

DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833
TEL: (916) 274-5751
FAX: (916) 274-5786NOTICE OF PUBLIC HEARINGS OF THE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
AND NOTICE OF PROPOSED CHANGES TO TITLE 8
OF THE CALIFORNIA CODE OF REGULATIONS

Pursuant to Government Code Section 11346.4 and Labor Code Sections 148.7, the Occupational Safety and Health Appeals Board of the State of California has set the time and place for Public Hearings on proposed changes to its rules of practice and procedure found in Title, 8, California Code of Regulations, Division 1, Chapter 3.3, Articles 1, 3 and 4, Sections 350.1, 371, 371.1, 373, 374.2, and 376:

PUBLIC HEARINGS: On September 6, 2011 at 10:00 a.m.
Occupational Safety and Health Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, California

DISABILITY ACCOMMODATION NOTICE: Disability accommodation is available upon request. Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the public hearings of the Occupational Safety and Health Appeals Board should contact the Disability Accommodation Coordinator at (916) 274-5751 or the state-wide Disability Accommodation Coordinator at 1-866-326-1616 (toll free). The state-wide Coordinator can also be reached through the California Relay Service, by dialing 711 or 1-800-735-2929 (TTY) or 1-800-855-3000 (TFY-Spanish).

Accommodations can include modifications of policies or procedures or provision of auxiliary aids or services. Accommodations include, but are not limited to, an Assistive Listening System (ALS), a Computer-Aided Transcription System or Communication Access Realtime Translation (CART), a sign-language interpreter, documents in Braille, large print or on computer disk, and audio cassette recording. Accommodation requests should be made as soon as possible. Requests for an ALS or CART should be made no later than five (5) days before the hearing.

OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

A handwritten signature in black ink, appearing to read "Michael Wimberly".

MICHAEL WIMBERLY, Executive Officer

NOTICE OF PROPOSED CHANGES TO TITLE 8
OF THE CALIFORNIA CODE OF REGULATIONS
BY THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Notice is hereby given pursuant to Government Code Section 11346.4 that the Occupational Safety and Health Appeals Board, pursuant to the authority granted by Labor Code Section 148.7, and to implement Labor Code Sections 148.7, 148.8, 6600, and 6610, will consider the following proposed revisions to Title 8, Rules of Practice and Procedure, of the California Code of Regulations, as indicated below, at its Public Hearing on September 6, 2011.

TITLE 8: RULES OF PRACTICE AND PROCEDURE

Chapter 3.3, Subchapter 4, Articles 1, 3 and 4
Sections 350.1, 371, 371.1, 373, 374.2 and 376.

INFORMATIVE DIGEST OF PROPOSED ACTION/POLICY STATEMENT OVERVIEW

The Occupational Safety and Health Appeals Board (Board) is charged with hearing and resolving appeals filed by employers from occupational safety and health citations issued by the Division of Occupational Safety and Health. California Labor Code Section 148.7 authorizes the Board to adopt rules of practice and procedure for the matters that fall within its jurisdiction. The Board has adopted regulations to govern the appeals process and the procedure for reconsidering decisions made on such appeals (Title 8, California Code of Regulations, Sections 345-397).

This rulemaking proposal would expand and clarify various existing provisions pertaining to appeals. It would also add regulatory language providing for expedited proceedings where abatement of an alleged violation is at issue and specified circumstances exist. These proposed modifications will have the effect of clarifying the requirements for the parties to appeals before the Board, and will allow the Board procedures to address a particularly critical class of appeals.

This proposed rulemaking action contains non-substantive editorial changes, reformatting of subsections, and grammatical revisions. While these non-substantive revisions are not all discussed in this Informative Digest, they are clearly indicated in the regulatory text in underline and strikeout format, a copy of which is attached to this Notice. In addition to these non-substantive revisions, the following measures are proposed:

Section 350.1, Authority of Administrative Law Judge

This regulation is amended to include holding a status conference as specifically within the powers of the Administrative Law Judge. Status conferences are currently held by Administrative Law Judges pursuant to their authority under this section to "take other action during the pendency of the proceeding to regulate the course of a prehearing, hearing, or settlement conference, that is deemed appropriate by the Administrative Law Judge to further the purposes of the California

Occupational Safety and Health Act.” The reason for the amendment is to allow the regulations to more closely reflect current Board practice.

Section 371 Prehearing Motions

The proposed changes correct typographical errors only.

Section 371.1, Motions Concerning Hearing Dates

This section addresses the Board’s rules pertaining to motions filed by the parties to continue hearing dates set by the Board.

Subsection (b) is amended to create provision for parties to serve each other by fax, email, or personal service if an emergency arises, while specifying that the motion to the Board may not be emailed. Also, technical, non-substantive changes are proposed to provide greater clarity and to correct typographical errors. The effect of these amendments is to clarify the Board’s expectations and to provide the parties greater flexibility if an emergency arises.

Subsection (b)(2) is amended to specify that the facts supporting a motion for continuance must be submitted in a declaration signed under penalty of perjury. The effect of this amendment is to clarify the Board’s expectations and to discourage inflated claims made to support the motion.

Subsection (b)(3) is amended to state that the Board will not rule on a motion for continuance unless the moving party provides the other parties’ position on the motion or ten business days have passed, whichever comes first. This amendment will clarify the Board’s practices in ruling on continuance motions.

Subsection (c) is amended to state that any opposition to the motion must be filed with the Board immediately and no later than 10 days from service of the motion instead of stating that it can be filed at any time prior to a ruling on the motion. This amendment will clarify the Board’s expectations for continuance motions.

Subsection (d) is amended to state the Board’s commitment to ruling promptly on continuance motions and to correct typographical errors. This amendment will clarify the Board’s practices in ruling on continuance motions. Under this proposal, the content of existing subsection (d) has been incorporated, in large part, into the revised subsection (e). This amendment will organize the regulatory text effectively.

Subsection (e) is amended to incorporate language previously included in subsection (d) and to specify that continuance motions will each be considered on its own merits. The section states that continuances will be granted upon an affirmative showing of good cause and specifies factors that will be considered in determining whether good cause exists. Under this proposal, the language currently contained in subsection (e) is moved to revised subsection (f). These amendments will maintain the organization of the regulatory text and will clarify the Board’s practices in ruling on continuance motions.

Subsection (f) is amended to incorporate the language previously included in subsection (e). The language previously stated in subsection (f) is moved to new subsection (g) in this proposal. These amendments will maintain the organization of the regulatory text.

Subsection (g) is added to incorporate the language previously stated in subsection (f) and to add that a previously denied motion for continuance may be renewed at hearing, and new information may be provided, if it was originally denied without prejudice. Previously, the regulation simply stated that a motion for continuance, once denied, could not be renewed on the same grounds at hearing. These amendments will maintain the organization of the regulatory text and will provide party's greater flexibility to revisit a continuance motion under specified circumstances.

Section 373, Expedited Proceedings

This regulation currently allows the parties or the Board to move to expedite an appeal proceeding and states, in very general terms, that timeframes for aspects of the proceedings will be shortened to the extent possible if a proceeding is expedited.

Subsection (b) is added to specify that the Board will expedite an appeal on its own motion if it is aware that an alleged violation remains unabated, abatement is at issue, and the violation falls within one of the listed classifications. Subsection (c) states steps in the process that will occur when an appeal is expedited under this provision. These two new sections will notify the regulated public of circumstances under which the Board will expedite a proceeding and of the primary steps in the process.

Section 374.2, Status Conferences

This regulation is added to better articulate current practice. Currently, status conferences are held as needed under the authority of the Administrative Law Judge under Regulation 350.1. This new section identifies the issues addressed at a status conference, and provides for the use of sanctions by an Administrative Law Judge for a party's failure to appear at and participate in a status conference. These sanctions are the same as are currently contained in Regulation 374, Prehearing Conferences. In both current practice and in the proposed regulation, the issues addressed at a status conference are not identical to those of a prehearing conference. The matters suitable for a status conference are 1) the issues to be presented, 2) the witnesses to be called, 3) the status of discovery requests, 4) pending and contemplated motions, and 5) any other matters that may aid in expediting the hearing or otherwise disposing of the case. A status conference may be set by an Administrative Law Judge as needed to regulate the course of the proceeding.

Section 376, Time and Place of Hearing

Subsection (c) of this provision allows the Board to delay appeal proceedings when the Division of Occupational Safety and Health's Bureau of Investigations is reviewing an employer's conduct associated with an alleged violation to determine if a case should be referred to the district attorney for possible criminal charges to be brought against the employer. It also allows for such delay pending the determination by a prosecuting authority whether or not to file charges. This proposal amends the provision to state that the Board will delay the appeal proceedings for up to three years as opposed to the two years currently provided for in the regulation. This amendment will

conform the delay permitted to the statute of limitations for charging an employer with criminal conduct under the relevant statutes.

Subsection (d) states that the Board will set a hearing at a location as near as practicable to the place of employment where the violation is alleged to have occurred. This proposal would add factors to be considered when the Board is deciding the best location for the hearing. This amendment will provide guidance regarding the phrase "as near as practicable" without unduly limiting the Board's discretion or its ability to determine a hearing's location.

Subsection (e) is new and is added to specify factors the Board will consider when deciding how best to calendar hearings. This amendment will provide guidance regarding the Board's practices when setting hearings without unduly limiting the Board's discretion or its ability to set its calendar.

DOCUMENTS INCORPORATED BY REFERENCE

None.

COST ESTIMATES OF PROPOSED ACTION

Costs or Savings to State Agencies

No costs or savings to state agencies will result as a consequence of the proposed action.

Impact on Housing Costs

The Board has made an initial determination that this proposal will not significantly affect housing costs.

Impact on Businesses

The Board has made an initial 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.

Cost Impact on Private Persons or Businesses

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Costs or Savings in Federal Funding to the State

The proposal will not result in costs or savings in federal funding to the state.

Costs or Savings to Local Agencies or School Districts Required to be Reimbursed

No costs to local agencies or school districts are required to be reimbursed. See explanation under "Determination of Mandate."

Other Nondiscretionary Costs or Savings Imposed on Local Agencies

This proposal does not impose nondiscretionary costs or savings on local agencies.

DETERMINATION OF MANDATE

The Occupational Safety and Health Appeals Board has determined that the proposed regulations do not impose a local mandate. Therefore, reimbursement by the state is not required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because these regulations do not constitute a "new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

The California Supreme Court has established that a "program" within the meaning of Section 6 of Article XIII B of the California Constitution is one which carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

These proposed regulations do not require local agencies to carry out the governmental function of providing services to the public. Rather, the regulations require local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, these proposed regulations do not in any way require local agencies to administer the California Occupational Safety and Health program. (See City of Anaheim v. State of California (1987) 189 Cal.App.3d 1478.)

The proposed regulations do not impose unique requirements on local governments. All employers - state, local and private - will be required to comply with the proposed standards.

EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendments may affect small businesses. However, no economic impact is anticipated.

ASSESSMENT

The adoption of this proposal will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

ALTERNATIVES THAT WOULD AFFECT PRIVATE PERSONS

The Board must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

DOCUMENT AVAILABILITY

A copy of the proposed changes in STRIKEOUT/UNDERLINE format is available upon request made to the Occupational Safety and Health Appeals Board's Office, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833, (916) 274-5751. Copies will also be available at the Public Hearing.

An INITIAL STATEMENT OF REASONS containing a statement of the purpose and factual basis for the proposed actions and a description of any identified alternatives considered has been prepared and is available upon request from the Appeals Board's Sacramento Office.

The Occupational Safety and Health Appeals Board's rulemaking file on the proposed actions, including all the information upon which the proposals are based are open to public inspection Monday through Friday, from 8:30 a.m. to 4:30 p.m. at the Appeals Board's Sacramento Office.

The full text of proposed changes, including any changes or modifications that may be made as a result of the public hearing, shall be available from the Chief Counsel 15 days prior to the date on which the Appeals Board adopts the proposed changes.

Once the Final Statement of Reasons is prepared, it may be obtained by calling the telephone number listed above.

You can also access the Board's notice and the other materials associated with this proposal on the Appeals Board's website, the address for which is <http://www.dir.ca.gov/oshab>.

PUBLIC COMMENT

Notice is also given that any interested person may comment on this proposal in writing, or orally at the public hearing. It is required that written comments be submitted so that they are received no later than September 6, 2011, at 5:00 p.m.

The official record of the rulemaking proceedings will be closed at the conclusion of the public hearing and written comments received after 5:00 p.m. on September 6, 2011, will not be considered by the Board unless the Board announces an extension of time in which to submit written comments. Written comments should be mailed to the address provided above or submitted by fax to (916) 274-5785 or e-mailed to oshab@dir.ca.gov. The Occupational Safety and Health Appeals Board may thereafter adopt the above proposal substantially as set forth without further notice.

CONTACT PERSON

Inquiries concerning either the proposed administrative action or the substance of the proposed changes may be directed to Jeff Mojcher, Chief Counsel, or Michael Wimberly, Executive Officer, at (916) 274-5751.

OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD



MICHAEL WIMBERLY, Executive Officer

Attachments