

Return to Work	RULEMAKING COMMENTS 3 <sup>RD</sup> 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
General Comment	Commenter approves of the proposed regulations.	Tina Coakley Legislative & Regulatory Analyst The Boeing Company May 10, 2006 Written Comment	We agree.	None requested.
Section 10002(f)	<p>The proposed language for this regulation clearly states that the employer is not required to provide work when the employee cannot lawfully perform work. However, commenter feels that the regulation lacks guidance on the application of the +/- 15% adjustment to the permanent disability indemnity benefit. Commenter believes that clarification is needed on this public policy issue and the regulation should clearly state <u>how and when</u> the PD adjustment requirement should be applied.</p> <ul style="list-style-type: none"> <li>• Is the employee entitled to a 15% increase in the weekly permanent disability rate because the employer ultimately did not provide the work as described in Labor Code §4658?</li> <li>• Is the employee's weekly PD rate subject to a 15% decrease because the work was offered but could not be provided due to the employee's unlawful work status?</li> <li>• Is the intent to eliminate a PD adjustment either up or down pursuant to CCR §10002 when subsection (f) is operational?</li> <li>• When would the adjustment to the</li> </ul>	Jose Ruiz Claims Operations Manager State Compensation Insurance Fund May 19, 2006 Written Comment	<p>We disagree. Labor Code section 4658(d)(3)(A) provides that if the employer makes a proper offer of modified, alternative or regular work, whether or not the employee accepts it, the employer is entitled to a 15% reduction of permanent disability benefits. It also provides that the reduction shall be made with regard to each remaining payment after the offer was made. Thus, if a valid offer was made, the statute is clear that the reduction applies and that the reduction begins when the offer is made. Section 10002(f) clarifies only that if the employer learns that he cannot legally hire the employee after the offer was made, then he does not have to.</p> <p>There is no authority to eliminate the 15% adjustment.</p>	None.

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	PD weekly rate be applied (i.e. Date of employer's knowledge? Date employee left work? The next payment date? Is the +/-15% adjustment retroactively applied?)?			
Section 10003 – Form DWC AD 10003 Notice of Regular Work – Page 1	<p>Commenter recommends striking the word “the” from the proposed language:  <u>I, _____ (Name of Claims Administrator), have obtained the above <del>verified with the employer</del> <u>the facts concerning this job offer</u> information from your employer.</u></p>	<p>Jose Ruiz  Claims Operations Manager  State Compensation Insurance Fund  May 19, 2006  Written Comment</p>	<p>We agree to make this non-substantive change.</p>	<p>The extra “the” will be deleted.</p>
Section 10001 - Definitions	<p>Commenter points out that the definition of "seasonal work" uses the phrase "annual season hire." Commenter believes that the intention is unclear and the proposed definition therefore fails to meet the Government Code Section 11349.1 standard of clarity. Commenter questions if the phrase is supposed to indicate that the employee is hired for a single season? Guaranteed reemployment each year for a specific season?</p> <p>Commenter believes that greater clarity could be achieved if the definition were modified to read:</p> <p><b>"Seasonal Work" means employment as a daily hire, a project hire, or employment in</b></p> <p>i) <b>a trade, business or occupation that is not continuous or carried on throughout the year or,</b></p> <p>ii) <b>a trade, business or occupation that is temporarily or</b></p>	<p>Steven Suchil  Assistant Vice President  American Insurance Association  May 22, 2006  Written Comment</p>	<p>We disagree. The proposed regulation is referring to an employee who is traditionally hired on a seasonal basis year after year (annually). As explained in <i>Henry</i>, “Seasonal positions often accommodate the requirements of particular employees. These include teachers, park rangers, resort employees, lifeguards and ski instructors.”</p>	<p>None.</p>

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	<p><b>intermittently suspended for regularly recurring period of time, or</b></p> <p><b>iii) a trade, business or occupation that is regularly suspended due to weather, climate or other conditions.</b></p>			
Section 10002(c)	<p>Subdivision (c) addresses situations in which there is a dispute regarding an employee's permanent and stationary status. Commenter believes that the legislature intended to encourage return-to-work as soon as feasible consistent with any limitations an employee may have as a result of an industrial injury. While legislators did put an outside time limit of 60 days from the P&amp;S date for an employer to offer regular, modified or alternative work and be entitled to the 15% reduction in indemnity benefits, they did not require the offer to be made after the P&amp;S date. Subparagraph (1), however, requires the employer to reimburse the employee and make a new job offer if the P&amp;S date on which the employer relied has changed. The second job offer provision fails to comply with the Government Code Section 11349.1 authority standard, unless the first job offer is no longer valid because the employee's job limitations have changed. Commenter believes that the subparagraph should be revised to read:</p> <p><b>(1) Where there is a final judicial determination that the employee is permanent and stationary on a date later than the date relied on by the employer in making its offer of work, the employee shall</b></p>	<p>Steven Suchil Assistant Vice President American Insurance Association May 22, 2006 Written Comment</p>	<p>We disagree that the statute has an “outside limit” only. Labor Code section 4658 requires that the offer be made “within 60 days of a disability becoming permanent and stationary.” It does not allow for offers to be made more than 60 days before the employee is permanent and stationary.</p>	None.

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	<p><b>be reimbursed any amount withheld up to the later of the final judicial determination or, if required by a documented change in the employee's condition and limitations, the date a new notice of offer of work is served on the employee pursuant to subdivision (b).</b></p>			
Section 10002(f)	<p>Subdivision (f) explains that an employer is relieved of its obligation to offer regular, modified or alternative work if the employee cannot lawfully perform the work. Commenter states that he language lacks sufficient clarity, and therefore fails to comply with Government Code Section 11349.1, because, while it implies that the employer is also relieved of its obligation to increase indemnity benefit payments by 15%, it does not do so explicitly, nor does it clarify whether the employer in such situations may reduce indemnity benefit payments by 15%. Commenter states that it is critical that the regulation provide clear guidance to employers, employees and claims administrators on this issue.</p>	<p>Steven Suchil Assistant Vice President American Insurance Association May 22, 2006 Written Comment</p>	<p>We disagree. Labor Code section 4658(d)(3)(A) provides that if the employer makes a proper offer of modified, alternative or regular work, whether or not the employee accepts it, the employer is entitled to a 15% reduction of permanent disability benefits. It also provides that the reduction shall be made with regard to each remaining payment after the offer was made. Thus, if a valid offer was made, the statute is clear that the reduction applies and that the reduction begins when the offer is made. Section 10002(f) clarifies only that if the employer learns that he cannot legally hire the employee after the offer was made, then he does not have to.</p>	None.
Section 10002(g)	<p>Subdivision (g) addresses the employer's job offer requirements where employees were employed in seasonal work. It allows the 12-month duration to be satisfied by cumulative periods of seasonal work, implying that whoever makes the offer is required to guarantee the full 12 months. If that is not what was intended, then the subparagraph (2) needs to be redrafted. If that is the intention, then the net effect will be to penalize</p>	<p>Steven Suchil Assistant Vice President American Insurance Association May 22, 2006 Written Comment</p>	<p>We agree that the first sentence is correct. We disagree that the net effect will be to penalize the employer. As stated in <i>Henry</i>: "When the employer does provide continuous employment to its injured worker, the employer receives a bonus. The bonus is a refund from the insurer if the employer returns the injured worker to alternative work</p>	None.

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	employers who always operate on a seasonal or project only basis. Commenter contends that could not have been what the legislature intended and urges the Division to exempt such employers entirely from the job offer requirements.		for 12 consecutive months. (§ 4638, subd. (a).) But employers are not required to offer better, or more extensive, year-round positions to injured workers. They are only required to restore workers to suitable alternative employment of reasonably similar wages, hours and working conditions for 12 months.”	
Section 10001(a)	<p>Commenter requests that the Division retain the alternative work definition in Labor Code section 4658.1(c) that has been adopted in the SJDB regulations.</p> <p><i>(a) “Alternative work” means work <del>(1)</del> offered either by the employer who employed the injured worker at the time of injury, or by another employer where the previous employment was seasonal work <del>(2)</del> that the employee has the ability to perform, <del>(3)</del> that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and <del>(4)</del> that is located within a reasonable commuting distance of the employee’s residence at the time of injury.</i></p> <p><b>Discussion</b> No matter whether or not alternative work may be offered by another employer, any change from the alternative work definition that was adopted in the SJDB regulations is unnecessary.</p>	<p>Brenda Ramirez Medical Director</p> <p>Michael McClain General Counsel and Vice President California Workers’ Compensation Institute (CWCI) May 22, 2006 Written Comment</p>	We disagree. This definition, which applies to this article only, needs to clarify that the offer to alternative work for purposes of receiving the 15% reduction may be made by another employer where the previous employment was for seasonal work. This language will make it possible for employers of seasonal workers to be able to take advantage of the 15% reduction and well as help seasonal workers receive return to work offers.	None.

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	<p>Labor Code section 4658.1 provides a single definition of alternative work that applies throughout Article 3, including to job offers relating to both Return to Work (RTW) permanent partial disability (PPD) payment adjustments, and to Supplemental Job Displacement Benefits (SJDB). Not only is it unnecessary, it is also confusing to have differing definitions for the RTW and SJDB regulations, particularly when the notice of alternative work offer is made for both regulations on a single required form.</p> <p>Commenter questions whether the Administrative Director may allow claims administrators to decrease the PPD payments of seasonal employees, but not of non-seasonal employees, when other (non-injury) employers offer alternative work. Is a work offer by another (non-injury) employer an offer of alternative work or a new job offer? If the Administrative Director has the authority to permit a reduction in PPD payment when another employer offers alternate work, then that reduction should be allowed for all employers, not only employers offering seasonal work.</p>			
Section 10002(f)	<p>Commenter recommends the following language:</p> <p><i>(f) When the employer offers regular, modified or alternative work to the employee that meets the conditions of this section and <del>subsequently</del> learns that the employee cannot lawfully perform regular, modified or alternative work, the employer is not required to provide the regular, modified or alternative work and may</i></p>	<p>Brenda Ramirez Medical Director</p> <p>Michael McClain General Counsel and Vice President California Workers' Compensation Institute (CWCI) May 22, 2006</p>	<p>We disagree. Labor Code section 4658(d)(3)(A) provides that if the employer makes a proper offer of modified, alternative or regular work, whether or not the employee accepts it, the employer is entitled to a 15% reduction of permanent disability benefits. It also provides that the reduction shall be made with regard to each remaining payment after the</p>	None.

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	<p><u>decrease the permanent partial disability payment by 15 percent.</u></p> <p><b>Discussion</b> In order to avoid costly litigation over the issue, it is critical that the Administrative Director clarify whether or not PPD payment is subject to the 15 percent adjustment when the employer learns that the employee cannot lawfully perform regular, modified or alternative work.</p> <p>“Subsequently” should be deleted since the employer may not provide work whether the employer learns before or after the offer that the employee cannot lawfully work.</p>	Written Comment	<p>offer was made. Thus, if a valid offer was made, the statute is clear that the reduction applies and that the reduction begins when the offer was made. Section 10002(f) clarifies only that if the employer learns that he cannot legally hire the employee after the offer was made, then he does not have to.</p> <p>By using the term “subsequently” the regulation follows the ruling of the Del Taco case and protects the innocent employer. With regard to other scenarios, the factual situation will have to be brought before the WCAB.</p>	
Section 10002(g)	<p>Commenter requests that the Division modify the language as indicated, delete the citation to <u>Henry v. WCAB</u>, and modify the Notice of Regular Work form as recommended later in their comments regarding section 10003:</p> <p><i>(g) If the employer offers regular, modified, or alternative seasonal work to the employee, the offer shall meet the following requirements:</i></p> <p><i>(1) the employee was hired for seasonal work prior to injury;</i></p> <p><i>(2) the offer of regular, modified or alternative seasonal work is for no less than <u>the cumulative duration of work performed or offered, whichever is greater, during the 12 months prior to the injury of reasonably similar hours and working conditions to the employee's previous employment, and where</u></i></p>	<p>Brenda Ramirez Medical Director</p> <p>Michael McClain General Counsel and Vice President California Workers' Compensation Institute (CWCI) May 22, 2006 Written Comment</p>	<p>We disagree. As stated in <i>Henry</i>: “When the employer does provide continuous employment to its injured worker, the employer receives a bonus. The bonus is a refund from the insurer if the employer returns the injured worker to alternative work for 12 consecutive months. (§ 4638, subd. (a).) But employers are not required to offer better, or more extensive, year-round positions to injured workers. They are only required to restore workers to suitable alternative employment of reasonably similar wages, hours and working conditions for 12 months.”</p>	None.

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	<p><del>the previous employment was for seasonal work, the one year requirement may be satisfied by cumulative periods of seasonal work;</del></p> <p>(3) the work must commence within 12 months of the date of the offer; and</p> <p>(4) The offer meets the conditions set forth in this section.</p> <p><b>Discussion</b> The recommended language provides seasonal and temporary employees a return to work that is equivalent to their position at the time of injury as the legislature intended.</p> <p>The statute permits an employer to offer similar seasonal reemployment for no less than the 12-month statutory period. If an employee works for a six month harvesting season or for four months on contract for a film, then the employer is permitted under the statute to make a qualifying offer of employment within the following 12 month period.</p> <p>Labor Code Section 4658(d)(2) and (3) specifically state that the employer must offer regular, modified or alternative work “for a period of at least 12 months.” The Division has proposed language in this subsection that will require work offers that exceed this period. If the employment season is brief, the period required by the Division may extend for many years of seasonal work. We believe that this impermissibly enlarges the scope of</p>			
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	<p>the statute.</p> <p>If the Division modifies the language as recommended, the citation to <u>Henry v. WCAB</u> will be unnecessary.</p>			
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Section 10003 – Notice of Offer to Work – Usual Occupation	<p><b>Recommendation -- Usual Occupation</b> Based on the opinion of ___treating physician ___QME ___ AME , (Name of Physician) on _____(Date), <u>you are able to return to the your usual occupation or to the position you held at the time of your injury</u> on _____(Date).</p> <p><b>Discussion</b> Replacing “the” with “your” and adding “to the” prior to “position” will correct the typographical errors that may otherwise lead to interpretation that “usual occupation” will apply only if the employee was engaged in his/her usual occupation at the time of injury. If the legislature intended that interpretation, there would have been no need to include the term “usual occupation” in Labor Code section 4658.1(a). The term was included; therefore the Legislature did not mean to limit “usual occupation” to the at-injury position. Labor Code section 4658.1(a) defines “regular work” as either <i>“the employee’s usual occupation or the position in which the employee was engaged at the time of the injury...”</i></p> <p>Commenter continues to suggest repositioning the date reference on the form so that it is clear the requested date is the date on which the employee is able to return to work, and not the date of injury.</p>	<p>Brenda Ramirez Medical Director</p> <p>Michael McClain General Counsel and Vice President California Workers’ Compensation Institute (CWCI) May 22, 2006 Written Comment</p>	<p>We agree to make the non substantive changes by adding the words “your” and “to the.”</p> <p>We disagree. On the line referred to the date of injury is to be inserted. The return to work date is on the next line.</p>	<p>The words “your” and “to the” will be inserted.</p> <p>None.</p>
Section 10003 – period of at Least 12 Months	<p>Commenter recommends the following language:  This position is expected to last for a <del>total</del></p>	<p>Brenda Ramirez Medical Director</p> <p>Michael McClain</p>	<p>We disagree. The employer must offer a job for a total of 12 months of work, not for a period of 12 months (but only a few months of work</p>	<p>None.</p>

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	<p><del>period</del> of at least 12 months <del>of work</del>. If this position does not last for a <del>total period</del> of at least 12 months <del>of work</del>, 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 the wages and compensation paid to you at the time of your injury.</p> <p><b>Discussion</b> These recommended modifications relate to the prior discussion (above) on seasonal employment and “a period of at least 12 months.” The modifications will be necessary if the Administrative Director accepts the changes recommended for Labor Code section 10002(g)(2).</p>	<p>General Counsel and Vice President California Workers’ Compensation Institute (CWCI) May 22, 2006 Written Comment</p>	<p>because it is a seasonal job). See discussion of <i>Henry</i> above.</p>	
<p>Section 10003 – Proposed Verification</p>	<p>Commenter recommends that the Division delete the proposed verification statement.</p> <p><b>Discussion</b> The verification statement is unnecessary and confusing. The offer of reemployment is an issue between the employer and the employee and may or may not be conveyed by the claims administrator. The instruction: “THIS SECTION TO BE COMPLETED BY EMPLOYER OR CLAIMS ADMINISTRATOR” found at the top of the form makes this clear. If the section is completed by the employer, the verification makes no sense, and is unnecessary and confusing. There are no other DWC forms, including the current forms DWC-AD 10133.53 or the DWC RU94, which have included a verification statement. Claims</p>	<p>Brenda Ramirez Medical Director</p> <p>Michael McClain General Counsel and Vice President California Workers’ Compensation Institute (CWCI) May 22, 2006 Written Comment</p>	<p>We disagree. Because the claims administrator may be completing the form for the employer, and the consequence includes a 15% reduction in remaining permanent disability payments, it is important that the claims administrator obtain the job information from the employer. The form does not require a verification – that language was deleted after the second 15 day comment period.</p>	<p>None.</p>

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	administrators may make job offers on behalf of the employer, therefore any job offer made is based on the claims administrator's knowledge and claims handling procedures for that employer. The verification adds nothing to the process and may cause unnecessary confusion and delay.			
Section 10002(b)(1) and (2)	<p>Commenter proposes the following changes to the proposed language:</p> <p>(b) Within 60 days from the date that the condition of an injured employee with permanent partial disability becomes permanent and stationary:</p> <p>(1) If an employer <del>does</del> <u>has</u> not served the employee with a notice of offer of regular work, modified work or alternative work for a period of at least 12 months, each payment of permanent partial disability remaining to be paid to the employee from the date of the end of the 60 day period shall be paid in accordance with Labor Code section 4658(d)(1) and increased by 15 percent.</p> <p>(2) If an employer <u>has</u> <del>served</del> the employee with a notice of offer of regular work, modified work or alternative work for a period of at least 12 months, each payment of permanent partial disability remaining to be paid from the date the offer was served on the employee shall be paid in accordance with Labor Code section 4658(d)(1) and decreased by 15 percent, regardless of whether the employee accepts or rejects the offer.</p>	<p>Brenda Ramirez Medical Director</p> <p>Michael McClain General Counsel and Vice President California Workers' Compensation Institute (CWCI) May 22, 2006 Written Comment</p>	We disagree. The proposed language is contradictory with Labor Code section 4658, which requires the offer to be made within 60 days, as opposed to more than 60 days before the employee is permanent and stationary.	None.

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	<p><b>Discussion</b>  Committer proposed these revisions in December and again in February and is renewing their recommendation because they believe that the administrative director has the authority and the responsibility to harmonize these discordant statutory provisions.</p> <p>The changes in (1) and (2) will clarify that a 15% PD adjustment will depend on whether or not a work offer was served by the 60th day following the permanent and stationary (P&amp;S) date. This change will eliminate confusion and disputes over what should occur if a work offer is made at any time prior to the P&amp;S date, and employers will not be penalized for making return to work offers as soon as medically feasible. This will also reduce the need to serve a duplicate work offer following an offer of modified/alternative work within 30 days after last payment of temporary disability, as required under the Supplemental Job Displacement Benefit regulations. Duplicate work offers are unnecessary, will confuse employees, and will increase administrative costs.</p> <p>As commenter has previously indicated, the proposed revision is similar to the regulatory solution devised for Labor Code section 4658.6(c), the notice requirement for the supplemental job displacement benefit. In CCR section 10133.51(b), the administrative director required the claims administrator to send the notice “within 10 days of the last payment of temporary disability, <b>if not previously provided</b>” (emphasis added). This</p>			
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	<p>regulation reduced the number of notices, allowed employers to notify the injured worker as early as feasible, and fostered efficient and effective communication, all of which supported the statutory goals and promoted the use of the benefit.</p> <p>The Institute's members believe that the proposed revision to sections 10002(b)(1) and (2) will accomplish the same positive goals and better support the legislative policies contained in the statute.</p>			
General Comment	<p>Commenter is concerned that the Division has neither deleted nor modified changes to the 10133.53 and 10133.55 forms proposed during the 2nd fifteen day comment period of the RTW regulations. These forms are part of existing SJDB regulations, so the Institute recommended removing all revisions to the forms because the proposed changes will violate the Administrative Procedures Act (APA).</p> <p>While the APA contains a limited statutory exemption, where no regulation is required, if the form's contents consist only of existing, specific legal requirements, this exemption does not apply here. The current versions of the forms are already in regulation and changes have not been noticed in accord with APA requirements. In addition, the proposed changes, such as the addition of proof of service, constitute something more than simply existing, specific legal requirements. There are no existing statutory or legal requirements for proving service of offers of modified, alternative or regular work. The</p>	<p>Brenda Ramirez Medical Director</p> <p>Michael McClain General Counsel and Vice President California Workers' Compensation Institute (CWCI) May 22, 2006 Written Comment</p>	The proposed regulations refer to both of these forms and both deal with compatible subject matter.	None.

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	Institute therefore urges the Administrative Director to reconsider and to remove the proposed changes.			
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