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Art Carter, Chair  
Occupational Safety & Health Appeals Board  
2520 Venture Oaks Way #300  
Sacramento, California 95833

**Via facsimile and email (916) 274-5786**

**Re: Comments on proposed OSHAB regulations**

Dear Mr. Carter and Members of the Occupational Safety & Health Appeals Board,

Please register my objections to the proposed changes in the regulation before you which was considered on September 6, 2011. The comments contained herein are related only to Section 376 (c) and are not to be construed as indicating agreement with or opposition to other portions of the proposed regulations.

I am a retired prosecutor who prosecuted many cases against employers for violations of Sections 6423 and 6425 of the California Labor Code based on violations cited by Cal OSHA pursuant to Title 8 of the California Code of Regulations. These cases were presented to me by the Bureau of Investigations for review to determine the propriety of filing criminal charges based upon the citations issued. More often than not, these cases were brought to me within weeks of the expiration of the statute of limitations which impeded my ability to file criminal charges. This impediment was also due, in large part, to the lack of early communication between the prosecuting entity and those involved with the pending Cal OSHA administrative proceeding.

While the proposed amendment seeks to address this deficiency, I am of the opinion that the proposed amendment is too narrow and does not completely and adequately address what is needed to allow the effective exercise of prosecutorial discretion. The purpose of the amendment is to account for the ability of prosecutors to charge worker safety violations as felonies under California Labor Code Section 6425. This option was provided to prosecuting entities in 1999 and extended the statute of limitations period to three years as is customary in many felony prosecutions. If the exercise of prosecutorial discretion is to be considered meaningful, it is essential that the control and ability to file criminal charges rest solely with the prosecuting authority, a notion that is consistent given the burden of “beyond a reasonable doubt” that the prosecuting authority must meet in order to sustain a criminal conviction.

The proposed language currently in Section 376 (c) fails to provide the prosecuting authority with the necessary control to which I believe that the prosecuting authority is absolutely entitled. Instead, it provides an opportunity for the employer to control and, perhaps, even the Division of Occupational Safety and Health to influence the potential for the filing of criminal charges.

I would respectfully submit for your consideration the following reasons in support of my objections: First, if the employer is permitted the choice of having its appeal proceed in the normal course, it appears that the case may proceed in that manner despite an objection by the Division or the prosecuting authority. How are the interests of justice to be served if the Division is required to proceed administratively and the employer is provided what amounts to free discovery of the prosecutor’s case through the presentation of testimony/evidence presented by the Division? The ensuing testimony is available for use by the employer in a subsequent criminal proceeding as impeachment or to impact the credibility of the prosecutor’s witnesses. Since there is no requirement that the employer or employer representatives provide similar testimony, the employer is provided with an opportunity to impact prosecutorial discretion depending upon the testimony produced administratively. Clearly the ability of the prosecutor to file criminal charges should take precedence over the administrative proceeding itself. Second, nothing in the proposed regulations requires the Appeals Board to delay the hearing in cases where criminal charges have actually been filed. Again, since the proposed language addresses only the review stage of the case, prosecutorial discretion is again impacted in the post indictment/charging period and the employer has the opportunity to press the administrative hearing at the expense of the criminal proceeding. Third, if the Bureau of Investigations (BOI) is used as the measuring stick by which an investigation is completed, it negates the ability of the prosecuting authority to conduct its own independent investigation as most of these cases have precious little time left on the statute of limitations when they are finally presented to the prosecuting authority for review. Again, another example of how the administrative process is given priority over the discretionary review of the prosecutor. Finally, the current regulation provides no mechanism by which the prosecution authority may actually make a request to become a “party” or otherwise communicate to the parties that it has any interest in the matter, and, assuming the BOI investigative report is finally presented to the prosecuting authority

with the assistance of a permissible extension of time beyond the concluding date of the BOI investigation, a loss of control of the case by the prosecuting authority is once again demonstrated and serves as an impediment to the meaningful exercise of prosecutorial discretion.

A concise and practical resolution to these issues has been submitted to you by Frances C. Schreiber of the Kazan Law Group (see Kazan Law Group commentary letter dated September 2, 2011). I respectfully urge you to review her suggestions related to the amending language in an effort to address each of the deficiencies in the language contained in the current proposed amendment that I have discussed. In considering the adoption of her suggestions, I believe that you will find an opportunity to balance the playing field, preserve the sanctity which is prosecutorial discretion, and restore the precedence of criminal proceedings over those of an administrative nature.

Respectfully submitted,

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