

## TITLE 8. DEPARTMENT OF INDUSTRIAL RELATIONS

### NOTICE OF SECOND PROPOSED EXTENSION OF EMERGENCY ACTION

The Acting Director (“Acting Director”) of the Department of Industrial Relations (“Department”) proposes to extend the emergency regulatory action taken on November 4, 2010, in OAL File No. 2010-1028-01 E, and extended on May 2, 2011, in OAL File No. 2011-0422-01 EE, for one additional ninety (90) day period pursuant to section 11346.1 of the Government Code.

Emergency Regulatory Action: On November 4, 2010, the Office of Administrative Law approved the former Director’s emergency rulemaking action to repeal Subchapter 4.5 (commencing with section 16450) of Chapter 8 of Division 1 of Title 8 of the California Code of Regulations and to amend section 16423 (within Subchapter 4 of the same chapter and division) in order to eliminate references to Subchapter 4.5. On May 2, 2011, the Office of Administrative Law approved a ninety (90) extension of this action in order to provide the Acting Director with additional time to commence a regular rulemaking to repeal or amend all or some of the regulations in Subchapter 4.5. The Acting Director commenced a regular rulemaking to make necessary amendments to the regulations on July 1, 2011, and is requesting one additional extension of this emergency action so that the repeal of Subchapter 4.5 will remain in effect while that rulemaking is being conducted.

Basis for Prior Action: Emergency action was taken for the purpose of suspending and postponing the commencement of fee-based compliance monitoring and enforcement by the Department on public works projects pursuant to sections 1771.3 and 1771.55 of the Labor Code and related statutes. It was necessary to take this action on an immediate emergency basis due to questions raised over the legality of using bond funds to pay the fees set forth in section 16452, which in turn prevented the state from selling bonds to fund public works construction due to bond counsel’s unwillingness to write an unqualified opinion for the sale of any bond that may be subject to the fee. Because the applicability of sections 1771.3 and 1771.55 of the Labor Code and related statutes were conditioned upon the Director’s adoption of implementing regulations, the suspension and postponement of the effective date of those regulations had the effect of suspending and postponing implementation of the underlying statutes and removing the impediment to selling bonds until the legal questions were addressed.

Basis for Extension of Emergency Action: The situation described above continues to exist; that is, questions raised by bond counsel over the legality of using bond funds to pay the fees set forth in section 16452 continue to exist and are preventing bond counsel from expressing a willingness to issue the unqualified opinion letters that are needed in order for the state to be able to sell bonds to fund public works construction. Although the legal issues have been narrowed substantially since this controversy began, bond counsel remains unwilling to write unqualified opinion letters until some of the statutory terminology is revised, and prospective revisions to the statutes may also trigger a need for further regulatory revisions. Because the emergency rulemaking action cannot remain in effect beyond a maximum of 360 days, the Acting Director has commenced a regular rulemaking to adopt amendments that will have the effect of: (1) postponing

the effective date of the regulations to January 1, 2012, or any later date set by legislation or the need for approval by an outside agency such as the Department of Finance or the Office of Administrative Law; and (2) revising regulatory fee requirements to address specific concerns raised by bond counsel

Substantial Progress and Due Diligence Toward Repeal or Replacement of Suspended Regulations through Regular Rulemaking: As was noted in the first extension request, the legal questions that prevented bond counsel from writing unqualified opinion letters were first raised in oral conversations during the last week of July of 2010 and first expressed in writing in correspondence to the State Treasurer and the Director of Finance dated October 19, 2010. This led to the Department's preparation of a "white paper" on the historical development of California's Prevailing Wage Law, and bond counsel's later acceptance of the white paper's central premise that prevailing wage enforcement was an expense associated with public works construction and accordingly that bond funds legally could be used for this purpose. However, bond counsel also expressed the belief that statutory and regulatory revisions were still "necessary to the issuance of unqualified general bond opinions in the future by the Attorney's General Office." The Department and bond counsel subsequently exchanged proposals for statutory amendments to address these concerns, but as of July 1, 2011, had not reached agreement on what was necessary, valid, or appropriate from a legal standpoint.

Since Government Code section 11346.1(h) limits an agency to a maximum of two 90 day extensions of an emergency regulatory action, the Acting Director could not wait any longer for statutory revisions to be agreed upon and introduced a regular rulemaking. The Acting Director drafted regulatory amendments that would strike the fee requirements that are likely to be inconsistent with new legislation, allow the regulatory provisions that have not been challenged to go back into effect, and to push back the effective date of the regulations to 2012 when the outstanding issues are likely to be resolved. A regular rulemaking to adopt these amendments was commenced on July 1, 2011, and assuming great diligence in conducting the rulemaking and no major revisions arising out of public comments, this rulemaking could be concluded just prior to the end of the requested second extension of the emergency regulatory action.

#### FINDING OF CONTINUING EMERGENCY

The Acting Director finds that there is a continuing emergency, as described in the Notice of Proposed Emergency Action issued on October 21, 2010 and the Notice of Proposed Extension of Emergency Action issued on April 14, 2011, both of which are incorporated herein by reference. For the reasons explained in those prior Notices and underlying correspondence, bond counsel will be unwilling to provide unqualified bond opinions if Subchapter 4.5 goes back into effect in its present form or if revisions are not made to the underlying legislation. Without unqualified bond opinions, the state's public works bonds will be unmarketable, which will leave the state unable to pay for public works projects and result in a loss of employment and economic stimulus to the community at a time of continuing stress to the local, state, and national economies.

#### INCORPORATION OF PRIOR EMERGENCY REGULATORY ACTION

In further support of this Notice of Proposed Extension of Emergency Action, the Acting Director incorporates herein by reference (1) the Notice of Proposed Emergency Action and documentation submitted in support of the emergency regulatory action that was approved by the Office of Administrative Law on November 4, 2010 in OAL File No. 2010-1028-01 E, and (2) the Notice of Proposed Extension of Emergency Action and documentation submitted in support of that extension that was approved by the Office of Administrative Law on May 2, 2011 in OAL File No. 2011-0422-01 EE.

#### STATEMENT UNDER TITLE 1, CALIFORNIA CODE OF REGULATIONS, §48

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

Title 1, California Code of Regulations, section 55(b) sets forth the requirements for submitting comments to the Office of Administrative Law on the proposed emergency action. Comments must be in writing, must identify the topic of this rulemaking, and must be submitted directly to the Office of Administrative Law as follows:

Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814-4339  
Fax: (916) 323-6826  
e-mail: [staff@oal.ca.gov](mailto:staff@oal.ca.gov)

In addition, a copy of the comments must be transmitted to the Department's contact person for this rulemaking. To ensure prompt receipt and consideration of your comments, the Department requests that you transmit a copy either by e-mail to [SBX2-9comments@dir.ca.gov](mailto:SBX2-9comments@dir.ca.gov), or by fax, to the attention of John Cumming, at 415/703-4277.

## AUTHORITY AND REFERENCE

**Authority:** Sections 54, 55, 1771.55(b), and 1773.5, Labor Code.

**Reference:** Sections 17250.30 and 81704, Education Code; section 6531, Government Code; sections 1771.3, 1771.55, 1771.75, 1771.85, and 1771.9, Labor Code; sections 6804, 20133, 20175.2, 20193, 20209.7, 20688.6, and 20919.3, Public Contract Code; and section 75075, Public Resources Code.

## UPDATED INFORMATIVE DIGEST AND DISCLOSURES

The Acting Director readopts and incorporates by reference (1) the Informative Digest/Policy Overview Statement and the Disclosures Regarding the Proposed Action as set forth in the Notice of Proposed Emergency Action issued on October 21, 2010, and (2) the Update Informative Digest and Disclosures set forth in the Notice of Proposed Extension of Emergency Action issued on April 14, 2011.