice as likely as white workers in a 2020 survey to report experiencing possible safety-related retaliation.²⁴ Formerly-incarcerated workers may fear retribution that could affect their parole or losing one of few jobs available to returning citizens.²⁵ Immigrant workers are loath to report injuries or speak up about health and safety,²⁶ and unauthorized immigrants have particular reason to be wary of deceptive practices related to immigration enforcement.²⁷

Given these well-founded reasons for fear of speaking up on occupational safety and health in the workplace, workers may be reluctant not only to step up to serve as a representative for their peers but also to be forthcoming about issues when someone purporting to be an OSHA inspector arrives to the workplace. A trusted third party can ease those fears and signal to workers that it is safe for them to provide candid, unfiltered information to OSHA's inspectors.

²³ Assistant Secretary of Labor for Occupational Safety and Health Doug Parker recently testified that, in a span of seven months, these efforts reduced the average age of pending cases by 36 percent and decreased the total number of pending cases by 18 percent in 2023. Statement of Douglas L. Parker, Asst. Sec'y, Occ. Safety & Health Admin., U.S. Dep't of Lab., Before the Subcomm. on Wrkf. Prots., Comm. on Educ. & Wrkf., U.S. House of Reps. 3 (Sept. 27, 2023), https://democrats-edworkforce.house.gov/imo/media/doc/douglas_lparkertestimony.pdf.

²⁴ IRENE TUNG & LAURA PADIN, NAT'L EMP. L. PROJ., SILENCED ABOUT COVID-19 IN THE WORKPLACE (2020), <https://www.nelp.org/publication/silenced-covid-19-workplace/>; Deborah Berkowitz & Shayla Thompson, *OSHA Must Protect COVID Whistleblowers Who File Complaints*, NAT'L EMP. L. PROJ. (Oct. 8, 2020), <https://www.nelp.org/publication/osha-failed-protect-whistleblowers-filed-covid-retaliation-complaints/>.

²⁵ Michael Sainato, *Inside New York's 'Body Shops' That Exploit Ex-Prisoners to Drive Down Wages*, THE GUARDIAN (Sept. 3, 2021), <https://www.theguardian.com/business/2021/sep/03/former-prisoners-new-york-city-labor-brokers-construction-industry>; Amy Martyn, *This Company Gives Formerly Incarcerated People a Second Chance, But Workers Face On-The-Job Dangers*, NBC NEWS (May 8, 2021), <https://www.nbcnews.com/news/us-news/company-gives-formerly-incarcerated-people-second-chance-workers-face-job-n1266718>.

²⁶ HUM. RTS. WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING": WORKERS' RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS 46 n.21 (2019), https://www.hrw.org/sites/default/files/report_pdf/us0919_web.pdf.

²⁷ See, e.g., Jordan Valinsky, *A Restaurant Must Pay Workers \$140,000 After Allegedly Hiring a Fake Priest to Extract Confessions of Workers' 'Sins'*, CNN (June 20, 2023), <https://www.cnn.com/2023/06/20/business/california-restaurant-fake-priest-fine/index.html> ("Under oath, an employee of Taqueria Garibaldi explained how the restaurant offered a supposed priest to hear their workplace 'sins' while other employees reported that a manager falsely claimed that immigration issues would be raised by [DOL]'s investigation..."); Steven Barnes, *Federal Suit Says Former Restaurateur Tried to Get Ex-Employee Deported*, TIMES-UNION (Sept. 6, 2022), <https://www.timesunion.com/news/article/In-fight-with-Albany-restaurant-cook-is-seized-14371045.php>; Chris Bragg, *Amid Wage Fight With Guilderland Restaurant, Cook Is Seized by ICE Agents*, TIMES-UNION (Aug. 23, 2019), <https://www.timesunion.com/news/article/In-fight-with-Albany-restaurant-cook-is-seized-14371045.php>; Andrew Khouri, *More Workers Say Their Bosses Are Threatening to Have Them Deported*, L.A. TIMES (Jan. 2, 2018), <https://www.latimes.com/business/la-fi-immigration-retaliation-20180102-story.html>; Conrad Wilson & Phoebe Flanigan, *ICE Confirms Portland Officials' Fears About Immigration Arrests at Courthouse*, ORE. PUB. BROAD. (Jan. 30, 2017), <https://www.opb.org/news/article/portland-ice-immigration-arrests-multnomah-county-courthouse/>; Steven Greenhouse, *Immigration Sting Puts 2 U.S. Agencies at Odds*, N.Y. TIMES (July 16, 2005), <https://www.nytimes.com/2005/07/16/politics/immigration-sting-puts-2-us-agencies-at-odds.html>.

C. A default rule would best protect workers' right to representation.

Even if OSHA persists in the mistaken interpretation of § 8(e) that it can screen out workers' choice of representative based on the Agency's determination of whether a third party would aid the inspection, OSHA should consider the obvious—that workers turn to third parties when workers themselves decide that they need them. OSHA inspectors will never have the time, much less the ability, to fully investigate the myriad of concerns animating such a decision. Moreover, there is the real risk that inspectors could arbitrarily and capriciously deny worker representatives a role in not just the inspections but other parts of the enforcement process (as, for example, in the case discussed by the Governmental Accountability Project in a letter attached to these comments). OSHA should respect workers' decision about their own needs for additional support and representation during the inspection by promulgating a rule that defaults to offering their chosen representative the opportunity to participate in the walkaround.

II. WORKERS ARE INCREASINGLY TURNING TO SOURCES OF SUPPORT IN THEIR COMMUNITIES.

The Proposed Rule is a timely intervention. Workers are increasingly turning to sources of support in their communities for issues related to workplace injustice, including occupational hazards.

Although representation of workers is most associated with unions, an array of “wholly new organizational forms”²⁸ has emerged in the last 20 years or so (even longer for some such groups) to focus on the workplace as a site of intervention for social, economic, and environmental justice. Perhaps the best known of the newer form of workers' rights organizations is the *worker center*, a category of organization taking a variety of forms but tending to be locally based in character, often providing some supportive services such as skill training or legal aid, and frequently using community organizing strategies to protest in support of workers reporting wage theft or hazardous workplaces.²⁹ Worker centers often align in networks, the hubs of which sometimes supply technical assistance and expertise to their affiliates.³⁰

Somewhat related are *interfaith worker justice groups*, or “coalitions, committees, and community groups of interfaith worker advocates, congregational members, and clergy” focused on remedying workplace injustice.³¹ Some organizations blend the role of interfaith worker justice group and worker center.³²

²⁸ Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP. ON POL. 324, 325 (2016).

²⁹ See JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006); Janice Fine, *Worker Centers: Entering a New Stage of Growth and Development*, NEW LAB. F., Fall 2011, at 45 (2011).

³⁰ Some prominent examples include the National Day Laborers Organizing Network, the website of which is at <https://ndlon.org/>; the Restaurant Opportunities Centers United, at <https://rocunited.org/>; and the National Domestic Workers Alliance, at <https://www.domesticworkers.org/>.

³¹ See, e.g., *Interfaith Groups*, INTERNET ARCHIVE WAYBACK MACHINE: INTERFAITH WORKER JUSTICE, <https://web.archive.org/web/20150206063434/http://www.iwj.org/network/interfaith-groups> (Feb. 6, 2015).

³² A good example is Arise Chicago, for which more information is available at <https://www.arisechicago.org/>.

Less heralded is an emerging cohort of what might be called *employment law programs*. Typically founded in the aftermath of restrictions on legal aid funded by the Legal Services Corporation (LSC) that prohibited class or collective action litigation and cases brought by unauthorized migrants and most guest workers (save for H-2A workers and the subset of H-2B workers in forestry), a new generation of legal aid organization outside of the LSC orbit is bringing individual and class cases for workers' rights.³³ They may be standalone law and policy organizations,³⁴ programs in multi-issue poverty law groups,³⁵ or legal departments of multi-strategy groups engaged broadly in workers' rights and economic justice.³⁶ Some might be called "movement-focused," standalone organizations or legal arms of worker centers that provide movement lawyering to worker centers and their clients.³⁷ Still others focus on specific populations, such as guest workers,³⁸ or particular issues, such as whistleblower protections or issues affecting work-life balance.³⁹

As these groups proliferate, OSHA is likely to encounter all of them in the field. A default rule maximizing workers' right to have the representative of their choice in walkarounds would pose no problem, but for as long as OSHA maintains a screening function, OSHA will at least need to educate its field staff on the kinds of third-party organizations that may be tapped by workers as their representatives and the kinds of positive contributions their representational services will provide an inspection.

At a minimum, OSHA should provide specific instructions in both the final rule and the Field Operations Manual that it will always accept workers' lawyers (whether hired from a traditional firm or an employment law program) as their representatives in all phases of OSHA inspection, enforcement, and contest. People have sought representation from lawyers in this country for far longer than they have sought representation by unions, and the legitimacy of such representation should not be questioned. Especially in light of the many reasons for fear discussed above that workers may have when seeking to challenge unsafe and unhealthy workplaces, the rock-solid privilege afforded the lawyer-client relationship in the American legal order means that there is probably no representative workers can trust more than their lawyer. Unfortunately, as the case in the attached letter from the Government Accountability Project illustrates, OSHA has at times

³³ A leading example is the Northwest Workers' Justice Project, founded by D. Michael Dale to meet unmet legal needs of immigrant and contingent workers in Oregon. See *Fellows: D. Michael Dale*, Echoing Green, <https://fellows.echoinggreen.org/fellow/d-michael-dale/> (last visited Nov. 17, 2023). See also *Northwest Workers' Justice Project*, <https://nwjp.org/> (last viewed Nov. 17, 2023).

³⁴ An interesting example is Towards Justice, the Denver-based organization working on cases at the local, state, and national level. For more information, see <https://towardsjustice.org/>.

³⁵ One such example is the Workplace Law Project at the Baltimore-based Public Justice Center. For more information, see <https://www.publicjustice.org/en/workplace-justice/>.

³⁶ See, e.g., *Legal Services*, MAKE THE ROAD NY, <https://maketheroadny.org/program/legal-services/> (last viewed Nov. 7, 2023).

³⁷ A key example is the Boston-based group Justice at Work. For more information, see <https://jatwork.org>.

³⁸ Leading examples are Centro de los Derechos del Migrante, the website of which is at <https://cdmigrante.org/>, and Farmworker Justice, at <https://www.farmworkerjustice.org/>.

³⁹ Examples might include the Government Accountability Project, for which more information is available at <https://www.whistleblower.org/>, and A Better Balance, at <https://www.abetterbalance.org/>.

abused its current discretion to ignore the representational role of workers' lawyers. OSHA should ensure that this mistake is never made again.

III. OSHA SHOULD DISMISS ARGUMENTS AGAINST A RULE THAT MAXIMIZES WORKERS' RIGHT TO REPRESENTATION.

It is very likely that OSHA will hear from employers and industry associations opposing the Proposed Rule on the grounds that even a modest broadening of acceptance of third-party worker representatives joining walkarounds will somehow open the door to unionization or some other curbing of employers' otherwise unbridled control over the workplace. Among other arguments, I anticipate that OSHA will hear arguments that it is intruding on territory belonging to the National Labor Relations Board or that unions will exploit the third-party representational role to organize workplaces. Neither argument is credible, and I urge OSHA to dismiss them.

A. The OSH Act does not cede jurisdiction on these issues to the National Labor Relations Board.

I anticipate OSHA will face an argument that section 4 of the OSH Act, which preempts OSHA jurisdiction over "working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health,"⁴⁰ entrusts any question of worker representation to the National Labor Relations Board rather than OSHA.

Courts disposed of this argument long ago in cases involving worker representation under the Mine Act. The Mine Act grants miners the right to have their representative join an MSHA inspection, using language that in all key respects is the same as the relevant provision of the OSH Act:

OSH Act § 8(e)

Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his

Mine Act § 103(f)

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection.... Where there is no authorized miner representative,

⁴⁰ OSH Act § 4.

authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine.

Two federal appeals courts have affirmed workers' rights under the Mine Act to select a non-employee third party as their representative for MSHA walkaround—and held that this right does not conflict with the *National Labor Relations Act* (NLRA).⁴¹ In fact, the D.C. Circuit Court affirmed the value of third-party representatives by emphasizing that nonemployee representatives can provide “valuable safety and health expertise, use their knowledge of other mines to spot problems and suggest solutions, and take action without the threat of pressure from the employer.”⁴² A third court has added that a labor organization under the NLRA is not precluded from serving as a miner's representative under the Mine Act.⁴³ In other words, DOL has jurisdiction to recognize workers' representatives no matter what their status is under the NLRA.

B. A rule that maximizes workers' right to representation cannot be exploited for organizing activity or harassment.

I anticipate that OSHA will also likely hear an argument that it must restrict workers' rights to have a third party represent them in the walkaround because such a third party could be a union—and the union could use the opportunity somehow to engage in labor organizing or disruptive activities. I urge OSHA to dismiss any such argument.

Union organizing is a time-consuming process that cannot happen on the spur of the moment in the middle of a walkaround. Legendary labor organizer Jane McAlevey explains that organizing is a time-consuming process:

How do union organizers help workers beat [the] odds [against them]? There are two key methods that animate two key principles behind any successful union drive and any union development. The methods are leader identification and structure tests, and the principles are democracy and participation. Leadership identification is grounded in the belief that natural leaders already exist among workers, long before organizers or activists get involved. These natural, or organic, leaders have no title, but they are people whom other workers trust, whom they turn to for help when they aren't sure how to get something done. Structure tests are mini-campaigns designed to help assess the level of worker participation by work area, be it a unit in a hospital or a shift at a fast-food restaurant.

⁴¹ *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275 (10th Cir. 1995); *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257 (D.C. Cir. 1994).

⁴² *Kerr-McGee*, 40 F.3d at 1263.

⁴³ *DOL v. Wolf Run Mining Co.*, 452 F.3d 275 (4th Cir. 2006).

A good organizer must be able to recognize organic leaders. Fortunately, there is a tried-and-true method for identifying these leaders, and though it's not complicated, it does require good listening skills and a lot of patience and discipline. To identify leaders effectively, an organizer has to ask most of the workers by work area variations of the same question, which is: Who is the worker you turn to when you need help understanding something? There are more questions, but they are all a variation of this single question. Once an organizer hears the same name over and over, they will then use a structure test to assess whether this worker really is the worker that most everyone else relies upon and trusts....

Structure tests are always done by hand and face-to-face, not using online tools, because, in addition to assessing the capacity of workers to get their co-workers to do something, they also help build solidarity because they force workers to engage in face-to-face conversations.⁴⁴

The one-on-one conversations that McAlevy explains are so critical to labor organizing require more time than can be snatched from stray moments in a walkaround. First, the organizer should connect with the employee prior to meeting to make sure they have similar expectations and remind them of their shared expectations at the start of their one-on-one.⁴⁵ Ideally, the conversations should last thirty to sixty minutes, to make sure the organizer and employee have enough time to connect and secure commitment.⁴⁶ Next, effective one-on-one conversations require the organizer to ask questions to understand the employee's story, values, and resources that may be relevant to the shared purpose.⁴⁷ During the one-on-one, the organizer should also share resources and coach the employee through any mentioned challenges.⁴⁸ The meeting ends with parties making decisions about whether to collaborate.⁴⁹ Such an intensive process could not realistically occur during an OSHA inspection. It is difficult to imagine how a third party representing workers in a walkaround could engage in these in-depth organizing conversations undetected.

CONCLUSION

OSHA has wisely recognized in the Proposed Rule that it should advise its inspectorate to recognize the value that a third party put forward as the workers' walkaround representative can add to an inspection. Instead of the small proposed change in which OSHA would continue to judge each time (potentially inconsistently or even arbitrarily) whether to allow a third party as

⁴⁴ Jane McAlevy, *Why Unions Matter*, JANEMCALEVY.COM, <https://janemcalevey.com/writing/why-unions-matter-excerpt-from-a-collective-bargain-unions-organizing-and-the-fight-for-democracy/> (excerpting JANE MCALEVY, A COLLECTIVE BARGAIN: UNIONS, ORGANIZING, AND THE FIGHT FOR DEMOCRACY (2021)).

⁴⁵ Leading Change Net., Marshall Ganz & New Org. Inst., *Organizing: People, Power and Change—The One on One 1:1 Meeting*, THE COMMONS: SOCIAL CHANGE LIBRARY, <https://commonslibrary.org/organizing-people-power-and-change-the-one-on-one-meeting/> (last visited Oct. 26, 2023).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

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workers' walkaround representative but have slightly broader regulatory language describing possible contributions such a representative could provide, OSHA should more boldly rewrite the Proposed Rule to accept workers' choice of representative by default and maximize workers' rights to representation of their own choosing throughout the inspection, enforcement, and contest processes. In light of the parallel language used in the OSH Act and the Mine Act, OSHA should simply adopt the regulations MSHA implements to maximize miners' rights to representation of their choosing. Doing so will promote worker health and safety by fostering workers' trust in being forthcoming during the inspection process.

Sincerely,



ROBERT C. "BOBBY" SCOTT

Ranking Member