April 1, 2026

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California Department of Industrial Relations
Division of Occupational Safety and Health
Legal Unit
1515 Clay Street, Suite 1901
Oakland, CA 94612

RE: Opposition to "Employer Representative and Representative Authorized by Employees During Workplace Inspections" Proposed Rule

By Electronic Submission

Dear Mr. Shawver:

These comments are submitted on behalf of the 42 undersigned organizations in opposition to the California Division of Occupational Safety and Health's ("Cal/OSHA" or "the Division") above-referenced worker walkaround proposed regulation (the "Proposed Rule"). For the reasons set forth below, we urge the Division to withdraw the Proposed Rule in its entirety.

We share the Division's commitment to safe and healthful workplaces. However, the Proposed Rule fails to further that goal. Instead, it substantially and impermissibly expands access to private employer worksites in ways that exceed the Division's statutory authority, conflicts with the National Labor Relations Act ("NLRA"), undermines employer property rights, endangers trade secrets, and will ultimately discourage the employer cooperation that makes efficient and effective safety inspections possible.

In addition to these comments, we have attached comments[1] filed by 75 employer organizations, including the undersigned organizations, on the Occupational Safety and Health Administration's (OSHA) final rule, "Worker Walkaround Representative Designation Process,"[2] which make many of the same arguments we've included here.

I. The Proposed Rule Exceeds the Division's Statutory Authority.

California Labor Code § 6314(d) provides that a representative authorized by employees must be given an opportunity to accompany Division inspectors during a workplace safety inspection. The Proposed Rule, however, expands the category of permissible employee representatives well beyond what the statute permits or what is necessary to aid any inspection.

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[1] Comments by the Coalition for Workplace Safety, et al, "Worker Walkaround Representative Designation Process Proposed Rule" (Nov. 13, 2023), available at https://workingforsafety.com/wp-content/uploads/Comments-for-Coalition-for-Workplace-Safety.pdf.

[2] 89 Fed. Reg. 22,558 (Apr. 1, 2024).

Under the Proposed Rule, any third party (regardless of whether they are a safety professional) may accompany Division inspectors so long as the inspector determines their participation is "reasonably necessary to the conduct of an effective and thorough physical inspection." This standard contains no meaningful criteria to distinguish legitimate safety expertise from a third party with wholly unrelated interests, such as a union organizer, advocacy group, or plaintiff's attorney seeking access to a non-union workplace. The inspector is left with essentially unfettered discretion to determine whether the representative should be allowed to participate, and the employer has no meaningful recourse to prevent the individual(s) from entering their facilities short of demanding Cal/OSHA provide a warrant. California's Administrative Procedure Act requires that regulations be "reasonably necessary to effectuate the purpose" of the authorizing statute.[3] A standard that cannot be consistently applied or reviewed fails that test.

The language of the Proposed Rule also would seemingly permit an unlimited number of representatives, each chosen by as few as two employees. Meanwhile, as it currently stands, the statute only contemplates a single authorized employee, demonstrating that the Legislature envisioned a defined, limited role, not an open-ended invitation to any third party a subset of employees chooses to designate. Cal/OSHA is clearly exceeding its authority with the Proposed Rule.

Moreover, the existing federal framework, which the Proposed Rule mirrors, has already faced serious legal challenge. A federal district court is currently considering whether the federal OSHA Walkaround Rule[4] exceeds OSHA's statutory authority and is arbitrary and capricious under the Administrative Procedure Act.[5] The same fundamental legal deficiencies infect this Proposed Rule. California should not adopt a rule on borrowed time when the underlying legal theory is under active judicial scrutiny.

II. The Proposed Rule's "Good Cause" and "Reasonably Necessary" Standards Are Illusory and Leave Employers without Meaningful Protection.

The Proposed Rule purports to impose a "good cause" and "reasonably necessary" threshold before a non-employee, non-collective bargaining third party may join an inspection. In practice, however, these limitations provide no real protection. The Proposed Rule vests the inspector (a safety enforcement officer) with sole authority to make determinations about third-party representative credentials, the legitimacy of employees' authorization, and resolution of competing claims to representative status. Inspectors are not trained on the complexities of labor-management relations. That is why federal OSHA explicitly instructs inspectors to avoid involvement in labor-management disputes.[6] The same logic applies here.

Critically, the Proposed Rule provides no procedure by which an employer may challenge an inspector's determination about the identity or qualifications of a third-party representative before that person enters the facility. This leaves employers vulnerable to an arbitrary decision made by an inspector. Once a competitor's consultant, a union organizer, or an activist has been allowed

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[3] Cal. Gov't Code § 11342.2

[4] 89 Fed. Reg. 22,558 (Apr. 1, 2024)

[5] *Chamber of Commerce of the United States v. OSHA*, No. 6:24-cv-00271-ADA-DTG (W.D. Tex.)

[6] OSHA Field Operations Manual, Chapter 3 § IV.G

inside and has observed proprietary processes, no subsequent legal remedy can fully undo the harm. Exclusion of evidence in an enforcement proceeding cannot cure the disclosure of trade secrets or the strategic advantage gained by a third party through unauthorized access.

The amici brief[7] filed in the federal litigation mentioned above aptly described this problem: the inspector is left to resolve real-time legal questions (*e.g.,* representative authorization, trade secret designations, competing claims by rival unions) for which neither the statute nor the regulation provides any meaningful guidance. This is not a workable standard. It is an invitation to inconsistency, litigation, and abuse.

III. The Proposed Rule Conflicts with the National Labor Relations Act.
The Proposed Rule directly conflicts with federal labor law in three respects.

First, the NLRA grants employees both the right to select collective bargaining representatives and the equally important right to *refrain* from collective representation.[8] The Proposed Rule, however, permits as few as two employees to designate a union as the "authorized representative" of the workforce for purposes of an inspection without any majority vote, any showing of majority support, or any of the procedural safeguards the National Labor Relations Board ("NLRB") has developed over decades to protect genuine employee free choice. This directly undermines the fundamental principle of majority rule that underpins the NLRA.

Second, granting a minority union access to an employer's facility under the imprimatur of a government inspection confers on that union a "deceptive cloak of authority" that unlawfully advantages it over other unions and over employees who prefer no representation at all. The Supreme Court has long recognized that mere recognition of a union lacking majority support violates the NLRA.[9] An employer who admits a non-majority union onto its property pursuant to this regulation risks committing an unfair labor practice, yet refusal to comply with the inspector's determination risks obstruction of an inspection. This is an untenable position that the Legislature cannot have intended to create.

Third, the NLRB has exclusive jurisdiction to administer the nation's rules regarding collective representation.[10] Congress did not empower a state-level safety agency to make determinations about which labor organization is authorized to represent a particular group of employees. The Proposed Rule effectively requires Cal/OSHA to make such determinations without the expertise, procedures, or legal authority to do so.

Furthermore, under established NLRB precedent, if an employer permits one union organizer access to its property, it may be required to provide equal access to all other unions seeking to organize the same employees.[11] The Proposed Rule, therefore, sets employers up for an

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[7] Amicus Brief for the Coalition for a Democratic Workplace, et al, *Chamber of Commerce of the United States v. OSHA,* No. 6:24-cv-00271-ADA-DTG (W.D. Tex.), available at https://myprivateballot.com/wp-content/uploads/2024/07/CDW-Amicus-Brief_Worker-Walkaround_July-2024.pdf.

[8] 29 U.S.C. § 157.

[9] *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961).

[10] *NLRB v. A.J. Tower Co*., 329 U.S. 324 (1946).

[11] See *Duane Reade, Inc.,* 338 NLRB 943 (2003); *Price Crusher Food Warehouse,* 249 NLRB 433 (1980).

irreconcilable conflict: compliance with the Proposed Rule may itself trigger NLRA violations, while any attempt to limit such access to satisfy NLRA obligations may be treated as obstruction of a Cal/OSHA inspection.

IV. The Proposed Rule Violates Employer Property Rights and Raises Significant Constitutional Concerns.

The Proposed Rule opens the door to violations of the Fourth and Fifth Amendments, creating a target for constitutional challenges and certain confusion among employers, "employee representatives," and inspectors.

The Fourth Amendment of the United States Constitution and its California counterpart (Article I, Section 13) protect against unreasonable searches and seizures from the government. In the present context, these provisions state that a government agent cannot simply march into a private employer's place of business absent the premises owner's permission or a warrant signed by a judge. This is the law for state troopers, for the national guard, and for inspectors.

The Fifth Amendment of the United States Constitution and its California counterpart (Article I, Section 19) guarantee the right to property, with a fundamental element of that right being the right to exclude others. For California employers, this translates to an established right to exclude uninvited visitors from their worksites.[12] Indeed, the Supreme Court specifically applied the Fifth Amendment in the context of California union organizers, holding that California took private property when it forced landowners to grant union organizers access.[13]

The Supreme Court recognizes these rights in the inspection context, holding that an inspector "stands in no better position than a member of the public" without a warrant.[14] It is the warrant, not the title, that places the inspector (or other state or federal agents) in the "better position" than the general public. But it is the title – that of an authorized state agent – that permits the inspector to seek a warrant and, ultimately, enter a private premises uninvited. If a general member of the public enters a private business without permission, it is trespass. Members of the public do not have authority to seek and execute a warrant, nor can they *simply walk in behind* a state agent executing a warrant.

To be sure, this *piggyback* approach already has failed before the U.S. Supreme Court in the context of police media ride-alongs. The "ride-alongs" at issue present a similar arrangement that Cal/OSHA proposes here. A member of the media rode with a police officer to film arrests, police chases, and even the execution of warrants. But, like here, whereas the police officer may have granted permission for the media member to participate in various enforcement activities, this did not (because it could not) create a constitutional right for that media member to enter a private residence under a warrant. The Supreme Court made this clear, holding that the Fourth Amendment prohibits law enforcement from bringing uninvited visitors along with them onto private property.[15]

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[12] Cal. Civ. Code §§ 1708, 3479; *Warfield v. Peninsula Golf & Country Club*, 10 Cal. 4th 594 (1995).
[13] *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).
[14] *Marshall v. Barlow's, Inc*., 436 U.S. 307, 314 (1978).
[15] *Wilson v. Layne*, 526 U.S. 603 (1999).

The Supreme Court did carve out a very narrow exception to this rule for instances where the individual's presence directly aided the warrant's execution. Specifically, the third-party who accompanied a police officer executing the warrant was necessary to identify the stolen property at issue.[16] But this is a far cry from the Proposed Rule here, where an inspector has unfettered discretion to decide that a third-party is "reasonably necessary to the conduct of an effective and thorough physical inspection." The Proposed Rule, as drafted, provides no constitutional safeguards and virtually ensures constitutional violations as inspectors decide for themselves – no doubt under the influence of would-be "employee representatives" – who might be "reasonably necessary" to conduct an inspection.

Cal/OSHA seeks to create the false appearance of the inspector's right to do so, and this, perhaps, is the most significant shortcoming of the Proposed Rule. Under the Proposed Rule, an inspector can arrive to a facility with a member of the public of their choosing and demand entry. In most cases, it is the mere threat of a warrant that ensures the inspector's prompt "permission" to enter. (Why force the issue when the business owner knows that the inspector will simply return with a warrant?) Under the Proposed Rule, the inspector will now represent that the selected "employee representative" also will be covered by this speculative warrant, but while the Proposed Rule suggests this authority, the U.S. and California Constitutions do not. This means private business owners will unwittingly permit a general member of the public to enter their premises under the false belief that the selected representative *would have* Constitutional authority to do so – when they have no right to be there at all. A state or federal judge, in all likelihood, will see through this constitutional breach, but a private citizen, rightfully afraid to face a warrant, will never get that far.

V. The Proposed Rule Endangers Employer Trade Secrets and Increases Employer Liability.
The Proposed Rule's interaction with trade secret protections is another area of serious concern. California Civil Code Section 3426.1(d) and the OSH Act protect confidential business information and trade secrets from disclosure during the inspection process. Proposed § 331.8(d) purports to preserve trade secret protections by allowing employers to restrict access to trade secret areas.

In practice, however, this protection is inadequate. Many employers (particularly in manufacturing, food production, technology, and chemical industries) protect their entire production process as a trade secret. A third-party representative granted general access to an employer's facility may observe proprietary processes before any trade secret designation can be asserted or adjudicated. Worse, a third-party representative employed by a competitor or working on behalf of a union engaged in an organizing campaign has every incentive to gather and retain information about the employer's operations, regardless of any nominal confidentiality requirement. Once that information is disclosed, no subsequent order can undo the harm.

The Division has not explained how inspectors will evaluate trade secret claims on the spot, how it will prevent third parties from retaining or using improperly observed information, or what remedies will be available to employers if their trade secrets are compromised. These are not theoretical concerns; they are predictable and foreseeable consequences of the rule as drafted.

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[16] *Id*.

Additionally, forcing employers to admit uninvited third parties creates direct premises liability exposure.[17] If a third-party representative is injured during an inspection, the employer faces potential liability for an uninvited guest whose presence it did not choose and could not prevent. The Proposed Rule is entirely silent on this risk.

VI. The Proposed Rule Will Discourage Employer Cooperation and Slow Down Inspections.
Paradoxically, the Proposed Rule is likely to impede the very workplace safety goals it claims to advance. The vast majority of Cal/OSHA inspections proceed by employer consent, without the delay and expense of warrant proceedings. That cooperation exists, because employers trust the inspection process to be neutral, predictable, and focused on safety.

If consenting to an inspection means opening the workplace door to potentially hostile third parties, such as union organizers, advocacy groups, competitor representatives, or plaintiff's attorneys, more employers will withhold consent and require the Division to obtain warrants. This will delay inspections, divert Division resources, expand inspection-related litigation, and ultimately slow the abatement of genuine workplace hazards. This outcome serves no one with a genuine interest in workplace safety.

VII. The Division's "At Least As Effective As" Justification Is without Merit.
Cal/OSHA asserts that the Proposed Rule is necessary to ensure its state plan remains "at least as effective as" the federal standard following federal OSHA's amendment of its walkaround regulation to permit third-party access. That justification does not withstand scrutiny.

Cal/OSHA has no existing counterpart to the original federal walkaround regulation. It did not act when the federal framework was first established; only after federal OSHA expanded third-party access did Cal/OSHA determine it needed to follow suit. This timing reveals that the Proposed Rule is not driven by any genuine gap in worker protection. As discussed throughout these comments, the Proposed Rule will not enhance workplace safety. A regulation that undermines employer cooperation, invites constitutional violations, and introduces parties with interests adverse to efficient safety enforcement will only make Cal/OSHA's program less effective.

Cal/OSHA also should have exercised prudent regulatory restraint and waited for the ongoing federal court challenge to the underlying federal rule to be resolved before burdening California employers with a regulation built on an unsettled legal foundation.

Conclusion
The Proposed Rule far exceeds the Division's statutory authority, conflicts with the NLRA, threatens employer property rights and trade secrets, and will undermine the cooperative relationships between employers and Cal/OSHA that make efficient safety enforcement possible. It introduces a framework built around labor relations disputes that the Division is neither authorized nor equipped to resolve. We strongly urge the Division to withdraw the Proposed Rule.

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[17] Cal. Civ. Code § 1714; *Rowland v. Christian,* 69 Cal. 2d 108 (1968).

Respectfully submitted,

60 Plus Association
Alliance for Chemical Distribution
American Association of Senior Citizens
American Bakers Association
American Foundry Society
American Hotel & Lodging Association
American Road & Transportation Builders Association
American Staffing Association
American Trucking Associations
Associated Builders and Contractors
Associated Builders and Contractors of California
Associated Equipment Distributors
Associated General Contractors of America
California Hotel & Lodging Association
CAWA - Representing the Automotive Parts Industry
CHRO Association
Coalition for a Democratic Workplace
Coalition for Workplace Safety
FMI – The Food Industry Association
Foodservice Equipment Distributors Association
Independent Bakers Association
Institute of Makers of Explosives
International Foodservice Distributors Association
International Franchise Association
International Warehouse Logistics Association (IWLA)
National Armored Car Association
National Association of Wholesaler-Distributors (NAW)
National Cotton Ginners Association
National Federation of Independent Business
National Grain and Feed Association
National Roofing Contractors Association
National Tooling and Machining Association
Non-Ferrous Founders' Society
North American Die Casting Association
Precision Machined Products Association
Precision Metalforming Association
PRINTING United Alliance
Southern California Contractors Association
Texas Cotton Ginners' Association
Tree Care Industry Association
U.S. Chamber of Commerce
United Contractors