

AGRICULTURAL LABOR RELATIONS BOARD

ADDENDUM TO INITIAL STATEMENT OF REASONS IN SUPPORT OF PROPOSED REGULATORY ACTION

SECTION-BY-SECTION EXPLANATION FOR ADOPTION

Proposed section 20291, subdivision (a): A regional director may consolidate an unfair labor practice complaint with a compliance specification involving a monetary remedy alleged to be owed when the regional director deems it appropriate to do so to avoid unnecessary cost and delay. In cases involving a limited number of farmworker charging parties and/or limited amounts of alleged backpay owed to workers, consolidation of the unfair labor practice liability proceedings with proceedings to determine the amount of backpay actually owed increases efficiency in the Board's processes. (See, e.g., *Ocean Mist Farms* (2020) 46 ALRB No. 5 [consolidated proceeding].) Consolidation of a compliance specification with an unfair labor practice complaint after a pre-hearing conference has begun requires the approval of the administrative law judge or the Board. The requirement that a judge or the Board approve consolidation after a pre-hearing conference in the unfair labor practice case is necessary to allow a respondent a fair opportunity to respond to a request for consolidation and to present arguments why consolidation may not be appropriate at that stage of proceeding. The provisions of this subdivision incorporate substantially similar language from existing regulation 20290, subdivision (a), which is proposed to be repealed and re-adopted here as part of the restructuring of the Board's compliance proceedings.

Proposed section 20292, subdivision (c): Paragraph (1) allows a regional director to issue a partial specification when unable to prepare a full specification. In such cases, the regional director must establish good cause why the regional director is unable to prepare a full specification. Permitting a regional director to proceed on the basis of a partial specification will allow proceedings to determine the amount of a monetary remedy to proceed on the basis of information available to a regional director, which is necessary in certain cases where a respondent either delays, fails, or refuses to produce information necessary to prepare a full calculation of a monetary remedy ordered to be paid by the Board. Allowing the use of partial specifications in such circumstances will avoid delays in the Board's administrative processes and enable the Board to complete processing of a compliance case involving monetary remedies within the one-year statutory deadline. (See Lab. Code, § 1149.3, subd. (a).) The partial specification must set forth in detail all information reasonably available to the regional director in preparing the partial specification and calculating the amount of the monetary remedy owed. This will allow the administrative law judge to assess the extent to which a respondent has not provided information necessary for complete calculations, which can lead to more efficient proceedings where the parties and judge are aware of the issues in the case and likely to be litigated at a hearing. The provisions of this paragraph incorporate virtually identical language from existing regulation 20291, subdivision (d), which is proposed to be repealed and re-adopted here as part of the restructuring of the Board's compliance proceedings. Paragraph (2) describes pleading requirements when a regional director asserts a respondent's noncooperation contributed to the regional director's inability to prepare a full specification, including that the

regional director shall additionally file a motion with the specification to preclude a respondent from disputing the calculations of the partial specification or introducing evidence previously withheld from the regional director. These requirements will allow an administrative law judge to more efficiently assess the scope of a respondent's noncompliance, provide for more timely determinations concerning such allegations, and contribute to more expeditious processing of compliance cases to effectuate monetary remedies ordered by the Board.

Proposed section 20391:

Subdivision (a): describes the requirements for filing and serving a majority support petition, including that the petition shall be signed under penalty of perjury stating that the contents of the petition are true to the best of the declarant's knowledge. The petition shall be filed in person at the regional office nearest the location of the employer whose employees the labor organization seeks to represent, and shall be served personally on the employer consistent with requirements in Labor Code 1156.37, subdivision (d). The requirement of filing in person will allow for the simultaneous submission of both the petition and accompanying proof of support, which must include original signatures and be physically delivered to the regional office. The petitioning labor organization must submit proof it has filed LM-2 reports for the previous two years and that it had a collective bargaining agreement in effect covering agricultural workers as of May 15, 2023, both of which are required conditions for the filing of a petition under subdivision (a) of Labor Code section 1156.37. Evidence of proof of support from employees in the bargaining unit sought to be represented also must be physically delivered to the appropriate regional office of the Board. Upon receipt of a petition and proof of support, the regional director must notify the employer named in the petition. This requirement is necessary to ensure prompt notice to the employer, including regarding applicable deadlines for responding to the petition.

Subdivision (a)(1): This paragraph sets forth the required contents of proof of support submitted by a labor organization. Subparagraph (A) establishes the required format for an authorization card, and subparagraph (B) describes the prescribed format of petitions used to establish proof of support. Prescribing the required contents of authorization cards and petitions used to demonstrate proof of support is designed to increase transparency as to the format and contents of the cards or petitions. Cards or petitions must be signed by employees and dated, identify the name of the employer to whom the petition relates, and include spaces for employees' addresses, telephone numbers, and email addresses. This information will assist a regional director investigating a petition in conducting a comparison of the proof of support with an employer's list of employees in the bargaining unit and corroborating the identities of the employees, including the ability to verify the employee signatures are not expired because they are dated over one year before filing of the petition. Cards or petitions also must clearly advise employees that their signatures are valid for one year, are equivalent to a vote in favor of the petitioning labor organization, and may not be revoked. These requirements are necessary to ensure employees understand the significance and purpose of the petitions or cards they are signing in expressing their support for a labor organization, particularly in light of the fact that this process differs from other labor organizing procedures under the ALRA where employees may vote in a secret ballot election. (See Lab. Code, § 1156.3, subd. (b).)

Subdivision (a)(3): This paragraph requires a regional director to provide notice to agricultural employees that a labor organization has filed a majority support petition seeking to represent them as their exclusive collective bargaining representative. Such noticing should be provided within 48 hours after an employer is notified of the filing of the petition in order to promptly advise employees of the filing of the petition and applicable procedures for processing the petition. The regional director or the regional director's agent(s) shall distribute the notice to workers and read the notice to workers and answer questions they may have regarding the petition. In addition, the employer shall post the notice at its property and notify the regional director and labor organization of such information concerning where and when the notice to employees has been posted. Notices posted at the employer's property shall remain posted while the petition remains pending before the regional director. These provisions are necessary to communicate to the workers information regarding the majority support petition and that a labor organization is seeking to become their exclusive collective bargaining representative.

Subdivision (b): This subdivision describes the requirements for an employer to file a response to a majority support petition, including the provision of a list of its agricultural employees during the pay period prior to the filing of the petition. The employer must serve its employee list electronically pursuant to Labor Code section 1156.37, subdivision (d). The employer's response and employee list must be filed and served within 48 hours after personal service of the majority support petition on the employer, which is required to conform to statutory requirements under Labor Code section 1156.37, subdivision (d). This subdivision provides the time for an employer to file its response may be extended where the deadline for doing so falls on a Saturday, Sunday, or legal holiday, consistent with Code of Civil Procedure section 12a.

Subdivision (b)(1): This paragraph specifies the requirements of an employer's response to a majority support petition and the allegations asserted in the petition, including setting forth the proper identity of the employer, the employer's contact information, and the identity of an individual or attorney authorized to accept service on behalf of the employer and represent the employer. This information is necessary to facilitate the regional director's investigation of a majority support petition, including assessing whether the requirements of Labor Code section 1156.37, subdivision (b) are met.

Subdivision (b)(2): This paragraph describes the required contents of an employee list produced by an employer, including that the list shall include employees' full names, street addresses, landline and cellular telephone numbers, email addresses, and job classifications and crew or department information. This information is necessary to facilitate the regional director's investigation of the proof of support accompanying a majority support petition, including corroborating the identities of employees and their eligibility for inclusion in the bargaining unit as agricultural employees.

Subdivision (c)(4): This paragraph describes procedures applicable to a regional director's investigation of a majority support petition when disputes arise concerning the eligibility of individuals to be counted as agricultural employees for determining the size of the bargaining unit and whether a labor organization has demonstrated proof of majority support. These procedures are necessary to provide guidance to handling staff and the parties concerning

the manner in which such disputes will be addressed and resolved, providing transparency in the handling and resolution of such disputes, and ensuring parties are advised regarding the disposition of eligibility disputes.

Subparagraph (A) governs disputes concerning the eligibility of employees included in an employer's list of employees who worked during the pay period directly preceding the filing of the petition. When the regional director or labor organization disputes the eligibility of individuals included on the employer's list, such individuals will be marked as "challenged" and the regional director will notify the employer of all such challenges. If the number of challenged individuals is in an amount sufficient to affect the determination whether majority support has been established, the regional director must notify the parties of such determination and allow the labor organization 30 days to submit additional proof of support or to cure any support previously but deemed invalid, consistent with Labor Code section 1156.37, subdivision (e)(4). These provisions concerning the manner in which eligibility challenges are addressed are consistent with existing law in the context of secret ballot election proceedings where challenges need only be resolved when the number of challenges is in an amount sufficient to affect the outcome of the election. If the number of challenges is smaller than the margin of a labor organization's victory in establishing proof of majority support, then it is unnecessary to resolve the challenges as the resolution of such disputes will not affect the result of the process. Within 10 days after notice by the regional director as described above, the parties are required to submit to the regional director their respective positions and all supporting evidence concerning whether the individuals are eligible agricultural employees in the applicable bargaining unit. Within two days after the close of the 30-day cure period, the regional director must notify the parties whether majority support has been established. If the number of challenged individuals remains in an amount determinative of whether majority support is established, the regional director is required to address and dispose each of the challenges and state whether the employees have been found to be eligible or not. These timeframes are necessary to ensure the expeditious processing of majority support determinations.

Subparagraph (B) governs situations where a labor organization alleges that eligible agricultural employees have been omitted from or not included in an employer's employee list, for example when a labor organization submits authorization cards or petition signatures from individuals alleged to be agricultural employees of the employer but who are not included in the employer's employee list. In such cases, the labor organization is required to submit to the regional director its position regarding the eligibility of individuals whom the labor organization contends are eligible employees not included on the employer's list and all supporting evidence. If the labor organization asserts eligible employees have been omitted from the employer's list during the regional director's initial investigation of a petition, the regional director shall not include those individuals in the regional director's initial determination whether majority support has been established. If majority support is not established during the regional director's initial 5-day investigation of the petition, the regional director shall notify the parties of such determination and allow the labor organization 30 days to submit additional support or to cure any previously submitted support deemed to be invalid, consistent with Labor Code section 1156.37, subdivision (e)(4). During the 30-day cure period the regional director shall consider and determine the eligibility of all individuals alleged by the labor organization to be eligible employees, including such allegations as presented by the labor organization during the cure

period. Within two days after the close of the cure period, the regional director must notify the parties whether majority support has been established. If the number of individuals alleged to be eligible employees omitted from the employer's list is in an amount sufficient to affect the outcome whether majority support has been established, the regional director shall include in its notice and tally the identity of all employees deemed to be eligible but omitted from the employer's list. Preserving the anonymity of the individuals until such time is necessary to protect the confidentiality interests of employees supporting the labor organization, and the requirement that the identities of individuals determined to be eligible be disclosed in the regional director's final notice and tally is necessary to ensure the employer is informed of the employees' identities in the event the employer seeks to dispute such eligibility determinations. If the employer files objections to the certification and challenges the eligibility of individuals determined by the regional director to be eligible employees omitted from the employer's list, the regional director shall produce to the Board and all parties all statements and evidence received by the regional director or in its possession regarding the individuals' eligibility. This requirement is necessary to ensure the Board and parties are aware of the evidence relied upon by the regional director in making eligibility determinations, and is consistent with existing procedures regarding the handling of eligibility challenges in the context of secret ballot election proceedings. In the event an objection disputing the eligibility of employees is set for hearing, this subparagraph further specifies that the scope of examination and inquiry in the hearing on such issues is limited to the individuals' eligibility. This is necessary to ensure employees are not subjected to improper examination concerning whether they support a labor organization.

Subdivision (d): This subdivision prescribes consequences where an employer does not cooperate with a regional director's investigation regarding a majority support petition, including failures to respond to a petition or instances where an employee list is incomplete or inaccurate. In such instances, a regional director is entitled to invoke certain presumptions in order to allow for the continued processing of the majority support petition and to prevent employers from frustrating the process of investigating a majority support petition. Allowing a regional director to invoke presumptions regarding the propriety of a majority support petition in light of the requirements of Labor Code section 1156.37, subdivision (b), or the sufficiency of a labor organization's proof of support under Labor Code section 1156.37, subdivision (d) is necessary to prevent or combat employer tactics to delay or frustrate processing of a majority support petition. The presumptions a regional director may invoke in such circumstances where an employer fails to respond to allegation of a majority support petition or produces a list that is substantially inadequate or incomplete in terms of providing the required information are consistent with existing law in the context of investigating a petition for certification and the provisions of regulation 20310, subdivision (f). This subdivision further provides an employer may not be excused from the consequences of this subdivision by claiming its employees are supplied by a farm labor contractor, as the employer is deemed to be the employer of all such employees under Labor Code section 1140.4, subdivision (c), and Labor Code section 1157.3 requires employers to maintain current and accurate payroll lists. This subdivision also specifies that an employee list containing missing or incorrect employee contact information may be deemed to constitute voter suppression within the meaning of Labor Code section 1156.37, subdivision (j), which is necessary to ensure eligible employee are not disenfranchised or improperly excluded from this process.

Subdivisions (e), (f), (g), and (h): These subdivisions have been renumbered from previous subdivisions (d), (e), (f), and (g), respectively, as set forth in the originally noticed regulatory text for proposed section 20391.

Subdivision (i): This subdivision is renumbered from previous subdivision (h) as set forth in the originally noticed regulatory text for proposed section 20391. This subdivision states that a majority support petition “campaign” by a labor organization will be deemed to be underway if the labor organization can establish proof of support of at least 10% of an employer’s agricultural employees. This threshold requirement applies to situations where a labor organization alleges an employer engaged in an unfair labor practice or misconduct or takes adverse action against an employee during the course of a labor organization’s majority support petition campaign under subdivisions (j) and (k) of Labor Code section 1156.37. Under section 1156.37, subdivision (j), a labor organization may be certified by the Board if an employer who engages in an unfair labor practice or misconduct during such a campaign and the Board finds the chances of a new majority support petition reflecting the fair and free choice of the employees to be slight. Under section 1156.37, subdivision (k), an employer who takes adverse action against an employee during a campaign is presumed to have taken such action for unlawful retaliatory purposes unless the employer rebuts the presumption by “clear and convincing” evidence. The 10% support threshold required by this section is necessary to implement the provisions of Labor Code section 1156.37, subdivisions (j) and (k), and to provide clarity and guidance to affected parties, including labor organizations who may make such allegations of unlawful conduct as described in those subdivisions, as well as employers who may be subject to heightened liabilities or risks under those subdivisions. However, under this subdivision a labor organization may still avail itself of the provisions of Labor Code section 1156.37, subdivisions (j) and (k) even if it cannot establish proof of support from at least 10% of the employees if the labor organization can demonstrate an employer’s unlawful conduct prevented it from doing so. This allowance is necessary to accommodate situations where an employer’s unlawful conduct stunted or prevented an organizing campaign at its inception or early stages and impeded the ability of the labor organization to obtain further support.