

**FINDING OF EMERGENCY
OF THE
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

**REGARDING THE CALIFORNIA LABOR CODE
CALIFORNIA CODE OF REGULATIONS,
TITLE 8, ARTICLES 6, 6.5, AND 7.5
SUPPLEMENTAL JOB DISPLACEMENT BENEFIT**

Government Code Section 11346.1 requires a finding of emergency to include a written statement with the information required by paragraphs (2), (3), (4), (5) and (6) of subsection (a) of Section 11346.5 and a description of the specific facts showing the need for immediate action.

The Acting Administrative director of the Division of Workers' Compensation finds that the adoption of these regulations is necessary for the immediate preservation of the public peace, health and safety, or general welfare, as follows:

FINDING OF EMERGENCY

Basis for the Finding of Emergency

- On September 18, 2012, the Governor signed Senate Bill (SB) 863 (Chapter 363) which takes effect on January 1, 2013.
- SB 863 has created substantial changes in the entitlement of critical benefits within the workers' compensation system that must take effect on January 1, 2013, particularly for those who are injured after January 1, 2013. Some of the changes will also impact those who are injured prior to January 1, 2013.
- Action is necessary in order to implement, on an emergency basis, the provisions of Labor Code sections 4658.6, 4658.7, and 4658.8. The regulations are mandated by Labor Code section 4658.7(h), which provides the Administrative Director "shall adopt regulations for the administration of this section..."
- An injured worker will not be entitled to the supplemental job displacement benefit unless a physician provides information on a form and in a manner determined by the Administrative Director. Once the injured worker has reached permanent and stationary status for all conditions, this form will trigger the employer's obligation to offer work within 60 days of having received this form. Therefore, there is insufficient time to go through the regular rulemaking process.

- The Division, recognizing the need for implementation of emergency regulations, held a pre-rule-making discussion on October 2, 2012 to obtain input from stakeholders.
- Thereafter, on November 6, 2012 the Division posted draft regulations on its public forum for 10 days for public comment.
- Without the implementation of emergency regulations, as of January 1, 2013, permanently disabled injured workers who are not offered reemployment will be without a means to retrain and return to the workforce causing harm to the public peace, health and safety, and general welfare.
- The Emergency Regulations will remedy the inequity for those having been injured after January 1, 2013.

Background

- The Division of Workers' Compensation develops regulations to implement, interpret, and make specific the California Labor Code.
- SB 863 was signed into law by Governor Brown on September 18, 2012 to become effective January 1, 2013.
- Employees who are injured after January 1, 2013 will be denied critical benefits to get them back to work without these regulations.

AUTHORITY AND REFERENCE

The Acting Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in her by Labor Code sections 59, 133, 4658.5, 4658.6, and 4658.7 proposes to amend Article 8 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, section 9813.1 and Articles 6, 6.5, and 7.5 of Chapter 4.5, Subchapter 1.5, of Title 8, California Code of Regulations, sections 10116.9, 10117, 10118, 10133.53, 10133.55, repeal sections 10133.51 and 10133.52, and adopt Article 7.5 of Chapter 4.5, Subchapter 1.5, of Title 8, California Code of Regulations, sections 10133.31, 10133.32, 10133.33, 10133.34, 10133.35, and 10133.36.

INFORMATIVE DIGEST

Summary of Existing Laws

Section 4658.5 of the Labor Code provides that an employee is entitled to a supplemental job displacement voucher if the injured employee does not return to work for the employer within 60 days of the termination of temporary disability.

SB 863 added section 4658.7 for injuries occurring on or after January 1, 2013 and changed the conditions under which an injured worker is entitled to the voucher, the amount of the voucher and the expenses for which it may be used. A permanently partially disabled worker is entitled to a voucher unless the employer makes an offer of regular, modified, or alternative work that meets certain criteria. Instead of requiring the offer within 30 days of the termination of temporary disability, Labor Code section 4658.7 allows the employer to offer regular, modified,

or alternative work within 60 days of receipt of a report finding that all conditions have become permanent and stationary and that the injury has caused permanent partial disability. The medical report must be from a primary treating physician, Agreed Medical Evaluator, or a Qualified Medical Evaluator.

The statute requires that the medical report that precipitates the offer must be made on a specific form created by the Administrative Director. Labor Code section 4658.7(h)(2) requires that the employer be fully informed of the work capacities and of activity restrictions resulting from the injury that are relevant to potential regular work, modified work, or alternative work. This is intended to make it easier for an employer to perform the return-to-work analysis and understand the injured worker's work capacities so that it can make an informed decision regarding a return to work offer. Under SB 863, injured workers will be provided voucher benefits sooner in the life of their claim.

Section 4658.5 and 4658.7 of the Labor Code (effective 1/1/13) requires the Administrative Director to adopt regulations necessary to administrate the supplemental job displacement benefit. Adoption of these regulations on an emergency basis promotes fairness and benefits the general welfare of the people of California by providing injured workers with dates of injury on or after January 1, 2013 with a means to retrain and return to work.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS RELIED UPON

- WCIRB's Updated Preliminary Estimate of Cost Impact of SB 863 as Amended August 27, 2012.

SUMMARY OF PROPOSED REGULATIONS

The Administrative Director adopts and amends administrative regulations governing vouchers. These regulations implement, interpret, and make specific sections 4658.5 through 4658.7 of the Labor Code as follows:

Item 1 – Section 9813.1 Notice of Supplemental Job Displacement Benefit, Notice of Offer of Modified or Alternative Work for Injuries Occurring on or After January 1, 2004.

- Repealed. Assembly Bill (AB) 355 (Chapter 544) repealed the requirement for this notice of the supplemental job displacement benefit by deleting former subdivision (c) of Labor Code section 4856.
- Therefore, this section was repealed to conform with the statutory change.

Item 2 – Section 10116.9. Definitions for Articles 6.5 and 7.5

- This section provides definitions for key terms regarding vouchers.
- The definitions of “furnished” and “receipt” are added to ensure that its meaning, as used in the regulations, will be clear to the regulated public.

Item 3 - Section 10117. Offer of Work; Adjustment of Permanent Disability Payments.

- This section was amended to reflect its application to injuries occurring only until December 31, 2012.

Item 4 – Section 10118. Form [DWC-AD 10118 “Notice of Offer of Work for Injuries Occurring Between 1/1/04 – 12/31/12.”]

- This section was amended to reflect its application to injuries occurring only until December 31, 2012.

Item 5 – Section 10133.31. Requirement to Issue Supplemental Job Displacement Nontransferable Voucher for Injuries Occurring on or after January 1, 2013.

- This section covers vouchers for injuries on or after January 1, 2013.
- If the injury causes partial permanent disability, the employee is eligible for a voucher unless the employer makes an offer of regular, modified, or alternative work within 60 days after receipt by the claims administrator of the new form “Physician’s Return-to-Work & Voucher Report” and the offer of work lasts at least 12 months. The time for issuance of the offer has changed. Instead of requiring the offer within 30 days of the termination of temporary disability, Labor Code section 4658.7 allows the employer to offer regular, modified, or alternative work within 60 days of receipt of a report finding that all conditions have become permanent and stationary and that the injury has caused permanent partial disability. The medical report must be from a primary treating physician, Agreed Medical Evaluator, or a Qualified Medical Evaluator.
- The statute requires that the medical report that precipitates the offer must be made on a specific form created by the Administrative Director. Labor Code section 4658.7(h)(2) requires that the employer be fully informed of the work capacities and of activity restrictions resulting from the injury that are relevant to potential regular work, modified work, or alternative work. This is intended to make it easier for an employer to perform the return-to-work analysis and understand the injured worker’s work capacities so that it can make an informed decision.
- Labor Code section 4658.7(b)(1)(A) provides that the employer has the option of providing the physician with a job description. If the option is exercised, the physician is to evaluate and describe in the form whether the work capacities and activity restrictions are compatible with the physical requirements set forth in that job description.
- Labor Code section 4658.7(b)(1)(B) provides that the claims adjuster is to send the form to the employer.
- Labor Code section 4658.7(c) requires an employer to offer an injured worker the voucher within 20 days after the window for making an offer of work.
- Labor Code section 4658.7(d) provides that the voucher may be redeemed for as much as an aggregate of \$6,000. For injuries before January 1, 2013, the amount varies depending on the level of disability.
- The expenses for which an injured worker could use the voucher were limited for injuries occurring before January 1, 2013. An injured worker could use the voucher for payment of tuition, fees, books and other expenses required by the school for retraining and skill enhancement, with 10 percent of the voucher for vocational or return-to-work counseling.
- For injuries occurring on or after January 1, 2013, vouchers can be used for:

1. Payment of education-related retraining or skill enhancement, or both, at a California public school or with a provider that is certified and on the state's Eligible Training Provider List, including payment of tuition, fees, books, and other expenses required by the school for retraining or skill enhancement;
2. Payment for occupational licensing or professional certification fees, related examination fees and examination preparation course fees;
3. Payment for the services of licensed placement agencies, vocational or return-to-work counseling and resume preparation, for as much as a combined 10 percent of the amount of the voucher;
4. Purchase of tools required by a training or educational program in which the employee is enrolled;
5. Purchase of computer equipment including, but not limited to monitors, software, networking devices, input devices (such as keyboard and mouse), peripherals (such as printers), and tablet computers of up to one thousand dollars (\$1,000) reimbursable after cost is incurred and submitted with appropriate documentation. The employee shall not be entitled to reimbursement for purchase of games or any entertainment media;
6. Up to \$500 for miscellaneous expense reimbursement or advance, payable on request without itemized documentation or accounting. The request can be made via email or regular mail. The employee is not entitled to any other voucher payment for transportation, travel, telephone or Internet access, clothing or uniforms or incidental expenses.

Item 6 – Section 10133.32. Form [DWC-AD 10133.32 “Supplemental Job Displacement Non-Transferable Voucher for Injuries Occurring on or after January 1, 2013.”]

- This section is the voucher form. It is sent to the injured worker with an expiration date and information on how to redeem the voucher.

Item 7 – Section 10133.33. Form [DWC-AD 10133.33 “Description of Employee’s Job Duties”]

- This is an optional form which can be sent to a physician prior to any medical evaluation declaring the employee permanent and stationary with permanent partial disability.
- Labor Code section 4658.7(b)(1)(A) provides that the employer has the option of providing the physician with a job description. If the option is exercised, the physician is to evaluate and describe in the form whether the work capacities and activity restrictions are compatible with the physical requirements set forth in that job description

Item 8 – Section 10133.34. Offer of Work for Injuries Occurring on or after January 1, 2013.

- Labor Code section 4658.7 provides that the employer shall not be liable for the supplemental job displacement benefit if the employer timely offers regular, modified or alternative work, which must meet certain criteria.

- This section sets forth the criteria for the offer of work.

Item 9 – Section 10133.35. Form [DWC-AD 10133.35 “Notice of Offer of Work for Injuries Occurring on or after January 1, 2013.”]

- This section is a mandatory form that the employer must send to the injured employee if the employer has regular, modified or alternative work available.

Item 10 - §10133.36. Form [DWC-AD 10133.36 “Physician’s Return-to-Work & Voucher Report.”]

- This section is the mandatory form which Labor Code section 4658.7(h)(2) requires to fully inform the employer of work capacities and of activity restrictions resulting from the injury that are relevant to potential regular work, modified work, or alternative work.

Item 11 - § 10133.51. Notice of Potential Right to Supplemental Job Displacement Benefit.

- This section was deleted to conform with AB 335 (Chapter 544) which deleted the requirement to provide a notice of potential rights to supplemental job displacement benefit.

Item 12 - § 10133.52. Form [DWC-AD "Notice of Potential Right to Supplemental Job Displacement Benefit Form."]

- This section was deleted to conform with AB 335 (Chapter 544) which deleted the requirement to provide a notice of potential rights to supplemental job displacement benefit.

Item 13 - § 10133.53. Form [DWC-AD 10133.53 "Notice of Offer of Modified or Alternative Work for Injuries Occurring Between 1/1/04 – 12/31/12."]

- This section was amended to reflect its application to injuries occurring only until December 31, 2012.

Item 14 - § 10133.55 Form [DWC-AD 10133.55 “DWC-AD 10133.55 “Request for Dispute Resolution Before the Administrative Director.”]

- This section is the form used to request dispute resolution before the Administrative Director regarding the supplemental job displacement benefit.
- This form was amended to include disputes regarding vouchers for injuries occurring after January 1, 2013.

Item 15 - § 10133.57. Supplemental Job Displacement Nontransferable Training Voucher Form for Injuries Occurring between January 1, 2004 and December 31, 2012.

- This section was amended to reflect its application to injuries occurring only until December 31, 2012.

Item 16 - § 10133.58. State Approved or Accredited Schools.

- Labor Code section 4658.7(e)(1) provides that the voucher may be applied towards payment for education-related retraining or skill enhancement, or both at a provider that

is on the state's Eligible Training Provider List.

- This section was amended to reflect changes to eligible providers.

Item 17 - § 10133.60. Termination of Claims Administrator's Liability for the Supplemental Job Displacement Voucher.

- Time for use of the voucher is limited. Labor Code section 4658.7(f) provides that a voucher expires two years after the date it is furnished, or five years after the date of injury, whichever is later.
- The employee is not entitled to payment of reimbursement of any expenses that have not been incurred and submitted to the employer with appropriate documentation before the expiration date.

Small Business Effect

The Department of Industrial Relations, Division of Workers' Compensation has determined no adverse impact on small business. The proposed regulations change existing procedures for those injured after January 1, 2013 to comply with statutory changes.

Policy Statement Overview

The objective of the proposed emergency regulations is to administrate the supplemental job displacement benefit to injured workers who cannot return to work with dates of injury occurring on or after January 1, 2013 as mandated by Labor Code sections 4568.5 and 4658.7.

MATTERS PRESCRIBED BY STATUTE APPLICABLE TO THE AGENCY OR TO ANY SPECIFIC REGULATION OR CLASS OF REGULATIONS

NONE

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The Department of Industrial Relations, Division of Workers' Compensation has determined that this proposed regulatory action would not impose a mandate on local agencies or school districts.

FISCAL IMPACT STATEMENT (attached Form 399)

- A. Cost or Savings to any state agency: **NONE**
- B. Cost to any local agency required to be reimbursed under Part 7(commencing with Section 17500) of Division 4: **NONE**
- C. Cost to any school district required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4: **NONE**
- D. Other nondiscretionary cost or savings imposed on local agencies: **NONE**
- E. Cost or savings in federal funding to the state: **NONE**

**STATEMENT OF CONFIRMATION OF
MAILING OF FIVE-DAY EMERGENCY NOTICE**
(Title 1, CCR section 50(a)(5)(A))

The Division of Workers' Compensation sent notice of the proposed emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulations to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1(a)(2).