**STATE OF CALIFORNIA**

**DEPARTMENT OF INDUSTRIAL RELATIONS**

**DIVISION OF WORKERS’ COMPENSATION**

**NOTICE OF RULEMAKING**

**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, 56, 57, 63, 10133.54 & 10133.55)**

**NOTICE IS HEREBY GIVEN** that the Administrative Director of the Division of Workers’ Compensation (hereafter “Administrative Director”), proposes to adopt, amend and repeal regulations to implement the provisions of Labor Code sections 139.2, 4060, 4061, 4061.5, 4062, 4062.1, 4062.2, 4062.3, 4062.5, 4067, 4600, 4604.5, and 4660 through 4663 regarding the examination, appointment, reappointment and discipline of Qualified Medical Evaluators and the procedures for obtaining QME medical-legal evaluations, that are used to resolve disputes in the workers’ compensation system. This action is taken 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.

When adopted, the proposed regulations will constitute title 8, California Code of Regulations, Division 1, Chapter 1, Articles 1, 2, 3, 5, 6 & 7.5, sections 1, 11, 11.5, 14, 33, 35, 35.5, 50, 51, 52, 54, 55, 56, 57, 63, 10133.54 & 10133.55. The regulations implement, interpret and make specific the manner in which the Administrative Director will exercise the authority under Labor Code sections 139.2, 4060, 4061, 4061.5, 4062, 4062.1, 4062.2, 4062.3, 4062.5, 4067, 4600, 4604.5, and 4660 regarding the appointment of Qualified Medical Evaluators and the procedures concerning medical evaluations.

**PROPOSED REGULATORY ACTION**

The Department of Industrial Relations, Division of Workers’ Compensation, proposes to adopt, amend or repeal the following regulations in Division 1, Chapter 1, Articles 1, 2, 3, 5, 6 & 7.5 of Title 8, California Code of Regulations, commencing with Sections 1, 11, 11.5, 14, 33, 35, 35.5, 50, 51, 52, 54, 55, 56, 57, 63, 10133.54 & 10133.55. The proposed changes involve both changes without regulatory effect (“non-substantive” changes) within the meaning of section 100 of Title 1 of the California Code of Regulations (e.g. grammatical, capitalization, punctuation, syntax, numbering and lettering sequencing and corrections of cross references), as well as substantive changes. A comprehensive summary of the proposed change to each affected section is set out in the Initial Statement of Reasons, which is not printed here but will be available at no charge upon written request made to Regulations Coordinator below or via the web at: <http://www.dir.ca.gov/dwc/DWCrulemaking.html>.

## TIME AND PLACE OF PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, oral or in writing, with respect to the subjects noted above, on the following date:

**Date: March 13**, **2023**

**Time: 10:00 a.m. to 5:00 p.m., or until conclusion of business**

**Place: Elihu Harris State Office Building – Auditorium**

 **1515 Clay Street**

 **Oakland, California 94612**

**PLEASE BE ADVISED**: All visitors to this building are required to go through a security screening which includes passing through metal detectors, and the x-raying and inspection of all personal belongings.

Alternate formats, assistive listening systems, sign language interpreters, or other types of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the Statewide Disability Accommodation Coordinator, Maureen Gray, 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 public hearing also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

## WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed amendment to modify existing regulations, related to the Medical-Legal Fee Schedule to the Department of Industrial Relations, Division of Workers’ Compensation. The written comment period closes on March 13, 2023.The Division of Workers’ Compensation will only consider comments received at the Department of Industrial Relations, Division of Workers’ Compensation by that date. Again, equal weight will be accorded to oral comments presented at the public hearing and written materials.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to the DWC contact person:

Maureen Gray

Regulations Coordinator

Department of Industrial Relations

P.O. Box 420603

San Francisco, CA 94142

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 March 13, 2021.

## CONTACT PERSON

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 amendments to the regulation, 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.

**AUTHORITY AND REFERENCE**

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code section 53, 133, 139.2, 4060, 4061, 4062, 4062.1, 4062.2 and 5307.3.

Reference is made to Labor Code sections 139.2, 139.4, 139.45, 3716, 4060, 4061, 4061.5, 4062, 4062.1, 4062.2, 4062.3, 4062.5, 4067, 4600, 4604.5, 4628 and 4660; Government Code sections 6254, 14755; Business and Professions Code section 730

**INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW**

Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of his or her employment. The adjudication of workers' compensation claims requires the use of written reports of Qualified Medical Evaluators (QMEs).

Objective and Anticipated Benefits of the Proposed Amendments to the Regulations:

The Administrative Director of the Division of Workers’ Compensation proposes to amend, repeal and add to various regulations that govern the examination, appointment, reappointment and discipline of physicians who are certified as Qualified Medical Evaluators (‘QMEs’) as provided in sections 1, 11, 11.5, 14, 31.3, 33, 35.5, 50, 51, 52, 54, 55, 56, 57 & 63 of Title 8 of the California Code of Regulations. These changes are needed to update and improve the functionality of the affected regulations based upon the current practical operation of the Qualified Medical Evaluator program. The proposed changes are also necessary as a result of recent challenges to the administration of the QME program based upon inconsistent statutory and regulatory analysis as between the DWC and physician users of the QME program. The proposed changes add functionality to the regulatory scheme by instituting a system for electronic service of medical-legal reports and allow for expedited adjudication of QME discipline actions. The proposed changes are also necessary as a result of the need to educate physician providers of the possible occurrence of bias in Medical-Legal reporting and to prevent such bias. In addition, other changes are proposed to improve the overall operation of the QME system for those who use it. The proposed changes also correct typographical errors in the existing regulations, update the use of gender pronouns and correct erroneous citations in the existing regulations. A fuller summary of the proposed changes is provided in the Initial Statement of Reasons.

Finally, this rulemaking proposes numerous “changes without regulatory effect”, within the meaning of section 100 of Title 1 of the California Code of Regulations, because the proposed amendments correct the punctuation, capitalization, grammar, syntax, number or letter sequencing, or cross references in the text.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Administrative Director has determined that these proposed amendments to the regulations are not inconsistent or incompatible with existing regulations.

The Administrative Director now proposes to amend regulations related to the administration of the Qualified Medical Evaluator program. The proposed regulations implement, interpret, and make specific Labor Code sections 139.2, 139.3, 139.31, 139.4, 139.43, 3716, 4060, 4061, 4061.5, 4062, 4062.1, 4062.2, 4062.3, 4062.5, 4067, 4600, 4604, 4604.5, 4660, 4600.1, 4610.5, 4628, 4661, 4661.5, 4662, 4663, 4664, 5307.3, 5307.27, 5710, & 6254 as follows:

**Article 1. General (§1)**

Section 1: The definitions section, which applies to §§ 1 through 122, is amended to eliminate the definition of “Agreed Panel QME” which is no longer operative after a deletion in the implementing statute.

**Article 2. QME Eligibility (§§10 – 19)**

Section 11 is amended to add the requirement of two hours of anti-bias training to the eligibility requirements to become a QME.

Section 11.5 is amended to change the parameters of the requirements for the report writing course that candidates must take to become eligible to serve as a QME. The total course hour requirement is increased from 12 to 16, two hours of anti-bias training are added and two hours of case law review are also added. Non-substantive changes are made regarding renumbering to allow for the additions to the regulation.

Section 14 is amended to reduce the hours of required chiropractic education from 44 to 25. The amount of allowable distance learning hours is adjusted and two hours of anti-bias training are added to bring the requirements into compliance with the amendments to sections 11 and 11.5.

**Article 3. Assignment of Qualified Medical Evaluators, Evaluation Procedure (§§ 29 – 39.5)**

Section 33 is amended to make non-substantive minor clerical corrections to the regulation.

Section 35 is amended to add requirements for the procurement of medical records from a primary treating physician.

Section 35.5 is amended to add a requirement that a declaration under penalty of perjury be added to every medical legal evaluation report attesting that that the evaluator did not discriminate in any way against the parties to the action or the injured worker in the evaluation process or in the content of the report.

**Article 5. QME Reappointment (§§ 50 – 57)**

Section 50 is amended to add the requirement that a QME must be in compliance with all regulations and relevant statutes in order to be reappointed. The section is also amended to add a requirement that a QME must cooperate with any investigation instituted by the administrative director into the QMEs practice. The regulation is also amended to bring it into compliance with current gender specific pronouns.

Section 51 is amended and restructured to add some of the specific criteria upon which the Administrative Director can base a decision to deny reappointment as a QME. As part of the regulatory restructuring the provisions of former regulation sections 52, 54, 56 and 57 are made part of subdivisions that are added to the restructured regulation 51.

Section 52 is repealed as a result of its provisions being moved to amended section 51.

Section 54 is repealed as a result of its provisions being moved to amended section 51.

Section 55 is amended to expand the required continuing education hours for QME reappointment from 12 to 16 and delineate the minimum number of hours required in certain specified subject matter categories of continuing education.

Section 56 is repealed as a result of its provisions being moved to amended section 51.

Section 57 is repealed as a result of its provisions being moved to amended section 51.

**Article 6. QME Discipline (§§ 60 – 65)**

Section 63 is amended to allow the Administrative Director to reappoint a QME to a probationary period as a condition of reappointment. This subdivision is also amended to add procedures that allow the Administrative Director to assign hearings to a hearing officer to act as an administrative law judge, notwithstanding Government Code §11502, in cases where the hearing relates to the denial of appointment or reappointment of a QME. The regulation is also amended to enumerate conditions related to a QME’s failure to comply with Labor Code section 139.2, irregularities with the physician’s licensing, or a physician’s violation of Labor Code section 139.21 that will make the physician ineligible for reappointment as a QME.

Non-substantive renumbering is applied to the regulation to account for the numbering of sections that add the new elements of the regulation.

**Article 7.5. Supplemental Job Displacement Benefits (§§ 10133.31 – 10133.60)**

Section 10133.54 is repealed as a result of a binding judicial decision vesting jurisdiction over SJDB disputes with the WCAB.

Section 10133.55 is repealed as a result of a binding judicial decision vesting jurisdiction over SJDB disputes with the WCAB.

**DISCLOSURES REGARDING THIS PROPOSED REGULATORY ACTION**

The Administrative Director has made the following initial determinations:

* **Determination regarding whether this rulemaking imposes a Local Mandate**:

None is imposed by these proposed regulations because no new program or higher level of service to the public is required. The regulations provide technical detail on procedures used to regulate Qualified Medical Evaluators (‘QMEs’) and the procedures for obtaining reports from QMEs and impose the same requirements on all employers in California. Local government and districts as employers, like all other employers in California, are already required by law to have workers’ compensation coverage, or otherwise to self administer or contract for another entity to administer the workers’ compensation claims of their employees and to conform to the Labor Code in using the medical dispute resolution procedures involving QMEs and AMEs.

* **Significant statewide, adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states:** None.
* **Effect on Housing Costs**: None
* **Cost Impacts Incurred By Private Persons or Businesses:** The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
* **Statement of the results of the Economic Impact Assessment (EIA):**
1. **Other impacts on Jobs and Businesses:** The Administrative Director has determined that the changes proposed in this rulemaking 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 in the State of California.
2. **Anticipated Benefits of the Proposed Regulations:** The Administrative Director has determined that the changes proposed in this rulemaking will not: (1) benefit the health and welfare of California residents: (2) benefit worker safety: or (3) benefit the State’s environment.

**EFFECT ON SMALL BUSINESS**

The Administrative Director has determined that this rulemaking will not have any significant impact on small business.

Physicians appointed as Qualified Medical Evaluators fall within the definition of small business, and already are required by existing law to comply with the statutes and regulations governing Qualified Medical Evaluators (QMEs). Physicians are required to meet certain criteria in order to be certified as QMEs. Once appointed, Physicians serve a two-year term, and must be reappointed at the end of that term. The Administrative Director is required to issue panels listing three Qualified Medical Evaluators when requested by a party to resolve a disputed issue (Lab. Code §§ 139.2(h), 4062.1, 4062.2, and 139.2(h)(3).) In compiling the panel of three QMEs, from which to select randomly, the Administrative Director must include only evaluators who do not have a conflict of interest as defined by the Administrative Director in regulations adopted pursuant to Labor Code section 139.2(o) and are in the specialty designated by the party holding the legal right to select the specialty. (Lab. Code § 139.2(h)(3)(A).) Once selected from the panel of three, the physician examines the injured worker and issues a medical-legal evaluation. Physicians can also issue follow-up medical legal evaluations and supplemental medical legal reports.

The proposed regulations and amendments to the existing regulations relate to the criteria for initial appointment and reappointment as a QME, the educational requirements for such appointments and reappointments, and the processes that govern the administration of the QME program.

The Administrative Director has determined that there is either no, or a *de minimus* amount of, added expense to the QME by virtue of the proposed regulations and amendments to the regulations. Therefore, the Administrative Director has concluded there is no significant adverse economic impact on QMEs as small businesses by the adoption of these proposed regulations.

At the current time, the best estimate by the Division of Workers’ Compensation indicates that employers will not be affected in any substantial pecuniary fashion by the proposed regulations and amendments to the existing regulations.

**FISCAL IMPACTS**

* **Costs or savings to state agencies or costs/savings in federal funding to the State:** None
* **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 bullet above)
* **Other nondiscretionary costs/savings imposed upon local agencies:** None (See Local Mandate bullet above)

**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 of this rulemaking, would be as effective and less burdensome to the affected private persons than the proposed action of this rulemaking, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

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**

The text of the draft proposed regulations was made available for pre-regulatory public review and comment for at least ten days through the Division’s Internet website (the “DWC Forum”), as required by Government Code section 11346.45.

**AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE/INTERNET ACCESS**

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the Regulations Coordinator named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

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, pre-rulemaking comments and the Form 399. Also included are the documents relied upon in drafting the proposed regulations.

In addition, the Notice, Initial Statement of Reasons, and proposed text of the regulations being proposed may be accessed and downloaded from the Division’s website at [www.dir.ca.gov](file:///%5C%5Csfo37cvc%5CDWCRules%5CQME%20Files%5CProcess%20Regulations%5CFinal%20Docs%20December%202022%5COAL%20Documents%5Cwww.dir.ca.gov). To access them, click on the “Proposed Regulations – Rulemaking” link and scroll down the list of rulemaking proceedings to find the Qualified Medical Evaluator Regulations link.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Department of Industrial Relations, Division of Workers’ Compensation, 1515 Clay Street, 18th Floor, Oakland, California 94612, between 9:00 A.M. and 4:30 P.M., Monday through Friday. Copies of the proposed regulations, Initial Statement of Reasons and any information contained in the rulemaking file may be requested in writing to the Regulations Coordinator.

**CONTACT PERSON FOR GENERAL QUESTIONS**

Non-substantive 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 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

E-mail: mgray@dir.ca.gov

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

**CONTACT PERSON FOR SUBSTANTIVE QUESTIONS**

In the event the contact person above is unavailable, or for questions regarding the substance of the proposed regulations, inquiries should be directed to:

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 this contact person is (510) 286-7100.

**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 shown will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

**AVAILABILITY OF THE FINAL STATEMENT OF REASONS**

Upon 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 at [www.dir.ca.gov](http://www.dir.ca.gov).

**AUTOMATIC MAILING**

A copy of this Notice will automatically be sent to those interested persons on the Administrative Director’s mailing list.

If adopted, the regulations with any final amendments will appear in title 8 of the California Code of Regulations, commencing with section 1. The text of the final regulations also may be available through the website of the Office of Administrative Law at [www.oal.ca.gov](http://www.oal.ca.gov).