

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH

INITIAL STATEMENT OF REASONS

**Proposed Amendments to California Code of Regulations
Title 8, Division 1, Chapter 3.2, Subchapter 1, [Proposed] Article 2.5, Section 331.8**

**Subject Matter of Proposed Rulemaking: Employer Representative and
Representative Authorized by Employees During Workplace Inspections**

SUMMARY

Labor Code Section 6314 provides that during an investigation by the Division of Occupational Safety and Health (DOSH or Cal/OSHA, also referred to as “the Division”), a representative of the employer and a representative authorized by the employees shall have the opportunity to accompany the Division’s representative during the inspection of a workplace. This proposed regulation would define who may be considered an authorized representative of the employees. This proposed rule is consistent with a recent change in the federal regulations that clarified who may be considered an authorized representative of employees for purposes of a federal OSHA workplace inspection.

Part 1903, Section 1903.8 of Title 29 of the Code of Federal Regulations (CFR) (“Section 1903.8”) provides that representatives of both the employer and the employees shall be given an opportunity to accompany the Compliance Safety and Health Officers (“CSHO”) during the physical inspection of any workplace for the purpose of aiding such inspection. Section 1903.8, subsection (c), sets forth the criteria for who may qualify as an authorized representative of employees for purposes of accompanying the CSHO during an inspection. On April 1, 2024, the United States Occupational Safety and Health Administration (“OSHA”) issued a final rule amending Section 1903.8(c). The amendment clarifies that the representative(s) authorized by employees may be an employee of the employer or a third party. A third party may be deemed a representative authorized by employees when, in the judgment of the CSHO, good cause has been shown why they are reasonably necessary to aid in the inspection. The new federal rule went into effect on May 31, 2024.

Pursuant to the federal Occupational Safety and Health Act of 1970 (29 USC § 651 et seq.), all states with occupational safety and health “state plans” must maintain workplace inspection rights and procedures that are at least as effective as those provided under federal law. (29 USC § 667(c)(3).) California is a state with its own

approved occupational safety and health state plan. The Department of Industrial Relations' Division of Occupational Safety and Health ("Division") is the agency responsible for administering and enforcing California's state plan.

The proposed addition of Section 331.8 to Title 8 of the California Code of Regulations is necessary to ensure that California's workplace inspection rights and procedures are at least as effective as the federal workplace inspection rights and procedures contained in Part 1903 of the Code of Federal Regulations. (29 CFR § 1903.8.)

PROBLEM BEING ADDRESSED BY/SPECIFIC PURPOSE OF THE PROPOSED RULEMAKING

Under Cal/OSHA's current regulations, workplace inspections typically include an employer representative during the "walkaround", but not an employee representative. Employee representatives are typically involved only in unionized workplaces. Employee representatives, even outside of unionized workplaces, may help the inspections based on their familiarity with the workforce, knowledge of the worksite, or for their expertise in other relevant areas. Having an employee representative participate in a walkaround may also encourage employees to participate in the inspection, who would otherwise fear retaliation. The proposed rule would allow for a broader spectrum of employee representatives to accompany the Division during the inspections, which would make them more effective and consistent with federal OSHA inspection practices. Third party employee representatives may be helpful during worksite inspections where the Division may need more expertise as to the industry, the worksite, and specific work processes, or assistance in communicating effectively with the employees.

The federal Occupational Safety and Health Act of 1970 covers most private-sector employers and their employees in all 50 states, either directly through OSHA or through a "state plan" approved by OSHA under 29 CFR §§ 1902 *et seq.* A State plan is an OSHA-approved occupational safety and health program operated by an individual state instead of by federal OSHA. OSHA approves and monitors all State plans and provides funding for those plans. If OSHA establishes a new or revised standard, states with a state plan must adopt a standard at least as effective within six months. (29 CFR §§ 1953.4(b), 1953.5(a).)

OSHA published its final rule amending the Representatives of Employers and Employees regulation on April 1, 2024. OSHA's amended rule clarifies that in addition to an employee or a bargaining representative, a broad range of persons may be treated as the representative authorized by the employees so long as their participation is reasonably necessary to assist in the inspection. The previous version of the rule was

substantively the same, but only listed industrial hygienists and safety engineers as examples of third parties who may serve as an employee representative.

OSHA's amended rule, 29 CFR § 1903.8, subsection (c), eliminates any reference to particular categories of third parties who may be deemed the authorized representative of employees. Instead, the rule asserts that a third party may be found to be reasonably necessary for the inspection because of their "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills." (29 CFR § 1903.8(c).) The stated purpose of this change was to clarify that a third-party representative authorized by employees may have a variety of skills, knowledge, or experience that could aid the CSHO's inspection. These options are not limited to industrial hygienists or safety engineers.

Currently, there is no equivalent to 29 CFR § 1903.8 within Title 8 of the California Code of Regulations. To ensure that California's state inspection process is as effective as the federal process, which the law requires, it is necessary to issue a Title 8 regulation that defines who can be considered an authorized representative of employees and does so in such a way as to make the Division's worksite inspections at least as effective as those of OSHA.

NECESSITY

California is a state plan state under 29 CFR § 1902 *et seq.* The Department of Industrial Relations must take all steps necessary to prevent withdrawal of approval for California's state plan by the Federal Government. (Labor Code § 50.7.) Generally, OSHA expects State plans to adopt corresponding regulations within six months of the adoption of a new or revised federal standard. (29 CFR §§ 1953.4(b)(3), 1953.5(a)(1).) OSHA's final rule amended the federal workplace inspection process set forth in 29 CFR § 1903.8. As such, the Division must adopt a workplace inspection regulation that is "at least as effective as" the federal requirements set forth in 29 CFR, Part 1903. The proposed regulation is necessary for California to comply with this federal mandate.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR OTHER DOCUMENTS RELIED ON

In preparing the Proposed Rulemaking, the Division relied upon Federal OSHA's final rule, titled "Worker Walkaround Representative Designation Process." This document may be found at 89 Federal Register 22558, pages 22558 – 22601:

<https://www.govinfo.gov/content/pkg/FR-2024-04-01/pdf/2024-06572.pdf>

The Division also relied upon 29 CFR § 1908.3, from which it incorporates elements of OSHA's inspection process that remain unchanged from before its adoption of the modified employee representative rule.

REASONABLE ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

No reasonable alternatives have been identified or brought to the attention of the Division that would lessen the impact of the proposed amendments on small businesses. There is no adverse economic impact expected on small businesses as a result of the adoption of this proposed regulation.

SPECIFIC TECHNOLOGY OR EQUIPMENT

The proposed rule would not impose any technology or equipment requirements on affected employers.

BENEFITS OF THE PROPOSED RULEMAKING

The proposed rulemaking will enhance the Division's ability to conduct effective workplace inspections by permitting a broader array of experts to serve as employee representatives and to accompany the Division during the workplace inspection when they are needed. The proposed rule would mirror the federal rule and grant the Division the same ability as federal OSHA to rely on a broader array of employee representatives.

There is also a benefit to codifying a provision regarding employer and employee representatives in Title 8. Some employers refuse to consent to the Division's inspection of their workplace. These denials may become even more common if the employer objects to the presence of the authorized representative of the employees. When an employer refuses access to the Division, the Division must seek a search warrant from the Superior Court. By codifying these rules, the Division will have stronger grounds for obtaining search warrants that allow for workplace access with the necessary representatives. Absent a rule that defines the representative authorized by employees, courts may be reluctant to issue a warrant which would permit the Division's representative and third-party representative to access a workplace for purposes of conducting an inspection.

SPECIFIC PURPOSE AND FACTUAL BASIS OF PROPOSED RULE

Tit. 8 Cal. Code Regs. Article 2.5 § 331.8 Employer Representative and Representative Authorized by Employees

The proposed section 331.8 interprets and implements Labor Code requirements as to the conduct of workplace inspections in a manner that is consistent with federal OSHA inspection requirements. This change is required to comply with amendments to federal law, which broaden the criteria for who may be considered a “representative authorized by...employees” for purposes of accompanying the Division’s representative during a workplace inspection. This change also benefits the Division by granting it greater discretion to allow a variety of experts of various backgrounds to accompany a workplace inspection when they may be helpful.

Labor Code Section 6314 subsection (d) states in relevant part:

In the course of any investigation or inspection of an employer or place of employment by an authorized representative of the division, a representative of the employer and a representative authorized by his or her employees shall have the opportunity to accompany him or her on the tour of inspection.

There is no regulation implementing or interpreting the term “representative authorized by his or her employees” as used in Section 6314 subsection (d). This would change with the proposed adoption of Article 2.5 Section 331.8.

The proposed rulemaking would make the following changes:

a) 8 CCR Section 331.8 subsection (a) is added, to allow both a representative of the employer and a representative authorized by employees to accompany the Cal/OSHA inspector during the inspection of the worksite, consistent with Labor Code section 6314 subsection d. Subsection (a) authorizes the Cal/OSHA inspector to allow multiple representative for employer and employee and authorizes the inspector to resolve any disputes as to who the representatives are.

These provisions are consistent with federal provisions governing workplace inspections. (29 CFR § 1903.8(a)(b).) Subsection (a) promotes an efficient and clear workplace inspection process by allowing the inspector leeway to permit more than one representative for the employer or the employee and to resolve any dispute as to the number of representative or their identities. The employer or employee representative may object to someone’s participation in the workplace inspection, and the inspector is authorized to make a final and immediate decision to avoid delays or interference with the inspection process.

b) 8 CCR Section 331.8 subsection (b) establishes who may be designated as the representative authorized by employees for purposes of accompanying the inspection. Where the employee representative is an employee of the company or the

collective bargaining (union) representative, they will be allowed to accompany the inspector. If the authorized representative of employees is someone other than an employee or collective bargaining representative, it must be shown that their accompaniment is reasonably necessary for an effective and thorough inspection. There may be various reasons why the third-party representative's participation may be reasonably necessary, including their knowledge of the workplace, the industry, the hazards involved, or their ability to communicate with hard-to-reach employees in the workplace. The inspector will make the determination as to whether the third-party representative may accompany the inspection.

This subsection incorporates the primary feature of the amended federal rule, which is to broaden the definition of a third-party representative authorized by employees. Unless the third-party is the collective bargaining representative for the employees at the worksite, the third-party will be allowed to join the inspection only if they show that they are likely to make it more effective. The effectiveness and thoroughness of the workplace inspection is paramount in determining whether a third-party representative authorized by employees may accompany the inspection. Unlike the federal rule, the proposed rule does not require the collective bargaining representative to make a showing that they are likely to aid in the inspection. The employee's union representative is assumed to have the necessary knowledge and experience of the workforce and workplace, as well as the ability to communicate with employees about workplace matters.

c) 8 CCR Section 331.8(c) is added to establish the inspector's authority to lead the inspection and make sure that the conduct of the representatives who participate does not interfere with the effectiveness of the workplace inspection. This subsection allows the inspector to limit the representatives' interactions, such as arguments, with each other, and even to remove a representative from the inspection process if their conduct interferes with the inspection.

This subsection provides the inspectors tools which they can employ to make sure that the accompaniment process serves its purposes of aiding an effective inspection. The workplace inspection is not an opportunity for employer and employee representatives to advocate with each other or address issues that are not germane to the inspection. This subsection authorizes the inspector to enforce reasonable rules to make sure that the inspection goes smoothly and even to bar a person from the inspection if their conduct interferes with the inspection.

d) 8 CCR Section 331.8(d) is added to allow the employer to protect trade secrets, as defined by the Code of Civil Procedure, by requiring that any employee representative in an area containing trade secrets be an employee of the company. If this requirement results in excluding the only available employee representative, then the inspector will be required to interview employees who work in the area as part of the inspection.

This subsection is consistent with federal regulation and current state practices to protect trade secrets from unauthorized disclosure.

By incorporating both new and longstanding federal provisions as to workplace inspections, the Division will ensure that the proposed rule is interpreted and operated in a similar manner to the federal rule.

ECONOMIC IMPACT ANALYSIS PER GOVERNMENT CODE SECTION 11346.3(b)

Evidence Supporting Finding of No Significant Statewide Adverse Impact Directly Affecting Business: The proposed amendments will not have significant adverse economic impacts on employers.

During its rulemaking process leading up to the April 1, 2024, final rule, Fed/OSHA conducted an economic analysis to determine the economic impact on employers from the implementation of an amended 29 CFR 1903.8(c). OSHA determined that the revisions would impose no new direct cost burden on employers.¹

The rule poses only minimal burdens on employers and does not change their compliance duties as to health and safety requirements. The rule merely clarifies who the Division may deem to be an authorized representative of the employees for purposes of joining the workplace inspection. The employer's role will be the same.

The representatives of employees may incur some costs when and if they choose to accompany the Division's representative during the inspection of a worksite. These costs would include travel and time spent during an inspection.

Creation or Elimination of Jobs Within the State of California: The Division does not anticipate that the Proposed Rulemaking will result in the creation or elimination of jobs in California.

Creation of New Business, Elimination of Existing Business, or the Expansion of Business in California: The Division does not anticipate that any businesses in California will be created or eliminated because of

Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment: The regulation will benefit worker safety by enhancing employee participation during workplace health and safety inspections and providing broader leeway for third-party employee representatives to use their expertise, skills and experience to make inspections more effective.

¹ <https://www.federalregister.gov/d/2024-06572/p-338>

**REASONABLE ALTERNATIVES TO THE REGULATON AND THE DIVISION'S
REASON FOR REJECTING SUCH ALTERNATIVES**

The Proposed Rulemaking reconciles the Division's regulations to the parts of the recently amended federal rule that OSHA is currently implementing. Any alternative would have to be at least as effective as the amended federal regulation. The Division has not identified any reasonable alternatives to the Proposed Rulemaking, including alternatives that would lessen any adverse impact on small business. If the proposed regulation were not adopted, the Division's inspection procedures would not be at least as effective as the federal rules. Furthermore, without a regulation, the courts will be less likely to allow the Division the flexibility it needs to include the appropriate representative authorized by employees in the inspection.

Duplication or Conflict with Federal Laws (California Government Code Section 11346.2(b)(7)): The proposed regulation is consistent with 29 CFR § 1903.8.

Inconsistency or Incompatibility with Existing State Regulations: A review of regulations adopted by this and other comparable agencies has been conducted, and the Division has determined that there are no existing comparable state regulations.