

## OSHA's 'Union Walk Around Rule' Challenged in Court

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December 14, 2016 Matthew Deffebach

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PRACTICES OSHA, Labor and Employment

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On September 8, 2016, a lawsuit was filed by the National Federation of Independent Business (“NFIB”) seeking to enjoin and strike down the Occupational Safety and Health Administration’s (“OSHA”) Union Walk Around Rule.<sup>1</sup> This rule was created by an OSHA letter of interpretation issued in February of 2013, which states that non-union employees may elect anyone to accompany OSHA compliance officers as they inspect the employer’s worksite.<sup>2</sup> In the past, a union has used the Union Walk Around Rule to accompany OSHA inspectors in non-union settings and have been accused of using the procedure as a means to intimidate employers into unionizing.

OSHA does have a rule allowing “a representative authorized by [the employer’s] employees.” 29 U.S.C. § 657(e). However, NFIB argues that there is nothing within the Occupational Safety and Health Act allowing a non-employee to accompany the compliance officer. NFIB argues that the letter of interpretation violates the Administrative Procedures Act (“APA”) because it is in fact a standard that should have been subject to notice and comment rather than an interpretation of an existing rule. This litigation should be closely watched as the outcome will impact both the Union Walk Around Rule and the long debate over whether OSHA’s “interpretations” are sometimes standards subject to notice and comment rulemaking under the APA.

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<sup>1</sup> *National Federation of Independent Business v. Dougherty, et al.*, 3:16-cv-025688 (September 8, 2016) filed in the United States District Court for the Northern District of Texas.

<sup>2</sup> See [OSHA Standard Interpretation Letter](#), February 21, 2013.