

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

INITIAL STATEMENT OF REASONS

**Subject Matter of Regulations:
Provider Suspension Procedure**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTIONS 9788.1, 9788.2, 9788.3, 9788.4, 9788.5 and 9788.6**

Adopt Section 9788.1	Notice of Provider Suspension
Adopt Section 9788.2	Provider Request for Hearing
Adopt Section 9788.3	Suspension Hearing
Adopt Section 9788.4	Suspension Notification
Adopt Section 9788.5	Amendment of the Order of Suspension or Determination and Order re: Suspension
Adopt Section 9788.6	Service and Computation of Time

BACKGROUND TO REGULATORY PROCEEDING

This Initial Statement of Reasons (“ISOR”) describes the purposes, rationales, and necessity of the Division of Workers’ Compensation’s (DWC) proposed amendments to the existing provider suspension procedure regulations which became effective as emergency regulations on January 6, 2017. This ISOR fulfills the requirements of California’s Administrative Procedure Act. (See Government Code section 11340 et seq.)

On September 30, 2016, Governor Brown signed into law Assembly Bill 1244 (Gray, Chapter 852, Statutes of 2016). The bill addressed medical fraud within the workers’ compensation system and created a new suspension process for physicians, practitioners and providers who have either been convicted of one of the crimes enumerated in Labor Code section 139.21(a)(1), suspended due to fraud or abuse from the Medicaid or Medicare programs, or has had their license, certificate, or approval to provide health care revoked or surrendered.

AB 1244 added Labor Code section 139.21 which requires the Administrative Director of DWC to promptly suspend any physician, practitioner, or provider from participating in the workers’ compensation system if that individual has been convicted of any felony or misdemeanor involving fraud or abuse of the Medi-Cal program, Medicare program, or workers’ compensation system, if that individual’s license, certificate, or approval to provide health care has been surrendered or revoked, or if that individual has been suspended for fraud or abuse from participation in the Medicare or Medicaid programs.

AB 1244 requires the Administrative Director to provide notice of the suspension, which becomes effective after thirty (30) days from the date the written notice is sent, unless the physician, practitioner, or provider stays the suspension by requesting a hearing within ten (10) days from the date the written notice is sent.

Assembly Bill 1244 was a comprehensive bill that, in addition to adding a provider suspension hearing procedure, also added a special lien adjudication process to address the liens of those physicians, practitioners, or providers who were suspended on the basis of certain criminal convictions. Since the special lien proceeding is triggered by certain provider suspensions, the implementation and execution of the proceeding is dependent upon the existence and operation of the suspension process.

Until enactment of Assembly Bill 1244, there was no suspension procedure aside from the Administrative Director's authority to revoke a physician's certificate to act as a Qualified Medical Evaluator under Labor Code section 139.2. These regulations provide the specific suspension procedure for provider suspensions based upon the factors set forth in Labor Code section 139.21(a).

Labor Code section 139.21(a)(1)(A) requires the Administrative Director to suspend providers that have been convicted of a felony or misdemeanor involving (i) fraud or abuse of the workers' compensation system, Medi-Cal, Medicare, or fraud or abuse of any patient; (ii) conduct related to the individual's medical practice as it pertains to patient care; (iii) a financial crime related to the Medi-Cal program, Medicare program, or workers' compensation system; or (iv) otherwise substantially related to the qualifications, functions, or duties of a provider of services. In addition, Labor Code section 139.21(a)(1)(B) and (C) require the Administrative Director to suspend physicians, practitioners, and providers who have been suspended from the Medicare or Medicaid programs or whose license, certificate, or approval to provide health care has been revoked or surrendered.

The Administrative Director is required to exercise due diligence to identify physicians, practitioners, or providers who have been suspended from the Medi-Cal program by accessing the quarterly updates to the list of suspended and ineligible providers maintained by the State Department of Health Care Services.

In addition, Labor Code section 139.21(b) mandates the Administrative Director adopt regulations for suspending a physician, practitioner, or provider from participating in the workers' compensation system subject the following notice requirements:

The Administrative Director is required to provide physicians, practitioners, or providers written notice of their right to a hearing and the procedures to follow to request a hearing on the suspension. The notice shall state the suspension will take effect after thirty (30) days from the date the notice was mailed unless the physician, practitioner, or provider requests a hearing within ten (10) days the notice was mailed. The request for a hearing shall stay the suspension until the hearing is completed. The hearing shall be held within thirty (30) days of the receipt of the request. If the Administrative Director finds that the criteria for suspension listed above is applicable, the physician, practitioner, or provider shall be immediately suspended from participating in the workers' compensation system.

The Administrative Director shall have the power and jurisdiction to conduct these hearings or may designate and appoint a hearing officer to conduct the provider suspension hearings. Any appointed hearing officer may administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause the deposition of witnesses to be taken in the manner prescribed by law for similar cases in civil cases in the superior courts of California.

Labor Code section 139.21(c) requires the Administrative Director to promptly notify the physician's, practitioner's, or provider's state licensing board of a suspension imposed pursuant to this section and to update the qualified medical evaluator and medical provider network databases as appropriate.

Labor Code section 139.21(d) requires the Administrative Director to give notice of the suspension to the Chief Judge of the Division so that notice can be promptly given to district offices and all workers' compensation judges. All suspensions shall be posted on the department's website.

Labor Code section 139.21(b)(1), provides: "The administrative director shall adopt regulations for suspending a physician, practitioner, or provider from participating in the workers' compensation system, subject to the notice and hearing requirements in paragraph (2)." These proposed regulations cover the entire provider suspension procedure. This rulemaking only pertains to the provider suspension regulations. The special lien proceeding regulations will be done in a separate rulemaking and will be filed as a regular rulemaking package.

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

- Department of Industrial Relations. "Issue Brief: Issues and Impact of Lien Filing in California Workers' Compensation System." August 19, 2016.

- Rand Corporation study, “Provider Fraud in California’s Workers’ Compensation, Selected Issues”. Nicholas M. Pace and Julia Pollak. June 28, 2017.
- *Healthsmart Pacific, Inc. dba Pacific Hospital of Long Beach and Michael D. Drobot v. Department of Industrial Relations, et al.*, Los Angeles Superior Court Case No. BS170361, filed August 1, 2017.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

None.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATIONS AND REASONS FOR REJECTING THOSE ALTERNATIVES

The Administrative Director has not identified any effective alternative, or any equally effective and less burdensome alternative to the regulation at this time. The public is invited to submit such alternatives during the public comment process.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE IMPACT DIRECTLY AFFECTING BUSINESS

The Administrative Director has determined that the proposed regulations will not have a significant adverse impact on business. Nearly all of the costs of suspending physicians, practitioners, and providers under Labor Code section 139.21 are prescribed by the express requirements of the statute itself, which sets forth the grounds for suspensions, the notice requirements, and the procedures for appealing a notice and holding a hearing on the appeal, the appointment of hearing officers, the hearing procedures and burden of proof, and the requirements for deciding an appeal and providing notice once the suspension is effective. It is the Labor Code that mandates nearly all the costs, rather than the regulations. The regulation’s impacts are limited to clarifying timelines at various stages of the process mandated by the statute, and some additional specific requirements related to the mailing and handling of appeal documents.

It is anticipated that these regulations will impact approximately 400 physicians, practitioners, or providers who will be suspended from participating in California’s workers’ compensation system in 2017-18 and another 150 suspensions annually thereafter.

The Division anticipates that one in three of these individuals will choose to appeal their suspensions, which means that only 133 will incur costs in the first year and only 50 annually thereafter. The Division estimates the regulation’s overall total statewide cost to businesses to \$7,448 in the first year and \$2,800 thereafter.

DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS (Gov. Code section 11346.2(b)(7))

The proposed regulations do not duplicate or conflict with any federal regulations. These proposed regulations are specific to the requirements of a state statute governing the suspension of physicians, practitioners, and providers from California's workers' compensation system.

SUMMARY OF PROPOSED CHANGES

Section 9788.1 – Notice of Provider Suspension

Specific Purpose of Section:

This section sets forth the process for issuing the notice of suspension to a physician, practitioner, or provider who has met one of the criteria set forth under Labor Code section 139.21(a) (1), and it defines "suspension from participation".

Necessity:

Labor Code section 139.21 requires the Administrative Director to provide physicians, practitioners, or providers written notice of their right to a hearing.

This section lists the required elements of the notice of suspension, i.e., the basis for suspension, sets forth the timeframe for requesting a hearing, and provides notice that a physician, practitioner, or provider is prohibited from seeking payment for goods or services related to an occupational injury or illness provided on or after the date of their suspension. This section also sets forth the procedure for service of the notice upon the provider.

It also defines "suspension from participation" to ensure that the term's meaning, as used in the regulations, will be clear to the regulated public.

Section 9788.2. Provider Request for Hearing.

Specific Purpose of Section:

This section provides the process for a physician, practitioner, or provider served with notice of suspension to request a hearing with the Administrative Director of the Division of Workers' Compensation, and the consequences for failure to request a hearing.

Necessity:

This section informs the physician, practitioner, or provider of the right to request a hearing within 10 days of service of the notice of suspension to contest the allegation that Labor Code section 139.21(a)(1) is applicable, and further specifies that any such appeal state the legal and factual reason for requesting for hearing, and that the failure to request a hearing constitutes a waiver of that right. It also informs the physician, practitioner or provider that if a request for hearing is not filed, the Administrative Director shall issue an Order of Suspension 30 days after the notice of suspension was served together with the written notice required by section 9788.4. This section sets forth the procedure for service of an Order of Suspension and appeals of an Order of Suspension.

Section 9788.3. Suspension Hearing.

Specific Purpose of Section:

This section provides the hearing procedure for the physician, practitioner or provider, to contest the notice of suspension. It provides for the designation of hearing officers, the rules governing hearings, the issuance of written recommended Determinations and Orders re: Suspension by hearing officers, and the issuance of Determinations and Orders re: Suspension by the Administrative Director. This section sets forth the procedure for service of the Determination and Order re: Suspension and appeals of the Determination and Order re: Suspension.

Necessity:

It is necessary to set forth the procedures and timelines for holding hearings, service of documents, rules of evidence, and issuance of decisions in order to ensure fair, efficient, and uniform application of procedures. This section provides the specific procedures and timelines for scheduling and holding hearings, designating hearing officers, issuing recommended and final Determinations and Orders re: Suspension, and service of documents.

Section 9788.4. Suspension Notification.

Specific Purpose of Section:

This section provides the procedures for notification of suspension after hearing and decision.

Necessity:

This section sets forth the list of individuals and entities that must be notified upon a provider suspension. The list includes: the Chief Judge of DWC, who shall correspondingly notify the DWC district offices and all DWC Administrative Law

Judges; the special lien proceeding attorney designated under Labor Code section 139.21(f), if one is appointed; and the provider's state licensing, certifying, or registering agency. In addition, the Administrative Director must update the DWC Qualified Medical Evaluator and Medical Provider Network databases to reflect the provider suspension and also post notification of the provider's suspension on the department's website.

Section 9788.5. Amendment of the Order of Suspension or Determination and Order re: Suspension.

Specific Purpose of Section:

This section provides that if the Administrative Director becomes aware that a suspended physician, practitioner, or provider would be subject to suspension under Labor Code section 139.21(a)(1) for a criminal conviction or other statutory basis that did not serve as the basis for the suspension in the original Order of Suspension or Determination and Order re: Suspension, the Administrative Director may issue an amended Order of Suspension or amended Determination and Order re: Suspension following written notice to the physician, practitioner, or provider pursuant to section 9788.1 and an opportunity for hearing pursuant to sections 9788.2 and 9788.3.

Necessity:

This section is needed to address situations in which a physician, practitioner, or provider is subject to multiple prosecutions and convictions for distinct activities that fall within crimes described in Labor Code section 139.21(a)(1)(A). When the suspension is based on a criminal conviction, the physician, practitioner, or provider's liens are consolidated into a special lien proceeding in which liens associated with the underlying criminal activity are subject to dismissal with prejudice. Although technically a physician, practitioner, or provider can only be suspended once, this section clarifies the ability of the Administrative Director to modify a notice of suspension, subject to the same procedural protections, in order to reach liens associated with a subsequent conviction that is unrelated to the first.

Section 9788.6. Service and Computation of Time.

Specific Purpose of Section:

This section defines the word "filed", makes clear service is complete on mailing, and sets forth the specific time extensions to respond to documents served by mail.

Necessity:

Labor Code section 139.21(b)(2) requires a written notice of suspension be sent by mail, a request for hearing be made within 10 days from the date the notice is sent, a hearing within 30 days of receipt by the administrative director of the request, and suspension of the physician, practitioner, or provider 30 days from the date the notice is mailed unless a hearing is requested. This section provides definitions needed to effectuate these timelines and the manner of computing the time requirements to respond, after receiving documents served by mail. In particular, this section clarifies that the usual “mailbox rules” found in the Code of Civil Procedure and other Workers’ Compensation Appeals Board regulations apply to physicians, practitioners, or providers who are exercising their right to appeal a Notice of Suspension.

ECONOMIC IMPACT ANALYSIS

Creation or Elimination of Jobs within the State of California

The Administrative Director has determined that the proposed regulations will not have a significant adverse impact on jobs within the State of California. AB 1244 mandates the adoption of regulations for promptly suspending a physician, practitioner, or provider from participating in the workers’ compensation system if that individual meets the criteria specified above. Labor Code section 139.21(b)(1), provides: “The administrative director shall adopt regulations for suspending a physician, practitioner, or provider from participating in the workers’ compensation system, subject to the notice and hearing requirements in paragraph (2).”

The suspension of physicians, practitioners, and providers from the workers’ compensation system is prescribed by the express requirements of Labor Code section 139.2 itself, rather than the regulations. The statute sets forth the grounds for suspensions, the notice requirements, and the procedures for appealing a notice and holding a hearing on the appeal, the appointment of hearing officers, the hearing procedures and burden of proof, and the requirements for deciding an appeal and providing notice once the suspension is effective. The regulations provide procedural clarification to the provider suspension process set forth in detail in the statute. Given the limited scope of the regulations it is not anticipated that the regulations will result in the elimination of business. The regulation’s impacts are limited to clarifying the hearing and decision procedure, timelines at various stages of the process mandated by the statute, and requirements related to the mailing and handling of appeal documents.

Creation of New or Elimination of Existing Businesses Within the State of California

Businesses will not be created or eliminated by the regulations. The suspension of physicians, practitioners, and providers from the workers’ compensation system is

prescribed by the express requirements of Labor Code section 139.21 itself, rather than the regulations. The regulations provide procedural clarification to the provider suspension process set forth in detail in the statute. Given the limited scope of the regulations it is not anticipated that the regulations will result in the creation or elimination of business. The regulation's impacts are limited to clarifying timelines at various stages of the process mandated by the statute, and requirements related to the mailing and handling of appeal documents.

Expansion of Business or Elimination of Existing Businesses Within the State of California

Businesses will not be expanded or eliminated by the regulations. The suspension of physicians, practitioners, and providers from the workers' compensation system is prescribed by the express requirements of Labor Code section 139.21 itself, rather than the regulations. The regulations provide procedural clarification to the provider suspension process set forth in detail in the statute. Given the limited scope of the regulations it is not anticipated that the regulations will result in the expansion or elimination of existing businesses. The regulation's impacts are limited to clarifying timelines at various stages of the process mandated by the statute, and requirements related to the mailing and handling of appeal documents.

Benefits of the Regulations

The objective of the proposed regulations is to implement the requirement of creating a suspension process for physicians, practitioners, and providers who are subject to suspension from the workers' compensation system pursuant to Labor Code section 139.21. Having procedures that are clear, specific, and fair will help minimize litigation appeals over procedural unfairness and help accomplish the statute's objective of getting fraudulent providers out of the system. The proposed regulations are not anticipated to affect the environment, either by benefit or harm, as they deal exclusively with the suspension process for physicians, practitioners, and providers from the workers' compensation system for matters enumerated in Labor Code section 139.21, unrelated to the environment.