August 13, 2013

Via electronic delivery: michaels.david@dol.gov
and USPS regular mail

The Honorable David Michaels, PhD, MPH
Assistant Secretary of Labor for Occupational Safety and Health
United States Department of Labor
Occupational Safety and Health Administration
200 Constitution Avenue, NW, Room S2315
Washington, DC 20210

Re: OSHA Letter of Interpretation Dated February 21, 2013

Dear Dr. Michaels:

In OSHA's "letter of interpretation" dated February 21, 2013, and addressed to Mr. Steve Sallman of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Letter"), the agency states it is merely clarifying well-established rights of an employee to designate as his or her employee representative for various OSH Act purposes any person, including, for example, a union which has no collective bargaining agreement with the employer or an unrelated community organization. While the line between legitimate agency interpretation and unauthorized issuance of a regulation is not always clear, the Letter respects no such distinction. Behind the mask of the Letter's interpretive label hides a substantive regulation with far-reaching impacts, and we write to you today on behalf of the American Exploration & Production Council (AXPC), Association of Energy Service Companies (AESC), and Domestic Energy Producers Alliance (DEPA) to explain why OSHA should immediately withdraw the Letter.

Before diving into the legal deficiencies of the Letter, we want to emphasize there is a host of practical concerns which by themselves warrant OSHA's withdrawal of the Letter. Many of these concerns have already been raised in a compelling response to the Letter submitted by the Coalition for Workplace Safety (CWS), a copy of which has been enclosed for your convenience. Rather than reiterate points previously made by CWS, we hereby endorse CWS's comments and confirm AXPC, AESC, and DEPA share CWS's numerous, valid concerns.

Practical concerns aside, there are many reasons the Letter is legally indefensible. First, 29 C.F.R. Section 1903.8(c), which discusses the role of employee representatives in walkaround inspections, explicitly provides for only a limited number of exceptions to the general rule that an employee representative "*shall* be an employee(s) of the employer." Specifically, the regulation identifies as potentially acceptable non-employee employee representatives only an "industrial hygienist" or a "safety engineer." Applying the canon of statutory and regulatory construction expression "unius est exclusion alterius" ("the expression of one is the exclusion of another"), Section 1903.8(c)'s specific identification of two potentially acceptable non-employee employee representatives implicitly excludes any other type of prospective employee

representative who is not an expert in occupational safety and health at the specific workplace. At a minimum, the precise language of the regulation is not susceptible to the diluted interpretation in the Letter, which endorses infinite numbers, types, and combinations of potential non-employee employee representatives.

Furthermore, an employee may only avail himself or herself of the limited non-employee exceptions defined in Section 1903.8(c) upon a showing of "good cause" to the Compliance Safety and Health Officer (CSHO), who must ultimately determine the non-employee employee representative "is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace . . . ." Despite the OSH Act and Section 1903.8(c)'s unmistakable preference for having employees serve as employee representatives, OSHA, as justification for its having reached an entirely contrary conclusion in the Letter, asserts benefits might be derived from the participation of non-employee employee representatives. Ironically, OSHA brazenly concedes that it simply adopted the benefits claimed by Mr. Sallman's December 18, 2012, letter. To the extent a non-employee employee representative has the precise expertise contemplated by Section 1903.8(c) (i.e., an industrial hygienist or safety engineer), it is possible there may be benefits to his or her participation as an employee representative; however, neither the OSH Act nor its implementing regulations gives OSHA the authority it has asserted in the Letter to sanction and, arguably, favor widespread use of non-employee employee representatives—especially use of non-employee employee representatives who may have limited or no expertise relevant to the workplace at issue.

This brings us to a discussion of the Letter in the context of the Administrative Procedure Act (APA). The APA requires an agency to comply with public notice and comment procedures when promulgating regulations *unless* an agency (a) is merely issuing an interpretive rule or general statement of policy or (b) for good cause finds that notice and comment are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553 § (b)(3)(A)-(B). OSHA cannot claim its Letter is exempt from notice and comment regulation-making based on a showing of good cause, because the agency has not shown or found it would have been "impracticable, unnecessary, or contrary to the public interest" to comply with notice and comment procedures. Simply put, there is no excuse for the agency's otherwise blatant disregard of the requirement that it ensure transparency and an opportunity for meaningful public comment during the process of drafting new regulations.

An objective reading of the Letter reveals a "[s]ubstantive rule[] . . . which effects a change in existing law or policy. . . . [and not an] [i]nterpretive rule[] . . . which merely clarify[ies] or explain[s] existing law or regulations." *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983). For more than forty years, the OSH Act and its implementing regulations have generally been understood to encourage participation by employees in OSHA investigations of employees' respective workplaces, and there can be no question about whether an employee's serving as an employee representative furthers applicable statutory and regulatory objectives. More importantly, neither the OSH Act nor its implementing regulations need a "letter of interpretation" to clarify any ambiguity; rather, the statute and regulations clearly state that an employee representative *shall* be an employee unless exigent circumstances demand otherwise – and then only to the extent the prospective non-employee employee representative provides

subject matter expertise (e.g., industrial hygienist; safety expert) otherwise lacking in the pool of available employees from which an employee representative otherwise could have been selected. Finally, because "[t]he spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum . . . . [and d]etermining whether a given agency action is interpretive or legislative is an extraordinarily case-specific endeavor," OSHA should have complied with APA public notice and comment requirements and avoided even the appearance of improper regulation-making. *Am. Hosp. Ass'n v. Bowen*, 834 F. 2d 1037, 1045 (D.C. Cir. 1987).

It is worth noting this is not the first time OSHA has circumvented the APA's public notice and comment requirements in an attempt to make substantive changes to regulations applicable to employee representatives. In one such prior example, OSHA provided no opportunity for public notice and comment prior to issuing a final rule (the "Walkaround Compensation Rule" or "WCR") which, had it not been revoked by OSHA at the eleventh hour due to the WCR's having been successfully challenged in court, would have required employers to pay employees for their time spent accompanying a CSHO on a walkaround inspection. *See* 46 Fed. Reg. 28,842 (May 29, 1981) (describing the procedural background leading to revocation of 29 C.F.R. 1903.8(e), a regulation which would have become effective the following day). Although OSHA claimed the Walkaround Compensation Rule was "an interpretive rule and general statement of policy" for which public participation was not required, the U.S. Court of Appeals for the District of Columbia disagreed, holding that because "the [OSH] Act . . . neither prohibited nor compelled pay for walkaround time . . . . the regulation was not interpretive but legislative." *Id.* at 28,843. As a result, OSHA had to go back to the drawing board and propose the regulation in compliance with the APA's public notice and comment requirements.

While the Walkaround Compensation Rule is instructive because it documents OSHA's penchant for taking procedural short-cuts in the regulation-making process, the substance of the WCR is also instructive because it contradicts OSHA's position in the Letter. The Walkaround Compensation Rule primarily contemplated employees serving as employee representatives. For example, the WCR noted that "[b]y virtue of their familiarity with the workplace and its operations, employee representatives . . . ensure[] that all locations and all phases of workplace activities are examined for possible hazards." 46 Fed. Reg. 3852-01, 3855 (Jan. 16, 1981). The WCR even drew upon legislative history of the OSH Act to justify the rule's preference for having employees serve as employee representatives, noting that "no one knows better than the working man what the conditions are, where the failures are, where the hazards are, and particularly where there are safety hazards." *Id.* at 3854 (quoting Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong. 151, 430 (1971) (statement of Sen. Harrison Williams)). Although the WCR acknowledged the possibility of having a union representative serve as the employee representative (albeit, a union which has a collective bargaining agreement in place with the employer), it did so only against the backdrop of a lengthy discussion of the critical importance of having employees available and willing to serve as employee representatives in the event a union was unable or unavailable to assume the role:

> In the first place, there will undoubtedly be many cases where no union exists in the plant where the inspection is taking place. Even

> where there is a union there will be circumstances where the union is unable for financial reasons to undertake this obligation . . . . Also, since the union is supported by employee dues, payment by the union for walkaround time in the last analysis must be viewed as employees paying themselves for participation in the walkaround. Finally, it is uncertain to what extent employees are now willing, and would continue to be willing, to assume the walkaround obligation at the sacrifice of wages, particularly in the context of lengthy inspections. *Id.* at 3856.

OSHA's clear intent in issuing the Walkaround Compensation Rule was to create an incentive for employees to serve as employee representatives and, indirectly, discourage such participation by non-employees. Finally, had the Walkaround Compensation Rule supported the broad "interpretation" of employee representatives touted in the Letter, it would have created absurd results for employers, who would have been forced to pay community organizers and representatives of unions without collective bargaining agreements for their time accompanying CSHOs on walkaround inspections.

More recently and of even greater relevance to the members of AXPC, AESC, and DEPA, OSHA attempted unsuccessfully to use an "enforcement policy" (the "FRC Memo") as the legal vehicle by which to transform a general performance-based personal protective equipment (PPE) standard into a non-discretionary duty of oil and gas operators to outfit employees with flame-resistant clothing (FRC) during oil and gas well drilling, servicing, and production-related operations. *See Sec'y of Labor v. Petro Hunt, LLC*, OSHRC Docket No. 11-0873 (June 2, 2012). The Administrative Law Judge (ALJ) disagreed with OSHA's characterization of the FRC Memo as nothing more than an interpretation of existing requirements, because unlike the PPE standard, which affords oil and gas operators "discretion, within reason, to determine how to properly address a hazard [using PPE]", the FRC Memo "require[d] that FRC be worn in all instances at oil and gas operations." *Id.* at 10. Consequently, the ALJ held that "[OSHA] engaged in improper rulemaking under the aegis of an enforcement standard." *Id.* at 9.

AXPC, AESC, and DEPA fully support the OSH Act's goal of ensuring workplace safety and OSHA's role in implementing regulations in furtherance of that noble objective, but our organizations cannot condone attempts by OSHA to operate outside well-defined boundaries of its regulatory authority. Before OSHA can implement its new and expansive "interpretation" of employee representatives, it must first subject its "interpretation" to the formal regulation-making process and give due consideration to the flood of public comments which will inevitably ensue. In the meantime, we request the Letter, which lacks any legally defensible basis, be withdrawn immediately.

Sincerely,

V. Bruce Thompson
President
American Exploration & Production Council

Executive Director
Association of Energy Service Companies

Mike McDonald
President
Domestic Energy Producers Alliance

xc: Via electronic mail:
Dr. Howard Shelanski, Administrator, Office of Information and Regulatory Affairs (hshelanski@omb.eop.gov)
Rep. John Kline, Chairman, House Committee on Education and the Workforce (loren.swett@mail.house.gov)
Rep. Tim Walberg, Chairman, Subcommittee on Workforce Protections, House Committee on Education and the Workforce (brandon.fisher@mail.house.gov)
Sen. Lamar Alexander, Ranking Member, Senate Committee on Health, Education, Labor and Pensions (kyle_fortson@help.senate.gov; kai_hirabayashi@help.senate.gov)
Sen. Johnny Isakson, Ranking Member, Subcommittee on Employment and Workplace Safety, Senate Committee on Health, Education, Labor and Pensions (tommy_nguyen@help.senate.gov)

Encl. Letter from the Coalition for Workplace Safety to OSHA (June 12, 2013)

June 12, 2013

The Honorable David Michaels, PhD, MPH
Assistant Secretary
Occupational Safety and Health Administration
United States Department of Labor
200 Constitution Avenue, NW, Room S2315
Washington, DC 20210

By electronic transmission

RE: Letter of Interpretation Endorsing Union Representatives on Walk-Around Inspections at Non-Union Workplaces

Dear Dr. Michaels:

OSHA's February 21, 2013 letter of interpretation addressed to Mr. Steve Sallman of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (LOI) that explicitly endorses union representatives and other non-employee third parties accompanying OSHA inspectors on walk-around inspections at non-union workplaces is very alarming. It has quickly become a matter of high concern among members of the Coalition for Workplace Safety, their employers, and attorneys representing employers on OSHA issues. Similarly, the LOI is also generating significant anxiety among companies, and the attorneys representing them, who are concerned about being targeted by unions in either the organizing or contract negotiating contexts. In addition to being inconsistent with the statute and regulations, this letter of interpretation is bad policy implemented through a non-transparent closed process.

The overwhelming consensus is that this will undermine the safety focus of these inspections and turn them into opportunities for unions or other parties with agendas contrary to the employer to enhance campaigns against the employer, gain entry to the employer's premises to develop more information for the campaign, or even glean proprietary information. It will place OSHA in the middle of organizing drives or labor contract negotiations and will put the Compliance Safety and Health Officer (CSHO) in an untenable position: either he/she rejects the employee's request to have a union representative on the walk-around, contrary to this letter of interpretation, or he/she permits it, which would make OSHA appear to be taking sides in an organizing campaign contrary to the Field Operations Manual.

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www.workingforsafety.com

Other complications of this policy are making sure the union representative, community organizer, or third party has adequate workplace safety protection, does not present a risk to the safety or security of the facility, and does not have access to confidential business information. Many workplaces have explicit policies preventing anyone not specifically authorized from entering the workplace. Is the employer expected to provide PPE for a non-employee to accompany a CSHO on a walk-around inspection? How is the employer to know whether this individual has adequate knowledge of the potential hazards that may be present? Who is responsible if the third party non-employee is injured? Who is responsible for conducting background screening of the third party for security risk, criminal background, and other factors, especially in facilities that are subject to Department of Homeland Security regulation? Since there will be no workers' compensation coverage for the non-employee third party, can the employer require the third party to sign a waiver holding the employer harmless for any injury or other consequence of being in the workplace?

While the statute and regulations permit employees to designate a representative to accompany the OSHA inspector, they do so in the context of the representatives being included "for the purpose of aiding such inspection." (29 U.S.C. 657 (e)). OSHA's letter would permit union representatives, or other third parties, to accompany OSHA inspectors on walk-around inspections at any workplace, including those without a union, for reasons far beyond this context, indeed without any relationship to this context.

OSHA's regulations are clear that the employee representative must also be an employee of the company: "The representative(s) authorized by employees shall be an employee(s) of the employer." (29 CFR 1903.8(c), emphasis added). The only circumstances under which a non-employee would be included in the inspection process would be "if in the judgment of the CSHO, 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 Compliance Safety and Health Officer during the inspection." (29 CFR 1903.8 (c), emphasis added). In the more than 40 years since 29 CFR 1903.8 was issued[1], during which time OSHA has conducted approximately 30,000 – 40,000 inspections *per year*, the agency has consistently followed a practice of bringing in (neutral) third parties to participate in inspections *only* when that third party had special expertise that was beyond what the CSHO possessed and was "necessary to the conduct of an effective and thorough physical inspection of the workplace." These third parties were selected by OSHA, *not* the employees, to be part of the inspection.

The letter of interpretation ignores the explicit requirement indicated by "shall be an employee"[2] and focuses on the narrow circumstances in which non-employees have been used by OSHA. However, the letter expands those circumstances well beyond the context of

[1] See, 36 Fed. Reg. 17850, September 4, 1971.

[2] The letter of interpretation dismisses this by noting that "the regulation acknowledges that most employee representatives will be employees of the employer being inspected." "Most employee representatives will be employees" is not at all consistent with the regulatory mandate that employee representatives "shall be employee(s) of the employer." The LOI language suggests that whether employee representatives are also employees of the employer is a matter of chance rather than a requirement.

providing for someone who can aid the inspection, and puts the selection in the hands of the employee rather than OSHA, while also diminishing the CSHO's ability to control who is involved in the inspection, thereby substantively altering the meaning of 29 CFR 1903.8(c):

> Therefore, a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative so long as the individual has been authorized by the employees to serve as their representative….
>
> The Secretary's regulations, 29 C.F.R. § 1903.8, qualify the walkaround right somewhat, but only in order to allow OSHA to manage its inspections effectively.
> (Letter to Steve Sallman, February 21, 2013, page 2, emphasis added.)

Finally, the Field Operations Manual gives CSHOs explicit instructions to avoid creating the impression that OSHA is taking sides in any labor dispute during unprogrammed inspections such as those occurring because of an accident, fatality or complaint: "During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute." (Field Operations Manual, Chap. 3, (IV)(H)(2)(c), emphasis added). Allowing union representatives to accompany a CSHO during an inspection triggered by a complaint, such as what happens during organizing campaigns and during contract negotiations, would be absolutely contrary to this instruction.

The fact that this significant change in policy was done through a letter of interpretation and not a rulemaking, although it substantively changes the regulation, means that affected parties had no opportunity to provide input, and OSHA had no obligation to present any data or evidence demonstrating the need for this change. Using this approach to circumvent the protections of the rulemaking process undermines this administration's claims of transparency and openness in its policy setting.

We understand the letter of interpretation was not reviewed by the Secretary's office, which also raises questions about whether any office outside of OSHA had an opportunity to review this and to consider the problems it will create and the overt bias it exposes. In addition, this letter was issued (but not made public) barely two months after the request was submitted. For OSHA to respond so quickly raises questions about whether the agency knew in advance the request was being submitted.

Accordingly, rather than inappropriately attempting to amend by interpretation a final rule to create new rights that are inconsistent with the emphasis on workplace safety that should characterize OSHA inspections, and the way the rule has been interpreted and implemented by OSHA in the well over a million inspections it has conducted over the past 42 years, the letter should be withdrawn. If OSHA believes this approach is worth pursuing, the only way for the agency to proceed is to engage in a full rulemaking process to modify 29 CFR 1903.8(c). To discuss this further please contact any of the names listed on the first page of this letter.

Sincerely,

American Bakers Association
American Beverage Association
American Chemistry Council
American Composites Manufacturers Association
American Council of Engineering Companies
American Feed Industry Association
American Foundry Society
American Petroleum Institute
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors
Associated Wire Rope Fabricators
California Cotton Ginners Association
California Cotton Growers Association
Can Manufacturers Institute
Corn Refiners Association
Flexible Packaging Association
Food Marketing Institute
Forging Industry Association
Heating, Air-Conditioning & Refrigeration Distributors International
Hilex Poly
Independent Electrical Contractors
Industrial Fasteners Institute
Industrial Minerals Association – North America
Institute of Makers of Explosives
International Foodservice Distributors Association
International Liquid Terminals Association (ILTA)
LeadingAge
Motor & Equipment Manufacturers Association
National Association for Surface Finishing
National Association of Chemical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Chicken Council
National Council of Chain Restaurants
National Grain and Feed Association
National Oilseed Processors Association
National Retail Federation
National Roofing Contractors Association
National Stone, Sand & Gravel Association
National Systems Contractors Association
National Tooling and Machining Association
National Turkey Federation

National Utility Contractors Association
NFIB
Non-Ferrous Founders' Society
North American Die Casting Association
Precision Machined Products Association
Precision Metalforming Association
Retail Industry Leaders Association
Texas Cotton Ginners Association
Textile Rental Services Association
U.S. Chamber of Commerce
U.S. Poultry & Egg Association
Western Agricultural Processors Association

CC: Dominic Mancini, Acting Administrator, Office of Information and Regulatory Affairs
Rep. John Kline, Chairman, House Committee on Education and the Workforce
Rep. Tim Walberg, Chairman, Subcommittee on Workforce Protections, House Committee on Education and the Workforce
Sen. Lamar Alexander, Ranking Member, Senate Committee on Health, Education, Labor and Pensions
Sen. Johnny Isakson, Ranking Member, Subcommittee on Employment and Workplace Safety, Senate Committee on Health, Education, Labor and Pensions