

NOTICE OF PROPOSED MODIFICATIONS TO
CALIFORNIA CODE OF REGULATIONS

Title 8, Chapter 3.3, Articles 1, 1.5, 2, 3, 4 and 5
Sections 347, 350.1, 355, 359, 359.1, 371.2, 374, 385, 386, 392.4, and 392.5

Rules of Practice and Procedure

Pursuant to Government Code Section 11346.8(c), the Occupational Safety and Health Appeals Board (Board) gives notice of the opportunity to submit written comments on the proposed modifications to Title 8, sections 350.1, 355, 386, and 392.4 contained in this notice.

On November 15, December 6, and December 18, 2006, the Board held Public Hearings to consider revisions to Title 8, sections 347, 350.1, 355, 359, 359.1, 371.2, 374, 385, 386, 392.4, and 392.5, which pertain to the Board's rules of practice and procedure. The Board received comments on the proposed revisions and proposes the modifications contained in this notice as a result of those comments and Board consideration.

A copy of the full text of the standards with the modifications clearly indicated, are attached for your information.

Any written comments on the modifications shown in this notice must be received by 5:00 p.m. on July 2, 2007, at the Occupational Safety and Health Appeals Board's Sacramento office, 2520 Venture Oaks Way, Suite 300, Sacramento, California 95833 in order to be considered. The standards will be scheduled for adoption at a future meeting of the Board.

The Board's rulemaking file on the proposed action is open to public inspection Monday through Friday, from 8:00 a.m. to 4:30 p.m., at the Board's Sacramento office at 2520 Venture Oaks Way, Suite 300, Sacramento, California 95833.

Inquiries concerning the proposed changes may be directed to Jeff Mojcher, Chief Counsel at (916) 274-5751.

OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

Date: June 8, 2007

Candice Traeger, Board Chair

ORIGINALLY PROPOSED TEXT

California Occupational Safety & Health Appeals Board's
Regulatory Proposal
FORM 9 – Text
Changes to Title 8, Chapter 3.3, Articles 1, 1.5, 2, 3, 4 and 5
Sections 347, 350.1, 355, 359, 359.1, 371.2, 374, 385, 386, 392.4, and 392.5

Article 1 GENERAL

Section 347 Definitions

(c) "Appeals Board" or "Board" means the Occupational Safety and Health Appeals Board, and includes the chairman ~~man~~ person and members of the Appeals Board, administrative law judges, and staff of the Appeals Board.

(e) "Completed Appeal Form" means all required blanks filled in and boxes checked, with the signature of employer or employer's representative, and citation(s) appealed from attached to the appeal form.

(f) "Day", unless specifically stated otherwise means calendar day.

(g) "Authorized Employee Representative" means a labor organization which has a collective bargaining relationship with the cited employer and which represents affected employees or an employee organization which has been formally acknowledged by a public agency as an employee organization that represents affected employees of the public agency;

(h) "Declaration" means a certification in substantially the following form:

(1) If executed within California:

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California on _____,

(City) (Date)

(Signature) _____

(Typed or printed name)

(2) If executed outside California:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ (Signature) _____

(Date) (Typed or printed name)

- (i) “Division” means the Division of Occupational Safety and Health;
- (j) “Division Action” means any citation, notice, special order, order to take special action, notification of penalty, notification of failure to abate alleged violation and of additional civil penalty, or notification of failure to return a signed statement of abatement issued by the Division pursuant to Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or Section 2950 of the Health and Safety Code, which by statute may be appealed to the Appeals Board;
- (k) “Docketed Appeal” means any completed appeal form which has been received by the Appeals Board and assigned a specific docket number;
- (l) “Employee” means every person who is required or directed by any employer, to engage in any employment, or to go to work or be at any time in any place of employment;
- (m) “Employee Appeal” means any appeal filed by an employee from the period allowed by the Division to abate the alleged violation;
- (n) “Employer” means the state and every state agency, each county, city, district, and all public and quasi-public corporations and public agencies therein, every person including any public service corporation, which has any natural person in service, and the legal representative of any deceased employer;
- (o) “Hearing” means any hearing before the Appeals Board or an Administrative Law Judge set for the purpose of receiving evidence;
- (p) “Hearing Record” means the official record of evidence taken by electronic device in any proceeding before the Appeals Board;
- (q) “Intervenor” means a person, group of persons, trade association, legal foundation, or public or private interest group who has been granted leave to intervene in any proceeding;
- (r) “Memorandum of Items of Costs” means an itemization of costs claimed pursuant to Section 149.5 of the Labor Code;
- (s) “Obligor” means a person other than an employer who is obligated to an employer to repair any machine, device, apparatus, or equipment and to pay any penalties assessed against an employer;
- (t) “Participation Notice” means a notice informing affected employees of their right to participate in certain proceedings;
- (u) “Party” means a person who has made an appearance before the Appeals Board and been granted party status;
- (v) “Person” means an individual, firm, partnership, trust, estate, association, corporation, company, or other entity.
- (w) “Petition for Costs” means any claim for reasonable costs to be awarded by the Appeals Board pursuant to Section 149.5 of the Labor Code;
- (x) “Proceeding” means any adjudicatory action begun by the filing of an appeal and includes a hearing, prehearing conference, petition for costs, reconsideration, or any other act that may result in an order or decision of the Appeals Board;

(y) “Representative” means a person authorized by a party or intervenor to represent that party or intervenor in a proceeding;

(z) “Rule” means any section set forth in this chapter adopted by the Appeals Board;

(aa) “Working Days” means any day that is not a Saturday, Sunday or State-recognized holiday as provided in Government Code Sections 6700 and 6701.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 2015.5, Code of Civil Procedure; Sections 148.7, 149.5, 6301, 6302, 6304, 6304.1 and 6305(b), Labor Code.

Section 350.1 Authority of Administrative Law Judges

(a) In any proceeding assigned for hearing and decision under Labor Code Sections 6604 and 6605, an Administrative Law Judge shall have full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Appeal Board, to hold a prehearing conference, to hold a settlement conference, to compel discovery at any time in the proceeding, to issue a subpoena and subpoena duces tecum for the attendance of a person and the production of testimony, books, documents, or other things, to compel the attendance of a person residing anywhere in the state, to certify official acts, to regulate the course of a hearing, to grant a withdrawal, disposition or amendment, to order a continuance, to approve a stipulation voluntarily entered into by the parties, to administer oaths and affirmations, to rule on objections, privileges, defenses, and the receipt of relevant and material evidence, to call and examine a party or witness and introduce into the hearing record documentary or other evidence, to request a party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding, to extend the submittal date of any proceeding, to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings and decisions as may be necessary for the full adjudication of the matter, or take other action during the pendency of a proceeding to regulate the course of a prehearing, hearing, or settlement conference, that is deemed appropriate by the Administrative Law Judge to further the purposes of the California Occupational Safety and Health Act . Final orders, findings, and decisions issued by an Administrative Law Judge shall be the orders, findings, and decisions of the Appeals Board unless reconsideration is granted.

NOTE: Authority cited: Sections 148.7, 149.5, 6604 and 6605, Labor Code. Reference: Section 11182, Government Code; and Sections 148.7, 148.8, 149.5, 6604, 6605 and 6607, Labor Code.

ARTICLE 1.5 SERVICE OF DOCUMENTS AND DUTY TO NOTIFY OTHERS OF APPEAL AND HEARING

Section 355 Proper Method of Service & Official Address of Record

(a) The Appeals Board shall maintain in each proceeding an official address of record which shall contain the names and addresses of all parties and intervenors and their representatives, agents, or attorneys of record. ~~Any change or substitution in such~~

~~information must be communicated promptly in writing to the Appeals Board.~~

Documents sent by the Appeals Board to the official address of record for the employer that are returned or undeliverable may result in dismissal of the appeal.

(b) Any change or substitution in the names and addresses of all parties and intervenors and their representatives, agents, or attorneys of record must be communicated promptly in writing to the Appeals Board. Failure to communicate changes or substitutions promptly in writing by the employer may result in dismissal of the appeal.

(c) Service on a party or intervenor who has appeared through a representative shall be made upon such representative.

(d) Unless otherwise required, service may be made by personal delivery or by depositing the document in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first-class postage prepaid, by deposit with a carrier guaranteeing overnight delivery, or by facsimile ("FAX") machine, as provided in subsections (i) and (j) below.

(e) Service is complete at the time of personal delivery or mailing.

(f) Proof of service shall be filed with the document and may be made by any of the following means:

(1) Affidavit or declaration of service by personal delivery, mail, overnight courier or FAX;

(2) Written statement endorsed upon the document served and signed by the party making the statement; or

(3) Letter of transmittal.

(g) Proof of service by the Appeals Board may be made by endorsement on the document served, setting forth the fact of service on the persons listed on the official address record on the date of service. The endorsement shall state whether such service was made personally, by mail, overnight courier or FAX, the date of service and the signature of the person making the service.

(h) Where service is made by the posting of a document, citation, notice, order or decision, proof or certification of such posting shall be filed with the issuing office of the Division not later than the second working day following the posting.

(i) The Appeals Board may serve documents on parties and parties may file documents with the Appeals Board and serve them on other parties by means of FAX under the following conditions:

(1) The length of the document to be filed and/or served shall be no more than twelve (12) pages including cover page and attachments;

(2) A cover sheet shall be attached containing the number of pages transmitted, the FAX number of the sender, the sender's telephone number, and the name of a contact person;

(3) If a document is filed by FAX, all parties shall be served in the same manner or by guaranteed overnight delivery. The FAX transmission shall include a proof of service indicating the method of service on each party.

(j) A document is considered received on the following working day if transmission begins later than 5:00 p.m. Pacific Time.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

ARTICLE 2 FILING APPEAL

Section 359. Filing of Appeal –Date

(a) Except as provided in Section 361.1(b), an appeal shall be deemed filed on the date a communication indicating a desire to appeal the Division action is hand delivered, mailed to, or received by the Appeals Board in Sacramento, California, whichever is earlier. No particular format is necessary to institute the appeal. Communications to the Division of Occupational Safety & Health indicating a desire to appeal are not deemed filed with the Appeals Board and do not initiate the appeal.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 6601, Labor Code.

Section 359.1 Appeal Form.

(a) If an appeal is initiated by other than an appeal form, a completed appeal form shall be filed with the Appeals Board within 10 days of the Appeals Board's written acknowledgement of the desire to appeal. Failure to file a completed appeal form ~~may result in dismissal of the appeal~~ with the Appeals Board within 10 days of written acknowledgement by the Board of the intent to appeal constitutes grounds for dismissal.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 148.7, Labor Code.

ARTICLE 3. PREHEARING PROCEDURE, DISCOVERY AND MOTIONS

Section 371.2 Amendments Prior to Hearing.

(a) Once the parties are notified that an appeal has been docketed by the Appeals Board, any proposed amendment of the citation or appeal shall be made in accordance with the procedures set forth in Section 371. Where the parties are notified by mail, the notification date is deemed to be five days after the date on the notification letter. An amendment by the Division that alleges a new violation may be permitted by the Appeals Board, but not after six months have elapsed since occurrence of the alleged violation.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 11507, Government Code; Sections 6317 and 6603(a), Labor Code

Section 374 Prehearing Conference.

(b) Each party to a prehearing conference shall be prepared to discuss issues, stipulate to any factual or legal issue about which there is no dispute, stipulate to the identification and admissibility of documentary evidence, comply with any request for discovery, report on discovery status where the ALJ has compelled discovery prior to the prehearing, and to do such other things as may aid in the disposition of the proceeding.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.

ARTICLE 4. HEARING

Section 385 Decisions

(a) Unless otherwise ordered, all proceedings shall be submitted for decision at the close of the hearing. The Appeals Board or Administrative Law Judge may extend the submission date and shall, within 30 days after the proceeding is submitted, summarize the evidence received and relied upon, make findings upon all facts involved in the appeal, and file an order or decision with the reasons or grounds upon which the order or decision was made.

NOTE: Authority cited: Sections 148.7 and 149.5, Labor Code. Reference: Sections 148.7, 149.5, 6608 and 6609, Labor Code.

Section 386. Post Submission Amendments

(a) The Appeals Board may amend the issues on appeal or the Division action after a ~~proceeding is submitted for decision~~ both parties have presented evidence in order to:

- (1) Correct a clerical error;
- (2) Address an issue litigated by the parties;
- (3) Amend the section number cited in the citation if the same set of facts apply to both the cited and proposed sections; or
- (4) Amend any part of the Division action to conform it to a statutory requirement.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 6603(a), Labor Code; Section 11516, Government Code.

ARTICLE 5. RECONSIDERATION

392.4 Motions During Reconsideration Process

(a) Any motion or request for action, any opposition thereto, and any reply relating to any proceeding under reconsideration by the Appeals Board shall be in writing and directed to the Appeals Board. The caption of each motion, request, opposition or reply shall contain the title and docket or petition number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefor.

(b) Any motion or request, or opposition thereto, and any reply shall be signed by the party filing or by the party's representative, and a copy shall be served on all parties. Service shall be in a manner as prescribed in Section 355(c) and proof of such service meeting the requirements of Section 355(c) shall be filed with the Appeals Board.

(c) Unless otherwise ordered, the following dates shall apply to motions or requests:

(1) The Appeals Board shall notify the parties at least 60 days prior thereto of the date of last day for making motions or requests relating to any proceeding under reconsideration.

(2) A motion or request shall be served and filed no later than 30 days before the the date so specified by the Appeals Board as the last date for making such motion or request, as provided in 392.4(c)(1).

(3) Any opposition to such motion or request shall be served and filed no later than 10 days from service of the motion or request.

(4) Any reply papers shall be served and filed no later than 10 days before the date specified by the Appeals Board in 392.4(c)(1).

(d) A request to file a motion, request, opposition or reply later than the times specified in 392.4(c) may be granted in the Appeals Board's discretion if accompanied by a declaration showing good cause for the late filing.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 6618 and 6620, Labor Code.

Section 392.5. Availability of Hearing Tapes Recording Media

(a) The Appeals Board shall promptly ~~mail~~ provide a copy of the ~~hearing tape(s)~~ recording of the hearing to any requesting party upon receipt of a written request. The request may be made in person, by mail, or by facsimile.

(b) A party may request that the ~~tape(s)~~ recording copy be sent via overnight delivery.

(c) The requesting party shall bear the cost of reproduction and ~~postage~~ delivery.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 149.5, 6621 and 6629, Labor Code.

PROPOSED MODIFICATIONS

(Modifications are indicated in: bold for existing language that was planned for deletion but will be retained; bold, double underline wording for new language; and bold, strikeout for deleted language.)

(Only modified sections are included.)

California Occupational Safety & Health Appeals Board's
Modifications to Regulatory Proposal
Changes to Title 8, Chapter 3.3, Articles 1, 1.5, 4 and 5
Sections 350.1, 355, 386, and 392.4

Article 1 GENERAL

Section 350.1 Authority of Administrative Law Judges

(a) In any proceeding assigned for hearing and decision under Labor Code Sections 6604 and 6605, an Administrative Law Judge shall have full power, jurisdiction and authority to hold a hearing and ascertain facts for the information of the Appeal Board, to hold a prehearing conference, to hold a settlement conference, to compel discovery at any time in the proceeding, to issue a subpoena and subpoena duces tecum for the attendance of a person and the production of testimony, books, documents, or other things, to compel the attendance of a person residing anywhere in the state, to certify official acts, to regulate the course of a hearing, to grant a withdrawal, disposition or amendment, to order a continuance, to approve a stipulation voluntarily entered into by the parties, to administer oaths and affirmations, to rule on objections, privileges, defenses, and the receipt of relevant and material evidence, to call and examine a party or witness and introduce into the hearing record documentary or other evidence, to request a party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding, to extend the submittal date of any proceeding, to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings and decisions as may be necessary for the full adjudication of the matter, or take other action during the pendency of a proceeding to regulate the course of a prehearing, hearing, or settlement conference, that is deemed appropriate by the Administrative Law Judge to further the purposes of the California Occupational Safety and Health Act. Final orders, findings, and decisions issued by an Administrative Law Judge shall be the orders, findings, and decisions of the Appeals Board unless reconsideration is granted.

NOTE: Authority cited: Sections 148.7, 149.5, 6604 and 6605, Labor Code. Reference: Section 11182, Government Code; and Sections 148.7, 148.8, 149.5, 6604, 6605 and 6607, Labor Code.

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Section 355 Proper Method of Service & Official Address of Record

(a) The Appeals Board shall maintain in each proceeding an official address of record which shall contain the names and addresses of all parties and intervenors and their representatives, ~~agents, or attorneys of record~~. ~~Any change or substitution in such information must be communicated promptly in writing to the Appeals Board.~~

Documents sent by the Appeals Board to the official address of record for the employer that are returned or undeliverable may result in dismissal of the appeal if the Appeals Board is unable to effectively communicate with the employer.

(b) ~~Any change or substitution in the names and addresses of allny parties or and intervenors and, or its their representatives, agents, or attorneys of record must be communicated, in writing, promptly, and in no case more than 30 days after the change, in writing to the Appeals Board's Sacramento office. The written communication must also be served on all parties and intervenors.~~ Failure to communicate changes or substitutions promptly in writing by the employer may result in dismissal of the appeal if the Appeals Board is unable to effectively communicate with the employer.

(c) Service on a party or intervenor who has appeared through a representative shall be made upon such representative.

(d) Unless otherwise required, service may be made by personal delivery or by depositing the document in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first-class postage prepaid, by deposit with a carrier guaranteeing overnight delivery, or by facsimile ("FAX") machine, as provided in subsections (i) and (j) below.

(e) Service is complete at the time of personal delivery or mailing.

(f) Proof of service shall be filed with the document and may be made by any of the following means:

(1) Affidavit or declaration of service by personal delivery, mail, overnight courier or FAX;

(2) Written statement endorsed upon the document served and signed by the party making the statement; or

(3) Letter of transmittal.

(g) Proof of service by the Appeals Board may be made by endorsement on the document served, setting forth the fact of service on the persons listed on the official address record on the date of service. The endorsement shall state whether such service was made personally, by mail, overnight courier or FAX, the date of service and the signature of the person making the service.

(h) Where service is made by the posting of a document, citation, notice, order or decision, proof or certification of such posting shall be filed with the issuing office of the Division not later than the second working day following the posting.

(i) The Appeals Board may serve documents on parties and parties may file documents with the Appeals Board and serve them on other parties by means of FAX under the following conditions:

- (1) The length of the document to be filed and/or served shall be no more than twelve (12) pages including cover page and attachments;
 - (2) A cover sheet shall be attached containing the number of pages transmitted, the FAX number of the sender, the sender's telephone number, and the name of a contact person;
 - (3) If a document is filed by FAX, all parties shall be served in the same manner or by guaranteed overnight delivery. The FAX transmission shall include a proof of service indicating the method of service on each party.
- (j) A document is considered received on the following working day if transmission begins later than 5:00 p.m. Pacific Time.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

ARTICLE 4. HEARING

Section 386. Post Submission Amendments

- (a) The Appeals Board may amend the issues on appeal or the Division action after a **proceeding is submitted for decision both parties have presented evidence** in order to:
- (1) Correct a clerical error;
 - (2) Address an issue litigated by the parties;
 - (3) Amend the section number cited in the citation if the same set of facts apply to both the cited and proposed sections; or
 - (4) Amend any part of the Division action to conform it to a statutory requirement.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 6603(a), Labor Code; Section 11516, Government Code.

ARTICLE 5. RECONSIDERATION

392.4 Motions During Reconsideration Process

- (a) Any motion or request for action, any opposition thereto, and any reply relating to any proceeding under reconsideration by the Appeals Board shall be in writing and directed to the Appeals Board's Sacramento office. The caption of each motion, request, opposition or reply shall contain the title and docket or petition number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefor.
- (b) Any motion or request, or opposition thereto, and any reply shall be signed by the party filing or by the party's representative, and a copy shall be served on all parties. Service shall be in **a the manner as** prescribed in Section 355(c) and proof of **such** service meeting the requirements of Section 355(c) shall be filed with the Appeals Board.
- (c) Unless otherwise ordered, **the following dates shall apply to motions or requests a motion or request may be served and filed at any time after reconsideration has**

been granted, but no later than 30 45 days before the date set forth in subsection (1) below:

(1) The Appeals Board shall notify the parties at least 690 days prior thereto of the date of last day for making motions or requests relating to any proceeding under reconsideration.

(2) A motion or request shall be served and filed no later than 30 45 days before the date so specified by the Appeals Board as the last date for making such motion or request, as provided in 392.4(c)(1).

(3) Any opposition to such motion or request shall be served and filed no later than 130 days from service of the motion or request.

(4) Any reply papers shall be served and filed no later than 150 days before the date specified by the Appeals Board in 392.4(c)(1) from service of the opposition papers.

(d) A request to file a motion, request, opposition or reply later than the times specified in 392.4(c) may be granted in the Appeals Board's discretion if accompanied by a declaration showing good cause for the late filing.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 6618 and 6620, Labor Code.