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Docket # OSHA-2023-0008
OSHA Directorate of Construction
Occupational Safety & Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
klienback.donald.w@dol.gov

RE: Worker Walkaround Representative Designation Process: Proposed Rule; 88 Fed. Reg. 59825 (Aug. 30, 2023).

Dear Mr. Klienback:

Introduction - The Flexible Packaging Association (FPA) is respectfully submitting comments on OSHA's proposed Notice of Proposed Rulemaking (NPRM or Notice) regarding OSHA's Walkaround Representative Designation Process (i.e., the proposed "walkaround rule"). FPA is a national trade association, established in 1950, comprised of manufacturers and suppliers of flexible packaging. The industry produces packaging for food, healthcare, and industrial products using coating and lamination of paper, film, foil, or any combination of these materials to manufacture bags, pouches, labels, liners, wraps, rollstock, and tamper-evident packaging for food and medicine. Flexible packaging is a $42.9 billion industry that employs roughly 85,000 people in the United States and is the second largest and fastest growing segment of the U.S. packaging market. FPA's members generally are not represented by the building and trades unions.

Background - OSHA is proposing to revise 29 CFR § 1903.8(c), regarding individuals who can be representatives authorized by an employee or employees during OSHA's physical inspections of the workplace (also referred to as the ''walkaround inspection''), pursuant to Section 8(e) of the OSH Act. See 29 U.S.C. 657(e).[1] OSHA proposes to amend 20 CFR § 1903.8(c), to clarify that for the purpose of the walkaround inspection, the representatives authorized by employees may be an employee of the employer or, when they are reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, *id.* at 59,831, a third-party.

[1] The OSH Act of 1971 therein states, "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."

Second, OSHA is proposing to clarify that a third-party representative authorized by employee(s) may be reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace by virtue of their knowledge, skills, or experience. *Id.* at 59826. With regard to this clarification, the Notice states that third-party representation is "not limited to only those individuals with skills and knowledge similar to that of the two examples provided in the existing regulatory text (*i.e.,* an industrial hygienist or safety engineer), and may include a "multitude of third parties," such as an elected or designated union leader or representative, business agency or representative from a worker advocacy group, community organization, local safety council, and technical representatives for the equipment used in and operations performed at the employee's worksite. See examples on page 59,830.

The Notice also indicates that third-party representatives from worker advocacy organizations, labor organizations, consultants, or attorneys who are experienced in interacting with governmental officials or have relevant cultural competencies may be authorized to represent them to provide a "trusted presence," particularly for "workers such as immigrants, refugees, or other vulnerable workers," whom may be unfamiliar with OSHA, face cultural barriers, or fear that their employer will retaliate against them for speaking to OSHA or the OSHA Compliance Safety & Health Officer (CSHO) conducting the inspection. *Id.* at 59,831.

FPA's members are concerned about the additional burden that the proposal, if it is adopted, would place on their plant managers and on the CSHO to determine if the third parties are reasonably necessary to the conduct of an effective and thorough inspection of a workplace. Even though the NPRM makes clear that the proposed revisions to § 1903.8(c), would not change the CSHO's authority to determine whether an individual is a representative authorized by employees (29 CFR 1903.8(b), or affect other provisions of § 1903 that limit participation in walkaround inspections, such as the CSHO's authority to prevent an individual from participating in the walkaround inspection if their conduct interferes with a fair and orderly inspection in 29 CFR § 1903.8(d)or the employer's right to limit entry of employee-authorized representatives into areas of the workplace that contain trade secrets in 29 CFR § 1903.9(d).

A. <u>The Proposed Rule Should Limit the Number of Representatives that an Employee Can Request to Participate in a Walkaround Inspection.</u>

The potential that the proposed rule presents for a large party of employees and their representatives, the CSHO, the employer, and his/her representatives on the manufacturing floor poses potential threats to walkaround participants, to the manufacturing process, and to an effective investigation. These potential threats are magnified by the variety of backgrounds that are described in the notice for broadening the types of employee representatives, which have little or no background in safety management, no prior knowledge of a manufacturing process and the associated safety equipment on these processes, and/or no knowledge of OSHA requirements. It also puts additional burdens on employers because we must ensure these personnel have adequate safety training before the representative steps onto the manufacturing floor. Second, it is unlikely that many of the proposed new groups of

representatives will be aware of or understand the manufacturing process, or that they will appreciate basic protocols like maintaining distance from the manufacturing equipment. (In a flexible packaging plant, some of the most visually interesting machinery to visitors are the highspeed equipment, the types of products produced, how film is made, and the robots that manage materials from processes to packing for shipment, and it ii really important for visitors, as well as our employees, to exercise caution around this equipment.) The larger the inspection party, the more the opportunity for distraction grows.

Because FPA's members share these safety concerns, we strongly suggest that if OSHA adopts these proposed changes, each employee should be limited to no more than one representative, and the employer should be limited to one representative. The only exception to that rule that FPA can anticipate might be for a translator, if necessary, for an effective inspection. This will help ensure the safety of walkaround participants. Doing so also ensures that employers can provide adequate safety training before the inspection begins and that suitable arrangements can be made to fit third-party representatives with protective equipment and to discuss non-disclosure agreements with employee representatives, which any walk around visitors will be required to sign prior to entering the plant for an OSHA inspection.

B. The Proposed Rule's Expansion of the Types of Third-Party Representatives that May Accompany an Employee during a Walkaround Inspection is Overbroad and Should Be Narrowed.

The Notice states that "inspections are not limited to the two examples provided in existing regulatory text: Industrial Hygienist or Safety Engineer." 88 Fed. Reg. at 59,831/2. OSHA also solicits other types of candidates for employee representatives. *Id.* 59,830. While FPA does not necessarily object to a third-party accompanying an employee on a walkaround inspection—particularly if he or she is a translator, industrial hygienist, or safety engineer—the Association is concerned by the exceedingly broad descriptions in the Notice of the seemingly unlimited variety of people who can represent employees during a plant walkaround. For this reason, we believe that it is arbitrary and unreasonable.

1. *OSHA should narrow the types of third-parties that may accompany an employee during a walkaround.*

FPA does not favor non-technical experts assisting employees on a walkaround inspection because we believe that the negatives of their participation outweigh the potential benefits that they are likely to provide to the CSHO in conducting the walkaround. For this reason, FPA does not support members of civic organizations and cultural advisors participating in walkarounds, as "trusted presence counselors." *Id.* at 59,830/2. Not only do these individuals seem unlikely to enhance an effective and thorough physical inspection of the workplace, but it would be reasonable to anticipate that many such individuals would interfere with the inspection by necessitating lengthy discussions of process equipment and safety designs, or

products or lengthen the inspection by conferring with the employee on personal issues. For similar reasons, FPA also does not believe that representatives of civic organizations that might be opposed to or adverse to a product (e.g., plastics or chemicals) would aid in an effective and thorough workplace inspection by presenting a "trusted" presence. *Id. at 59830/2.*[2] Nor do we believe that family members or representatives of community and cultural support centers are appropriate third-party representatives for employees during a walkaround inspection, and we submit that the reasoning supplied by the notice that their presence may enhance the effectiveness of an inspection of a plant by providing a trusted presence stresses credulity, whether the employee is an immigrant or a timid person who cannot communicate comfortably with a government official, like a CSHO. *Id., at* 59830. (In marked contrast, a translator can be essential to an effective inspection.)

Likewise, we do not believe that the "multitude" of other third parties described in the Notice, *id*. at 59829, including elected or designated union leaders or representatives, business agencies, or representative from a worker advocacy group, local safety council, and/or technical representatives for the equipment used in and operations performed at the employees' worksite are likely to contribute any value to the OSHA inspection. OSHA appears to suggest that representatives from worker advocacy groups, such as unions, should be considered by employees as possible representatives in a walkaround at a non-unionized plant. 88 Fed. Reg. 59831. FPA disagrees because the potential for a union representative at a non-unionized plant has the potential to create distraction, if not disruption, in the workplace. Even though FPA's members appreciate that certain types of union representatives may have relevant safety inspection or safety engineering credentials, we believe that it is unreasonable for such individuals to be present in a non-union shop. In balancing the "pros and cons" of such representation for an employee, we believe the cons—which would include the CSHO having to sort these issues out during an inspection—override the benefits. If our members' employees have not voted and paid dues to belong to a union, they should not be allowed to represent employees in the plant in any capacity. Although FPA's members appreciate that a CSHO is authorized by the regulations to intercede if a third-party interferes with an inspection, inviting union advocates into a closed shop, unnecessarily requires even seasoned CSHOs to unnecessarily shoulder the burden to intercede in such inspections.

Without pre-notification to the employer (discussed further below), FPA also does not support attorneys representing an employee or class of employees or persons in civil or criminal litigation accompanying an employee during an OSHA walk-around. First, such an individual also is likely to work for a competitor, and even if he/she signed non-disclosure agreements before beginning an inspection, there are other legal and procedural issues that would be created by their participation in an OSHA inspection or that could potentially pose issues during such an inspection for the CSHO or for an employer. For entirely different reasons, our members are concerned that consultants pose other risks to confidentiality during an inspection if they act as a representative of an employee. First, although they would be prohibited from entering areas

[2] FPA urges OSHA to consider other options for counseling workers that do not pose potential for disruption or third-party trespassing under the guise of employee assistance

with confidential business information under existing OSHA regulations, they can easily take note of information on a process operator's computer screen that provides detailed insights into a flexible packaging product runs and would also be able to gain insights into confidential materials and suppliers for certain types of manufactured in the plant. In some instances, consultants also would be privy to new consumer products not yet introduced to the public, which could be identified by the packaging being printed. (For these and other reasons, all of our members require all third-parties to sign a non-disclosure agreement before they are permitted to enter a facility.)

2. *In the final rule, FPA urges OSHA to restrict the types of third-party representatives that may accompany an employee during a walkaround*.

FPA urges OSHA to to restrict employee representatives on walkaround inspections to a broader category of technical experts such as a safety engineer, industrial hygienist, or a translator. In other words, FPA does not support the proposed clarification of the existing rule that third-party experts "may include a "multitude of third parties," *id. at 59,829,* such as an elected or designated union leader or representative, business agency or representative from a worker advocacy group, community organization, local safety council, and technical representatives for the equipment used in and operations performed at the employees' worksite. If this rule is adopted, OSHA should evaluate and list the types of technical experts in the rule that are qualified to be representatives with a matching description of how they would be expected to contribute to an effective and thorough inspection. Such a list should not create a presumption that any particular person is qualified or abrogate the authority of the CSHO to determine whether an individual is a representative authorized by employees (29 CFR 1903.8(b), or affect other provisions of § 1903 that limit participation in walkaround inspections, such as the CSHO's authority to prevent an individual from participating in the walkaround inspection if their conduct interferes with a fair and orderly inspection in 29 CFR § 1903.

3. *The final rule should provide that other third-party representatives should be subject to prior requirements to notify and justify why the third-party would assist in an effective walkaround.*

For anyone else that the employee wishes to nominate as his or her representative during a walkaround inspection, OSHA must submit a justification to the employer for approval prior to allowing them into the plant, and the employer must have 10 days to respond to OSHA on such request.

C. The Proposed Rule, if Adopted, Will Be Burdensome.

On page 59831 of the NPRM, OSHA states, "This proposed rule imposes no new burden on employers and does not require them to take any action to comply. FPA submits that the

agency has failed to consider the costs to employers, which include, but are not limited to, safety training; provision of protective equipment; insurance costs for non-employee/non-state or federal personnel on the premises during a walkaround; and potential liabilities for accidents and negligence, including parking lot accidents on the premises of a plant. Nor has the agency adequately considered the cost of matching the employee's third-party expertise, including an attorney or consultant to attend the walkaround if OSHA decides that such representatives are allowed on walkarounds. Other costs involve the development of confidential disclosure agreements for third-parties, training of third-parties, the personnel required to develop the programs to address the issues that we anticipate third parties will need to be trained on if OSHA ultimately issues the rule as it is proposed, as well as the cost of training employees that the Notice requests comment on in the Notice.

CONCLUSION

On page 59831, OSHA seeks comment on whether the proposed changes to paragraph (c) are clear regarding representatives authorized by employees for purposes of walkaround inspections. Why or why not? As we have explained in our comments, the proposed rule puts no limits on the types of representatives that employees may select to accompany them on a walkaround inspection, and therefore, is unreasonable on its face. FPA appreciates that some employees may be wary of speaking to federal government officials if they are immigrants or lack language skills or even feel scared of retribution, but the "it takes a village" approach is not a mechanism for a enhancing a plant walkaround. We do not think that the agency has thought through other options for how to help these workers. Further, it would not be reasonable for OSHA to expect its CSHO to arbitrate or necessarily even know of these individuals' credentials before a walkaround, which could directly involve them in labor disputes, prohibited by federal law.

Respectfully submitted,

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