

**PROPOSED REGULATIONS OF
THE DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
TITLE 8, CALIFORNIA CODE OF REGULATIONS
Chapter 3.2, California Occupational Safety and Health Regulations (CAL/OSHA)
Division 1, Section 336)**

**STATEMENT OF NO REGULATORY EFFECT AND REQUEST FOR
EFFECT UPON FILING WITH THE SECRETARY OF STATE**

As set forth below, the Division of Occupational Safety and Health ("the Division") proposes to make specified changes without regulatory effect to Section 334(c) of Title 8 of the California Code of Regulations.

Subject to the approval of the Office of Administrative Law, an agency like the Division may revise one of its regulations without complying with the rulemaking procedure specified in Article 5 of the Administrative Procedure Act (Gov't Code 11340, et seq.) if the proposed change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of the subject regulation. (1 C.C.R. § 100.)

Pursuant to Section 100(a), such "changes without regulatory effect" include:

- (6) making a regulatory provision consistent with a changed California statute if both of the following conditions are met:
 - (A) the regulatory provision is inconsistent with and superceded by the changed statute, and
 - (B) the adopting agency has no discretion to adopt a change which differs in substance from the one chosen.

Here, the Division seeks to amend Section 334 of Title 8 of the California Code of Regulations pursuant to Section 100 to make it consistent with one of its "reference" statutes, Labor Code section 6342(b). Section 334 defines the various classifications for citations that the Division may issue to employers for violations of the substantive occupational safety and health standards found in Title 8.

Among other classifications, a violation of Title 8 may be issued as "serious". The definition for a "serious violation" currently set forth in Section 334(c) is functionally identical to the definition that was set forth in Labor Code section 6432(a) prior to 2011. However, effective January 1, 2011, the Legislature amended Labor Code Section 6432 to change the definition of "serious violation." (Stats 2010 ch 692 § 2(AB 2774), effective January 1, 2011.) In doing so, the Legislature made the existing language of Section 334(c) inconsistent with, and superceded by, its underlying Reference statute. Thus, the purpose of the proposed amendment is to conform the regulatory definition to the amended legislation.

The proposed amendment is appropriate for a "Section 100 change" because it has no regulatory effect. The statutory definition of "serious violation" found in Section 6432 is detailed and complete, and both the Division and the Occupational Safety and Health Appeals Board have been applying the new legislative definition since January 1, 2011. (See, e.g., CME Services, OSHAB 12-2279/2280, Decision (May 9, 2013); Trademark Construction Co., Inc., OSHAB 12-0096/0097, Decision (May 8, 2013).)¹ Through this proposed Section 100 change, the Division is not attempting to further define the term "serious violation" or to otherwise create an additional material alteration to any requirement, right, responsibility, condition, prescription or other regulatory element of the subject regulation – beyond that dictated by, and already in effect because of, the Labor Code amendment of 2011. Moreover, the Division has no discretion to define "serious violation" in a manner that is substantively different from the definition set forth in Labor Code section 6432. Consequently, the proposed amendments set forth on the attached "Actual Text" are appropriate for promulgation as a "Section 100 Change".

Finally, the Division requests that the proposed Section 100 change take effect as soon as it is filed with the Secretary of State. As stated above, both the Division and the Occupational Safety and Health Appeals Board have been enforcing and adjudicating serious citations under the new "realistic possibility" standard since January 1, 2011. However, the employer-defense bar has recently challenged the Division's ability to issue the realistic-possibility standard of Labor Code section 6432 on the ground that it conflicts with the existing language of Section 334(c). (Robert D. Schultz and James A. Noll dba The Showboat Lounge, OSHAB 01-125, Decision After Reconsideration (May 29, 2003).) The Division seeks to avoid the unnecessary expenditure of scant resources litigating this issue by rendering the point moot through this proposed Section 100 change as soon as possible.

¹ These Decisions of the Occupational Safety and Health Board's administrative law judges are not precedential, and are cited herein only to illustrate that the Board is applying the new standard.