OSHA – 2013 Interpretative Letter

OSHA has recently taken action to rescind the February 2013 interpretative letter, also known as the Fairfax memo, which permitted employees at non-union companies to designate a non-employee union representative to accompany an OSHA compliance officer as he/she conducted a site compliance inspection. The Fairfax memo was issued at the request of organized labor. The focus of the organized labor was Section 1903.8(c) of the Code of Federal Regulations. This section gives a compliance officer the latitude to permit a third party to accompany him during an inspection if he feels that the third party can contribute some expertise to assist him during the inspection. Prior to the Fairfax memo this assistance focused on safety engineers or industrial hygienists.

The position of organized labor was that this regulation contemplates permitting “any” third party to accompany the compliance officer if the compliance officer feels that the presence of the third party was reasonably necessary. While most could see how a third party industrial hygienist or a safety engineer or even an interpreter could add a level of expertise to compliance it was considerably more difficult to see such a contribution in a compliance inspection. The rationalization was that the union representative may have had experience in evaluating working conditions or had some other potentially valuable contribution to make.

Non-union employers saw this more as a blatant attempt of organized labor to insert gain access to their workforce. Recently the Fairfax memo was challenged in the U. S. District Court for the Norther District of Texas. The challenge was that the interpretive letter was in fact an expansion of the existing regulation and, therefore should have been proposed under the rule making provision of the Administrative Procedures Act. Following an action by the Court on the lawsuit in early February 2017, OSHA on April 27th 2017 agreed to rescind the interpretation letter and to remove that “guidance” from the Field Operations Manual.