

# **Agricultural Employer-Employee Collective Bargaining and Mediation Law QUESTIONS & ANSWERS**

## **Who can file a declaration and request for mediation with the ALRB?**

An agricultural employer or a labor organization certified as the exclusive bargaining agent of a bargaining unit of agricultural employees.

[Section 1164\(a\)](#)

## **Who is an agricultural employer under this provision?**

An "agricultural employer," for purposes of this chapter, means an agricultural employer, as defined in subdivision (c) of Labor Code Section 1140.4, who has employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration pursuant to this subdivision.

[Section 1164\(a\)](#)

## **When can a declaration and request for mediation be filed with the ALRB?**

It depends upon whether the union was certified prior to or after the effective date of the mediation law, January 1, 2003. Also, amendments to the statute effective January 1, 2012 added two other circumstances when a request for mediation may be filed. There are now four categories of requests with different conditions that must be met.

[Section 1164\(a\)](#)

## **What are the four categories?**

- 1) If the union was certified prior to January 1, 2003, the request can be filed with the Board at any time following 90 days after a renewed demand to bargain by an agricultural employer or a labor organization where the request meets the conditions specified in Section 1164.11. Section 1164.11 contains three conditions:
  - (a) the parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain,
  - (b) the employer has committed an unfair labor practice, and
  - (c) the parties have not previously had a binding contract between them.

[Sections 1164\(a\), 1164.11](#)

- 2) If the union was certified after January 1, 2003, the request may be filed with the Board at any time following 90 days after an initial request to bargain by an agricultural employer or a labor organization certified after January 1, 2003, if the parties have failed to reach a collective bargaining agreement.

[Section 1164\(a\)](#)

- 3) If the Board has certified the labor organization because of employer misconduct that, in addition to affecting the results of the election, would render slight the chances of a new election reflecting the free and fair choice of employees, a request may be filed no less than 60 days after the certification.

[Sections 1156.3\(f\), 1164\(a\)](#)

- 4) If the Board finds that the employer has unlawfully initiated, supported, sponsored, or assisted in the filing of a decertification petition, a request may be filed no less than 60 days after the board has dismissed the decertification petition.

[Section 1164\(a\)](#)

**Are there requirements as to what a declaration and request for mediation must include?**

Yes, for **Category 1**, where the certification issued prior to January 1, 2003, the declaration must state that (1) the parties are subject to an existing certification and have failed to reach a collective bargaining agreement for a least one year after the date on which the labor organization made its initial request to bargain; (2) the employer has committed an unfair labor practice, describing the nature of the violation, and providing the corresponding Board decision number or case number; (3) the parties have not previously had a binding contract between them, (4) the employer has employed 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration, and (5) the date of the renewed demand to bargain, which must have occurred or after January 1, 2003.

For **Category 2**, where the certification issued after January 1, 2003, the declaration must state that (1) the parties are subject to an existing certification and have failed to reach a collective bargaining agreement, (2) the employer has employed 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration, and (3) the date of the initial request to bargain.

For **Category 3**, the declaration must state that (1) the Board has certified the labor organization pursuant to Labor Code section 1156.3(f) and include a citation to the Board order containing the certification, (2) at least 60 days have elapsed since the certification, (3) the parties have no collective bargaining agreement currently in effect, and (4) the employer has employed 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration.

For **Category 4**, the declaration must state that (1) the Board has dismissed a decertification petition based on a finding that the employer unlawfully initiated, supported, sponsored, or assisted in the filing of the decertification petition and include a citation to the Board order containing that finding, (2) at least 60 days have elapsed since the dismissal of the decertification petition, (3) the parties have no collective bargaining agreement currently in effect, and (4) the employer has employed 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration.

All declarations must be signed under penalty of perjury by the authorized representative of the filing party and be accompanied by any documentary or other evidence that supports the statements in the declaration.

[Title 8, Cal. Code Regs., sec. 20400](#)

**What kinds of unfair labor practices can trigger the mandatory mediation process for pre-January 1, 2003 certifications?**

The unfair labor practice must be one for which a final Board decision has issued or where there is a settlement agreement that includes an admission of liability.

[Title 8, Cal. Code Regs., sec. 20400\(a\)\(1\)](#)

**Does the filing of a declaration and request for mediation require a response from the other party to the collective bargaining relationship?**

Within three days of service of the declaration, the other party may file an answer. The answer must be signed under penalty of perjury by an authorized representative of the filing party and must identify any statements in the declaration that are disputed. The answer must be accompanied by any supporting evidence. If the responding party claims that the employer has not employed 25 or more agricultural employees during any calendar week in the year preceding the filing of the declaration, payroll records sufficient to support the claim shall be submitted with the answer. Pay roll records shall be submitted in electronic form if they are kept in that form in the normal course of business. All statements in a declaration that are not expressly denied in the answer will be deemed admitted.

[Title 8, Cal. Code Regs., sec. 20401.](#)

**What happens after a declaration and request for mediation and any answer are received by the Board?**

The Board will review the declaration and answer. If the declaration fails to include all of the requirements of section 20400 (a) or (b), then the Board will dismiss the declaration.

If no answer is timely filed or if the answer admits the truth of all factual assertions of the declaration and the declaration meets the requirements of section 20400, then the Board will immediately issue an order directing the parties to mediation and conciliation and request a list of mediators from the California State Mediation and Conciliation Service.

When a timely filed answer disputes the existence of any of the requirements for referral to mediation, the Board will attempt to resolve the dispute based on the parties' filings and/or an investigation. Within five days of receiving an answer to a declaration, the Board will either dismiss the petition; or refer the parties to mediation, or schedule an expedited evidentiary hearing to resolve any factual issues relating to whether the requirements for referral to mandatory mediation have been met.

[Section 1164\(b\); Title 8, Cal. Code Regs., sec. 20402](#)

**How will the expedited hearing to resolve whether the requirements for referral to mandatory mediation are met be conducted?**

The expedited hearing will be conducted by a member of the Board or by an Administrative Law Judge, under the rules of evidence so far as practicable. The parties have the right to appear in person at the hearing or by counsel or other representative; to call, examine and cross-examine witnesses, and to introduce all relevant and material evidence. All testimony must be given under oath. The hearings will be reported in a

manner designated by the Board. Discovery is permitted and the parties have the right to the issuance and enforcement of subpoenas.

The Administrative Law Judge or Board member who conducts the hearing must file with the Executive Secretary a decision within 10 days from the receipt of all the transcripts or records of the proceedings. The decision must contain findings of fact adequate to support any conclusions of law necessary to decide the matter.

[Title 8, Cal. Code Regs., sec. 20402 \(c\)\(d\)](#)

**Is the decision of the ALJ/Board member appealable to the full Board?**

Yes, within 10 days of service of the decision, any party may file exceptions to the decision or any part of the proceedings. The exceptions must state the grounds for each exception, identify by page number that part of the decision to which exception is taken and cite to those portions of the record that support the exception. The Board must issue its decision within 10 days of receipt of the exceptions. The Board must issue either an order dismissing the declaration or an order directing the parties to mandatory mediation. If the parties are directed to mediation, then the Board also requests a list of mediators from the State Mediation and Conciliation Service.

[Title 8, Cal. Code Regs., sec. 20402 \(6\) \(7\)](#)

**Once the Board determines that mediation is appropriate, how is a mediator chosen?**

The Board requests from the California State Mediation and Conciliation Service a list of nine mediators who have experience in labor mediation. The California State Mediation and Conciliation Service may include names chosen from its own mediators, or from a list of names supplied by the American Arbitration Association or the Federal Mediation Service. The parties then select a mediator from the list within seven days of receipt of the list. If the parties cannot agree on a mediator, they strike names from the list until a mediator is chosen by process of elimination. If a party refuses to participate in selecting a mediator, the other party may choose a mediator from the list. The parties also have the option of mutually designating a mediator from a list of all qualified mediators maintained by the State Mediation and Conciliation Service.

[Section 1164\(b\); Title 8, Cal. Code Regs., sec. 20403.](#)

**Can a mediator be disqualified?**

Yes, a mediator can be disqualified for bias, prejudice, or an interest in the outcome of the proceedings. The mediator has a responsibility to notify the Executive Secretary of any fact that makes it appear probable that a fair and impartial mediation cannot be held before him/her, setting forth the reasons for that belief. Additionally, prior to the first mediation session, any party may request that the mediator disqualify himself/herself whenever it appears probable that the selected mediator cannot conduct a fair and impartial mediation. That request must be made under oath and must specify all facts constituting the grounds for the disqualification of the mediator.

Once a party requests the disqualification of the mediator, the mediator has the option of either admitting the disqualification or refusing the disqualification, in writing or on the

record stating the grounds for the ruling, and proceeding with the mediation. The mediator's rejection of the disqualification is a ground for review by the Board of the mediator's report in very limited circumstances.

[Title 8, Cal. Code Regs., sec. 20404.](#)

### **Who bears the costs of mediation and conciliation?**

The costs of mediation and conciliation shall be borne equally by the parties.

[Section 1164\(b\)](#)

### **What happens after a mediator is appointed?**

The mediator selects a time and place for the mediation and causes notice to be served personally or by mail on the parties at least fifteen (15) days before the mediation. The mediation is to begin within thirty (30) days of the selection of the mediator, or as soon as practical. Additionally, within seven (7) days after receipt of a Board order directing the parties to mediation and prior to any discovery requests, each party must identify for the mediator those issues that are in dispute and those that are not in dispute, identify the standards which they propose to resolve the disputed issues, and provide agreed upon contract language for those issues not in dispute. This information is to be served on the other party immediately and upon the mediator upon his/her selection.

[Section 1164\(c\); Title 8, Cal. Code Regs., sec. 20405; sec. 20407.](#)

### **What happens during the mediation process?**

During the mediation, the parties must provide the mediator with a detailed rationale for each of its contract proposals on the issues that are in dispute and also provide on the record supporting evidence to justify those proposals. The mediator presides at the mediation, rules on the admission and exclusion of evidence and on questions of procedure. The mediator has the right to go off the record at any time to clarify issues informally. All off-the record communications are confidential as provided in Evidence Code section 1119 and shall not be the basis for any findings and conclusions in the mediator's report.

During the mediation, the parties have the right to be represented by counsel or other representative; the parties have the right to be heard, to present evidence, and to cross-examine witnesses. The rules of evidence and rules of judicial procedure need not be observed. The testimony of witnesses must be given under oath. All evidence must be preserved in the official record through the use of a court reporter or, with the consent or both parties and the approval of the mediator, by a stipulated record.

[Title 8, Cal. Code Regs., sec. 20407 \(a\)](#)

### **Is discovery available to the parties during the mediation process?**

Yes, within fifteen days of receipt of a Board order directing the parties to mediation and conciliation, either party has the right to demand in writing that the other party provide a list of witnesses it intends to call, designating which witnesses will be called as expert witnesses, and a list of documents that it intends to introduce on the record at the mediation. That demand may be served either personally or by registered or certified mail; a copy must be served on the mediator.

The parties also have the right to request issuance of subpoenas requiring the attendance and testimony of witnesses and production of any materials, including books, records, or correspondence in the possession of or under the control of a party to the mediation. However, information concerning the financial condition of the employer and its ability to meet the costs of the contract are not discoverable except where the employer makes a plea of inability to meet the union's wage and benefit demands; other financial information may be discoverable if necessary to verify or evaluate a party's claims or proposals.

[Title 8, Cal. Code Regs., sec. 20407 \(a\) \(1\); sec. 20406.](#)

**How long is the period of mediation?**

Mediation shall proceed for a period of 30 days. Upon mutual agreement of the parties, the mediator may extend the mediation period for an additional 30 days.

[Section 1164\(c\)](#)

**What happens if the parties resolve the issues to their mutual satisfaction and agree to a collective bargaining agreement without the need for the issuance of a mediator's report?**

In that event, it is no different than any collective bargaining agreement. However, the parties do have an obligation to notify the Board and submit a copy of the agreement.

[Title 8, Cal. Code Regs., sec. 20407, subdiv. \(e\)](#)

**What happens if upon expiration of the 30-day period (or 60-day period if the mediation period is extended), the parties do not resolve the issues to their mutual satisfaction?**

The mediator shall certify that the mediation process has been exhausted.

[Section 1164\(c\)](#)

**What happens after the mediator certifies that the mediation process has been exhausted?**

Within 21 days after the last mediation session, the mediator shall file a report with the Board that resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement, including all issues subject to mediation and all issues resolved by the parties prior to the certification of the exhaustion of the mediation process. With respect to any issues in dispute between the parties, the report must cite to the evidence in the record that supports his/her findings and conclusions. When the mediator files the report with the Board, he/she must also transfer the official record of the proceeding to the Board.

[Section 1164\(d\); Title 8, Cal. Code Regs., sec. 20407 \(a\) and \(c\)](#)

**What factors may the mediator consider in resolving the issues in dispute, once the mediation process is exhausted?**

The mediator may consider those factors commonly applied in other similar types of proceedings, including, but not limited to the following:

1. The stipulations of the parties.

2. The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer makes a plea of inability to meet the union's wage and benefit demands.
3. A comparison of corresponding wages, benefits, and terms and conditions of employment in collective bargaining agreements covering similar agricultural operations with similar labor requirements.
4. Comparison of corresponding wages, benefits, and terms and conditions of employment in comparable firms or industries in geographical areas with similar economic conditions, considering the size of the employer, the skills, experience, and training required of the employees, as well as the difficulty and nature of the work.
5. The average consumer prices for goods and services, commonly known as the Consumer Price Index, and the overall cost of living in the area where the work is performed.

[Section 1164\(e\); Title 8, Cal. Code Regs., sec. 20407\(b\)](#)

#### **What if a party disagrees with the mediator's report?**

Either party, within seven days of the filing of the report by the mediator, may petition the Board for review of the report. The petitioning party shall, in the petition, specify the particular provisions of the mediator's report for which it is seeking review by the Board; shall specify the specific grounds authorizing review by the Board; and shall cite the portions of the record that support the petition.

[Section 1164.3\(a\); Title 8, Cal. Code Regs., sec. 20408 \(a\)](#)

#### **What is the Board's responsibility after a petition for review is filed?**

The Board, within 10 days of receipt of a petition, may accept for review those portions of the petition for which a prima facie case has been established

[Section 1164.3\(a\); Title 8, Cal. Code Regs., sec. 20408.](#)

#### **What constitutes a prima facie case warranting review of the petition?**

The petitioner must allege, with appropriate citations to the record that either:

- (1) a provision of the collective bargaining agreement set forth in the mediator's report is unrelated to wages, hours, or other conditions of employment within the meaning of Section 1155.2, or
- (2) a provision of the collective bargaining agreement set forth in the mediator's report is based on clearly erroneous findings of material fact.
- (3) A provision of the collective bargaining agreement set forth in the mediator's report is arbitrary or capricious in light of the mediator's findings of fact.

[Section 1164.3\(a\)](#)

#### **What happens if the Board does not accept a petition for review or no petition for review is filed?**

The mediator's report shall become a final order of the Board.

[Section 1164.3\(b\)](#)

**What happens if the Board finds grounds to grant review?**

If it finds grounds exist to grant review within the meaning of Section 1164.3, subdivision (a), the Board shall order the provisions of the report that are not the subject of the petition for review into effect as a final order of the Board.

[Section 1164.3\(b\)](#)

**If the Board accepts a petition for review, what actions follow?**

The Board issues a decision concerning the petition and if it determines that a provision of the collective bargaining agreement contained in the mediator's report violates the provisions of subdivision (a), it shall, within 21 days, issue an order requiring the mediator to modify the terms of the collective bargaining agreement.

[Section 1164.3\(c\)](#)

**If the Board orders the mediator to modify the terms of the collective bargaining agreement, what actions must the mediator take?**

The mediator shall meet with the parties for additional mediation for a period not to exceed 30 days. That meeting shall begin within thirty days of the issuance of the Board's order, or as soon as practical. At the expiration of this mediation period, the mediator shall prepare a second report resolving any outstanding issues, which will be filed with the Board.

[Section 1164.3\(c\); Title 8, Cal. Code Regs., sec. 20408](#)

**What if any party disagrees with the mediator's second report?**

Either party, within seven days of the filing of the mediator's second report, may petition the Board for a review of the mediator's second report pursuant to the procedures specified in section 1164, subdivision (a), i.e., the same procedures used for seeking review of the first report. The Board shall issue an order confirming the mediator's report and ordering it into immediate effect, unless it finds that the report is subject to review for any of the grounds specified in subdivision (a), in which case the Board shall determine the issues and issue a final order.

[Section 1164.3\(d\)](#)

**What if neither party seeks review of the mediator's second report?**

The mediator's second report shall take immediate effect as a final order of the Board.

[Section 1164.3\(d\)](#)

**Are there other grounds for seeking review of a mediator's report besides those in section 1164.3, subdivision (a)?**

Yes, section 1164.3, subdivision (e) allows either party to petition the Board to set aside a mediator's report if a prima facie case is established that any of the following have occurred:

- (1) the mediator's report was procured by corruption, fraud, or other undue means,
- (2) there was corruption in the mediator, or



(3) the rights of the petitioning party were substantially prejudiced by the misconduct of the mediator.

[1164.3\(e\)](#)

**If a petition for review is filed based on section 1164.3, what happens if there are material facts in dispute outside of the official record?**

The Board may order an expedited evidentiary hearing to resolve the dispute. That hearing to be conducted in the same manner as a hearing to determine whether the statutory prerequisites for mandatory mediation have been met in the event that an answer is filed disputing the facts set forth in a declaration requesting mediation.

[Title 8, Cal. Code Regs., sec. 20408 \(b\)](#)

**What happens if a party meets its burden of establishing one of the three grounds above?**

The Board shall within 10 days vacate the report of the mediator and shall order the selection and appointment of a new mediator, and an additional mediation period of 30 days, pursuant to Section 1164.

[1164.3\(e\)](#)

**How can the Board's order be enforced?**

Within 60 days after the order of the Board takes effect, either party or the Board may file an action to enforce the order of the Board, in the superior court for the County of Sacramento or in the county where either party's principal place of business is located.

[1164.3\(f\)](#)

**Can the Board's order be stayed during appeal?**

No final order of the Board shall be stayed during any appeal under this section, unless the court finds that (1) the appellant will be irreparably harmed by the implementation of the Board's order, and (2) the appellant has demonstrated a likelihood of success on appeal.

[1164.3\(f\)](#)

**When can a dissatisfied party seek appellate review of a Board order?**

Within 30 days after the order of the Board takes effect, a party may petition for a writ of review in the Court of Appeal or the California Supreme Court.

If the writ issues, it shall be made returnable at a time and place specified by court order and shall direct the Board to certify its record in the case to the court within the time specified. The petition for review shall be served personally upon the Executive Secretary of the Board and the nonappealing party personally or by service. (sic)

[1164.5\(a\)](#)

**What is the scope of the court's review?**

Review is limited to determining, on the basis of the entire record, whether any of the following occurred:

(1) The Board acted without, or in excess of, its powers or jurisdiction.

(2) The Board has not proceeded in the manner required by law.

(3) The order or decision of the Board was procured by fraud or was an abuse of discretion.

(4) The order or decision of the Board violates any right of the petitioner under the Constitution of the United States or the California Constitution.

[1165.5\(b\)](#)

**Are any limitations placed on the reviewing courts?**

Yes, the courts are not permitted to hold a trial de novo, to take evidence other than as specified by the California Rules of Court, or to exercise independent judgment on the evidence.

In addition, no court, except the Courts of Appeal or the Supreme Court, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the Board to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the Board in the performance of its official duties, as provided by law and the rules of court.

[1164.5\(c\)](#)

**Who can appear in the court proceedings?**

The Board and each party to the action or proceeding before the mediator may appear in the review proceeding.

[1164.7\(a\)](#)

**What actions can the appellate courts take?**

The courts shall enter judgment either affirming or setting aside the order of the Board.

[1164.7\(a\)](#)

**Does the new law impose any other requirements on labor organizations or agricultural employers?**

Yes, certified labor organizations and agricultural employers must submit to the Board a copy of the full text of any collective bargaining agreements to which they agree, where the effective date of the agreement is on or after the effective date of the regulations adopted by the Board to implement SB 1156 and AB 2596.

[Title 8, Cal. Code Regs., sec. 20450](#)

**Does the law contain a sunset provision?**

No. As originally enacted, the law was to sunset on January 1, 2008, however that provision (former sec. 1164.14) was removed by subsequent legislation (SB 75).

