# STATE OF CALIFORNIA

# DEPARTMENT OF INDUSTRIAL RELATIONS

# Division of Workers’ Compensation

# NOTICE OF SECOND MODIFICATION TO TEXT OF THE PROPOSED REGULATIONS and NOTIFICATION OF DOCUMENTS RELIED UPON and the addition of a SUPPLEMENTAL INITIAL STATEMENT OF REASONS to the rulemaking file

# Subject Matter of Regulations: Workers’ Compensation

# Qualified Medical Evaluator Regulations

# TITLE 8. CALIFORNIA CODE OF REGULATIONS

# SECTIONS 1, 11, 11.5, 14, 33, 35, 35.5, 50, 51, 52, 54, 55, 55.1, 56, 57, 63, 10133.54 & 10133.55

**NOTICE IS HEREBY GIVEN** thatpursuant to the requirements of Government Code section 11346.8 (c), and section 44 of title I of the California Code of Regulations, the Administrative Director of the Division of Workers’ Compensation, 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, proposes to modify the text of the following proposed regulations which were the subject of a regulatory hearing held on March 13, 2023:

Amend section 1 Definitions

Amend section 11 Eligibility

Amend section 33 Unavailability of QME

Amend section 50 Reappointment Requirements and Application Form

Amend section 51 Reappointment and Denial of Reappointment

Amend section 55 **Reappointment: Continuing Education Programs**

**Add section 55.1 Reappointment: Continuing Education Programs**

Amend section 63 Denial of Appointment or Reappointment

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

Any interested person, or his, her or their authorized representative, may submit written comments relevant to the proposed modifications of proposed amendments to existing Qualified Medical Evaluator regulations, to the Department of Industrial Relations, Division of Workers’ Compensation. Written comments on the proposed changes will be accepted between November 21, 2023 and December 11, 2023. The written comment period closes on December 11, 2023. The Division of Workers’ Compensation will only consider comments received at the Department of Industrial Relations, Division of Workers’ Compensation by that date.

Submit written comments concerning the modifications to the proposed regulations prior to the close of the public comment period to the Division of Workers’ Compensation (“DWC”) contact person:

Maureen Gray

Regulations Coordinator

Department of Industrial Relations

P.O. Box 420603

San Francisco, CA 94142

All written comments received by December 11, 2023, which pertain to the indicated changes will be reviewed and will be summarized and responded to in the Amended Final Statement of Reasons as part of the compilation of the rulemaking file. Please limit your comments to the modifications to the text. 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 December 11, 2023.

The text of the regulations and proposed modifications can be viewed via the web at: <http://www.dir.ca.gov/dwc/DWCrulemaking.html>.

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 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 TEXT OF REGULATIONS AND RULEMAKING FILE

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 modifications to 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:

Winslow F. West, Industrial Relations Counsel

 Department of Industrial Relations

 Division of Workers’ Compensation

 Post Office Box 420603

 San Francisco, CA 94142

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

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

### FORMAT OF PROPOSED MODIFICATIONS

**Proposed Text Noticed for 45-Day Comment Period:**

The proposed text was indicated by underlining: added language. Deletions are indicated by strikeout: ~~deleted language~~.

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

The proposed text was indicated by double underlining: added language. Deletions are indicated by double strikeout: deleted language.

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

The proposed text was indicated by bold text and single underlining: **added language**. Deletions are indicated by bold text, underlined and single strikeout: **~~deleted language~~**.

### DOCUMENTS RELIED UPON

(1) Pre-Notice Comments from the DWC Forum

(2) Senate Bill 863

(3) Labor Code section 4062.2

(4) En banc decision of the Workers’ Compensation Appeals Board regarding

*Anthony Dennis v. State of California Department of Corrections and Rehabilitation Inmate Claims; State Compensation Insurance Fund* (ADJ9346293)

### SUPPLEMENTAL INITIAL STATEMENT OF REASONS

A Supplemental Initial Statement of Reasons is also being posted with the documents related to the second modification of the text of the regulations. The Division of Workers’ Compensation has submitted the Supplemental Initial Statement of Reasons to augment the Initial Statement of Reasons originally published in this Rulemaking on January 20, 2023. The Supplemental Initial Statement of Reasons provides additional information about the proposed regulations and the need for an economic impact of the proposed regulations.

### SUMMARY OF PROPOSED CHANGES

1. **§ 1. Definitions.**

**Subsection (ii)** is amended to change the language related to the reason the transmissions must be encrypted. It removes reference to professional standards for encryption and simplifies the interpretation of the regulation by adding the actual intent of encryption which is to protect the integrity of the transmission. This change is intended to add clarity to interpretation of the regulation.

1. **§ Section 11. Eligibility Requirements for Initial Appointment as a QME.**

**Subsection (i)** is deleted since the new anticipated effective date of the regulations of April 1, 2024 makes the proposed amendment unnecessary.

**3. § 33. Unavailability of QME.**

**Subsection (a)** was amended to add clarity by enunciating that both Comprehensive Medical Legal Evaluations and Follow-Up Medical Legal Evaluations are considered new medical legal evaluations for purposes of this subsection. Adding the specific language provides clarity in the interpretation of the regulation.

**4. § 50. Reappointment: Requirements and Application Form.**

**Subsection (e)** is amended to add language that clearly delineates how the Administrative Director shall exercise discretion when it comes to determining whether a QME seeking reappointment is in compliance with all statutes duties and regulations. The amendment requires the Administrative Director to take into account the mitigation factors and sanctions guidelines in exercising discretion. Detailing the manner in which the Administrative Director shall exercise discretion in the reappointment process provides clarity to the QME community with respect to the reappointment process.

**Subsection (f)** is amended to add language that clearly delineates how the Administrative Director shall exercise discretion when it comes to determining reappointment for a QME seeking reappointment who has failed to cooperate with an investigation into the QME’s practice. The amendment requires the Administrative Director to take into account the mitigation factors and sanctions guidelines in exercising discretion. Detailing the manner in which the Administrative Director shall exercise discretion in the reappointment process provides clarity to the QME community with respect to the reappointment process.

**5. § 51. Reappointment: Failure to Comply with Time Frames and Denial of Reappointment.**

**Subdivision (a)(4)** is amended to add examples of “good cause” as it is used in the regulation subdivision. The amendment is added to provide clarity in the interpretation of the regulation subdivision.

**Subdivision (a)(5)(A)** is amended to add specificity with respect to the criteria for considering rejections of QME reports and to make clear that rejections of the reports for any failure to comply with any regulations adopted by the Administrative Director or the Appeals Board are covered by the regulation subdivision. The amendment is added to provide clarity in the interpretation of the regulation subdivision.

**Subdivision (a)(12)** is amended to add language and delete language in order to make the proper interpretation of the regulation more direct and understandable. The amendment is added to provide clarity in the interpretation of the regulation subdivision. The amendment clarifies that continued unprofessional behavior by a QME can be grounds for denial of reappointment.

**6.** **§ 55. Reappointment: Continuing Education Programs.**

**Section 55** is amended to change it back to the original text of section 55 before any proposed amendment was made to the text by virtue of this proposed regulatory action. The title of section 55 was changed to reflect the fact that section 55 only applies to applications for reappointment that are received and/or submitted before April 1, 2026. This change was made to ensure that the regulations would continue to reflect the requirements for applications for reappointment received prior to the two-year phase in date for the new requirements of the added regulation 55.1. A sentence was added to the first paragraph of section 55 to reflect the fact that it will only continue to apply to applications for reappointment received and/or submitted before April 1, 2026.

The intent to provide a phase-in period for the new hour and subject matter requirements for reappointment as a QME that match the certification period of appointment as a QME was to provide the QME population an adequate time to comply with the new requirements.

**7. § 55.1. Reappointment: Continuing Education Programs.**

**Section 55.1** was added to incorporate the prior proposed amendments to section 55. The new section contains the amendments to old section 55 that were originally proposed and adopted as a result of the first 45 day comment period and the first 15 day comment period. The changes proposed for purposes of the second 15 day comment period are as follows:

**Subdivision (b)** is amended to delete language that is no longer necessary due to the amendments to Subdivisions (b)(1) through (b)(5). The requirements that the hours listed in (b)(1) through (b)(5) are minimum requirements is clarified by the amendments to those subdivisions.

**Subdivision (b)(1)** is amended to add language in order to make the proper interpretation of the regulation more direct and understandable. The amendment is added to provide clarity in the interpretation of the regulation subdivision.

**Subdivision (b)(2)** is amended to add language in order to make the proper interpretation of the regulation more direct and understandable. The amendment is added to provide clarity in the interpretation of the regulation subdivision.

**Subdivision (b)(3)** is amended to add language in order to make the proper interpretation of the regulation more direct and understandable. The amendment is added to provide clarity in the interpretation of the regulation subdivision.

**Subdivision (b)(4)** is amended to add language in order to make the proper interpretation of the regulation more direct and understandable. The amendment is added to provide clarity in the interpretation of the regulation subdivision.

**Subdivision (b)(5)** is amended to add language in order to make the proper interpretation of the regulation more direct and understandable. The amendment is added to provide clarity in the interpretation of the regulation subdivision.

**Subdivision (b)(6) (i)** is amended to add language and delete language in order to make the proper interpretation of the regulation more direct and understandable. The amendment is added to add clarity in the interpretation of the regulation subdivision. The regulation is also amended to make the nominal listing or title of the subdivision consistent with the designation protocol of the regulatory scheme.

**Subdivision (b)(6) (ii)** is amended to make the nominal listing or title of the subdivision consistent with the designation protocol of the regulatory scheme.

**Subdivision (b)(6) (iii)** is amended to make the nominal listing or title of the subdivision consistent with the designation protocol of the regulatory scheme.

**Subdivision (b)(7))** is deleted as it is no longer necessary to change the effective date for implementation of the new minimum continuing education hour and content requirements for physicians seeking reappointment as QMEs. The addition of the new regulation 55.1 containing only the requirements necessary for applicants for reappointment to comply with four application submitted on or after April 1, 2026 makes the phase-in requirements of previously proposed subdivision (b)(7) unnecessary.

**Subdivision (c)(5)** is amended to reduce the hours of accreditation for participation on a panel reviewing report quality from 5 to 4. This change was necessitated by the number of minimum hours required in Subsection (b). Since that Subsection contains 12 minimum hours, providing 4 hours in report quality review makes up the total of 16 hours required for reappointment.

**8. § 63. Denial of Appointment or Reappointment.**

**Subsection (c)** is amended to add language providing that if the Administrative Director decides to reconsider a previous decision denying reappointment to a candidate during the pendency of an appeal, good cause in exercising that discretion is evaluated taking into consideration the mitigation factors and factors utilized to determine penalties contained in the sanctions guidelines of regulation 65. The amendment is added to provide clarity in the interpretation of the regulation subdivision.