

DEPARTMENT OF INDUSTRIAL RELATIONS

FINAL STATEMENT OF REASONS

FOR ADOPTION OF PREVAILING WAGE HEARING REGULATIONS

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CALIFORNIA CODE OF REGULATIONS, TITLE 8, CHAPTER 8, SUBCHAPTER 6,

SECTIONS 17201 through 17270.

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NOTICE OF PROPOSED ADOPTION OF REGULATIONS BY THE DIRECTOR OF  
INDUSTRIAL RELATIONS TO ESTABLISH HEARING PROCEDURES FOR  
APPEALS FROM PREVAILING WAGE DETERMINATIONS

**FINAL STATEMENT OF REASONS**

**UPDATE OF INITIAL STATEMENT OF REASONS**

As authorized by Government Code section 11346.9(b), the Director of the Department of Industrial Relations (“Director”) incorporates the Initial Statement of Reasons prepared in this matter.

A.

The following sections were amended following the public hearing and circulated for further public comment: 17201, 17202, 17204, 17208, 17212, 17223, 17224, 17230, 17237, 17240, 17245, 17262, and 17264 [added].

**Section 17201 [Rule 01]. Scope and Application of Rules.**

Subpart (d) was added by moving what had appeared as an advisory comment into the body of the regulation. Because these hearing regulations are a collection of procedural rules, the Director decided to use the term “Rule” to refer to individual sections. This subpart explains that the number of each Rule corresponds to the last two digits of the section. This terminology is both descriptive and easier to use than full section citations.

**Section 17202 [Rule 02]. Definitions.**

A new definition of “Joint Labor-Management Committee” was added in connection with extending intervention rights to such committees under Section 17208 (Rule 08) below. The purpose of providing this definition is to limit intervention rights to a specific type of committee that is authorized by federal statute and not extend such rights to other committees that might fit within a more generic definition.

The definition of “Party” was also modified so that it now refers to the three subparts of the revised intervention rule (Section 17208 [Rule 08]) that extend potential party rights.

A definition of “Rule” was added to clarify that it refers to a section within this collection of Prevailing Wage Hearing Regulations. Although this definition is somewhat redundant to

subpart (d) of Section 17201, the purpose of also including it here is that these use it as a specially defined term, and thus some users may look here for its definition.

The two new definitions were inserted in the appropriate alphabetical order, and all of the other subparts were relettered accordingly.

**Section 17204 [Rule 04]. Appointment of Hearing Officers; Delegation of Appointment Authority to Chief Counsel.**

Subpart (d) was modified to state the correct title of the Chief Counsel as “Chief Counsel of the Office of the Director.” This is a non-substantive change.

**Section 17208 [Rule 08]. Intervention and Participation by Other Interested Persons.**

A new subpart (c) was added to extend intervention rights to the individual or entity whose complaint led to the Assessment or Notice that is at issue in the review proceeding. The Director has proposed two options for this Rule – Option A which limited intervention to surety and bonding companies under specified circumstances, and Option B which gave the Hearing Officer more open-ended authority to permit intervention. The open-ended Option B was rejected because the Director believed there should be a set standard for who may intervene rather than variable standards that depend on the circumstances of the case and identity of the Hearing Officer.

Using the more restrictive Option A, the Director then considered if or to what extent intervention should be authorized for employees or employee groups with a stake in the case. Although employees potentially may pursue other legal remedies, the Assessment under Labor Code section 1741 or Withholding of Contract Payments under Labor Code section 1771.6 may provide the only effective means through which employees may recover additional wages due under the prevailing wage laws. A complaint by an employee, union, or Joint Labor-Management Committee often triggers the investigation that leads to an Assessment or Withholding of Contract Payments. The role of affected employees and their representatives in these cases is similar in some respects to the role of victims and victims rights organizations in a criminal prosecution.

As was noted in the Initial Statement of Reasons, the hearing procedures authorized under Labor Code section 1742 provide the exclusive means for an affected contractor or subcontractor to obtain review of an Assessment or Notice of Withholding. The more that other persons are permitted to intervene into these proceedings, the more difficult it becomes to protect the affected contractor or subcontractor’s statutory right to a prompt hearing and decision. The Director rejected an intervention standard that would permit any affected employee to intervene, since this would open the proceeding up potentially to scores of additional parties who would all have a right to receive notices and be heard. However, the Director decided that an employee, union, or Joint Labor-Management Committee who filed the complaint that led to the proceeding should have a right to intervene if the request is made early in the proceeding and there is no

good cause for denying the request. The good cause element makes the intervention standard provided for complainants under subpart (c) slightly different than the one provided for sureties and bonding companies under subpart (b).

Subparts (c) and (d) from the original Option A text were relettered as subparts (d) and (e). Additional language was added to subpart (e) [formerly (d)] to clarify that this Rule provides the only basis for intervening into one of these cases and that the Hearing Officer may impose conditions limiting the manner and extent to which an intervener may participate in a case. The purpose of these clarifications is to preclude parties from seeking or invoking claimed intervention rights based on other statutory, court rule, or administrative law standards.

Subpart (f) was added to clarify that a person need not seek intervention in one of these review proceedings as a condition for pursuing other prevailing wage remedies. The purpose of this subpart is to emphasize that intervention is a purely optional remedy and not a procedure that must be exhausted by a party who has other available enforcement remedies.

#### **Section 17212 [Rule 12]. Administrative Adjudication Bill of Rights.**

A new subpart (c) was added to require that written communications submitted during a review proceeding shall be governed by Government Code section 11430.60 (b) and (c). The purpose of this subpart and the cited statute is to require attorneys and authorized representatives to identify the client on whose behalf a brief or other written communication is submitted.

Subpart (c) from the original proposal was relettered subpart (d).

#### **Section 17223 [Rule 13]. Transmittal of Request for Review to Department.**

This section was amended to add a Proof of Service or other document showing the address of the bonding company or surety to the list of items that the Enforcing Agency must transmit to the Director upon receipt of a Request for Review. The purpose of this amendment is to provide both a reminder to the Enforcing Agency of its statutory duty to serve the Assessment or Notice of Withholding on the bonding company or surety and also to provide the Hearing Officer with early notice of the bonding company or surety's identity so that hearing notices may be sent to those entities. A further purpose for establishing proof of service on those entities and providing them with early notice of hearings is to avoid late intervention requests based on lack of prior notice that might result in hearings having to be delayed.

#### **Section 17224 [Rule 24]. Disclosure of Evidence.**

This section was amended by changing "said party" to "the affected contractor or subcontractor" in an effort to make it sound less legalistic. This is not a substantive change.

### **Section 17230 [Rule 30]. Scheduling of Hearing Date; Continuances and Tolling.**

This section was reorganized and amended based on public comments to two options that were circulated. The competing options were a strict policy against continuances once a firm hearing date is set or a more relaxed standard for continuance requests that are joined by all parties. The Director accepted a compromise proposed in a public comment to have the more relaxed standard apply only when a joint request is for 30 days or less. The Director also added a relaxed standard for continuances requested by a contractor who did not wait the full 60 days available to file a Request for Review. That 60 day period can be used for early settlement and evidence review before the Request is filed. Since the contractor has the primary statutory interest in a prompt hearing, the Director believed that some consideration should be given for contractors who inadvertently limit their time for settlement efforts, evidence review, and hearing preparation by filing the Request for Review immediately after service of the Assessment or Notice of Withholding of Contract Payments.

The relaxed standards are incorporated into the revised subpart (c), while the stricter standard governing all other continuance requests remains in subpart (b). An inadvertent error in the revised text circulated for further public comment made a continuance request of exactly 30 days subject to neither standard. To correct this error, the language of the relaxed standard has been changed from “less than 30 days” to “30 days or less.”

Further nonsubstantive corrections have been made as follows. In the second sentence of subpart (b), the word “subparagraph” was changed to “subpart” to conform to the terminology used in the other regulations; and in the last line of subpart (b), the word “relevant” was unnecessary and therefore was deleted. In subpart (e), the word “of” was inserted after the first three words of item (4) so that it now reads “upon the order of a court ...”; and the very last word “hereunder” has been changed to “under these Rules.”

### **Section 17237 [Rule 37]. Depositions and Other Discovery.**

In subpart (c), the word “depositions” was changed to “deposition testimony.” The purpose of this change was to avoid the implication that a deposition could be scheduled and taken in another proceeding for the purpose of generating evidence for one of these cases. A further nonsubstantive change was made to this subpart by deleting the word “unrelated,” which was an unnecessary and potentially confusing modifier of the words “separate proceedings.”

### **Section 17240 [Rule 40]. Notice of Appointment of Hearing Officer; Objections.**

Subpart (c) has been modified to state the correct title of the Chief Counsel as “Chief Counsel of the Office of the Director.” This is a non-substantive change. The last sentence of subpart (c) has also been modified by adding the clarifying words “in the pending case” after “ex parte communication.” This last sentence states an exception to the usual time limit for objecting to the appointment of a particular Hearing Officer, and the reason for this exception is to permit a

challenge when something objectionable is first discovered *after* the regular time limit expires. The added language clarifies this intent by making the example given (receipt of a prohibited ex parte communication) refer more specifically to an event that likely would occur or be discovered only after the 10 day limit (as opposed to an abstract event that might occur or be discovered at any time).

**Section 17245 [Rule 45]. Official Notice.**

At the suggestion of two of the commenters, subpart (a) was modified by adding three specific types of information that are likely to be the subject of official notice in these proceedings. The specified items are generally available to the public, including on the Department's web site. The purpose of listing them in this regulation is to give parties a better sense of the types of information with the Department's special expertise that are subject to official notice and to preclude any effort in these proceedings to reopen past determinations that were based on their own administrative processes and records. The addition of these items as a new subpart (1) required the other subparts to be renumbered.

**Section 17262 [Rule 62]. Final Decision; Time for Seeking Review.**

A new subpart (d) was added to specify that a petition for court review of the Director's decision may be served upon the Director by serving the office of the Hearing Officer and upon the Labor Commissioner by serving the office of the attorney who represented the Labor Commissioner in the hearing. This preferred option would be easier for the party filing the petition, who would already know the identities and addresses of the persons to be served from the review proceeding. It would also help the agencies, since these offices are where the agencies would assemble the record and begin their preparation for court review. The subpart also specifies that this preferred method is an option and does not preclude parties from using any other legally authorized method for serving the Director or the Labor Commissioner.

**Section 17264 [Rule 64]. Request for Participation by Director in Judicial Review Proceeding.**

This section was added to disclose the Director's intent to take a passive role in court review proceedings except in cases where the validity of statutes, regulations, or the Director's own authority (as opposed to the correctness of the decision) is at issue. The section also expressly offers parties the opportunity to request the Director's active participation in a court review proceeding. This section is non-substantive and informative only.

B.

Following the public hearing, additional non-substantive corrections were made to the regulations as follows:

Wherever the text of a regulation referred to a different Rule, a citation to the complete Section number was added in brackets. For example, the reference to Rule 08 in Section 17202(j) now reads “Rule 08 [Section 17208].” This change was made in Sections 17202, 17204, 17205, 17210, 17220, 17221, 17222, 17226, 17228, 17229, 17233, 17234, 17235, 17236, 17247, 17250, 17261, and 17270.

Terms that are specially defined in Section 17202 [Rule 02] have been spelled with initial capital letters wherever they appear in any other section. This had been done inconsistently in the proposed draft circulated for public comment.

In Section 17203 [Rule 03], in the last clause of subpart (d), the words “a different rule” have been changed to “a different requirement” in order to avoid confusion with specially defined terminology.

In Section 17211 [Rule 11], the word “regular” was an unnecessary modifier for the term “Working Day” and was stricken from both places where it appeared in the last sentence of subpart (a).

In Section 17234 [Rule 34] the word “subdivision” was changed to “subpart” to conform to usage in the other regulations. In one of the bracketed portions (indicating information to be filled in) in the model declaration in subpart (b), the words “here insert” were deleted as unnecessary and potentially confusing since the instruction does not appear elsewhere.

In Section 17236 [Rule 36], the last sentence of subpart (b) was deleted because it had been copied inadvertently from the previous section 17235 and was meaningless within the context of this section. In the first sentence of subpart (c), the word “section” was changed to “Rule” to conform to usage in the other regulations.

In Section 17243 [Rule 43], in the last sentence of subpart (b), the word “testified” has been added after the word “has” (so that it now reads “has testified or intends to testify”) to make the language easier to understand without changing its meaning.

In Section 17248 [Rule 48], the word “subparagraph” was changed to “subpart” to conform to usage in the other regulations.

In Section 17249 [Rule 49], the words “hearing officer’s record” in subpart (b) were changed to “official record” to conform with the terminology used in subparts (a) and (c).

In Section 17252 [Rule 52], in subpart (c) the word “may” was added before the word “designate” and the word “afford” was changed to “give” to make the language easier to read and understand without changing the meaning.

## LOCAL MANDATES DETERMINATION

These regulations impose no mandates on local agencies or school districts.

## SUMMARY AND RESPONSE TO COMMENTS:

In accordance with Government Code §11346.45, a set of draft regulations was circulated among persons who would be subject to the regulations, and written responses were received from the following persons: Scott Kronland of the law firm Altschuler, Berzon, Nussbaum, Rubin & Demain, that generally represents union organizations [to be referred to hereinafter as the “Kronland” comments]; Dennis B. Cook of the law firm Cook, Brown & Prager on behalf of the Associated Builders & Contractors, Inc., Golden Gate Chapter [“ABC”]; and Staci L. Brandt of the law firm Booth, Mitchel & Strange, that primarily represents sureties [“Brandt”].

During the public comment period, three additional sets of written comments were submitted, and four persons testified at the two public hearings, as follows: written comments only by the State Building & Construction Trades Council [“SBCTC”]; written and oral comments by the California Department of Transportation [“Caltrans”]; oral comments only by David Kersh of the Carpenters/Contractors Cooperation Committee, Inc. [“Kersh”]; written and oral comments by Patricia Gates of the law firm Van Bourg, Weinberg, Roger & Rosenfeld on behalf of several construction trades unions [“Gates”]; and oral comments only by Jo-Anne Lyons, a Compliance Officer for the Northern California Electrical Construction Industry [“Lyons”].

No comments were received on the post-hearing revisions.

Although some comments focused on the constitutionality of the statute or other issues outside the scope of these regulations, all were presented or fell within the scope of individual regulations and therefore are organized that way below. No comments were made about the procedures followed in proposing these regulations.

### Section 17201 [Rule 01]. Scope and Application of Rules.

**Kronland:** In light of Rule 08’s narrow intervention rule [as set forth in the original draft] that leaves out the employee whose wages are at stake and the complaining party, it would be helpful if the regulations made clear that non-parties are not bound by the decision nor foreclosed from pursuing other legal remedies. In AB 1646 (the enabling statute) the Legislature stated: “It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.” (Stats. 2000, Chapter 954, §1)

**Response:** This recommendation was accepted and incorporated into subpart (c) of this section.

Section 17202 [Rule 02]. Definitions.

**Brandt:** There should be a specific definition of “surety” in this section, because the language of Labor Code §203.5 is confusing and inconsistent with literature on the law of suretyship. The term “bonding company” is an informal synonym for surety that generally is not used by the surety industry.

**Caltrans:** Definition of “interested party” should be included in light of Section 17208’s reference to participation by “other interested parties.” Interested parties should have a monetary interest and should not include labor management groups.

**Response:** The definition of “surety” proposed by Brandt was incorporated verbatim as subpart (n). The term “bonding company” appears throughout the statute and may have another meaning outside of the surety industry, and therefore no attempt was made to redefine that term. No definition was added for the term “interested party” because it does not appear anywhere else in the regulations other than Rule 08 [Section 17208], and is not intended to have a special meaning. The question of what type of interest a party should have in order to be permitted to intervene is addressed under Rule 08 [Section 17208] below.

Section 17205 [Rule 05]. Authority of Hearing Officers.

**ABC:** There should be a means by which a party may submit an interim appeal to the Director on the basis that the Hearing Officer abused his or her discretion in the conduct of the hearing or denied a party’s fundamental due process rights.

**Response:** This proposal would make it impossible to start the hearing within the statute’s 90 day limit in nearly every case in which an interim appeal was taken. The proposal also is inconsistent with the statute’s division of functions between the Hearing Officer and the Director. In *Fireman’s Fund Insurance Companies v. Quackenbush*, 52 Cal.App.4<sup>th</sup> 599 (1997), the Court of Appeal found that no interim appeal was permitted under comparable provisions of the Government Code. For these reasons the proposal was rejected.

Section 17206 [Rule 06]. Access to Hearing Records.

**Caltrans:** What is the Enforcing Agency’s responsibility as far as employee privacy when allowing public access to hearing records? What about the requirement of Labor Code section 1776(e)?

**Response:** The comment is outside the scope of these regulations in that this Rule governs only hearing records under the control of the Director (rather than the Enforcing Agency). Whether documents submitted for consideration by a Hearing Officer should be kept confidential in whole or in part is a matter to be presented by the parties and decided by the Hearing Officer

in accordance with whatever legal standards may govern the confidentiality of those documents. By its terms, Labor Code §1776(e) governs the disclosure by an Enforcing Agency of certified payroll records that have been submitted to it by a contractor. It does not necessarily define how other records containing employee information must be treated, nor does it address in any way the responsibilities of the Director or a Hearing Officer in one of these proceedings.

Section 17208 [Rule 08]. Intervention and Participation by Other Interested Persons.

*Intervention by Sureties:*

**Brandt:** The deadline for surety intervention as a matter of right should be conditioned on the surety having received notice of the Assessment or Notice of Withholding.

**Response:** This suggestion was incorporated into subpart (b) governing intervention by sureties and bonding companies. Three other rule modifications were made to try to ensure that sureties and bonding companies get timely notice and make time intervention requests. In the same subpart (b), intervening sureties and bonding companies have the burden of proving any claim they did not get timely notice. Rule 20(a) [Section 17220(a)] provides that the Assessment or Notice may be sent to the address appearing on the face of the bond. Rule 23 [Section 17223] requires the Enforcing Agency to include a Proof of Service or other document showing the surety or bonding company's address with the items transmitting to the Hearing Officer at the start of the case. This latter requirement should serve as an effective reminder to serve sureties and bonding companies in a timely fashion.

*Intervention generally:*

**Kronland:** It would be helpful if regulations made clear that non-parties are not bound by the decision in the proceeding or foreclosed from pursuing any other remedies. An employee whose own wages may be at stake, and the party who filed the complaint should have an automatic right, upon request, to receive notice of the hearing date and the Director's final decision.

**ABC:** Intervention should only be allowed where the person proves to the satisfaction of the Hearing Officer that he or she has a direct financial interest in the outcome. Other disinterested parties can seek permission to file an amicus brief.

**SBCTC:** Option B is superior because it provides for intervention by other interested parties. An employee whose wages are at stake should have a presumptive right to intervene upon timely application. The rule should also permit employees or their representatives to get on the service list if they only want to monitor the proceedings, and the rule should make clear that an employee has no duty to intervene. Rule 10(e) should also be modified to include employees and representatives monitoring the proceeding.

**Kersh:** The Carpenters/Contractors Cooperation Committee is in favor of opening up proceedings because the compliance committee would have information to present in the case.

**Caltrans:** We prefer the more restrictive Option A. The rule should be more restrictive as to participants and clearly define “interested party.” The Enforcing Agency is there representing the interests of affected employees. Allowing others without a vested monetary interest into the proceeding would draw out the hearing process and create a lot of confusion.

**Gates:** Option A unduly limits participation by unpaid employees and their representatives and should be rejected because it is unfair and one-sided. Option B is better but does not go far enough to secure participation by an affected employee or an employee’s representative, or by a labor union or labor compliance organization that filed the underlying complaint that led to the Assessment or Notice of Withholding of Contract Payments. All of these should have broader intervention rights, and intervention should not be denied without a finding of “good cause” for the denial. The language should also be amended to allow any of these to be added to service list in lieu of seeking party status, and an employee should be under no obligation to intervene in light of other available legal remedies. The option of being added to the service list also should not be denied absent “good cause.” This alternative would be chosen by many without the resources to participate fully as parties and would help streamline the process. The employees are the persons most affected by the proceeding and involvement in the review proceeding is more efficient than a separate court action, which few employees can afford and few private attorneys would handle. The labor compliance organizations (which can and should be a defined term) are often the source of the underlying complaint, have considerable expertise, and would not duplicate the work of the Enforcing Agency. As a practical matter, employees and labor compliance groups would rarely choose to intervene and would have no interest in dragging out the proceedings.

**Lyons:** Our trust fund supports having third parties come in at certain times to give their expertise or opinions. Compliance groups very often have filed the claim and can offer more specific and detailed knowledge on scope of work issues than the Enforcing Agency.

**Response:** The suggestions regarding employees having other remedies were incorporated both into Section 17201(c) above, and into a new subpart (f) of this section, which provides that seeking intervention shall not be a condition for pursuing another remedy.

Affected employees, unions, and labor compliance groups have a recognizable interest in these proceedings that may not always be adequately protected by the Enforcing Agency. However, the real difficulty in crafting this rule was how to acknowledge that interest without giving a multitude of individuals the ability to intervene “as a matter of right” and effectively prevent cases from being heard and decided within the statutory time limits. Even those who thought intervention should be strictly limited to parties with a “monetary interest” inadvertently suggested a standard that would entitle every affected employee, perhaps numbering into the hundreds, to intervene individually, with the same right to receive notices and exercise other due process rights as other parties in the case. Personal resources would not necessarily be a limiting factor, since for tactical reasons these interveners might be supported by others standing within or outside the dispute and on either side of the issues.

The balancing of these interests and concerns led to a compromise standard that will permit the employee, union, or Joint Labor-Management Committee who filed the complaint to intervene as

a matter of right, provided that person or entity makes the request early and there is no good cause for denying the request. This proposal was incorporated as a new subpart (c) in Section 17208. This standard is slightly different from the surety/bonding company standard of subpart (b) in recognition of the fact that sureties and bonding companies have a statutory right to notice and may be bound by the Decision of the Director, while neither is true for employees, unions, and labor compliance groups.

Subpart (d) provides a means for persons claiming any other type of interest in the proceeding to participate as an “interested party” (more formally referred to by courts as an “amicus”). This participation would generally be limited to receiving notices and presenting arguments as determined by the Hearing Officer. At this time, the Director does not want to try to anticipate who would or would not have a substantial enough interest in the issues or controversy to warrant this sort of participation. Instead this will be something for the Hearing Officer to determine on a case by case basis.

The proposal for creating a lesser right to get on the service list and receive all notices was also rejected as being potentially unwieldy and unduly costly in cases with numerous employees who could all make the request. The Director understands that the Labor Commissioner will establish procedures to ensure that the complaining employee or entity receives notice of any Assessment or Notice of Withholding issued as a result of that complaint and is kept abreast of any further developments in the case. If these efforts prove to be insufficient or inadequate, the Director may consider amending the regulations.

#### Section 17220 [Rule 20]. Service and Contents of Assessment or Notice of Withholding of Contract Payments.

**Brandt:** Subpart (a) should be amended to provide that the identity of a surety would be deemed knowable and service would be adequate if sent to the address appearing on the fact of the bond. Subpart (c) should be amended by adding a statement in bold type warning that failure by a contractor, subcontractor, or surety to timely request a hearing will result in a final binding order.

**Response:** These recommendations were accepted and incorporated into the regulation with the following exception. The suggested reference to a surety filing a request for a hearing was rejected as inconsistent with Labor Code §§1741 and 1742(a), which give sureties the right to receive notice of an Assessment or Notice of Withholding of Contract Payments but only gives an affected contractor or subcontractor the right to obtain review of an Assessment or Notice of Withholding.

#### Section 17221 [Rule 21]. Opportunity for Early Settlement.

**Brandt:** “Surety” should be added to subpart (a) as a party who may request an early settlement meeting.

**Kersh:** There should be a way to make settlement agreements public so compliance groups can monitor whether particular contractors have violated the law and what steps those contractors take to remedy the violations. We want to make sure the contractor doesn't get off easy in a current proceeding, and we also want to be able to measure past performance when the contractor seeks to prequalify for a new project.

**Caltrans:** The parties should be required to identify who will represent them in an early settlement meeting. Early settlement meetings are most productive if legal counsel are not involved. When one party shows up with counsel but the other does not, it creates an imbalance that may make it impossible to proceed. Either the unrepresented party will want to stop until it too has counsel or it may proceed but not be able to deal effectively with opposing counsel.

**Response:** The surety suggestion was rejected as inconsistent with Labor Code §§ 1741, 1742, and 1742.1(b), which give sureties the right to receive notice of an Assessment or Notice of Withholding of Contract Payments, but only give affected contractors and subcontractors the right to obtain review and to utilize the formal early settlement process. However, the fact that sureties have no right of access to this particular procedure should not preclude them from having settlement discussions with the Enforcing Agency in appropriate situations.

The public information suggestion was rejected as being inconsistent to some extent with Labor Code §1742.1(b)'s requirement that information conveyed for purposes of settlement be kept confidential. The suggestion also goes somewhat beyond the scope of these hearing regulations in that cases may settle before the time comes for filing a Request for Review. There is no direct statutory authority for a Hearing Officer or the Director to set the terms of or to disapprove a settlement entered into between the parties before the filing of the Request for Review.

The proposal that would mandate prior disclosure of who will attend the settlement meeting was also rejected as beyond the appropriate scope of these regulations. Hearing Officers have no control over the early settlement meetings, which may occur before any Request for Review is filed. How parties are represented in these meetings and how seriously they take the opportunity for early settlement is a matter of personal choice. Parties certainly may ask each other to disclose in advance whether they intend to bring counsel, and they may use the response (or non-response) in deciding whether to bring their own counsel. Since the opportunity to request a settlement meeting under Labor Code §1742.1(b) and this Rule is entirely optional, there does not appear to be any good reason for a contractor to deliberately "sandbag" the agency with a surprise appearance by legal counsel.

#### Section 17222 [Rule 22]. Filing of Request for Review.

**Kronland:** It may be easier for the agencies if the affected contractor or subcontractor is required to attach a copy of the Assessment or Notice of Withholding to the Request for Review.

**Response:** Attaching the Assessment or Notice was added as an option in subpart (e), but not as a requirement. Public policy requires any appeal document to be construed liberally in favor of finding it sufficient to start the appeal. Since the Request for Review must be filed with the

Enforcing Agency that issued the Assessment or Notice (rather than with the Office of the Director), the Enforcing Agency should be able to match up the Request for Review with the Assessment or Notice at issue.

Section 17224 [Rule 24]. Disclosure of Evidence.

**Brandt:** Add sureties to the parties with the right to review evidence to be utilized by the Enforcing Agency.

**Caltrans:** Require reciprocal disclosure of evidence by the contractor or give Enforcing Agencies direct subpoena authority (rather than having to go through the Hearing Officer).

**Response:** The surety suggestion was rejected as inconsistent with Labor Code §1741 and 1742(b), which give sureties the right to receive notice of an Assessment or Notice of Withholding of Contract Payments, but only give affected contractor and subcontractors the right to early disclosure of the evidence to be utilized at the hearing. The reciprocity suggestion was also rejected as inconsistent with §1742(b), which creates only a unilateral obligation to disclose evidence, that is similar to the type of rule that governs criminal proceedings. The Enforcing Agency also has a full range of investigative authority which it presumably would exercise before issuing the Assessment or Notice of Withholding. In other words, the Enforcing Agency, at least in theory, will already have had a chance to see all of the contractor's potential evidence before the case ever begins.

Regarding subpoena authority, Rule 35 [Section 17235] is neutral and authorizes attorneys to issue subpoenas to the same extent they are authorized to do so by Code of Civil Procedure §1985 or Government Code §11450.20. Only non-attorneys are required to go through the Hearing Officer to obtain a subpoena.

Section 17225 [Rule 25]. Withdrawal of Request for Review; Reinstatement:

**Brandt:** Add surety as party who may withdraw a Request for Review.

**Response:** This suggestion was rejected. Since sureties cannot file a Request for Review (*see* Response to Comments under Section 17220 above), they cannot withdraw it.

Section 17226 [Rule 26]. Dismissal or Amendment of Assessment or Notice of Withholding of Contract Payments.

**Caltrans:** The amendment process is burdensome on the Enforcing Agency when there are continuing violations by contractors in ongoing public works projects. The regulations would require monthly amendments with no set time for resolution of the dispute. Must an Enforcing Agency wait for the Hearing Officer to grant an amendment before withholding more funds for a continuing violation, and will this jeopardize the Enforcing Agency's ability to withhold

adequate funds at the end of a project? When do continuing violation cases go to hearing? There should be a cutoff point where there can be no further amendments and the dispute goes to hearing. If the Enforcing Agency issues successive Notices, do the subsequent notices supersede the earlier ones?

**Response:** This Rule will not require Enforcing Agencies to amend Assessments or Notices in the manner feared by the commenter. The Rule states that “Upon motion ..., the Enforcing Agency *may* dismiss or amend[.]” (Emphasis added.) Whether to seek an amendment of a prior notice or instead issue a new notice for a subsequent violation is entirely within the discretion of the Enforcing Agency. Every failure to pay the prevailing wages due to any worker is a distinct violation, with its own deadline based on when the failure occurred. There may be a variety of ways to approach continuing or ongoing violations covering a large number of workers. The Enforcement Agency has the flexibility to decide which approach is best in a given situation. The Hearing Officer’s authority is limited to hearing the case presented by the parties through the Request for Review. The focus of this Rule 26 [Section 17226] is on changes in the total potential liability (wages, liquidated damages, and penalties) based on a recomputation or new evidence discovered after the issuance and appeal of the original Assessment or Notice. This Rule is not intended as a vehicle that would either require or permit subsequent violations to be tacked on to prior notices. The purpose for requiring the Hearing Officer’s approval for an amendment is to prevent significant last minute changes that would effectively circumvent the contractor’s right to prior notice and an adequate opportunity to prepare a defense. Whether multiple Notices and Requests for Review should be consolidated for hearing is a subject that would be addressed under Rule 32 [Section 17232].

Section 17228 [Rule 28]. Finality of Assessment or of Withholding of Contract Payments When No Timely Request for Review is Filed; Authority of Awarding Body to Disburse Withheld Funds.

**ABC:** The withholding of funds to cover alleged prevailing wage underpayments and penalties is unnecessary, causes contractors to not pay first tier subcontractors and so on, generates needless litigation, and is exceedingly long, exacerbating an overtaxed system. The Director should seek legislative changes if he lacks the authority to address these issues by regulation.

**Brandt:** Add “surety” wherever affected contractor or subcontractor appears.

**Caltrans:** The “final order” should be issued in writing by the Hearing Officer. The duty of the Labor Commissioner to file the final order with the superior court should be mandatory and should be within a set time period so that the Enforcing Agency will know when it can take action to recover wages and penalties pursuant to the judgment. It would be nice if the Awarding Body had this authority on its own.

**Response:** The comment regarding the necessity of and problems caused by the withholding of funds is directed toward to the wisdom of long-standing statutory scheme and is well beyond the scope both of these regulations or what the Director may address by regulation. The

suggestion to add “surety” was rejected because it would have recognized sureties as having the same rights and status as affected contractor and subcontractors. As discussed in the responses to the comments to Sections 17020, 17021, 17024, and 17025 above, Labor Code §§1741 et seq. do not accord sureties the same rights and status as affected contractors and subcontractors.

With regard to Caltrans’ more specific comments, the purpose of this section was to clarify a point that could only be inferred from the statute, which was that an Assessment or Notice of Withholding would necessarily become final if not appealed within the statutory time limit. Without the appeal (*i.e.* Request for Review) there is no way that this kind of case would come under the attention or authority of a Hearing Officer. While a procedure to do so might be devised, it would just introduce more delay into a process the commenter would like to see expedited. Labor Code §1742(d) expressly states that “a final order may be filed by the Labor Commissioner,” and the Director does not believe it would be appropriate to fundamentally alter this provision by either turning it into a mandatory duty or expanding the authority to awarding bodies. Awarding bodies should present their concerns directly to the Labor Commissioner, and they may have a remedy in mandamus if the Labor Commissioner does not properly discharge his or her duty.

Section 17229 [Rule 29]. Finality of Notice of Withholding of Contract Payments; Authority of Awarding Body to Recover Additional Funds.

**Caltrans:** There should be a time limit within which the Labor Commissioner must file a final order with the superior court. Our interest is in knowing when we can go after the additional funds that are due or when we can disburse the funds we already have. As a project ends we have less and less ability to obtain funds.

**Response:** This proposal was rejected for the reasons discussed in the Response to the comments to Section 17228 above.

17230 [Rule 30]. Scheduling of Hearing Date; Continuances and Tolling.

**SBTCT:** SBTCT believes the optional text should be used to allow for a continuance if all parties join in the request and there is good cause. This will allow for more flexibility in scheduling. However the language should be modified to provide that the continuance must be for less than 30 days. Otherwise there is a risk that long continuances will be granted as a matter of course, defeating one of the purposes of the statute, which is to provide a prompt hearing.

**Caltrans:** Caltrans strongly supports Option B. The Hearing Officer should have more discretion to continue the proceeding. Continuances may be necessary when both the Enforcing Agency and contractor have multiple hearings pending.

**Gates:** The optional text should be used to allow for a continuance if all the parties join in the request and there is good cause for the continuance. This will provide for more flexibility. However, the language should be modified to provide the continuance must be for less than 30

days. Without that limitation there is a risk long continuances will be granted as a matter of course defeating a key purpose of the statute to provide for a prompt hearing.

**Response:** The optional text supported by the commenters was adopted, and the 30 day limit recommended by SBTCT and Gates was incorporated into the Rule.

Section 17232 [Rule 32]. Consolidation and Severance.

**Caltrans:** Enforcing Agencies should have the ability to move for consolidation of wage cases. Where there are separate cases against more than one subcontractor of a single prime contractor, consolidation should not be permitted. Likewise, cases against the prime contractor and subcontractor should not be consolidated unless the violations are related. We have had sometimes 20 subcontractors working for one prime, and consolidation would create an administrative nightmare for Caltrans.

**Response:** Any party may move for consolidation or severance of cases, and the second sentence of subpart (a), referring to a Hearing Officer's own motion to consolidate, does not preclude parties from making such a motion. The purpose of the second sentence of subpart (a) is to limit a Hearing Officer's authority to consolidate cases on his or her own motion by requiring that the parties first be given notice and a chance to object. Because this is a new system for reviewing prevailing wage violations, the Director is not prepared to say that consolidation will always be appropriate or inappropriate under any particular set of circumstances. Accordingly only a general standard (based on similar facts and circumstances and conservation of time and expense) is being adopted at this time. Whenever consolidation is proposed, the parties will have an opportunity to show why it is or is not appropriate. A consolidation that would be an administrative nightmare for the Enforcing Agency clearly would not meet the test of conserving time and expense.

Section 17234 [Rule 34]. Evidence by Affidavit or Declaration.

**ABC:** Testimony by affidavit is fraught with due process problems and should not be permitted. An investigator in these cases often testifies about hearsay obtained during the course of the investigation, and this weakness is compounded by permitting others to testify by affidavit. No useful purpose is served by permitting persons who have a significant financial interest in the outcome to testify without being examined by the parties or to move into evidence the affidavit of such a biased person under the guise of "admissible" hearsay. Parties who stand to gain thousands of dollars upon signing a document stating they were underpaid need to be examined as to the facts and their bias and interest in order to ensure fundamental fairness.

**Response:** This specific purpose of this Rule is to allow testimony to be presented in writing rather than in person and still be treated as direct testimony *provided* that the specific procedures of this Rule are followed. These procedures, among other things, guarantee that other parties will have the right, upon request, to examine or cross-examine the maker of the statement. This Rule is modeled on comparable provisions found in Code of Civil Procedure §98 [Economic

Litigation for Limited Civil Cases], California Rule of Court 1613 [Judicial Arbitration], and Government Code §11514 [Formal Adjudicative Hearings under Administrative Procedure Act]. The only burden placed on the opposing party is to make a timely request to examine the witness. Subpart (c) then requires that the party who offered the statement to produce the witness or have the statement treated as hearsay only. This follows the Court Rule 1613 standard rather than the Government Code standard (interpreted as requiring the party who requests examination to subpoena the witness). This Rule also does not limit a party's right to subpoena any witness whom it believes should testify in person. Regarding the treatment of hearsay, see the Response under Rule 44 [Section 17244] below.

Section 17235 [Rule 35]. Subpoena and Subpoena Duces Tecum.

**Caltrans:** Enforcing Agencies should not have to go through the Hearing Officer to subpoena the contractor's records. This creates an unnecessary step in the discovery process and is both unduly burdensome and unfair. The Enforcing Agency should either have its own subpoena power or the same ability as the contractor to obtain records upon request.

**Response:** See Response to comments under Rule 24 [Section 17224] above. Consistent with Code of Civil Procedure §1985 and Government Code §11450.20, a subpoena may be issued by an attorney of record, and only non-attorneys are required to go through the Hearing Officer. Subpart (a) allows a subpoena duces tecum to require production of documents "at any reasonable time or place" and thus may be used to review records prior to the hearing.

Section 17241 [Rule 41]. Time and Place of Hearing.

**Kronland:** Should there be a provision about whether the hearing will continue on the next day if it is not done in one day?

**Response:** Labor Code §1742(b) requires that the hearing be commenced within 90 days after receipt of the Request for Review, but it does not require the hearing to continue on consecutive days until completed. While this is a desirable goal, the Hearing Officer or parties may not have a hearing facility available on a continuous basis or they may have other conflicts that would make it difficult to schedule or continue the hearing on consecutive days. Hearings should be completed promptly in accordance with the spirit of §1742's other time limits, but how to accomplish this in a given case is best left to the discretion of the Hearing Officer in consultation with the parties.

Section 17244 [Rule 44]. Evidence Rules; Hearsay.

**ABC:** Hearsay evidence should not be permitted in an administrative proceeding where the temptation to inflate a claim in order to receive additional compensation is omnipresent. The informality of unemployment claims should not extend to cases where employees and employers

often have significant sums of money involved. From an employer's perspective, hearsay evidence is difficult if not impossible to refute, and from a Hearing Officer's standpoint, once this evidence door is opened, it is nearly impossible to close it and cut off the other party from responding with additional hearsay rebuttal evidence without applying different rules for different parties. This result should be eliminated by maintaining the judicial standards of hearsay to which we all are accustomed.

**Response:** Prior to July 1, 2001, a contractor could appeal the withholding of contract payments due to prevailing wage violations by bringing a direct action in court or by appealing to the Director with no further right of court appeal. Stats. 2000, Chapter 954 (AB 1646) replaced these options with an exclusive administrative hearing remedy that is subject to mandamus review in court. While Labor Code §1742(b) gives the Director the task of adopting regulations that set forth the hearing procedures, it plainly anticipated that these procedures would resemble those found in other administrative appeal systems. A relaxed standard of admissibility for hearsay evidence is a customary feature of nearly every administrative appeal system, irrespective of the dollar amount involved. See Government Code §11513; 5 U.S.C. §556(d); and 3 Davis and Culp, *Administrative Law Treatise* (3d ed. 1994), §§10.1 – 10.4. As the Davis treatise explains, courtroom rules of evidence were developed for juries, but the evidentiary rules applicable to administrative proceedings are more appropriate for hearing officers with focused areas of expertise. California law limits the use of hearsay evidence by providing that, with certain exceptions, it cannot by itself support a finding. Government Code §11513(d), and see *In re Lucero L.*, 22 Cal.4<sup>th</sup> 1227, 1244-45 (2000). This limitation has been incorporated into subpart (d) of this Rule.

#### Section 17245 [Rule 45]. Official Notice.

**SBCTC:** Subpart (a) should be modified to state expressly that the Director may take official notice of all prevailing wage determinations made by the Director. Though implicit in the proposed text, this should be made explicit because the applicable prevailing wage rates will be at issue in many proceedings, particularly for calculations of restitution. Some contractors have sought to complicate court proceedings (under the preexisting statute) by treating prevailing wage determinations as evidentiary facts that must be proven through live testimony of an official from the Division of Labor Statistics and Research. Because the Director issues these determinations in the first place, the Director can certainly take official notice of them.

**Gates:** It is critical that prevailing wage determinations, precedential coverage decisions, and wage data studies and reports issued by the Department of Industrial Relations be specifically mentioned as appropriate for official notice. Otherwise, parties might cause undue delay and expense questioning Department employees about the validity of these items. Official notice will streamline the process and allow the hearing to proceed without unnecessary delay. We have faced situations where even a prevailing wage determination has been questioned and there has been an attempt to turn them into issues of fact so that personnel from the Division of Labor Statistics and Research are subpoenaed. Specifying these items will enable anyone reading this Rule to have a better idea of what technical facts are within the expertise of the

Director's office and the various divisions and in turn provide more notice of matters will be factually disputable and which ones will not.

**Response:** This recommendation, including all of the items suggested by commenter Gates, was incorporated into subpart (a) of the Rule.

Section 17247 [Rule 47]. Contempt and Sanctions.

**ABC:** Nothing in the statute authorizes a Hearing Officer to award attorney's fees or costs. While a Hearing Officer must maintain control of the proceeding, this sanction is not within his or her power.

**Response:** Labor Code §1742(b) states only that the hearing shall be conducted by an impartial hearing officer who shall possess the qualifications of an administrative law judge. §1742(b) requires the Director to establish procedures, which the Director is doing through these regulations, while Government Code §§11415.10 and 11415.20 authorize agencies to conduct adjudicative proceedings under the administrative adjudication provisions of the Administrative Procedure Act unless a provision conflicts with a more specific statute, regulation, or court decision. The sanction authority set forth in this Rule is based on the language of Government Code §11455.20, which provides identical authority to officers presiding over adjudications under the Administrative Procedure Act. Since nothing in Labor Code §1742 or any other statute, regulation, or court decision prohibits it, the Director has implicit authority to adopt such a rule as part of these hearing procedures.

Section 17249 [Rule 49]. Hearing Record; Recording of Testimony and Other Proceedings.

**Kronland:** Is there a way to shift more of the responsibility and cost for keeping the record to the appellant?

**Response:** The Director ultimately must maintain a record that will be suitable for court review under Code of Civil Procedure §1094.5. In meeting this responsibility, a balance must be struck between conserving the agency's budget and not imposing undue expenses on the parties as a condition for exercising their right to a hearing under the statute and these regulations. This Rule provides that a hearing will be tape recorded unless the Hearing Officer authorizes another method for recording testimony. A party who wants the testimony recorded in another manner has the burden of making a timely request and of also procuring and paying for the services of a court reporter or other means for recording testimony as well as for transcripts produced through that other means. Thus the Director guarantees that a tape recording will be made at the Director's expense, in the absence of any other request, but the parties may obtain a court reporter or some other means for recording the testimony if they are willing to pay for it. Rule 63 [Section 17263] provides that the cost of preparing the record for court review will be the responsibility of the party who requests it (usually the petitioner seeking review), consistent with the requirements of Code of Civil Procedure §1094.5(a).

Section 17250 [Rule 50]. Burdens of Proof on Wages and Penalties.

**ABC:** Imposing the burden of proof on the defendant in a wage claim to prove that the government acted without sufficient evidence or otherwise improperly is an unconstitutional violation of procedural due process. The Enforcing Agency must establish a prima facie case before the burdens of presenting evidence and persuasion are shifted to the employer. Merely introducing a self-serving report does not establish a prima facie case. This problem should not be further compounded by the assessment of a penalty without a hearing. Due process mandates that an employer is entitled to a hearing to evaluate the nature and extent of the penalty and present his or her case with regard to the factors giving rise to the penalty. The statute's abuse of discretion standard treats the penalty assessment as a discretionary act of a government officer instead of part of a prevailing wage investigation subject to judicial review as a contested legal matter. ABC believes the parties are better off if fundamental due process is served and not subjugated to thwart fairness to employers. The Director is encouraged to endorse legislation to remedy these problems.

**Brandt:** Add "surety with contractor and subcontractor."

**Response:** ABC's comments are directed toward the substance of the statute and cannot be addressed through these regulations. With regard to penalty assessments, however, the Director notes that they are subject to review by the Director and ultimately the courts under established "abuse of discretion" standards. See *Harris v. Alcoholic Beverage Control Appeals Board*, 62 Cal.2d 589 (1965). The suggestion to add "surety" was rejected because it was premised upon sureties having the same rights and status as affected contractor and subcontractors. As discussed in the responses to the comments to Sections 17020, 17021, 17024, and 17025 above, Labor Code §§1741 et seq. do not accord sureties the same rights and status as affected contractors and subcontractors.

Section 17251 [Rule 51]. Liquidated Damages.

**ABC:** Perhaps the most draconian feature of AB 1646 is the "pay-to-play" feature of assessing liquidated damages on employers who seek review of a wage assessment. Enforcement of the prevailing wage law is grievously flawed when an employer must choose between being exposed to double liability just because it wants to defend its action or paying a contested claim to avoid such exposure. This system will cause prime contractors to settle cases not because of the facts or law, but merely to avoid the double penalty for contesting the original assessment. To the extent the Director believes he has no discretion in enforcing this flawed process of assessing liquidated damages, he should seek legislation to correct this deficiency.

**Brandt:** Add a provision that liquidated damages will not be assessed against a surety absent notice providing sufficient time for the surety to participate as a party to any hearing.

**Response:** ABC's comments are directed toward the substance of the statute and cannot be addressed through these regulations. With regard to the "surety" suggestion, Labor Code §1742.1 (a) provides that liquidated damages shall be imposed if the wages remain unpaid 60 days after service of the Assessment. It provides that payment of these damages may be waived if the contractor or subcontractor demonstrates certain facts, but the statute does not provide any separate grounds for exonerating the surety, whose liability appears to be entirely derivative from the contractor's or subcontractor's liability, regardless of any equities that may apply separately to the surety. Allowing sureties to be exonerated on separate grounds would also run contrary to the purposes of having surety bonds and of the statute itself to secure the prompt payment of prevailing wages due to employees on public works contracts.

Section 17260 [Rule 60]. Decision.

**Kronland:** I was confused about when the recommended decision became the Director's decision and if this was automatic.

**Response:** This comment pertained to the prepublication draft. Subpart (b) was added to the Section to clarify that the recommended decision has no status or effect of its own, and that the only decision of consequence is the one issued and approved by the Director. *Note:* a further amendment to Labor Code §1742 that is scheduled to take effect in 2005 will eliminate the Director entirely from the decision-making process and give administrative law judges (as successors to the hearing officers under the current statute) authority to issue final decisions.

## **ALTERNATIVES DETERMINATION**

The Director has determined that no alternative would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective and less burdensome to affected private persons than these regulations.