

NOTICE OF OSHAB PROPOSED RULEMAKING
Modifying Regulation Concerning Time and Place of Hearing

The Occupational Safety and Health Appeals Board (“Appeals Board or Board”) proposes to adopt the proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed actions.

PUBLIC HEARING

The Board will hold a public hearing on **June 16, 2022**, 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 relating 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.

The meeting will also be accessible to the public, and the Board will accept comment from the public, via ZOOM or telephonically.

To join the meeting utilize the web address or telephone number below:

- Video-conference at <https://zoom.us/join> (Meeting ID: 886 7179 9862)
- Teleconference: +1 669 900 9128 (Access Code 886 7179 9862).

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 ajackson@dir.ca.gov. The written comment period closes at 5:00 p.m. on **June 16, 2022**. The Board will consider only those comments received at the Board offices by that time. Written comments should be submitted to:

Aaron Jackson, Staff Counsel
Cal/OSHA Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833

AUTHORITY AND REFERENCE

Labor Code (LC) 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 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 (Division).

INFORMATIVE DIGEST/ POLICY STATEMENT OVERVIEW

The Board initiates this rulemaking to modify its Rules of Practice and Procedure.

Following the emergence of COVID-19, and the accompanying issuance of a number of local and Statewide safety and health orders, it became extremely difficult for the Board to conduct in-person hearings. Nonetheless, the Board still had a duty to proceed with hearings in a timely manner in order to advance occupational safety and health through timely adjudication of employer appeals, and to protect the rights of the parties. In order to discharge its obligations, the Board, like most other State agencies, transitioned to conducting hearings via videoconference for the safety of its employees, parties, representatives, and witnesses. The Board derived authority for videoconference hearings, at least on a temporary basis, from Paragraph 11 of Executive Order N-63-20, Government Code section 11440.30, and several other existing statutes and regulations. The Executive Order constituted an important, but not exclusive, pillar supporting the Board's authority to conduct videoconference hearings.

As a result of the experience gained with videoconference hearings, the Appeals Board found, and many parties noted, that videoconference hearings represent a practical, effective, and efficient method for conducting hearings in many circumstances.

However, paragraph 11 of Executive Order N-63-20 has recently been withdrawn, removing an important pillar supporting the Board's authority to conduct videoconference hearings. A new piece of authority takes its place. The California State Legislature, via Assembly Bill 1578 (2021-2022 Reg. Sess.),¹ took action to modify the Administrative Procedure Act (APA) to expand hearing officer discretion to set matters for remote hearings, by amending Government Code section 11440.30. Those amendments became effective on January 1, 2022.

To ensure the recognized benefits of remote hearings may continue and administrative efficiencies maximized even after COVID-19 abates, and to avoid any confusion regarding the Board's processes, the Appeals Board proposes amendments to its Rules of Practice and Procedure to make them consistent with, and explicitly adoptive of, some of the provisions of the APA as amended by AB 1578. The Appeals Board proposes to codify a permanent rule permitting the Board discretion to set videoconference hearings, as well as delineating Board-specific procedures governing selection of the hearing format, through modification of Section 376² of the Board's Rules of Practice and Procedure. In sum, the proposed modifications to Section 376 will not only adopt the newly-amended Government Code section 11440.30, it will set forth how that section of

¹ Assem. Bill No. 1578 (2021-2022 Reg. Sess.), approved by Governor, September 30, 2021 (hereinafter "AB 1578").

² References will be to California Code of Regulations, title 8, unless otherwise specified.

the APA will be applied in Board proceedings, providing clear guidance to the regulated community.

For non-expedited hearings, the proposed modifications to section 376 will task the Administrative Law Judge with determining the following: 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. These decisions will be case-specific and will be guided by consideration of various listed criteria, such as, without limitation: the place of employment where the violation is alleged to have occurred; the location and suitability of Appeals Board hearing venues; the availability of Administrative Law Judges, witnesses, and parties; the location of the parties and the witnesses; evidentiary presentation and case management issues; whether multiple hearings can be set on the same day without necessitating a continuance; the parties' and Administrative Law Judge's projection of the length of time needed for the hearing; transportation barriers or travel distance required for attendance at a hearing, for any party or witness; 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; inability of a party or witness to secure care for children, other family members, or dependents that would unduly hinder travel to a hearing; the health and safety of parties, witnesses, representatives, and Appeals Board staff; any other factors, hardships, or impediments requiring a more expeditious hearing date; and stipulations of the parties.

For expedited hearings, the Appeals Board shall continue to set the hearings pursuant to the procedures and timeframes set forth in section 373. All expedited hearings shall initially be set for the videoconference format. However, the Appeals Board may, in its discretion, modify the hearing format after it is initially set.

The changes to Government Code section 11440.30, engendered by AB 1578, also permit a party to object to remote hearings, and require the Administrative Law Judge to consider the objections. The Appeals Board's proposed modifications to section 376 will specify how such objections should be submitted in Appeals Board proceedings, and factors relevant to consideration of the objection. Except where otherwise provided, the objection must be submitted by motion. Factors relevant to consideration of the objection include whether the objecting party demonstrates that it will be prejudiced, or that its due process rights will be compromised, by conducting all or part of the hearing by videoconference.

Finally, the Board proposes three revisions to its rules of practice and procedure, representing clean-up efforts from prior rulemakings. First, section 372.8 contains an unnecessary reference to section 372.9, which should be removed because the section has been repealed. Second, section 376.8 has an incorrect cross-reference. It refers to the definition of "hearing record" by an incorrect

citation; the definition of hearing record is located at section 347, subdivision (s), not (r). Third, there is a typographical error in section 372.6, subdivision (c). It references Government Code Section 11140.30, but the reference should be to section 11440.30.

Anticipated Benefits of the Proposed Regulations:

Anticipated Benefits of Proposed Revisions to Section 376—Videoconference hearings represent a practical and effective method for conducting hearings in appropriate circumstances. They also facilitate ease of public access to Board hearings. The proposed modifications to the Board's Rules of Practice and Procedure will codify a permanent procedure for setting hearings by videoconference consistent with the amended Administrative Procedure Act.

Anticipated Benefits of Proposed Revisions to Sections 372.6, 372.8 and 376.8—The proposed changes to these rules will merely clean-up minor citation and cross-reference errors, ensuring the Board's rules are internally consistent and clear.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Board has concluded that these changes related to the Board's Rules of Practice and Procedure are not inconsistent or incompatible with existing state regulations. 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 Board's internal rules of practice and procedure concerning the selection of the hearing time, venue, and format.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: None

Cost or savings to any state agency: The Board estimates some costs and savings for both the Appeals Board and the Division of Occupational Safety and Health (Division). On balance, as noted in the STD 399, the Board anticipates significantly more savings than costs for the Division and the Appeals Board.

Estimated Costs:

Division Costs: Total Division costs, both labor and equipment, are estimated to be \$28,668.96.

Appeals Board Costs: Total Board costs, both labor and equipment are estimated to be \$20,175.33.

Estimated Savings:

Division Savings: Total Division savings, both labor and equipment are estimated to be \$61,686.66.

Appeals Board Savings: Total Board savings, both labor and equipment, are estimated to be \$41,851.95.

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 proposed regulation will only have a cost impact on employers that receive citations for violations of workplace safety orders, and thereafter appeal to those citations to the Appeals Board and proceed to hearing. The Board estimates it conducts, on average, approximately 104 such hearings per year. In total, it is estimated that the cost impact of the proposed regulation is \$74,379.28 annually. However, it is estimated that savings substantially outweigh costs. Total employer savings are estimated to be \$172,329.73.

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.

Effect on Small Business: In total, it is estimated that small business employers that appeal citations before the Appeals Board, and thereafter proceed to hearing, will accrue \$64,338.08 annually in total costs to comply with this regulation over its lifetime; however, as noted above, savings outweigh costs.

Results of the Economic Impact Analysis

The Board concludes that it is (1) unlikely that the proposed regulations will either create or 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; (3) unlikely that the proposed regulations will lead to the expansion of businesses currently doing businesses within the state of California; and (4) unlikely that the proposed regulations will have any effect on housing costs.

Benefits of the Proposed Action: The procedural amendments directly benefit the health and welfare of California workers by clarifying and increasing the efficiency in the administrative process generally, which helps achieve the purpose of the Occupational Safety and Health Act and

also benefits the public. The proposed rule changes will also increase the ease of public access to Board hearings. In addition, videoconference hearings represent an important public health tool when necessary to address emergency circumstances. Finally, the proposed regulations may have a positive effect on the environment in some circumstances. The proposed regulations will permit the Board to set some hearings via videoconference. When that occurs, it will negate the need for some parties and/or witnesses to travel to a hearing location, reducing pollutants associated with travel via car or airplane.

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 affected 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:

Aaron Jackson, Staff Counsel

ajackson@dir.ca.gov

Cal/OSHA Appeals Board

2520 Venture Oaks Way, Suite 300

Sacramento, CA 95833

Phone Number: (916) 274-5751

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 Mr. Jackson at the above address.

The designated backup contact person to whom inquiries may be made is J. Jeffrey Mojcher, and inquiries may be made to

J. Jeffrey Mojcher, Chief Counsel

jmojcher@dir.ca.gov

Cal/OSHA Appeals Board

2520 Venture Oaks Way, Suite 300

Sacramento, CA 95833

Phone Number: (916) 274-5751

AVAILABILITY OF STATEMENT OF 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 and the initial statement of reasons. Copies may be obtained by contacting Mr. Jackson 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 Mr. Jackson 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 Mr. Jackson 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>

DISABILITY ACCOMMODATION NOTICE: Disability accommodation is 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 public hearings/meetings of the Occupational Safety and Health Appeals Board should contact the Disability Accommodation Coordinator at (916) 274-5751 or the state-wide Disability Accommodation Coordinator at 1-866-326-1616 (toll free). The state-wide Coordinator can also be reached through the California Relay Service, by dialing 711 or 1-800-735-2929 (TTY) or 1-800-855-3000 (TTY-Spanish).

Accommodations can include modifications of policies or procedures or provision of auxiliary aids or services. Accommodations include, but are not limited to, an Assistive Listening System (ALS), a Computer-Aided Transcription System or Communication Access Realtime Translation (CART), a sign language interpreter, documents in Braille, large print or on computer disk, and audio cassette recording. Accommodation requests should be made as soon as possible. Requests for an ALS or CART should be made no later than five (5) days before the hearing.