

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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Attachment No. 3

INITIAL STATEMENT OF REASONS**CALIFORNIA CODE OF REGULATIONS**

TITLE 8: Chapter 3.5, Subchapter 1, Article 2, Sections 406, 411.1-411.4,
415, 417.3 and 417.5 of the Administrative Regulations

Variances from Occupational Safety and Health Standards**SUMMARY**

Pursuant to Labor Code Section 142.3, the Board has adopted a number of regulations that govern Board consideration of requests for variances from occupational safety and health safety standards. The Board has determined that some of these regulations require clarification or deletion and that additional regulatory provisions are needed.

Under the existing regulations, employees affected by a variance application may request party status in the variance proceedings. Existing regulations also specify that affected employees may elect to have their labor organization (authorized employee representative) represent them in the proceedings. The regulations further allow interested parties to apply for intervener status in variance proceedings. The regulations are less clear, however, regarding whether or not a labor organization that wishes to participate in a variance proceeding but that is not explicitly representing an affected employee is an intervener or a party in the variance.

The Board believes that affected employees' opinions and concerns should be heard during the variance process, either through individual employees or through their labor organizations, and the Board does not believe there is merit to treating these two situations differently. Similarly, the Board sees no basis on which to treat an authorized employee representative as an intervener if an employee has not expressly requested representation and as a party if an employee has requested representation. Moreover, the Board recognizes that there may be situations in which individual employees prefer to remain anonymous during variance proceedings. Accordingly, the Board proposes to revise the existing regulations to clarify that authorized employee representatives, as well as employees, are entitled to party status in variance proceedings.

Existing administrative regulations also state that the Standards Board entertains applications for interim variances from occupational safety and health regulations. Board staff proposes to delete the references to, and regulations governing, interim variances, because the Standards Board knows of no authority under which it may grant such variances and the presence of these

regulations causes the regulated public to believe that interim variances are an option available to them.

Existing regulations further state that, to the extent practicable, hearings for variance applications and temporary variance appeals are to be scheduled so that the Division of Occupational Safety and Health's (Division) evaluation report will be available for presentation at the hearing. The Board considers the Division's input on variance requests to be essential and does not schedule hearings until the Division's report is submitted. Accordingly, the Board proposes to revise the existing regulation to clarify that the Board will wait, in all instances, to schedule the hearing until it receives the Division's report on the matter.

Existing regulations also specify that variance applicants may withdraw their variance requests at any time before a decision is issued either in writing or orally at the variance hearing. The Board proposes to revise this regulation to require that all requests to withdraw a variance application be submitted in writing so that the administrative record is clear. Moreover, the Board proposes to clarify the phrase "before a decision is issued." Both a proposed decision and a final decision are rendered in variance proceedings and there has been some confusion regarding which of these "decisions" the regulation refers to. To address this concern, the Board proposes to revise the regulation to state that an applicant may withdraw the application anytime before the Board renders its final decision.

Although existing regulations specify that an applicant may withdraw a variance application, the Board does not have a regulatory process for situations in which an applicant does not withdraw its request, but ignores or abandons the application after it has been docketed. These situations require Board staff to devote resources to pursuing the applicant and cause record keeping problems for the staff. Accordingly, the Board proposes to add a regulation that will allow it to dismiss variance requests in these situations.

SPECIFIC PURPOSE AND FACTUAL BASIS OF PROPOSED ACTION

This proposed rulemaking action contains non-substantive, editorial and grammatical revisions. These non-substantive revisions are not all discussed in this Initial Statement of Reasons. However, these proposed revisions are clearly indicated in the regulatory text in underline and strikeout format. In addition to these non-substantive revisions, the following actions are proposed:

Section 406

This section states that affected employees may elect to participate as parties in variance proceedings. The Board proposes to revise this section to clarify that an authorized employee representative (i.e., a labor organization that has a collective bargaining agreement with the employer) may also elect to participate as a party in the proceedings. This revision is necessary to clarify that affected employees and their authorized representatives are entitled to party status.

Section 411.1

This section explains the Board's procedure for addressing defective applications for interim and/or permanent variances from the occupational safety and health standards. The Board proposes to eliminate the references to interim variances in this section, because the Board knows of no authority under which it may entertain applications for interim variances. Labor Code Section 143 only authorizes the Board to grant permanent variances, and the references to interim variances contained in this section mislead the regulated public into thinking that interim variances are an option available to them. This revision is necessary to correct that misperception.

Section 411.2

This section states that an employer may apply for an interim variance. The Board proposes to delete this section to clarify that interim variance applications are not entertained by the Board. This change is needed because the Board is not authorized to grant such variances and the existing regulations mislead the regulated public into thinking it can. This revision is necessary to correct that misperception.

Section 411.3

This section describes the process for granting an interim variance. The Board proposes to delete this section to clarify that the Board does not grant interim variances. The existing regulation causes the public to believe that interim variances are an available remedy and this revision is necessary to help eliminate that misunderstanding.

Section 411.4

This section describes the process for denying an interim variance. The Board proposes to delete this section to clarify that the Board does not grant or deny interim variances. The existing regulation causes the public to believe that interim variances are an available remedy and this revision is necessary to help eliminate that misunderstanding.

Section 415(b)

This section states that, whenever practicable, hearings on variance applications and appeals will be scheduled at a time when the Division's evaluation report is available. The Board proposes to revise this section to reflect its current practice, which is to schedule a hearing only after the Division's report is prepared. This revision is necessary to clarify the Board's practices.

The Board also proposes to add the term "Temporary Variance" before the word "Appeals" in the section title for clarification purposes.

Section 417.3(a)

This section states that variance applicants may withdraw their applications, either in writing or orally at the hearing, at any time before a decision is issued. The Board proposes to revise this section to require that requests to withdraw a variance application be submitted in writing. The Board also proposes to clarify that the withdrawal must be submitted before the Board renders its final decision on the variance. This revision is necessary to ensure a complete administrative record and to clarify when withdrawals of variance applications must be submitted.

The Board also proposes to add the term “Temporary Variance” before the word “Appeals” in the section title for clarification purposes.

Section 417.5

The Board proposes to add a new section that would allow it to dismiss permanent variance applications when the applicant fails to assist in the consideration of the application. This section would require the Board to provide an applicant with written notice of the Board’s intent to dismiss the application at least 30 days prior to taking action and would require the applicant to respond to the notice in writing, and assist in processing the application, in order to avoid dismissal. This regulation is necessary to allow for more efficient handling of variance applications.

DOCUMENTS RELIED UPON

None.

DOCUMENTS INCORPORATED BY REFERENCE

None.

REASONABLE ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC
IMPACT ON SMALL BUSINESSES

No reasonable alternatives were identified by the Board and no reasonable alternatives identified by the Board or otherwise brought to its attention would lessen the impact on small businesses.

SPECIFIC TECHNOLOGY OR EQUIPMENT

This proposal will not mandate the use of specific technologies or equipment.

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 Non-discretionary Costs or Savings Imposed on Local Agencies

This proposal does not impose non-discretionary costs or savings on local agencies.

DETERMINATION OF MANDATE

The Occupational Safety and Health Standards Board has determined that this regulatory proposal does 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 this regulatory proposal will not require local agencies or school districts to incur additional costs in complying with the proposal. Furthermore, this proposal does 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 regulatory changes do not require local agencies to carry out the governmental function of providing services to the public. Moreover, these proposed regulatory changes 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.)

This regulatory proposal does not impose unique requirements on local governments. All employers - state, local and private - will be required to comply with the prescribed standards.

EFFECT ON SMALL BUSINESSES

The Board has determined that the regulatory proposal will not affect small businesses.

ASSESSMENT

The adoption of the proposed changes to these regulations 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

No reasonable alternatives 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 or would be as effective and less burdensome to affected private persons than the proposed action.