

**OCCUPATIONAL SAFETY
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Attachment No. 2

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

TITLE 8: Chapter 3.5, Subchapter 1, Articles 1 and 2, Sections 403, 404, 405.1, 407-407.3, 411, 411.1, 411.2, 412.2, 418 and 420 of the Administrative Regulations

Variations From Occupational Safety and Health Standards
and Appeals from Temporary Variance Decisions

SUMMARY

Pursuant to Labor Code Section 142.3, the Board has adopted a number of regulations that govern Board consideration of requests for variances from occupational safety and health standards and appeals of temporary variance decisions. The Board has determined that some of these regulations require clarification or deletion and that additional regulatory provisions are needed.

The Board proposes to make the following amendments to the administrative regulations pertaining to requests for variances from occupational safety and health standards and appeals of temporary variance decisions:

- Revise the titles of Subchapter 1 and Article 2 to reflect the repeal of the term, and regulations governing, "Interim Variances" from a previous rulemaking action;
- Add "Conveyance Owner" to the definition of "Employer";
- Define the term "Conveyance Owner" to ensure conveyances, such as elevators and escalator, are included in the regulatory requirements pertaining to variances;
- Add administrative provisions specifically for conveyances;
- Clarify regulations regarding how to compute deadlines for tasks required in the variance process;
- Rephrase the undefined term "panel itself" to simply "panel";
- Revise and relocate regulations regarding notification and service requirements that arise during the variance process to a more appropriate area within the administrative regulations.
- Add service and notification requirements tailored to Conveyance Owners;
- Clarify and revise the requirements for completing a variance application;
- Clarify the process which allows parties to a variance proceeding to request that the Board take action on the matter prior to the variance hearing; and

- Clarify the requirements pertaining to pre-hearing conferences.

Moreover, this proposed rulemaking action contains non-substantive, editorial and grammatical revisions. These non-substantive revisions are not all discussed in this Informative Digest, but they are clearly indicated in the regulatory text in underline and strikeout format. In addition to these non-substantive revisions, the following actions are proposed:

SPECIFIC PURPOSE AND FACTUAL BASIS OF PROPOSED ACTION

Subchapter 1

The existing title of Subchapter 1 reads, “Rules of Procedure for Interim and Permanent Variances, and Appeals from Temporary Variances.” The Board proposes to omit the reference to interim variances from the title of Subchapter 1, since the term “interim variances” and the regulations governing such variances was repealed in a prior rulemaking action. The revision is necessary to accurately reflect the contents of the subchapter.

Section 403

Section 403 provides definitions pertinent to the rules of procedure for permanent variances and appeals from temporary variances. This section defines the term “Employer” but does not specifically include entities that own or have custody of conveyances governed by Title 8’s Elevator Safety Orders. Conveyance owners often have cause to seek variances from the Title 8 safety orders governing their devices and the absence of any reference to “conveyance owners” in the administrative regulations sometimes proves confusing for those individuals/entities requiring a variance for such equipment. Moreover, since the Board proposes to add administrative provisions specifically for conveyance owners, it is necessary to clarify who will be regulated by these requirements. Accordingly, the Board proposes to define “Conveyance Owner” and include conveyance owners in the definition of “Employer”. The proposed revision is necessary to clarify that conveyance owners are covered by the administrative regulations pertaining to variances and will clarify that they may seek variances from the Title 8 safety orders.

Section 404

Section 404 specifies how to calculate deadlines related to tasks stated in the administrative regulations. Non-substantive changes are proposed to clarify that the reference to “days” pertains to calendar days and to clarify how weekend days and holidays are to be treated. These proposed amendments are necessary to clarify the intent of the existing regulation.

Section 405.1

Section 405.1 describes the authority afforded hearing officers, the power of the Board, and the hearing “panel itself.” While “Board itself” is a defined term in the administrative regulations, “panel itself” is not. The Board believes that the reference to “panel itself” could cause confusion and should be amended to simply state “panel.” This amendment is non-substantive and is necessary to eliminate the possibility of confusion on this issue.

Section 407-407.3

Sections 407, 407.1, 407.2 and 407.3 contain service and notification requirements for variance hearing participants. Specifically, Section 407 requires that any document submitted to the Board by a hearing participant be served on all parties, and states that parties who have representatives should be served through their representatives. The section further states the manner in which service may be affected. Section 407.1 describes options for demonstrating proof of service. Section 407.2 describes documents that must be posted for employees or served on an authorized employee representative, and states that all postings must be maintained until the time of hearing. Section 407.3 states the notification obligations of an employee, or authorized employee representative, who is seeking to appeal a ruling on a temporary variance. These sections are currently contained in Article 1 of the administrative regulations, which is entitled “General.”

The Board proposes to consolidate and move these sections to Article 2, Applications for Permanent Variance, and Appeals from Temporary Variance, Sections 411.2, 411.3 and proposed new Section 412.2. The Board believes these provisions should be placed in Article 2, because the documents to be served or posted pertain to variance applications and appeals. It is also proposed to change the titles of Sections 411.2 and 411.3 from “Interim Variances” and “Notice of the Granting of an Interim Variance” to “Compliance with Notification and Posting Requirements Regarding Variance Proceedings and Temporary Variance Appeals” and “Employer Posting and Notification Responsibilities Regarding Variance Proceedings and Temporary Variance Appeals”, respectively. This revision is necessary due to the repeal of the term, and regulations regarding, “interim variance(s)” from a previous rulemaking action. The proposed amendments are necessary to provide clarity to the regulations and make it easier for the regulated public to locate the posting and notification requirements pertaining to variances.

Existing Section 407(a) requires that all documents pertaining to a variance that are submitted to the Board be served on all parties. A revision is proposed to delete this provision, since the Board has assumed responsibility for ensuring that all documents reach all parties prior to the variance hearing. The Board assumed this responsibility so that variance hearings could proceed as scheduled. This amendment is necessary to prevent variance participants from needlessly completing a task that has been assumed, and is being performed by, the Board.

The Board also proposes to eliminate duplicative language in the administrative regulations by combining the requirements in existing Sections 407(b) and 407.2(b), both of which require that relevant documents be served on an authorized employee representative, into proposed new Section 411.2(a). In addition, the Board proposes to combine the notification requirements of

Sections 407(c) and (d) into proposed new Section 411.2(b), since both sections list first-class mail or personal delivery as the permissible means of notification for all hearing participants. The proposed amendments are necessary to provide clarity in the administrative regulations.

Article 2

The existing title of Article 2 reads, “Applications for Interim and/or Permanent Variance, and Appeals from Temporary Variance.” The Board proposes to omit the reference to interim variances from the title of Article 2, since the term “interim variances” and the regulations governing such variances was repealed in a prior rulemaking action. The proposed revision is necessary since interim variances are not a viable option.

Section 411

Section 411 specifies the requirements for a completed permanent variance application. Currently, subsection (a) permits an employer or class of employers to file a variance application. The Board proposes to remove the reference to “class of employers.” This amendment is necessary because the Labor Code does not specifically authorize the Board to entertain applications from a “class of employers” and the practice has proved problematic when used in the past. Moreover, Section 419 permits the Board to consolidate the applications of multiple employers for hearing or decision when the applications are sufficiently similar to each other. This amendment is necessary to provide clarity and consistency to the regulations.

The Board further proposes to revise subsection (a) to emphasize that variances are granted from the regulations contained in *Title 8 of the California Code of Regulations*. Presently, employers sometimes request variances from national consensus standards or standards contained in Title 24. This amendment is necessary to clarify that the Board may grant variances from the Title 8 safety orders only.

As written, Section 411 does not require that an application for permanent variance be submitted under penalty of perjury. Because the Board relies on the representations made in the application, it is important to ensure that they are accurate and truthful. Accordingly, the Board proposes to add this requirement to subsection (a). The proposed amendment is necessary to ensure permanent variance applications contain accurate and reliable information.

The Board further proposes to add a “note” to subsection (a) that will direct variance applicants to the definition of “Employer” contained in Section 403(n). The previously mentioned revisions to this definition specify that “conveyance owners” are “Employers” for purposes of applying for a permanent variance. The Board believes that the note will help conveyance owners, who are sometimes confused by the term “Employer,” know that they are included in that term. Moreover, the Board proposes to replace the term “applicant” with the term “Employer” in this section to provide greater clarity throughout the regulations. The proposed revisions are necessary to clarify that conveyance owners and variance applicants are “Employers”.

In subsections (b) and (b)(10), the Board proposes to clarify that Employers must submit six copies of their variance applications (instead of one), and six copies of any photographs, blueprints or other illustrative materials (instead of three). The Board requires this number of copies, because the application must be distributed to various individuals involved in the evaluation and review process. In many instances, the application includes illustrative materials that the Board is unable to copy for the variance applicant, thus delaying the processing of the application. Amending the regulation to specify that six copies are required will reduce such delays and render the regulation consistent with the Board's current practice.

Existing subsection (b)(2) requires that the address of the place(s) of employment involved in the variance request be included in the application. The Board proposes to amend subsection (b)(2) to require that variance applications provide the address "where the variance will be in effect." The proposed amendment recognizes that some variances are granted for locations that are "places of employment" only in the technical sense of the term. For example, a variance granted for an escalator in a public shopping mall technically is in a place of employment, because the mall is a place of employment for the mall's employees. Nonetheless, it is also a commercial center and a public gathering place. Accordingly, the Board proposes to amend this section to avoid confusion resulting from use of the term "place of employment." The proposed amendment is necessary to clarify the regulatory intent.

The Board proposes to make similar non-substantive changes to subsections (b)(3) and (b)(4) to better clarify the intent of those sections.

Existing subsection (b)(5) requires variance applicants to certify that they have complied with certain employee notification responsibilities, one of which involves the posting of the variance application, or a summary of it, and specifying where a copy may be examined, at the place or places where notices to employees are normally posted. This requirement conflicts, however, with existing Section 407.2(a) (proposed Section 411.3) which states that employers are to post the variance application, or a summary of it, after the application has been docketed. To eliminate this conflict, the Board proposes to amend subsection (b)(5) to require certification in the variance application that the employer will comply with the notification and posting requirements contained in proposed Sections 411.2 and 411.3. Proposed Sections 411.2 and 411.3 contain a revised version of existing Section 407.2 and outline how the notification and posting must occur. This amendment is necessary to clarify the regulatory requirements by eliminating an inconsistency in the existing standards.

Similarly, existing subsection (b)(6) requires that the variance application describe how employees have been notified of their rights in the variance process, while existing Section 407.2(a) (proposed Section 411.2(a)) requires that employees be notified of their rights after the variance has been docketed. Because it is more meaningful to notify employees of these rights once the application is in final form and has been docketed, the Board proposes to delete subsection (b)(6) and instead state this requirement solely in Section 411.2. As noted, subsection (b)(5) will require that employers certify under penalty of perjury that they will comply with Section 411.2's requirements. This amendment is necessary to clarify the regulatory requirements by eliminating an inconsistency in the existing standards.

Non-substantive amendments, including renumbering, are proposed for remaining subsections (b)(7), (9) and (10) which are necessary to clarify the intent of the regulations.

Section 411.2

The contents of existing Section 411.2, Interim Variances, were repealed in a prior rulemaking. The Board proposes to rename this Section, “Compliance with Notification and Posting Requirements Regarding Variance Proceedings and Temporary Variance Appeals”, and add the revised contents of existing Sections 407(b) and (c), 407.1, and 407.2(b). Those sections address the manner in which parties are to be notified of events that occur during the variance process and are proposed for repeal. The Board proposes to move these provisions to this location because the posting and notification obligations pertain to the variance application, so it seems appropriate to address this issue in the Article that contains the application requirements.

The Board proposes to combine and revise Sections 407(c) and 407.1, including replacing the term “service” with the term “notification” because “service” reflects a degree of legal formality that the Board does not observe in the variance process. The Board also proposes to incorporate one of the provisions of existing Section 411(b)(5) which requires that both the affected employees and their authorized representative be notified of variance events. As explained above, the Board proposes to delete Section 411(b)(5). These amendments are necessary to better communicate variance participants’ responsibilities, place the regulations in a more logical location, and better reflect the regulatory intent.

Section 411.3

The contents of existing Section 411.3, Notice of the Granting of an Interim Variance, were repealed in a prior rulemaking. The Board proposes to rename this Section, “Employer Posting and Notification Responsibilities Regarding Variance Proceedings and Temporary Variance Appeals”, and add the employer-specific posting and notification responsibilities currently outlined in existing Section 407.2, which is proposed for repeal. The Board proposes to move these provisions to this location because the posting and notification obligations pertain to the variance application, so it seems appropriate to address this issue in the Article that contains the application requirements. The provisions of existing Section 407.2 will also be editorially revised to provide greater clarity.

In addition to re-locating and revising the provisions of existing Section 407.2, the Board proposes to add notification requirements specifically for conveyance owners to Section 411.3. The Board recognizes that the employees of a conveyance owner generally are not the employees affected by a variance. Instead, it is the employees of the conveyance maintenance provider and the building maintenance provider that are more likely affected by a variance. Consequently, the Board proposes to require conveyance owners to notify their conveyance maintenance provider and the building maintenance provider of a variance request. These amendments are necessary to better communicate variance participants’ responsibilities, place the regulations in a more logical location, and provide more meaningful notification requirements for conveyance owners.

The Board further recognizes that conveyance owners often apply for variances pertaining to new or vacant buildings. In such instances, there often is no one to inform of the variance request. In response, the Board proposes to add an exception to the notification requirements for those situations. The exception would require the conveyance owner to attest to the lack of a conveyance maintenance or building maintenance provider in the application and would require the owner to comply with the regulation if a conveyance or building maintenance provider is hired before the variance hearing occurs. The proposed amendment is necessary to clarify those requirements that are specific to conveyance owners and eliminate unnecessary notification practices.

Section 412.2

Proposed new Section 412.2 will contain the revised contents of existing Section 407.3, which pertains to employees' duty to notify employers of employee-initiated temporary variance appeals. Section 407.3 is proposed for repeal. The Board proposes to editorially revise and relocate the provisions of existing Section 407.3 to proposed new Section 412.2 in order to place them in proximity to the other regulations that pertain to temporary variance appeals and better communicate affected employees' and/or employee representative's obligations in such situations. These amendments are necessary to place the regulation in a more logical location and clarify the regulatory intent.

Section 418

Section 418 addresses requests in which Employers ask the Board to take a specific action on a variance matter prior to the variance hearing. The Board proposes to revise this section to clarify that such requests must be made in writing. The Board also proposes to replace the term "motions" with the term "requests" to clarify that the requests need not be filed in a legal format. In addition, the Board proposes to require that these requests state the variance docket number in lieu of the "title" and "number of the case." These changes are necessary because the Board's record keeping system relies on docket numbers, variances do not typically have "titles", and variances are not considered "cases."

The Board further proposes to specify that, if a hearing officer has not been assigned to a variance, such requests should be sent to the executive officer and that, if a hearing officer has been assigned, the hearing officer may handle such requests without the Board members' involvement. This proposed revision is necessary to conform the regulation to the Board's current practices and will have no effect on the regulated public.

Section 420(a)

Section 420(a) allows the Board to require an information exchange or meeting between the parties to a variance prior to the variance hearing for the purpose of considering matters that will tend to simplify the issues or expedite the proceedings. Such actions may be made either on the Board's own initiative or at the request of a party. The Board proposes to replace the references to "motions" in this section with other terms that do not suggest a legal format in order to clarify that pre-hearing activities need not be legal in nature. The Board further proposes to specify that, if a hearing officer has been assigned to a variance matter, the hearing officer may resolve pre-hearing concerns without the involvement of the Board members. The proposed revision is necessary to allow the Board more flexibility in resolving issues before a hearing by allowing the hearing officer to address these concerns with those parties who need to be included in its resolution.

REASONABLE ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

No reasonable alternatives were identified by the Board and no reasonable alternatives identified by the Board or otherwise brought to its attention would lessen the impact on small businesses.

SPECIFIC TECHNOLOGY OR EQUIPMENT

This proposal will not mandate the use of specific technologies or equipment.

COST ESTIMATES OF PROPOSED ACTION

Costs or Savings to State Agencies

No costs or savings to state agencies will result as a consequence of the proposed action.

Impact on Housing Costs

The Board has made an initial determination that this proposal will not significantly affect housing costs.

Impact on Businesses

The Board has made an initial determination that this proposal will not result in a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

Cost Impact on Private Persons or Businesses

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Costs or Savings in Federal Funding to the State

The proposal will not result in costs or savings in federal funding to the state.

Costs or Savings to Local Agencies or School Districts Required to be Reimbursed

No costs to local agencies or school districts are required to be reimbursed. See explanation under “Determination of Mandate.”

Other Nondiscretionary Costs or Savings Imposed on Local Agencies

This proposal does not impose non-discretionary costs or savings on local agencies.

DETERMINATION OF MANDATE

The Occupational Safety and Health Standards Board has determined that the proposed regulations do not impose a local mandate. Therefore, reimbursement by the state is not required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because the proposed amendments will not require local agencies or school districts to incur additional costs in complying with the proposal. Furthermore, these regulations do not constitute a “new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.”

The California Supreme Court has established that a “program” within the meaning of Section 6 of Article XIII B of the California Constitution is one that carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

These proposed regulations do not require local agencies to carry out the governmental function of providing services to the public. Moreover, these proposed regulations do not in any way require local agencies to administer the California Occupational Safety and Health program. (See City of Anaheim v. State of California (1987) 189 Cal.App.3d 1478.)

These proposed regulations do not impose unique requirements on local governments. All employers - state, local and private - will be required to comply with the prescribed standards.

EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendments will not affect small businesses.

ASSESSMENT

The adoption of the proposed amendments to these regulations will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

ALTERNATIVES THAT WOULD AFFECT PRIVATE PERSONS

No reasonable alternatives have been identified by the Board or have otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.