November 13, 2023

Douglas J. Parker
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave. NW
Room S-3502
Washington, DC 20210

RE: Notice of Proposed Rulemaking, Worker Walkaround Representative Designation Process, RIN 1218-AD45

Dear Mr. Parker:

HR Policy Association ("HR Policy" or "Association") welcomes the opportunity to submit the following comments for consideration by the Occupational Safety and Health Administration ("OSHA") in response to the published Notice of Proposed Rulemaking ("NPRM," "Proposed Rule," or "Rule") and Request for Comments regarding the worker walkaround representative designation process under the Occupational Health and Safety Act ("OSH Act" or Act").[1]

HR Policy is a public policy advocacy organization that represents the most senior human resources officers in nearly 400 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The Association's member companies are committed to ensuring that laws and

[1] 88 Fed. Reg. 59825.

policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy, and submits the following comments for review by OSHA.[2]

Association members are wholeheartedly dedicated to ensuring the safety of their employees in the workplace and adhering to the OSH Act. The recent global pandemic unequivocally showcased the willingness of large employers, including Association members, to allocate all necessary resources to guarantee the well-being of their workforce. The Association is accordingly fully supportive of OSHA's mission to ensure the safety of American workplaces, and similarly supports thoughtful and measured regulations and actions in furtherance of this mission.

OSHA's proposed walkaround rule is neither thoughtful nor measured, nor would it contribute to OSHA's mission of ensuring safe workplaces – in fact, in practice the proposed rule has the potential to threaten workplace safety more than preserve it. Perhaps OSHA is itself aware of this inconvenient fact; nowhere in the entirety of the Administration's Proposed Rule does OSHA articulate any workplace safety basis for its promulgation – indeed, nowhere in the Proposed Rule does it explain how the Rule would increase or ensure workplace safety whatsoever. For these reasons and those articulated further below, the Association strongly urges OSHA to rescind the Proposed Rule in its entirety.

- **The Proposed Rule inhibits – rather than augments – employers' ability to manage workplace safety.**

OSHA is tasked with ensuring safety across American workplaces and promulgating rules and guidance to that effect. The Proposed Rule, however, is likely to have an opposite net effect. As mentioned above, in its Proposed Rule, OSHA provides no substantial evidence that it will

[2] The Association is also a signatory to comments submitted by the Coalition for Workplace Safety, and endorses all arguments put forth in such comments. As articulated in those comments, the Association also asserts that the Proposed Rule is beyond the scope of OSHA's legal authority.

augment (or even uphold) workplace safety. Indeed, the only mention of workplace safety within the context of the Proposed Rule and its ostensible purpose involves an example of how having an interpreter accompanying an CSHO on an inspection could be necessary for a workplace with a predominantly non-English speaking employee population.[3] OSHA provides no other examples or evidence for how its Proposed Rule ensures or improves workplace safety.

By contrast, the Proposed Rule has the potential to jeopardize workplace safety in several ways. By placing no limit on the number or manner of third-party representatives present for an inspection, nor on how many employees may request different representatives, nor provide employers any avenue for screening such representatives ahead of time (nor remove them if they pose a safety risk), the Proposed Rule significantly inhibits employers' ability to manage workplace safety. Having an unknowable and uncontrollable stream of third parties in the workplace is an obvious safety risk. This is particularly true for many factory or manufacturing settings with hazardous work areas in which all personnel must be continuously accounted for to ensure the safety of all involved.

While CSHOs may be well experienced with common workplace hazards and how to remain safe while conducting inspections, third parties are unlikely to have such experience. The Proposed Rule provides zero rules or guidance on any training or protocols third parties must undergo to accompany an inspection, nor any guidance whatsoever on how to ensure their safety. The Proposed Rule introduces a variety of new risks by allowing unlimited third-party access to potentially hazardous workplaces, but fails to provide any frameworks for how such risks will, could, or should be mitigated. As such the Proposed Rule could, in practice, increase safety risks

[3] *Id*. at 59830.

rather than ensure workplace safety, the Association strongly urges the Administration to rescind its rulemaking.

- **The Proposed Rule places no restrictions on the number, manner, or conduct of third parties that may accompany an inspection at significant risk to employer operations.**

As briefly mentioned above, the Proposed Rule allows for any number, and (essentially) any manner of third party to accompany CSHO inspectors on site visits. Nothing in the Rule limits the number of third parties an employee may request, nor the number of employees who may make such requests. Further, any third party is permitted per the Rule, provided they have "knowledge, skills, or experience with particular hazards or conditions in the workplace or similar workplaces, as well as any relevant language skills."[4] This extremely broad language – which in fact is not even a full requirement ("the third party *should* have...")[5] – places little if any actual restrictions on the type of third party that may accompany an inspection.

It is entirely up to the discretion of the CSHO to determine whether a third party qualifies under the Rule. Meanwhile, the employer, the primary custodian of workplace safety, is given no say in the process under the Rule. The unlimited presence of third parties during site visits presents several safety risks, as already outlined above. The Association urges OSHA to rescind its rulemaking on this basis, or, at the very least, provide meaningful guardrails on the scope of third-party access to inspections. At minimum, third parties should be limited to no more than one person per inspection and should have to meet a minimum set of objectively developed workplace safety requirements that is more robust than what is contemplated in the Proposed Rule (and more relevant to its intended purpose).

[4] *Id*. at 59830.
[5] 88 Fed. Reg. 59825, 59830 (emphasis added).

Further, the rule provides no code of conduct for third parties on site visits. Thus, not only are there no limits on the number or manner of third parties, but there are no limits on the scope of permitted activities they may undertake during such site visits. Third parties may seek to engage with employees on the job for a variety of reasons during inspections, including for union organizing purposes, in a manner that may significantly interfere with employer operations. Again, because such unlimited access presents several risks to employer operations, the Association urges the Administration to abandon its rulemaking. At minimum, any final rule should set restrictions on the scope of permitted activities during inspections by third parties – such activities should be strictly limited to assisting in the completion of the inspection for purposes of OSH Act compliance.

- **The Proposed Rule fails to address any potential liability stemming from third party conduct.**

As discussed above, the introduction of unlimited third-party access to employer property during CSHO site visits presents several safety and operational risks. However, the Proposed Rule fails to address who exactly would be liable should any such risks be realized and injury or property damage were to occur. Moreover, the Proposed Rule fails to articulate whether OSHA or the employer will be primarily responsible for the safety of third parties in the first instance. The Rule is similarly silent on whether employers are expected or required to provide safety or protective equipment to third parties or whether that will be OSHA's responsibility. The number of unanswered safety and liability questions associated with the Proposed Rule is extremely problematic for employers and could result in significant expense for employers as a result.

Furthermore, having unlimited third-party access in the workplace introduces a range of potential threats and concerns for employees as well. It will be exceedingly challenging for employers to predict third party behavior, qualifications, or adherence to safety protocols,

making it difficult to ensure a secure and productive workplace. This unpredictability can lead to safety issues, disruptions, and complications for the regular workforce, as well as raise questions about liability and responsibility in the event of incidents or accidents. As a result, employers should be engaged and informed when managing the presence of third parties in the workplace, which requires careful consideration and a proactive approach to safeguarding the well-being and interests of all employees. The Proposed Rule discourages employer cooperation and seemingly ignores employer property rights and responsibilities to ensure workplace safety.

- **The Proposed Rule inappropriately weakens protections for employer intellectual property and trade secrets.**

Employers may house or use proprietary information at facilities subject to OSHA inspection. Such information could include specialized equipment, proprietary manufacturing processes, production methods, or other trade secrets that contribute to an employer's competitive advantage. Again, as discussed above, the Proposed Rule allows essentially unlimited third-party access to employer facilities and does not place any restrictions whatsoever on the conduct of such third parties while they are accessing employer property. Accordingly, third parties could gain valuable insight into an employer's intellectual property and/or trade secrets and record the same while on a site visit, at significant risk to the employer.[6] While the OSH Act itself provides for some trade secret protections, the Proposed Rule does not, nor does it provide any guidance on how the two may conflict with each other or how to solve such conflicts.

[6] Boeing national security NLRB thing

- **The Proposed Rule is a clear attempt to increase union access to employer property under the guise of workplace safety.**

As discussed above, while OSHA is tasked with setting workplace safety standards and ensuring the safety of American workplaces, the Proposed Rule offers no meaningful justifications on how the Rule will achieve any of these objectives. The Biden Administration has made it no secret that it is using all possible levers of executive branch power as part of its "All of Government" approach to augment union density across the country.

By allowing unlimited numbers of third parties to accompany OSHA inspections, and by giving broad latitude on who exactly can qualify as a third party, the Proposed Rule clearly contemplates allowing for union representatives to accompany OSHA inspections. Rather than workplace safety, it appears that the goal of the Proposed Rule is to instead increase union access to employer property. In case that were not already clear, in the last month, OSHA and the National Labor Relations Board executed a memo of understanding that created a close partnership between the two agencies "to promote safe and healthy workplaces through protecting worker voice."[7] As part of this partnership, the NLRB will train OSHA personnel, including CSHO's, on what constitutes unfair labor practices and protected concerted activity. Essentially, OSHA site inspections would become not only safety checks, but unfair labor practice inspections as well.

In combination with the accompaniment of union representatives, OSHA site inspections would essentially become avenues for increased union organizing and unfair labor practice allegations. This result, which is clearly the primary goal of the Proposed Rule (if not the stated one) is an extremely inappropriate dilution of the purpose of safety inspections and OSHA's

[7] NLRB and OSHA Announce New MOU to Strengthen Health and Safety Protections for Workers, NLRB (Oct. 31, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-and-osha-announce-new-mou-to-strengthen-health-and-safety-protections.

mission in general. Further, because the employer again has no say in the process, such a result unlawfully infringes upon employer rights under the NLRA.

The Proposed Rule in practice will not enhance workplace safety for the above-mentioned reasons. As such, the Association opposes it and strongly urges OSHA to retract the rule.

Sincerely,

/s/ Gregory Hoff

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