

MIOSHA Issues Agency Instruction, Clarifying Procedures for Conducting Interviews During Enforcement Investigations

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On October 17, 2022, the Michigan Occupational Safety and Health Administration (MIOSHA) issued an [agency instruction](#), the subject of which is “Interviews in Health and Safety Investigations.” The stated purpose of that agency instruction is to provide “clarification on proper procedures when conducting interviews for enforcement investigations under Section 29(1) of the Michigan Occupational Safety and Health Act.” The instruction applies to MIOSHA inspections related to the Construction Safety and Health Division and the General Industry Safety and Health Division. The instruction will remain effective, barring any change in the interim, until October 17, 2027.

Section 29(1) of the Michigan Occupational Safety and Health Act (MIOSH Act) permits MIOSHA representatives to “question privately the employer, owner, operator, agent, or an employee with respect to safety or health” in the course of an inspection or investigation. Historically, MIOSHA inspectors permitted the presence of another person in the employee interview at the employee’s request. The permitted persons included union representatives, management representatives, or both. Generally, there was no issue with employers, managers, and other “company” representatives being represented by counsel during those interviews.

In 1990, an employer challenged this practice in *Bureau of Safety and Regulation, General Industry Safety and Health Division v. Detroit Diesel Allison Parts Distribution Center*, Docket No. NOA 843544 (December 14, 1990). In that case, “the employer challenged whether MIOSHA could privately question employees during an inspection with a union representative present [while] excluding the employer representative.” The administrative law judge (ALJ) ruled that the MIOSH Act’s use of the word “private” limited the interview to a private interview with the MIOSHA inspector and the employee. The ALJ also noted that MIOSHA, the employee, and the employer could agree to have other people present if they desired, but MIOSHA could not permit union representatives to be present while excluding employer representatives.

The October 17, 2022, agency instruction includes limitations on who may participate in MIOSHA interviews of employees, employers, agents, owners, operators, or agents, though the instruction states that “[a]ny of the following individuals may be present”:

MIOSHA personnel who are present for training or observational purposes;

MIOSHA-retained individuals present for purposes of transcribing or recording the interview;

MIOSHA-retained translators or interpreters; and

MIOSHA-retained personnel hired for purposes of assisting in interviews of persons with disabilities.

In other words, under this agency instruction, only MIOSHA personnel or persons retained by MIOSHA are permitted to be present for MIOSHA interviews.

Employers may want to keep in mind that MIOSHA is empowered to issue civil and criminal penalties. Specifically, Section 35(5) of the MIOSH Act states the following:

An employer who willfully violates this act, an order issued pursuant to this act, or a rule or standard promulgated under this act which causes the death of an employee is guilty of a felony and shall be fined not more than \$10,000.00, or imprisoned for not more than 1 year, or both. If the conviction is the second under this act, the person shall be fined not more than \$20,000.00, or imprisoned for not more than 3 years, or both.

Thus, under this agency instruction, MIOSHA personnel may conduct interviews that could be used in a felony criminal prosecution while denying interview subjects access to counsel. Moreover, the agency instruction does not make reference to any limitations on the interviews based on the Fifth Amendment or Fourteenth Amendment to the United States Constitution, or a requirement that any sort of notification of due process rights be given to interviewees.

Ogletree Deakins will continue to monitor developments with respect to MIOSHA and its new agency instruction and will post updates to the firm's [Michigan](#) and [Workplace Safety and Health](#) blogs. Important information for employers is also available via the firm's [webinar](#) and [podcast](#) programs.