

NOTICE OF PUBLIC HEARING

Title 8. Division of Occupational Safety and Health

NOTICE IS HEREBY GIVEN that the Division of Occupational Safety and Health is proposing to take the action described in the Informative Digest/Policy Statement Overview. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held in the basement Auditorium at 455 Golden Gate Avenue, San Francisco, California, at 10:00 a.m., on September 3, 2001. These facilities are accessible to persons with mobility impairments.

Written comments must be received by the Division at its office not later than 5:00 p.m. on September 3, 2001, or must be received by the Division at the hearing. The official record of the rulemaking proceeding will be closed at 5:00 p.m. on September 3, 2001. Written comments received after that date and time shall not be considered unless an extension of time in which to receive specific written comments is announced at the public hearing.

The Division may thereafter adopt the proposed regulations substantially as described below or may modify them if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference.

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

Informative Digest/Policy Statement Overview.

Pursuant to Labor Code sections 60.5 and 6308, the Division of Occupational Safety and Health ("the Division") of the Department of Industrial Relations is charged with the administration and enforcement of the provisions of the California Occupational Safety and Health Act, commencing with Labor Code section 6300, as well as other provisions of law impacting upon the health and safety of employees in the State of California.

Existing law authorizes the Division to issue various permits, licenses, certifications, registrations and other authorizations (referred to generically herein as "Permits"). For example, contractors who perform certain asbestos-related work must be registered with the Division's Asbestos Contractors Registration

Unit. The Division also enforces the safe erecting, climbing, dismantling and operating of tower cranes through its tower crane permit program. The Division may also require certification of individuals, as in the case of persons who desire to test certain crane and derrick operations. The foregoing examples are only examples of the many types of Permits which the Division may issue. In addition to issuing Permits, the Division may also prohibit certain unsafe operations through issuance of Orders Prohibiting Use (“OPUs”).

Just as the Division may issue Permits, so it also has the authority to deny, restrict or revoke them. Though an employer may appeal all such actions, there are currently no codified procedures that govern every type of appeal. Pursuant to Government Code section 11400.20, proposed Article 1.5 will establish uniform general procedures for employers to appeal a Division order denying, suspending, or revoking a Permit. The proposed article will also govern appeals from OPUs. The purpose of the rulemaking will be to codify necessary procedural due process protections. The Proposed Regulations will supplement, but will not replace, any existing appeal procedures codified in Title 8.

Specific Purpose of Adoption/Factual Basis: Proposed Article 1.5 will establish uniform general procedures for employers to appeal a Division order denying, suspending, or revoking a Permit. The proposed article will also govern appeals from OPUs. The purpose of the rulemaking will be to codify necessary procedural due process protections, consistent with the mandate of Government Code section 11400.20. The specific terms of the proposed regulations (hereinafter the “Proposed Regulations”) are summarized below.

340.40. Scope and Application.

Section 340.40 sets forth the scope and application of the Proposed Regulations. It states that the Proposed Regulations are applicable to any proceeding involving the denial, suspension, or revocation of a Permit. The procedures set forth in the Proposed Regulations would also apply to proceedings involving OPUs. The Proposed Regulations apply to the denial, suspension or revocation of a permit for which there are no specific adjudicative procedures. Although the Proposed Regulations may supplement other codified procedures for administrative appeals, in cases of conflict with other regulatory appeal procedures, the more-specific procedures will apply.

340.41. Notification of Division Proceedings.

Section 340.41 will require the Division to notify the holder of a Permit, in writing, when it has determined that good cause exists to suspend or revoke the Permit. The Division will also furnish written notification of its denial of a Permit. The written notice must state the statute or regulation authorizing, as well as a statement of the ground(s) for, the Division’s action.

340.42. Request for Hearing.

If an employer desires to contest the Division's denial, suspension or revocation of a Permit, or the issuance of an OPU, the employer must submit a request for hearing within five days of the Division's action. All requests for hearing must be written, and must set forth the grounds for appeal. Appeals for the issuance of OPUs shall be mailed or delivered to the District Manager of the District Office from which the OPU was issued. Appeals for the denial, suspension or revocation of a Permit shall be mailed or delivered to the Director.

Upon receipt of a request for an appeal hearing, the Director shall designate a presiding officer from among specified individuals to hear the appeal, and shall inform the appellant of the date time and location of the appeal proceedings. The presiding office may change the date, time or location of a hearing unilaterally or upon the motion of any party. A hearing for the denial, suspension, or revocation of a Permit shall be heard not less than 48 hours after the Division's receipt of an appeal. By statute, a hearing regarding the issuance of an OPU shall be heard within 24 hours.

The Proposed Regulations require the appellant to notify its employees of date, time and location, and must also inform them of the subject matter of the appeal. The employer must accomplish this notification by posting the Division's notice, or by providing some other written notice.

The Division may serve the Notice either personally or by certified mail.

The Division must make a copy of the Proposed Regulations available prior to the date of the appeal proceedings, and must advise whether the proceedings are subject to Chapter 5 of the Government Code.

340.43. Conduct of Hearing.

Section 340.43 describes the manner in which the presiding officer shall conduct the hearing. Consistent with constitutional due process guarantees, an appellant has the right to present evidence before a neutral presiding officer appointed by the Director. Section 340.43 also allows an appellant to appear through an attorney or any other representative. In order to create an accurate record, the appeal proceedings must be tape recorded or memorialized in some other manner agreed-upon by the parties.

Similar to other statutory and regulatory schemes for administrative procedure, Section 340.43 requires the hearing office to issue a decision within 30 days after submission of the matter at the close of hearing. However, in order to prevent undue interruption of an appellant's operations, decisions regarding OPUs are due as soon as possible after the conclusion of a hearing.

The Proposed Regulations also govern the type of evidence that will be admitted at hearing. The Proposed Regulations would allow the parties to present relevant documentary or other evidence through direct and cross examination. A party may also present rebuttal evidence. The presiding officer may also examine witnesses at the hearing. Hearsay evidence would be admissible, but could not be the factual basis for a decision.

Pursuant to the Proposed Regulations, the administrative hearings would be open to the public. However, to ensure that the testimony at hearing is not tainted, the Presiding Officer may, upon motion, exclude witnesses from the hearing room. However, each party may designate one representative to remain in the hearing room, even if that representative will also testify as a witness.

340.44. Grounds for Disqualification of Presiding Officer.

To ensure a fair hearing, Section 340.44 allows any party to petition the Director for disqualification of an appointed presiding officer. Such a request shall be based on grounds set forth in specified sections of the Government Code.

340.45. Service of Process.

Section 340.45 governs the service of process for adjudicative procedures held pursuant to the Proposed Regulations. It provides for service by personal delivery or by first class mail. Service by facsimile is also permissible under the Proposed Regulations, subject to enumerated conditions intended to ensure that notice is actually received by the parties. Service is complete under the Proposed Regulations at the time of the personal delivery or mailing.

Proof of service must be filed with the document served, and may be made by affidavit or declaration, written and endorsed statement, or a letter of transmittal.

Facsimile machines may be used to file and serve documents as long as the length of the document is no more than 12 pages, the facsimile includes a cover sheet indicating the number of pages faxed, all parties are served either by facsimile or overnight mail, and the faxing party follows the facsimile up with an original of the document. A facsimile shall be considered received on the following workday if facsimile transmission begins after 5:00 p.m.

340.46. Discovery.

To further the goal of discerning the truth, Section 340.46 grants parties limited discovery rights. Among other things, each party to an adjudicative hearing is entitled to request the names of potential witnesses to the extent known by another party, and to inspect and make copies of writings or other evidence another party proposes to offer into evidence, including the Division's

investigative reports. Consistent with the Labor Code, Section 340.46 does not require the Division to disclose the name of a complainant through discovery.

To ensure that each party receives the information necessary to present its case on appeal, the presiding officer has the authority to order timely completion of discovery, or to continue the appeal hearing to allow for completion of discovery.

340.47. Subpoenas and Subpoenas Duces Tecum.

Section 340.47 authorizes the presiding officer to issue subpoenas and subpoenas duces tecum to order the appearance of witnesses or the production of documents or things. Such authority may be necessary in many cases to ensure that the parties have the ability to compel the production of witnesses and information necessary to support their positions. To preclude unnecessary inconvenience to witnesses, a party applying for a subpoena or subpoena duces tecum must show good cause for the attendance of the witness or production of the documents or things. For the same reason, Section 340.47 also requires that all non-party witnesses be entitled to witness fees and mileage to compensate for certain out-of-pocket expenses incurred in connection with the appeal hearing. Parties who subpoena a peace officer must comply with Government Code section 68097.2.

340.48. Official Notice.

Pursuant to Section 340.48, the presiding officer would be authorized to take official notice of certain generally-accepted facts, theories, and technical and scientific matters within the field of occupational safety and health. The presiding officer may also take official notice of determinations, rulings, orders, findings and decisions of the Division or Standards Board. The purpose of official notice is to streamline the appeal process by allowing the presiding officer to make limited findings without the necessity of hearing evidence. Each party to a hearing must be given reasonable opportunity on request to present information relevant to the propriety of taking official notice and the tenor of the matter to be noticed.

340.49. Confidential Evidence.

Section 340.49 would require the presiding officer to consider confidential, and issue all necessary orders to protect, any hearing exhibit which might reveal a trade secret. Among other things, this section would apply to photographs taken by the Division in the course of any inspection or investigation, consistent with Labor Code section 6314. The Presiding Officer must issue necessary orders to protect such information.

340.50. Prehearing Motions.

Section 340.50 would allow a party to make pre-hearing motions to the presiding officer to dispose of certain issues prior to hearing. Such motions must be in writing, and may include motions for continuance, for clarification of issues relating to discovery and other matters important to the conduct of the hearing. Pre-hearing motions may not be made later than 24 hours prior to the commencement of the hearing.

340.51. Interpreters.

Section 340.51 would require that all hearings be conducted in English. Accordingly, to afford parties who are not English-proficient a fair hearing, the Division must notify each party of its right to an interpreter at the time it sends notice of the date and time for hearing. Parties who desire an interpreter must request such services at the time they submit an appeal. The party requesting the interpreter must pay the interpreter's fees, unless the Division elects to pay the fees based on a party's financial status. Any interpreter used must be approved by the Occupational Safety and Health Appeals Board.

More Information.

The full text of the Proposed Regulations, and all information upon which the Proposed Regulations are based, including an initial statement of the reasons for the Proposed Regulations, are available upon request. Inquiries concerning the Proposed Regulations, including questions regarding the substance of the Proposed Regulations, may be directed to:

Christopher P. Grossgart, Staff Counsel
Michael D. Mason, Chief Counsel
Department of Industrial Relations
Division of Occupational Safety and Health
Legal Unit
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102
(415) 703-5080

The Division's rulemaking file on the Proposed Regulations is open for public inspection Monday through Friday, from 8:00 a.m. to 5:00 p.m., at 455 Golden Gate Avenue, 10th Floor, San Francisco, California. Interested parties may obtain copies of the initial statement of reasons, the actual text of the Proposed Regulations, this notice, and the final statement of reasons, (once it has been prepared pursuant to Government Code section 11346.9(a),) from the Division representatives named above, or from the Division's web site (www.dir.ca.gov/DOSH).

Cost or Savings of the Proposed Regulations.

Costs or Savings to State Agencies: No costs or savings to state agencies will result as a consequence of the Proposed Regulations.

Impact on Housing Costs: The Proposed Regulations will not significantly affect housing costs.

Impact on Businesses: The Division has made an initial determination that the Proposed Regulations 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 Impacts on Representative Private Persons or Businesses: The Division is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the Proposed Regulations.

Costs or Savings in Federal Funding to the State: The Proposed Regulations will not result in costs or savings in federal funding to the State.

Costs or Savings to Local Agencies or School Districts: 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: The Proposed Regulations do not impose nondiscretionary costs or savings on local agencies.

Determination of Mandate.

The Proposed Regulations do not impose a mandate on local agencies or school districts. The Division has determined that the Proposed Regulations do not impose a mandate requiring reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because the Proposed 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 of the California Constitution is one which 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.)

The Proposed Regulations do not require any local agency to carry out the governmental function of providing services to the public.

Effect on Small Businesses.

It has been determined that the Proposed Regulations may affect small businesses.

Assessment.

The adoption of the Proposed 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.

Consideration of Alternatives.

The Division must determine that no reasonable alternative considered by the Division, or that has been identified and brought to the attention of the Division, 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.

Notice of Public Hearing – Adjudicative Regs