November 10, 2023

Via E-Filing on Regulations.gov

Mr. Douglas L. Parker
Assistant Secretary of Labor for OSHA
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Public Comment – Worker Walkaround Representative Designation Process – Docket No. OSHA-2023-0008 / RIN 1218-AD45

Western Growers respectfully submits the following comments in response to the U.S. Department of Labor proposed rule referenced above.

Western Growers is an agricultural trade association headquartered in Irvine, California with members that grow, pack, and ship fruits, vegetables, and tree nuts from California, Arizona, New Mexico, and Colorado. Beyond our home states, Western Growers members produce in and directly contribute to the economies of more than 30 states and 25 countries. In total, Western Growers' members account for roughly half of the annual fresh produce and tree nuts grown in the United States, providing American families with healthy, nutritious food.

Rulemaking Process

The Secretary of Labor is generally granted broad authority to inspect the workplace for health and safety violations from the Occupational Safety and Health Act ("OSH Act"), but this Notice of Proposed Rulemaking ("NPRM") falls short of what the legislative authority requires. The Department cites legislative authority stating that the OSH Act is intended to grant the Secretary of Labor authority to promulgate regulations to resolve the question of who a duly authorized representative of employees is.[1] However, the rule does not establish procedures for an employee to who shall be considered a duly authorized representative of employees.

Many questions arise as to how one—including an employer, or a Compliance Safety and Health Officer ("CSHO")—might know whether a third-party is a duly authorized representative of the employees. For instance, how many employees are required to designate an authorized third-party representative? What process will be used for determining whether the representative possesses the skills, knowledge, experience with hazards or conditions in the workplace or similar workplaces, or language skills reasonably necessary to participate in the physical inspection? This NPRM purports that the reasonably necessary standard will be at the judgment of the CSHO but is silent as to whether judicial review of a CSHO's decision to take away an

[1] *See* Legislative History of the Occupational Safety and Health Act of 1970, at 151 (Comm. Print 1971) ("Although questions may arise as to who shall be considered a duly authorized representative of employees, the bill provides the Secretary of Labor with authority to promulgate regulations for resolving this question.")

employer's right to exclude a third-party from entering private property is allowed. The agricultural community has no notice as to what the standards, procedures, and rights will be under this proposed regulation and cannot meaningfully comment. We ask that the Department respond and clarify the above-mentioned questions prior to finalizing this NPRM.

Per Se Taking Under the 5th Amendment

The Department correctly notes that the CSHO investigations are consistent with the fourth amendment. However, the cases cited by the Department alleging the ability to use the administrative warrant process to bring a non-employee third-party onto an employer's private property in contravention of their right to exclude, does not stand for the propositions the Department claims.[2] In *Caterpillar*, the third-party was an employee of employer, while simultaneously to the time of the CSHO's inspection was in the midst of a labor dispute sanctioned by the National Labor Relations Act ("NLRA").[3] In that case, the court determined that requiring a striking employee—not a third-party as proposed in this rule—to decide to forfeit their NLRA protected right to participate in concerted action in order to participate in the CSHO's inspection was against public policy and declined to allow the employer to restrict access to that employee.[4] The employer cited concerns of the striking employee attempting to further the concerted action through the inspection by intimidating other employees, but the court stated that "the Act and its regulations establish a number of administrative safeguards that adequately protect the rights of employers and limit the possibility that private participation in an inspection will result in harm to the employer."[5] Although the court determined that the striking employee could participate in the CSHO's inspection, it was in the context of an *employee* being the authorized representative, not a non-employee third-party. *Caterpillar* does not stand for the proposition that a third-party non-employee is able or allowed to participate in the CSHO inspection against the employer's right to exclude, as the third-party in question in this case was an actual employee of the employer and was the safety and health representative of the facility for five years.[6]

As proposed, this NPRM would allow a government-authorized physical invasion of a person or entity's property and such actions have recently been described as a *per se* taking requiring just compensation.[7] "[T]he right to exclude falls within the category of interests that the Government cannot take without compensation."[8] "The fact that a right to take access is exercised only from time to time does not make it any less a physical taking."[9] The Department correctly asserts that the government does not effect a "taking" when it is engaged in a reasonable search under the fourth amendment, however it does effect a "taking" when allowing a third-party to enter a property and thus restricting the property owner's right to

[2] *In re Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 340 (7th Cir. 1995) ("Thus, § 8(e) does not prohibit striking employees from accompanying OSHA compliance officers on inspections. To hold otherwise and to adopt such an overbroad rule would force employees to choose between exercising their National Labor Relations Act right to strike and their OSHA right to accompany inspections. We decline to force that choice upon employees.").
[3] *Id*.
[4] *Id.*
[5] *Id*. at 339.
[6] *Id*. at fn. 5.
[7] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021)
[8] *Id*. (cleaned up and internal quotations omitted).
[9] *Id*. at 2075.

exclude. The United States Supreme Court in *Cedar Point* went further to explain the taking analysis may be different if the taking were subject to the "receiving of certain benefits". However, the "taking" here is not for receiving of a benefit, but for the government to perform the function Congress assigned it.[10] It is clear under the *Cedar Point* analysis that as proposed, this NPRM would amount to an uncompensated "taking".

A third-party is not necessarily precluded from participating in a CSHO's inspection, but the NPRM fails to describe the method and qualifications a CSHO must use to determine whether a third-party is reasonably necessary to conduct an effective and thorough physical inspection of the workplace and thus does not inform the regulated public of how they will or will not be able to exercise their right to exclude.

Questions posed by the Department:

> Should OSHA defer to the employees' selection of a representative to aid the inspection when the representative is a third-party (i.e., remove the requirement for third-party representatives to be reasonably necessary to the inspection)? Why or why not? Please provide any relevant information, examples, considerations, and/or data to support your position.

No, the Department should not remove the requirement that third-party representatives be reasonably necessary to the inspection. The Department is already proposing to allow access to an employer's private property without just compensation and as mentioned, some third-party representatives may prove to be reasonably necessary to assist in a CSHO's inspection (i.e., industrial hygienist or those with language skills the CSHO lacks). Removing the requirement that the third-party representative be reasonably necessary to the CSHO's inspection would further show that this proposal is an unlawful taking under the fifth amendment as there is no reason for the third-party representative being on the property if they are not assisting the CSHO.

> Should OSHA retain the language as proposed, but add a presumption that a third-party representative authorized by employees is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace? Why or why not? Please provide any relevant information, examples, considerations and/or data to support your position.

No, the Department should not retain the language as proposed as the language is insufficient to explain the Department's process for the third-party representative being designated by the employer's employees. Additional procedural information is necessary before the regulated community can meaningfully comment on the Department's proposal. As stated in *Cedar Point*, "[t]he right to exclude is one of the most treasured rights of property ownership."[11] The Department allowing/mandating that some third-party not necessary to a CSHO's investigation on an employer's private property would be a *per se* taking under the fifth amendment.

[10] *Id*. at 2079.
[11] *Id*. at 2072 (internal quotations omitted).

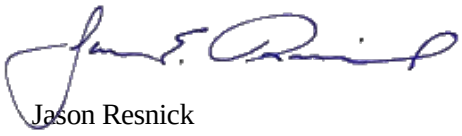
Adding a presumption without due process that the employee third-party representative is reasonably necessary would further trample employer's property rights. CSHO's should make a determination, and employers should be able to appeal such determination, before a CSHO takes a non-employee third-party onto employer's property. Without this procedure, employers' fourth and fifth amendment protections would be violated. This proposal also lacks any procedural information for an employer to meaningfully comment as it is unclear how an employee or a CSHO would know who is considered a reasonably necessary third-party non-employee.

> Should OSHA expand the criteria for an employees' representative that is a third party to participate in the inspection to include circumstances when the CSHO determines that such participation would aid employees in effectively exercising their rights under the OSH Act? Why or why not? If so, should OSHA defer to employees' selection of a representative who would aid them in effectively exercising their rights?

It is unclear what the Department means by "effectively exercising their rights under the OSH Act" and it is difficult for the regulated community to meaningfully comment on this question. As stated, it is unclear how an employer's employees will be able to designate a third-party representative as the Department has not articulated the process or procedure for making such a designation. Further, it is unclear, and unstated by the Department in the NPRM, how a third-party representative may "aid employees in effectively exercising their rights under the OSH Act" and how the CSHO, who is charged with investigating and protecting employee's rights under the OSH Act, is incapable of performing those duties without the assistance of a third-party representative.

Thank you for the opportunity to comment on this proposed regulation. We hope these comments inform your decisions and encourage you to revisit and republish this proposal with the sufficient information to provide thorough, meaningfully comments. We look forward to continued dialogue with the Department to ensure all employees have a safe working environment.

Respectfully submitted,



Jason Resnick
Senior Vice President and General Counsel
Western Growers