

**PROPOSED REGULATIONS OF
THE DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
TITLE 8, CALIFORNIA CODE OF REGULATIONS
(Article 1.5, Subchapter 2, Chapter 3.2, Sections 340.40 through 340.51)**

Adopt Article 1.5 to Subchapter 2 of Chapter 3.2 of Title 8 of the California Code of Regulations as follows:

Article 1.5. Adjudicative Hearings—General Rules of Practice and Procedure—Denial, Suspension or Revocation of Permits, Licenses, Certifications, Registrations or other Authorizations and Orders Prohibiting Use, issued by the Division of Occupational Safety and Health.

340.40. Scope and Application:

(a) These general rules of practice and procedure of the Division of Occupational Safety and Health (hereinafter “the Division”) are applicable to any proceeding involving the denial, suspension or revocation of any license, permit, certification or other authorization issued by the Division, and any proceeding involving an Order Prohibiting Use subject to Labor Code sections 6325, 6325.5 and 6327.

(b) These general rules of practice and procedure may supplement, but shall not replace, other codified administrative appeal procedures. In case of conflict with codified appeal procedures, the more-specific procedures shall apply.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.41. Notification of Division Proceedings for Suspension or Revocation.

(a) When, after investigation or inspection, the Division determines that good cause exists to deny, suspend or revoke any permit, license, certification, registration, or other authorization issued by the Division, written notification shall be provided to the person or entity against whom the Division intends to take such action.

(b) The Notification shall cite the statute or regulation authorizing the action taken by the Division, along with a statement of the grounds constituting good cause for the denial, suspension, revocation or other action proposed by the Division.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.42. Request for Hearing.

(a) Within five business days after the Division's denial, suspension, or revocation of an application for a permit, license certification, registration or other authorization, or, the issuance of an Order Prohibiting Use, the affected applicant or employer may request a hearing.

(b) The request must be in writing and must set forth specific reasons why the Division's action was improper.

(c) For the denial of an application, or for the suspension or revocation of a permit, license certification, registration or other authorization, the written request for hearing shall be mailed or otherwise delivered to the headquarters office of the Director.

(d) For the issuance of an Order Prohibiting Use, the request shall be mailed or otherwise delivered to the District Manager of the District office which issued the Order Prohibiting Use.

(e) Upon receipt of a request for an appeal hearing, the Director shall designate a Presiding Officer to conduct the hearing. The Presiding Officer may be a Deputy Chief, Regional Manager, or other representative designated by the Chief.

(f) The Division shall notify the appellant of the date, time and location of the hearing, and of the name of the Presiding Officer. The date and time of the hearing shall be subject to the specific provisions of the statute or regulation, if any, authorizing the action. Where no statute or regulation imposes specific time limitations, a hearing shall be set so as to provide sufficient time for preparation and attendance at the hearing, but in no event less than 48 hours. Hearings regarding the issuance of an OPU shall be held within 24 hours following the appellant's request for a hearing.

(g) The Presiding Officer may change the date, time and location of the hearing upon his or her own motion or upon the written motion of either party at any time prior to the hearing.

(h) The appellant must immediately notify all affected employees, former employees, and employee representatives, if any, of the date, time and location of the hearing along with a description of the purpose for the hearing, by posting the Notification or otherwise providing written notice. The Notice must remain posted for at least three working days or until the date of the hearing, which ever is less.

(i) The Division may serve the Notification personally or by certified mail. The provisions of this article are subject to section 1013 of the California Code of Civil Procedure.

(j) The Division shall make available upon request a copy of its governing procedures applicable to said proceedings including advisement as to whether the proceeding is subject to the provisions of Chapter 5, commencing with section 11500 of the Government Code.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.43. Conduct of Hearing

(a) Any person designated by the Director to preside over any Hearing subject to the provisions of this article shall be responsible for receiving evidence both from Division representatives and the person or entity against whom such action is taken and shall issue a decision as set forth in this article. Parties shall have the opportunity to present any and all relevant documentary or other evidence through the presentation of direct testimony, the cross-examination of witnesses, and the rebuttal of any evidence presented during hearing. The designated Presiding Officer may also examine witnesses or request the presentation of additional relevant evidence.

(1) Upon motion, the Presiding Officer may exclude witnesses from the hearing room. Each party may designate one representative who may stay in the hearing room, even if the representative will also serve as a witness.

(2) A party may appear in person or through a representative who is not required to be an attorney.

(3) Designated employee representatives may make written request to participate in the hearing if it is established that such participation will be relevant to any issues presented at the hearing.

(4) The hearing shall be tape-recorded, unless some other method of recording the proceedings is agreed to between the parties. The evidence shall be received under oath, affirmation or penalty of perjury.

(b) The hearing shall not be subject to the technical rules relating to evidence or witnesses. However, only relevant evidence of the sort responsible persons are accustomed to rely upon in conducting serious affairs shall be admitted and relied upon in rendering a decision. Hearsay evidence is admissible but may not be solely relied upon without other supporting evidence unless the hearsay would be admissible over objection in a civil proceeding.

(c) Any hearing conducted pursuant to this article shall be open to the public as required pursuant to Government Code section 11425.20.

(d) During all stages of a hearing, the Presiding Officer and all parties to the hearing shall be subject to the provisions of Article 7, commencing with section 11430.10 of the Government Code regarding ex parte communication.

(e) The matter shall be deemed submitted at the conclusion of the hearing unless some other submission date is agreed to between the parties or otherwise designated by the Hearing Officer.

(f) The Presiding Officer shall issue and serve a written decision on the parties no later than thirty (30) days after submission of the matter for decision.

(1) The time for issuance and service of the decision may be extended by the designated Presiding Officer.

(2) For an Order Prohibiting Use, a decision concerning the validity of the order shall be made as soon as possible after the conclusion of the hearing.

(g) The decision shall be in writing and specifically detail the findings of fact and conclusions supporting the decision.

(h) Any right to request review of the decision shall be governed by the specific regulation or statute authorizing the action taken by the Division.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.44. Presiding Officer – Grounds for Disqualification.

Any Presiding Officer designated by the Director may be disqualified for any ground set forth in Government Code sections 11425.30 and 11425.40. A request for disqualification must be in writing to the Director and shall specifically detail the grounds upon which disqualification is sought and the factual basis for the request. The request shall be filed with the Director pursuant to the provisions of section 340.45 of this Article.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.45. Service of Process

(a) Unless otherwise required, service may be made by personal delivery or by depositing the documents in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first-class postage prepaid.

(b) Service is complete at the time of the personal delivery or mailing.

(c) Proof of service shall be filed with the document and may be made by any of the following means:

(1) Affidavit or declaration of service by personal delivery or mail;

(2) Written statement endorsed upon the document served and signed by the party making the statement; or

(3) Letter of transmittal.

(d) Facsimile (fax) machines may be used to serve and file documents under the following conditions:

(1) The length of the document to be filed and/or served shall be no more than twelve (12) pages including cover page and attachments.

(2) A copy sheet shall be attached containing the number of pages transmitted, the fax number of the sender, the sender's telephone number, and the name of the contact person.

(3) If a document is filed by fax, all parties shall be served in the same manner or by guaranteed overnight delivery. The fax transmission shall include a proof of service indicating the method of service on each party; and

(4) No later than 24 hours after transmission, the sending party shall file and serve on all parties the original of any faxed document as set forth in this section.

(e) A document is considered received on the following working day if transmission begins later than 5:00 p.m. Pacific Time.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.46. Discovery

(a) Upon written request made to the other party prior to the hearing, a party to the proceeding is entitled to obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing. Nothing in this section requires the disclosure of the identity of a person who submitted a complaint regarding the unsafeness of an employment or place of employment unless the complainant requests otherwise.

(b) A party is entitled upon written request to inspect and make copies of any of the following materials in the possession or custody or under the control of the other party;

(1) Any statements of parties or witnesses relating to the subject matter of the proceeding;

(2) All writings or things which the party then proposes to offer in evidence;

(3) Any other writign or thing which is relevant and which would be admissible in evidence;

(4) Inspection and investigative reports made by or on behalf of the Division or other party pertaining to the subject matter of the proceeding, to the extent that such reports contain the names and addresses of witnesses or persons having personal knowledge of the acts, omissions or events which are the basis of the proceeding; reflect matters perceived by the Division in the course of its inspection, investigation or survey; or, contain or include by attachment any statement or writing described in this section.

(c) The parties shall arrange for a mutually-agreeable time for exchange of requested materials but in no event later than 24 hours prior to the time set for hearing.

(d) The Presiding Officer may, upon written request by either party, make provision for timely completion of discovery including continuance of hearing dates for purposes of completion of discovery.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.47. Subpoenas and Subpoenas Duces Tecum – Witness Fees

(a) Upon written request from a party, the Presiding Officer may issue a subpoena or subpoena duces tecum requiring the attendance of a person or the production of documents or things at the hearing.

(1) Compliance with the provisions of section 1985 of the Code of Civil Procedure shall be a condition precedent to the issuance of a subpoena duces tecum.

(2) The application for a subpoena or subpoena duces tecum shall be in the form of an affidavit under penalty of perjury and shall show good cause for the attendance of the witness or the production of the document or thing requested. In the case of a request for a subpoena duces tecum the request shall specifically state whether or not the personal attendance of the witness or qualified custodian of records is required.

(b) Any subpoena or subpoena duces tecum issued pursuant to subsection (a) of this section extends to all parts of the state and shall be served in accordance with the provisions of sections 1985.3, 1987, 1987.5 and 1988 of the Code of Civil Procedure. Service of a subpoena or subpoena duces tecum is made by delivering a copy to the witness together with a copy of the affidavit or declaration upon which the subpoena duces tecum is based, giving or offering at the same time, if demanded, the fees to which a witness is entitled for travel to and from the place designated.

(c) All witnesses appearing pursuant to subpoena, other than the parties, or their representatives directly associated with the action shall be entitled to receive fees, and all witnesses appearing pursuant to a subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court.

(d) Witnesses subpoenaed for hearing shall be entitled to the following fees and mileage, payable in advance;

(1) Witness fee for each day's actual attendance of thirty-five dollars (\$35.00);

(2) Mileage actually traveled, both ways, of twenty cents (\$.20) a mile;

(3) Per diem compensation of three dollars (\$3.00) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing, if the hearing is at a point so far removed from a residence as to reasonably preclude return thereto from day to day;

(e) Fees, mileage and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.

(f) A party who subpoenas a peace officer as listed at Government Code section 68097.1 or individuals designed by Government Code 68097.2 shall reimburse the public entity for the full cost of the public entity incurred in paying the officer his or her salary or other compensation and traveling expenses for each day that such officer is required to remain in attendance.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.48. Official Notice

(a) In reaching a decision, a Presiding Officer may take official notice either before or after submission of the proceeding for a decision, of any generally accepted

technical or scientific matter within the field of occupational safety and health, and determinations, rulings, orders, findings and decisions, required by law to be made by the Division of Standards Board.

(b) The Presiding Officer shall take official notice of those matters set forth in section 451 of the Evidence Code and may take official notice of those matters set forth in section 452 of the Evidence Code.

(c) Each party shall be given reasonable opportunity on request to present information relevant to (1) the propriety of taking official notice, and (2) the tenor of the matter to be noticed.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.49. Confidential Evidence

(a) A Presiding Officer shall consider confidential any exhibit which might reveal a trade secret referred to in section 1905 of Title 18 of the United States Code, information that is confidential pursuant to Chapter 3.5 (commencing with section 6250) of Division 7 of Title 1 of the Government Code, or photographs taken by the Division during the course of any inspection or investigation.

(1) The Presiding Office shall issue necessary orders to protect the confidentiality of such information, including the exclusion of witnesses during the course of the hearing if testimony might tend to reveal the substance of the confidential information.

(2) Parties shall request confidentiality at the time the evidence is submitted.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.50. Prehearing Motions

(a) No later than 24 hours prior to a hearing, a party may make a written motion for continuance or for clarification of issues related to discovery or other matters deemed important to the issues to be addressed during the course of the hearing.

(b) Such written motion shall be filed with the Presiding Officer and served upon the other party in conformance with section 340.45 of this article.

(c) The Presiding Officer may issue such orders as it deems necessary to address the issues referenced in such written motion.

(d) Prehearing motions in connection with the appeal of an OPU may be made up until and including the day of the appeal hearing.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.

340.51. Interpreters

(a) All hearings shall be conducted in the English language. The Division shall notify each party of the right to an interpreter at the time the parties are notified of the date of the hearing.

(b) A party who does not proficiently speak or understand the English language, who calls a witness who does not proficiently speak or understand the English language, or who requests an interpreter shall be provided with an approved interpreter during the hearing. A request for an interpreter shall be made at the same time as the request for appeal. The party requesting the interpreter shall pay the cost of the interpreter, unless the Division elects to pay the interpreter based on the financial hardship of the requesting party.

(c) For purposes of this section, an approved interpreter is a person whose name appears on the list of interpreters approved by the Occupational Safety and Health Appeals Board.

Authority: Labor Code section 60.5, 6308; Government Code section 11400.20. Reference: Labor Code section 60.5, 6308; Government Code section 11400.20.