

Occupational Safety and Health Appeals Board (OSHAB)
Prehearing and Hearing Regulations
PROPOSED LANGUAGE

Added text is indicated with an underline. Deleted text is indicated by ~~strikeout~~.

Amend Section 370 of Article 3 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 370. Application of Article.

This article applies to all proceedings before the Appeals Board brought pursuant to Part 1 (commencing with Section 6300) of Division 5 of the Labor Code, Section 105200-2950 of the Health and Safety Code and a petition for costs pursuant to Article 6 but not a proceeding under reconsideration pursuant to Article 5.

Note: Authority cited: Sections 148.7 and 149.5, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.

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Amend Section 371 of Article 3 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 371. Prehearing Motions.

(a) Any motion or request for action, any opposition thereto, and any reply relating to any proceeding shall be in writing, ~~be~~and directed to the Appeals Board, and comply with Section 355.4. The caption of each motion or request shall contain the title and docket or petition number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefor.

(b) Any written motion or request, any opposition thereto, and any reply shall be signed by the party filing or by the party's representative, and a copy shall be served on all parties. Service shall be in a manner as prescribed in Section 355.3 and proof of such service meeting the requirements of Section 355.3 shall be filed with the Appeals Board.

(c) Unless otherwise ordered, the following dates shall apply to written prehearing motions or requests:

(1) A written motion or request shall be served and filed no later than 20 days before the hearing date.

(2) Any opposition to the motion shall be served and filed no later than 10 days from service of the motion or request.

(3) Any reply papers shall be served and filed no later than 5 days from service of the opposition to the motion or request ~~before the hearing date~~.

(d) A request to file a motion, opposition, or reply later than the times specified in (c) shall be granted if accompanied by a declaration showing good cause for the late filing.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6603, Labor Code.

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Amend Section 371.1 of Article 3 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 371.1. Requests or Motions Concerning Hearing Dates - Continuances.

(a) Continuances are disfavored.

(b) A request or motion for a continuance shall be in writing and made promptly once the reason necessitating the continuance is ascertained. The request or motion shall be filed with the Appeals Board as required in Section 355.4. Service shall be in a manner as prescribed in Section 355.3 and proof of such service meeting the requirements of Section 355.3 shall be filed with the Appeals Board. In the case of an emergency where the time for the hearing does not permit service as set forth above, service may be made upon a party by fax, email, or personal service. Motions to the Appeals Board, however, may not be made by email. The request or motion shall contain:

(1) The date(s) presently assigned for hearing and the date(s) to which continuance is requested~~sought~~;

(2) A declaration signed under penalty of perjury containing facts in support of the request or motion; and

(3) An indication of whether the other parties to the appeal were contacted, and if so, their position on the request or motion. Absent exigent circumstances, the Appeals Board will not rule on the request or motion without notification of the other party's position or until the time to oppose the request or motion as provided in (c) has run, whichever comes first.

(c) Any opposition to a request or motion for continuance shall be filed with the Appeals Board immediately but no later than ten (10) days from service of the request or motion. Service shall be in a manner as prescribed in Section 355.3 and proof of such service meeting the requirements of Section 355.3 shall be filed with the Appeals Board.

(d) The request or motion shall be ruled on promptly and not delayed once the Appeals Board has received all information needed to rule on the request or motion.

(e) Each request or motion for a continuance shall be considered on its own merits. The request or motion shall be granted on an affirmative showing of good cause. The following circumstances shall be considered when determining whether good cause exists for the granting of the continuance:

(1) The unavailability of an essential witness, party, counsel or representative because an emergency arises, including, but not limited to, death or incapacitating illness.

(2) The addition of a new party who has not had notice of the hearing date and an adequate opportunity to prepare for the hearing.

(3) The age of the case and whether there were any previous continuances.

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(4) The ability of the parties to agree on at least three (3) alternative hearing dates in the immediate future and the Appeals Board's ability to calendar the case on one of the dates.

(5) The prejudice that parties or witnesses will suffer as a result of the continuance being granted or denied.

(6) Whether the party's counsel is calendared in another hearing which conflicts with the Appeals Board's scheduled hearing, including administrative, civil or criminal matters, the specific attempts made by counsel to continue the other matter, and the results of such attempts.

(7) Whether an alternative short of continuing the entire hearing, such as leaving the record open to allow testimony of an unavailable witness or witnesses at a later time, would accommodate the needs of the moving party while allowing the matter to proceed in the meantime.

(8) Whether the employer has abated the alleged unsafe condition or conditions.

(9) The status of any related criminal investigations or proceedings.

(10) Whether the conflict necessitating the continuance was either foreseeable or created by the party(ies) or the party(ies) representative(s).

(11) Any other fact or circumstance relevant to the fair determination of the request or motion.

(f) The following circumstances shall not constitute good cause:

(1) Failure to obtain representation, unless a substitution is required through no fault of the party.

(2) Failure of another party to comply with a request for discovery, unless the Appeals Board orders a continuance of the hearing after a motion to compel discovery has been filed pursuant to Section 372.6. A continuance of the hearing may be ordered only if:

(A) a motion to compel discovery was filed at a time which would not have foreseeably delayed the hearing, or good cause for such later filing is shown, and

(B) the matters sought to be discovered are of sufficient importance to warrant a continuance of the hearing.

Note: At-hearing sanctions for discovery abuses are specified in Section 372.7 of these regulations.

(g) Once a request or motion for continuance has been ruled on by the Appeals Board, a request or motion for continuance based on the same grounds shall not be entertained at the hearing. If the request or motion was denied without prejudice a party

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may renew the request or motion and submit additional information supporting the request including, but not limited to, changed circumstances or new information not previously~~formerly~~ available.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6603, Labor Code.

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Amend Section 373 of Article 3 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 373. Expedited Proceeding.

(a) Upon motion of a party or upon its own motion, the Appeals Board may order an expedited proceeding. All parties shall be notified and shall be expected to do all things necessary to complete the proceeding in the minimum time consistent with fairness. Time limits for filing a motion to compel discovery, and for responsive filings under Section 372.6 may be shortened as necessary to accommodate the expedited date for disposition of the case.

(b) Where the Appeals Board is aware or is notified that an alleged violation appealed is classified by the Division of Occupational Safety & Health as a Serious, Repeat Serious, Willful Serious, Willful, Willful Repeat or Failure to Abate, and either abatement is on appeal, or abatement has not occurred, the Appeals Board shall expedite the proceeding.

(c) The Appeals Board shall serve parties a written explanation of the expedited process, a notification of docketing, a copy of the docketed appeal forms and citations, a copy of the notice advising that the appeal has been perfected, a standing order compelling discovery, a stipulation form, and a notice of status conference, prehearing conference, and hearing.

(1) A telephonic or video status conference shall be held within 30 days of the perfection of the appeal. At that time, the Administrative Law Judge-ALJ will confirm that the expedited process is appropriate, review the requirements of the expedited process with the parties, review pending and impending discovery, and make such orders regarding any matter as needed to meet the timetable of this section,

(2) A telephonic or video prehearing conference shall be held within 60 days before the hearing ~~of the status conference~~. The prehearing conference will proceed under Section 374. The parties will be required to stipulate to undisputed facts, identify issues, and raise issues regarding the admissibility of evidence. The parties shall identify all witnesses and exhibits they intend to call or introduce at the hearing.

(3) A hearing shall ~~commence~~ be held, either by telephone, ie video, in person, or a combination thereof as determined by the Administrative Law Judge, within ~~60 days~~ 150 days from the perfection of the appeal of the prehearing conference and will be scheduled for one day and adjusted, if necessary.

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(4) The Appeals Board, on its own motion or pursuant to a motion of or a party, may ~~bring a motion to~~ shorten the timeframes set forth in subsections (c)(1)-(3) on a showing of good cause.

NOTE: Authority cited: Sections 148.7 and 149.5, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.

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Amend Section 374 of Article 3 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 374. Prehearing Conference.

(a) At any time before a hearing, upon motion of a party or upon its own motion, the Appeals Board may notice and order a prehearing conference for the purposes of simplifying the issues, expediting a hearing and affording parties an opportunity to participate in the disposition of the appeal. The prehearing conference may be conducted by means of a video or telephone conference call.

(b) Each party to a prehearing conference shall be prepared to discuss the issues, stipulate to any factual or legal issue about which there is no dispute, stipulate to the identification and admissibility of documentary evidence, comply with any request for discovery, report on discovery status where the Administrative Law Judge~~ALJ~~ has compelled discovery prior to the prehearing conference, and to do such other things as may aid in the disposition of the proceeding.

(c) In advance of or after the prehearing conference, if the Administrative Law Judge deems it appropriate, they may order the parties to provide a statement addressing: the topics identified in subdivision (b), the status of settlement efforts, the parties' estimates of the length of time needed for the hearing, the parties' positions on whether there is a need for bifurcation of any issues, the parties' positions or supporting theories concerning any fact, claim, defense, or issue in the proceeding, and such other things as may aid in the disposition of the proceeding.

(ed) The failure to comply with an order directing preparation of a prehearing conference statement, or ~~the~~ failure of a party or its representative to prepare for and participate in the prehearing conference shall be grounds for the imposition of such sanctions, inferences, or other orders, then or during the hearing, as the Appeals Board may deem appropriate. These sanctions may include striking or excluding evidence offered by the non-complying party on that dispute, or precluding that party from contesting the position or information on that issue provided by the complying party.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.

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Amend Section 374.2 of Article 3 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 374.2. Status Conference.

(a) At any time before hearing, upon motion of a party or upon its own motion, the Appeals Board may notice and order a status conference to discuss the issues to be presented, the witnesses to be called, the status of discovery requests, pending and contemplated motions, and any other matters that may aid in expediting the hearing or otherwise disposing of the case. The status conference may be conducted by means of a ~~telephone~~video or teleconference call. The Administrative Law Judge may order each party to provide a brief statement regarding the aforementioned topics prior to the status conference. In non-expedited proceedings, if the Administrative Law Judge determines the statements provide sufficient information establishing the status conference is unnecessary, they may take the status conference off calendar.

(b) Sanctions for failure to appear shall comply with section 383. The failure of a party or its representative to ~~appear and~~ participate in the status conference or comply with the Administrative Law Judge's order to provide a brief status conference statement may be grounds for the imposition of such sanctions, inferences or other orders, then or during the hearing, as the Appeals Board may deem appropriate. These sanctions may include striking or excluding evidence offered by the non-complying party on that dispute, or precluding that party from contesting the position or information on that issue provided by the complying party.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.

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Amend Section 374.3 of Article 3 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 374.3. Settlement Conference.

The Appeals Board on its own motion, or upon written request of a party, may schedule a settlement conference to be held before an ~~a~~Administrative Law Judge who shall not hear the appeal, unless otherwise stipulated by the parties. Each party shall attend or be represented by a person authorized to negotiate regarding settlement. The settlement conference may be conducted telephonically, via video conference, by means of a telephone, in person, or as otherwise directed by the Administrative Law Judge.~~conference call.~~

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 148.7, Labor Code.

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Amend Section 376 of Article 4 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 376. Time and Place of Hearing.

(a) Appeals shall be heard promptly.

(b) Appeals relating to a special order, order to take special action, the reasonableness of the abatement period and an expedited proceeding shall be given priority over other proceedings.

(c) When the Appeals Board is notified that a case is being reviewed by the Bureau of Investigations or any prosecuting authority, the Appeals Board shall delay the hearing until notified that review is concluded or for a period not exceeding three (3) years, whichever occurs earlier. The three (3) year period begins when the Appeals Board receives notification of an investigation from the Bureau of Investigations or any prosecuting authority. If the Appeals Board is notified that criminal charges have been filed, the Appeals Board shall subsequently extend the delay until completion of the criminal case, which shall be deemed to occur on the date of a verdict of not guilty, a dismissal of the case by a court, or the date of sentencing after a verdict or plea of guilty or no contest. The Appeals Board may also delay the case beyond three (3) years from the date of the incident on the written request of a party or prosecuting authority if necessary to allow the Bureau of Investigations or any prosecuting authority to conclude its review or criminal prosecution of the case. The Appeals Board may, as determined necessary by the Administrative Law Judge assigned to the matter, hold status conferences and hear and rule on motions during the pendency of any such review, investigation, or prosecution.

(d) A hearing may be conducted by videoconference as provided in Government Code Section 11440.30 of the Administrative Procedure Act, if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place, to observe the exhibits, and to observe the hearing participants to the extent feasible.

(e) For each hearing, other than expedited proceedings set pursuant to ~~s~~Section 373, the Appeals Board shall determine, and include in any notice of hearing, the following information: the date(s), time(s), and length for the hearing; the format for conducting the hearing, whether in-person or by videoconference or a combination thereof; and the physical location of the hearing if the hearing includes an in-person format. If a videoconference hearing is selected, the notice of the hearing shall provide instruction on how to participate in the videoconference, identify the necessary technological equipment, and indicate what to do if technical problems arise.

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(1) Factors and criteria relevant to these determinations, which may be addressed or discussed at prehearing or status conferences, include, but are not limited to, the following:

- (A) Evidentiary presentation and case management issues;
- (B) Whether multiple hearings can be set before an Administrative Law Judge on the same day without necessitating a continuance;
- (C) The parties' and Administrative Law Judge's projection of the length of time needed for the hearing;
- (D) The place of employment where the violation is alleged to have occurred;
- (E) The location and suitability of Appeals Board hearing venues;
- (F) The availability of Administrative Law Judges, witnesses, and parties;
- (G) The location of the parties and the witnesses;
- (H) Transportation barriers or travel distance required for attendance at a hearing, for any party or witness;
- (I) Hardship caused by time away from current employment or other responsibilities that would be required of a party or witness in order to attend a hearing;
- (J) Inability of a party or witness to secure care for children, other family members, or dependents that would unduly hinder travel to a hearing;
- (K) The health and safety of parties, witnesses, representatives, and Appeals Board staff;
- (L) Any factors requiring a more expeditious hearing date;
- (M) Stipulations of the parties;
- (N) Other hardships or impediments raised by a party or witness;
- (O) Any other fact deemed relevant by the Administrative Law Judge or Presiding Administrative Law Judge.

(2) For hearings set for the videoconference format under subdivision (e) or (g), in whole or in part, the Appeals Board may issue orders requiring prehearing lodging of proposed exhibits via OASIS. Prehearing lodging of exhibits shall not be required more than three working days prior to the hearing. The Appeals Board will not review or consider any lodged documents for substance until introduced by a party or representative at hearing.

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(A) Notwithstanding the existence of an order requiring prehearing lodging of exhibits, the Appeals Board may grant parties the opportunity to utilize additional exhibits during the hearing not previously lodged, upon a showing that good cause exists, that no prejudice would occur, or such other showing deemed sufficient by the Appeals Board in its discretion.

(3) If the Appeals Board orders that the hearing occur by videoconference under subdivision (e) or (g), in whole or in part, and a witness, subpoenaed person, party, or representative contends, in a reasonable amount of time prior to the hearing, that they do not have access to the technological equipment necessary to attend, comply, and/or conduct the hearing by videoconference, the Appeals Board will make facilities available where they can access necessary equipment. The Appeals Board may require evidence regarding such claims before making facilities available.

(f) During any prehearing or status conference, each party and party representative shall be prepared to discuss whether to set the matter for a hearing in person, by videoconference, or combination thereof, and be prepared to discuss any relevant criteria set forth in subdivision (e)(1). The Appeals Board may require evidence supporting the application of these criteria to the specific case.

(g) The Appeals Board shall set the date(s) for hearings for expedited matters pursuant to ~~s~~Section 373. An expedited hearing shall be set for the videoconference format. The Appeals Board may, in its discretion, modify the expedited hearing format after it is initially set. If a party believes that the videoconference format would be inappropriate for the expedited hearing, it may request, either at the status conference or pursuant to the procedures set forth in subdivision (h), that the Appeals Board modify the hearing format to an in-person hearing, with reference, without limitation, to the relevant criteria set forth in subdivision (e). The Appeals Board may require evidence supporting the application of these criteria to the specific case.

(h) Government Code section 11440.30, subdivision (b)(2), permits a party to object to the selection of the videoconference hearing format and requires the Appeals Board to consider the objection. Where a party objects to the Appeals Board's selection of the hearing format, except where otherwise directed by Administrative Law Judge, the objection shall be in the form of a written motion in compliance with ~~s~~Section 371, identifying the requested change in the hearing. If the facts supporting the objection first become known after the hearing commences, the objecting party shall file the motion as soon as the facts supporting the motion become known. Factors relevant to the Appeals Board's exercise of discretion on objections include, but are not limited to, whether the objecting party has demonstrated that it will be prejudiced or its due process rights will be compromised if it conducts the hearing in the selected format, with reference to the criteria set forth in subdivision (e), without limitation. The motion must be accompanied

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by evidence in the form of either declarations (pursuant to sSection 347, subdivision (i)) or specific references to witness testimony and citation to the record. The Appeals Board may also reconsider the hearing format on its own motion at any time.

(i) For purposes of the Appeals Board's rules set forth in Chapter 3.3, when a hearing is ordered to occur by videoconference, the videoconference format of the hearing will constitute the place of hearing and hearing room. To the extent the rules set forth in Chapter 3.3 provide a right to appear in person or personally, that right is satisfied by the videoconference appearance. Further, subpoenas may be issued pursuant to sSection 372.2, either subdivision (a) or (c), requiring attendance of a person at the videoconference place of hearing, provided the subpoena includes sufficient instruction and information on how to participate in the videoconference, identifies the technological equipment necessary, and indicates what to do if technical problems arise. The Appeals Board shall furnish optional subpoena forms upon request for attorneys' use.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 11410.20, 11415.10, 11410.40 and 11440.30, Government Code; and Sections 148.7, 149.5 and 6308(c), Labor Code.

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Amend Section 378 of Article 4 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 378. Representation at Hearing

(a) A party may appear in person or through a representative ~~who is not required to be an attorney at law~~. A representative shall file a written notice of representation with either the Sacramento or West Covina Office of the Appeals Board and serve a copy on all parties as required by Sections 355.3 and 355.4. A representative is not required to be an attorney at law.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding.

(c) An employee who is represented by an authorized employee representative may appear through such authorized employee representative.

(d) A representative may withdraw its representation of a party by filing a written notice of withdrawal with the Appeals Board, providing the Appeals Board with the most recent contact information the representative has for the party and the contact information for the replacement representative, if available, and by serving a copy of the written notice of withdrawal on all parties, intervenors, and obligors as required by Sections 355.3 and 355.4.

NOTE: Authority cited: Sections 148.7 and 149.5, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.

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Amend Section 383 of Article 4 of Chapter 3.3 of Division 1 of Title 8 of the California Code of Regulations to read as follows:

§ 383. Failure to Appear.

(a) If after service of a notice of hearing, prehearing conference, settlement conference, status conference, or another event scheduled and duly noticed by the Appeals Board, a party fails to appear at the noticed event, either personally or by representative, the Appeals Board may take the proceeding off calendar; may, after notice, dismiss the proceeding; or may receive evidence from any party that appears.

(b) Before dismissing the proceeding, the assigned Administrative Law Judge shall prepare and serve a notice of intent to dismiss the appeal or citation(s), or an order pursuant to Section 350.4, allowing the non-appearing party at least 15~~10~~ days to request reinstatement of the appeal. The request must show good cause for missing the noticed event.

(c) Good cause is defined as sufficient facts to establish a reasonable basis for the failure to appear. A request for reinstatement, and any opposition, shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant and declared under penalty of perjury.

(d) A party, intervenor, ~~or obligor~~, or their representative, opposing the reinstatement of any proceeding based on the non-appearing party's showing of good cause may file a response no later than 10 days from service of the reinstatement request.

(e) Service of the request for reinstatement and any response shall be accomplished as prescribed in Section 355.3 and proof of service meeting the requirements of Section 355.3, subsection (e) shall be filed with the Appeals Board as required in Section 355.4.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5, 6603 and 6611, Labor Code.