

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS**

NOTICE OF PUBLIC HEARING – RULEMAKING

AMENDMENTS TO CALIFORNIA CODE OF REGULATIONS, Title 8, Division 1, Chapter 3.2, Subchapter 1, Article 4, Sections 333 and 336.

Subject Matter of Proposed Rulemaking: Abatement Credit for Cal/OSHA Citations.

PUBLIC HEARING

Notice is hereby given that the California Department of Industrial Relations (“the Department”) proposes to adopt the amendments to Title 8, Section 333 and 336, of the California Code of Regulations (“Title 8” or “8 CCR”) described below (“the Proposed Regulations”) after considering all comments, objections or recommendations regarding the proposed action.

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, orally or in writing, with respect to the Proposed Regulations, as follows:

Date: October 9, 2015

Time: 10:00 a.m. to 5:00 p.m., or the conclusion of business, if before 5:00 p.m.

Place: Elihu M. Harris State Building
1515 Clay Street, Room 1304
Oakland, CA 94612.

Please Be Advised: All visitors to this building are required to go through a security screening which includes passing through metal detectors, and the x-raying and inspection of all personal belongings.

The building is accessible to persons with mobility impairments. Other disability accommodations are available upon request.

Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the programs of the Director should contact the Statewide Disability Accommodation Coordinator at 1-866-326-1616 (toll free), or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance. Accommodation requests should be made as soon as possible. Requests for an assistive-listening system or communication access real-time translation should be made no later than five (5) days before the hearing.

In order to ensure unimpeded access for disabled individuals wishing to present comments and facilitate the accurate transcription of public comments, camera usage will be allowed on only one area of the hearing room. To provide everyone a chance to speak, public testimony may be limited to 10 minutes per speaker and should be specific to the proposed regulations. Testimony which would exceed 10 minutes may be submitted in writing.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation. If public comment concludes before the noon recess, no afternoon session will be held.

The Director of the Department of Industrial Relations (“the Director”) requests, but does not require, that all persons who make oral comments at the hearing also provide a written copy of their comments. Equal weight will be accorded to oral comments and written comments. The Director also requests that comments be submitted directly to the Division of Occupational Safety and Health (“the Division”). Division staff will be conducting the hearing on behalf of the Director.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the Proposed Regulations. Written comments, regardless of the method of transmittal, must be received by the Division representatives named below by 5:00 p.m. on October 9, 2015, which is hereby designated as the close of the written comment period. Comments received after this date will not be considered timely. Persons wishing to use the California Relay Service may do so at no cost by dialing 711.

Written comments may be submitted to the Division by any of the following means:

1. By mail or hand delivery to Chris Grossgart, IRC IV, DOSH Legal Unit, 1515 Clay Street, Suite 1901, Oakland, CA 94612;
2. By fax transmission addressed to Chris Grossgart at (510) 286-7039; or
3. By email to: cgrossgart@dir.ca.gov. It is strongly urged that email transmission of comments, particularly those with attachments, contain the regulation identifier “Abatement Credit Comment” in the “subject” line to facilitate timely identification and review of the comment.

All comments, including email or fax transmissions, should include the commenter’s name and U.S. Postal Service mailing address in order for the Division to provide the commenter with notice of any proposed changes to the regulation text on which additional comments may be solicited.

AUTHORITY AND REFERENCE

Section 333:

Labor Code sections 54, 55 and 6319 authorize the Director to adopt the Proposed Regulations. The Proposed Regulations implement, interpret, and make specific Sections 6319, 6320, and 6625 of the Labor Code.

Section 336:

Labor Code Sections 54, 55, 6319, 6319.3, 6401.7 and 9060 authorizes the Director to adopt the Proposed Regulations. The Proposed Regulations implement, interpret, and make specific Sections 6314.5, 6318, 6319, 6320, 6401.7, 6409.1, 6427-6432, 6434, 6625, 7320, 7321, 7321.5, 7381 and 9060 of the Labor Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Department is the state agency responsible for administering California's state plan for occupational safety and health. The Department is under the control of the Director, who performs all duties and exercises all powers and jurisdiction vested by law in the Department, including the promulgation of regulations necessary to carry out the provisions of the Labor Code.

The Division of Occupational Safety and Health ("the Division") within the Department is charged with the administration and enforcement of the provisions of the California Occupational Safety and Health Act, commencing with Labor Code section 6300, as well as other provisions of law impacting upon the health and safety of employees in the State of California. The Division has jurisdiction over every employment and place of employment in California to enforce all laws or special orders requiring such employment and place of employment to be safe.

After inspecting an employer's work place, the Division is authorized to issue citations to that employer for violations of Title 8 discovered during the inspection. The Division also has authority to impose civil penalties with the citations it issues. The Division calculates the amount of the civil penalties according to Title 8 regulations promulgated by the Director. One factor in calculating a civil penalty is abatement; employers who abate cited violations may be eligible for a 50% penalty reduction as an "abatement credit."

Prior to February 2015, the Division granted the 50% abatement credit to employers at the time of issuance, on the presumption that the employers would abate violations by the date the Division fixed for abatement on the face of the citations. In other words, the Division granted the abatement credit *prospectively*, before the employers were even required to abate the cited conditions.

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 either abated the violation while the Division's inspection is ongoing, or submitted evidence of abatement within 10 working days after the end of the period the Division fixes for abatement in a citation. (Stats 2014 Ch. 497 § 1 (AB 1634).)

The Director promulgated emergency regulations, effective February 12, 2015, to implement the requirements of AB 1634 ("the Emergency Regulations".) The Emergency Regulations made the following changes to Sections 333 and 336 of Title 8:

1. Under Section 333, if an employer fails to notify the Appeals Board in writing of its intention to contest a citation within 15 working days from the date it receives a citation and civil penalty, then the citation and civil penalty are deemed a final order of the Appeals Board, not subject to review by any court agency. The Emergency Regulations added the words "Final Order" to the title of Section 333. In addition, the Emergency Regulations created 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 specified that any such modification to the civil penalty would not be appealable to the Appeals Board.
2. The Emergency Regulations divided Section 336(e) into subsections (e)(1,) relating to abatement credits for General violations and subsection (e)(2,) relating to abatement credits for Serious violations. The Emergency Regulations deleted provisions relating to the abatement of Serious violations from Subsection (e)(1.)
3. The Emergency Regulations added Subsection (e)(2) to govern abatement credit for Serious citations. It provides that, 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.
4. Subsection (e)(3) of the Emergency Regulations listed the types of Serious violations that would not be 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.

The Emergency Regulations will be in effect until August, 2015. Before that time, the Director proposes to promulgate the Proposed Regulations, which are substantially similar to the Emergency Regulations, through the regular rulemaking process so that they will continue in effect after August. However, as set forth below, the Director proposes to make some changes to the language of the Emergency Regulations, as follows:

The Proposed Regulations would add the words "Final Order" to the title of Section 333 to alert the regulated public as to the subject matter of that section. Second, the Proposed Regulations would divide Section 333 into Subsection 333(a) and Subsection 333(b). Subsection 333(a) would enunciate the existing general rule that, if an employer fails 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 are deemed a final order of the Appeals Board, not subject to review by any court or agency.

In addition, under new Subsection 333(b,) the Proposed Regulations would create an exception in the "final order rule" of Subsection 333(a) to require the Division to modify the civil penalty of a citation pursuant to Section 336(e)(2) if an employer timely submits satisfactory proof of abatement, even if the citation has become a final order by operation of law. Subsection (b) also allows employers to appeal the Division's denial of abatement credit if there is a dispute about the sufficiency of timely submitted abatement measures or if there is a dispute about the correct calculation of the 50% abatement credit.

The Proposed Regulations would amend Section 336 as follows:

1. Existing section 336(e) governs abatement credit for General and Serious violations. The Proposed Regulations would divide Subsection (e) into subsections (e)(1) and (e)(2). Subsection (e)(1) would govern abatement credits for General violations, while Subsection (e)(2) would govern abatement credits for Serious violations. The Proposed Rulemaking would delete provisions relating to the abatement of Serious violations from subsection (e)(1). It would also specify that "Repeat General" and "Willful General" citations would not be eligible for an abatement credit.
2. The Proposed Regulations would add subsection (e)(2) to Section 336 to govern abatement credit for Serious citations. It would provide that, for Serious violations not listed in subsection (e)(3), the Division will only grant an abatement credit if 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 Proposed Regulations would list the types of Serious violations that would not be 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.
4. The Proposed Regulations would amend Subsection (f) to specify that the required statement of abatement must be signed.

Anticipated Benefits of the Proposed Regulations:

The Proposed Regulations will immediately further the goal of A.B. 1634 to promote safe and healthful workplaces by encouraging employers to correct serious unsafe and unhealthy working conditions – i.e., those conditions which have a reasonable possibility of causing serious injury or death – 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.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Director has determined that the Proposed Regulations are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Director has concluded that these are the only regulations that concern the calculation of abatement credit for the Division’s citations and civil penalties.

DISCLOSURES REGARDING THE PROPOSED REGULATIONS

The Director has made the following initial determinations:

Mandate on local agencies and school districts: None.

Costs or savings to any State agency: The Director is not aware of any costs or savings that a State agency will incur in reasonable compliance with the Proposed Regulations.

However, as set forth in greater detail in the discussion of Cost Impacts on Representative Private Persons or Businesses, below, State Agencies that fail to timely abate cited Serious workplace hazards may forfeit the 50% abatement credit.

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

Other nondiscretionary costs or savings imposed on local agencies: None.

Costs or savings in federal funding to the state: None.

Cost Impacts on Representative Private Persons or Businesses: The Director is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the Proposed Regulations.

Under existing regulations, the Division prospectively grants a 50% abatement credit to the proposed civil penalty for eligible citations at the time of issuance, on the presumption that the cited employer will timely abate the cited condition. If an employer fails to timely abate a given citation, the Division is authorized to rescind the 50% abatement credit, re-inspect the work place, and/or issue a failure-to-abate citation with enhanced civil penalties. Thus, an employer ultimately does not retain the 50% abatement credit unless it corrects a cited hazard.

The Proposed Regulations have a similar effect, with less administrative work for the Division. The Division will not grant the 50% abatement credit for Serious citations unless and until the employer has abated the cited serious hazard. Thus, employers who comply with the abatement requirements will receive abatement credit for timely-submitted proof of abatement. Only those employers who fail to timely submit proof of abatement will forfeit the 50% abatement credit, even if they later submit show satisfactory evidence of abatement.

Statistics from the Integrated Management Information System ("IMIS") show that approximately 40% of Serious citations are not abated at the time of issuance. However, it is not possible to extract from IMIS the number of Serious citations out of that 40% for which the Division does not receive timely proof of abatement. Therefore, the Director cannot estimate what the aggregate cost impact will be to employers who choose not to timely abate Serious citations.

Statewide adverse economic impact directly affecting businesses and individuals:

Although the Proposed Regulations will directly affect businesses (that have employees) statewide, the Director anticipates that the adverse economic impact, including the ability of California businesses to compete with business in other states, will not be significant.

Significant effect on housing costs: The Proposed Regulations will not significantly affect housing costs.

Results of the Economic Impact Analysis/Assessment:

The Director concludes that it is (1) unlikely that the Proposed Regulations will eliminate any jobs for employers, (2) unlikely that the Proposed Regulations will create a significant number of jobs for employers, (3) unlikely that the Proposed

Regulations will create a significant number of new businesses employing workers, (4) unlikely that the Proposed Regulations will eliminate any existing businesses, and (5) unlikely that the Proposed Regulations will result in the expansion of businesses currently doing business within the state.

Benefits of the Proposed Action: The Proposed Regulations will benefit California workers because it will induce employers to abate occupational safety and health violations within days of the issuance of citations in order to receive an abatement credit. The faster employers abate unsafe conditions, the less time their employees are exposed and at risk of injury or illness on the job. The anticipated decrease in injuries will have attendant economic benefits, including fewer work days lost to occupational injuries and illnesses and fewer worker's compensation claims.

Small Business Determination: The Director has determined that the Proposed Regulations affect small business.

CONSIDERATION OF ALTERNATIVES

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

The Director 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 Regulations may be directed to:

Christopher Grossgart, IRC IV
Division of Occupational Safety and Health, Legal Unit
1515 Clay Street, Suite 1901
Oakland, CA 94612
Telephone: (510) 286-7348; Facsimile: (510) 286-7039
cgrossgart@dir.ca.gov

The backup contact person for these inquiries is:

Mary Ann David, Legal Support Supervisor
Division of Occupational Safety and Health, Legal Unit
1515 Clay Street, Suite 1901
Oakland, CA 94612

Telephone: (510) 286-7348; Facsimile: (510) 286-7039
mdavid@dir.ca.gov

Please direct requests for copies of the proposed text (the "Actual Text") of the Proposed Regulations, the Initial Statement of Reasons, the modified text of the Proposed Regulations, if any, or other information upon which the rulemaking is based to Ms. David at the above address.

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

The Director will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at the Headquarters of the Division of Occupational Safety and Health at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this Notice, the Actual Text of the Proposed Regulations, the Initial Statement of Reasons, the Economic Impact Statement and the emergency rulemaking file. The rulemaking file also includes the Emergency Regulation package submitted to the Office of Administrative Law on February 2, 2015 and the Re-Adoption of Emergency Regulations package, submitted to the Office of Administrative Law on July 30, 2015, both of which are incorporated herein by this reference. Copies of any or all of these documents may be obtained by contacting Ms. David at the address or phone number listed above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, the Director may adopt the Proposed Regulations substantially as described in this notice. If the Director makes modifications which are sufficiently related to the originally-proposed text, she will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before adopting the Proposed Regulations as revised. Please send requests for copies of any modified regulations to the attention of Ms. David at the address indicated above. The Director will accept written comments on the modified regulation 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. David at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of the Proposed Action, the Initial Statement of Reasons, and the text of the Proposed Regulations in underline and strikeout can be accessed through our website at www.dir.ca.gov/dosh.

***** END *****