

**STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY
443 Lafayette Road
St. Paul, Minnesota 55155-4319**

In the Matter of the Proposed
Amendment and Adoption by the
Minnesota Department of Labor and
Industry of Rules Governing Contestation
Procedures for Occupational Safety and
Health Citations

**STATEMENT OF NEED AND
REASONABLENESS**

The primary purpose of the proposed rules and amendments to existing rules is to implement the recent statutory changes affecting contestation procedures. Some rules are simply amended to reflect the new process, others, while new to this Chapter of the rules (Minnesota Rules, Chapter 5210) are simply transferred from the Occupational Safety and Health Review Board rules (Minnesota Rules, Chapter 5215) with some changes.

Effective August 1, 1991 the legislature has restructured the contestation procedures for Occupational Safety and Health Citations. Previously the contestations were filed with the Commissioner who transferred them to the Occupational Safety and Health Review Board for hearing. The Board then handled all filings up to the point of hearing. When the matter was ready for hearing, the Board transferred the matter to an administrative law judge who would issue a decision on behalf of the Board. The judge's decision could then be appealed back to the Board.

Under the new statutory provisions the Commissioner will handle all filings up to the point of hearing. When the matter is ready for hearing the Commissioner will transfer the matter to an administrative law judge who will issue a decision. That decision may be appealed to the Board by any party.

Because all of the filing prior to hearing will be through the Commissioner rather than the Board it was necessary to amend all of the procedural rules to reflect that change. And, because many of the procedural rules were under the Board's jurisdiction it was necessary to transfer those rules to the Commissioner. Thus most of the proposed new rules are really the Board's old rules with some changes. The Commissioner will be adopting the amended Board rules and the Board will be repealing those now unnecessary rules under its jurisdiction.

The new statutory provisions also include new definitions of "affected employee" and "authorized employee representative". Additionally, the new provisions also changed some time periods for filing documents and consolidated some filings into a new "notice of contest" form. Many of the proposed rule changes are necessary to implement these changes and create the new form.

Minn. Rules Part 5210.0010 Purpose. This Part is repealed because it duplicates Part 5210.0020 and because it is inaccurate insofar as it refers to the Purpose of the entire chapter. This Part was originally promulgated before the Chapter was enlarged.

Minn. Rules Part 5210.0020 Scope and Purpose. Only the title of this Part is changed to accomplish a merger with Part 5210.0010.

Minn. Rules Part 5210.0270 Contest by Employee. A reference to the "Occupational Safety and Health Review Board" is changed to "Commissioner" as provided by the statutory change. "Notice of Contest" is changed to "letter of contest" to avoid confusion with the form filed by employers.

Minn. Rules Part 5210.0400 Statutory Authority. A reference to the "Occupational Safety and Health Review Board" is changed to "Commissioner" as provided by the statutory change.

Minn. Rules Part 5210.0415 Definitions (Proposed).

This proposed new Part adds definitions necessary to understand both the proposed new procedural rules and the amended existing procedural rules. Most of the definitions are amended versions of those previously in the Board's rules. Subpart 1 defines the scope of application of the definitions; they only apply to Parts 5210.0400 to 5210.0584. Subpart 2 defines administrative law judge as it was defined in the Board's rules. Subpart 3 clarifies that references in the statute or rules to either "citation" or "penalty notice" actually refer to the combined form issued by the commissioner. Subpart 4 clarifies that certain terms used in the rules are defined by statute. Subpart 5 defines days as it was defined in the Board's rules and as provided by statutory changes. Subpart 6 defines "letter of contest" to distinguish it from a "notice of contest". Subpart 7 defines "notice of contest" to mean the new form mandated by the statutory changes for an employer's objection to a citation issued by the commissioner. Subpart 8 defines proceeding as it was defined in the Board's rules.

Minn. Rules Part 5210.0530 Citations; Notices of De Minimis Violations. Subpart 1 is amended to clarify "OSHI" abbreviations. The abbreviations are replaced by "Occupational Safety and Health Investigator". Subpart 2 is amended to substitute "administrative law judge" for "review board" consistent with the new statutory provisions.

Minn. Rules Part 5210.0540 Petitions For Modification of Abatement Date. Subpart 1 is amended to add a Section "F" which requires that the petition, which is already required to be posted, include a notice to affected employees regarding their right to object to the petition. Previously the Board required an additional notice to be posted - the rule change combines the two requirements. Subpart 4 is amended to require that the petition be posted on or before the date it is filed. This requirement is consistent with

the requirement for posting a notice of contest, and consistent with requirement "E" in Subpart 1 which requires the employer to certify in the petition that posting has been accomplished. Subpart 5 combines two separate filings into one. Previously an employee was required to file an objection, and then later file a response with the reasons for the objection. Now both filings are combined. Subpart 8 "A" is amended to substitute "administrative law judge" for "Board" in order to make the process consistent with the statutory changes. "B" is also amended to change "the Board shall docket and process." to "the administrative law judge shall treat ..." to make the process consistent with the new roles and duties of the various entities. "D" is eliminated as a result of combining two filings in Subpart 5.

Minn. Rules Part 5210.0550 Posting of Citations. Subpart 2 is amended to extend the period for posting citations, in cases where the violation has been abated, to the same period as the notice of contest. Previously the citation was only posted until abatement or 15 days whichever is longer. In most cases where the employer contests a citation there is no abatement until the dispute is resolved. If an employer abates the violation but continues to contest the citation, this amendment requires continued posting of the citation. Subpart 3 is amended to make it consistent with current practice. Previously this rule conflicted with the Board's rule which required the posting.

Minn. Rules Part 5210.0560 Informal Conference with Commissioner. This Part is amended to change references to "Notice of intention to contest" to "Notice of contest" to create uniformity in the references to the new form. References to "15 calendar days" are also changed to "20 calendar days" pursuant to the statutory change.

Minn. Rules Part 5210.0561 Record Address (Proposed). This proposed new rule is identical to the Board's rule except that "Commissioner" is substituted for "board" and the cross-references are changed to the appropriate new rules. The rule requires that a party provide a mailing address in the initial pleading.

Minn. Rules Part 5210.0562 Service and Notice (Proposed). This proposed new rule is also identical to the Board's rule with two exceptions. First, the requirement to file proof of service and posting with the executive secretary is eliminated because it is now included on the Notice of Contest form and because these filings are no longer made to the Board. Second, in Subpart 5 the posting requirement is changed from "until commencement of the hearing or until earlier disposition" to "until the contestation is resolved" so that the posting requirements for citations, notices of contest, letter of contest, and notices of hearing are all the same.

Minn. Rules Part 5210.0563 Service and Notice of Affected Employees (Proposed). Previously the Board had two separate rules; one for employees with an "authorized employee representative" and one for unrepresented employees. Those rules required posting of notices for unrepresented employees and service of notices on authorized employee representatives for represented employees.

This proposed commissioner's rule combines the two Board rules and requires posting in all cases as well as service on authorized employee representatives. The proposed rule also eliminates language requiring posting of a "notice to employees" and language requiring certification of service and posting because these items are now included on the "notice of contest" form.

Minn. Rules Part 5210.0564 Letter of Contest filed by Employee or Representative (Proposed). This proposed rule is essentially the same as the Board rule except references to "Board" and cross-references to Board rules are changed. While the Board rule used the term "notice of contest", this rule uses "letter of contest" to clarify that contests by employees need not be filed on the same form used by employers.

Minn. Rules Part 5210.0565 Notice of Contest and Certification of Services (Proposed). This proposed rule is entirely new and intended to implement the statutory requirement to create a "notice of contest" form. The form combines the employer's objection to a citation, the notice to employees, and certification of service and posting into one form to simplify the process for employers. The form asks for information necessary to process the contest and requires a sworn notarized statement as to the truthfulness of information provided.

Minn. Rules Part 5210.0566 Filing (Proposed). This again is essentially the same as the Board's rule. It explains where filings are to be made at different stages of the process. Filings are with the commissioner prior to assignment to an administrative law judge, with the judge until a decision is issued and, after a decision, with the Board. The rule also clarifies that filing is complete upon receipt by the Commissioner but that when a filing is made by mail "receipt by the commissioner" means the postmark date.

Minn. Rules Part 5210.0567 Consolidation (Proposed). Identical to Board's rule except reference to Board is eliminated. The rule allows a judge to consolidate cases with common parties and issues.

Minn. Rules Part 5210.0568 Severance (Proposed). Identical to Board's rule except reference to Board is eliminated. The rule allows a judge, for good cause, to sever some issues or parties from a proceeding.

Minn. Rules Part 5210.0569 Protection of Trade Secrets and Other Confidential Information (Proposed). The rule requires the judge to make orders to protect confidential information.

Minn. Rules Part 5210.0570 Party Status (Proposed). Identical to Board's rule except references to Board are eliminated. The rule allows affected employees and authorized employee representatives the opportunity to participate in the contested citation process as provided by statute.

Minn. Rules Part 5210.0571 Representatives of Parties and Intervenors (Proposed). Identical to Board rule. The rule clarifies the role of party or intervenor representatives.

Minn. Rules Part 5210.0572 Form of Pleadings (Proposed). Identical to Board's rule except reference to Board is eliminated. The rule sets minimum standards for the form of pleadings filed with the commissioner or judge.

Minn. Rules Part 5210.0573 Signature on Pleadings (Proposed). Identical to Board's rule. The rule requires signatures on pleadings and clarifies the meaning of the signature as a representation of truthfulness and good faith.

Minn. Rules Part 5210.0574 Refusal of the Pleading (Proposed). Identical to Board's rule except that the reference to Board is changed to "commissioner or administrative law judge". The rule gives authority to refuse pleadings which do not comply with the rules.

Minn. Rules Part 5210.0575 Caption; Titles of Cases (Proposed). Identical to Board's rule except reference to "executive secretary of the Board" is changed to Commissioner. The rule sets forth a standard caption for contested cases.

Minn. Rules Part 5210.0576 Employer Contests (Proposed). Identical to Board's rule except references to Board are changed consistent with statute change and time limits for filing complaint and answer are changed consistent with statute change. The rule requires the Commissioner to serve a formal complaint on the employer no later than 90 days after receiving the notice of contest and requires the employer to answer that complaint within 20 days after receiving the complaint. The time limits were expanded to give the parties more time to conclude settlement negotiations. The rule also requires the commissioner to give the employer certain information regarding the process and provides for possible dismissal by a judge if filings are untimely.

Minn. Rules Part 5210.0577 Petitions for Modification of Abatement Date (Proposed). Identical to Board's rule except that the language regarding the Board is eliminated, and the requirement for an objecting party to file a response is eliminated because it was combined with the requirement to file an objection in Part 5210.0540. The rule requires the commissioner and judge to handle these cases in an expedited manner.

Minn. Rules Part 5210.0578 Employee Contests (Proposed). Identical to Board's rule except the cross-references are corrected and "Notice of Contest" is replaced by "letter of contest" to avoid confusion with the new notice of contest form for employers.

Minn. Rules Part 5210.0579 Statement of Position (Proposed). Identical to Board rule. The rule allows any party to file a statement of their position at any time prior to hearing.

Minn. Rules Part 5210.0580 Response to Motions (Proposed). Identical to Board's rule. The rule requires that any response to a motion be filed within 10 days.

Minn. Rules Part 5210.0581 Failure to File (Proposed).

Identical to the Board's rule except reference to "Board" is replaced by "Commissioner". The rule provides that failure to file a pleading may constitute a waiver of the right to further participation in the proceedings.

Minn. Rules Part 5210.0582 Hearing (Proposed).

Identical to Board's rule except references to "Board" are changed to "Commissioner", cross-references are corrected, and language allowing Board to set matter on for hearing if neither party has filed a notice of readiness within 45 days after an answer was filed is eliminated. The commissioner, as one of the parties, can request that the matter be scheduled for hearing any time after an answer is filed.

Minn. Rules Part 5210.0583 Settlement (Proposed). Similar to Board's rule except the rule is re-structured to eliminate references to the Board and to the Board's authority to vacate. The Board's vacation authority is now statutory and will probably be the subject of rulemaking by the Board. This rule implements the statutory changes which make unopposed settlement agreements a final order of the commissioner where the agreement is reached before the matter is sent to an administrative law judge. Agreements which are objected to by affected employee or authorized employee representatives must still be approved by a judge unless the commissioner renegotiates the agreement to satisfy the objection or decides to continue the contested case process. Any agreements reached after the matter is sent to the judge must be approved by the judge. Any time there is an objection to an agreement the judge must consider that objection before approving or disapproving the agreement.

Minn. Rules Part 5210.0584. Expedited Proceeding (Proposed). Identical to Board's rule except references to "Board" or "executive secretary" are replaced with "commissioner". The rule allows for expedited proceedings by motion of a party or intervenor.

Minn. Rules Part 5210.0810 Effect on Variances. This Part is amended to substitute "administrative law judge" for "Board" consistent with the statutory change.

Minn. Rules Part 5210.0860 Contest of Variance Denial Before Review Board. The title of this Part as well as references in the rule to "contest" or "notice" are changed to avoid confusion with the "notice of contest" form which is not intended to be used in this situation. Objections to the commissioner's decision denying a variance are simply referred to as "objections". References to "review board" or "board" are changed to "administrative law judge" or "commissioner" consistent with the statutory change.

Impact on Small Business

The adoption of the proposed rules has only a minimal impact on small businesses. Primarily the rules implement recent statutory changes, however, the rules also now require employers of affected employees represented by unions to post certain notices in the same location as the citation is posted. Previously, these employers were only required to serve those notices on the union representatives.

Fiscal Impact on Local Public Bodies

The Commissioner has considered the fiscal impact of the adoption of these rules on local public bodies pursuant to M. S. § 14.11, subd. 1 (1988), and has found none. No additional financial burdens are placed on local public bodies as the proposed changes will not affect the expenditure of public monies by local bodies.