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September 13, 2017

NOTIFICATION OF INTENT TO READOPT EMERGENCY REGULATIONS

Subject: Provider Suspension Procedure

Notice is hereby given that the Department of Industrial Relations, Division of Workers' Compensation (DWC), proposes to readopt for a second time the Provider Suspension Procedure emergency regulations that were adopted effective January 6, 2017 (OAL File No. 2016-1227-01E). The emergency regulations can be found at Article 5.5.1 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, sections 9788.1, 9788.2, 9788.3, and 9788.4. The regulations implement Labor Code section 139.21(a) through (d), which allows the Administrative Director of DWC to suspend from participating in the state's workers' compensation system any physician, practitioner, or provider who has met the criteria specified in Labor Code section 139.21(a). This includes being convicted of any felony or misdemeanor that involves fraud or abuse of Medi-Cal program, the Medicare program, or workers' compensation system. This readoption action is being taken in accordance with Government Code sections 11346.1 and 11349.6 of the California Administrative Procedure Act. These regulations will be submitted to the Office of Administrative Law (OAL) on or before September 22, 2017.

As required for readoption of emergency regulations, DWC has made substantial progress and is proceeding with diligence to comply with Government Code section 11346.1, subdivision (e) and California Code of Regulations, title 1, section 52(b)(1). Since the emergency regulations have been in place, the DWC has suspended thirty-three (33) physicians, practitioners or providers from participating in California's workers' compensation system, with an additional twenty-two providers currently in the suspension process. Additionally continued experience with the suspension process, and legal challenges to it, have given DWC insight into how the procedure can be updated and improved to ensure that the regulations afford appropriate due process protections and withstand constitutional challenges.

In recent months, numerous legal challenges have been filed against the Division, which, in part raise issues regarding the validity of the suspension regulations. In the hearings challenging the suspensions, the physicians, practitioners, and providers have raised arguments regarding the suspension process which have required evaluation to determine whether changes or clarification of the regulations are necessary. Additionally, litigation was recently filed against the Division of Industrial Relations and the Acting Administrative Director asserting procedural due process challenges to the suspension process, precipitating a need to analyze the issues raised and further evaluate the regulation text. The Division has been evaluating the arguments challenging the

suspension process.

Specifically, five cases have recently been filed challenging the constitutionality of the Labor Code section 139.21 and the administrative procedures adopted for suspending providers. One of them was filed as recently as September 1, 2017. The DWC has needed time to review and assess these cases and determine if the emergency regulations require alteration before submitting the regulations in final form, based upon the issues raised in these lawsuits.

Those cases are: (1) *Sobol v. Parisotto, et al.*, Los Angeles Superior Court Case No. BS169849, filed June 5, 2017; (2) *Barri v. Workers' Compensation Appeals Board*, Cal. Court of Appeal Case No. G054838 (Fourth Appellate District), filed February 14, 2017; (3) *Cohen v. Administrative Director*, Sacramento Superior Case No. 34-2017-80002577, filed April 21, 2017; (4) *Healthsmart Pacific, Inc. dba Pacific Hospital of Long Beach and Michael D. Drobot v. Department of Industrial Relations, et al.*, Los Angeles Superior Court Case No. BS170361, filed August 1, 2017; and (5) *Iglesias v. California Division of Workers' Compensation, et al.*, Los Angeles Superior Court Case No. BS 170614, filed September 1, 2017.

The serious allegations of due process violations in these cases implicate the provider suspension regulations. For instance, in both *Sobol v. Parisotto* and *Iglesias v. California Division of Workers' Compensation*, the petitioners are challenging the evidentiary standard and hearing procedures for Labor Code section 139.21 suspensions set forth in the regulations, alleging that they are so vague as to violate due process protections.

In *Drobot v. Department of Industrial Relations*, the petitioner challenges the regulations as violating due process based on the filing requirements for requesting a hearing pursuant to section 9788.2. Drobot contends the regulatory requirements violate due process by not providing for the time delay in mailing of a request for hearing, and by requiring that the request of hearing be filed rather than mailed. He also contends section 9788.2(a) violates due process in requiring the request for hearing set forth the legal and factual reasons for requesting a hearing, because it requires him to obtain the assistance of an attorney to provide that information.

Given the serious consequences of a medical provider's suspension, it is vitally important to allow the DWC the necessary time to review these cases to assure the permanent hearing procedures for the suspension of physicians, practitioners, and providers from participating in the workers' compensation system are viable.

Yet it is equally important to recognize a second, compelling reason unique to these regulations required by Labor Code section 139.21 for the DWC to have sufficient time to devote to analyzing court challenges to the regulations. It is imperative that the suspension procedure process be seamless and constitutionally sound because certain qualifying suspensions trigger a subsequent special lien proceeding in which millions of dollars worth of liens are potentially eliminated from the workers' compensation system. The implementation and execution of the special lien proceeding is wholly dependent upon the existence and operation of the suspension process and a valid suspension. Labor Code sections 139.21(e) and (f) specifically mandates that the lien consolidation proceedings be dependent on the suspension of the medical provider pursuant to the suspension hearing procedures, which are the subject of these regulations.

The interdependence between the suspension procedure and the special lien proceeding

process necessitates that the suspension regulations be highly scrutinized in light of all the legal challenges raised against them and any other foreseeable arguments that may be made.

The suspensions based on the qualifying criminal convictions serve as the foundation for the special lien proceedings. In some instances, the challenges to the suspension regulations have come to light only after the special lien proceedings have been initiated, as providers attack both the suspension proceedings and the special lien proceedings. It was necessary to allow time for both the suspension and special lien proceedings processes to operate so that the DWC could evaluate and consider the procedural issues and challenges arising from the processes before developing the permanent regulations.

The suspension procedure is the basis for the special lien proceedings which have the potential to eliminate thousands of liens from the workers' compensation system. To date, six special lien proceedings have been initiated involving thousands of liens valued in the millions of dollars.

Some examples of cases challenging the regulations, with special lien proceedings initiated subsequent to suspension, include that of Philip Sobol, where the subsequent special lien proceeding involves over 6,000 liens with an estimated value of at least $42 million dollars, and that of Michael D. Drobot, where the subsequent special lien proceeding involves over 1,800 liens with an estimated value of at least $180 million.

Time has also been required to assess current legislation affecting the provider suspension process. In late August, proposed amendments to pending legislation were proposed which required DWC analysis to determine the possible impact on the suspension regulations. AB 1422, introduced by Assembly Member Daly, was amended multiple times in recent weeks to propose clarifying changes to Labor Code section 139.21. The DWC has been tracking this legislative action and evaluating the need to make changes to the suspension regulations based on what the legislators have identified as issues with regard to the suspension process.

A Rand Corporation study was published on June 28, 2017, entitled "Provider Fraud in California's Workers' Compensation, Selected Issues" and has necessitated further evaluation.

Issues that require clarification or additional regulations include the appropriate service requirements for notices and orders of suspension; circumstances justifying a continuance of the suspension hearing; and the necessity of amending suspension orders to include any additional bases for suspension including, but not limited to, a subsequent conviction of the physician, practitioner or provider that meets the criteria specified in Labor Code section 139.2(a).

The DWC anticipates publishing the text of the proposed permanent regulations for rulemaking on its forum by early October, 2017, and hold a public hearing forty-five (45) days thereafter. Readoption of the emergency regulations will keep the emergency regulations in place pending rulemaking for the permanent provider suspension procedure regulations.

Pursuant to California Code of Regulations, title 1, section 52(b)(2) there have been no changes in emergency circumstances since the original adoption of the emergency regulations. Without these emergency regulations in place, convicted providers may still

be treating patients in the workers' compensation system, causing harm to the public peace, health and safety, and general welfare of the state.

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed readoption action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed readoption action to every person who has filed a request for notice of regulations action with the agency. After submission of the proposed readoption to OAL, OAL shall allow any interested persons five calendar days to submit comments on the proposed readoption as set forth in Government Code section 11349.6. Upon filing, OAL will have ten (10) calendar days within which to review and make a decision on the proposed readoption.

DWC hereby incorporates by reference the rulemaking record of OAL File No. 2016-1227-01E and OAL File No. 2017-062201EE. Included with this notice is the specific regulatory language now in place following DWC's emergency action and an updated version of the Finding of Emergency that was initially submitted to OAL in December 2016.

You may review the regulatory language and Updated Finding of Emergency on the DWC's website at the following address: http://www.dir.ca.gov/dwc/dwcRulemaking.html

If you have any questions regarding this proposed emergency action, please contact Maureen Gray, DWC's regulation coordinator, at mgray@dir.ca.gov or (510) 286-0676.