



CALIFORNIA

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Via email walkaroundrule@dir.ca.gov

March 28, 2026

Silas Shawver, Staff Counsel
California Department of Industrial Relations
Division of Occupational Safety and Health (Cal/OSHA) Legal Unit
1515 Clay Street, Suite 1901
Oakland, CA 94612

Re: Proposed Amendments to California Code of Regulations, Title 8, Division 1, Chapter 3.2, Subchapter 1, Article 2.5 [Proposed] Section 331.8 *Employer Representative and Representative Authorized by Employees During Workplace Inspections*

Dear Mr. Shawver:

On behalf of California's small businesses, the National Federation of Independent Business (NFIB) respectfully submits these comments in strong opposition to proposed Title 8, California Code of Regulations, section 331.8, titled "*Employer Representative and Representative Authorized by Employees During Workplace Inspections.*"

NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses. NFIB represents over 13,000 small business owners in California.

Small businesses support workplace safety and comply with Cal/OSHA inspections every day, often without dedicated compliance staff or in-house counsel. Unfortunately, proposed section 331.8 goes well beyond clarifying existing law and instead fundamentally alters the inspection process in an unnecessary, harmful, and legally questionable manner. NFIB recommends rescinding the proposed rule. The proposal exceeds the Division's authority and would impose unwarranted burdens on small businesses, making workplaces neither healthier nor safer.

The Proposed Rule Exceeds Cal/OSHA's Statutory Authority

California Labor Code § 6314(d) provides that “a representative of the employer and a representative authorized by his or her employees shall have an opportunity to accompany him or her on the tour of inspection.” The statute does not define “authorized by employees,” does not authorize third-party access, and does not grant Cal/OSHA discretion to convert inspections into multiparty proceedings involving union representatives.

Proposed section 331.8 purportedly implements Labor Code § 6314, but in fact it incorrectly expands the code by allowing non-employee third parties to participate in inspections, presuming that union representatives are qualified without demonstrating necessity, and giving inspectors broad powers to resolve disputes without clear standards. California agencies cannot extend statutory rights or obligations through regulation. By redefining who can enter a private workplace and participate in inspections, proposed section 331.8 exceeds Cal/OSHA's delegated authority.

Automatic Union Access to Non-Union Workplaces Is Unwarranted and Unlawful

Like the federal rule,¹ proposed section 331.8 states that when the employee representative is a third party, they may accompany Cal/OSHA if “their participation is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace” such as due to their knowledge, skills or experience with hazards or other workplace conditions.

California's proposed rule adopts a broader approach. Unlike the federal rule, proposed section 331.8(b) presumes that union representatives have the necessary knowledge and experience to accompany inspections, even in non-union workplaces, without requiring a showing that a union presence is reasonably necessary. This provision is fraught with risk for small business owners, who generally operate without in-house counsel or easy access to experienced labor counsel. As a result, union officials would gain physical access to private-sector non-unionized workplaces, increasing the risk that safety inspections could serve as a cover for organizing activities. This exposes employers to potential adversarial union actions unrelated to workplace safety. Labor Code § 6314 does not grant unions special treatment, nor does it authorize Cal/OSHA to provide access rights that employers do not explicitly and clearly authorize.

The Proposed Rule is Inconsistent with Constitutionally Protected Property Rights

¹ 29 CFR 1903.8(c). The federal OSHA walkaround rule—29 C.F.R. § 1903.8 (as amended in 2024)—is currently under active legal challenge. *Chamber of Commerce of the United States of America, et al. v. OSHA, et al.*, No. 6:24-cv-00271 (W.D. Tex).

The proposed rule also conflicts with constitutionally protected property rights under the Fifth Amendment. In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021), the U.S. Supreme Court faced "[a] California regulation" that "grants labor organizations a 'right to take access' to an agricultural employer's property in order to solicit support for unionization." The Supreme Court recognized "the central importance to property ownership of the right to exclude" (at 2073) and held that, in the Supreme Court's "understanding of the role of property rights in our constitutional order" (at 2077), a taking of that right to exclude constitutes "a per se physical taking" (at 2080). In enforcing the property right to exclude, the Supreme Court noted (at 2079, citation omitted): "Because a property owner traditionally had no right to exclude an official engaged in a reasonable search, government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners." Note the two limitations in the Supreme Court's statement about when searches do not implicate the property right to exclude: (1) the search must be conducted by "an official," and (2) the search must be "reasonable." If the searcher is not "an official," or if the search is not "reasonable," a search violates the property right to exclude.

Section 6314 (a) of the California Occupational Safety and Health Act of 1973 provides that qualified [Cal/OSHA] divisional inspectors and investigators" authorized by the chief of Cal/OSHA "upon presenting appropriate credentials to the employer, have free access to any place of employment to investigate and inspect during regular working hours, and at other reasonable times when necessary for the protection of safety and health, and within reasonable limits and in a reasonable manner. The chief or his or her authorized representative may, during the course of any investigation or inspection, obtain any statistics, information, or any physical materials in the possession of the employer that are directly related to the purpose of the investigation or inspection, conduct any tests necessary to the investigation or inspection, and take photographs.

This statutory provision allows a Cal/OSHA inspector or investigator to enter the business premises to conduct a "reasonable" (the provision uses the word three times) inspection, which on its face (as distinguished from how it may be applied) meets the requirements outlined in the *Cedar Point Nursery* case for a search not to implicate the right to exclude. However, proposed section 331.8 conflicts with the business owner's constitutionally recognized property right to exclude because it authorizes an individual who is not "an official" (specifically, third-party representatives) to accompany a Cal/OSHA inspector during the inspection of the business.

The Proposed Rule Imposes Unwarranted Burdens on Small Businesses

Proposed section 331.8 grants inspectors exclusive authority to decide who may participate in inspections and to resolve disputes about participants promptly and definitively. This

broad discretion could create uncertainty for small business owners who might reasonably fear retaliation if they object to demands from inspectors or employees. Regulations should include clear standards, especially when private property rights and discretionary enforcement powers are at stake.

Allowing outside third parties or union representatives to participate risks turning safety inspections into adversarial proceedings that distract from safety issues and expose small businesses to unnecessary enforcement escalation.

Conclusion

California's small businesses want safe workplaces. They also need predictable and balanced enforcement. Proposed section 331.8 undermines those goals by expanding access to inspections beyond Cal/OSHA's delegated statutory limits, deputizing third-party representatives, and exposing employers to unnecessary legal risks. For these reasons, NFIB requests that Cal/OSHA withdraw proposed section 331.8.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Taylor". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Tim Taylor
California Policy Director
National Federation of Independent Business (NFIB)