

AGRICULTURAL LABOR RELATIONS BOARD

FINAL STATEMENT OF REASONS IN SUPPORT OF REGULATORY ACTION TO:

- **Repeal existing sections 20290, 20291, 20292, and 20293; and**
- **Adopt new sections 20290, 20291, 20292, 20293, 20294, 20295, 20296, 20297, 20297.5, 20391, and 20411.**

FINAL STATEMENT

The Agricultural Labor Relations Board (ALRB or Board) adopts the above regulatory sections pursuant to the Notice of Proposed Rulemaking issued on March 8, 2024, and published in the California Regulatory Notice Register (Cal. Reg. Notice Register (Mar. 8, 2024) No. 10-Z, p. 249), that same day, as well as the Notice of Modifications to Text of Proposed Regulations and of Addition of Documents to Rulemaking File issued on June 21, 2024, the Second Notice of Further Modifications to Text of Proposed Regulations and of Addition of Documents to Rulemaking File issued on October 2, 2024, and the Third Notice of Further Modifications to Text of Proposed Regulations and of Addition of Documents to Rulemaking File issued on November 1, 2024.

UPDATE TO INITIAL STATEMENT OF REASONS

The ALRB issued its Notice of Proposed Rulemaking on March 8, 2024, accompanied by an Initial Statement of Reasons and the express terms of the proposed regulatory text. The Board received public comments during the 45-day comment period. Thereafter, on June 21, 2024, the Board issued a Notice of Modifications to Text of Proposed Regulations and of Addition of Documents to the Rulemaking File, as well as an Addendum to the Initial Statement of Reasons in Support of the Proposed Regulatory Action. The Board received public comments during the 31-day comment period. On October 2, 2024, the Board issued a second Notice of Modifications to Text of Proposed Regulations and of Addition of Documents to the Rulemaking File, as well as a second Addendum to the Initial Statement of Reasons in Support of the Proposed Regulatory Action. The Board received public comments during the 15-day comment period. On November 1, 2024, the Board issued a third Notice of Modifications to Text of Proposed Regulations and of Addition of Documents to the Rulemaking File, as well as a third Addendum to the Initial Statement of Reasons in Support of the Proposed Regulatory Action. The Board received no public comments during the second 15-day comment period.

ADDITIONAL DOCUMENTS ADDED TO THE RULEMAKING FILE

The ALRB has added the following records to its rulemaking file:

- Regulations Subcommittee Report recommending proposed modification to regulatory language, dated May 20, 2024
- Updated Regulations Subcommittee Report recommending proposed modification to regulatory language, dated June 7, 2024
- Addendum to Initial Statement of Reasons in Support of the Proposed Regulatory Action, dated June 21, 2024
- Regulations Subcommittee Report recommending proposed modification to regulatory language, dated September 11, 2024
- Second Addendum to Initial Statement of Reasons in Support of the Proposed Regulatory Action, dated October 2, 2024
- Regulations Subcommittee Report recommending proposed modification to regulatory language, dated October 25, 2024
- Third Addendum to Initial Statement of Reasons in Support of the Proposed Regulatory Action, dated November 1, 2024
- Regulations Subcommittee Report recommending approval of proposed regulatory action dated December 2, 2024

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

SUMMARY AND RESPONSES TO PUBLIC COMMENTS

The regulatory action formally commenced on March 8, 2024. The initial 45-day public comment period closed April 22, 2024. Following the consideration of public comments received during the initial comment period, on June 21, 2024, the ALRB issued a formal notice of modifications to the text of the proposed regulatory action and of the addition of documents to the rulemaking file and provided a 31-day comment period. The written comment period closed July 22, 2024. Following the consideration of public comments received during the 31-day comment period, on October 2, 2024, the ALRB issued a second formal notice of modifications to the text of the proposed regulatory action and of the addition of documents to the rulemaking file and provided a 15-day comment period. Following the consideration of public comments received during the 15-day comment period, on November 1, 2025, the ALRB issued a third formal notice of modifications to the text of the proposed regulatory action and of the addition of documents to the rulemaking file and provided a second 15-day comment period. The comment period closed November 18, 2024. No further comments were received.

The comments received focused on proposed regulations designed to implement the statutory amendments to the ALRA as enacted by Assembly Bill No. 113 (AB 113), Statutes of 2023, chapter 7. Proposed regulations implementing AB 113 can be divided into three topics: 1. regulations to implement the statutory changes to how the Board's compliance proceedings are conducted; 2. regulations to implement the addition of new appeal bond statutes to the ALRA; and 3. regulations to implement the addition of new Labor Code section 1156.37 to the ALRA, which introduces a new "majority support petition" process for certain labor organizations to become certified to represent agricultural employees in collective bargaining. The comment summaries and responses below are organized by these three topics under the notice periods in which they were received.

A. Summary and Responses to comments received during the initial notice period of March 8, 2024 through April 22, 2024

1. Updates to Regulation Pertaining to Contents of Compliance Specification Involving Monetary Remedies or Notice of Hearing Without Specification (Prop. Reg. 20292)

Comment Summary: ALRB regional directors proposed excluding "the source of interim earnings" from a compliance specification. (Prop. Reg. 20292, subd. (a)(3).) The regional directors expressed concern about employees who fear blacklisting.

Response: The Board did not adopt this proposed modification. The language at issue has been a requirement in compliance specifications for many years, dating back to at least 1991 when regulation 20291 was adopted. Interim earnings, and the sources of interim earnings, also are directly relevant to a respondent's ability to assess the extent of an employee's mitigation efforts, conduct discovery relating to mitigation efforts, and to assert such defenses at hearing. In fact, regulation 20236, subdivision (e) generally requires the production of all information in the regional director's files tending to "verify, clarify or contradict the items and amounts alleged in the backpay ... specification"

Comment Summary: The regional directors also proposed deleting the reference in proposed regulation 20292, subdivision (a)(6) to any missing or deceased discriminates entitled to backpay awards.

Response: The Board did not adopt this proposed modification. This provision continues verbatim the existing language in regulation 20291, subdivision (a)(6). Identification of deceased workers or workers who cannot be located is necessary to comply with requirements under Labor Code section 1161 pertaining to the Agricultural Employee Relief Fund (AERF). That statute requires the Board to collect monetary remedies on behalf of workers, to remit to the employees the monies they are due, and to deposit in the Fund monies collected but not disbursed because an employee or lawful representative of an employee could not be located.

Comment Summary: The regional directors proposed including the recovery of consequential damages in a compliance specification.

Response: The Board found this proposal unnecessary, as the recovery of economic or financial losses incurred as a direct or foreseeable result of a respondent's unfair labor practice already are encompassed under existing law as within the Board's make-whole remedial authority, and further that proposed regulation 20292, subdivision (a)(4), which continues verbatim the language of existing regulation 20291, subdivision (a)(4), allows for the specification and recovery of such harms.

2. Unfair Labor Practice Appeal Bonds (Lab. Code §1160.11; Prop. Regs. 20297, 20297.5)

There were no comments received pertaining to proposed regulations to implement Labor Code §1160.11 during the initial notice period.

3. Majority Support Petitions (Lab. Code § 1156.37; Prop. Reg. 20391)

Most of the comments received during the 45-day, 32-day and 15-day comment periods described above focused on proposed regulation 20391 and implementation of the majority support petition procedures codified in Labor Code section 1156.37. The comments directly below were received during the initial notice period, and are organized by the issues addressed by proposed regulation 20391.

Employee Revocation of Authorization

Comment Summary: Several commenters urged the Board to adopt procedures by which an employee may revoke an authorization previously given to a labor organization, or at least to recognize an alleged right to revoke in the regulation. The commentors supporting this type of proposal establishing an employee's right to revoke an authorization card asserted that recognition of revocation rights is necessary to protect employee free choice in the selection of bargaining representatives. In this regard, Labor Code section 1152 expressly recognizes "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations ... and shall also have the right to refrain from any or all such activities" Commentors also suggested our Board is bound to follow precedent under the National Labor Relations Act (NLRA) recognizing an employee's right to revoke an authorization card. (See Lab. Code, § 1148.)

Response: The Board did not adopt the suggested revocation procedures in proposed regulation 20391. Labor Code section 1156.37 is unlike any provision of the NLRA, any regulatory provision adopted by the National Labor Relations Board (NLRB), or any process administered by the NLRB. Notably, the statute is silent on the issue of whether employees may revoke an authorization card or signature on a petition supporting a union. In exercising rulemaking authority under Labor Code section 1144, the Board is not bound to follow NLRB rules. (*ALRB v. Superior Court* (1976) 16 Cal. 3d 392, 412-413.) Whether to adopt revocation procedures in regulation is a matter left to the Board's discretion. (*State of California (SEIU 1000/IT Bargaining Unit 22)* (2007) PERB Order No. Ad-367-S, pp. 11-12 [revocation of signatures in support of severance petition not allowed when not authorized by statute or regulation].)

To alleviate expressed concerns that employees may not understand the distinction between authorization cards or petitions used for majority support purposes as opposed to a petition or card used to support holding a secret ballot election under Labor Code section 1156.3, and to emphasize the significance of what an employee's signature on a petition or card used for majority support purposes means, the proposed regulations require that express language be included on authorization cards or petitions that a signature is equivalent to a vote for the labor organization and that it cannot be revoked. The Board believes these requirements sufficiently inform employees what they are signing and what their signature on a card means. To the extent an employee legitimately may claim the purpose of a card was misrepresented to the employee, claims of such a nature are distinct from more general requests to revoke a prior authorization and are not affected by this regulation. (See *Cemex Construction Materials Pacific, LLC* (2023) 372 NLRB No. 130, *27, fn. 148 ["Under Board law, if a union organizer misrepresents the nature or purpose of a union-authorization card, the card is invalid ..."]; *NLRB v. Arrow Specialties, Inc.* (8th Cir. 1971) 437 F.2d 522, 525.)

The Board also does not believe this approach interferes with employee free choice under the ALRA. The employee has complete freedom of choice whether to sign an authorization card. The language described above regarding the significance of signing a card reinforces this freedom by informing the employee about what they are signing, what their signature means, and the consequence of signing. Accordingly, the employee has full freedom of choice whether to sign an authorization card, including the knowledge that a card cannot be revoked once signed, much like a vote in an election cannot be taken back once cast. In other words, this approach provides greater disclosures to employees to enable them to more fully exercise their freedom of choice whether to support a labor organization.

Electronic Filing of Petition and Proof of Support

Comment Summary: ALRB regional directors proposed eliminating the electronic filing requirement for a majority support petition.

Response: The Board agreed, and modified proposed regulation 20391, subdivision (a), accordingly. The Board also added language to subdivision (a) clarifying the labor organization's proof of support must be submitted with the petition for the petition to be deemed filed.

Authorization Card Format and Content

Comment Summary: During the initial comment period, there were several comments pertaining to the contents of authorization cards used to support a majority support petition. Several comments supported the Board's proposed requirement the card identify the agricultural employer to whom the majority support campaign pertains, with one commentator proposing the agricultural employer's name be included on the card at the time it is presented to or signed by an employee. Commentors also requested further

transparency regarding the content of the cards and that the Board adopt a uniform format for cards used in a majority support process.

Response: To provide transparency and greater clarity and understanding amongst all affected parties, the Board modified proposed regulation 20391, subdivision (a) to prescribe the required format and content of authorization cards. The Board also included the requirement that the card template be available on the ALRB's web site.

Require Employee Authorizations be Deemed Valid Only if Signed While Employee is Employed by Subject Employer

Comment Summary: Several comments asserted the Board should adopt requirements that authorization cards be deemed valid only if signed by an employee while the employee is actually working for the employer subject to the majority support organizing campaign. Commenters requested that labor organizations be required to secure updated petitions or cards from the same employees, ensuring they are equipped with the same information as employees who sign post-regulation cards.

Response: The Board declined to adopt this modification. The language in proposed regulation 20391, subd. (a)(2)) is based on existing regulatory language in Board regulation 20300, subdivision (i)(1). Agriculture is a seasonal industry, and workers often work for multiple agricultural employers over the course of a calendar year depending on the season and harvests. Requiring a worker's authorization and support for a labor organization be given effect only if signed by the worker while employed with the subject agricultural employer would impose an unnecessary burden on employee free choice and a labor union's organizing efforts.

Labor Code section 1156.37, subdivision (c) and the proposed regulation (20391, subd. (a)(2)) require that employee support be given effect only as to those employees working for the agricultural employer at the time the petition is filed. This requirement, coupled with the requirement that the authorization cards also identify the name of the agricultural employer to whom the organizing campaign pertains, is sufficient to ensure only current employees of the employer are included for purposes of determining whether majority support is established while also protecting and enabling employee free choice.

Language Accessibility of Authorization Cards

Comment Summary: Several comments expressed language accessibility concerns and recommended the Board adopt requirements that cards provided to employees be in a language they understand. One comment also suggested requiring the card be read to the employee in the language the employee understands, as well.

Response: The Board did not adopt this proposed modification. The Board recognizes farmworkers come from varying backgrounds and speak a wide variety of languages and dialects. However, translation into all languages or dialects, such as dialects with no written language, could become unwieldy. The Board will provide English and Spanish

language translations of authorization cards. In other circumstances, a witness could attest that the content of a card was read to an employee and the employee understands the nature of what they are signing.

Signature Authenticity Verification Procedures

Comment Summary: Several commentators proposed the Board adopt procedures for verifying signatures on authorization cards, including that signatures be reviewed by representatives of the labor organization, employer, and/or other third-party.

Response: The Board declined to adopt such procedures. The proposals received on this issue directly violate well-established law recognizing the confidentiality of authorization cards and rejecting employer attempts to obtain the cards or otherwise assess who amongst its workforce supports a labor organization. (*United Nurses Associations etc. v. NLRB* (9th Cir. 2017) 871 F.3d 767, 785-786; *Wright Elec., Inc. v. NLRB* (8th Cir. 2000) 200 F.3d 1162, 1167; *Madeira Nursing Center, Inc. v. NLRB* (6th Cir. 1980) 615 F.2d 728, 731; *Heck's, Inc.* (1984) 273 NLRB 202, 206 [“It is well recognized that employees would be coerced or ‘chilled’ in the exercise of their Section 7 right to sign union authorization cards if they knew that the employer had the absolute right to see the cards”].)

The regional director is required to examine the cards as part of the investigation of the showing of support. However, the regional director is entitled to presume the validity of signatures on authorization cards absent the presentation of objective evidence calling their authenticity into question. (See *Camvac International, Inc.* (1988) 288 NLRB 816, 860, citing *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 607; see *Perdue Farms, Inc.* (1999) 328 NLRB 909, 911.) In this regard, the NLRB Casehandling Manual, Part 2, Representation Proceedings, Section 11027.1, states:

Although written authorizations should be examined on their face (to check, for example, for signatures that appear to be in the same handwriting), their validity should be presumed unless called into question by the presentation of objective evidence ... W-4 forms or other documents should not be accepted routinely for checking against signatures on the authorizations, absent objective evidence that provides a reasonable basis for challenging the showing of interest.

The Board finds this approach is appropriate and reasonable in majority support proceedings under Labor Code section 1156.37.

Duration of Authorization Validity

Comment Summary: One commentator proposed the Board measure the one-year period of validity of a signed card from the date a determination is made whether majority support exists.

Response: The Board declined to change proposed language regarding the period of validity. Measuring the timeframe in which a signed card will be deemed valid in terms of the date a majority support petition is filed provides certainty, clarity, and predictability in terms of the showing of support and a labor organization's efforts to establish majority support. This approach is more appropriate than an alternative that would introduce an element of unpredictability by allowing for the arbitrary invalidation of a card during the course of the cure period described in subdivision (e)(4) of Labor Code section 1156.37. In other words, the invalidation of a card during the 30-day cure period in these circumstances when the card may have been deemed timely and valid during the course of the regional director's initial investigation of the petition and showing of support would be inappropriate.

Regional Director Noticing to Workers of Filing of Majority Support Petition

Comment Summary: On June 3, 2024, the ALRB's regional directors submitted draft language and a proposal to adopt a notice, posting and in-person reading requirement the employer's worksite when a majority support petition is filed.

Response: The Board agreed to adopt the substance of the regional directors' proposal.

Extension of Time for Initial Employer Response to Majority Support Petition

Comment Summary: During the initial comment period, several commentators requested that the Board allow the deadline for an employer response to a majority support petition to be continued to the next business day when it falls on a Saturday. As initially proposed, regulation 20391, subdivision (b) extended this deadline when it falls on a Sunday or legal holiday. The commentators cited Code of Civil Procedure section 12a, subdivision (a), which states when the last day to perform an act falls on a holiday the deadline shall be continued to the next day that is not a holiday, defining "holiday" to include Saturdays. (See also Code Civ. Proc., § 10 [defining "holiday" to include Sundays and other designated legal holidays].) Code of Civil Procedure section 12a has been found applicable to statutory timeframes in other codes, including the Labor Code. (See, e.g., *Parsons v. Estenson Logistics, LLC* (2022) 86 Cal.App.5th 1260, 1267-1268; *DeLeon v. BART Dist.* (1983) 33 Cal.3d 456, 457; *People v. Superior Court* (1976) 65 Cal.App.3d 511, 517, fn. 2.)

Response: The Board adopted this recommendation and modified regulation 20391, subdivision (b), accordingly.

Inferences Based on Employer Non-Compliance

Comment Summary: The regional directors proposed that the Board adopt provisions authorizing a regional director to make negative inference against an employer that does not comply with its obligations to respond to a majority support petition and produce a list of employees.

Response: The Board considered existing Board regulation 20310, subdivision (f) regarding prescribed consequences when an employer fails to comply with response requirements in the context of a petition for certification. The Board concluded incorporation of similar provisions under the proposed regulation was appropriate and modified proposed regulation 20391 accordingly. (See prop. reg. 20391, subd. (d).)

Extension of Time for Regional Director to Make Initial Determination Re: Majority Support

Comment Summary: The regional directors requested the Board adopt language in regulation 20391 interpreting the word “day” in Labor Code section 1156.37, subdivision (e)(1) as referring to business days, as opposed to calendar days. The regional directors stated this proposal would allow them further time to conduct an investigation of a majority support petition, particularly after receipt of the employer response. The regional directors alternatively requested the regulation be amended to state a determination of majority support be extended when the last day to make the determination falls on a Sunday or legal holiday.

Response: The Board declined to adopt the “business days” interpretation. Adopting a specific interpretation of the term “days” in subdivision (e)(1) of section 1156.37 to refer to business days would lead to inconsistencies with respect to other deadlines in the statute, and the ALRA. However, the Board did amend proposed regulation, subdivision (c) to allow that the regional director’s initial determination be extended to the next business day when the deadline falls on a Saturday, Sunday, or legal holiday.

Regional Director Authority to Add/Remove Workers Based on Eligibility Determinations

Comment Summary: ALRB regional directors suggested modifications to the proposed regulation authorizing a regional director to make eligibility determinations during the course of investigating a majority support petition. In *DMB Packing Corp. dba The DiMare Company* (Nov. 3, 2023) ALRB Admin. Order No. 2023-11, p. 6, the Board held a regional director has such authority.

Response: The Board agreed it was appropriate to address these issues in the regulation and modified the regulatory language setting forth procedures regarding eligibility determinations in majority support proceedings. The Board further modified proposed regulation 20391, subdivision (c)(4) following the June 21 to July 22, 2024 comment period and the Board approved the further modifications at the September 18, 2024 public Board meeting.

Timing of Regional Director Determination After Additional Support Received in Cure Period

Comment Summary: The regional directors requested clarification in the timeframe when a determination of majority support must be made after a labor organization is allowed an

opportunity to produce additional support, and proposed the timeframe be measured from the time the cure period expires. Specifically, Labor Code section 1156.37, subdivision (e)(4) states the Board shall grant a labor organization 30 days to produce additional support if it is determined the labor organization's initial showing of support was insufficient. The statute provides no timeframe in which a determination of majority support must be made following this 30-day "cure period."

Response: The Board agreed the initial proposed regulatory language was ambiguous and made the suggested clarification in regulation 20391, subdivision (c)(2), so it now reads: "Within two days after the 30-day cure period closes, the regional director shall notify the parties whether proof of majority support has been established."

Threshold Support Requirements for Labor Code Section 1156.37, Subdivisions (j) and (k)

Comment Summary: The regional directors expressed concern regarding the 10% support threshold set forth in proposed regulation 20391, subdivision (h), regarding implementation of Labor Code section 1156.37, subdivisions (j) and (k).

Response: These statutory provisions allow a labor organization to file an unfair labor practice charge regarding certain employer conduct "during a labor organization's Majority Support Petition campaign," and impose heightened liabilities for employers who engage in proscribed conduct during such a campaign. The Board considered this proposal and maintained the 10% threshold was an appropriate measure for determining whether an organizing campaign sufficiently is underway. However, the Board recognized certain conduct designed to inhibit or prevent an organizing campaign at its inception could prevent a labor organization from making this showing. The Board modified the regulatory language to account for these types of circumstances, while maintaining a general threshold of support requirement, in proposed regulation 20391, subdivision (i) [re-lettered from (h) based on other proposed modifications].

Extension of Employer Objection Deadline

Comment Summary: Several commentors requested the Board adopt a provision extending the deadline for an employer to file objections to a union's majority support certification from 5 days to 30 days after issuance of the certification.

Response: The objections deadline is set forth in statute (§ 1156.37, subd. (f)(1)), and the Board has no authority to adopt a regulation extending the statutory deadline.

B. Summary and Responses to comments received during the period the modified text was available to the public: June 21, 2024 through July 22, 2024

1. Updates to Regulation Pertaining to Contents of Compliance Specification Involving Monetary Remedies or Notice of Hearing Without Specification (Prop. Reg. 20292)

There were no comments regarding proposed regulation 20292 received during the June 21, 2024 to July 22, 2024 notice period.

2. Unfair Labor Practice Appeal Bonds (Lab. Code §1160.11; Prop. Regs. 20297, 20297.5)

Proposed regulations 20297 and 20297.5 govern procedures relating to the posting of an appeal bond or a deposit in lieu of a bond when an agricultural employer seeks judicial review of a Board order awarding a monetary remedy in an unfair labor practice proceeding. The regulations require the employer to provide the address at which it, or a surety that has provided a bond, may be served with notices, papers, or other documents. (Prop. regs. 20297, subd. (a)(2), 20297.5, subds. (b)(2), (c)(2).)

Comment Summary: A commenter proposed that the regulations also require the employer to provide the “name, email address, phone number, fax number, and physical address” at which the employer or its surety may be served.

Response: This comment pertained to regulatory language proposed in the initial rulemaking notice materials, and thus was outside the scope of the June 21 to July 22, 2024 comment period. However, the Board viewed the comment as more technical in nature and agreed with the proposal to facilitate service of papers in these situations. Accordingly, the Board incorporated these suggestions to require an employer to provide certain further contact information for its, or its surety’s in the case of a bond, agent for service of process. (See new prop. regs. 20297, subd. (a)(2), 20297.5, subds. (b)(2), (c)(2).) However, the Board declined require fax numbers be provided, consistent with more recent regulatory changes modernizing the Board’s filing and service provisions, including the removal of fax filing and service provisions.

3. Majority Support Petitions (Lab. Code § 1156.37; Prop. Reg. 20391)

Most comments received during the second notice period focused on proposed regulation 20391 and implementation of the majority support petition procedures codified in Labor Code section 1156.37. The comments directly below were received during the June 21, 2024 to July 22, 2024 notice period, and are organized by the issues addressed by proposed regulation 20391.

Electronic Filing of Petition and Proof of Support

Comment Summary: A commenter requested the Board authorize electronic filing of majority support petitions, as set forth in the originally proposed regulatory language. The Board previously modified the originally proposed language based on comments from regional staff regarding the different manners for filing a petition and submitting the accompanying proof of support and proposing to require in-person filing of all such materials for processing purposes. The commenter also requested the Board authorize the electronic submission of proof of support accompanying a majority support petition, i.e., the signed authorization cards or authorization petitions. (The commenter repeated these requests during the October 2, 2024 to October 17, 2024 comment period.)

Response: The Board retained the requirement that a majority support petition be filed in the appropriate regional office in person. The Board believes the submission of original authorization cards or petitions will benefit regional staff and facilitate the investigation of majority support petitions, including comparing employee names and information on the submitted cards or petitions with those provided in an employer's employee list. While the commenter proposed allowing the electronic submission of cards or petitions followed by original submissions, the Board does not believe this will result in a more efficient process. Rather, it may contribute to delays and result in the duplication of work by regional staff investigating the cards or petitions. However, the Board intends to continue reviewing possible procedures to allow for the electronic submission of proof of support accompanying representation proceedings under our Act. The National Labor Relations Board (NLRB) and California Public Employment Relations Board (PERB) both allow for the electronic submission of support, but submission of PDF files of photocopied support, standing alone, is not recognized as sufficient by either. Rather, electronic support generally must be accompanied by other materials corroborating and authenticating the support. The Board intends to defer action on the issue of electronic proof of support to future rulemaking where the subject may be more fully considered.

Proof of LM-2 and Collective Bargaining Agreement Requirements

Comment Summary: The original proposed regulatory language would have required a petitioning labor organization to "submit proof" it has filed LM-2 reports the preceding two years and is or was a party to a collective bargaining agreement in effect when AB 113 took effect. (Prop. reg. 20391, subd. (a); Lab. Code, § 1156.37, subd. (a).) The commenter proposed the language be amended to allow a labor organization to attest to these facts rather than requiring the filing of lengthy reports or contracts, at least in the absence of any dispute about the labor organization's standing to file a majority support petition.

Response: The Board agreed with this proposal and modified the regulatory language in proposed reg. 20391, subd. (a) accordingly.

Proof of Service of Majority Support Petition on Employer

Comment Summary: A commenter proposed adding language to proposed regulation 20391 specifying the manner of service of a majority support petition on an agricultural employer. The commenter cited existing regulation 20300, subdivision (e), which describes methods of service of a certification petition, as a model. Unlike Labor Code section 1156.3 governing certification petitions, however, Labor Code section 1156.37 requires a petitioning labor organization to "personally serve the petition on the employer."

Response: The Board adopted the commenter's suggestion of adding language specifying the manner by which to effect service on an employer with modifications to reflect the statutory requirement of personal service.

Authorization Card Format and Content

Comment Summary: A commenter proposed adding language providing that any proof of support may be accepted if it “can be reasonably understood to be an authorization for union representation by the worker.”

Response: The Board did not adopt this proposed modification. The Board’s view is that specification of the format of cards or petitions is the better practice and will result in greater transparency, as well as communication to the workers of the disclaimers specifically described in the regulation regarding the consequences of signing a card or petition.

Comment Summary: The same commenter presented oral comments at the July 16, 2024 Board meeting expressing a concern about the handling and submission of cards procured by a labor organization before the effective date of the regulation.

Response: The Board recognized this is as a legitimate concern and adopted language to provide for the grandfathering of authorization cards or petitions procured before the effective date of the regulation. The Board also added language providing both English and Spanish language versions of the authorization cards and petition forms will be available on the Board’s web site.

Online Availability of Authorization Card Templates

Comment Summary: The proposed regulation states the Board will make available on its web site a template of the authorization card and petition forms. A commenter raised the concern that employers will download these cards or petitions, and they will be prone to abuse or misuse.

Response: The Board declined the request that the Board not make template forms for cards and petitions available on its web site. The Board believes the concern does not outweigh the benefits derived from making approved forms available. The card and petition forms made available under the proposed regulation specifically describe their intended purposes and uses. Moreover, the regulation specifies that signatures on cards or petitions are not revocable, and the statutory LM-2 and collective bargaining agreement requirements in the statute (Lab. Code, § 1156.37, subd. (a)) further limit the ability for third parties to misuse or abuse the authorization card or petition forms. Finally, fraudulent use of the cards would be unlawful under the ALRA.

Assistance Completing Authorization Cards/Petitions

Comment Summary: A commenter proposed language be adopted specifically stating that assistance may be provided to a worker in filling out an authorization card, stating this is acceptable practice before the NLRB and under other statutory schemes.

Response: While the Board recognizes such assistance may be necessary in light of language and literacy challenges that exist amongst the farmworker population, the Board considered this proposal unnecessary. Barring evidence of fraud or other misconduct, nothing in the ALRA prohibits employees or union organizers from assisting workers in completing authorization cards. Moreover, nothing requires a farmworker to complete all sections of an authorization card or petition beyond the signature requirement or otherwise prohibits assistance to farmworkers completing authorization cards. (See *Smithfield Packing Co., Inc.* (2004) 344 NLRB 1, 2 [supervisor unlawfully threatened employee assisting another employee in completing an authorization card].)

Regional Director Noticing to Workers of Filing of Majority Support Petition

Proposed regulation 202391, subdivision (a)(4) was added following the initial notice period.

Comment Summary: A commenter objected to the added proposed language relating to notifying agricultural employees of the filing of a majority support petition, arguing that the Board has no authority to provide such noticing because the statute does not specifically allow for it.

Comment Summary: Another commenter agreed employees are entitled to notice of the filing of a petition, but asserted that a direct meeting with employees for a reading and question and answer period is unnecessary.

Response: The Board considered the two comments immediately above, and reconsidered the notice requirements set forth in the modified regulatory language and decided to retain the notice-posting requirement but to remove the reading and question and answer aspects. In light of comments received, the Board was concerned with the possibility of these readings being subjected to abuse or manipulation by parties, as well as the logistical requirements involved in diverting staff and resources to conducting readings across a workforce. The Board concluded that notices posted at the employer's worksite can communicate to workers relevant and necessary information regarding the petition and their rights under the Act.

The Board disagreed with the contention the Board has no authority to provide noticing to workers regarding the filing of a majority support petition, because the statute does not expressly provide for noticing the workers. To the contrary, rulemaking is a proper means to fill gaps in the statutory language or to adopt provisions necessary to implement statutory requirements and achieve the intended purposes and goals of the legislation. (Lab. Code, § 1144.) The ALRA is predicated on protecting the rights of farmworkers. Providing notice to workers that a labor organization seeks to be designated as their exclusive collective bargaining representative is consistent with the Board's mission to serve and protect the interests of farmworkers. (Lab. Code, §§ 1140.2, 1152.) Noticing ensures farmworkers are aware of matters that may affect their interests, the procedures by which a representation petition will be processed, and informs them of their rights under the Act and steps they may take to protect their rights, including contacting the

ALRB. The Board notes PERB's regulations require notice to workers when a recognition petition is filed. (See, e.g., Cal. Code Regs., tit. 8, §§ 33060, 51035, 61220.)

Extension of Time for Initial Employer Response to Majority Support Petition

Following the initial comment period, the Board modified regulation 20391, subdivision (b) to allow the deadline for an employer response to a majority support petition to be continued to the next business day when it falls on a Saturday.

Comment Summary: A commenter objected to extending the 48-hour employer response deadline. The commenter asserted that Labor Code section 1156.37, subdivision (d) does not explicitly provide for extending this deadline, and that expanding the response period to beyond 48 hours will negatively impact union organizing efforts. (The same commenter repeated this comment during the October 2 to October 17, 2024 notice period.)

Response: The Board declined to reconsider regulation 20391, subdivision (b) as modified following the initial comment period. Code of Civil Procedure section 12a, expressly provides for the extension of legal deadlines that fall on a Saturday, Sunday, or legal holiday. Section 12a applies to deadlines across California Codes, including the Labor Code. Notwithstanding the commentors' claims the Legislature did not specifically provide for extensions of deadlines under the statute, it also is an established principle the Legislature is presumed to be aware of existing statutory law and judicial decisions when adopting new statutes. (*Rudick v. State Bd. of Optometry* (2019) 41 Cal.App.5th 77, 87, citing *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Had the Legislature intended to exempt the deadlines in Labor Code section 1156.37, it presumably would have adopted language indicating its intent to do so.

Service of Employee List on Labor Organization

Comment Summary: A commenter requested proposed regulation 20391, subdivision (b)(2) be amended to require an employer to personally and electronically serve its employee list on the petitioning labor organization.

Response: The Board declined to adopt the requested amendment. Proposed regulation 20391, subdivision (b) requires personal service of the employer response on the petitioning labor organization, consistent with Labor Code section 1156.37, subdivision (d). Proposed regulation 20391, subdivision (b)(2), as currently drafted, specifies that the response shall be accompanied by the employer's employee list which additionally must be served on the labor organization electronically, either by email or by electronic service consistent with regulation 20169, subdivision (b). Thus, the proposed regulation already requires personal and electronic delivery of the employee list to the labor organization, consistent with the statute.

Extension of Time for Regional Director to Make Initial Determination Re: Majority Support

Comment Summary: A commenter objected to the amendment made after the initial notice period extending the deadline for regional director to make an initial determination regarding the investigation of a majority support petition and proof of support when it falls on a Saturday, Sunday, or legal holiday. (The commenter repeated this comment during the October 2, 2024 to October 17, 2024 comment period.)

The commentor also objected to language in proposed regulation 20391, subdivision (c) measuring the time for the regional director to make a determination following the initial investigation of a majority support petition as due within three days after receipt of the employer's response. According to the commentors, Labor Code section 1156.37 states this initial determination must be made within five days after the petition is filed.

Response: The Board declined to reconsider this amendment to the proposed regulations. While the statute provides some support for the commentor's claims when the second sentence of section 1156.37, subdivision (e)(1) is considered in isolation, a more comprehensive view of the statutory process supports the current proposed regulatory language. The investigation described in subdivision (e)(1) requires consideration of an employer's response to the petition, as well as conducting a comparison of the labor organization's proof of support with the employee list produced by the employer. As indicated above, the employer response and employee list are not due until 48-hours after the petition is filed -- a deadline that is automatically extended by operation of law when it expires on a Saturday, Sunday, or legal holiday. Thus, the investigation cannot truly begin in earnest until the employer response and employee list are received. In instances where the employer response and employee list are extended pursuant to Code of Civil Procedure section 12a, it would be impractical and unrealistic to require the regional director to complete an investigation in a single day or less than two days. In other words, isolating the five-day deadline emphasized by the commentors ignores the full scope of the investigation that must be conducted during this timeframe and the intervening deadline for production of the employer response and employee list, both of which are crucial to the investigation. Measuring the timeframes accordingly also works to the benefit of the labor organization, which may have the opportunity to more thoroughly review and consider the employer's eligibility list so that it may raise issues to the regional director when it believes employees have been improperly included or omitted from the list — a problem we have seen arise in multiple majority support cases to date. In other words, restricting the time and scope of the regional director's investigation may work both to the detriment of the labor organization and to the arbitrary disenfranchisement of workers.

Comment Summary: A commenter expressed a concern that an employer may thwart the majority support process by failing to produce an employer list, thereby preventing the regional director from conducting an investigation of the petition.

Response: The Board declined to modify the proposed regulatory language in response to this comment. The proposed regulation already expressly would allow the regional director to proceed with its investigation notwithstanding an employer's refusal to

participate or cooperate, including drawing adverse inferences or presumptions as may be necessary to do so. The Board maintains the proposed regulatory language is consistent with the statute and better harmonizes its various provisions, treating them in the context of one another, as compared to the stricter interpretation of time frames proffered by the commentors.

Evidence Relating to Eligibility Determinations

Comment Summary: A commenter objected to proposed regulation 20391, subdivision (c)(4)(B)(v) concerning the nature of the evidence the region must furnish to the Board and parties regarding the eligibility of disputed workers. Under the proposed regulatory language, and consistent with existing regulation 20363, subdivision (a), the names of agricultural employees whose eligibility is in dispute are disclosed but measures are set forth to protect the confidentiality of the names of agricultural employee witnesses who provided statements or evidence concerning the eligibility of another worker. (See also Board regs. 20236, 20274.) The commenter requested the regulation be amended to extend confidentiality protections to prevent the disclosure of statements by the workers whose eligibility directly is in dispute.

Response: The Board declined to amend the proposed regulatory language. Any declarations or statements by workers in this context would be strictly limited to the eligibility of the subject individual, i.e., whether the individual is an agricultural employee, and whether they worked during the eligibility period. In this context, a declaration by a challenged workers is comparable to the challenged ballot declarations regional staff obtains from challenged voters in an election context (Board reg. 20363, subd. (a).)

“Cure” Period Terminology

Comment Summary: A commenter stated that they prefer to refer to the timeframe described in Labor Code section 1156.37, subdivision (e)(4) as the “30-day additional support period” as opposed to “cure period,” as currently described in the proposed regulations.

Response: The 30-day period described in the statute is intended to provide a petitioning labor organization additional time to perfect its majority support petition by curing previously submitted proof of support that was returned to the labor organization, as well as to secure additional support. The terminology largely is inconsequential, but the Board believes “cure period” is an accurate descriptor (and one which the Board and parties have used in majority support proceedings conducted to date). Therefore, the Board retained the originally proposed language.

Timing of Regional Director Determination After Additional Support Received in Cure Period

Comment Summary: A commenter objected to the proposed process whereby the regional director shall not determine the eligibility of individuals alleged by a labor organization to be eligible but omitted from the employer list during the initial investigation of a majority support petition. According to the commenter, the regional director must make such determinations during its initial five-day investigation because the statute expressly requires it, citing Labor Code section 1156.37, subdivision (e)(1).

Response: The statute is entirely silent regarding the handling of eligibility disputes, whether they pertain to individuals included on an employer's list but alleged to be ineligible or individuals omitted from the list but alleged to be eligible. As a practical matter, if the bargaining unit is large and there are a significant number of challenges to investigate and resolve, it may not be possible for the regional director to complete the investigation within the initial 5-day investigation period. Therefore, the Board determined that where there the number of outstanding authorization cards would be outcome determinative, the investigation may be resolved within the 30-day cure period. Moreover, the alternative process proposed by the commenter is inconsistent with the statute. The commenter proposed the regional director should be required to make eligibility determinations during the initial investigation, which may result in certification of the labor organization, and then any disputes concerning the eligibility of those workers can be resolved in a post-certification challenge process. However, the statute does not contemplate any separate post-certification challenge procedure. The Board made a slight modification to the proposed regulatory language to provide a regional director discretion in making eligibility determinations regarding individuals omitted from the employer's list either during the initial investigation period or during a subsequent cure period. The process set forth for handling eligibility disputes in this context fits within the process contemplated by the statute and is consistent with existing precedent and rules governing the handling of eligibility disputes, including that the votes of challenged individuals need not be addressed unless they are in a number sufficient to affect the outcome of the process.

Tally Requirements

Comment Summary: Two commenters objected to the requirement the regional director prepare a tally at the conclusion of its investigation of a majority support petition. (See prop. reg. 20391, subds. (c)(2), (c)(3), (c)(4).) They asserted the statute does not require a tally be prepared, cited other card-check laws which do not require tallies, and expressed concern the preparation of a tally will incentivize employers to file objections after a certification issues.

Response: The Board did not find these arguments persuasive. At the outset, neither Labor Code section 1156.3 governing secret-ballot elections nor section 1156.7 concerning decertification elections provide for the preparation of a tally following an election, but the Board's secret-ballot election regulations and longstanding practice

require the preparation of tallies following representation elections. (See Board reg. 20360, subd. (a) [“As soon as possible after completion of the balloting, a Board agent shall count the ballots and shall prepare both a tally of ballots and a list of the names of each person whose ballot was challenged, along with the basis for the challenge and the name of the party making the challenge, and shall furnish both the tally and the list to the representatives of all parties who are present”].)

The tally provides transparency and has been held fundamental to the Board’s handling and assessment of election objections. Section 1156.37, subdivision (f) uses “election” terminology in describing the cognizable bases for a party to object to a labor organization certification, including that the “majority support election was conducted improperly” or that “[i]mproper conduct affected the results of the majority support election.” (Lab. Code, § 1156.37, subd. (f)(1)(C)-(D).) This language tracks similar language under section 1156.3 governing secret-ballot elections, in which a party may object to “the conduct of the election or conduct affecting the results of the election.” (Lab. Code, § 1156.3, subd. (e)(1).) In evaluating such objections, the Board’s precedent requires application of an “outcome-determinative” standard, which requires showing not only that improprieties or misconduct occurred but that they were “sufficiently material” or “affected a sufficient number of employees or portion of the workforce” so as to affect the results of the election. (*Wonderful Nurseries, LLC* (Mar. 18, 2024) ALRB Admin. Order No. 2024-04, pp. 10-12, citing *Gerawan Farming, Inc.* (2018) 44 ALRB No. 10, p. 4; see *Premiere Raspberries, LLC* (2017) 43 ALRB No. 2, pp. 10-12; *Oceanview Produce Co.* (1994) 20 ALRB No. 16, p. 6.) In conducting such inquiries, the margin of victory plays a critical role; indeed, the outcome-determinative test cannot be conducted without knowing the final vote tally. (*Gerawan Farming, Inc.*, *supra*, 44 ALRB No. 10, p. 4.) By adopting this outcome-determinative standard in section 1156.37, subdivision (f)(1), the Legislature presumably intended the Board to continue to apply existing precedent and standards to the evaluation of objections to a majority support certification. Our Board already has determined the statute codifies this standard in the majority support petition context. (*Wonderful Nurseries, LLC*, *supra*, ALRB Admin. Order No. 2024-04, p. 12.)

The Board does not believe the various PERB regulations cited by the commenter support its request that the Board not provide a tally. These PERB regulations pertaining to recognition requests or petitions do not include or provide for any objections procedure to occur either before or after majority support is determined and certification granted. As noted above, the tally serves an important function for the Board under our Act in assessing the sufficiency or merit of objections alleging certain conduct affected the outcome or results of the process.

The commenter also cited the New York farmworker card-check law, which does not require a tally be provided, as support for its comment here. The Board found the New York law distinguishable from Labor Code section 1156.37 in a number of respects. As one example relevant here, the New York statute does not specifically provide for an objections process after a majority support determination is made, and applicable regulations do not specifically provide for certification objections based on a party’s

misconduct affecting the results or outcome of the process. (N.Y. Lab. Law § 705; N.Y. COMP. CODES R. & REGS. tit. 12, § 263.29, subd. (b).) Further, the statute requires the New York Board to conduct a secret-ballot election in lieu of proceeding by card-check review when an employer produces evidence that the dues authorizations produced by the union “are fraudulent or were obtained through coercion.” (N.Y. LAB. LAW § 705-1.) Our statute does not provide any comparable procedures for addressing or handling such claims, but rather defers them to the post-certification objections process. As noted above, consideration of such objections requires consideration of the final vote tally and margin of victory.

For these reasons, the Board maintained the current proposed regulatory language requiring the regional director to prepare a tally at the conclusion of majority support procedures.

Comment Summary: One commenter alternatively proposed the regional director should be required to state the reasons for their eligibility determinations.

Response: The Board did not adopt this proposed modification. The tally contemplated by the regulations is not in the nature of a report or legal brief. Rather, the tally simply recites the final figures and results of the process, similar to the tally form used by regional staff to document the results of a secret-ballot election. (See prop. reg. 20391, subd. (c)(4)(B)(iv).) The proposed regulation largely tracks the procedures to be used in resolving eligibility disputes in the context of an election (see Board reg. 20363), including furnishing evidence in the region’s possession concerning the eligibility of disputed individuals, and the subcommittee recommends maintaining the current language.

Threshold Support Requirements for Labor Code Section 1156.37, Subdivisions (j) and (k)

Comment Summary: Two commenters objected to proposed regulation 20391, subdivision (i) concerning the requirement a labor organization establish proof of support from at least 10% of the agricultural employees in a bargaining unit sought to be represented for purposes of triggering the certification or employer liability provisions of Labor Code section 1156.37, subdivisions (j) and (k). The commenters asserted an employer’s unlawful conduct affecting a majority support organizing campaign could occur at any time, including at the inception of a campaign, thereby stifling or preventing the labor organization from gaining the requisite 10% proof of support from bargaining unit employees.

Response: The Board reconsidered this provision in light of the concerns articulated by the commenters during the second notice period. The Board agreed articulation of a specific support threshold was problematic and raised logistical concerns in how these types of claims would be processed. Accordingly, the Board deleted this subdivision. Allegations of a nature described in Labor Code section 1156.37, subdivisions (j) or (k) are bound to involve fact-intensive inquiries into whether a majority support campaign

was underway at the time of an employer's alleged unlawful conduct. Such matters are best left to the Board's adjudicatory processes and ad hoc decision making. (*ALRB v. Superior Court* (1976) 16 Cal.3d 392, 413.) This approach will allow applicable rules or standards to be considered and adopted in the context of the facts presented on a case-by-case basis, recognizing each case is likely to present its own unique circumstances.

Objections by A Labor Organization/Board Review of Certification

Comment Summary: As originally proposed, regulation 20391, subdivision (e) described procedures applicable to objections filed to a certification. During the June 21 to July 22, 2024 comment period, commentors asserted labor organizations have a right to object under the statute, citing subdivision (j) of Labor Code section 1156.37 as support. They requested the regulation be modified to address a labor organization's right to obtain review of a certification where it is found the labor organization has not established majority support.

Response: The Board agreed and modified the proposed regulation to allow a labor organization to file an application under Labor Code section 1156.37, subdivision (j) obtain such review. Subdivision (j) provides, in relevant part, that a labor organization may be certified as the exclusive bargaining representative of an appropriate bargaining unit of agricultural employees if "an employer commits an unfair labor practice or misconduct ... during a labor organization's Majority Support Petition campaign, and the employer's unfair labor practice or misconduct would render slight the chances of a new majority support campaign reflecting the free and fair choice of employees" As the commentors noted, and as our Board has acknowledged, the terms "unfair labor practice" and "misconduct" have distinct meanings and are subject to remediation via different procedures. (See *Wonderful Nurseries, LLC* (Apr. 18, 2024) ALRB Admin. Order No. 2024-10, p. 8, fn. 6.) In other words, in the context of a representation election our Board has explained that a party may engage in misconduct sufficient to warrant setting aside an election but which does not rise to the level of an unfair labor practice. (*Ibid.*; *Gallo Vineyards, Inc.* (2008) 34 ALRB No. 6, pp. 15-16; *Mann Packing Co., Inc.* (1988) 15 ALRB No. 11, pp. 8-9.) Likewise, conduct constituting an unfair labor practice may not rise to a level sufficient to warrant setting aside an election. (*Mann Packing Co., Inc.*, *supra*, 15 ALRB No. 11, p. 9.)

Accordingly, the Board modified the proposed regulatory language in proposed regulation 20391, subdivision (e) to codify a labor organization's ability to obtain review of the results of a majority support proceeding based on employer misconduct as described in Labor Code section 1156.37, subdivision (j). The modified language requires labor organization review applications are due in the same timeframe as an employer's objections under Labor Code section 1156.37, subdivision (f)(1).

Timing of Objections Hearing

Comment Summary: A commenter requested the Board amend proposed regulation 20391, subdivision (f)(2) regarding the timing in which an objections hearing be

commenced. Specifically, the commenter contended that section 1156.37, subdivision (f)(2) gives a labor organization the right to request a hearing commence after the 14-day statutory deadline.

Response: The language commented on was included in the Board's originally noticed rulemaking materials and was not affected by the later proposed modifications to the regulatory language. Therefore, this comment was beyond the scope of the June 21 to July 22, 2024 comment period. Nevertheless, the Board addressed this comment. While a labor organization always may present requests concerning the scheduling of a hearing, the statute does not give the labor organization unfettered control over the matter. The expeditious timeframe for conducting an objections hearing is consistent with the statutory design that proceedings move quickly, and further is consistent with providing an employer a forum for promptly addressing certification objections in light of other obligations and timeframes implicated by the labor organization's certification, including requesting referral to mandatory mediation and conciliation. (See *Wonderful Nurseries, LLC* (Apr. 12, 2024) ALRB Admin. Order No. 2024-08, p. 9.)

Comment Summary: The same commenter also requested language be adopted requiring the ALRB's executive secretary to "consult" with the affected labor organization to determine its position on the timing of the hearing.

Response: the parties are consulted by the executive secretary or assigned investigative hearing examiner regarding issues concerning the scheduling of the hearing. Thus, the Board did not find this proposal necessary, and the Board maintained the current proposed regulatory language.

C. Summary and Responses to comments received during the period the further modified text was available to the public: October 2, 2024 through October 17, 2024

1. Updates to Regulation Pertaining to Contents of Compliance Specification Involving Monetary Remedies or Notice of Hearing Without Specification (Prop. Reg. 20292)

Comment Summary: A commenter stated that they opposed allowing joint or derivative liability issues to be determined for the first time during compliance proceedings. The commenter asked the Board to modify proposed reg. 20292, subd. (e) to permit the regional director to assert joint or derivative liability during compliance proceedings only where the regional director can (a) demonstrate that the potentially jointly/derivatively liable person or entity has been provided with notice and opportunity to participate in the underlying liability proceedings, or (b) plead in any specification its reasonable justification for the delay in naming the person or entity in the underlying proceedings and the grounds for naming the person or entity at the later stage.

Response: This comment pertained to regulatory language proposed in the initial rulemaking notice materials and was thus outside the scope of the October 2 to October 17, 2024 comment period. Nonetheless the Board considered it, but did not make the requested change. Proposed regulation 20292, subd. (e) is not a new provision, rather it

previously existed as regulation 20291, subd, (f). As the Board explained in its Notice of Proposed Rulemaking, as part of the Board's restructuring of its compliance proceedings, the Board is proposing to repeal section 20291, subd, (f), but to re-adopt virtually identical language in proposed new section 20292, subdivision (e).

2. Unfair Labor Practice Appeal Bonds (Lab. Code §1160.11; Prop. Regs. 20297, 20297.5)

There were no comments received pertaining to proposed regulations to implement Labor Code §1160.11 during the October 2, 2024 through October 17, 2024 notice period.

3. Majority Support Petitions (Lab. Code § 1156.37; Prop. Reg. 20391)

Most comments received during the third notice period focused on proposed regulation 20391 and implementation of the majority support petition procedures codified in Labor Code section 1156.37. The comments directly below were received during the October 2, 2024 through October 17, 2024 notice period, and are organized by the issues addressed by proposed regulation 20391.

Proof of Service of Majority Support Petition on Employer

Comment Summary: A commenter directed a comment at revised proposed regulation 20391, subd. (a)(1) which requires that a notice to the owner, officer or director of the employer be provided when service of the majority support petition is made on anyone other than the owner, officer or director of the employer. The comment was that requiring the notice be provided by email and by an overnight courier is excessive, and the commenter proposed that service could be accomplished by either sending a follow up email when an owner, officer or director is not served, or by overnight courier, but not both.

Response: The Board agreed with this proposal and modified the regulatory language accordingly by changing the word "and" to the word "or."

Comment Summary: Another commenter urged the Board to strike the provision allowing the petition to be personally served upon a supervisor of employees covered by the petition when service upon any owner, officer, or director of the employer is not possible. The commenter argued that this will invite disputes over whether the employer was adequately served based on arguments that the individual served lacked the authority to be deemed a supervisor, or due to delays in the agricultural employer receiving notice.

Response: The Board did not adopt this proposed modification. The Board believes that the requirement that the labor organization immediately notify the employer of the name and location of the person served and provide a copy of the petition by email, if available, or by overnight delivery adequately ensures that the agricultural employer will receive notice of the petition.

Submission of Originals

Comment Summary: This comment regarding the requirement in proposed regulation 20391, subd. (a)(2) requiring the filing of “originals” of authorization cards or petitions relates to the commenter’s request during the second notice period that the Board to allow majority support petitions and authorization cards or petitions to be filed via email, with the filing of originals within 48 hours.

Response: The Board did not adopt this proposed modification. The Board believes the submission of original authorization cards or petitions will benefit regional staff and facilitate the investigation of majority support petitions.

Authorization Card Format and Content

Comment Summary: A commenter noted that the proposed regulations appear to require that authorization cards include a worker’s email address. The commenter raised the concern that a substantial number of farmworkers do not have email addresses, and the omission of an email address could result in rejection of otherwise valid cards. The commenter requested that the Board add language making it clear that Board shall have discretion to accept the support as valid even if not all the information in the format is provided, so long as the support can reasonably be understood to be an authorization for union representation by the worker.

Response: The Board did not believe this modification was necessary and did not adopt it. The proposed regulation’s prescribed authorization card format includes fields for an email address and other contact information, but there is no requirement that that a field be filled in if the information is not available. The regional director will investigate the petition based on the information provided.

Comment Summary: With respect to the format for authorization cards prescribed in 20391, subd. (a)(2)(A), one commenter requested that the language in bold at the bottom of the card advising that signing the card is “is a vote” for the union and that a signature cannot be revoked for one year be moved up so it appears before the signature line.

Response: The Board believes that the large bold font of the notice at the bottom of the authorization card makes it adequately visible to potential signers. The Board did not believe this proposal was necessary and did not adopt it.

Comment Summary: Two commenters opposed the provisions in 20391, subds. (a)(2)(A) and (B) that allow the regional director to accept authorization cards/petitions that have been “signed and dated before the effective date of this regulation... if the card is in substantial compliance with the requirements of this subdivision.” The commenters believe that the “substantial compliance” standard is vague and unclear and will invite challenges from employers.

Response: The Board declined to further define “substantial compliance” in the proposed regulation. Determining what constitutes “substantial compliance” is a fact-based inquiry.

Regional Director Noticing to Workers of Filing of Majority Support Petition

Comment Summary: A regional director stated that she disagreed with the elimination of verbal noticing to workers in the proposed regulation following the second notice period. Her concern was that written noticing alone would be insufficient to inform farmworkers of their rights during a majority support petition. She urged the Board to retain verbal noticing, but in order to minimize concerns with abuse or manipulation of the readings by the parties, she proposed that verbal noticing take place without a question-and-answer period.

Response: The Board declined to retain verbal noticing to workers due to the concern that an in person noticing could be subjected to abuse or manipulation by parties. The Board believes posting of a written notice is adequate.

Comment Summary: A commenter requested that in addition to issuing to the employer the notice to employees regarding the filing of the majority support petition, that the regional director provide a copy of the notice to the labor organization.

Response: The Board agreed with this proposal and modified the proposed regulatory language adding language to 20391, subd. (a)(4) requiring a copy of the notice be provided to the labor organization.

Initial Employer Response/Employee List Contents

Comment Summary: A commenter opposed the requirement in proposed reg. 20391, subd. (b)(2) that employers provide their employee’s landline and cellular telephone numbers and their email addresses. The commenter requested that the regulation be modified so an email address is not required.

Response: Proposed regulation 20391, subd. (b)(2) which describes the required contents of the employee list provided by the employer tracks the language of existing regulation section 20310, subd. (a)(2) which describes the required contents of an employer’s response to a representation petition, and also requires employers to provide email addresses. Accordingly, The Board declined this proposal and retained the current proposed regulatory language.

Inferences Based on Employer Non-Compliance

Comment Summary: A commenter objected to the “substantially inadequate” standard set forth in subdivision (d)(1)(B) that would trigger the presumption as too vague. The commenter proposed that subdivision (d)(3) should expressly state that the “failure of an employer to provide a complete or accurate employee list shall be excused by the fact

that the employer based its information on information supplied to it by its employees” regardless of whether they are direct hire of farm labor contractor employees.

Response: Although this comment was outside the scope of the October 2 to October 17, 2024 comment period, the Board considered it. However, the Board declined to modify proposed regulation 20391, subd. (d). The determination of whether the employee list is “substantially inadequate” is a fact-based inquiry, and under proposed regulation 20391, subdivision (d)(2), the regional director must provide the employer with written reasons the list was found to be incomplete or inaccurate. Thus, the Board did not believe it was necessary to further define this term in the proposed regulations.

Extension of Time for Regional Director to Make Initial Determination Re: Majority Support

Comment Summary: A commenter stated that the requirement that the regional director issue a decision within three days after receipt of the employer’s response is potentially in conflict with the statute, which allows the parties to be notified within five days of the filing of the majority support petition. In the event an employer responded within the first 24 hours, the regional director’s response would be due one day earlier than it would be due under the regulations.

Response: The Board does not believe that the proposed regulation is in conflict with the statute. Accordingly, the Board declined this proposal and retained the current proposed regulatory language.

Comment Summary: A commenter urged the Board to add requirement that when the regional director returns a majority support petition to the labor organization that it finds invalid, the regional director make a copy of the originally submitted evidence and consider it the regional director’s later review of the validity of any evidence submitted during the ‘cure period.’ If signatures or information are suddenly different, then the regional director should be required to investigate.

Response: The Board believes that this proposal is unnecessary, as the Board believes the regional director will conduct the investigation appropriately and will consider all relevant evidence. The Board declined this proposal.

Eligibility Dispute Procedures

Comment Summary: Several commenters expressed concern that revised proposed reg. 20391, subds. (c)(4)(A) and (B) do not allow employers to challenge names submitted by the labor organization. The commenters suggested that to maintain fairness and ensure the integrity of the process, the regulation should be revised to explicitly provide employers the right to challenge the labor organization’s list of alleged supporters, and that the regional director should be required to notify the employer of the names and other identifying information of the workers allegedly left off the list.

Response: Proposed regulation 20391, subdivision (c)(4)(D)(ii) provides that if the number of challenged or allegedly omitted individuals is sufficient to affect the determination whether majority support is established, the regional director's notice will identify all individuals found to have been omitted from the employer's list. The Board believes that this adequately informs the employer of the identities of individuals added to the eligibility list in order to provide the employer an opportunity to object to such individuals in post-certification objections under Labor Code section 1156.37, subdivision (f). The Board believes the proposal as written strikes a balance between protecting the confidentiality of the employees who have submitted support in favor of the labor organization while the pre-certification investigation is pending and allowing the employer to adequately prepare its post-certification objections. Accordingly, the Board declined to further modify the proposed regulatory language.

Evidence Relating to Eligibility Determinations

Comment Summary: A commenter requested that the Board amend the proposed language in proposed regulation 20391, subd. (c)(4)(D)(ii) to prohibit the disclosure of any declarations from any non-supervisory agricultural employees, including those of the employees that are the subject of eligibility disputes. The commenter contended that if the regional director provides reasons for including a disputed employee in a unit, that is enough information to allow an employer or union to contest the evidence relied on by the regional director.

Response: The commenter raised the same concerns in its July 15, 2024 written comments with respect to formerly proposed regulation 20391, subd. (c)(4)(B)(v). The Board declined to adopt the commenter's proposal because any declarations or statements by workers in this context would be strictly limited to the eligibility of the subject individual, i.e., whether the individual is an agricultural employee, and whether they worked during the eligibility period. Under the proposed regulatory language, and consistent with existing regulation 20363, subdivision (a), the names of agricultural employees whose eligibility is in dispute are disclosed, but measures are set forth to protect the confidentiality of the names of agricultural employee witnesses who provided statements or evidence concerning the eligibility of another worker. (See also Board regs. 20236, 20274.) Accordingly, the Board decline to amend proposed regulation 20391, subd. (c)(4)(D)(ii).

Timing of Regional Director Determination After Additional Support Received in Cure Period

Comment Summary: A commenter pointed out that proposed regulation 20391, subdivision (c)(2) would give the regional director just two days to finalize the review after the cure period closes. The commenter proposed that at the very least, this should be two business days.

Response: The Board declined to adopt this proposal. As the Board stated in its Initial Statement of Reasons, the two-day period is necessary to ensure the expedient processing

of a majority support petition and is consistent with other rapid deadlines set forth in the statute regarding the processing of majority support petitions. In addition, as stated in the response to the initial comment pertaining to the timing of the regional director's initial determination, adopting a specific interpretation of the term "days" in subdivision (e) of section 1156.37 to refer to business days would lead to inconsistencies with respect to other deadlines in the statute, and the ALRA.

Limitation of Scope of Employer Challenge of Eligibility Disputes in Objections (prop. reg. 20391, subd. (c)(4)(E))

Comment Summary: One commenter asked regarding this provision: "Does this mean that an employer would not be permitted to challenge the validity of the underlying vote and whether it was obtained unlawfully?"

Response: Proposed regulation 20391, subd (c)(4)(E) would not affect the other grounds for objections set forth in Labor Code section 1156.37, subdivision (f)(1)(A-D).

Objections by A Labor Organization/Board Review of Certification

Comment Summary: Modified proposed regulation 20391, subdivision (e)(1)(A) allows for labor organizations to file applications for review of a certification "where it is alleged an employer engaged in misconduct that would render slight the chances of a new majority support campaign reflecting the free and fair choice of employees." A commenter requested that the Board also permit labor organizations to file applications for Board review, not just when employer misconduct is alleged to have affected the majority support campaign, but also in situations where it is alleged that "the board improperly determined the geographical scope of the bargaining unit," "the majority support election was conducted improperly," or "improper conduct (by an employer or the Board) affected the results of the majority support election." The commenter stated that this would track the language of Labor Code section 1156.37, subd. (f)(1).

Response: The bases for objections as set forth in Labor Code section 1156.37, subd. (f)(1) appear to be available only to employers. Proposed regulation 20391, subdivision (e)(1)(A) is consistent with the statute. Accordingly, the Board declined this proposal and retained the current proposed regulatory language.

Comment Summary: A commenter asked the Board to clarify whether proposed regulation 20391, subd. (e)(1) provides labor organizations with an opportunity to challenge certification.

Response: At the September 18, 2024 Board meeting, the Board determined it was appropriate to modify the proposed regulatory language in proposed regulation 20391, subdivision (e) to codify a labor organization's ability to object to the results of a majority support proceeding based on employer misconduct as described in Labor Code section 1156.37, subdivision (j). In light of other statutory language describing the objections as challenging the certification of a labor organization, the Board agreed that

the bases for objections as set forth in subdivision (f)(1) appear to be available only to employers. Therefore, the Board agreed it was appropriate to clarify that a labor organization could file an application for review of a dismissal of a majority support petition within five days after service of a certification limited to the bases in 1156.37, subdivision (j).

The Board received no comments during the final period additional further modified text was available to the public: November 1, 2024 to November 18, 2024.

ALTERNATIVES DETERMINATION

The ALRB has determined that no alternative it considered would be more effective in carrying out the purpose for which this regulatory action is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, 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 conducted preliminary rulemaking activities which provided opportunities to interested parties or stakeholders to propose alternatives to accomplishing the objectives the Board sought to achieve in this rulemaking process to adopt regulations implement recent statutory amendments to the ALRA as enacted by Assembly Bill No. 113 (AB 113), Statutes of 2023, chapter 7, which took effect immediately when signed by the Governor on May 15, 2023. In addition, this proposed regulatory action implements new Labor Code section 1160.10 (Assem. Bill No. 2183 (2021-2022 Reg. Sess.), Stats. 2022, Ch. 673, § 4), which took effect on January 1, 2023. After the Board approved the proposed regulatory action for commencement of a formal rulemaking process, the Board received public comments proposing modifications to the text of the adopted regulations during the original 45-day comment period, during a subsequent 31-day notice period after the Board issued its Notice of Modifications to Text of Proposed Regulations and of Addition of Documents to the Rulemaking File, and during a subsequent 15-day notice period after the Board issued its Notice of Further Modifications to Text of Proposed Regulations and of Addition of Documents to the Rulemaking File.

Except as set forth in the summaries and responses to comments, no other alternatives have been proposed or otherwise brought to the Board's attention.

ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS

The ALRB did not identify any adverse impacts on small business as a result of this regulatory action, nor did the ALRB receive any public comment identifying any adverse impacts on small business or means to reduce any such impacts.