

DEPARTMENT OF INDUSTRIAL RELATIONS, OFFICE OF THE DIRECTOR

NOTICE OF PROPOSED RULEMAKING
CALIFORNIA CODE OF REGULATIONS, TITLE 8, CHAPTER 8,

SECTIONS 25101 to 25111

Prepared by:

Office of the Director

TITLE 8. DIRECTOR OF INDUSTRIAL RELATIONS NOTICE OF PROPOSED RULEMAKING

The Director of Industrial Relations (“Director”), proposes to adopt the proposed regulations described below after considering all comments, objections and recommendations regarding the proposed action.

Notice is hereby given that the Director, pursuant to rulemaking authority derived from Labor Code sections 55, 59, and 139.48, in order to implement, interpret and make specific sections 139.48 of the Labor Code, proposes to adopt Sections 25101-25111 Chapter 8 Subchapter 8 of title 8 of the California Code of Regulations (“CCR”) concerning a Return-to-Work Supplement Program.

PUBLIC HEARING: The Director will hold public hearings on December 8, 2014 from 10:00 a.m. to 3:00 p.m. at 1515 Clay Street, Oakland, California, and on December 9, 2014 from 1:30 p.m. to 4:30 p.m. at the State Building, 320 West 4th Street, Suite 500, Los Angeles, California. At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action described in the Informative Digest. The Director requests, but does not require, that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

WRITTEN COMMENT PERIOD: Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action by mail or personal delivery to Tess Gormley, 1515 Clay St., Oakland, CA 94612. Written comments may also be sent to Tess Gormley (1) via electronic mail to LC139.48Comments@dir.ca.gov or (2) via fax to (510) 622-3265. To be considered, written comments must be received by the Director no later than 5:00 p.m., December 9, 2014.

AUTHORITY AND REFERENCE

Labor Code section 139.48 directs the creation of a return-to-work program and charges the Director with establishing the amount of payments and eligibility for payments by regulation. The proposed regulations implement, interpret, and make specific section 139.48. The Director is also acting under authority of sections 58-59 of the Labor Code.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

The Legislature enacted Labor Code section 139.48 which establishes a program for providing a Return-to-Work Supplement to those injured workers whose wage loss is disproportionate to their permanent disability benefit.

The Director is charged with issuing regulations to implement this program. In particular, the Director is to determine the amount of the payment and the eligibility for the payment. The Legislature created a \$120 million fund for the purpose of making supplemental payments to workers. Eligibility for payments was to be determined by the

Director based on studies conducted by the Director in consultation with the Commission on Health and Safety and Workers' Compensation. A study was done by RAND concerning permanent disability entitled "*Identifying Permanently Disabled Workers with Disproportionate Earnings Losses for Supplemental Payments,*" RAND, February 2014. http://www.dir.ca.gov/chswc/Reports/2014/Earnings_Losses_2014.pdf . That study confirmed findings of earlier RAND research that shows that workers who do not return to the same job with the same employer tend to have a much greater earnings loss than those workers who are able to return to the same job. Some thought was given to attempting to quantify actual wage loss however this proved impossible in any way that would be practical for payment of this benefit. Some workers voluntarily leave the workforce and may reenter at a much later date. It would be problematic to attempt to pick a date to use to determine actual individual wage loss, and even if that were possible to determine on a case by case basis the cause of the wage loss. In view of the number of participants in the workers' compensation system and the size of the fund, the Director determined that it would be preferable to establish a program that was simple to understand, and easy and inexpensive to operate and that could provide some payments to those workers most likely to have disproportionate wage loss, or to have already had disproportionate wage loss at a point close in time to when the individual was determined to be entitled to the Supplemental Job Displacement Benefit.

The Director proposes to add sections 25101 to 25111 to Chapter 8, Subchapter 8, Article 1 of 8 California Code of Regulations. 25101 is a general description of the scope of the regulations. 25102 provides definitions of terms used in the regulations. 25103 establishes that those injured workers who receive a Supplemental Job Displacement Benefit because they cannot return to the job they were doing at the time when they were injured would be eligible for a Return-to-Work Supplement. 25104 requires that the Supplemental Job Displacement Benefit voucher includes a notice about the Return-to-Work Supplement. 25105, 25106, 25107, and 25108 describe the application process. All applications would be made electronically on the DIR website. 25109 sets the amount of the Return-to-Work Supplement at \$5,000.00 and allows the Director to adjust this amount based on further studies or the number of anticipated eligible individuals. 25110 provides for an appeal process to the trial level of the Workers' Compensation Appeals Board. 25111 provides notice that an application for this benefit is a claim for benefits from the state under the False Claims Act.

Anticipated Benefits of the Proposed Regulations

The objective of these regulations is to implement the Legislature's creation of a Return-to-Work fund in a manner that is objective, simple and directly benefits injured workers most likely to have disproportionate wage loss compared to their permanent disability benefits. The Director expects that this program will be able to deliver payments in a timely manner to those workers who cannot return to their former job who are receiving the Supplemental Job Displacement Benefit. Providing this supplement will further assist these workers in their transitions from their former employment.

Evaluation of Inconsistency/Incompatibility with Existing State Regulations

The Director has conducted an evaluation of whether or not the proposed regulations are inconsistent or incompatible with existing state regulations. These regulations implement a new program and are the only regulations concerning the Return-to-Work Supplement. Therefore, the proposed regulations are not inconsistent or incompatible with existing state regulations.

No comparable federal regulation or statute exists. Please see the Director's Initial Statement of Reasons for further information.

DISCLOSURES REGARDING THE PROPOSED ACTION: The Director has made the following initial determinations:

- Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None. These proposed changes to the regulations do not impose any significant economic impact independent of the statutes. Costs imposed on individuals seeking benefits are not significant.
- Impact or effect on small businesses: None. These proposed changes to the regulations do not impose any significant economic impact or effect independent of the statute.
- Significant effect on housing costs: None. These proposed changes to the regulations do not impose any significant economic impact independent of the statute. Costs imposed on individuals seeking payments are not significant.
- Cost impacts on representative private person or business: The Director is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. A representative person seeking payment would be able to apply on line at locations made available by the Department.

RESULTS OF THE STANDARDIZED REGULATORY IMPACT ASSESSMENT (SRIA)(Gov. Code sec 11246.3(c)(1)(A)-(F).

Creation or elimination of jobs within the state: unlikely to have an overall impact on job creation or elimination as a result of the regulation.

Creation or elimination of businesses within the state: unknown creation of business, unlikely elimination of business.

Competitive advantages or disadvantages for California Businesses: there is a slight increase in workers' compensation costs as a result of the statute; the regulations do not add significant costs.

Increase or decrease of investment in California: unknown.

Incentives for innovation in products, materials, or processes: There may be a small incentive for innovation in workplace safety procedures and practices.

Benefits of the regulation: the regulation will allow distribution of \$120 million to injured workers and may incentivize safety improvements. Employers may become more safety conscious. These regulations are neutral as to the environment.

DEPARTMENT OF FINANCE COMMENTS

Pursuant to Government Code section 11346.3(f) the Department of Finance comments on the Department's SRIA and the following is the Department's summary of those comments and the Department's response.

Comment One

The Department may want to expand its qualitative discussion on macro impacts of the proposed regulations. There could be a decrease in investment if businesses reduce operations in response to the \$120 million dollar assessment, or an increase if the higher assessment leads to investment in safer workplaces.

Response to Comment One

The Department revised the "Impact on California Individuals and Business Enterprises" section of the SRIA to elaborate on these macro impacts.

Comment Two

The Department should expand the discussion on industry-level impact if there is data available. The \$120 million dollar assessment will be proportional to workers' compensation insurance costs and it would be helpful to show numbers to illustrate this distribution. It would also be helpful to complement this industry-level analysis with the offsetting impacts from the personal consumption by workers receiving the Supplement.

Response to Comment Two

The Department revised the section entitled "Impact on California Individuals and Business Enterprises" of the SRIA to include additional detail on industry level impact. The Department agrees that in the future it would be useful to have additional information about the impact on personal consumption by workers. A case can be made that the impacted workers are more likely to spend on basics in California and a case can

be made that under those circumstances workers and employers would spend the same percentage in California.

FISCAL IMPACTS:

- Costs or savings to state agencies or costs / savings in federal funding to the State: The program is funded by a fund created by Labor Code section 139.48. The Director does not anticipate that these regulations will create any costs or savings for state agencies or in federal funding.
- Local Mandate: None.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None.
- Other nondiscretionary costs / savings imposed upon local agencies: None.

CONSIDERATION OF ALTERNATIVES: In accordance with Government Code section 11346.5(a)(13), the Department must determine that no reasonable alternative is considered or that otherwise has been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective as the proposed action and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provisions of the law.

The Director invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

CONTACT PERSONS: Nonsubstantive inquiries concerning this action, such as requests for copies of the text of the proposed regulations, and the location of public records, may be directed to Tess Gormley at (510) 286-0787. Inquiries regarding the substance of the proposed regulations may be directed to Fred Lonsdale at (510) 286-3800.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS / INTERNET ACCESS: An initial statement of reasons and the text (“express terms”) of the proposed regulations have been prepared and are available from the contact person named in this notice. The Director will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at her office located at the above address. Rulemaking records may be accessed through the agency’s Internet website at www.dir.ca.gov.

AVAILABILITY OF CHANGED OR MODIFIED TEXT: After holding the hearings and considering all timely and relevant comments received, the Director may adopt the proposed regulations substantially as described in this notice. If the Director makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Director adopts the regulations as revised. Any such modifications will also be posted on the Director's website.

Please send requests for copies of any modified regulations to the attention of the contact person(s) listed above. The Director will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS: Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the website listed above.