

NOTICE OF PROPOSED RULEMAKING OSHAB STAY OF ABATEMENT REGULATIONS

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 action.

PUBLIC HEARING

The Board will hold a public hearing on Thursday, March 3, 2016 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 relevant 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 agonzalez5@dir.ca.gov. The written comment period closes at 5:00 p.m. on **March 3, 2016**. The Board will consider only comments received at the Board offices by that time. Submit written comments to:

Autumn Gonzalez
Cal/OSHA Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833

AUTHORITY AND REFERENCE

Labor Code 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 Occupational Safety and Health Appeals Board (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. The proposed regulations implement, interpret, and make specific Labor Code Section 6603.

INFORMATIVE DIGEST/ POLICY STATEMENT OVERVIEW

The Board initiates this rulemaking to update its Rules of Practice and Procedure. The Board consists of three members appointed by the Governor, and confirmed by the Senate. The Board handles appeals from private and public-sector employers regarding citations issued by the

Division of Occupational Safety and Health for alleged violation of workplace safety and health laws and regulations. These appeals are heard in two stages. Initial appeals are held before an Administrative Law Judge (ALJ) appointed by the Board; an appeal of the ALJ decision may be heard by the Board. The mission of the Appeals Board is to fairly, timely and efficiently resolve appeals and to provide clear, consistent guidance to the public, thereby promoting workplace safety and health.

Proposed rule 362 implements, and makes specific, the changes made by the Legislature to Labor Code sections 6625 that became effective January 1, 2015, through AB 1634, regarding the extent of a stay of the citation and abatement order during the pendency of an appeal before the Appeals Board. Labor Code section 6625 now allows for a stay of serious, repeat serious, or willful serious citations and abatement pending an appeal only to the time when the initial decision by the first level hearing officer is issued, and allows for an additional stay of abatement only upon request to the Appeals Board. Existing Board rule 362 grants a stay until the exhaustion of the administrative proceeding. The rule is inconsistent with the terms of the amended Labor Code. Labor Code Section 6625(a)(2) grants the Board authority to stay, suspend, or postpone an order or decision during the pendency of reconsideration upon the same terms by which it directs reconsideration. Labor Code Section 6625(b) states that the filing of a petition for, or the pendency of, reconsideration of a final order or decision involving a citation classified as serious, repeat serious, or willful serious shall not stay or suspend the requirement to abate the hazards affirmed by the decision or order unless the employer demonstrates by a preponderance of the evidence that a stay or suspension of abatement will not adversely affect the health and safety of employees. The employer must request a stay or suspension of abatement by filing a written, verified petition with supporting declarations within 10 days after the issuance of the order or decision. The proposed regulations will provide parties with clarity as to how to file a petition with supporting declarations to request a stay or suspension of abatement. The regulations will also define the procedures by which the Board will consider and respond to that request.

Changes to rule 364 Withdrawal of Appeal and 364.1 Withdrawal of Division Action also assist in implementation of Labor Code section 6625, and other changes to the Labor Code made by AB 1634. The proposed changes in rule 364 allow the Division, employers and obligors to more expeditiously withdraw an appeal once a settlement is reached. Changes in Section 364.1 allow the Division to amend a citation to grant an abatement credit once the employer has met the criteria established for awarding such credit as defined in Labor Code 6319(g). The regulation would allow the amended citation to have immediate effect, rather than requiring the Division to file a motion to amend its citation. The proposed changes also allow the parties to withdraw an appeal once a citation is amended to reflect an abatement credit, should that credit be the only matter at issue in an appeal, without action on the part of the Board.

Anticipated Benefits of the Proposed Regulations:

The proposed regulations will conform the Board's current rules of practice and procedure to the Labor Code, and provide clarity to the parties who are tasked with following the requirements of the Labor Code. The broad objective of the regulation is to ensure that all parties have an understanding as to how to apply for a stay of abatement, and the procedures that govern the Board's decision-making in granting a stay. The specific benefits anticipated from this regulation are increased clarity in the Board's regulations, allowing all parties to use the appropriate procedures to apply for a stay or to answer a stay petition. The regulations related to section 6319(g) will allow the Division to quickly amend a citation without the need to file a motion. This will make it possible for an appeal to move forward in an efficient manner. If an employer filed an appeal only to resolve an abatement credit issue, the parties will be able to withdraw the appeal without delay. This will lead to greater procedural efficiency.

The regulation ensures that the Board's rules of practice and procedure are in conformance with the amended Labor Code. This will further ensure that the parties are clear as to how to exercise their rights, and how the Board will apply the amended Labor Code in appeal procedures.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Board has determined that the proposed regulations related to Labor Code section 6625 are not inconsistent or incompatible with existing regulations. The Division of Occupational Safety and Health has an emergency regulation for an abatement credit related to section 6625 that the Board has determined is consistent with its current regulations and those changes proposed herein. 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 abatement credit and the stay of abatement period.

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: None

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: None

Cost or savings in federal funding to the state: None

Cost impacts on a representative private person or business: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant statewide adverse economic impact directly affecting businesses and individuals:
None

Significant effect on housing costs: None

Results of the Economic Impact Analysis

The Board concludes that it is: (1) unlikely that the proposed regulations will 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, because the amendments update Title 8 regulations to reflect procedural requirements currently in existence in the Labor Code. These changes are currently in effect and the proposed regulations will conform the Board's regulations and processes to those changes.

Benefits of the Proposed Action: To the extent that these rules make it easier for the regulated community to follow and comply with AB 1634, 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 is applied for, the timelines for application, and when a Board's decision related to a stay can 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.

CONSIDERATION OF ALTERNATIVES

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 affective 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:

Autumn Gonzalez
Agonzalez5@dir.ca.gov
Cal/OSHA Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833

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 Ms. Gonzalez at the above address.

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, the initial statement of reasons and the notices and meeting minutes of the November 6, 2014 and March 5, 2015 stakeholder meetings. Copies may be obtained by contacting Ms. Gonzalez 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 Ms. Gonzalez 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 Ms. Gonzalez 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>