

DEFEND YOUR PROPERTY

What Are Your Rights When Visitors Show Up?

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Legal Disclaimer

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with legal counsel for individual responses to questions or concerns regarding any given situation.

WHO ARE THE ENFORCERS?

CALIFORNIA

Division of Labor Standards Enforcement

- aka Office of the Labor Commissioner.
- Enforces California's minimum employment standards (e.g., wage-and-hour laws, FLC laws, IWC orders).
- Adjudicates wage claims.
- Investigates discrimination complaints and retaliation complaints.
- Includes Bureau of Field Enforcement and Retaliation Unit.

Division of Occupational Safety and Health

- aka DOSH; Cal-OSHA.
- Enforces health-and-safety laws and regulations in places of employment in California.

Employment Development Department

- Underground Economy Operations (UEO) unit detects and deters violations of payroll-tax laws.
- Suspected non- or under-reporting of wages or employees may result in tax audit of employer.

LABOR ENFORCEMENT TASK FORCE (LETF)

- Division of Labor Standards Enforcement (Labor Commissioner)
- Cal/OSHA
- Employment Development Department
- Workers' Compensation
- Attorney General/District Attorneys

Visit from the Labor Enforcement Task Force

- All have limited rights to access.
- Under California law, these government agencies have authority to enter your property when
 - (1) given employer consent;
 - (2) subject to an administrative subpoena; or
 - (3) subject to a search warrant.

You do NOT have to give consent.

Department of Fair Employment and Housing

- Enforces state laws and regulations banning discrimination and harassment based on specified protected status:
 - Race, color, ancestry, national origin, religion, creed, age (40 and over), mental disability, physical disability, sex, gender (including pregnancy, childbirth, breastfeeding or related medical conditions), sexual orientation, gender identity, gender expression, medical condition, genetic information, marital status, and military or veteran status.

Visit from Department of Fair Employment and Housing

- Upon receiving a complaint, the DFEH will investigate by way of interviews, obtaining records and documents from the employer, on-site inspection of facilities and operations and/or formal discovery including interrogatories and depositions of witnesses.
- Compliance can be enforced through subpoena.

Agricultural Labor Relations Board

- Enforces the Agricultural Labor Relations Act and Regulations under it (unfair labor practices, collective bargaining, etc.)
- Agriculture only (primary ag and non-commercial secondary operations)
- ~~Labor Union Access~~ (Important Update)

Agricultural Labor Relations Board

- ~~• The ALRA gave unions the “right to take access” to an agricultural employer’s property in order to solicit support for unionization.~~
- ~~• Notice of Intent to Take Access.~~
- ~~• Access for up to three hours per day, 120 days per year.~~

Agricultural Labor Relations Board

- Two agricultural employers challenged the ALRA's access rules on the grounds that the rules amounted to an unconstitutional, governmental taking of a private property right without just compensation.
- The United States Supreme Court agreed with the growers and struck down the access rules as unconstitutional.
- **Citation:** *Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063

Agricultural Labor Relations Board

“The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: ‘[N]or shall private property be taken for public use, without just compensation.’ The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, ‘[p]roperty must be secured, or liberty cannot exist.’ Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). **This Court agrees, having noted that protection of property rights is ‘necessary to preserve freedom’ and ‘empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.’** [Citation omitted.]” (*Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063, 2071.)

Agricultural Labor Relations Board

“The right to exclude is ‘one of the most treasured’ rights of property ownership. [Citation omitted.] According to Blackstone, the very idea of property entails ‘that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’ 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the right to exclude is ‘universally held to be a fundamental element of the property right,’ and is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’ [Citations omitted.]” (*Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063, 2072-73.)

WHO ARE THE ENFORCERS?

FEDERAL

U.S. Department of Labor

Wage and Hour Division

- Enforces federal minimum employment standards:
 - Fair Labor Standards Act (wage-and-hour, child labor).
 - Migrant and Seasonal Agricultural Worker Protection Act, including regulation of FLCs and growers who use their services.
 - Form I-9 compliance (findings of unauthorized employment reported to DHS; findings of disparate treatment reported to DOJ).

Visit from U.S. Department of Labor Wage and Hour Division

- May appear at your location to begin an audit or as a result of an employee complaint, announced or unannounced.
- Employers have a right to have an attorney present with them during the visit.
- The DOL-WHD investigator will seek to know if employees have been notified of their rights and may generally begin by looking to determine whether the employer has made the necessary postings.
- Enforcement by subpoena or judicial order to compel.

Department of Homeland Security Immigration & Customs Enforcement

- Enforces the federal prohibition against knowingly employing persons not eligible to be employed in the United States.
- Enforces the requirement to verify the employment eligibility of all newly hired employees (Form I-9).

Visit from Department of Homeland Security Immigration & Customs Enforcement

- May appear at your location for a Form I-9 audit, a raid or to detain specific individuals.
- Employers have 3 days to comply with a Form I-9 audit request for forms.
- ICE agents may enter public areas of your business without permission.
- ICE agents can enter the private areas of your business only if they have your consent or a judicial warrant or court order. **This is not the same as an administrative order.**

U.S. Equal Employment Opportunity Commission

- Enforces federal laws and regulations banning discrimination and harassment based on specified protected status.
- Federal counterpart of DFEH.

Visit from U.S. Equal Employment Opportunity Commission

- Once the EEOC receives a complaint they will request information and documents relevant to the case.
- EEOC staff may visit the worksite to obtain information or to interview employees.
- Staff may enter with your consent but may be required to wait up to 30 minutes for a management representative.
- Compliance can be forced through subpoena and court order requiring production of records, allowing access to employees for interviews or to gain access to the workplace; a warrant is not necessary.

National Labor Relations Board

- Enforces the National Labor Relations Act and regulations under it (unfair labor practices and collective bargaining).
- Doesn't cover agriculture but does cover commercial ag-related activities (e.g., post-harvest handling of commodities not produced by the employer).

YOUR PROPERTY RIGHTS— ENFORCERS

- The Fourth Amendment does protect employers from unreasonable searches and seizures in the workplace.
- Therefore, enforcers generally must have an administrative warrant to enter areas of business premises from which the public is excluded.
- However, there are exceptions to the warrant requirement:
 - Open Fields Doctrine: Entry into an open field, even if a trespass, is not a search within the meaning of the Fourth Amendment.
 - Probable Cause.
 - **Consent.**

YOUR PROPERTY RIGHTS— CONSENT

- If you consent to a search, then a warrant is not required to enter your property.

YOUR PROPERTY RIGHTS— CONSENT

- Should you demand a warrant or consent?
- Need to have a game plan in advance.
- Consider the following:
 - The standard that applies to administrative warrants is much lower than the standard that law enforcement must meet to get a warrant to search your home.
 - In addition, to this lower standard, courts are deferential to specialized agencies like Cal/OSHA.
 - Challenging an administrative warrant is an uphill battle.
 - What does the inspector say is the purpose of the inspection? Will they agree to limit the scope of the inspection? Will the inspector agree to wait for your legal counsel or representative to accompany them during the inspection?

YOUR PROPERTY RIGHTS— CONSENT

- In *Nolte Sheet Metal, Inc. v. Occupational Safety & Health Appeals Bd.* (2020) 44 Cal.App.5th 437, a Cal/OSHA inspector, accompanied by six other governmental officials from the Contractors State License Board, the EDD, the DLSE, and the California Department of Insurance, confronted the son of Nolte Sheet Metal's owner and stated they were going to conduct an inspection at the worksite.
- Three of these inspectors were in "SWAT team attire with bulletproof tactical vests and visible firearms." The owner's son, an hourly employee, testified that he was intimidated by this showing of force and did not think he had the option of telling the group of inspectors that they could not search the premises.
- **The employer challenged the inspection on the basis that it was nonconsensual because consent was obtained by intimidation, duress, and coercion, and so not given freely and voluntarily.** However, the Cal/OSHA Appeals Board found the **employer consented and the inspectors' conduct did not amount to duress or coercion.** (Two reviewing courts—a superior court and an appellate court—affirmed the Appeals Board's decision. The appellate court expressed some concern about how consent was obtained but indicated that it was not enough to overturn the Appeals Board's decision.)

WHO ARE NOT ENFORCERS?

- Legal Aid Services (e.g., CRLA).
- Labor Union Agents (e.g., UFW, UFCW, Teamsters).
- EDD – Migrant and Seasonal Farmworker Outreach Program.
- Private Attorneys.
- Private Investigators.
- Private Consultants.
- News Media Reporters.
- Legislators.

EDD – Migrant and Seasonal Farmworker Outreach Program

- MSFW Outreach Workers claim to assist farmworkers, by visiting where they work, live, and gather to ensure that farmworkers receive equal and timely services.
- MSFW Outreach Workers provide farmworkers with information about workforce development services, labor law protections, Unemployment, State Disability benefits and other support resources.
- They will inform employers of any potential violations and methods for fixing the violation.
- The outreach worker is required to carry the paperwork necessary to file a formal EDD complaint with them and will fill it out for employees.

YOUR PROPERTY RIGHTS— NON-ENFORCERS

- You can generally prohibit private individuals (e.g., non-enforcers) from entering or being on your land.
- ~~Exception: Labor union organizers may take limited access under the ALRB's access regulation~~ (**Update:** *Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063, held that the ALRA's "access" rules were unconstitutional. Therefore, employers are no longer required to give union organizers the right to physically access their property to solicit support for unionization.)

DEFEND YOUR PROPERTY RIGHTS

- Establish a Company Policy:
 - No Visitors.
 - No Solicitations.
 - No Subcontracting by FLCs.

DEFEND YOUR PROPERTY

- Prepare your supervisors and management:
 - Train on Company policy.
 - Engage all visitors immediately (go to them).
 - Have visitors wait outside of the property.
 - Call the owner/manager/FLC immediately.
 - Note date/time/place.
 - Get cards/names/license numbers.
 - Do not physically restrain if non-compliance.

DEFEND YOUR PROPERTY

- Farm Labor Contractors should be prepared:
 - Supervision of who is trying to enter and talk to employees.
 - Contacts for the grower management.
 - Trained to notify grower management immediately.
 - No Subcontracting.
 - Communication.
 - Farm Rules-Company Policy.

DEFEND YOUR PROPERTY

- Agency personnel will wait a “reasonable amount of time” for owner/manager.
- EEEEC policies indicate up to 30 minutes.
- Call legal counsel ASAP.

QUESTIONS?

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