



# "The Public Interest"

## Health/Safety and Environmental Issues

*the PASMA way to shared knowledge*

Public Agency Safety Management Association

**September 30, 2016**

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### **Some notes from the Prez...**

Congratulations members, and a special thanks to the members of your Board who devoted many hard hours above and beyond their normal duties to manage this event from idea to delivery. Members, your support has meant the world to us particularly since this years' conference was accomplished without the assistance of an event coordinator. Your positive responses and accolades during and after this event were most appreciated. We, members and board, have collectively made the 2016 Conference one of the best in recent memory and it is testament that a "Shared Burden", may not be such a burden after all.

#### **Some other quick reminders:**

1. We need volunteers by weeks end to serve on the Nominating Committee since our by-laws mandate we open election for a new 2017 Board. I'm a big proponent of volunteerism and hope you are as well. Please let Ms. Perkins, our secretary know of your intent so that the committee may be selected.

2. Speaking of Volunteers and nominations; its also time to submit your candidate for "**2016 Safety & Health Professional of the Year**" award. With your nominee, please submit a paragraph or two highlighting their accomplishments and your reasons meriting this award. *FYI...SURVIVING THE TRADE SHOULD NOT BE THE ONLY QUALIFIER.*

3. During the off months when we do not meet, may I encourage your attendance to other Safety & Health Associations to include the Southern California Industrial Safety Society (the oldest Safety Association in California); any of the ASSE Chapters including the Los Angeles, Long Beach, Orange County, Bakersfield and San Diego Chapters, and last but certainly not least; The Safety Forum of the Inland Empire. All of the Associations provide topical speakers and are a tremendous source of up to date information, and as the noted economist, Mr. Peter Drucker, once suggested..."the era of making and moving things has been replaced by the information era.

4. Our Northern Chapter members have been in a bit of a "funk" that should be resolved soon. Through the good graces of one of our own veteran members, Ms. Cari Elofson, we are helping our colleagues secure a fixed location for their meetings. Ms. Elofson has in principal offered a meeting room at her Dublin office.



*thank you!*



And now for the rest of the stories....

Remember the old song "*I fought the law*"?...Read some of these cool stories...

<http://www.natlawreview.com/article/lawsuit-filed-against-osha-walk-arounds>

### **Lawsuit Filed Against OSHA on Walk-Arounds**

Tuesday, September 27, 2016

The **Occupational Safety and Health Administration** overstepped its authority in expanding union representation at "walk-arounds" in non-union workplaces, the National Federation of Independent Business has alleged in a lawsuit against the agency filed in Texas. *Nat'l Fed'n of Indep. Bus. v. Dougherty*, No. 3:16-cv-02568 (N.D. Tex. Sept. 8, 2016).

The complaint alleges that unions are inappropriately proselytizing in the workplace during OSHA safety inspections.

The Occupational Safety and Health Act of 1970 and OSHA's Field Operations Manual recognizes the right of workers to have an "employee representative" accompany OSHA inspectors during a workplace safety inspection.

In a controversial **February 21, 2013, letter of interpretation**, OSHA Deputy Assistant Secretary Richard E. Fairfax wrote that workers can designate "a person who is affiliated with a union without a collective bargaining agreement at their workplace or with a community organization" to act as their "personal representative."

He continued, "It is OSHA's view that representatives are 'reasonably necessary' when they will make a positive contribution to a thorough and effective inspection.... [T]here are numerous ways that an employee representative who is neither an employee of the employer being inspected nor a collective bargaining agent could make an important contribution to a thorough and effective inspection."

The letter, known now as the "Fairfax Memo," raised concern among employers that unions would use the right to gain entry into workplaces they normally would not be allowed.

The new complaint alleges that, in 2013, OSHA inspected Professional Janitorial Service, a Houston-based cleaning company, four times in four months in the midst of a labor dispute with the Service Employees International Union. It alleges that nonemployee representatives from the SEIU accompanied the inspector, giving the union access to the workplace at a tense time in union relations.

The lawsuit argues the Occupational Safety and Health Act allows only the "personal representative" to be employees and persons with specialized safety expertise, such as industrial hygienists. It alleges the "Fairfax Memo" unlawfully reduces the standard to anyone who "will make a positive contribution."

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<http://jacksonville.com/news/georgia/2016-08-31/story/us-magistrate-wont-let-osha-inspect-georgia-poultry-plant-without>

Posted September 1, 2016 12:00 am - Updated August 31, 2016 09:51 am By [Joshua Silavent](#)

**U.S. magistrate won't let OSHA inspect Georgia poultry plant without establishing cause OSHA says injuries justify inspection and will take warrant application to higher court**

GAINESVILLE, GA. | The Occupational Safety and Health Administration is pushing back against a local judge's recommendation to deny the agency a warrant to inspect the Mar-Jac poultry plant in Gainesville for worker-safety violations. U.S. Magistrate J. Clay Fuller found that OSHA needed to establish "**probable cause**" lest inspection warrants "**become tools of harassment.**" But this standard was not met, according to Fuller. He recommended that a warrant for an expanded inspection be denied because such an investigation could not be solely based on an employee complaint or report of an injury. In the latest court filing on Aug. 19, OSHA states that high rates of injury at the plant demand an expanded inspection. The agency believes it has "reasonable suspicion" of safety violations and inadequate record keeping.

In 2015, for example, court records indicate that Mar-Jac workers reported at least 25 musculoskeletal injuries, six injuries after being struck by hazards, seven slips, trips or falls, and 10 eye injuries from biological hazards. OSHA believes that numerous workplace hazards, including "dozens of injuries ... and above average rates in an already high-hazard field with documented instances of under reporting constitutes 'enough injuries' for probable cause."

The court fight has put **OSHA's new Regional Emphasis Program** in the cross hairs. Unveiled last fall, the program is designed to improve worker safety in poultry plants through outreach, education and enforcement efforts, including inspections of production operations, according to the agency.

The Regional Emphasis Program became the basis for OSHA's request for a warrant to inspect up to 16 areas of inquiry beyond an initial accident investigation that began in February when an on-the-job injury left a worker with third-degree burns on the hands and face.

OSHA officials have expressed concern that injury rates are under reported in the poultry industry because many workers are immigrants who do not speak English or understand the protections afforded them. The Bureau of Labor Statistics reports poultry workers suffer serious injuries at higher rates than workers in most other private-sector industries and also experience more work-related illnesses. Higher incidences of days missed, hearing loss and respiratory conditions are also reported. Industry and trade representatives say these numbers are misleading. "When comparing apples to apples, poultry processing's rate is much lower than all food manufacturing in general," Thomas Super, spokesman for the National Chicken Council, told The Times in an email. "Poultry processing's injury and illness rate of 4.3 is on par with all manufacturing jobs, 4.0, and is decreasing at a much faster rate."

Moreover, the incidence of occupational injuries and illnesses within the poultry sector's slaughter and processing workforce has fallen by 81 percent in the last 20 years, Super said.

OSHA is now arguing that it has the authority to expand unannounced inspections, which result from imminent dangers, fatalities and worker complaints, under the framework of the REP.

OSHA wants the motion to deny the warrant set aside so it can proceed with inspecting Mar-Jac, saying the judge's recommendation "erroneously concludes" that reasonable suspicion does not exist. In addition, this suspicion is based on evidence, and because it was prompted by an accident, raises no Fourth Amendment concerns, the agency argues.

OSHA is also arguing that it has resources and jurisdiction to expand an inspection to at least eight of 16 hazards even without the REP in place.

The U.S. District Court will have the final say at a later, undetermined date.





## And now a word about OSHA's propensity for underground rulemaking...

<http://www.natlawreview.com/article/agricultural-retailers-assn-v-osa>

Agricultural Retailers Assn. v. OSHA

Monday, September 26, 2016

While the repercussions remain to be determined, it appears that a unanimous panel of the D.C. Circuit finally lost its patience with the cavalier approach of the federal OSHA bureaucracy in revising established interpretations of OSHA standards without notice and comment rulemaking -- a practice which has been encouraged by a line of decisions on judicial deference issued by the U.S. Supreme Court. The panel made the courageous decision to uphold the underlying constitutional principles of due process against this persistent pattern of regulatory abuse and the long shadow of *Perez v. Mortgage Bankers*.

An industry challenged an OSHA "guidance" memo that narrowed the "retail facility" exemption to the OSHA Process Safety Management (PSM) Standard and would, for the first time, have subjected up to 4,800 facilities to the requirements of the OSHA PSM Standard. The court could have invalidated the OSHA memo on the narrow ground that OSHA's revised definition of "retail facility" was inconsistent with and, in effect, amended the regulatory text of the rule. Instead, the court appears to have broadly held that any OSHA guidance that announces a substantive change in the established interpretation of an OSHA standard is an amendment of that standard, which requires notice and comment rulemaking. Under that analysis, OSHA would not be permitted to make a substantive change to an established interpretation of an OSHA standard without notice and comment rulemaking. If that is the intent of the decision, a Petition for Certiorari to the U.S. Supreme Court appears inevitable.

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## Moment of Zen or Not?

