

**State of California
Office of Administrative Law**

In re:
Department of Industrial Relations

Regulatory Action:

Title 8, California Code of Regulations

Adopt sections: 15203.11
Amend sections: 15203.2, 15251, 15430

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2019-1105-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This rulemaking action would have established requirements for reporting information needed to evaluate the administrative costs, expenditures, solvency, and performance of public self-insured employer workers' compensation programs.

DECISION

On November 5, 2019, the Department of Industrial Relations, Office of Self-Insurance Plans (OSIP) submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On December 20, 2019, OAL notified OSIP of the disapproval of this regulatory action. The reasons for the disapproval were failure to comply with the "clarity" standard of Government Code section 11349.1 and failure to follow all required procedures under the California Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DISCUSSION

Regulations adopted by OSIP must be adopted pursuant to the rulemaking provisions of the APA, Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (sections 11340-11361). Pursuant to section 11346 of the Government Code, any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA. No exemption or exclusion applies to the present regulatory action under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

I. CLARITY

OAL must review regulations for compliance with the “clarity” standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines “clarity” as meaning “...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The “clarity” standard is further defined in section 16 of title 1 of the California Code of Regulations (CCR), OAL’s regulation on “clarity,” which provides the following:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:

- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
- (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
- (3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
- (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
- (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or
- (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be “directly affected” if they:

- (1) are legally required to comply with the regulation; or
- (2) are legally required to enforce the regulation; or
- (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this rulemaking action, several proposed regulatory provisions fail to comply with the “clarity” standard. Some of these clarity problems are discussed below. All clarity concerns must be addressed by OSIP prior to resubmission of this rulemaking to OAL.

Issue 1. Proposed form J-1 (Joint Powers Authority (JPA) Self-Insurer's Profile and Financial Summary Report), part B.7.b., and proposed form P-1 (Self-Insurer's Profile and Financial Summary Report), part B.6.b., ask: "Were any Public Safety Employee Salary Continuation benefits provided in the most recent fiscal year?" Form J-1, part B.7.c., and form P-1, part B.6.c., next inquire: "Was any Industrial Disability Leave provided (in lieu of Workers' Compensation temporary disability payments) in the most recent fiscal year?" Similarly, proposed form AR-2 Addendum (Aggregate Claims Information) includes line items 11, "Public Safety Employee Benefits Paid (\$ amount)," and 13, "Industrial Disability Leave Benefits Paid (\$ amount)."

The terms "Public Safety Employee Salary Continuation benefits," "Public Safety Employee Benefits," "Industrial Disability Leave," and "Industrial Disability Leave Benefits" are unclear and do not have meanings generally familiar to those directly affected. Nearly all comments received by OSIP were from public self-insurers or their representatives, who are "directly affected" by these regulations as the term is defined in section 16(b) of title 1 of the CCR. These entities are either legally required to comply with the regulations or derive from the enforcement of the regulations, as representatives of those who must comply, a benefit that is not common to the public in general. They commented extensively on this proposal to let OSIP know that the above terms do not have meanings generally familiar to those directly affected. Examples include:

California Association of Joint Powers Authorities (CAJPA): Clarity needed on definition of "public safety employees" (item c) and whether OSIP is using the definition from Labor Code 4850.¹ (45-day comment; FSR p. 16.)

CAJPA: Add language or citations to clarify the differences between Public Safety Employee Continuation Benefits in item b and Industrial Disability Leave in item c. The terms are used interchangeably. (1st 15-day comment; FSR p. 20.)

California Workers' Compensation Institute (CWCI): Add Labor Code references to the items "Public Safety Employee Benefits" and "Industrial Disability Leave Benefits" to provide clarity on specific costs to be reported. (1st 15-day comment; FSR p. 20.)

Issue 2. Proposed form AR-2 Addendum includes line item 7, "Catastrophic Claims." This term is unclear and does not have a meaning generally familiar to those directly affected. As previously stated, nearly all comments received by OSIP were from public self-insurers or their representatives, who are "directly affected" by these regulations. These entities are either legally required to comply with the regulations or derive from the enforcement of the regulations, as representatives of those who must comply, a benefit that is not common to the public in general, and they commented extensively to let OSIP know that the terms "catastrophic" and "catastrophic claims" do not have meanings generally familiar to them. Examples include:

Special District Risk Management Authority/California State Association of Counties-Excess Insurance Authority: Clarify the definition of "catastrophic claims." (1st 15-day comment; FSR p. 25.)

¹ OAL notes that Labor Code section 4850 does not define or use the term "public safety employee."

CAJPA: Provide a specific definition of the term “catastrophic.” Otherwise, it will be interpreted in different ways leading to inaccurate and incomparable data. (1st 15-day comment; FSR p. 25.)

Issue 3. Proposed form AR-2 Addendum includes line item 25, “Diagnostics.” This term is unclear and those directly affected commented that the term “Diagnostics” does not have a meaning generally familiar to them. For example:

CWCI: Recommend changing “Diagnostics” to “Diagnostic Imaging” to provide greater clarity. “Diagnostic Imaging” services are readily identifiable by a range of AMA Current Procedural Terminology (CPT) codes, and are categorized by the U.S. National Library of Medicine to include X-rays, CT scans, nuclear medicine scans, MRI scans, and ultrasound. Ease of identification will allow for greater consistency in reporting. However, if the intent is actually to include a wider range of diagnostic studies and tests, a definition or list of reportable services should be provided in the regulation. (2nd 15-day comment; FSR p. 28.)

OAL agrees with the commenters that the provisions identified and discussed above need further clarification. Labor Code section 3702.2(a) requires public self-insured employers to “provide detailed information...to evaluate the costs of administration, workers’ compensation benefit expenditures, and solvency and performance of the public self-insured employer workers’ compensation programs, on a schedule established by the director.” These entities cannot comply with this mandate if OSIP does not specify what information must be reported or clarify the information by defining unclear terms. These entities are required by law to report timely and accurately or they will face civil penalties as prescribed in Labor Code section 3702.9(a) and section 15251(e) of title 8 of the CCR.

To the extent that unclear terms in the proposed regulations are not defined elsewhere in law, they are in violation of section 16, subdivisions (a)(1) and (a)(3), of title 1 of the CCR, and the clarity standard of the APA. OSIP must resolve all such clarity issues before resubmitting this action to OAL.

II. FAILURE TO FOLLOW APA PROCEDURES

Government Code section 11347.3, subdivision (b)(5), requires that the rulemaking record contain the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). Section 11346.5, subdivision (a)(6), requires, in part, the estimate of the cost or savings to any state agency. This paragraph further defines “cost or savings” as “additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.” Government Code section 11357 requires that DOF adopt instructions for inclusion in the State Administrative Manual (SAM) prescribing the methods that any agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate and other information, DOF has developed, and requires regulatory agencies to use, the STD. 399 “Economic and Fiscal Impact Statement.” (SAM Chapter 6600, commencing with section 6601.)

SAM section 6615 establishes when financial estimates contained in STD. 399 require the concurrence of DOF. Section 6615 provides in part:

6615 ESTIMATES WHICH REQUIRE DEPARTMENT OF FINANCE ACTION

(Revised and renumbered from 6660 on 03/09)

Subdivision (c) of Government Code Section 11357 specifically authorizes the DOF to "...review any estimate...for content including, but not limited to, the data and assumptions used in its preparation."

A state agency is not required in all instances to obtain the concurrence of the DOF in its estimate of the fiscal impact of its proposed regulation on governmental agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- | | |
|----------------------------------|-------------------|
| A.1-Reimbursable Local Costs | B.1-State Costs |
| A.2-Non-Reimbursable Local Costs | B.2-State Savings |
| A.3-Local Savings | B.4-Other |
| A.6-Other | |

In addition, the DOF's approval is required for the inclusion in any such estimate of any statement to the effect that reimbursement of local costs will be requested in a subsequent Governor's Budget, Section A.1 (b) on the STD. 399 [...].

On the STD. 399 in the rulemaking record for this proposed regulatory action, OSIP checked boxes in sections A.2, A.6, and B.1 of the Fiscal Impact Statement to indicate non-reimbursable state costs, other fiscal effects on local government, and additional state expenditures in the current fiscal year, respectively.

Pursuant to SAM section 6615, when a state agency indicates that its proposed regulatory action will result in an increase in costs, then the STD. 399 is required to be submitted to DOF for review and a signature must be obtained from DOF indicating concurrence by DOF before submitting the STD. 399 as part of the rulemaking record for OAL's review. This did not occur. There is no signature from DOF on OSIP's STD. 399. Thus, OSIP failed to follow required APA procedures. OSIP must comply with SAM section 6615 before resubmitting this action to OAL.

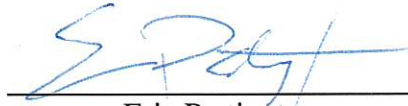
CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), OSIP may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this disapproval decision will be e-mailed to the OSIP contact person on the date this decision is signed below.

Any changes made to the regulation text to address the clarity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR. OSIP must resolve all other issues raised in this Decision of Disapproval before resubmitting to OAL.

If you have any questions, please contact me at (916) 323-6225.

Date: December 27, 2019



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