NOTICE OF REQUEST FOR SECOND EXTENSION OF EMERGENCY ABATEMENT CREDIT REGULATIONS OF THE DEPARTMENT OF INDUSTRIAL RELATIONS

TITLE 8 of the CALIFORNIA CODE OF REGULATIONS
Chapter 3.2. California Occupational Safety and Health Regulations
Subchapter 1. Regulations of the Director of Industrial Relations
Article 4. Proposed Penalty Procedure
§333. Notice of Proposed Assessment of Civil Penalties
§336. Assessment of Civil Penalties

The Director of the Department of Industrial Relations finds that it is necessary to extend the effectiveness of these emergency regulations governing the granting of abatement credit for Cal/OSHA citations in order to preserve the public peace, health and safety, or general welfare, as follows:

FINDING OF EMERGENCY

The Labor Code authorizes the Division of Occupational Safety and Health ("the Division") to issue citations for violations of the occupational safety and health standards set forth in Title 8 of the California Code of Regulations ("Title 8",) and to require abatement of the workplace hazards cited. The Division may also impose civil penalties against employers for the violations it cites. The Division calculates the amount of a proposed civil penalty using factors found in Section 336 of Title 8, including, among other factors: the employer's size (number of employees;) its good faith; its history of compliance; the extent of the cited violation; and whether the violation is deemed Regulatory, General, Serious, Willful or Repeat. In addition, prior to the adoption of emergency regulations in February 2015, Section 336(e) required the Division to reduce the civil penalty by 50% *before a citation was issued,* on the presumption that an employer would abate the cited hazard by the date set for abatement in the citation. However, if an employer appealed a citation to the Occupational Safety and Health Appeals Board ("the Appeals Board",) the requirement for an employer to abate the cited hazard was stayed until the appeal was finally resolved – oftentimes several years after issuance of the citation. Moreover, since the Division automatically granted an employer the 50% abatement credit at the time the citation was issued, there was often no monetary incentive for an employer to abate the cited hazard unless and until the citation was finally affirmed. As a result, under prior law, hazardous work place conditions could go uncorrected for long periods of time, subjecting employees to the potential of serious injuries while the appeal process continued and before the Division could compel an employer to abate.

To encourage more rapid abatement of work place hazards, the Legislature amended Labor Code sections 6319, 6320, and 6625 to prohibit the Division from granting an abatement credit for *Serious* violations (those violations which could reasonably cause death or serious injury – see Labor Code section 6432) unless the employer has actually abated the hazardous condition. (Stat. 2014, chap. 497 [A.B. 1634].) Abatement may be verified either directly by a Division compliance officer during the course of an onsite inspection, or by an employer's statement of abatement (accompanied by supporting evidence) received by the Division within 10 working days after the end of the period fixed for abatement in the citation. These requirements became effective January 1, 2015, and are applicable to citations issued as a result of inspections commenced after that date.

In order to implement the new requirements of A.B. 1634, the Director of the Department of Industrial Relations amended two sections of Title 8 through emergency regulations. First, the Director amended Section 336(e) to delete the language that creates the automatic and prospective 50% abatement credit for Serious citations, and to replace it with an abatement credit that is conditioned upon the employer timely showing actual proof of abatement. It was necessary to promulgate this amendment as an emergency regulation, as the Division would begin issuing citations as a result of inspections opened in Calendar Year 2015 as early as late January. Thus, absent the emergency regulations, the Division would have found itself in a position where it would have had to violate the Director's penalty-calculation regulations in order to comply with the new requirements of A.B. 1634.

To avoid this legal conflict in the future, it is necessary to extend the emergency regulations, because they further the goal of A.B. 1634 by encouraging employers to correct serious unsafe and unhealthy workplace conditions within *days* after receipt of a citation in order to receive the 50% civil penalty reduction, rather than potentially waiting up to several *years* to abate once all appeals of a citation have been exhausted. Extending these emergency regulations will allow the safety and health benefits of A.B. 1634 to continue in effect.

In addition, the Director had to immediately amend Section 333 of Title 8 to resolve another related conflict. Under Section 333 (as it existed prior to the emergency regulations,) if an employer failed to notify the Appeals Board in writing of its intention to contest a citation within 15 working days from the date it received a citation and civil penalty, then the citation and civil penalty were deemed a final order of the Appeals Board, not subject to review by any court or agency.

The conflict arises because A.B. 1634 provides that an employer is entitled to an abatement credit if it delivers proof of abatement to the Division within 10 working days of the date set for abatement in the citation. In many cases, the Division reasonably must allow 14 days, and sometimes longer, for an employer to abate violations. Thus, an employer need not submit proof of abatement until 10 working days *after* the 14-day abatement period is over – well after the 15-working-day period for appealing a citation has lapsed. However, since an unappealed citation will have become a final order before the date abatement is due, the Division will lose the authority to lower the civil penalty by granting the earned abatement credit. Absent the Director's amendment to Section 333 in the emergency regulations, employers would potentially appeal every Serious citation alleging violations that are unabated at the time of issuance, just to preserve the Division's ability to grant the earned abatement credits. Consequently, the emergency regulations are necessary to comply with A.B. 1634, to ensure that the Division retains the ability to grant employers earned abatement credits, and to prevent the necessity for employers to appeal every Serious citation to the Appeals Board.

There was not sufficient time following the adoption of A.B. 1634 for the Director to address these problems through nonemergency regulations, so the Director implemented the necessary changes as emergency regulations. The Director extended the emergency regulations for 90 days, effective August 10, 2015 and expiring November 10, 2015. On October 9, 2015, the Division conducted the public hearing as part of the certificate of compliance (regular rulemaking) process. From the comments at the hearing, it became apparent that the Division will have to send amended language out for a 15-day comment period. Since the first 90-day extension of the emergency regulations expires on November 10, the Division must request a second extension of the emergency regulations to give it time to send out the notice of 15-day changes before the emergency regulations expire.

STATEMENT UNDER TITLE 1, CALIFORNIA CODE OF REGULATIONS, §48

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action (or extension of a prior emergency action) to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency rulemaking to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

Title 1, California Code of Regulations, section 55(b) sets forth the requirements for submitting comments to the Office of Administrative Law on the proposed emergency action. Comments must be in writing, must identify the topic of this rulemaking, and must be submitted directly to the Office of Administrative Law as follows:

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339
Fax: (916) 323-6826
e-mail: staff@oal.ca.gov

In addition, a copy of the comments must be transmitted to the Department's contact person for this rulemaking. To ensure prompt receipt and consideration of your comments, the Department requests that you transmit a copy either by e-mail to cgrossgart@dir.ca.gov, or by fax, to the attention of Chris Grossgart, at (510) 286-7039.

AUTHORITY AND REFERENCE

Section 333
Authority cited: Sections 54, 55 and 6319, Labor Code. Reference: Section 6319, Labor Code.

Section 336
Authority cited: Sections 54, 55, 6319, 6319.3, 6401.7 and 9060, Labor Code. Reference: Sections 6314.5, 6318, 6319, 6320, 6401.7, 6409.1, 6427-6432, 6434, 7320, 7321, 7321.5, 7381 and 9060, Labor Code.

INFORMATIVE DIGEST

Labor Code section 6307 provides that the Division has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary adequately to enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment.

Labor Code section 6317 authorizes the Division, after inspecting a place of employment, to issue citations to an employer for violations of Title 8 discovered during the inspection. Section 6317 also allows the Division to impose proposed civil penalties for the citations it issues.

Labor Code section 6319 requires the Director of the Department of Industrial Relations to promulgate regulations governing the assessment of civil penalties for cited violations. In promulgating these regulations, the Director must consider, among other factors, whether the employer has timely abated the violations. Prior to the adoption of the existing emergency regulations, the Division had to reduce the proposed civil penalty for cited violations by 50% at the time of issuance, on the presumption that an employer would abate the violations by the date the Division fixed in the citation for abatement. (Title 8 § 336(e).) In other words, the Division granted the employer a 50% abatement credit *prospectively*, before an employer received the citation or was required to abate the subject violative condition.

Effective January 1, 2015, the Legislature amended Labor Code sections 6319 and 6320 to prohibit the Division from granting an abatement credit unless the employer has abated the violation while the Division's inspection is ongoing or unless the employer submits evidence of abatement within 10 working days after the end of the period the Division has fixed for abatement in a citation.

These proposed emergency regulations (which the Director now seeks to extend) amended Section 336 of Title 8 to reflect these new abatement requirements, specifically:

1. Section 336(e) governs abatement credit for General and Serious violations. The emergency regulations divide Subsection (e) into subsections (e)(1,) relating to abatement credits for General violations and subsection (e)(2,) relating to abatement credits for Serious violations. The proposed emergency regulations delete provisions relating to the abatement of Serious violations from subsection (e)(1).

2. The emergency regulations add subsection (e)(2) to govern abatement credit for Serious citations. Thus, for Serious violations not listed in subsection (e)(3), the Division will not grant an abatement credit unless the employer has either: (a) abated the violation during the course of the Division's inspection and before the issuance of a citation; or (b) submitted to the Division a signed statement with supporting evidence showing abatement of the Serious violation within 10 working days after the end of the period the Division fixed for abatement in the citation.

3. Subsection (e)(3) of the emergency regulations lists the types of Serious violations that are not subject to an abatement credit, including: (a) Serious citations with high Extent and Likelihood modifiers; (b) citations classified as "Repeat Serious" and "Willful Serious;" (c) Serious violations respecting the use of a carcinogen; and (d) Serious violations causing death or serious injury, illness, or exposure as defined in Labor Code section 6302. Subsection (e)(3) contains no new regulatory requirements and merely re-organizes existing codified language for ease of reference.

The emergency regulations also make changes to Section 333 of Title 8. Prior to the adoption of the emergency regulations, if an employer failed to notify the Appeals Board in writing of its intent to contest a citation within 15 working days from the date it received a citation and civil penalty, then the citation and civil penalty were deemed a final order of the Appeals Board, not subject to review by any court or agency. The emergency regulations add the words "Final Order" to the title of Section 333. In addition, the emergency regulations create an exception in the "final order rule" of Section 333 to allow the Division to modify the civil penalty of a citation pursuant to Section 336(e)(2) even if the citation has become a final order by operation of law, and further specify that any such modification to the civil penalty is not appealable to the Appeals Board.

Inconsistency or Incompatibility with Existing State Regulations:

The Proposed Rulemaking is not inconsistent or incompatible with existing state regulations.

Technical or Theoretical, or Empirical Studies, Reports, or Documents Relied on:

None.

Mandate on Local Agencies or School Districts:

The Division has determined that this proposed regulatory action would not impose a mandate on local agencies or school districts.

FISCAL IMPACT STATEMENT

A. Cost or Savings to any state agency: NONE

B. Cost to any local agency required to be reimbursed under Part 7(commencing with Section 17500) of Division 4: NONE

C. Cost to any school district required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4: NONE

D. Other nondiscretionary cost or savings imposed on local agencies: NONE

E. Cost or savings in federal funding to the state: NONE

STATEMENT CONFIRMING COMPLIANCE WITH GOVERNMENT CODE § 11346.1(a)(2)

(Title 1 CCR section 50(a)(5)(A))

The Division has complied with the provisions of Government Code section 11346.1(a)(2), regarding the sending of notice of proposed emergency regulations action to every person who has filed a request for notice of regulatory action. The notice was sent electronically on July 22, 2015, to members and attendees of the Cal/OSHA Advisory Committee, as well as other members of the public who have requested notice of regulatory actions at least five working days prior to submission to the Office of Administrative Law.