

INITIAL STATEMENT OF REASONS

OSHAB STAY OF ABATEMENT REGULATIONS

The Occupational Safety and Health Appeals Board (Board) proposes to adopt regulations to implement the changes set forth in AB 1634, Occupational Safety and Health: Violations (Amending Labor Code 6319, 6320 and 6625, relating to employment).

PROBLEM STATEMENT:

Rules 362, 364, 364.1 —Changes Based on AB 1634

The Board proposes changes to Rules 362, 364, 364.1 to address the below listed problems:

The Legislature on September 20, 2014 adopted AB 1634, Occupational Safety and Health: Violations (Amending Labor Code 6319, 6320 and 6625, relating to employment) to prohibit the Division of Occupational Safety and Health (“the Division”) from granting, for serious violations, a proposed modification to civil penalties for abatement or credit for abatement unless the employer has abated the violation or submitted a statement and/or evidence establishing the hazard has been abated in accordance with existing law.

AB 1634 also prohibits the stay or suspension of a requirement to abate the hazards affirmed by a decision or order of the Board that is classified as a serious violation, willful serious, or repeat serious. The law authorizes the Board to stay or suspend an affirmed abatement requirement upon petition by the employer only if the employer demonstrates that a stay or suspension will not adversely affect the health and safety of employees.

Due to these changes, the Board’s Rules of Practice and Procedure no longer conform to the Labor Code, and must be changed to conform with the law.

BENEFIT STATEMENTS:

Rules 362, 364, 364.1 —Changes Based on AB 1634

The Board proposes the changes to Rules 362, 364, 364.1 to provide the below listed benefits:

These new regulations will put the Board’s procedures into conformance with the amendments to the Labor Code made by AB 1634, and provide the regulated community with guidance in filing for a stay of abatement under the new statutory language. Pursuant to the amended Labor Code, the regulations will encourage employers to quickly demonstrate that they have abated any hazards that threaten the health and safety of their employees. The change also will allow the Board to use the discretion it currently has under Labor Code section 6625 to stay, postpone, or suspend an order or decision of the Board after a petition for reconsideration has been filed, or to allow the order or decision to have effect. Currently, the regulation has removed the Board’s

discretion and grants an automatic stay in all pending appeals. This will positively impact the health and safety of employees who were previously exposed to violative conditions in the workplace.

PURPOSE STATEMENT:

Section 362: To clarify the Board's current rules of practice and procedure when parties seek to comply with the amendments to Labor Code 6625. Labor Code section 6625 specifies that abatement of the hazard in a citation classified as serious, repeat serious and willful serious must occur when a final decision or order of the Board is rendered, unless certain procedures are followed. The section specifies the procedures wherein a party may petition for a stay or suspension of the requirement to abate the hazard of a serious, repeat serious, or willful serious citation that has been affirmed by a decision or order of the Board. The amendment makes specific section 6625(b), which requires employers who are appealing serious, repeat serious, or willful serious cases in a petition for reconsideration to make a showing that the stay will not negatively impact employee health before the Board may grant a stay of abatement. Additionally, for citations not classified as serious, repeat serious, or willful serious, the amendment conforms rule 362 to the actual language of Labor Code 6625 by permitting the Board to exercise discretion not to stay a decision or order of an ALJ. The Board's current rule does not allow the Board to exercise any discretion and creates a mandatory stay in all cases.

Section 364: To specify that an employer may withdraw its appeal before a final decision of the Board. Employees or obligors may request reinstatement of the appeal for certain stated grounds as listed in the regulation, and must make their motion for reinstatement within 30 days. Creates a more efficient means for employers to settle and withdraw appeals with the Division.

Section 364.1: To conform the Board's current rules of practice and procedure to the amendments Labor Code section 6319(g). To specify that the Division may withdraw part of its action by issuing an amended Citation that removes an item alleging a violation or reducing a proposed penalty. By this change, the Division does not need to file a motion in order to grant an employer an abatement credit. A more efficient means of allowing the parties to reflect an abatement credit than the Board's current rules allow.

NECESSITY:

Section 362: Implements the new statutory procedure by amending the Board's rules of practice and procedure to reflect the changes in the Labor Code, so that the regulated community receives accurate information when referencing the Board's rules regarding filing for a stay of abatement. In serious, serious, repeat serious, or willful serious cases, the proposed regulation requires the employer to file for a stay or suspension of the requirement to abate the hazards affirmed by a decision or order of the Board. In all other classifications of citations, including general citations, there is an automatic stay during the pendency of reconsideration unless the Board

orders otherwise. The regulation states that the employer must demonstrate by a preponderance of the evidence that the stay of abatement will not adversely affect the health or safety of employees, and may do so through filing a written verified petition with supporting declarations, within 10 days after the issuance of the order or decision. Affected employees may respond to the petition for a stay in 7 days. The Board decided it will answer the petition within 30 days, or if the petition is not answered within 30 days, the Board shall consider the petition denied, because this assures the parties of a rapid and clear determination on a stay request. Further challenge may then proceed to Superior Court. This requirement will prevent unabated conditions from existing when Board workload is heavy.

Section 364: Change allows the employer or obligor to more expeditiously withdraw an appeal before hearing. The withdrawal may be reinstated by the Board upon showing of certain specified grounds. Necessary for timely and efficient processing of those appeals that have been settled, particularly where the only issue had been abatement, and the parties were able to come to a settlement and the employer is no longer pursuing the appeal.

Section 364.1: Changes in 2014 to Labor Code section 6319(g) make abatement credits to civil penalties only allowable in serious cases once the employer has demonstrated abatement of the violation to the Division. The proposed regulation changes the Board's current rules of practice and procedure to allow the Division to modify the citation to reflect abatement credits without requiring the filing of a motion. The amendment allows the parties to withdraw an appeal that has been settled once an abatement credit has been issued, without action on the part of the Board, removing unnecessary clerical work from the ALJ's workload. This will allow the employer, Division and the Board to quickly and efficiently dispose of appeals that were filed and settled once the abatement credit issue was resolved.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS:

The Board reviewed internal statistics measuring the number of appeals of citations involving abatement as an issue as it drafted this regulation.

SPECIFIC TECHNOLOGY OR EQUIPMENT:

This proposal will not mandate the use of specific technologies or equipment.

ECONOMIC IMPACT ASSESSMENT:

Economic Impact Assessment per Government Code section 11346.3, subdivision (b):

For amendments to Cal/OSHA Appeals Board Rules of Practice and Procedure

Action: The changes that are proposed seek to conform the Board's Rules of Practice and Procedure to recent changes in the Labor Code, enacted in AB 1634.

Impact: By statute, the Appeals Board is only authorized to enact rules of procedure and cannot alter, create or diminish substantive rights of those affected by the Occupational Safety and Health Act.

Economic Impact Assessment

The proposed regulations (sections 362, 364, and 364.1) are necessary for the Board to implement changes to the Labor Code signed into law on September 20, 2014. The proposed regulations will clarify the Board's rules of practice and procedure, and will ensure that staff and the regulated community have a common understanding of AB 1634, and are implementing it in a consistent manner. The regulations ensure that the parties have a clear understanding as to how to file for a stay of abatement under the Labor Code. The proposed regulations ensure consistent application and implementation of the new statute for all stakeholders impacted by AB 1634, and are reasonably necessary to effectuate the statute. Again, clarity of rules and increased efficiency and transparency in the Board's regulations will lead to a lesser burden on stakeholders to appear before the Board, and eliminate costs associated with protracted litigation, which is beneficial for all businesses.

The Board reviewed data for serious appeals involving an abatement issue. These are relatively rare appeals (less than five a year) and the Board does not see a trend, based on the data, of an increase in these kinds of appeals. There is no indication that the change in regulations will create any significant adverse economic impact on businesses. For businesses that file an appeal at the Board, the costs involved are the cost of postage and paper, and labor for preparing the filing. It is not anticipated that this change in the regulations will have more than a de minimis economic impact on businesses.

(1) CREATION/ELIMINATION OF JOBS WITHIN THE STATE OF CALIFORNIA

The Board finds it unlikely that the regulations related to implementing rules of practice and procedure related to AB 1634 will have any impact on the creation of jobs in the state of California. The regulations are primarily intended to clarify for the regulated community how the law is to be implemented and interpreted at the Board. The regulation clarifies for the parties how to apply for a stay of abatement (section 362) and how to implement an abatement credit that may be granted by the Division of Occupational Safety and Health during the pendency of an appeal (sections 364 and 364.1). There may be some increased workload on the Board staff, but that workload may be absorbed by existing resources and not involve creation of jobs.

(2) CREATION OF NEW OR ELIMINATION OF EXISTING BUSINESSES WITHIN THE STATE OF CALIFORNIA

It is estimated that no businesses within the State of California will be created or eliminated by these proposed regulations which serve only to identify the procedures necessary for the Board to implement AB 1634, and to clarify Board rules of practice and procedure for appealing a citation.

(3) EXPANSION OF BUSINESSES WITHIN THE STATE OF CALIFORNIA

It is not expected that any business will find reason to expand its business based on these regulations.

(4) BENEFITS OF THE REGULATION TO THE HEALTH AND WELFARE OF CALIFORNIA RESIDENTS, WORKER SAFETY, AND THE STATE'S ENVIRONMENT

To the extent that these rules make it easier for the regulated community to follow and comply with AB 1634, an Occupational Safety and Health statute, the regulations will have a positive impact on California's working people. The regulations provide procedures which clarify the statute, and ensure that the regulated community, including employers, employees, the Division, and Board staff, have a clear understanding of how a stay of abatement may be applied for, the timelines for application, and when a Board's decision related to a stay may be appealed. Efficient processing and resolution of a stay issue is in the interest of all parties and will ensure that dangerous conditions are abated in a timely manner. Procedures allowing for streamlined processing of earned abatement credits also encourage more expeditious resolution of dangerous or unhealthy workplace conditions.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES:

No reasonable alternatives have been identified by the Board or have otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed, 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.