

**STANDARDS PRESENTATION
TO
CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD**

PROPOSED STATE STANDARD,
TITLE 8, CHAPTER 3.5, SUBCHAPTER 1, ARTICLE 4

Amend Section 421 as follows:

§421. Time and Place of Hearing.

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(c) Except as hereinafter provided, the Standards Board may set the time and place of hearing at its principal office or at a another location ~~as near as practicable to the place of employment with respect to which the variance is sought~~ designated by the Board that is more convenient for the applicant.

(d) Where, because of the distance involved or for other reasons, it is ~~impracticable~~ impractical for the parties and their witnesses to appear at the same place of hearing, a videoconference hearing ~~for each party~~ may be scheduled. ~~Parties may submit questions to the Standard Board to be asked of the opposing parties, their witnesses, or representatives of the Division at such hearings. Such questions must be in writing and must be received by the Standards Board prior to the hearing. If the Standards Board finds the questions material to the issues, they shall be asked by the Standards Board.~~

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2, 147 and 6457, Labor Code.

Amend Section 422 as follows:

§422. Witnesses and Subpoenas.

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(e) If the hearing officer finds that the affidavit is complete and supports the application for the subpoena duces tecum, the hearing officer shall issue the requested subpoena.

(f) Each party shall arrange for the service of all subpoenas, including subpoenas duces tecum, issued to the ~~for "that"~~ party. A copy of the affidavit for subpoenas duces tecum shall be served with such subpoena.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

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Amend Section 422.1 as follows:

§422.1. Confidential Evidence by Affidavit.

~~(a) At any time ten or more days prior to a hearing or a continued hearing, any party may mail, or deliver to the opposing party a copy of any affidavit which he/she proposes to introduce in evidence, together with a notice as provided in subdivision (b). Any exhibit or evidence that contains, or that might reveal, a trade secret as defined in Civil Code Section 3426.1 shall be considered confidential. The Board shall take such appropriate action that is within its control to protect the confidentiality of trade secrets.~~

~~(b) Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine affiant, his/her right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.~~

NOTE: Authority cited: Section 143.2, Labor Code; Section 6254(k), Government Code. Reference: Sections 143.2 and 6457, Labor Code.

Amend Section 423 as follows:

§423. Conduct of Hearing.

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~~(e) The hearing shall be conducted in the English language. The Board shall notify each party of the right to an interpreter on the notice of hearing. The proponent of any testimony to be offered by a party or a party's witness who does not proficiently speak the English language shall be provided an interpreter; if a request for language assistance is provided to the Board at least ten working days prior to the date of the hearing. A party may provide its own interpreter, if the interpreter is approved by the hearing officer as proficient in the English language and the language in which the witness will testify, to serve as an interpreter during the hearing. The hearing officer shall approve any person whose name appears on the current list of interpreters published by the State Personnel Board. The interpreter shall not have any involvement in the issues of the case prior to the hearing.~~

~~(f) The cost of the interpreter shall be paid by the Standards Board if the hearing officer so directs, otherwise by the party providing requiring the interpreter. Any person whose name appears on the list of interpreters known to be proficient in various languages published by the State Personnel Board shall be deemed to be approved by the hearing officer in the case. This determination shall be made consistent with Government Code Section 11435.25(b).~~

NOTE: Authority cited: Section 143.2, Labor Code, Sections 11435.05-11435.65, Government Code. Reference: Sections 143.2 and 6457, Labor Code.

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Amend Section 424.1 as follows:

424.1. Official ~~and Judicial~~ Notice.

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(b) The Standards Board shall take judicial official notice of those matters ~~which must be judicially noticed by a court under set forth in~~ Sections 451 and Section 452 of the Evidence Code.

(c) Each party shall be given reasonable opportunity to present information relevant to (1) the propriety of taking official notice, and (2) the tenor of matters to be noticed ~~under subsection (a). Each party shall be given reasonable opportunity to present information relevant to (1) the propriety of taking judicial notice, and (2) the tenor of matters to be noticed under subdivision (f) of Section 451 and Section 452 of the Evidence Code.~~

NOTE: Authority cited: Section 143.2 Labor Code. Reference: Sections 451 and 452, Evidence Code; and Sections 143.2 and 6457, Labor Code.

Amend Section 424.2 as follows:

§424.2. Continuance of Hearings and Further Hearings.

(a) The Standards Board may continue a hearing to another time or place on its own motion ~~or, upon a showing of good cause, at the request of any party may order further hearing on a matter at any time prior to the issuance of the Board's decision.~~ Written notice of the time and place of the continued hearing, ~~except as provide herein,~~ shall be in accordance with ~~Rule 421 411.2.~~ ~~When a continuance is ordered during a hearing, oral notice of the time and place of the continued hearing may be given to each party present at the hearing. Prior to the decision, the Standards Board, on its own motion, or upon a showing of good cause, may order a further hearing; notice thereof shall be given in accordance with rule 421.~~

(b) ~~In determining whether there is good cause for a continuance within the meaning of subdivision (a) the following policy should be taken into consideration: Continuances are not favored by the Standards Board. Any party may request a continuance or further hearing, but such requests are disfavored and shall only be granted upon a clear showing of good cause.~~ The parties are expected to submit for decision all matters in controversy and all necessary evidence at a single hearing ~~and to produce at such hearing all necessary evidence, including witnesses, documents and all other matters considered essential in the proof of a party's allegations.~~ Requests for continuances are inconsistent with the requirement that proceedings be expeditious. ~~Continuances will be granted only upon a clear showing of good cause.~~

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

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PROPOSED STATE STANDARD,
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Amend Section 424.3 as follows:

§424.3. Representation at Hearing.

(a) ~~Any party may appear~~ Employers must attend the variance hearing, either in person or through a representative. ~~It is the intent of the Standards Board to facilitate all matters connected with either submission of requests for hearing or the hearings themselves. All parties to such procedures should understand therefore that they may represent themselves, may act through a representative, or may be represented by counsel. Nothing in these regulations shall be construed as requiring representation by~~ The representative does not need to be an attorney-at-law.

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(d) Withdrawal of appearance of any representative may be effected by filing a written notice of withdrawal ~~and by serving a copy thereof on all parties~~ with the Board.

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NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143, 143.1, 143.2, 146 and 6457, Labor Code.

Amend Section 424.4 as follows:

§424.4. Exclusion of Witnesses.

Upon ~~the motion~~ a demonstration of good cause by any party, the Standards Board, in its discretion, may exclude from the hearing room any witnesses not ~~at the time~~ under examination at the time; but a party to the proceeding, ~~or his/her~~ and the party's counsel or representative cannot be excluded. ~~When the Division is represented at a hearing it is entitled, in addition, to the presence of one other officer or employee.~~

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

Amend Section 424.5 as follows:

§424.5. Oral Arguments and Briefs.

~~At the request of any party made prior to the close of the hearing, the Standards Board shall grant oral argument. If written argument is requested, it shall be granted and the parties shall be advised as to the time and manner within which their briefs are to be filed.~~

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

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Amend Section 425.1 as follows:

§425.1. Witness Fees.

Witnesses subpoenaed for any hearing are entitled to ~~the~~ fees and mileage as set forth in Sections 11450.40 and 68093 of the Government Code ~~provided a written demand therefor is filed with the hearing officer not later than 10 days after the date on which the witness appeared at the hearing. If not claimed within that time no fees or mileage shall be allowed.~~

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code; and Sections 11450.40 and 68093, Government Code.

Amend Section 425.2 as follows:

§425.2. ~~Default~~ Failure to Appear.

(a) Where it appears on record that a party was served with notice of hearing, but fails to appear at such hearing, either in person or by representative, the Standards Board may take the ease proceeding off calendar; may, after notice, dismiss the proceedings; or may hear the evidence from any party that attends the hearing and, after notice, make such decision as is just and proper.

(b) Any proceeding may be reinstated by the Board, at its discretion, if a non-appearing Employer submits to the Board, in writing, a reasonable explanation for the Employer's failure to appear at the hearing. The explanation must be submitted within ten days after service of the notification of intent to dismiss.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

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Amend Section 426 as follows:

§426. Decision; Action on Proposed Decision.

(a) A variance hearing may be held before the Standards Board itself, a hearing panel or a hearing officer. If a proceeding is heard before the Standards Board itself or a hearing panel, the hearing officer ~~who presided at the hearing shall be present during consideration of the application or appeal, and, if requested, shall assist and advise them~~ Standards Board. Where a proceeding is heard before the Standards Board itself, no member ~~thereof~~ of the Board who did not hear the evidence shall vote on the decision.

~~(b) If a proceeding is heard before a hearing panel of the Standards Board the hearing officer who presided at the hearing shall be present during the consideration of the application or appeal and, if requested, shall assist and advise the hearing panel.~~

~~(c)~~ (e) If a proceeding is heard by a hearing panel or a hearing officer ~~alone~~, the panel or hearing officer shall prepare a proposed decision in such form that it may be adopted by the Board as the decision in the proceeding. ~~A copy of~~ The proposed decision shall be filed by the Standards Board as a public record and a copy of the proposed decision shall be served by the Standards Board on each party. ~~The Board itself~~ may adopt the proposed decision or decide the case itself as provided in subdivision (d) below.

~~(d)~~(c) If the proposed decision is not adopted as provided in subdivision (e), ~~a copy of the proposed decision shall be served on the parties and~~ the Standards Board itself may decide the case upon the record, ~~including the transcript~~, with or without taking additional evidence, or may refer the case to ~~the same~~ a hearing panel or hearing officer to take additional evidence.

(1) If the case is ~~so~~ assigned to a hearing panel or hearing officer, the hearing panel or hearing officer shall prepare a proposed decision as provided in subdivision (e) based upon the additional evidence ~~and the transcript and other papers which are a part of~~ and the record of the prior hearing. A copy of ~~such~~ the proposed decision shall be furnished to each party as prescribed in subdivision (e).

(2) ~~If the case is heard by~~ The Standards Board itself, shall decide no cases provided for in this subdivision without affording and the Board chooses to take additional evidence, the parties shall be afforded the opportunity to present either oral or written argument before the ~~Board~~ Board itself. If additional oral evidence is introduced before the ~~Board~~ Board itself, no ~~Board~~ Board member may vote unless ~~he/she~~ the member heard the additional oral evidence.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

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Amend Section 427 as follows:

§427. Petitions for Re-Hearing.

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(b) Failure to file a petition for re-hearing within twenty days shall constitute valid grounds for denying the petition.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

Amend Section 427.1 as follows:

§427.1. Form of Petition for Re-Hearing.

(a) The petition for re-hearing shall state in detail the factual or legal basis for granting the petition for re-hearing.

(b) The petition for re-hearing will be denied if it only states the permissible grounds for re-hearing contained in Rule 427, unsupported by specific references to the record and an explanation of the petitioner's position.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

Amend Section 427.2 as follows:

§427.2. ~~Proof of Service for~~ of Petition for Re-Hearing.

~~Service of The Board shall serve~~ copies of the petition for re-hearing ~~shall be made~~ on all parties and interveners who have ~~been~~ joined in the proceeding at the time that the petition is filed with the Standards Board. ~~Failure to file proof of service shall constitute valid grounds for dismissing the petition for re-hearing.~~

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

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Amend Section 427.3 as follows:

§427.3. Re-Hearing.

(a) If a petition for re-hearing is submitted to the Board in a timely fashion, the Board may:

1) grant the petition;

2) affirm the Board's initial decision on the variance;

3) take no action on the petition, in which case it will be deemed denied 30 days after receipt by the Board; or

4) deny the petition and explain its basis for doing so.

(b) If the Board acts under subsection (a)(3), the Board will notify the Employer of the denial after the 30 days have passed.

(c) If a re-hearing is granted, the Board may ~~re-hear the case~~ review the petition itself, on all pertinent parts of the record of the prior hearing and such additional evidence and argument as may be presented or may refer it to a hearing panel or hearing officer.

(d) The re-hearing may be based on the existing record, or the Board, hearing panel or hearing officer that hears the matter may request that additional testimony and/or written evidence be submitted.

1) If further hearing is ordered, the Board will issue a notice of hearing and the Employer shall comply with the notification requirements contained in Rules 411.2(a)(3) and (b)(3).

2) If the decision is to be based on the existing record, the Board may decide the matter without notice and without affording the parties further opportunity to testify or submit information.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

Amend Section 427.4 as follows:

§427.4. Decision on Petition for Re-Hearing.

A decision which is issued on a re-hearing petition, after hearing is granted shall be in the same manner and form as prescribed in ~~Rule~~ Rule 426.1. ~~If the board takes no action on the petition for re-hearing within thirty (30) days, the petition will be deemed denied.~~

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

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Amend Section 428 as follows:

§428. ~~Method of Publication~~ Modifications to a Permanent Variance.

(a) A variance is valid only for the Employer to whom it is issued and only for the locations specified in the variance. If an Employer transfers ownership of the business to a different entity, the variance does not transfer to the new Employer.

(b) An Employer must seek to modify a variance if:

(1) the Employer wants to change the terms or conditions of an existing variance;

(2) the Employer wants to acquire the variance from the Employer to whom it was issued;

or

(3) the Employer wants to add to or change the locations listed in the existing variance.

(c) Employers seeking to modify a permanent variance must comply with Rules 411-411.2 and must include the docket number of the variance to be modified in the application. An Employer may satisfy 411(b)(3) and (4) by stating that it will comply with the conditions contained in the existing permanent variance that is subject to modification.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections ~~142.5, and~~ 143(d), 143.2 and 6457, Labor Code.