

Cal/OSHA Appeals Board
Handouts for Stakeholder Meeting November 6, 2014

Potential regulations to implement AB 1634

1. 362. Stay of Abatement Period and Abatement Change

Potential regulations for implementation of electronic case management, calendaring and document management system (OASIS)

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Proposed [Draft] Regulation

362. Stay of Abatement Period and Abatement Changes.

(a) Except as provided in subdivision (b), Unless otherwise provided by statute, all abatement periods and changes required by the Division are stayed upon the filing of a docketed appeal with the Appeals Board and remain stayed until withdrawal of the appeal or a final disposition of the proceeding by the Appeals Board.

(b) The filing of a petition for, or the pendency of, reconsideration of a final order or decision involving a citation classified as serious, repeat serious, or willful serious shall not stay or suspend the requirement to abate the hazards affirmed by the decision or order, unless the following conditions are met:

(1) The employer files a written petition to stay or suspend abatement within 10 days after the issuance of the decision or order of an Administrative Law Judge assigned by the Board.

(2) The employer's written petition shall be accompanied by supporting declarations that set forth the evidence demonstrating a stay or suspension of abatement will not adversely affect the health and safety of employees.

(3) A petition to stay or suspend abatement meeting all requirements of these regulations and the Labor Code shall be deemed filed on the date indicated on the proof of service. If there is no proof of service, the date of filing shall be the date of hand delivery to the Sacramento Office of the Appeals Board or the mailing date. The petition shall be served on all parties who have been joined in the proceeding at the time of filing.

(4) A petition to stay or suspend abatement that is not properly verified upon oath and/or not accompanied by a proof of service shall be considered filed in accordance with subsection (3) if the petitioner perfects the petition by filing the verification and/or proof of service within five days of the date of service letter from the Appeals Board noting the omission(s).

(5) Failure to perfect a petition to stay or suspend abatement in accordance with subsection (3) shall result in the dismissal of the petition.

(6) An opposing party may file an answer to the petition to stay or suspend abatement no later than 7 days from the service of the petition.

(c) Staying of order or decision under appeal: Proper and timely filing of a petition to stay or suspend abatement with the Board shall stay abatement during the pendency of the Board's review of the petition to stay or suspend abatement.

(d) The Board may issue an order or decision granting the petition to stay or suspend abatement within 30 days of receipt of filing if it determines that employer demonstrated by a preponderance of the evidence that a stay or suspension of abatement will not adversely affect the health and safety of employees, otherwise the petition shall be denied. Should the Board fail to Act within 30 days, the petition shall be deemed denied.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 148.7, Labor Code.

**Proposed regulations
for implementation of OASIS**

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Proposed [Draft] Regulation

347. Definitions

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Administrative Record

The Appeals Board shall maintain a complete administrative record that contains:

- (a) Pleadings;
- (b) All notices issued to parties;
- (c) All orders issued;
- (d) Any proposed decision by an administrative law judge. A proposed decision is a complete decision submitted to the Appeals Board for final approval and is not a draft decision being reviewed by supervisors;
- (e) The final decision;
- (f) Emails received from or sent to parties to the case;
- (g) The hearing record as defined by section 376.7;

Electronic Signature

An electronic signature is an electronic, symbol (e.g., a graphic representation of a person in JPEG file), or process (e.g., a procedure that conveys assent), attached to or logically associated with a record, and executed or adopted by a person with the intent to sign the record.

Digital Signature

A digital signature is a specific type of electronic signature that uses cryptographic transformation of data to provide authenticity, message integrity, and non-repudiation. For a digital signature to be valid, it must be created by a technology accepted for use by the State of California and conform to technologies capable of creating digital signatures as set forth in California Government Code Section 16.5:

- (1) It is unique to the person using it;
- (2) It is capable of verification;
- (3) It is under the sole control of the person using it;
- (4) It is linked to data in such a manner that if the data are changed, the digital signature is invalidated;
- (5) It conforms to Title 2, Division 7, Chapter 10, of the California Code of Regulations.

Hearing Record

(o) “Hearing Record” means the official record of evidence taken by electronic device in any proceeding before the Appeals Board; during, and if allowed by order, after the hearing until the Appeals Board or Administrative Law Judge (ALJ) conducting the hearing orders the record closed to further evidence. The “Hearing Record” contains all documentary evidence and other evidence admitted into the hearing record including the audio recording of testimony given from witnesses during the hearing or by affidavit and any evidence sealed from further disclosure by order the ALJ, confidential evidence pursuant to section 376.6, and physical, mechanical or demonstrative exhibits returned to a party for storage pursuant to section 376.4.

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Proposed [Draft] Regulation

348. Computation of Time

(a) In computing the time within which a right may be exercised or an act is to be performed, the first day shall be excluded and the last day shall be included. If the last day is not a working day, time shall be extended to the next working day.

(b) Unless otherwise indicated by proof of service, if the envelope was properly addressed, the mailing date shall be presumed to be:

- (1) the postmark date appearing on the envelope if first-class postage was prepaid; or
- (2) the date of delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.

(c) Where service of any document, letter, application, request, motion, pleading, brief, decision, petition, answer, memorandum, response, or other writing is by mail or email, and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed is extended five calendar days if the place of address is within the State of California, and ~~10~~ ten calendar days if the place of address is outside the State of California but within the United States. Such extension shall not apply to extend the time for filing an appeal.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 1013(a), Code of Civil Procedure; and Sections 148.7 and 149.5, Labor Code.

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Proposed [Draft] Regulation

355. Proper Method of Service.

(a) The Appeals Board shall maintain in each proceeding an official address record which shall contain the names and addresses of all parties and intervenors and their representatives. Documents sent by the Appeals Board to the official address of record for the employer that are returned or undeliverable may result in dismissal of the appeal if the Appeals Board is unable to effectively communicate with the employer.

~~(1)~~(b) Parties, intervenors and their representatives may elect first class mail or email as their preferred method of service for documents from the Appeals Board.

~~(b)~~(c) Any change or substitution in the name, ~~and~~ address, and/or email of any party or intervenor, or its representative, must be communicated, in writing or via [OASIS form online], promptly, and in no case more than 30 days after the change, to the Appeals Board's Sacramento office. ~~The~~A written communication must also be served on all parties and intervenors. Failure to communicate changes or substitutions promptly ~~in writing~~ by the employer may result in dismissal of the appeal if the Appeals Board is unable to effectively communicate with the employer.

~~(e)~~(d) Service on a party or intervenor who has appeared through a representative shall be made upon such representative.

~~(d)~~(e) Unless otherwise required, service by the parties may be made by personal delivery or by depositing the document 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, by deposit with a carrier guaranteeing overnight delivery, ~~facsimile ("FAX") machine, as provided in subsections (i) and (j) below.~~

~~(e)~~(f) Service is complete at the time of personal delivery or mailing. Absent evidence to the contrary, service by email shall be deemed complete at the time of transmission, unless a document is re-served in accordance with subdivision (k).

~~(f)~~(g) 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, mail, or overnight courier ~~or FAX~~;
- (2) Written statement endorsed upon the document served and signed by the party making the statement; or
- (3) Letter of transmittal.

~~(g)~~(h) Proof of service by the Appeals Board may be made by endorsement on the document served, setting forth the fact of service on the persons listed on the official address record on the date of service. The endorsement shall state whether such service was made personally, by mail,

email or overnight courier or FAX, the date of service and the signature of the person making the service.

~~(h)~~(i) Where service is made by the posting of a document, citation, notice, order or decision, proof or certification of such posting shall be filed with the issuing office of the Division not later than the second working day following the posting.

~~(i) The Appeals Board may serve documents on and parties may file documents with the Appeals Board and serve them on other parties by means of FAX 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 cover 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 a 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.~~

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

(k) This subdivision shall apply where, after serving a document(s) in accordance with subdivision (i), the Appeals Board subsequently receives notification that the service to one or more parties (or to their agents or attorneys of record) failed.

(1) When the Appeals Board receives notification of failed service to any intended recipient(s), the Appeals Board shall promptly re-serve the document on the intended recipient(s) using the method of service (i.e. email, postal service) best calculated to result in valid service on the intended recipient(s), even if the intended recipient(s) did not previously designate that method as their preferred method of service.

(2) The Appeals Board need not re-serve the document on intended recipients for whom the server did not receive notification of failed service.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

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Proposed [Draft] Regulation

359: ~~Filing of Appeal—Date~~ Appeal by Employee or Employee Representative

Proposed [Draft] Regulation

359.1 Appeal ~~Form~~.

(a) A completed appeal form shall be filed for each contested Division action either in paper or via the electronic appeal process maintained by the Appeals Board and available to participants on the OSHAB Internet site.

(b) If an appeal is initiated by means other than an appeal form or completed internet appeal process, a completed appeal form shall be filed with the appeals board within 10 days of the Appeals Board's written acknowledgment of the desire to appeal. Failure to file a completed appeal form with the appeals board within 10 days of written acknowledgement by the Board of the intent to appeal constitutes grounds for dismissal.

[other sections unchanged]

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Proposed [Draft] Regulation

376.7 Hearing Record

The Appeals Board or the Administrative Law Judge (ALJ) appointed by the Appeals Board to hold a hearing shall create a hearing record as defined by section 347, subdivision (o) and shall:

- (a) Mark the face of each documentary exhibit with the following designations:
 1. Division exhibits shall be consecutively marked with letters beginning with the Letter "A." If every letter of the alphabet is used, then the lettering shall continue with the designation "AA," throughout the remaining alphabet.
 2. Employer's exhibits shall be consecutively marked beginning with the number 1.
 3. Third-party exhibits shall be labeled "Third-party – 1" and consecutively thereafter.
 4. If the parties agree that an exhibit or exhibits are joint exhibits, then they shall be marked as "joint-exhibit-1" and consecutively thereafter.
 5. Physical, mechanical or demonstrative evidence returned to a party for storage during the pendency of the litigation pursuant to section 376.4 shall be identified in both the recorded and written hearing record pursuant following the instructions in 1 through 4 above.
 6. Sealed or confidential exhibits shall be identified and labeled in the recorded and written hearing record pursuant to 1 through 4 above, with the ALJ selecting identifying labels that do not reveal the confidential nature of the sealed or confidential document.
 7. Documents may be redacted by the ALJ to conceal confidential information that is not relevant to the issues being heard.
- (b) At the conclusion of the hearing and closure of the record to further evidence, transmit the paper exhibits entered into evidence to the scanning technician who shall within 48 hours of receipt scan the exhibits into the "hearing record" portion of the electronic case file.
- (c) Attach to the decision a summary of the entire evidentiary record labeled "Addendum A". Addendum A shall contain a list of all exhibits entered into evidence and the proponent of that evidence, the identity of witnesses testifying at the hearing, any exhibits that were offered as evidence and marked as an exhibit but were excluded from the evidentiary record, and the following certification:

I, _____ ALJ Name _____, the California Occupational Safety and Health Appeals Board Administrative Law Judge, duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was periodically monitored during the hearing and constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.