**STATE OF CALIFORNIA**

**DEPARTMENT OF INDUSTRIAL RELATIONS**

**DIVISION OF WORKERS’ COMPENSATION**

**Revised NOTICE OF RULEMAKING AFTER EMERGENCY ADOPTION**

**Workers’ Compensation – Qualified Medical Evaluator Regulations**

**(Title 8, California Code of Regulations sections 31.3, 31.5, 34, 46.3 and Forms 31.5 & 108)**

**NOTICE IS HEREBY GIVEN** that the Administrative Director of the Division of Workers’ Compensation (hereafter “Administrative Director”), proposes to adopt and amend regulations to implement the provisions of Labor Code sections 139.2, 4060, 4061, 4061.5, 4062, 4062.1, 4062.2, 4062.3, 4062.5, 4067, and 4600 regarding the examination, and the procedures regarding QME medical-legal evaluations, that are used to resolve disputes in the workers’ compensation system. This action is taken pursuant to the authority vested in the Administrative Director by Labor Code sections 53, 133, 139.2, 4060, 4061, 4062, 4062.1, 4062.2 and 5307.3.

When adopted, the proposed regulations will constitute title 8, California Code of Regulations, Division 1, Chapter 1, Article 3 sections 31.3, 31.5, 34; Article 4 section 46.3 and Forms 31.5 and 108. The regulations implement, interpret and make specific the manner in which the Administrative Director will exercise the authority under Labor Code sections 139.2, 4060, 4061, 4061.5, 4062, 4062.1, 4062.2, 4062.3, 4062.5, 4067, 4600, 4604.5, and 4660 regarding procedures concerning medical-legal evaluations. The adopted regulation implements a process by which medical-legal evaluations may be conducted.

**PROPOSED REGULATORY ACTION**

The Department of Industrial Relations, Division of Workers’ Compensation, proposes to amend and adopt the following regulations in Division 1, Chapter 1, Article 3, 4, & 10 of Title 8, California Code of Regulations, commencing with sections 31.3, 31.5, 34, 46.3 and Forms 31.5 and 108. The proposed changes involve both changes without regulatory effect (“non-substantive” changes) within the meaning of section 100 of Title 1 of the California Code of Regulations (e.g. grammatical, capitalization, punctuation, syntax, numbering and lettering sequencing and corrections of cross references), as well as substantive changes; although in the case of section 46.3 it is making permanent what was originally adopted as an emergency regulation. A comprehensive summary of the proposed change to each affected section and form is set out in the Initial Statement of Reasons, which is not printed here but will be available at no charge upon written request made to Regulations Coordinator below or via the web at: <http://www.dir.ca.gov/dwc/DWCrulemaking.html>.

## TIME AND PLACE OF PUBLIC HEARING

An in-person public hearing has been scheduled to permit all interested persons the opportunity to present oral statements or arguments with respect to the proposed amendments and adoption of title 8 CCR Section 31.3, 31.5, 34, 46.3 and Forms 31.5 & 108 on the following date:

**Date:** November 15, 2022

**Time: 12:00 p.m. to 5:00 p.m., or until conclusion of business**

**Place: Elihu Harris State Office Building – Auditorium**

 **1515 Clay Street**

 **Oakland, CA 94612**

Alternate formats, assistive listening systems, sign language interpreters, or other types of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the Statewide Disability Accommodation Coordinator, Maureen Gray, at 1-866-681-1459 (toll free), or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

**Please note that public comment will begin promptly at 12:00 p.m. and will conclude when the last speaker has finished his or her presentation or 5:00 P.M., whichever is earlier.**

The Administrative Director requests, but does not require, that any persons who make oral comments also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

## WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed amendment to modify existing regulations, related to the Qualified Medical Evaluator process to the Department of Industrial Relations, Division of Workers’ Compensation. The written comment period closes on Tuesday, November 15, 2022.The Division of Workers’ Compensation will only consider comments received at the Department of Industrial Relations, Division of Workers’ Compensation by that date. Again, equal weight will be accorded to oral comments presented at the public hearing and written materials.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to the DWC contact person:

Maureen Gray

Regulations Coordinator

Department of Industrial Relations

P.O. Box 420603

San Francisco, CA 94142

Written comments may be submitted via facsimile transmission (FAX), addressed to the above-named contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwcrules@dir.ca.gov.

Ms. Gray must receive all written comments no later than 11:59 p.m. on November 15, 2022.

## CONTACT PERSON

Inquiries concerning this proposed action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed amendments to the regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Maureen Gray

Regulations Coordinator

Department of Industrial Relations

Division of Workers’ Compensation

P.O. Box 420603

San Francisco, CA 94142

## BACKUP CONTACT PERSON

In the event the contact person is unavailable, inquiries should be directed to the following backup contact person:

Nicole L. Richardson, Attorney

 Department of Industrial Relations

 Division of Workers’ Compensation

 Post Office Box 420603

 San Francisco, CA 94142

 E-mail: (nrichardsont@dir.ca.gov)

The telephone number of the backup contact persons is (510) 286-7100.

**AUTHORITY AND REFERENCE**

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code section 53, 133, 139.2, 4060, 4061, 4062, 4062.1, 4062.2 and 5307.3.

Reference is made to Labor Code sections 139.2, 4060, 4061, 4061.5, 4062, 4062.1, 4062.2, 4062.3, 4062.5, 4067 and 4600.

**INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW**

Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of his or her employment. The adjudication of workers' compensation claims requires the use of written reports of Qualified Medical Evaluators (QMEs).

Objective and Anticipated Benefits of the Proposed Amendments to the Regulations:

The Administrative Director of the Division of Workers’ Compensation proposes to amend and add to various regulations that govern the evaluation process, appointment setting, and time frames for requesting replacements of physicians who are certified as Qualified Medical Evaluators (‘QMEs’) as provided in sections 31.3, 31.5, 34 and 46.3 of Title 8 of the California Code of Regulations. In addition, changes are made to forms 31.5 and 108 to accommodate changes to the regulations. These changes are needed to update and improve the functionality of the affected regulations based upon the current practical operation of the Qualified Medical Evaluator program. The recent adoption of emergency regulations indicated that certain changes in the function of regulations governing the operation of the Qualified Medical Evaluator program would lead to improved efficiency in the delivery of services. These regulations incorporate the changes that led to the increased efficiency. In addition, the Administrative Director of the Division of Workers’ Compensation proposes to adopt section 46.3 of Title 8 of the California Code of Regulations. The proposed change adds functionality to the regulatory scheme by instituting a system for the performance of QME evaluations remotely. A complete summary of the proposed changes is provided in the Initial Statement of Reasons.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Administrative Director has determined that these proposed amendments to the regulations are not inconsistent or incompatible with existing regulations.

The Administrative Director now proposes to amend and adopt regulations and forms related to the administration of the Qualified Medical Evaluator program. The proposed regulations and forms implement, interpret, and make specific Labor Code sections 139.2, 4060, 4061, 4061.5, 4062, 4062.1, 4062.2, 4062.3, 4062.5, 4067 and 5307.3 as follows:

**Article 3. Assignment of Qualified Medical Evaluators, Evaluation Procedure (§31.3-34 & Form 31.5)**

Section 31.3 is amended to provide additional time to schedule an appointment with a QME from 60 days to 90 days and if agreed from 90 day to 120 days. In addition, language is added to make the provisions of the regulation applicable to all face to face evaluations.

Section 31.5 is amended to comply with the new timeframes set forth in regulation 31.3.

Section 34 is amended to allow electronic service of form 110 consistent with regulation 36.7. The amendment also deletes the term “Agreed Panel QME” and deletes and re-numbers sections of the regulation to provide consistency.

Form 31.5 is amended to comply with the new time frames in regulation section 31.5.

**Article 4. Evaluation Procedures (§46.3)**

Section 46.3 adopted to provide for remote Medical-Legal Evaluations in the appropriate circumstances. The regulation allows evaluations to be performed by the use of electronic media when the physician and injured worker are in separate physical locations. This regulation provides flexibility for injured workers, physicians and insurance carriers/employers to agree to remote evaluations if certain criteria are met. The regulation substantially adopts the provisions of and makes permanent former emergency regulation section 46.2.

**Article 10. QME application forms (Form 108)**

Form 108 amended to make the form compliant with ADA standards. Updates to the website links for information. Updates to text to comply with changes to regulation sections 46.3 and 31.3.

**DISCLOSURES REGARDING THIS PROPOSED REGULATORY ACTION**

The Administrative Director has made the following initial determinations:

* **Determination regarding whether this rulemaking imposes a Local Mandate**:

None is imposed by these proposed regulations because no new program or higher level of service to the public is required. The regulations provide technical detail on procedures used to regulate Qualified Medical Evaluators (‘QMEs’) and the procedures for obtaining appointments and evaluations from QMEs, and impose the same requirements on all employers in California. Local government and districts as employers, like all other employers in California, are already required by law to have workers’ compensation coverage, or otherwise to self administer or contract for another entity to administer the workers’ compensation claims of their employees and to conform to the Labor Code in using the medical dispute resolution procedures involving QMEs and AMEs.

* **Significant statewide, adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states:** None.
* **Effect on Housing Costs**: None
* **Cost Impacts Incurred By Private Persons or Businesses:** The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
* **Results of the Economic Impact Assessment (EIA):** The Administrative Director has determined that the changes proposed in this rulemaking will not: (1) create or eliminate jobs within the State of California; (2) create new businesses or eliminate existing businesses within the State of California; or (3) affect the expansion of businesses in the State of California because the regulations are updating and providing flexibility to the current system. The Administrative Director has determined that the regulations will promote the health and welfare of California residents, worker safety and that state’s environment by decreasing transportation through use of remote health and providing flexibility with regards to scheduling evaluations at various locations instead of a specific in person location.

**EFFECT ON SMALL BUSINESS**

The Administrative Director has determined that this rulemaking will not have any significant impact on small business.

Physicians appointed as Qualified Medical Evaluators fall within the definition of small business, and already required by existing law to comply with the statutes and regulations governing Qualified Medical Evaluators (QMEs). Physicians are required to meet certain criteria in order to certify as QMEs. Once appointed, Physicians serve a two-year term, and must reappoint at the end of that term. The Administrative Director is required to issue panels listing three Qualified Medical Evaluators when requested by a party to resolve a disputed issue (Lab. Code §§ 139.2(h), 4062.1, 4062.2, and 139.2(h)(3).) In randomly compiling the panel of three QMEs, from which the injured worker and employer select a QME to evaluate the workers’ disability, the Administrative Director must include only evaluators who do not have a conflict of interest as defined by the Administrative Director in regulations adopted pursuant to Labor Code section 139.2(o) and are in the specialty designated by the party holding the legal right to select the specialty. (Lab. Code § 139.2(h)(3)(A).) Once selected from the panel of three, the physician examines the injured worker and issues a medical-legal evaluation. Physicians can also issue follow-up medical legal evaluations and supplemental medical legal reports.

The proposed regulations relate to the processes that govern the administration of the QME program.

The Administrative Director has determined that there is either no, or a *de minimus* amount of added expense to the QME by virtue of the proposed regulations. Therefore, the Administrative Director has concluded there is no significant adverse economic impact on QMEs as small businesses by the adoption of these proposed regulation.

At the current time, the best estimate by the Division of Workers’ Compensation indicates that employers will not be affected in any substantial pecuniary fashion by the proposed regulations and amendments to the existing regulations.

**FISCAL IMPACTS**

* **Costs or savings to state agencies or costs/savings in federal funding to the State:** Savings of $2,087,600.00 over the ten-year life of the regulation. This is based anticipated decrease in panel QME assignments and administration of the panel QME process.
* **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 (See Local Mandate bullet above)
* **Other nondiscretionary costs/savings imposed upon local agencies:** None (See Local Mandate bullet above)

**CONSIDERATION OF ALTERNATIVES**

In accordance with Government Code section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative considered, or that has otherwise been identified and brought to the Administrative Director’s attention, would be more effective in carrying out the purpose of this rulemaking, or would be as effective and less burdensome to the affected private persons, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of laws, than the proposed action of this rulemaking.

The Administrative 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.

**PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS**

The text of the draft proposed regulations was made available for pre-regulatory public review and comment for at least ten days through the Division’s Internet website (the “DWC Forum”), as required by Government Code section 11346.45.

**AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE/INTERNET ACCESS**

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the Regulations Coordinator named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

As of the date of this Notice, the rulemaking file consists of the Notice, the Initial Statement of Reasons, the proposed text of the regulations, pre-rulemaking comments and the Form 399. Also included are the documents relied upon in drafting the proposed regulations.

In addition, the Notice, Initial Statement of Reasons, and proposed text of the regulations being proposed may be accessed and downloaded from the Division’s website at <www.dir.ca.gov>. To access them, click on the “Proposed Regulations – Rulemaking” link and scroll down the list of rulemaking proceedings to find the Qualified Medical Evaluator Regulations link.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Department of Industrial Relations, Division of Workers’ Compensation, 1515 Clay Street, 18th Floor, Oakland, California 94612, between 9:00 A.M. and 4:30 P.M., Monday through Friday. Copies of the proposed regulations, Initial Statement of Reasons and any information contained in the rulemaking file may be requested in writing to the Regulations Coordinator.

**CONTACT PERSON FOR GENERAL QUESTIONS**

Non-substantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Maureen Gray

Regulations Coordinator

Department of Industrial Relations

Division of Workers’ Compensation

P.O. Box 420603

San Francisco, CA 94142

E-mail: mgray@dir.ca.gov

The telephone number of the contact person is (510) 286-7100.

**CONTACT PERSON FOR SUBSTANTIVE QUESTIONS**

In the event the contact person above is unavailable, or for questions regarding the substance of the proposed regulations, inquiries should be directed to:

Nicole L. Richardson, Attorney

Department of Industrial Relations

 Division of Workers’ Compensation

Post Office Box 420603

San Francisco, CA 94142

E-mail: (nrichardson@dir.ca.gov)

The telephone number of this contact person is (510) 286-7100.

**AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING**

If the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly shown will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

**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 Division’s website at [www.dir.ca.gov](http://www.dir.ca.gov).

**AUTOMATIC MAILING**

A copy of this Notice, the Initial Statement of Reasons and the text of the regulations, will automatically be sent to those interested persons on the Administrative Director’s mailing list.

If adopted, the regulations with any final amendments will appear in title 8 of the California Code of Regulations, sections 31.3, 31.5, 34, 46.3 and forms 31.5 & 108. The text of the final regulations also may be available through the website of the Office of Administrative Law at [www.oal.ca.gov](http://www.oal.ca.gov).