

AGRICULTURAL LABOR RELATIONS BOARD

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DATE: September 22, 2021

TO: Agricultural Labor Relations Board

CC: Santiago Avila-Gomez, Executive Secretary

FROM: Ralph Lightstone, Board Member
Barry Broad, Board Member

RE: Regulatory Proposals – Gendered Language Changes

Below are draft regulatory changes and proposals based on the Regulations Subcommittee's recommendations approved by the Board at the April 13, 2021 public meeting. Changes are reflected in underline (new language) and strikethrough (deletions) formats. Note that many regulations proposed to be amended in other substantive respects also include gender-neutral language corrections similar to those proposed below. In such instances, proposals concerning such other regulations are reflected separately in the report covering the general subject matter to which the regulations pertain. In other words, gender-neutral language amendments in a regulation in the chapter concerning unfair labor practices that is proposed to be amended in other substantive respects will be set forth in the separate regulation report on proposed regulatory language concerning unfair labor practice regulations.

GENDER-NEUTRALIZING UPDATES

To amend regulation 20222 to state:

§ 20222. Amendment of Complaint; Withdrawal of Complaint.

(a) The general counsel, or ~~his or her~~the general counsel's agents, may amend any complaint without leave, no later than 10 days prior to the commencement of the hearing. Where there are less than 10 days remaining prior to the opening of the hearing, the complaint may be amended on such terms as may be just, upon motion by the general counsel to the assigned administrative law judge. An amendment to a complaint shall be in writing, except that a complaint may be amended orally at hearing or prehearing if the amendment is reduced to writing, filed with the executive secretary and served on the assigned administrative law judge and on all parties no later than 10 days after the close of the prehearing conference or hearing, as the case may be.

(b) The general counsel or ~~his or her~~the general counsel's agents may withdraw any complaint, without leave, prior to the commencement of the hearing. Thereafter, the complaint may be withdrawn on such terms as may be just upon motion by the general counsel to the assigned administrative law judge.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151.4(a), 1160.2 and 1160.3, Labor Code.

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To amend regulation 20243 to state:

§ 20243. Motion for Decision for Lack of Evidence.

(a) After the general counsel or the respondent has completed its presentation of evidence, the opposing party, without waiving its right to offer evidence in support of its defense or in rebuttal in the event the motion is not granted, may move for decision in its favor in whole or in part. The motion shall be granted if the administrative law judge finds that there is no evidence in the record of sufficient substance to support a decision on the merits in favor of the party against whom the motion is directed; provided, that, in making this finding, the administrative law judge shall give to the evidence of said party all value to which it is legally entitled, making every favorable, legitimate inference which may be drawn from that evidence; provided further, that, with respect to the credibility of that party's witnesses, the administrative law judge may disregard such testimony ~~as he or she finds~~ found to be manifestly unworthy of belief.

(b) Any ruling granting a motion for decision as to all issues involved in the action shall be in writing with reasons stated and shall be served on all parties and the executive secretary. Any such ruling shall include a recommended order. Such ruling and recommended order is tantamount to an administrative law judge's decision and is reviewable as provided in sections 20279 et seq. or, in the alternative, a party may elect to seek review as provided in section 20242(b).

(c) If the evidence supports the granting of the motion as to some but not all of the issues, the administrative law judge shall grant the motion as to those issues; the administrative law judge's ruling may be made orally or in writing as provided in section 20241(c) and shall be noted in the judge's decision. Such ruling is subject to review under section 20242(b), but special permission is required; such a ruling is also reviewable by way of exception to the administrative law judge's decision pursuant to sections 20279 et seq.

(d) As to any ruling pursuant to this section which is based in whole or in part on a finding that testimony is manifestly unworthy of belief, the administrative law judge shall state, orally or in writing as provided above, the reason(s) for the finding.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1160.2 and 1160.3, Labor Code.

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To amend regulation 20274 to state:

§ 20274. Production of Statements of Witnesses After Direct Testimony.

(a) After direct examination of a witness, and upon motion of any party, the administrative law judge shall order the production of any statements of the witness in the possession of any other party that relate to the subject matter of the testimony. Should the statements produced be in a language other than English, a translation of the statement shall be made by the official interpreter retained for the proceeding.

(b) A statement includes a written declaration by the witness, signed or otherwise adopted or approved by ~~him or her~~ the witness, or a recording or transcription of a recording which is a verbatim recital of an oral statement that was recorded at the time the statement was made.

(c) If the party sponsoring the testimony claims that a statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony or matter which is privileged, the party shall deliver the statement to the administrative law judge for ~~his or her~~ private inspection. The administrative law judge may excise those portions of the statements which do not relate to the subject matter of the testimony or the subject matter of the hearing, or which are privileged. The remainder of the statement shall be delivered to the moving party.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1151(a) and 1160.2, Labor Code.

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To amend regulation 20290 to state:

§ 20290. Initiation of Compliance Proceedings.

(a) If it appears that a controversy exists with respect to the compliance with a Board order, a court decree enforcing a Board order, or an administrative law judge's decision which has become final, and such controversy cannot be resolved without a formal proceeding, the regional director shall issue in the name of the Board and serve on all parties a compliance specification as provided in ~~subsections~~ subdivisions (a), (b), (c) or (d) of section 20291. The specification shall be consistent with precedent under the Act and shall contain, or be accompanied by, a notice of hearing. In the alternative and in appropriate circumstances, the regional director shall issue and serve on the parties a notice of hearing without a specification as provided in section 20291(e). The notice of hearing with or without specification may provide for a hearing to be held before an administrative law judge not less than fifteen (15) days after the service of the notice; it shall be filed with the executive secretary and served on each party as provided in sections 20160 ~~and 20164~~ through 20169.

(b) Whenever the regional director deems it appropriate in order to effectuate the purposes and policies of the Act or to avoid unnecessary costs and delay, ~~he or she~~ the regional director may consolidate with a complaint and notice of hearing issued pursuant to section 20220, a compliance specification based on that complaint. After the opening of the pre-hearing conference, consolidation shall be subject to approval of the administrative law judge or the Board as provided in section 20244. Issuance of a compliance specification shall not be a prerequisite or bar to Board initiation of proceedings in an administrative or judicial forum which the Board or regional director determines to be appropriate for obtaining compliance with a Board order.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1160.3, Labor Code.

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To amend regulation 20291 to state:

§ 20291. Contents of Compliance Specification or Notice of Hearing without Specification.

(a) Contents of specification with respect to allegations concerning the amount of backpay due. With respect to allegations concerning the amount of backpay due, the specification shall specifically and in detail show, for each employee:

- (1) The backpay period;
- (2) The amount of gross backpay owed, the method of its computation, the data used in making the computation, and the reasons for selecting the method and data utilized;
- (3) The amount and source of interim earnings, the method of allocation, e.g., weekly average, and the reasons for selecting that method;
- (4) Amount and type of expenses claimed;
- (5) Net backpay, including the method of calculation and the reasons for selecting that method;
- (6) Missing or deceased discriminatees and the requested method for handling their claims;
- (7) The interest due to the date of the specification and a demand for appropriate interest thereafter; and
- (8) Any other pertinent information.

(b) Contents of specification with respect to allegations concerning the amount of bargaining makewhole due. The bargaining makewhole specification shall specifically and in detail show for all employees entitled to bargaining makewhole, including employees entitled to a makewhole supplement to backpay:

- (1) The bargaining makewhole period;
- (2) Actual gross earnings, or gross backpay for discriminatees not working during the bargaining makewhole period;
- (3) The bargaining makewhole wage rate; the comparable contract(s) or other economic measures upon which it is based, together with the reasons for their selection; and the manner in which the makewhole rate was derived from the comparable contract(s) or other economic measures;
- (4) Fringe benefits owed, the contract(s) or other economic data from which they were derived, the reasons for utilizing the contract(s) or other data, and the method by which fringe benefits were derived from the contract(s) or other data;
- (5) Net bargaining makewhole and/or bargaining makewhole supplement due;
- (6) The interest due to the date of the specification and a demand for appropriate interest thereafter;
- (7) Any other pertinent information;

(c) Contents of specification with respect to allegations other than the amount of backpay or makewhole due. With respect to allegations other than the amount of backpay or makewhole due, the specification shall contain a detailed description of the respects in which the person(s) named as respondent(s) have failed to comply with the Board order, court decree, or final administrative law judge's decision, including the remedial acts claimed to be necessary for compliance by the respondent(s).

(d) Use of Partial Specifications. Where, for good cause alleged and established at hearing, the regional director is unable to prepare a full specification as described in ~~subsection~~subdivision (a), (b) or (c) above, ~~he or she~~the regional director may issue a partial specification alleging in detail all information which is reasonably ascertainable, and the matter shall proceed on that basis.

(e) Use of Notice of Hearing without Specification. In appropriate circumstances, the regional director may issue a notice of hearing without a specification, containing a clear and detailed statement of the matter(s) in controversy and any relief sought. The regional director shall include in the notice of hearing the reason or reasons for dispensing with a specification and must substantiate such reason(s) if they are called into question during the course of the proceedings.

(f) Issues Involving Derivative Liability. Where the regional director believes that a person or persons not named in a Board order, court decree, or final administrative law judge's decision, is jointly or derivatively liable to comply with such order, decree, or decision, that liability may be determined in a compliance proceeding initiated under ~~subsection~~subdivision (a), (b), (c), (d), or (e) above, in which the regional director has named the person or persons as respondent(s) and has alleged the legal and factual basis for their joint or derivative liability.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1160.3, Labor Code.

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To amend regulation 20299 to state:

§ 20299. Agricultural Employee Relief Fund.

(a) This ~~subsection~~subdivision shall apply to all cases in which the Board has ordered monetary relief for agricultural employees or has issued an order approving a settlement agreement providing for payment of monies to agricultural employees, where the collection of monies pursuant to such orders or settlement agreements occurred on or after January 1, 2002. In addition, this ~~subsection~~subdivision shall apply where the collection of monies occurred prior to January 1, 2002, if the monies were not subject to an enforceable promise to return them to the employer and had not escheated to the State by operation of law as of January 1, 2002.

(1) Where, despite diligent efforts, the Board has been unable to locate employees or any person(s) legally entitled to collect money on their behalf for a period of two years after the date the Board collected monies on behalf of such employees, those monies shall be deposited in a special fund in the State Treasury that shall be named the Agricultural Employee Relief Fund (Fund).

(2) Provisions requiring that monies collected on behalf of employees who are not located within two years after the date of collection be deposited in the Fund may be included, pursuant to the mutual agreement of the Regional Director and the employer, in informal settlement agreements reached in accordance with section 20298.

(b) When a regional director has good cause to believe that the collection of the full amount of monetary relief previously ordered by the Board is not possible after reasonable efforts have been made to collect the balance from the employer, the regional director shall file a motion seeking a finding by the Board that the case is eligible for pay out from the Fund. In the case of formal settlement agreements, as defined in section 20298, where there has been a prior adjudication by the Board of the amounts owing, such adjudication shall define the full amount of monetary relief owing to employees. Where there has not been a prior adjudication of the amount owing to employees, the full amount owing to employees shall be the amount specified in the formal

settlement agreement. The motion shall be filed with the Board and served on the parties to the case in accordance with sections 20160 and 20166, and shall be accompanied by a statement describing the collection efforts made to date and the basis for the regional director's belief that collection of the full amount owing is not possible. Any party to the case may file a response within ~~ten (10)~~ days of service of the motion. If the Board grants the motion, the case shall become eligible for pay out from the Fund, in accordance with the provisions below.

(1) Within ~~ninety~~⁹⁰ days after the end of each fiscal year, the Board shall determine the amounts to be paid to eligible employees and shall begin distribution of those amounts.

(2) Employees eligible for pay out from the Fund shall be those entitled to monetary relief pursuant to orders in cases in which the Board has made the Fund eligibility finding specified in ~~subsection~~subdivision (b) above. Such employees shall be included in the next annual determination referred to in ~~subsection~~subdivision (b)(1). Eligibility shall continue for two successive annual determinations. Thereafter, eligibility for pay out from the Fund shall expire. In no event shall an employee be paid an amount from the Fund exceeding the amount owed but not collected from ~~his or her~~the employer.

(3) The amount to be distributed to each employee eligible for pay out shall be calculated as follows. The total amount of unallocated money in the Fund shall be divided by the aggregated total of the amounts owing to eligible employees. The resulting ratio shall be multiplied by the amount owing to each eligible employee to determine the amount to be distributed to each eligible employee. However, if the ratio is greater than one, it shall be deemed to be one for the purpose of calculating the amounts to be distributed, and any monies in excess of the amounts necessary for distribution shall remain in the Fund for future distributions. For the purpose of the above calculation, the "amount owing to each eligible employee" shall not include any amounts allocated to the employee in previous fiscal years.

(4) Notwithstanding ~~subsection~~subdivision (3) above, no amount less than ten dollars shall be allocated or distributed to any employee.

(5) Where money from the Fund cannot be distributed because the employee to whom it is assigned cannot be located and/or does not claim the money, the money shall be held in the Fund for distribution to that employee until one year has elapsed from the expiration of eligibility for distribution from the Fund, at which time the claim shall be extinguished and the money shall revert to the Fund for use in making payments to other eligible employees. Eligibility for distribution shall be deemed to have expired after all allocations for which an employee is eligible or upon an employee being allocated 100% of the amount owed, whichever comes first. However, where a claimant can demonstrate that extraordinary circumstances prevented distribution or receipt of monies owing prior to the time that the claim was extinguished, the Board may approve payment of the claim.

(c) The provisions of ~~subsection~~subdivision (b) shall be applied to every distribution from the Fund, unless the Board, within ten (10) days of the determination referred to in ~~subsection~~subdivision (b)(1), finds that application of those provisions will result in manifest injustice. In the event of such a finding, the Board may alter the distribution in order to avoid such injustice.

(d) A motion to make a case eligible for pay out from the Fund pursuant to ~~subsection~~subdivision (b) of this section shall be deemed to include a simultaneous motion to close pursuant to John V. Borchard, et al.(2001) 27 ALRB No. 1. In such event, the filing requirements set forth in this section shall be controlling. In the event that a closed case is later reopened pursuant to the criteria set forth in John V. Borchard, et al.(2001) 27 ALRB No. 1 and further collection of monies

from the employer is effectuated, the Fund shall be reimbursed to the extent that the combination of the amount collected from the employer and the amount paid from the Fund exceeds the full amount owed to employees in that case.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1161, Labor Code.

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To amend regulation 20335 to state:

§ 20335. Transfer, Consolidation, and Severance.

(a) Whenever it appears necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay, the Board or the regional director, after consultation with the parties, may order that any petition and any proceedings that may have been instituted with respect thereto:

- (1) Be consolidated with any other proceedings which may have been instituted in the same region;
- (2) Be transferred and continued before the Board for the purpose of investigation or consolidation with any other proceeding which may have been instituted in any regional office;
- (3) Be severed from any other proceeding with which it may have been consolidated pursuant to this section; or
- (4) Be transferred to and continued in another regional office for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such regional office.

(b) Whenever a petition under Labor Code §section 1156.3(c) is properly filed, the Board may, at its discretion, sever issues relating to the appropriateness of the bargaining unit, employment peak, or the accuracy of the allegations in the petition made pursuant to Labor Code §section 1156.3(a)(2), (3), or (4).

(c) Where a petition under Labor Code §section 1156.3(e) is filed, objecting to the conduct of the election or conduct affecting the results of the election pursuant to section 20365 or where challenges to the eligibility of voters to cast ballots are submitted to the Board pursuant to section 20363, the ~~E~~executive ~~S~~ecretary shall notify the ~~G~~eneral ~~C~~ounsel of such filing(s), under either of these sections, and provide to the ~~G~~eneral ~~C~~ounsel a copy of the documents filed, by no later than the close of business of the following work day on which the documents were received by the ~~E~~executive ~~S~~ecretary. Simultaneously, the ~~E~~executive ~~S~~ecretary will identify the date upon which the 21-day period for Board action under either section 20365 or 20363 will expire.

(1) The ~~G~~eneral ~~C~~ounsel may thereby proceed to determine whether there are currently any charges filed under Chapter 4 of the Act that mirror the objections or challenges received by containing the same or some of the same matter which form the basis of said objection or challenge. Upon making this determination, the ~~G~~eneral ~~C~~ounsel may, ~~at his or her option,~~ notify the ~~E~~executive ~~S~~ecretary that certain specified charges, in ~~his or her~~the general counsel's view, mirror certain specified objections or challenges. Where the ~~G~~eneral ~~C~~ounsel has decided to seek consolidation of said mirroring charge with the objections or challenges set for hearing, the ~~G~~eneral ~~C~~ounsel, by motion, must request that the Board consolidate the mirror unfair labor practice charge complaint. In order for the Board to consider such motion for consolidation, the

Board must receive the ~~G~~general ~~C~~counsel's motion prior to the date set for expiration of the 21 - day period under section 20365 and/or section 20363.

(2) Should the ~~G~~general ~~C~~counsel determine that ~~his or her~~the investigation and/or issuance of the complaint on mirror unfair labor practices cannot occur prior to the scheduled expiration date of the 21-day period, the ~~G~~general ~~C~~counsel may make, pursuant to Labor Code section 1156.3(i)(3), a motion to show good cause why the applicable 21-day period of time for determining which objections or challenges must be set for hearing should be extended for the purposes of consolidation. Alternatively, and also pursuant to Labor Code section 1156.3(i)(3), all affected parties may sign a stipulation extending the time period for consolidation.

For the purposes of this subdivision, good cause will be established when the ~~G~~general ~~C~~counsel avers that it is ~~his or her~~the general counsel's intent to move the Board to consolidate any enumerated mirror charges ~~he or she~~the general counsel has determined may merit complaint but that the investigation of those charges have not been completed and additional time is required to complete the investigation and/or issue complaint and move for consolidation. As a result of this averment, the Board will grant a 30-day continuance for the purpose requested so as to allow for a motion for consolidation.

(3) No other additional continuance will be granted for the purpose of section 20335(c) consolidation and the Board will proceed after the expiration of the 30-day continuance to hearing on the objections or challenges with or without consolidated charges. For purposes of any stipulation by the affected parties to extend the timeline set by Labor Code section 1156.3(i)(1)(A)(i), and pursuant to section 20130, the ~~G~~general ~~C~~counsel is not an affected party.

(4) Any resulting hearing will be governed by the procedures set forth in Chapters 4 and 6 of the Act. The ~~G~~general ~~C~~counsel or ~~his or her~~the general counsel's representative may participate in any such hearing only when an unfair labor practice complaint has been consolidated with the objections or as required by the provisions of section 20370(c).

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1156.3, Labor Code.

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To amend regulation 20350 to state:

§ 20350. Election Procedure.

(a) All elections shall be conducted under the supervision of the appropriate regional director. All elections shall be by secret ballot and shall be conducted at such times and places as may be ordered by the regional director. Reasonable discretion shall be allowed to the agent supervising the election to set the exact times and places to permit the maximum participation of the employees eligible to vote.

(b) Each party may be represented at the election by observers of its own choosing who should be designated at the pre-election conference, but in no event less than 24 hours before the start of the election. Such observers must be non-supervisory employees of the employer, except the petitioner, if an employee, also may not be an observer. Other persons, with the exception of supervisors or the petitioner, may be observers if agreed to by all parties in writing. Observers so designated should not wear or display any written or printed campaign material or otherwise engage in any campaign activities on behalf of any party while acting as observers. The Board agent has the discretion to determine the number of observers which each party may have. Any party objecting to the observers designated by another party must register the objection and the reasons therefore with the Board agent supervising the election by the close of business the day

immediately preceding the election. Failure to so register such objections will be construed as a waiver of the right to object to the conduct of the election on such ground. The regional director shall have the discretion to modify the time limits contained in this regulation where a strike election makes such limits impracticable or in other extraordinary circumstances.

(c) All parties shall be required, upon request by the regional director or ~~his or her~~ the regional director's agent, to cooperate fully in the dissemination to potential voters of official Board notices of the filing of a petition and official Board notices of direction of an election and any other notices which, in the discretion of the regional director or ~~his or her~~ the regional director's agent, are required to fully apprise potential voters of the time and location of an election.

(d) Unless otherwise directed by the regional director after consideration of the particular circumstances of a case, a pre-election conference shall be held in each case no later than 24 hours before the commencement of the election. Subject to the above limitation, the Board agent assigned to the election shall have discretion to set the time and place of the pre-election conference after consultation with the parties.

Note: Authority cited: Section 1144, Labor Code. Reference: Sections 1156.3, 1156.7 and 1157.2, Labor Code.

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To amend regulation 20355 to state:

§ 20355. Challenges.

(a) Any party or the Board agent may challenge, for good cause shown, the eligibility of any person to cast a ballot. Good cause shown shall consist of a statement of the grounds for the challenge, which shall be supported by evidence submitted subsequent to the closing of the polls. Any challenge must be asserted prior to the time that the prospective voter receives a ballot and be limited to one or more of the following grounds:

- (1) The prospective voter is a supervisor as defined by Labor Code ~~§~~section 1140.4(j);
- (2) The prospective voter was not employed in the appropriate unit during the applicable payroll period;
- (3) The prospective voter is employed by ~~his or her~~ the prospective voter's parent, child, or spouse, or is the parent, child, or spouse of a substantial stockholder in a closely held corporation which is the employer;
- (4) The prospective voter was employed or ~~his or her~~ the prospective voter's employment was willfully arranged for the primary purpose of voting in the election in violation of Labor Code ~~§~~section 1154.6;
- (5) The prospective voter is a guard employed primarily to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's property;
- (6) The prospective voter is a managerial or confidential employee;
- (7) The prospective voter is not an agricultural employee of the employer as defined in Labor Code ~~§~~section 1140.4(b); or

(8) The prospective voter's name does not appear on the eligibility list.

(b) Failure to challenge the eligibility of a person to vote prior to ~~his~~the person receiving a ballot shall constitute a waiver of the right to challenge that person's vote, and any post-election objection raising the issue of the eligibility to vote of a person whose ballot was not challenged at the election shall be dismissed.

(c) Prospective voters, including those whose names appear on the eligibility list, must present identification in order to vote. Identification may be in the form of an employer-provided identification card, a payroll check stub of that employer, driver's license, "green card," social security card, or any other identification which the Board agent, in ~~his or her~~the Board agent's discretion, deems adequate. The Board agent will challenge any prospective voter who fails to supply identification as required above, or any prospective voter concerning whom the Board agent concludes there is a substantial question of identity.

(d) Subsequent to the balloting but prior to the tally of ballots, the Board agent supervising the election shall have discretion to rule upon challenged ballots on which all parties agree that there is no factual or legal dispute, or to accept withdrawal of any challenge by the party making the challenge.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1156.3, Labor Code.