

NOTICE OF OSHAB PROPOSED RULEMAKING
Modifying Requirement to Produce Citations on Appeal and Modifying Discovery Rules

The Occupational Safety and Health Appeals Board (“Board”) proposes to adopt the proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed actions.

PUBLIC HEARING

The Board will hold a public hearing on **August 22, 2019**, at its normally scheduled public meeting held at 2520 Venture Oaks Way, Suite 300 in Sacramento, CA 95833 and 100 North Barranca Street, Suite 410, West Covina, CA 91791 at 9:30 a.m. The locations are wheelchair accessible. At the hearing, any person may present statements orally or in writing relating to the proposed action described in the Informative Digest. The Board requests, but does not require, that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory actions to the Board. Comments may also be submitted by email to **ajackson@dir.ca.gov**. The written comment period closes at 5:00 p.m. on **August 22, 2019**. The Board will consider only those comments received at the Board offices by that time. Written comments should be submitted to:

Aaron Jackson, Staff Counsel
Cal/OSHA Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833

AUTHORITY AND REFERENCE

Labor Code (LC) section 148.7 authorizes the Board to adopt, amend, or repeal rules of practice and procedure pertaining to hearing appeals and other matters falling within its jurisdiction. The Board is charged with hearing and resolving appeals filed by employers for occupational safety and health citations issued by the Division of Occupational Safety and Health (Division).

INFORMATIVE DIGEST/ POLICY STATEMENT OVERVIEW

The Board initiates this rulemaking to modify its Rules of Practice and Procedure. The Board consists of three-members appointed by the Governor and confirmed by the Senate. The Board hears and resolves appeals from private and public-sector employers regarding citations issued by the Division alleging violations of workplace safety and health laws and regulations. Appeals are

initially held before an Administrative Law Judge (ALJ) appointed by the Board. If a party is dissatisfied with the ALJ's decision, a party may request reconsideration by the Board. The Board may also reconsider a matter on its own motion.

The Board proposes to make several modifications to its Rules of Practice and Procedure to add greater clarity and transparency to the Board's current practices, and to provide greater efficiencies in its proceedings.

The Board proposes several modifications to California Code of Regulations, title 8, sections 359.1 and 361.3. The Board's rules do not currently distinguish between a docketed and a perfected appeal; the terms are functionally synonymous. In order for an employer's appeal to be docketed and perfected, section 359.1 requires, among other things, that the employer provide the Board copies of the citations it is appealing. The Board proposes modifications to sections 359.1 and 361.3 that will eliminate the requirement that the employer provide the Board copies of the citations it is appealing. The Board proposes instead to require that the Division provide copies of the appealed citations. To remove the requirement that an employer provide copies of the citations being appealed and place that burden on the Division, it is necessary for the Board to modify its rules concerning docketing and perfecting an appeal. The Board will need to distinguish the procedures for docketing and perfecting an appeal, and allow an employer's appeal to be docketed before it is deemed perfected. The Board will have to delay determination of whether an appeal has been perfected until after it receives a copy of the appealed citations from the Division.

The Board proposes modifications to sections 359.1 and 361.3 that will allow an employer's appeal to be docketed, without first being perfected, when it provides the Board certain basic information, such as its contact information, the inspection number, the citation and item numbers it is appealing, and the components of the citation(s) it is challenging. An employer need not provide the Board a copy of the citations it is appealing. Once the appeal is docketed, the Board will serve on the parties a "Notice of Docketed Appeal." After service of this notice, the Division will have 15 working days to provide the Board a copy of all the citations being appealed. Once the Division provides a copy of the citations being appealed, if the Board determines that the employer's appeal was initiated timely and all required information has been properly submitted, the employer's appeal will then be deemed perfected and the Board will provide the parties a notice advising that the appeal has been perfected.

Further, the proposed revisions to section 359.1 will specify that party discovery may commence upon perfection of an appeal. The Board will provide the parties a notice informing them of their right to conduct discovery. The notice shall inform the parties of the discovery mechanisms available under its regulations, including those contained in sections 372, 372.1, 372.2, and 372.3.

The Board also proposes to reword certain portions of section 359.1 and 361.3 to make them more readily understandable and proposes a modification to the title of section 359.1.

The aforementioned changes to sections 359.1 and 361.3, which modify the Board's rules concerning docketing and perfecting an appeal, will require modification to several other regulations in order to make the Board's rules internally consistent. The Board proposes changes to the definitions contained in section 347 to make them consistent with the proposed changes to sections 359.1 and 361.3. The definition of "Docketed" will be modified to reflect that an appeal need not be perfected in order to be docketed. Further, a definition will be created for "Docket Number," which provides that the docket number will be the same as the inspection number.

The Board also proposes modifications to section 373, concerning expedited proceedings, to make it consistent with the changes to sections 359.1 and 361.3. Specifically, the Board proposes to modify section 373, subsection (c), to require that the Board provide an employer a copy of the notice advising that the appeal has been perfected. The Board also proposes to alter section 373, subsection (c)(1) to require, in expedited proceedings, that a telephonic status conference be held within 30 days of perfection of the appeal, rather than within 30 days of docketing.

The Board also proposes two modifications to section 372.2 concerning the issuance of subpoenas in Board proceedings in an effort to create greater efficiencies. First, the Board proposes to modify section 372.2 to require licensed members of the California State Bar, acting in a representative capacity, to issue their own subpoenas and subpoenas *duces tecum*. Attorneys may use an optional subpoena form provided by the Board for the issuance of the subpoenas. A subpoena issued by an attorney must advise the subpoenaed party or witness of their right to file a motion to quash or modify the subpoena with the Appeals Board. Second, the Board proposes to give Board staff five working days to process requests for subpoenas, except that this time-period may be shortened on a showing of good cause.

Finally, the Board proposes the repeal of section 372.9, which requires that the Division provide employers copies of all documents and evidence in its possession within a specified 30-day period.

Anticipated Benefits of the Proposed Regulations:

Anticipated Benefits of Proposed Revisions to Sections 359.1 and 361.3—The current requirement, contained in section 359.1, that an employer provide copies of the citations it is appealing in order to docket and perfect its appeal has proven to be confusing and counterintuitive for some employers, such as small businesses, resulting in the dismissal of some appeals on procedural grounds. The Board seeks to reduce the number of appeals dismissed for procedural reasons by making the appeal and docketing process simpler for employers and removing the requirement that the employer provide copies of the citations. The Board anticipates that these

regulatory changes will reduce the number of appeals dismissed on procedural grounds and increase the number of employer appeals heard on the merits.

Anticipated Benefits of Proposed Revisions to Sections 347 and 373—The proposed changes to these rules will make them consistent with the proposed changes to sections 359.1 and 361.3, discussed above.

Anticipated Benefits of Proposed Revisions to Section 372.2—Several California jurisdictions allow licensed members of the California State Bar to issue subpoenas. It is routinely allowed by California courts and some other state agencies. (See, e.g., Code of Civil Procedure § 1985.) The Board discerns no reason why attorneys permitted to issue subpoenas in California courts should not also be allowed to do so in Board proceedings. Board staff must spend time processing requests for subpoenas, including for those parties represented by counsel. The Board anticipates that the proposed modification to section 372.2, requiring members of the California State Bar to issue their own subpoenas, will reduce the amount of Board staff time spent processing subpoena requests. This modification will ensure better utilization of Board resources. In addition, for those parties not represented by counsel who continue to request subpoenas from the Board, the proposed modification to section 372.2 allowing Board staff five working days to process subpoenas will ensure that Board staff is not unnecessarily burdened by last minute and dilatory requests for issuance of subpoenas. The proposed modification will allow Board staff to better plan and manage their workload, and promote greater efficiencies in Board operations.

Anticipated Benefits of Proposed Repeal of Section 372.9—The Board proposes repeal of section 372.9 because application of the rule is not desirable or beneficial in all cases. Section 372.9 currently requires, in each and every case, that the Division automatically provide each appealing employer copies of all documents and evidence within its possession related to the employer's appeal within a 30 day time-period. Division staff must spend time providing these documents in each case. However, not every case needs or benefits from this mandatory discovery rule. Many cases settle early without the need for an exchange of documents and evidence. In such cases, the automatic production of discovery required in section 372.9 becomes an unnecessary burden on the Division. The repeal of this section will provide greater efficiencies and ensure better utilization of resources, as the Division will only be required to produce discovery when it receives a written discovery request, i.e. where the discovery is needed and wanted by the requesting employer. The repeal of section 372.9 may also save employers money. Under section 372.9, the Division has to make copies of all documents and evidence in its file and provide them to employer. The Division requires an employer to pay a certain amount of money for these copies, e.g. 20 dollars for production of a compact disc containing data. The repeal of the section will benefit employers because they will no longer be required to incur copying charges in each and every case, but rather only in cases where they explicitly make a written discovery request.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Board has concluded that these changes related to the Board's Rules of Practice and Procedure are not inconsistent or incompatible with existing state regulations. After conducting a review for any regulations that would relate to or affect this area, the Board has concluded that these are the

only regulations that concern the Board's internal rules of practice and procedure concerning the perfection of an employer's appeal, subpoenas in Board proceedings, and the Division's production of evidence when an appeal is filed.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Board has made the following initial determinations:

Mandate on local agencies and school districts: None

Cost or savings to any state agency: There are three major elements to the Board's current proposal. The proposed rule changes will result in some additional costs and savings for both the Division and the Appeals Board. While the exact costs and savings are unknown, they should not exceed the amounts specified below.

Sections 347, 359.1, 361.3, and 373—The proposed changes to these sections will shift the duty to provide the citation package from the employer to the Division. Both the Division and Board will incur some costs as a result of this change. It is estimated that Division Management Services Technician's (MSTs) will spend 10-15 minutes per case, on average, electronically uploading the citations to the Board's electronic case file within the Board's OASIS system. The Board receives approximately 2,800 appealed cases per year. The MSTs are estimated to work at an hourly rate (with benefits) of 30.60 dollars,¹ meaning the costs for the Division's MST's to provide the citations should not exceed 21,420 dollars. (2,800 appealed cases * .25 hours * 30.60 hourly wage = 21,420 dollars.) The Board also estimates a 0.6 percent increase in the number of overall appeals it receives, representing an increase of approximately 17 appeals per year. However, the Board cannot quantify the exact costs it will incur handling this increase. It would require speculation as to whether each additional case will settle early, require a hearing, require a decision, require reconsideration, or proceed to a writ stage. No savings are anticipated from these rule changes.

Section 372.2— This rule change will require attorneys issue their own subpoenas. It is not anticipated that either the Division or the Board will incur any costs as a result of the proposed rule change. The Board will incur some savings. The Board receives approximately 1000 requests for subpoenas each year, with each taking on average 15 minutes to process. The subpoena requests

¹ The MST hourly rate was calculated using the mid-range monthly salary for the position on the Civil Service Pay Scale <https://www.calhr.ca.gov/Pay%20Scales%20Library/PS_Sec_15.pdf>. The base salary for that position was 2,822 dollars and the max salary 4,111 dollars, making the mid-range salary 3,467 dollars. The Board determined the hourly rate for the employees based on an estimate of 173.33 hours per month. The Board then added an additional 53% for other benefits. 3,467 dollar monthly salary / 173.33 hours per month = 20 dollars per hour. 20 dollars * 1.53 benefits = 30.60 dollar hourly rate with benefits.

are generally processed by a Legal Analyst, working at an estimated hourly rate (with benefits) of 43.89 dollars,² which means that the Board incurs approximately 10,972³ dollars per year in personnel costs processing subpoenas. The Board anticipates a 90 percent reduction in the amount of subpoena requests it will receive, since most subpoena requests come from attorneys. This will result in annual personnel savings of approximately 9,875 dollars.

Section 372.9—The repeal of this rule will produce savings to the Division. The Board estimates it takes on average one hour and 15 minutes for a Division MST to produce discovery to Employer. Assuming that the Division strictly complied with section 372.9 for all appealed cases, the Division would incur annual costs of approximately 107,100 dollars producing discovery for each appealed case. (2,800 appealed cases * 1.25 hours * 30.60 hourly wage = 107,100 dollars.) Following the repeal of this rule, while the Division would still be required to incur discovery production costs when a written discovery request is made, it would not automatically incur such costs in all cases as required by section 372.9. The Board estimates that at least 34 percent of cases, or approximately 952 cases annually, will settle without issuance of a written discovery request, since approximately 34 percent of cases settle within the first 90 days. Following the repeal of section 372.9, the Division may be required to produce discovery in, at most, 66 percent of cases rather than 100 percent of cases, conveying savings of 36,414 dollars. However, this projection of savings may be high. First, the projection assumes the Division's strict compliance with section 372.9, but the Board is informed that the Division does not currently strictly comply with the section meaning they are not automatically incurring such costs in all cases. Next, there are also other reasons why the projection may be inaccurate. The percentage of cases where no written discovery request is made may be higher. Therefore, the exact savings are unknown. It is not anticipated that any costs will be incurred as a result of this rule change.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None

Other nondiscretionary cost or savings imposed on local agencies: Based on a six month sample of cases (cases both opened and closed in that time period), local government entity appeals represent approximately 1.3 percent of the appeals before the Board, or approximately 36 of 2800 appealed cases per year. The Board estimates that local government entities will have representatives. Assuming there was current strict compliance with section 372.9, following the repeal of that section, if a local entity wanted discovery from the Division, their representative will

² The Legal Analyst hourly rate was calculated using the mid-range monthly salary of 4,973 dollars for the position on the Civil Service Pay Scale <https://www.calhr.ca.gov/Pay%20Scales%20Library/PS_Sec_15.pdf>. The base salary for that position is 4344 dollars and the max salary is 5602 dollars, making the mid-range salary 4973 dollars. The Board determined the hourly rate for the employees based on an estimate of 173.33 hours per month. The Board then added an additional 53% for other benefits. 4,973 dollars monthly salary / 173.33 hours per month = 28.69 dollars per hour. 28.69 dollars * 1.53 benefits = 43.89 dollars hourly rate with benefits.

³ Derived from following formula:

1,000 subpoena requests * .25 hours * 43.89 dollars hourly rate = 10,972 dollars.

have to issue written discovery request. The Board estimates the representatives charge an hourly rate of approximately 300 dollars per hour. The Board estimates that the representatives will spend no more than 15 minutes issuing a written discovery request following the repeal of rule 372.9. The costs for issuance of a discovery request will be approximately 75 dollars per case. Due to the number of cases that settle within the first 90 days, the Board estimates written discovery requests may be made in, at most, 66 percent of appealed cases, representing 24 cases. The annual costs for issuance of discovery for such local government entities may be as much as 1,800 dollars annually (24 discovery requests x 75 dollars = 1,800 dollars), but is not expected to exceed that amount. But, as discussed above, this projection may be high. The projection assumes the Division's current strict compliance with section 372.9, but the Board is informed that the Division does not currently strictly comply with the section, meaning parties already often incur such costs. Next, there are also other reasons why the projection may be inaccurate. The percentage of cases where no written discovery request is made may be higher.

Cost or savings in federal funding to the state: None

Cost impacts on a representative private person or business: There are three major elements to the Board's current proposal. While the exact costs and savings are unknown, they should not exceed the amounts specified below.

Sections 347, 359.1, 361.3, and 373—The proposed changes to these regulations remove the requirement that an appealing employer provide copies of the citations being appealed to the Board, and shifts that burden to the Division. It is estimated no business will incur costs as a result of this rule change. However, savings are anticipated from these rule changes. By removing the requirement that employer provide copies of the citations, the proposed rule changes will make it easier and more efficient for employers and their representatives to file appeals, conveying a monetary benefit and savings to some employers. For self-represented businesses or individuals, the monetary benefit will be negligible and unquantifiable. It will simply make the process of filing an appeal faster and simpler. For businesses or individuals represented by an attorney or non-attorney representative, accounting for approximately half of all appeals before the Board, savings will depend on the rate charged by the representative. The Board estimates that employers in half of all appealed cases, or approximately 1,400 cases per year, have representation. The Board estimates that it takes representatives approximately 15 minutes to submit copies of the citations to the Board during the appeal process. As discussed above, the Board estimates an average hourly rate of 300 dollars per hour. The costs for submission of the citations will be approximately 75 dollars per case for represented parties, and the elimination of that requirement will convey an annual savings of approximately 105,000 dollars. (1,400 appealed cases with representatives x 75 dollars = 105,000 dollars.)

Section 372.2—The proposed changes to this regulation require licensed members of the California State Bar to issue their own subpoenas rather than requesting them from the Board. It

is estimated that no business will incur a cost due to this proposed rule change. There are also no anticipated savings.

Section 372.9—The repeal of section 372.9, requiring the Division to automatically produce documents and evidence in its possession to an appealing employer within a specified 30-day time period may require employers to incur costs that would not be necessary were there strict compliance with section 372.9. However, the exact costs are unknown. Following the repeal of section 372.9, an employer desiring discovery will not be entitled to discovery as a matter of right, but will need to make a written request to the Division pursuant to the Board’s other discovery rules (i.e., sections 372 and 372.1). Based on a sample of approximately 900 cases, approximately 34 percent of cases will be unlikely to require discovery requests since they settle within the first 90 days. Therefore, the Board estimates that written discovery requests may be made in, at most, 66 percent of appealed cases, representing approximately 1,848 cases per year.

For self-represented businesses or individuals, the costs for requesting discovery will be negligible and unquantifiable, amounting to no more than preparation of a written request for the limited items of discovery permissible under the Board’s other discovery rules.

For business or individuals represented by an attorney or non-attorney representative, accounting for approximately half of appeals before the Board, the costs for issuance of a discovery request will depend on the rate charged by the representative, which will vary based on the representative’s experience, qualifications, attorney status, and other metrics. The Board estimates an average hourly rate for representatives of 300 dollars per hour. The Board estimates representatives will spend no more than 15 minutes issuing a written discovery request, as the Board’s discovery rules permit only limited discovery. The costs for issuance of a discovery request will be approximately 75 dollars per case for represented parties. The Board further estimates that businesses or individuals will be represented in half of all appealed cases. The annual costs for issuance of discovery for represented parties may be as much as 69,300 dollars annually (1,848 discovery requests – 50 percent of cases x 75 dollars = 69,300 dollars), but is not expected to exceed that amount. These costs would not be required if section 372.9 were in effect and strictly enforced. However, this initial cost projection may be high. The projection assumes the Division’s strict compliance with section 372.9, but the Board is informed that the Division does not strictly comply with section 372.9, meaning parties already often incur such costs issuing written discovery. Next, there are also other reasons why the projection may be inaccurate. The percentage of cases where no written discovery request is made may be higher. Thus, the exact costs are unknown.

The repeal of the automatic discovery rule may also provide some savings to employers since they will only be required to incur copying charges for discovery that they specifically request, rather than automatically incurring copying charges in all cases. The Division is entitled to receive 0.19 cents per page copied. The Division charges approximately 20 dollars for compact disks containing digital copies of the discovery file. Following the repeal of section 372.9, the Board estimates that

at least 34 percent of cases, or approximately 952 cases annually, will settle without issuance of a written discovery request. Again, approximately 34 percent of cases settle within the first 90 days (based on a sample of approximately 900 cases), conveying savings annually of as much as approximately 19,040 dollars. (952 x 20 dollars =19,040 dollars.) However, as discussed above, this projection of savings may be quite high. The projection assumes the Division's strict compliance with section 372.9 and it assumes 20 dollars for copying costs, but the Board is informed that the Division does not strictly comply with section 372.9 and that copying costs may be lower in some instances. For these reasons, the exact savings are unknown. Likewise, discovery may be requested in a smaller percentage of cases.

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None

Effect on Small Business: The Board estimates the percentage of small businesses that appeal citations to the Board correlates to the percentage of small businesses in the economy at large. Based on data received from the California Employment Development Department (EDD) approximately 81.9 percent of businesses have less than nine total employees.⁴ The effect on small business will be the same as for any employer. However, on balance, it is unlikely that the proposed regulations will negatively affect small business as these regulations generally serve to clarify the Board's policies and procedures and make the appeal process simpler for smaller employers. The Board anticipates that these regulatory changes will reduce the number of appeals dismissed on procedural grounds, particularly for small employers, and increase the number of employer appeals heard on the merits.

Results of the Economic Impact Analysis

The Board concludes that it is (1) unlikely that the proposed regulations will either create or eliminate any jobs in the State of California; (2) unlikely that the proposed regulations will lead to the creation of new businesses or the elimination of existing businesses within the State of California; and (3) unlikely that the proposed regulations will lead to the expansion of businesses currently doing businesses within the state of California.

Benefits of the Proposed Action: The procedural amendments directly benefit the health and welfare of California workers by clarifying and increasing the efficiency in the administrative process generally, which helps achieve the purpose of the Occupational Safety and Health Act and also benefits the public.

CONSIDERATION OF ALTERNATIVES

⁴ EDD, California Establishments by Size Class, Third Quarter 2017
<https://www.labormarketinfo.edd.ca.gov/file/indsize/chart_sob2017_3.pdf> [accessed 4.2.2019].

In accordance with Government Code section 11346.5 subdivision (a)(13), the Board must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the agency 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 or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Aaron Jackson, Staff Counsel
ajackson@dir.ca.gov
Cal/OSHA Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833
Phone Number: (916) 274-5751

Please direct requests for copies of the proposed text (the “express terms”) of the regulations, the initial statement of reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based to Mr. Jackson at the above address.

The designated backup contact person to whom inquiries may be made is J. Jeffrey Mojcher, and inquiries may be made to

J. Jeffrey Mojcher, Chief Counsel
jmojcher@dir.ca.gov
Cal/OSHA Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833
Phone Number: (916) 274-5751

AVAILABILITY OF STATEMENT OR REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations and the initial statement of reasons. Copies may be obtained by contacting Mr. Jackson at the contact information listed above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Board adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Mr. Jackson at the address indicated above. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Mr. Jackson at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikethrough can be accessed through our website at <https://www.dir.ca.gov/oshab/Rulemaking.htm>