

State of California
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

**THIRD NOTICE OF MODIFICATION TO TEXT OF
PROPOSED REGULATIONS**

Subject Matter of Regulations: Return to Work

TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTIONS 10001 – 10005

NOTICE IS HEREBY GIVEN that the Acting Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in her by Labor Code sections 59, 133, and 4603.5, proposes to modify the text of the following proposed amendments to Title 8, California Code of Regulations:

Section 10001	Definitions;
Section 10002	Offer of Work; Adjustment of Permanent Disability Payments;
Section 10003	Form DWC AD 10003 Notice of Offer of Work;

**PRESENTATION OF WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION
OF WRITTEN COMMENTS**

Members of the public are invited to present written comments regarding these proposed modifications. **Only comments directly concerning the proposed modifications to the text of the regulations will be considered and responded to in the Final Statement of Reasons.**

Written comments should be addressed to:

Maureen Gray, Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The Division's contact person must receive all written comments concerning the proposed modifications to the regulations no later than **5:00 p.m. on Monday, May 22, 2006**. Written comments may be submitted by facsimile transmission (FAX), addressed to the contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail), using the following e-mail address: dwcrules@hq.dir.ca.gov.

AVAILABILITY OF TEXT OF REGULATIONS AND RULEMAKING FILE

Copies of the original text and modified text with modifications clearly indicated, and the entire rulemaking file, are currently available for public review during normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays, at the offices of the Division of Workers' Compensation. The Division is located at 1515 Clay Street, 17th Floor, Oakland, California.

Please contact the Division's regulations coordinator, Ms. Maureen Gray, at (510) 286-7100 to arrange to inspect the rulemaking file.

The specific modifications proposed include changes to the text of the proposed amendments Title 8, California Code of Regulations:

Section 10001	Definitions;
Section 10002	Offer of Work; Adjustment of Permanent Disability Payments;
Section 10003	Form DWC AD 10003 Notice of Offer of Work;

DOCUMENTS SUPPORTING THE RULEMAKING FILE

- Comments from various interested parties concerning the regulations have been added to the rulemaking file.

FORMAT OF PROPOSED MODIFICATIONS

Proposed Text Noticed for 45-Day Comment Period:

The text is indicated by underlining, thus: underlined language.

Proposed Text Noticed for 15-Day Comment Period on Modified Text:

Deletions from the regulatory text, as proposed in October 2005, are indicated by double strike-through, thus: ~~deleted language~~.

Additions to the regulatory text, as proposed in October 2005, are indicated by a double underline, thus: added language.

Proposed Text Noticed for Second 15-Day Comment Period on Modified Text:

Deletions from the regulatory text, as proposed in April 2006, are indicated by double strike-through in italics, thus: ~~*deleted language*~~.

Additions to the regulatory text, as proposed in April 2006, are indicated by double underline in italics, thus: *added language*.

Proposed Text Noticed for This Third 15-Day Comment Period on Modified Text:

Deletions from the regulatory text, as proposed in May 2006, are indicated by double underline double strikethrough italics, thus: ~~*deleted language*~~.

Additions to the regulatory text, as proposed in May 2006, are indicated by double underline in the Arial font, thus: added language.

Deletions from Form 10003, as proposed in May 2006, are indicated by double underline double strikethrough 12 point Arial font (larger than the 10 point font), thus: ~~*deleted language*~~.

Additions to Form 10003, as proposed in May 2006, are indicated by double underline 12 point Arial font (larger than the 10 point font), thus: deleted language.

SUMMARY OF PROPOSED CHANGES

Modifications to Section 10001

Definitions; subdivisions (a) “Alternative work” and (f) “Seasonal Work”

In subdivision (a), the definition of “Alternative work” was changed because the deleted sections of subdivision (a) are already contained in the definition of “Seasonal Work” in subdivision (f). The typographical error “or” was changed to “of.” The proposed text states:

- (a) “Alternative work” means work (1) offered ~~by the~~ either by the employer who employed the injured worker at the time ~~or~~ of injury, or by another employer where the previous employment was ~~on a seasonal work basis, as a daily hire, or as a project hire,~~ (2) that the employee has the ability to perform, (3) that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and (4) that is located within a reasonable commuting distance of the employee's residence at the time of injury.

The definition of “Seasonal work” in subdivision (f) was changed to delete text that is already contained in definitions elsewhere in section 10001. The proposed text states:

- (f) “Seasonal Work” means employment as ~~the employee's usual occupation or the position in which the employee was engaged at the time of injury and that offers wages and compensation equivalent to those paid to the employee at the time of injury in which the employee regularly works as a daily hire, a project hire, or an annual season hire, and is located within a reasonable commuting distance of the employee's residence at the time of injury.~~

Modifications to Section 10002

Offer of Work; Adjustment of Permanent Disability Payments subdivisions (f) and (g) (1) (2)

Changes were made to Section 10002 (f) in order to clarify that when an employer has made an offer of regular, modified or alternative work and subsequently learns that the employee cannot

lawfully perform the work, without limitation to specific instances, the employer is not required to provide the work. Additionally, the case of *Anzelde v. WCAB* was added to the reference section. In *Anzelde*, the police officer applicant was unable to work at the modified job offered and created pursuant to the rehabilitation plan because of his participation in unlawful activities which were unrelated to his industrial injury. The proposed text states:

(f) When the employer offers regular, modified or alternative work to the employee that meets the conditions of this section and subsequently learns that the employee cannot lawfully perform regular, modified or alternative work ~~due to the employee's immigration status~~, the employer is not required to provide the regular, modified or alternative work.

Reference: Sections 139.48, and 4658, Labor Code, *Del Taco v. WCAB* (2000) 79 Cal.App.4th 1437, *Anzelde v. WCAB* (1996) 61 Cal. Comp. Cases 1458 (Writ denied), and *Henry v. WCAB* (1998) 68 Cal.App.4th 981.

Changes were made to Sections 10002 (g) (1) and (2) in order to be consistent with the fact that Section 10001 (a) states that an offer of alternative work for a seasonal employee shall be at least 85% of the wages paid to the employee at the time of injury. The proposed text states:

(g)(1) the employee was hired for ~~on a seasonal work basis, as a daily hire, or as a project hire~~ prior to injury;

(2) the offer of regular, modified or alternative *seasonal* work is ~~on a similar seasonal basis of reasonably similar wages, hours and working conditions to the employee's previous employment, and where the previous employment was for seasonal work on a seasonal basis, as a daily hire, or as a project hire, the one year requirement may be satisfied by cumulative periods of seasonal work;~~

Modifications to Section 10003

Form DWC AD 10003 Notice of Offer of Work;

At page 1 of DWC-AD Form 10003, the language was changed in order to be consistent with Labor Code section 4658. The proposed text states:

<u>THIS SECTION TO BE COMPLETED BY EMPLOYER OR CLAIMS ADMINISTRATOR:</u>	
Claims Administrator: _____	Claim Number: _____
<small>(Name of Claims Administrator)</small>	
Based on the opinion of _____ treating physician _____ QME _____ AME _____, you are able to return to the _____	
<small>(Name of Physician)</small>	
<u>usual occupation or position you held at the time of your injury</u>	
on _____ (Date).	

Additionally, language was changed in order to account for the situation where between the injury and the time Form 10003 is completed and sent, there has been a change in the employee's pay, such as cost of living increase or merit increase. Finally, language was modified to reflect that a claims adjuster cannot validate the accuracy of the information and can only convey what the employer described. The proposed text states:

This position is expected to last ~~for a total of~~ at least 12 months ~~of work~~. If this position does not last for ~~a total of at least 12 months of work~~, you may be entitled to an increase in your permanent disability benefit payments.

This position provides wages and compensation of \$ _____, that are ~~no less than equivalent to~~ the wages and compensation paid to you at the time of your injury.

I, _____ (Name of Claims Administrator), have obtained the above ~~verified with the employer the facts concerning this job offer~~ information from your employer.