UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NATIONAL FEDERATION OF INDEPENDENT BUSINESS,	§	
Plaintiff,	§	
v.	§	No. 3:16-cv-2568
DOROTHY DOUGHERTY, in her official capacity as Deputy Assistant Secretary of Labor for the Occupational Safety and Health Administration; OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; and ERIC HARBIN, in his official capacity as Regional Administrator for Region 6 of the Occupational Safety and Health Administration,	§	
Defendants.	§	

ORIGINAL COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff National Federation of Independent Business ("NFIB") hereby files its Original Complaint for Declaratory and Injunctive Relief, and would show as follows:

INTRODUCTION

1. Plaintiff National Federation of Independent Business (NFIB) brings this action to challenge the illegal administrative expansion of the "walk-around" right created by the Williams-Steiger Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. *See id*. § 657(e).

2. For over four decades, Defendant Occupational Safety and Health Administration (OSHA) construed the Act to afford employees a limited right to accompany an OSHA compliance safety and health officer during a workplace inspection. *See* 29 C.F.R. § 1903.8.

3. According to the agency's long-standing approach, an employee representative had to be an employee of the employer whose workplace was the subject of the inspection. *Id*. Under the same framework, however, OSHA allowed for third-party specialists (such as industrial hygienists and safety engineers) to accompany the compliance officer when their presence would be "reasonably necessary." *Id*.

4. This construction of the Act's walk-around right accurately captured a delicate legislative balance. Congress concluded that employees should be allowed to participate in inspections meant to protect their health and safety. But Congress also recognized that this participatory right should not be used as a pretext to facilitate union access to proselytize employees of open-shop businesses, *i.e*., a place of employment at which one is not required to join or financially support a union as a condition of hiring or continued employment.

5. In 2013, OSHA deviated significantly from its established construction of the Act's walk-around provision. In February of that year, Richard Fairfax, then Deputy Assistant Secretary of the Department of Labor, issued a "Standard Interpretation Letter" (the Fairfax Memo), which may be found at the following internet address: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604 (last visited Aug. 29, 2016).

6. Responding to an inquiry from the Allied Industrial and Service Workers International Union, the Fairfax Memo substantially diverged, in two key ways, from the walk-around right created by the Act and implemented by OSHA's regulations. First, it backtracked from the categorical requirement that an employee representative must be an employee. Second, it lowered the standard for admitting a third-party specialist to the walk-around, from "reasonably

necessary" to "will make a positive contribution." Last fall, OSHA incorporated the Fairfax Memo's interpretation into the agency's Field Operations Manual.

7. The reason for the Fairfax Memo's changes was to facilitate union access to open-shop workplaces. The Fairfax Memo effected these changes without giving the public prior notice or an opportunity to comment.

8. The newly revised rule announced in the Fairfax Memo conflicts with Congress's purpose behind the Act's walk-around provision. The Fairfax Memo's promulgation also violates the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b)-(c). Therefore, NFIB brings this action and alleges as follows:

PARTIES

Plaintiff

9. NFIB is the nation's leading small business advocacy organization. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. It represents approximately 325,000 independent business owners located throughout the United States and in a wide variety of industries. The typical NFIB member employs ten people and reports gross sales of about $500,000 a year.

10. Part of NFIB's mission is the enforcement of constitutional rights and statutory protections for its member-employers, including the notice-and-comment requirements for administrative rule-making. *See, e.g.*, Statement for the Record of Karen Harned, Executive Director, NFIB Small Business Legal Center, *Hearing on H.R. 3438, the "Require Evaluation Before Implementing Executive Wishlists Act of 2015"; and, H.R. 2631, the "Regulatory Predictability for Business Growth Act of 2015"*, House Reps. Comm. on the Judiciary, Subcomm.

on Regulatory Reform, Commercial and Antitrust Law 3-4 (Nov. 3, 2015), *available at* http://docs.house.gov/meetings/JU/JU05/20151103/104126/HHRG-114-JU05-20151103-SD005.pdf (last visited Aug. 24, 2016).

Defendants

11. Dorothy Dougherty is the Deputy Assistant Secretary of Labor for Occupational Safety and Health, and in that capacity overseas OSHA. Ms. Dougherty is the lead federal official responsible for the enforcement of the Fairfax Memo, which is the subject of this action. She is sued in her official capacity only.

12. OSHA is the federal agency responsible for the enforcement of the Occupational Safety and Health Act and its implementing rules and regulations, including the Fairfax Memo.

13. Eric Harbin is OSHA's Regional Administrator for Region 6, which encompasses the state of Texas. Within Region 6, Mr. Harbin is responsible for the enforcement of the Occupational Safety and Health Act and its implementing rules and regulations, including the Fairfax Memo. Mr. Harbin principally executes his official duties at OSHA's Region 6 office, located at the Maceo Smith Federal Building in Dallas, Texas. Mr. Harbin's domicile is also located within this District. It is likely that the preceding factual contentions will have evidentiary support after a reasonable opportunity for further investigation or discovery, as it is common knowledge that federal officers typically reside in the general area where they execute their principal duties, and that they execute their principal duties where their agency's office is located. Mr. Harbin is sued in his official capacity only.

JURISDICTION & VENUE

14. Jurisdiction is founded upon 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (judicial review of agency action), and 5 U.S.C. § 703 (authorizing suits for declaratory and injunctive relief against agency action).

15. Venue is proper in this District because at least one federal officer defendant resides here. *See* 28 U.S.C. § 1391(e)(1)(A). *See also* 5 U.S.C. § 703 (venue for actions under the Administrative Procedure Act generally proper in "a court of competent jurisdiction"). For the same reason, venue is proper in this Division. *See* 28 U.S.C. § 124(a)(1).

GENERAL ALLEGATIONS

16. The Occupational Safety and Health Act is the principal federal law regulating the safety and healthfulness of the nation's workplaces engaged in business affecting interstate or foreign commerce.

17. The Act entrusts the Secretary of Labor (and by delegation OSHA) with the authority, among other things, to issue safety and health standards for workplaces. 29 U.S.C. § 655.

18. To enforce these standards, the Act authorizes the investigation and inspection of workplaces. *Id*. § 657(a). When a workplace inspection is carried out, the Act grants to the employer and to the authorized representative of the employees the right to accompany the compliance officer during the workplace's physical inspection, for the purpose of aiding the inspection. *Id*. § 657(e). This walk-around right is subject to regulations issued by the Secretary. *See id*.

19. Shortly after the Act's passage, the Secretary promulgated regulations implementing the Act's inspection and related provisions, including the walk-around right. *See* 36 Fed. Reg. 17,850 (Sept. 4, 1971) (creating a new 29 C.F.R. Part 1903).

20. Under the pertinent regulation, the authorized employee representative himself must be an employee. 29 C.F.R. § 1903.8(c). But the regulation also gives the compliance officer limited discretion to allow a nonemployee to accompany the inspection. Specifically, a nonemployee may participate in the walk-around if such participation is "reasonably necessary" to conduct a physical inspection of the workplace. *Id*. The regulation gives as examples of such reasonably necessary third parties "an industrial hygienist or a safety engineer." *Id*.

21. Prior to 2013, it was commonly accepted OSHA practice among employers that, consistent with Section 1903.8, union representatives could not accompany a compliance officer unless they were employees themselves, or they had some specialized technical or site-specific knowledge that would assist the compliance officer during the inspection.

22. In 2013, OSHA issued the Fairfax Memo, which purports to alter dramatically the agency's practice under its existing regulation, in two key respects. First, the Fairfax Memo provides that "an employee representative" can include someone "who is not an employee of the employer." Fairfax Memo at 2. Second, the Fairfax Memo substantially lowers the standard for determining whether a third-party specialist may accompany the compliance officer—namely, from "reasonably necessary" to "will make a positive contribution." *Id*. These changes have hurt NFIB members.

23. For example, NFIB member Professional Janitorial Service, Inc. (PJS), is a Houston-based, locally owned and operated cleaning service company. PJS provides office cleaning, maid service, power washing, carpet cleaning, and other services to businesses throughout the Houston area. The company prides itself on being an industry leader in "systematized cleaning," which includes services meeting the Leadership in Energy and Environmental Design (LEED) green standards of the United States Green Building Council. These services are implemented through

a team cleaning approach. For PJS, the safety of its workers and its customers is paramount. To that end, the company has instituted a safety program that exceeds industry requirements.

24. Prior to the Fairfax Memo's issuance, PJS had never received any worker safety or health citation from any agency. PJS is an open-shop company.

25. In October, 2013, an OSHA compliance officer appeared at one of PJS's workplaces accompanied by three nonemployee representatives from the Service Employees International Union, one of the country's largest unions representing janitors, among other tradesmen. PJS objected to the onsite presence of these Union members, but was required to allow their presence on account of OSHA's enforcement of the Fairfax Memo. The Union representatives did not appear to have any specialized training or knowledge of industrial hygiene or safety engineering.

26. That same day the compliance officer inspected a second PJS workplace, accompanied by the same three Union representatives.

27. In November, 2013, the same compliance officer, again accompanied by the same three Union representatives, inspected a third PJS worksite.

28. In February, 2014, the compliance officer inspected a fourth PJS worksite, this time accompanied by two different Union representatives who, like their colleagues, did not appear to have any specialized training or knowledge of industrial hygiene or safety engineering.

29. For none of the foregoing inspections was any effort made to explain how or why the presence of the union representatives was at all necessary to facilitate a thorough workplace inspection.

30. On account of these prior inspections, in conjunction with ongoing disputes PJS has with the Union, PJS reasonably fears that it will again be required, against its will, to allow

nonemployee Union representatives onto its workplaces, because of OSHA's and its officers' enforcement of the Fairfax Memo.

DECLARATORY & INJUNCTIVE RELIEF ALLEGATIONS

31. The Fairfax Memo is the subject of a live controversy. NFIB, on behalf of itself and its members, contends that the Fairfax Memo is illegal under the Occupational Safety and Health Act, 29 U.S.C. § 657(e), and the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c), 706(2). In contrast, Defendants contend that the Fairfax Memo is procedurally and substantively sound.

32. NFIB and its members have been, are, and will continue to be injured by OSHA's and its officers' enforcement of the Fairfax Memo. As explained above, NFIB has at least one member—PJS—against whom Defendants have enforced the Fairfax Memo.

33. Given its ongoing Union-related disputes, PJS reasonably believes that OSHA and its officers again will enforce the Fairfax Memo against it. For example, a compliance officer can conduct an inspection as a result of a nonemployee complaint. *See* Fairfax Memo at 1 (noting that a union representative may submit a complaint on behalf of an employee of an open-shop business); OSHA Field Operations Manual at 9-2 (noting that an inspection "is normally warranted" if, among other things, a "valid formal complaint is submitted"). Because it wishes to unionize PJS's employees, the Union has a strong incentive to submit complaints to OSHA to trigger additional inspections and thereby provide the Union representatives with access to PJS's employees.

34. PJS does not wish to allow access to Union third-parties, but it nevertheless fears substantial civil penalties and practical business injuries should it not acquiesce in OSHA's and its officers' enforcement of the Fairfax Memo.

35. For its part, NFIB has a long-standing interest in advocating for strict compliance with the notice-and-comment obligations of federal administrative law, as well as for a balanced approach to workplace health and safety—one that takes into account employer concerns about union proselytizing. *See, e.g.*, NFIB Small Bus. Legal Ctr., *The Fourth Branch & Underground Regulations* 19 (2015) ("[T]he business community should have had an opportunity to protest the new rule [the Fairfax Memo], before it was announced, through a notice-and-comment process."). OSHA's and its officers' ongoing implementation of the Fairfax Memo injures these interests.

36. NFIB therefore has associational standing to bring this action. NFIB's members would otherwise have standing to sue in their own right; the interests NFIB seeks to protect are germane to NFIB's organizational purpose; and neither the claims asserted nor the relief requested requires the participation of individual NFIB members in the lawsuit. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977).

37. NFIB and its members have no plain, speedy, and adequate remedy at law and, absent judicial intervention, NFIB and its members will suffer irreparable injury. NFIB and its members have no remedy, other than through this action under the Administrative Procedure Act, to restrain OSHA's and its officers' continued enforcement of the Fairfax Memo.

38. A judicial determination of the parties' rights and responsibilities arising from this actual controversy, as well as an injunction prohibiting enforcement of the Fairfax Memo, are necessary and appropriate at this time.

FIRST CLAIM FOR RELIEF

(Violation of the Notice-and-Comment Requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b)-(c))

39. All of the preceding paragraphs are incorporated herein as if fully set forth.

40. As an authority of the government of the United States, OSHA is an agency subject to the Administrative Procedure Act. *See* 5 U.S.C. § 551(1). None of the Act's "agency" exceptions applies to OSHA. *See id*. § 551(1)(A)-(H).

41. NFIB, as an incorporated association, qualifies as a "person" under the Administrative Procedure Act. 5 U.S.C. § 551(2). NFIB's member PJS has suffered and has been adversely affected and aggrieved, and continues to suffer legal wrong and to be adversely affected and aggrieved, by agency action within the meaning of the Administrative Procedure Act. Many other small businesses that are members of NFIB face the same unlawful interpretation and potential implementation of the Occupational Safety and Health Act and OSHA regulations, with the attendant deprivation of rights, that PJS faces. Indeed, NFIB itself faces it. Therefore, NFIB may bring an action under the Act. *See* 5 U.S.C. § 702.

42. The Fairfax Memo is a rule within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(4), because it generally sets forth the terms of when a nonemployee may accompany a compliance officer during the inspection of a workplace, 29 U.S.C. § 657(a), (e).

43. The Administrative Procedure Act presumptively requires that the public be given notice of, and an opportunity to participate in, rule-making before a rule may go into effect. *See* 5 U.S.C. § 553(b)-(c). None of the Act's few limited exceptions to this general notice-and-comment obligation, *see id*. § 553(b)(3)(A)-(B), applies to the Fairfax Memo because, as alleged below, the Fairfax Memo is an amendment to OSHA's existing legislative rule governing the walk-around right.

44. The Fairfax Memo sets forth a walk-around right that is substantially different, in at least two ways, from that afforded by OSHA's existing walk-around regulation, 29 C.F.R. § 1903.8.

45. First, the Fairfax Memo creates an exception to Section 1903.8's categorical rule that the employee representative also must be an employee. *Compare id.* § 1903.8(c) ("The representative(s) authorized by employees shall be an employee(s) of the employer.") *with* the Fairfax Memo (affirming that "an employee representative who is not an employee of the employer" may serve as the "employee representative").

46. Second, the Fairfax Memo makes a material change in the standard for determining whether a nonemployee may accompany the compliance officer as a third-party neutral. Under Section 1903.8(c), such a third party must have some specialized knowledge directly germane to the inspection. *See* 29 C.F.R. § 1903.8(c) (offering as examples of an appropriate third party "an industrial hygienist or a safety engineer"). Also, the third-party's presence must be "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." *Id.* In contrast, the Fairfax Memo does not require a demonstration of any specialized knowledge or reasonable necessity. Rather, a third party may accompany the compliance officer so long as the individual "will make a positive contribution." Fairfax Memo. Demonstrating that one's presence will make a "positive contribution" is much easier to do than showing that one's presence will be "reasonably necessary."

47. The substantial differences between Section 1903.8 and the Fairfax Memo demonstrate that the latter's "interpretation" of Section 1903.8's walk-around right is in fact an amendment to the regulation.

48. Section 1903.8 itself is a legislative rule, which was subjected to notice and comment, *see* 36 Fed. Reg. at 17,851, and which binds the agency as well as the public as to the scope of the walk-around right. *See* 29 U.S.C. § 657(e) (establishing the walk-around right

"[s]ubject to regulations issued by the Secretary"); *id*. § 666(a)-(c) (prescribing various penalties for violation of "regulations prescribed pursuant to [the Occupational Safety and Health Act]").

49. Similarly, the Fairfax Memo's amendment of OSHA's existing walk-around regulation is binding on the agency and the public. OSHA has updated its Field Operations Manual to include the newly amended rule announced in the Fairfax Memo. *See* Field Operations Manual at 3-14 ("It is OSHA's view that representatives are 'reasonably necessary', when they make a positive contribution to a thorough and effective inspection."). The Fairfax Memo therefore binds the agency's compliance officers.

50. As an amendment to Section 1903.8, the Fairfax Memo also binds the public. An employer must submit to a nonemployee walk-around representative on pain of significant statutory penalties. *See* 29 U.S.C. § 666(a)-(c). Failure to comply also may subject an employer to a contempt citation. *See id*. § 657(b) (authorizing contempt of court citations against those who refuse to comply with subpoenas issued as part of the inspection and investigation process).

51. For similar reasons, the Fairfax Memo is a final agency action. *Cf.* 5 U.S.C. § 704 (providing a cause of action to challenge final agency action). It represents the consummation of the agency's decision-making process with respect to the scope of the walk-around right. It also produces legal consequences, and affects rights and obligations. The Fairfax Memo establishes the standards for determining the classes of persons who may accompany the agency's compliance officers. It necessarily determines whom an employer may and may not exclude from its premises. Therefore, the Fairfax Memo has the effect of committing the agency itself to a view of the law that, in turn, forces NFIB's members either to alter their conduct, or subject themselves to potentially significant civil liability.

52. OSHA offers no administrative remedy for persons aggrieved by de facto amendments to its regulations.

53. This action is timely because it has been commenced within six years of February 21, 2013, the date of the Fairfax Memo's promulgation. *Cf.* 28 U.S.C. § 2401(a) (six-year statute of limitations for actions seeking nonmonetary relief against the federal government).

54. Because the Fairfax Memo is an amendment to a legislative rule, it is itself a legislative rule. In promulgating the Fairfax Memo, OSHA did not give the public prior notice or an opportunity through comment to participate in the rule's formulation. Therefore, the agency has acted arbitrarily and capriciously, not in accordance with law, in excess of statutory authority, and without observance of procedure as required by law. *Cf.* 5 U.S.C. § 706(2)(A), (C), (D).

SECOND CLAIM FOR RELIEF

(Violation of Occupational Safety and Health Act, 29 U.S.C. § 657(e))

55. All of the preceding paragraphs are incorporated herein as if fully set forth.

56. The Occupational Safety and Health Act grants the right to "a representative authorized by [an employer's] employees" to accompany the compliance officer during the inspection of a workplace. 29 U.S.C. § 657(e). The Act contains no express authorization for a nonemployee to accompany the compliance officer. *See id.*

57. The walk-around right that the Act creates reflects a careful legislative compromise. An overly broad walk-around right—one that would allow third parties with no workplace-specific or technical knowledge to infiltrate a workplace—would frustrate the inspection regime's principal purpose of identifying and resolving workplace health and safety issues.

58. For over 40 years, OSHA reasonably construed the Act to allow, in very limited circumstances, for a nonemployee to accompany the compliance officer. As noted above, such a

nonemployee was allowed if, but only if, the nonemployee had special skills or knowledge directly pertinent to evaluating the physical safety and healthfulness of a workplace. *See* 29 C.F.R. § 1903.8(c).

59. The Fairfax Memo contravenes the Act by allowing nonemployees to accompany compliance officers without any showing that these third parties' presence is necessary to vindicate the inspection's safety- and health-related purposes. The Fairfax Memo therefore upsets Congress's careful legislative balance between giving employees a fair opportunity to participate in safety- and health-related inspections, and precluding such walk-around opportunities from being used for purposes unrelated to safety and health, such as for union organizing campaigns.

60. The Fairfax Memo is therefore arbitrary and capricious, not in accordance with law, and in excess of statutory authority. *Cf.* 5 U.S.C. § 706(2)(A), (C).

PRAYER FOR RELIEF

WHEREFORE, NFIB prays for relief as follows:

1. For a declaratory judgment that Defendants Dougherty and OSHA have acted arbitrarily and capriciously, not in accordance with law, in excess of statutory authority, and without observance of procedure as required by law, in issuing the Fairfax Memo, because the public was not afforded notice or an opportunity to comment before it was promulgated;

2. For a declaratory judgment that Defendants Dougherty and OSHA have acted arbitrarily and capriciously, not in accordance with law, in excess of statutory authority, and without observance of procedure as required by law, in issuing the Fairfax Memo, because it is contrary to the Occupational Safety and Health Act, 29 U.S.C. § 657(e);

3. For a preliminary and permanent prohibitory injunction forbidding Defendants from enforcing the Fairfax Memo;

4. For an award of attorney fees and costs, pursuant to 28 U.S.C. § 2412, or other appropriate authority; and,

5. For any other relief the Court determines to be just and proper.

DATED: September 8, 2016.

Respectfully submitted,

By: */s/ Adam H. Charnes*

ADAM H. CHARNES
State Bar No. 24090629
acharnes@kilpatricktownsend.com

KILPATRICK, TOWNSEND
& STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, Texas 75201
Telephone: (214) 922-7100
Facsimile: (214) 922-7101

- AND -

DAMIEN M. SCHIFF*
Cal. Bar No. 235101
dms@pacificlegal.org
JOSHUA P. THOMPSON*
Cal. Bar No. 250955
jpt@pacificlegal.org
**Pro Hac Vice Pending*

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

ATTORNEYS FOR PLAINTIFF NATIONAL FEDERATION OF INDEPENDENT BUSINESS