TESTIMONY

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ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

AND ASSOCIATED BUILDERS AND CONTRACTORS, INC.

"OSHA'S REGULATORY AGENDA: CPUBLIC RULEMAKING PROCESS"

FEBRUARY 4, 2014

BEFORE THE

U.S. HOUSE OF REPRESENTATIVE COMMITTEE ON EDUCATION AND THE WORKFORCE, SUBCOMMITTEE ON WORKFORCE PROTECTIONS

Chairman Walberg, Ranking Member Courtney, and members of the U.S. House Committee on Education and the Workforce, thank you for the opportunity to testify before you at today's hearing.

The NAM is the largest manufacturing association in the United States, representing small

The LOI contradicts the plain language of OSHA's governing statute ("the OSH Act") and the National Labor Relations Act (the "NLRA"). Section 8 of the OSH Act provides:

> 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….

Section 9 of the NLRA makes clear that only a union that has been chosen by a majority of employees in an appropriate bargaining unit can claim to be an "authorized representative." OSHA's published regulation implementing the OSH Act, 29 C.F.R. 1903.8(c), states:

> The representative authorized by employees shall be an employee of the employer. However if in the judgment of the Compliance Safety and Health Officer, 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.

The OSHA Review Commission's regulation, 29 C.F.R. 2200.1(g), defines an "authorized employee representative" to mean, "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees." The Commission has limited such status to unions recognized through the NLRB process.[1]

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Consistent with these regulations, OSHA's Field Operations Manual (FOM) and its predecessor the Field Inspection Reference Manual (FIRM) have long titled the section on inspection accompaniment: "Employees represented by a certified or authorized bargaining agent." Another section of the FOM addresses what an OSHA inspector should do where there is "No Certified or Recognized Bargaining Agent." The FOM directs OSHA inspectors to determine if other employees of the employer would suitably represent the interests of co-workers in the walk-around. If selection of an employee is impractical, inspectors are directed to conduct interviews with a reasonable number of employees during the walk-around.

OSHA has for decades consistently interpreted the law, the regulations and the Field Operations Manual to allow a safety inspector to be accompanied by a labor19z BT 0 scn ( )]TJ [(c)9(oi)3l6/TT1

employers to harassment from outside organizations. This is neither the intent of an OSHA inspection, nor is it appropriate under the previous interpretations of the regulations and the law. As a result of the new LOI, the possibilities for disruption in the workplace by any group who may have a gripe with an employer are limitless.

The NAM and ABC believe OSHA's new LOI constitutes a significant and potentially unlawful change in agency policy that does nothing to promote workplace safety and has a substantial negative impact on the rights of employers and their employees.

The New OSHA LOI Violat es The Administrative Procedure Act

As explained above, OSHA chose to issue the LOI without any advance public notice or opportunity for comment. By acting in this unilateral way, OSHA changed substantive, longstanding policy without any opportunity for employers to challenge the LOI within OSHA itself, either through rulemaking or at the OSHA Review Commission. Most importantly, by failing to go through the required notice and comment procedure, OSHA violated the Administrative Procedure Act (APA).

The APA clearly states that an agency seeking to change one of its rules must first provide the public with notice and opportunity to comment upon it. The only relevant exceptions to this notice and comment requirement arise when an agency acts through an "interpretive" (as opposed to legislative) rule, or a statement of general policy that is not deemed to be a rule at all.

The D.C. Circuit has struck down many other agency changes that were held out as merely interpretive. The judicial standard is that when an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has, in

effect, amended its rule, something it may not accomplish [under the APA] without notice and comment.

It is clear that OSHA gave its inspection regulation a definitive interpretation limiting union access to those facilities where the union has been authorized by a majority of employees. It is equally clear that the new LOI significantly revised that interpretation and that the agency has in effect substantially changed its published rule. For each of these reasons, we believe that if and when a court is asked to review OSHA's LOI, it will find that OSHA has violated the APA.

The New OSHA LOI Is Bad Policy

This is bad policy for several reasons. First, it undermines the rule of law, which is improper for any government agency charged with enforcing the law. Second, by allowing outside union agents

to represent the interests of non-union employees nor do they have any special expertise in the non-union workplace. In the incidents that have come to our attention where the new LOI has been applied, there was certainly no claim that the union agent had any special expertise except as an organizer. This is a totally improper reason for allowing outside agents to accompany OSHA safety inspectors.

In addition, the NLRB processes of authorizing majority representation by unions have been developed over the past 80 years for good reasons, in order to strike the right balance

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