

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

NOTICE OF RULEMAKING AFTER EMERGENCY ADOPTION

Subject Matter of Proposed Amendments to Regulations: Workers' Compensation – Workers' Compensation – Collective Bargaining Agreements

PROPOSED REGULATORY ACTIONS

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation (hereinafter "Administrative Director"), pursuant to the authority vested in her by Labor Code sections 59, 133, 3201.5, 3201.7, 3201.9, and 5307.3, has amended and adopted regulations on an emergency basis to implement the provisions of Labor Code section 3201.7, as adopted by Senate Bill 228. (Chapter 639, Stats. of 2003, effective January 1, 2004.)

The regulations amended are in Chapter 4.5, Subchapter 1.8, of Title 8, California Code of Regulations, sections 10200, 10201, 10202.1, 10202, 10203 10203.1, 10203.2 and 10204. These sections concern negotiated provisions for alternative methods of providing workers' compensation benefits, also generally know as "carve-out" programs.

The emergency regulations became effective on April 22, 2004. The purpose of this rulemaking is to amend and adopt the emergency regulations on a permanent basis.

TIME AND PLACE OF PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, either orally or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

Date: Thursday, July 8, 2004

Time: 10:00 a.m.

Place: Auditorium

**The Governor Hiram Johnson State Office Building
455 Golden Gate Avenue
San Francisco, California 94102**

The State Office Building and its Auditorium are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or any other type of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the State Disability Accommodation Coordinator, Adel Serafino, 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 10:00 a.m. and will conclude when the last speaker has finished his or her presentation or 5:00 p.m., whichever is earlier. If public comment concludes before the noon recess, no afternoon session will be held.

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

accorded to oral comments and written materials.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code sections 59, 133, 3201.5, 3201.7, 3201.9, and 5307.3.

Reference is to Labor Code sections 3201.5, 3201.7, and 3201.9.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Section 3201.7 of the Labor Code, enacted by Senate Bill 228 (Chapter 639, 2003), extends the option to negotiate “labor-management agreements,” or “carve-out” programs to employers in any industry not covered by Section 3201.5, who may negotiate such an agreement with a union with whom the employer has an existing collective bargaining relationship.

Paralleling Labor Code section 3201.5, which allows carve-out programs in the construction industry, Labor Code section 3201.7(a)(3) provides that an employer or groups of employers and a union that is the recognized or certified exclusive bargaining representative may negotiate a labor-management agreement that may include an alternative dispute resolution system (with final decisions subject to WCAB review), an agreed list of medical providers, an agreed list of qualified or agreed medical evaluators, the creation of a joint safety committee, the creation of a return to work program, the creation of a vocational rehabilitation program with an agreed list of rehabilitation providers. Unlike Section 3201.5, however, Section 3201.7(b) provides that employees subject to a section 3201.7 agreement have the right to representation by counsel at all stages during the alternative dispute resolution process.

Labor Code section 3201.7(c) provides that only employers who have annual workers’ compensation premiums of \$50,000 or more and have 50 employees are eligible to establish a carve-out program under section 3201.7. Groups of employers, which may include cities and counties, must have premiums of \$500,000 or more.

To establish a carve-out program under Labor Code section 3201.7 a union must first petition the Administrative Director for permission to negotiate a carve-out program. Section 3201.7(d) requires that the union’s petition specify the bargaining units to be included, the name of the employer or group of employers that will be negotiated with, and provide proof of the union’s status as the exclusive bargaining representative for the employees. The petition must be in “the form designated by the administrative director.” When the union’s status as the exclusive bargaining representative is verified, the Administrative Director will issue a letter advising the union and employer(s) of their eligibility to enter into negotiations for the purpose of establishing a Section 3201.7 carve-out program. The parties may negotiate for a period of one-year, but can jointly ask for an extension of an additional year if necessary.

When a carve-out agreement is reached, before it can take effect (or be continued), Section 3201.7(e) provides that employers must provide the Administrative Director with the carve-out agreement, the number of employees covered by the agreement, a statement that no action has been taken by an administrative agency or court to invalidate the carve-out agreement, and must provide a contact person, and any other information the Administrative Director finds necessary to implement section 3201.7. Section 3201.7(f) requires that unions must provide their current LM-2 or LM-3 filing with the U.S. Department of Labor and identify their respective contact person.

As with Labor Code section 3201.5, Labor Code section 3201.7 provides the Administrative

Director the authority to require section 3201.7 programs to provide data on, among other things, the number of claims filed, the average cost of claims, the number of contested and litigated claims, and the number of workers participating in established return to work or vocational rehabilitation programs. Under Section 3201.7, the Administrative Director must also be provided with information on “overall worker satisfaction.”

The Administrative Director now proposes to amend and permanently adopt the emergency regulations applicable to carve-out agreements for employers in all industries. These proposed regulations implement, interpret, and make specific Labor Code section 3201.7.

The regulations may be briefly summarized as follows:

- Section 10200 is amended to define key terms relating to carve-out programs under sections 3201.5 and 3201.7. Among the amendments is the inclusion of the term “labor-management agreement,” which is section 3201.7’s term for a carve-out program that applies to all industries except for construction, which are covered under section 3201.5.
- Section 10201 sets forth the procedure for recognizing construction carve-out programs under section 3201.5. The proposed amendments incorporate into section 10201 the existing section 10202, addressing the effect of a letter of eligibility issued under Labor Code section 3201.5, into section 10201.
- Section 10202 is adopted to set forth the procedure for recognizing carve-out programs under section 3201.7.
- Section 10202.1 is the Petition for Permission to Negotiate a Section 3201.7 Labor-Management Agreement (DWC Form RGS-1), required by proposed section 10202(a).
- Section 10203, which requires construction carve-out programs to report specific claim data, is amended to include programs recognized under Labor Code section 3201.7. The proposed amendment also implements Labor Code section 3201.9 by requiring claim information for the first mandatory reporting year, and then for next three calendar years as they occur.
- Section 10203.1 is the Aggregate Employer Annual Report (DWC Form GV-1), required by proposed section 10203(a)(2)(A).
- Section 10203.2 is the Individual Employer Annual Report (DWC Form GV-2), required by proposed section 10203(a)(2)(A).
- Section 10204 currently requires construction carve-out programs recognized under section 3201.5 to submit annual updates and provides that a program’s letter of eligibility may be revoked if the program fails to submit required data. The proposed regulations amend the section by imposing the requirements on programs recognized under section 3201.7.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Administrative 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. The regulations implement a statute designed to provide substantial

cost savings for unionized employers without reducing benefits that are promised to injured workers under existing law. This is primarily accomplished by reducing disputes in medical treatment through a negotiated exclusive list of medical providers and evaluators, and by reducing litigation costs through an alternative resolution system that stands in place of lengthy procedures before the Workers' Compensation Appeals Board.

- Adoption of these regulations 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 currently doing business in California.
- Effect on Housing Costs: None.
- Cost impacts on representative private person or business: Unknown but fairly small. Costs would be incurred to establish the administrative structure of the carve-out program, such as payment for the ombudsperson and related staff, and costs associated with establishing an alternative dispute resolution system, such as payments for mediators and arbitrators. Costs would also be incurred to report claim data to the carve-out program administrator or the Administrative Director, as the case may be. The costs are primarily due not to the regulations but to the legislative enactments that established the carve-out program for all unionized industries.

FISCAL IMPACTS

- Costs or savings to state agencies or costs/savings in federal funding to the State: The statute that is being implemented by these regulations will impose an additional workload on the Division of Workers' Compensation. The staffing requirements necessary to accommodate that workload will be addressed through the budget process.
- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district. Cities and counties that are self-insured may negotiate carve-out programs with unions that are the exclusive bargaining representative of cities' or counties' employees, but the statute does not mandate such programs. The potential costs imposed on all public agency employers by these proposed regulations, although not a benefit level increase, are not a new State mandate because the regulations apply to all unionized employers, both public and private, and not uniquely to local governments.
- 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" section above.)
- Other nondiscretionary costs/savings imposed upon local agencies: None. (See "Local Mandate" section above.)

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed regulations may affect small businesses.

FINDING CONCERNING THE CREATION OF A REPORTING REQUIREMENT

Pursuant to Government Code section 11346.3(c), the Administrative Director has made a finding that requiring employers participating in carve-out programs to submit annual reports is necessary for the health, safety, or welfare of the people of the state, and that it is necessary that this regulation apply to businesses.

The Administrative Director based this determination on the fact that the Administrative Director is required by Labor Code sections 3201.5 and 3201.7 to annually prepare a report concerning specific facts about the carve-out program, and make it available to the Legislature. The reports required by these regulations collect the data necessary to meet the legislative mandate. In addition, the data collected in the reports required by these regulations will allow the Administrative Director to more accurately allocate staff and resources for program oversight and assist the Administrative Director in responding to oversight inquiries concerning the carve-out program.

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 for which the actions are proposed or would be as effective and less burdensome to affected private persons than the proposed actions.

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

A pre-notice workshop, pursuant to Government Code section 11346.45, is not required to implement the proposed regulations, because the issues addressed are not so complex that they cannot easily be reviewed during the comment period.

In addition, the text of the draft proposed regulations was made available for pre-regulatory public comment through the Division's Internet message board (the DWC Forums).

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS / INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulations have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below or a copy will be provided upon written request.

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 in ~~strikeout~~/underline format, and the Form 399. In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Department of Industrial Relations' Internet site at www.dir.ca.gov

**PRESENTATION OF ORAL AND/OR WRITTEN COMMENTS AND DEADLINE
FOR SUBMISSION OF WRITTEN COMMENTS**

Members of the public are invited to present oral and/or written statements, arguments or evidence at the public hearing. If you provide a written comment, it will not be necessary to present your comment as oral testimony at the public hearing.

Any person may submit written comments on the proposed regulations, prior to the public hearings to:

Ms. Marcela Reyes,
Regulations Coordinator
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

Unless submitted prior to or at the public hearing, all written comments must be received by the agency contact person, no later than 5:00 p.m. on Thursday, July 8, 2004. Equal weight will be accorded to oral and written materials.

WRITTEN COMMENTS TRANSMITTED BY E-MAIL OR FACSIMILE

The Administrative Director will accept written comments transmitted by e-mail provided they are sent to the following e-mail address: dwcrules@dir.ca.gov

The Administrative Director will also accept written comments transmitted by facsimile provided they are directed to the attention of Marcela Reyes and sent to the following facsimile number: (415) 703-4720. Due to the inherent risks of non-delivery by facsimile transmission, the Administrative Director suggests, but does not require, that a copy of any comments transmitted by facsimile transmission also be submitted by regular mail.

Comments sent to other e-mail addresses or other facsimile numbers will not be accepted. Comments sent by e-mail or facsimile are subject to the deadline set forth above for written comments.

**AVAILABILITY OF RULEMAKING FILE AND LOCATION
WHERE RULEMAKING FILE MAY BE INSPECTED**

Any interested person may inspect a copy or direct questions about the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file.

The rulemaking file, including the Initial Statement of Reasons, the complete text of the proposed regulations and any documents relied upon in this rulemaking may be inspected during normal business hours (8:00 a.m. to 5:00 p.m., Monday through Friday, excluding public holidays) at the following location:

Division of Workers' Compensation
455 Golden Gate Avenue, Ninth Floor
San Francisco, California 94102

AVAILABILITY OF RULEMAKING DOCUMENTS ON THE INTERNET

Documents concerning this proceeding are available on the Division's website: 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 rulemaking link for "Collective Bargaining Agreements Under Labor Code Sections 3201.5 and 3201.7 (Carve-out Programs)."

CONTACT PERSON:

Nonsubstantive 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 directed to the contact person. The contact person is:

Ms. Marcela Reyes
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The telephone number of the contact person is (415) 703-4600.

BACK-UP CONTACT PERSON / CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

To obtain responses to questions regarding the substance of the proposed regulations, or in the event the contact person is unavailable, inquiries should be directed to: James M. Robbins, Industrial Relations Counsel, at the same address and telephone number as noted above for the contact person.

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 indicated will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted. The modified text will be made available on the Division's website: www.dir.ca.gov and may be located by following the directions provided above.

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: www.dir.ca.gov by following the directions provided above.

AUTOMATIC MAILING

A copy of this Notice, including the Informative Digest, will automatically be sent to those interested persons on the Administrative Director's mailing list and the DWC Carve-out Program's mailing list.

If adopted, the proposed regulations as amended will appear in Title 8, California Code of Regulations, sections 10200, 10201, 10202.1, 10202, 10203 10203.1, 10203.2 and 10204.

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