

INITIAL STATEMENT OF REASONS

OSHAB Rulemaking Package Modifying Regulation Concerning Time and Place of Hearing

California Labor Code (LC) section 148.7 permits the Occupational Safety and Health Appeals Board (Appeals Board or Board) to adopt, amend, or repeal rules of practice and procedure pertaining to hearing appeals and other matters falling within its jurisdiction. Pursuant to its authority under LC section 148.7, the Board proposes to adopt modifications to its Rules of Practice and Procedure contained in Title 8 of the California Code of Regulations.¹

PROBLEM STATEMENT:

Section 372.6—Changes to the Board’s Rules Regarding Proceedings to Compel Discovery

Section 372.6, subdivision (c), contains an incorrect reference. It references Government Code Section 11140.30, when it should reference, section 11440.30. The Board seeks to correct that error.

Section 372.8—Changes to the Board’s Rules Regarding Discovery; Exclusive Provisions.

The Board’s last rulemaking repealed section 372.9; however, section 372.8 still contains an unnecessary, vestigial cross-reference to that section, which the Board seeks to remove.

Section 376—Changes to the Board’s Rules Regarding the Time and Place of Hearing

Following the emergence of COVID-19, and the accompanying issuance of a number of local and Statewide safety and health orders, it became extremely difficult for the Board to conduct in-person hearings. Nonetheless, the Board still had a duty to proceed with hearings in a timely manner in order to advance occupational safety and health through timely adjudication of employer appeals, and to protect the rights of the parties.

In order to discharge its obligations, the Board, like most other State agencies, transitioned to conducting hearings via videoconference for the safety of its employees, parties, representatives, and witnesses. The Board derived authority for videoconference hearings, at least on a temporary basis, from Paragraph 11 of Executive Order N-63-20, Government Code section 11440.30, and several other existing statutes and regulations. The Executive Order constituted an important, but not exclusive, pillar supporting the Board’s authority to conduct videoconference hearings.

¹ References will be to California Code of Regulations, title 8 unless otherwise specified.

As a result of the experience gained with videoconference hearings, the Appeals Board found, and many parties noted, that videoconference hearings represent a practical, effective, and efficient method for conducting hearings in many circumstances. Remote proceedings have increased access for parties, their representatives, and the public.

However, paragraph 11 of Executive Order N-63-20 has recently been withdrawn, removing an important pillar supporting the Board's authority to conduct videoconference hearings. A new piece of authority takes its place. The California State Legislature, via Assembly Bill 1578 (2021-2022 Reg. Sess.),² took action to modify the Administrative Procedure Act (APA) to expand hearing officer discretion to set matters for remote hearings through amendment of Government Code section 11440.30. Those amendments became effective on January 1, 2022.

The Appeals Board proposes to amend its Rules of Practice and Procedure to make them consistent with, and explicitly adoptive of, some of the amended provisions of the APA set forth in AB 1578 in order to maximize administrative efficiencies, to ensure the benefits of remote hearings continue, and to avoid potential confusion regarding the Appeals Board's processes. The Appeals Board proposes to adopt a permanent rule detailing the Board's discretion to set videoconference hearings, as well as delineating Board-specific procedures governing selection of the hearing format, through modification of Section 376. In sum, Section 376 will not only adopt Government Code section 11440.30 as amended by AB 1578, it will delineate and specify how that specific legislation will be applied in Board proceedings, providing clear guidance to the regulated community.

Section 376.8—Changes to Board's Rules Regarding Administrative Law Judge Preparation of Hearing Record.

Section 376.8 refers to term "hearing record" as defined by Section 347, subdivision (r). However, the reference to subdivision (r) is incorrect. The definition of hearing record is within subdivision (s), not (r).

BENEFIT STATEMENT:

Section 372.6, subdivision (c)—Changes to the Board's Rules Regarding Proceedings to Compel Discovery

The proposed rulemaking merely corrects a minor citation reference error. This rulemaking will benefit parties by ensuring the Board's rules, and the references therein, are accurate and clear.

Section 372.8—Changes to the Board's Rules Regarding Discovery; Exclusive Provisions.

² Assem. Bill No. 1578 (2021-2022 Reg. Sess.), approved by Governor, September 30, 2021 (hereinafter "AB 1578").

The proposed rulemaking removes a reference to section 372.9 in section 372.8 because section 372.9 has been repealed. This rulemaking will benefit parties by ensuring the Board's rules are internally consistent and clear.

Section 376—Changes to the Board's Rules Regarding the Time and Place of Hearing

The proposed changes to this section will benefit the Board and parties by making sure the Board rules are consistent with, and adoptive of, the amendments to Government Code section 11440.30 of the Administrative Procedure Act, as set forth in AB 1578. The proposed rule will create an explicit regulatory mechanism authorizing Administrative Law Judges to set matters for a videoconference hearing where appropriate and regulating the manner by which that occurs, removing any uncertainty regarding the authority for, and availability of, videoconference hearings. The proposed rule provides clear guidance regarding criteria that may be considered when determining the date, time and length of hearing and the format of the hearing. It also provides clear guidance regarding the manner and means of objecting to a videoconference hearing. In addition, videoconference hearings represent an important public health tool when necessary to address emergency circumstances.

Section 376.8—Changes to Board's Rules Regarding Administrative Law Judge Preparation of Hearing Record.

The proposed changes to this rule will clean-up a minor citation and cross-reference error. This rulemaking will benefit parties by ensuring the Board's rules are internally consistent and clear.

PURPOSE STATEMENT:

Section 372.6, subdivision (c): The incorrect reference to Government Code Section 11140.30 is corrected so that it properly refers to section 11440.30, as was intended.

Section 372.8: Removes an unnecessary reference to section 372.9, since that section has been repealed.

Section 376, subdivision (d): This proposed subdivision is modified to specify that an Administrative Law Judge (ALJ) may conduct all or part of a hearing using a videoconference platform if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place, to observe the exhibits, and to observe the hearing participants to the extent feasible. It additionally ensures the Board's rules are consistent with, and adoptive of, the amendments to Government Code section 11440.30 of the Administrative Procedure Act, as set forth in AB 1578. The previous contents of subdivision (d) have been moved and combined with subdivision (e), as discussed below.

Section 376, subdivision (e): The subdivision is modified to say that when setting hearings, other than expedited proceedings, the Appeals Board shall determine and set: the date(s), time(s), and length for the hearing; the format for conducting the hearing, whether in-person or by videoconference or a combination thereof; and the physical location of the hearing if the hearing includes an in-person format. This proposed amendment effectively joins sections (d) and (e) of the current version of the regulation, and additionally adds that the ALJ must determine the proper hearing format, whether in-person, videoconference, or both.

Section 376, subdivision (e)(1): This subdivision states that there are criteria, without limitation, that may be relevant to the Appeals Board's determination of the date(s), time(s), and length for the hearing, the format for conducting the hearing, and the physical location of the hearing if the hearing includes an in-person format. These criteria are specified in subdivisions (e)(1)(A) through (e)(1)(O). Some of these criteria exist in the current version of the regulation, but their numbering and placement has been modified to allow and accommodate the new proposed regulatory changes, including the changes permitting additional consideration of the videoconference hearing format.

Section 376, subdivision (e)(1)(A): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider evidentiary presentation and case management issues.

Section 376, subdivision (e)(1)(B): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider whether multiple hearings can be set on the same day without necessitating a continuance.

Section 376, subdivision (e)(1)(C): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider the parties' and Administrative Law Judge's projection of the length of time needed for the hearing.

Section 376, subdivision (e)(1)(D): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider the place of employment where the violation is alleged to have occurred.

Section 376, subdivision (e)(1)(E): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider the location and suitability of Appeals Board hearing venues.

Section 376, subdivision (e)(1)(F): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider the availability of Administrative Law Judges, witnesses, and parties.

Section 376, subdivision (e)(1)(G): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider the location of parties and witnesses.

Section 376, subdivision (e)(1)(H): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider transportation barriers or travel distance required for attendance at a hearing for any party or witness.

Section 376, subdivision (e)(1)(I): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider hardship caused by time away from current employment or other responsibilities that would be required of a party or witness in order to attend a hearing.

Section 376, subdivision (e)(1)(J): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider the inability of a party or witness to secure care for children, other family members, or dependents that would unduly hinder travel to a hearing.

Section 376, subdivision (e)(1)(K): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider the health and safety of parties, witnesses, representatives, and Appeals Board staff.

Section 376, subdivision (e)(1)(L): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider any factors requiring a more expeditious hearing date.

Section 376, subdivision (e)(1)(M): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider stipulations of the parties.

Section 376, subdivision (e)(1)(N): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider other hardships or impediments raised by the parties.

Section 376, subdivision (e)(1)(O): Specifies that when the Administrative Law Judge makes the determinations required by subdivision (e), he or she may consider any other fact deemed relevant.

Section 376, subdivision (e)(2): Adds a new subdivision specifying that when the Appeals Board sets the hearing for a videoconference format, it may issue orders requiring prehearing lodging of proposed exhibits.

Section 376, subdivision (e)(3): Adds a new subdivision stating that where the Appeals Board orders that the hearing occur by videoconference, and a witness, party, or representative

establishes, in a reasonable amount of time prior to the hearing, that they do not have access to the technological equipment necessary to conduct the hearing by videoconference, the Appeals Board will make facilities available where they can access necessary equipment.

Section 376, subdivision (f): Adds a new subdivision specifying that during any prehearing or status conference each party and party representative shall be prepared to discuss the hearing format, whether in-person or videoconference, and any relevant criteria set forth in subdivision (e)(1)(A) through (e)(1)(O). It additionally specifies the Appeals Board may require evidence supporting application of these criteria in the specific case.

Section 376, subdivision (g): Adds a new subdivision specifying that expedited videoconference hearings will all initially be set for the videoconference format, and noting that the hearing dates will be set pursuant to the procedures set forth in section 373. It also adds procedures allowing the Appeals Board to modify the expedited hearing format after it is initially set either on its own motion or through a party request.

Section 376, subdivision (h): Adds a new subdivision specifying that parties may object to selection of the videoconference format, specifies how such objections should be submitted in Appeals Board proceedings, and specifies factors relevant to the objection. Except where otherwise provided, the objection must be submitted by motion. Factors relevant to consideration of the objection include whether the objecting party demonstrates that it will be prejudiced or that its due process rights will be compromised by conducting all or part of the hearing by videoconference.

Section 376.8: The proposed regulatory change merely modifies the reference to section 347 subdivision (s), not (r).

NECESSITY STATEMENT:

Section 372.6, subdivision (c): The correction of the incorrect reference to the Government Code statute is necessary to ensure the Board's rules are accurate and clear.

Section 372.8: The removal of the reference to section 372.9 is necessary because that section has been repealed. It ensures the Board's rules are internally consistent, accurate, and clear.

Section 376, subdivision (d): This subdivision is necessary to clarify that the Administrative Law Judge has authority to conduct a hearing via videoconference where she or he determines that the videoconference format is appropriate. The proposed subdivision clarifies that an Administrative Law Judge may conduct a hearing by videoconference provided each participant has an opportunity to participate in and to hear the entire proceeding while it is taking place, to observe exhibits, and to observe hearing participants to the extent feasible. Further, this subdivision is

necessary to ensure that the Board's rules are consistent with, and adoptive of, Government Code section 11440.30 as modified by AB 1578.

Section 376, subdivision (e): This section is necessary to delineate that for non-expedited matters, the Administrative Law Judge bears responsibility for making several decisions, including determining: the date, time and length of hearing; whether the hearing will be in-person or via videoconference, or combination of both; and, the location of physical hearing venue if the hearing is to occur in-person.

Section 376, subdivision (e)(1): This subdivision is necessary to delineate the criteria, without limitation, that may be relevant to the Appeals Board determination and selection of the date(s), time(s), and length for the hearing, the format for conducting the hearing, and the physical location of the hearing if the hearing includes an in-person format. The criteria are delineated in subdivisions (e)(1)(A) through (e)(1)(O). When deciding the appropriate format, the ALJ must engage in a case-specific analysis, including consideration of relevant criteria.

Section 376, subdivision (e)(1)(A) to (e)(1)(O): These subdivisions are necessary to list the criteria the Administrative Law Judge may consider when making the decisions regarding the date(s), time(s), and length for the hearing, the format for conducting the hearing, and the physical location of the hearing if the hearing includes an in-person format:

Section 376, subdivision (e)(1)(A): Specifies that evidentiary presentation and case management issues may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(B): Specifies that whether multiple hearings can be set on the same day without necessitating a continuance may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(C): Specifies the parties' and Administrative Law Judge's projection of the length of time needed for the hearing may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(D): Specifies that the place of employment where the violation is alleged to have occurred may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(E): Specifies that the location and suitability of Appeals Board hearing venues may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(F): Specifies that the availability of Administrative Law Judges, witnesses, and parties may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(G): Specifies that the location of parties and witnesses may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(H): Specifies that transportation barriers or travel distance required for attendance at a hearing, for any party or witness may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(I): Specifies that hardship caused by time away from current employment or other responsibilities that would be required of a party or witness in order to attend a hearing may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(J): Specifies that inability of a party or witness to secure care for children, other family members, or dependents that would unduly hinder travel to a hearing may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(K): Specifies that the health and safety of parties, witnesses, representatives, and Appeals Board staff may be considered by the Administrative Law Judge. This subdivision is necessary to ensure that the Board has authority to consider any public health or safety threats.

Section 376, subdivision (e)(1)(L): Specifies that any factors requiring a more expeditious hearing date may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(M): Specifies that stipulations of the parties may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(N): Specifies that other hardships or impediments raised by parties and witnesses may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(1)(O): Specifies that any other fact deemed relevant by the Administrative Law Judge or Presiding Administrative Law Judge may be considered by the Administrative Law Judge.

Section 376, subdivision (e)(2): This subdivision is necessary to specify that when the Appeals Board sets the hearing for a videoconference format, it may issue orders requiring pre-hearing lodging of proposed exhibits. The ability to require pre-submission of exhibits is necessary because a videoconference hearing might be unnecessarily delayed if parties attempt to contemporaneously upload exhibits during the proceeding, rather than prior to its commencement.

Section 376, subdivision (e)(3): In the event the Appeals Board orders a hearing via videoconference, this subdivision ensures all parties, witnesses, and representatives have access to necessary technology to participate in the hearing, where it is not otherwise available to them.

Section 376, subdivision (f): This subdivision is necessary to notify the parties as to when they should expect to discuss matters concerning the details of the hearing, including the date, length, and format. It clarifies that the parties should be prepared to discuss these matters, including the hearing format, at either a prehearing or status conferences, as deemed appropriate on a case-by-case basis.

Section 376, subdivision (g): This subdivision specifies that expedited hearing dates will be set pursuant to the procedures set forth in section 373. Due to the short timelines set forth in section 373 for setting expedited hearings, and the concurrent need to issue a rapid notice of hearing for such expedited matters, it is necessary for the Board to initially set all expedited hearings for the videoconference format, since the Board will not have sufficient time to entertain discussion on alternative formats prior to issuance of the initial hearing notice. However, the regulation specifies that the Appeals Board may modify the expedited hearing format after it is initially set, either on its own motion or upon a party request.

Section 376, subdivision (h): This subdivision is necessary to identify the procedures and mechanisms by which a party can challenge the Appeals Board's decision regarding the hearing format. Further, this subdivision is necessary to ensure that the Board's rules are consistent with, and adoptive of, the changes to Government Code section 11440.30 as modified by AB 1578.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS:

The Board has not relied on any technical, theoretical, or empirical studies or reports in proposing this rulemaking.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

These proposals will not mandate the use of any specific technologies or equipment.

ECONOMIC IMPACT ASSESSMENT:

Economic Impact Assessment per Government Code section 11346.3, subdivision (b):

The Board has made a determination that this proposal will not result in a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The amendments affect only procedural aspects of administrative proceedings regarding Occupational Safety and Health citations. The modifications are intended to increase efficiencies, and available options, in Board hearings, and

to provide mechanisms to lessen the burden on the stakeholders affected by the regulations. It is expected that these changes will increase access to Board hearings. These amendments to the Board's Rules of Practice and Procedure are anticipated to make appeal, adjudication, and hearing of citations simpler and more efficient.

(1) CREATION/ELIMINATION OF JOBS WITHIN THE STATE OF CALIFORNIA

The Board finds that the changes proposed to the Board's rules of practice are unlikely to have any direct impact on the creation or elimination of jobs within the State of California. The amendments predominantly affect only procedural aspects of administrative proceedings regarding Occupational Safety and Health citations, and increase available options for hearings. The modifications are intended to increase efficiencies in Board proceedings and to provide mechanisms to lessen the burden on the stakeholders affected by the regulations.

(2) CREATION OF NEW OR ELIMINATION OF EXISTING BUSINESSES WITHIN THE STATE OF CALIFORNIA

It is estimated that no businesses within the State of California will be created or eliminated by these proposed changes to the regulations. The amendments predominantly affect only procedural aspects of administrative proceedings regarding Occupational Safety and Health citations. The modifications are intended to increase efficiencies in Board proceedings and to provide mechanisms to lessen the burden on the stakeholders. These amendments to the Board's Rules of Practice and Procedure are anticipated, on balance, to make appeal, adjudication, and hearing of citations simpler, more efficient, and less costly for businesses.

(3) EXPANSION OF BUSINESSES WITHIN THE STATE OF CALIFORNIA

It is not expected any business will find reason to expand its business based on these regulations. The amendments affect only procedural aspects of administrative proceedings regarding Occupational Safety and Health citations. The modifications are intended to increase efficiencies in Board proceedings and to provide mechanisms to lessen the burden on the stakeholders. These amendments to the Board's Rules of Practice and Procedure are anticipated to make appeal and adjudication of citations simpler, more efficient, and less costly for businesses.

(4) BENEFITS OF THE REGULATION TO THE HEALTH AND WELFARE OF CALIFORNIA RESIDENTS, WORKER SAFETY, AND THE STATE'S ENVIRONMENT

The amendments directly benefit the health and welfare of California workers by clarifying and increasing efficiency in the administrative process generally and specifically in the hearing process. This is a benefit to working Californians who rely on the Board's process for timely resolution of Cal/OSHA appeals.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES:

No reasonable alternatives to the proposed changes have been identified by the Board or have otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of the law.