

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation
NOTICE OF PROPOSED RULEMAKING

Subject Matter of Proposed Amendment to Regulations:
Workers' Compensation – Vocational Rehabilitation

TITLE 8, CALIFORNIA CODE OF REGULATIONS SECTIONS 10122 ET SEQ.

Notice is hereby given that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in him by Labor Code Sections 133, 139.5 and 5307.3, proposes to amend existing regulations and to adopt proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The Department of Industrial Relations, Division of Workers' Compensation, proposes to adopt:

Amended Section 10122	Definitions
Proposed Section 10122.1	Weekend or Holiday Deadlines
Proposed Section 10127.3	Qualified Rehabilitation Representative
Amended Section 10131	Termination of Vocational Rehabilitation Services
Proposed Section 10131.2	Settlement of Prospective Vocational Rehabilitation
Amended Section 10133	Forms, Form Filing Instructions & Notices
Proposed Section 10133.10	Form RU-90 "Treating Physician's Report of Disability Status" and Form Filing Instructions
Proposed Section 10133.11	Form RU-91 "Description of Employee's Job Duties" and Form Filing Instructions
Proposed Section 10133.12	Form RU-94 "Notice of Offer of Modified or Alternative Work" and Form Filing Instructions
Proposed Section 10133.13	Form RU-102 "Vocational Rehabilitation Plan" and Form Filing Instructions
Proposed Section 10133.14	Form RU-103 "Request for Dispute Resolution" and Form Filing Instructions
Proposed Section 10133.15	Form RB-105 "Request for Conclusion of Rehabilitation Benefits" and Form Filing Instructions
Proposed Section 10133.16	Form RU-105 "Notice of Termination of Vocational Rehabilitation Services" and Form Filing Instructions

Proposed Section 10133.17	Form RB-107 “Statement of Decline of Vocational Rehabilitation Benefits” and Form Filing Instructions
Proposed Section 10133.18	Form RU-107 “Employee Statement of Declination of Vocational Rehabilitation Services” and Form Filing Instructions
Proposed Section 10133.19	Form RU-107A “Statement of Declination of Vocational Rehabilitation Services” and Form Filing Instructions
Proposed Section 10133.20	Form RU-120 “Initial Evaluation Summary” and Form Filing Instructions
Proposed Section 10133.21	Form RU-121 “Vocational Rehabilitation Progress Report” and Form Filing Instructions
Proposed Section 10133.22	Form RU-122 “Settlement of Prospective Vocational Rehabilitation Services” and Form Filing Instructions
Repealed Section 10133.1	Standardized Report Forms
Amended Section 10133.2	Pamphlets

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: September 13, 2002
Time: 10:00 am to 5:00 PM or conclusion of business
Place: Gov. Hiram W. Johnson State Office Building, Auditorium
455 Golden Gate Avenue
San Francisco, California 94102

The public hearing room is wheelchair accessible. Persons requiring additional accommodation of a disability are requested to alert the contact person identified below.

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. 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 of the Division of Workers’ Compensation is undertaking this regulatory action pursuant to the authority vested in him by Labor Codes sections

133, 139.5, and 5307.3 to adopt or amend regulations and to enforce the laws. The proposed regulations will further implement, interpret or make specific Labor Code sections 124, 133, 139.5, 4635, 4636, 4637, 4638, 4641, 4640, 4643, 4644, 4646, and Civil Code sections 7, 9, 10 and 11.

INFORMATIVE DIGEST AND PLAIN ENGLISH OVERVIEW

The Administrative Director of the Division of Workers' Compensation proposes to amend existing regulations and adopt new regulations concerning the provision of vocational rehabilitation services.

Amended Section 10122 Definitions

Labor Code Section 4637(a) provides that the employer has a 10 day time frame in which to provide an eligible employee with notification of his or her medical eligibility for vocational rehabilitation services. Labor Code Section 139.5(a) provides that the Administrative Director shall promulgate regulations that would expedite and facilitate the identification, notification and referral of industrially injured employees to vocational rehabilitation services.

Proposed Section 10127.3 provides that a qualified injured worker is to be referred to a qualified rehabilitation representative within 10 days after the employee has been determined to be medically eligible absent extenuating circumstances. This amendment to Section 10122 (Definitions) defines "extenuating circumstances" as natural or social conditions so disastrous as to impede normal business operations preventing the claims administrator from meeting the 10 day time frame set forth in Labor Code Section 4637. This proposed amendment would provide guidance to the regulated community concerning when extenuating circumstances effect the imposition of the 10-day time frame.

Proposed Section 10122.1 Weekend or Holiday Deadlines

Labor Code Section 4637(a) provides that the employer has a 10 day time frame in which to provide an eligible employee with notification of his or her medical eligibility for vocational rehabilitation services. Labor Code Section 139.5(a) provides that the Administrative Director shall develop standards for governing timeliness of vocational rehabilitation services.

This proposed amendment would provide guidance to the regulated community concerning the imposition of the 10-day time frame when the deadline of the act falls on a weekend or holiday.

Proposed Section 10127.3 Qualified Rehabilitation Representative (QRR)

Labor Code Section 4635(b) defines a “qualified rehabilitation representative.” Labor Code Section 4637 provides the procedures concerning the employee’s right to an agreed upon qualified rehabilitation representative.

When the employee is referred to a qualified rehabilitation representative, this proposed section would require the claims administrator to send all pertinent and narrative medical and vocational reports to the qualified rehabilitation representative.

Amended Section 10131 Termination of Vocational Rehabilitation Services

Section 10131 concerns the termination of vocation rehabilitation services. The amendments, subdivision (d), (e), and (f) are required due to changes in statutory and case law.

- (d) This subdivision sets forth that vocational rehabilitation services may be terminated under certain conditions due to the employee’s immigration status. This subdivision is required due to the holding of *Del Taco v. WCAB* (2000) 70 Cal.App.4th 1437.
- (e) This subdivision concerning termination of vocational rehabilitation services for a seasonal employee is necessary in order to comply with Labor Code Section 4644(a) (5), (6), and (7).
- (f) Labor Code Section 4646(b) (effective 1/1/03) provides that an employee and employer may settle the employee’s right to prospective vocational rehabilitation services. The existing regulation did not provide for settlement as a basis for termination of vocational rehabilitation services, and therefore, must be amended to comply with Labor Code Section 4644.

Proposed Section 10131.2 Settlement of Prospective Vocational Rehabilitation

Labor Code Section 4646(b) (effective 1/1/03) provides that an employee and employer may settle the employee’s right to prospective vocational rehabilitation services. This proposed regulation sets forth the procedure for settling prospective vocational rehabilitation in compliance with Labor Code Section 4646(b).

Amended Section 10133 Forms, Form Filing Instructions & Notices

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The current regulation requires the use of certain mandatory forms; however, it does not list the forms by name. The proposed regulations will now clearly list each mandatory form by its name and number. Each form and the filing instructions for the form will be a separate regulation.

Proposed Section 10133.10

Form RU-90 “Treating Physician’s Report of Disability Status” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.10 is to make Form RU-90 and its filing instructions a separate regulation from the other forms. The purpose of Form RU-90 is for the treating physician to report the employee’s disability status.

Proposed Section 10133.11

Form RU-91 “Description of Employee’s Job Duties” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.11 is to make Form RU-91 and its filing instructions a separate regulation from the other forms. The purpose of Form RU-91 is for the employee and employer to describe the employee’s job duties. The treating physician will review the form to determine whether the employee is able to return to work.

Proposed Section 10133.12

Form RU-94 “Notice of Offer of Modified or Alternative Work” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.12 is to make Form RU-94 and its filing instructions a separate regulation from the other forms. The purpose of Form RU-94 is to provide an employee with notice of the employer’s offer of modified or alternative work.

Proposed Section 10133.13

Form RU-102 “Vocational Rehabilitation Plan” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.13 is to make Form RU-102 and its filing instructions a separate regulation from the other forms. The purpose of Form RU-102 is to document objectives and methods to be used to implement a proposed rehabilitation plan.

Proposed Section 10133.14

Form RU-103 “Request for Dispute Resolution” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.14 is to make Form RU-103 and its filing instructions a separate regulation from the other forms. The purpose of Form RU-103 is to request the Rehabilitation Unit to resolve a disputed rehabilitation issue.

Proposed Section 10133.15

Form RB-105 “Request for Conclusion of Rehabilitation Benefits” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.15 is to make Form RB-105 and its filing instructions a separate regulation from the other forms. The purpose of Form RB-105 is to request the Rehabilitation Unit’s approval of conclusion of rehabilitation services for injuries before January 1, 1990.

Proposed Section 10133.16

Form RU-105 “Notice of Termination of Vocational Rehabilitation Services” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.16 is to make Form RU-105 and its filing instructions a separate regulation from the other forms. The purpose of Form RU-105 is to notify the employee of the employer’s termination of liability to provide rehabilitation services.

Proposed Section 10133.17

Form RB-107 “Statement of Decline of Vocational Rehabilitation Benefits” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.17 is to make Form RB-107 and its filing instructions a separate regulation from the other forms. The purpose of Form RB-107 is to record the employee’s declination of rehabilitation services for injuries before January 1, 1990.

Proposed Section 10133.18

Form RU-107 “Employee Statement of Declination of Vocational Rehabilitation Services” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.18 is to make Form RU-107 and its filing instructions a separate regulation from the other forms. The purpose of Form RU-107 is to record the employee’s declination of rehabilitation services for injuries between January 1, 1990 and December 31, 1993, inclusive.

Proposed Section 10133.19

Form RU-107A “Statement of Declination of Vocational Rehabilitation Services” and Form Filing Instructions

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.19 is to make Form RU-107A and its filing instructions a separate regulation from the other forms. The purpose of Form RU-107A is to record the employee's declination of rehabilitation services for injuries on or after January 1, 1994.

**Proposed Section 10133.20 Form RU-120 “Initial Evaluation Summary” and
Form Filing Instructions**

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.20 is to make Form RU-120 and its filing instructions a separate regulation from the other forms. The purpose of Form RU-120 is to document the findings and recommendations of the Qualified Rehabilitation Representative who conducts the initial evaluation.

**Proposed Section 10133.21 Form RU-121 “Vocational Rehabilitation
Progress Report” and Form Filing Instructions**

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.21 is to make Form RU-121 and its filing instructions a separate regulation from the other forms. The purpose of Form RU-121 is report on the progress of the employee who is receiving vocational rehabilitation services.

**Proposed Section 10133.22 Form RU-122 “Settlement of Prospective
Vocational Rehabilitation Services” and Form
Filing Instructions**

Labor Code Section 139.5 authorizes the Administrative Director to establish procedures relating to vocational rehabilitation. The purpose of proposed section 10133.22 is to provide a form (Form RU-122) to record the agreement between the employee and the employer to settle prospective vocational rehabilitation services for injuries on or after January 1, 2003.

Repealed Section 10133.1 Standardized Report Forms

As forms RU-120 and RU-121 will now be regulation sections 10133.20 and 10133.21, section 10133.1 will be repealed so as not to be duplicative.

Amended Section 10133.2 Pamphlets

The pamphlet currently entitled “Help in Returning to Work – 94” will be changed to “Help in Returning to Work.” It is amended to comply with Labor Code Section 4646(b) (effective 1/1/03), which provides that an employee and employer may settle the employee's right to prospective vocational rehabilitation services. The list of telephone

numbers for District Offices in the Division of Worker's Compensation has been deleted, as the numbers become outdated. Some additional language has been added under the section "Should I have an attorney." Grammatical corrections have been made.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department of Industrial Relations, Division of Workers' Compensation has made the following determinations:

State Mandated Local Costs; Reimbursement:

The Administrative Director has determined that the proposed regulations will not impose any new mandated program on local agencies and school districts. The California Supreme Court has determined that an increase in workers' compensation benefit levels does not constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. See County of Los Angeles v. State of California (1987) 43 Cal.3d 46. The requirements imposed on all employers by these proposed regulations, although not a benefit level increase, similarly do not constitute a new State mandate because the regulations apply to all employers, private and public, and not uniquely to local governments.

The proposed regulations may impose costs on local agencies and school districts. Any such costs, however, will be non-discretionary because the requirement that every employer comply with the requirements of California's workers' compensation laws is a statutory obligation. Furthermore, any such costs are non-reimbursable because the requirement for employers to comply with California's workers' compensation laws is not unique to local agencies or school districts and applies to all employers alike, public and private, including the State of California.

Cost or savings to any state agency:

The most significant change addressed by the proposed regulations is the ability to settle prospective vocational rehabilitation benefits. The remaining changes to the regulations will not result in any costs or savings to any state agency. The ability to settle prospective vocational rehabilitation benefits will most likely result in a savings to state agencies that are employers because the vocational rehabilitation benefits can be settled for a maximum amount of \$10,000, where as if the employee does not settle, he or she would be entitled to vocational rehabilitation benefits with a total value of \$16,000. As any settlement is voluntarily and usually for the economic advantage of the settling parties. The fact injured workers may now settle their vocational rehabilitation benefits may result in a savings for the Department of Industrial Relations, Division of Workers' Compensation, as the vocational rehabilitation unit may have less cases to monitor.

Cost or saving in federal funding to the state:

The proposed regulations will not affect any federal funding.

Significant statewide adverse economic impact on business:

The proposed regulations relating to the ability to settle prospective vocational rehabilitation benefits (Section 101331.2 and Form RU-122) will adversely affect vocational rehabilitation providers. It will not impact on the ability of California businesses to compete with businesses in other states.

Potential cost impact on representative private persons or businesses:

The Administrative Director has determined that the proposed regulations relating to the settlement of vocational rehabilitation (Sections 10131.2 and 10133.22) will adversely affect private vocational rehabilitation providers. Although the actual cost is unknown, an estimate is set forth below.

Statement of mandate: Regulation Sections 10131.2 and 10133.22 implement Labor Code §4646, which allows a represented employee to settle his or her prospective vocational rehabilitation benefits for not more than \$10,000. This regulation will apply to represented employees with dates of injury on or after 1/1/03.

Background: Labor Code §139.5 provides that maximum fees per case may not exceed \$4,500 for vocational rehabilitation services. Additionally, private vocational schools also receive approximately \$2,300 per case in fees from injured workers.

Working Data: The California Workers' Compensation Institute's (CWCI) Bulletin dated December 21, 2001 (No. 01-22) states that while workers' compensation claims increased for a third year in a row from 1996 – 1998, vocational rehabilitation costs declined during that same time period. The distribution of costs per case for 1998 was as follows: training programs (\$2,277); VRMA (\$3,189) and vocational rehabilitation evaluation (\$1,605).

There are approximately 250 vocational rehabilitation providers (companies) in California. In 2000, there were 22,334 new case filed with the Rehabilitation Unit. In 2001, there were 22,246 new cases filed. It is unknown how many represented employees will settle their vocational rehabilitation benefits. (85% of the employees who file cases with the Rehabilitation Unit are represented by attorneys.)

Assumptions: If 20% of employees settle their prospective vocational rehabilitation services per year, and if 22,200 new cases are filed each year for the next three years, 4,440 represented employees per year will no longer be utilizing the vocational rehabilitation services (evaluations) in the amount of approximately \$2,000 (assumption) and private vocational programs (schools) in an amount of approximately \$2,300 (assumption).

Calculation: This represents a loss of \$8,880,000 to vocational rehabilitation providers and \$10,212,000 to private vocational schools per year.

Conclusion: Whether or not the loss of revenue will cause the businesses to be eliminated is unknown. Additionally, AB749, which amended the Labor Code to

allow for settlement of prospective vocational rehabilitation services also amended the Labor Code to create for a Return to Work Program which may require the services of vocational rehabilitation providers.

Adoption of these regulations will :

- (1) create or eliminate jobs in California;
Although it is impossible to estimate how many jobs may be eliminated in the area of vocational rehabilitation services, the fact that an injured employee may settle his or her right to prospective rehabilitation benefits and use the settlement for self directed vocational rehabilitation may cause the elimination of jobs related to private vocational rehabilitation services.
- (2) create new business or eliminate existing business within California; or
Although it is impossible to estimate how many businesses may be eliminated in the area of vocational rehabilitation services, the fact that an injured employee may settle his or her right to prospective rehabilitation benefits and use the settlement for self directed vocational rehabilitation may cause the elimination of private vocational rehabilitation businesses.
- (3) affect the expansion of businesses currently doing business within California.
Although it is impossible to estimate, businesses in the area of vocational rehabilitation services will more likely decrease than expand due to the fact that an injured employee may settle his or her right to prospective rehabilitation benefits and use the settlement for self directed vocational rehabilitation.

Significant effect on housing costs: None.

Small Business Determination: The Department of Industrial Relations, Division of Workers' Compensation has determined that the proposed regulation affects small business, specifically, businesses that provide vocation rehabilitation services.

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 and less burdensome to affected parties 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.

AVAILABILITY OF RULEMAKING FILE, INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND DOCUMENTS SUPPORTING THE RULEMAKING ACTION/ 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 contact person 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 in strikeout/underline format, and the Form 399. The file also includes the Vocational Rehabilitation Advisory Committee sign-in sheet and the minutes from the meeting. In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Division's website at www.dir.ca.gov.

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, 455 Golden Gate Avenue, 9th Floor, San Francisco, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday.

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

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

In addition, any person may submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Marcela Reyes
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142
Tel: (415) 703-3033 or 703-4600

Written comments may be submitted by facsimile transmission (FAX), addressed to the above-named contact person at (415) 703-4720. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwcrules@dir.ca.gov.

Unless submitted prior to or at the public hearing, Ms. Reyes must receive all written comments no later than 5:00 p.m. on September 13, 2002.

CONTACT PERSON/ BACKUP 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 requested in writing at the same address. The contact person is:

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) 703-3033 or 703-4600.

Note: In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact person:

Destie Overpeck
Industrial Relations Counsel
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

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

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.

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 website: www.dir.ca.gov

AUTOMATIC MAILING

A copy of this Notice, the Initial Statement of Reasons, and the Text of the Proposed Regulations, will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted, the regulations as amended will appear in Title 8, California Code of Regulations, Section 10122 et seq.