

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation**

NOTICE OF PROPOSED RULEMAKING

Subject Matter of Regulations: Home Health Care Services Fee Schedule

**TITLE 8, CALIFORNIA CODE OF REGULATIONS,
SECTIONS 9789.90-9789.93**

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation ("DWC"), pursuant to the authority vested in her by Labor Code sections 133, 4603.5, 5307.1, 5307.3 and 5307.8 proposes to adopt the proposed regulations described below to implement the provisions of Labor Code section 5307.8, of Senate Bill 863 (Chapter 363, stats. of 2012, effective January 1, 2013). Labor Code section 5307.8 mandates this Home Health Care Service Fees Schedule for home health care services and provides that the schedule shall set forth fees and requirements for services providers and set forth maximum service hours and fees. The proposed Home Health Care Fee Schedule sets forth a methodology for payment and maximum allowable rates for payment for the full range of home health care services that may be required by injured workers.

PROPOSED REGULATORY ACTION

The Department of Industrial Relations, Division of Workers' Compensation, proposes to adopt Division 1, Chapter 4.5, Subchapter 1, Article 5.3, of Title 8, California Code of Regulations, sections 9789.90-9789.93.

Adopt Section 9789.90	Home Health Care - Definitions
Adopt Section 9789.91	Home Health Care - Eligibility for Services & Payment.
Adopt Section 9789.92	Home Health Care – Payment Methodology & Billing Rules.
Adopt Section 9789.93	Table A

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 proposed regulatory action, on the following date:

Date: November 30, 2015

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, CA 94612**

The State Office Building and its Auditorium are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other types of reasonable accommodations to facilitate effective communication for persons with disabilities are available upon request. Please contact the State Wide Disability Accommodation Coordinator, Kathleen Estrada, 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 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 regulatory action to the Department of Industrial Relations, Division of Workers' Compensation. The written comment period closes at 5:00 P.M., on November 30, 2015. The Division of Workers' Compensation will only consider comments received at the Department of Industrial Relations, Division of Workers' Compensation by that time. Equal weight will be accorded to oral comments presented at the hearing and written materials.

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

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94612

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.

Unless submitted prior to or at the public hearing, Ms. Gray must receive all written comments no later than 5:00 P.M., on November 30, 2015.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in her by Labor Code sections 133, 4603.5, 5307.1, 5307.3, 5307.8.

Reference is to Labor Code sections 4600, 5307.1, 5307.8 and 5307.11.

INFORMATIVE DIGEST/POLICY OVERVIEW

The regulations are required by legislative enactment – Senate Bill 863 (Chapter 363, stats. of 2012, effective January 1, 2013), which directed the Administrative Director to adopt a schedule of reasonable maximum fees payable for home health care services.

Labor Code section 5307.8 mandates this Home Health Care Services Fee Schedule for home health care services.

To implement this SB 863 fee schedule, DWC proposes to add sections 9789.90-9789.93.

The proposed Home Health Care Fee Schedule sets forth a methodology for payment and maximum allowable rates for payment for the full range of home health care services that may be required by injured workers.

Labor Code section 5307.8 provides that the schedule must not allow payment for services, including any services performed by a member of the employee's household, to the extent the services had been regularly performed in the same manner and to the same degree prior to the date of injury.

Labor Code section 4600, subdivision (b) provides that injured workers will be provided that is reasonably required to cure or relieve the injured worker from the effects of his or her injury, based upon the Medical Treatment Utilization Schedule (MTUS) Guidelines adopted by the Administrative Director pursuant to Labor Code section 53037.27.

Labor Code section 4600, subdivision (h) provides that home health care services shall be provided as medical treatment only if reasonably required to cure or relieve the injured employee from the effects of his or her injury and prescribed by a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, and subject to Section 5307.1 and 5307.8. Labor Code section 4600, subdivision (h) further provides that an employer shall not be liable for home health care services that are provided more than 14 days prior to the date of the employer's receipt of the physician's prescription.

Labor Code section 5307.11 allows the employer and the home health care service provider to contract for costs outside the fee schedule.

The proposed regulations are intended to implement, interpret or make specific Labor Code section 5307.8, as follows:

Proposed Section 9789.90 – Home Health Care - Definitions

- This section defines key terms used in the home health care services fee schedule.
- “CMS,” “home care organization,” “home health care agency,” “home health care services,” “IHSS,” and “Medicare” are defined to ensure that their meanings, as used in the regulations, will be clear to the regulated public.

Proposed Section 9789.91 – Home Health Care – Eligibility for Services

- Subdivision (a) provides that home health care services shall be provided as medical treatment only if reasonably required to cure or relieve the injured worker from the effects of his or her injury, if such treatment is prescribed by a licensed physician or surgeon, in accordance with Labor Code section 4600, subdivision (h) and the Medical Treatment Utilization Schedule.
- Subdivision (b) provides that home health care services are subject to the utilization review and independent medical review processes set forth in Labor Code sections 4610 and 4610.5, *et seq.*
- Subdivision (c) provides that, at the outset of care, an in-home assessment of the injured worker’s need for home health care shall be performed by a qualified registered nurse. Assessments of an injured workers’ need for home health care will be performed using CMS’s OASIS (Outcome and Assessment Information Set), a group of standard data elements used by CMS to assess patient’s needs for home health care services. A link to the OASIS form is incorporated into subdivision (c) by reference. Provisions are also made for evaluations of needs for rehabilitation services in the areas of speech language pathology, physician therapy or occupational therapy, where applicable.
- Subdivision (d) provides that an employer or their insurer shall not be liable for any home health care services provided by the injured worker’s spouse or other member of the injured worker’s household, or other entity, if those home health care services were provided to the injured worker prior to the industrial injury. Subdivision (d) further provides that an employer or their insurer shall not be liable for home health care services provided more than fourteen (14) days prior to the date of the employer’s or insurer’s receipt of the physician’s prescription or request for authorization for home health care services.
- Subdivision (e) provides that the fee schedule does not cover family caregivers or individuals who are not employed by a home care organization or a home health care agency. Subdivision (e) further provides that a claims administrator and an injured

worker may agree that the injured worker may use an unregistered provider (who is not employed by a home care organization or home health care agency and who may be a family member of the injured worker) who the necessary skills to provide the home health care services needed by the injured worker.

Proposed Section 9789.92 – Home Health Care – Payment Methodology

- Subdivision (a) states that applicable rates for covered services are contained in Table A, which is set forth in section 9789.93. Subdivision (a) also provides that in no case shall any payment rate under the fee schedule be lower than the then-applicable state or local minimum wage. Finally, subdivision (a) provides that the home health care fee schedule operates on a fee for service basis.
- Subdivision (b)(1) provides that, except in the case of per diem billing codes, home health care services will be billed in fifteen (15)-minute increments, with one unit of time being equal to fifteen (15) minutes. Subdivision (b)(1) further provides that a visit by a home health care provider will be for a minimum of four units, with any additional time beyond the four units to be billed in fifteen (15) minute increments. The four units may be for different services performed within the visit. For example, if only one service is performed during the visit, the provider would bill the four minimum units to the billing code for that service. However, if two, three or four services were provided during the initial hour of the visit, the provider would bill two, three or four codes, respectively, in relative proportion to the time spent on each service. No more than four services may be billed during a one-hour visit. Subdivision (b)(2) provides that a per diem code shall be used whenever per diem rate is lower than the incremental rate for the number of hours worked in a day providing a particular service. Finally, subdivision (b)(3) provides that providers will bill insurers using the CMS 1500 or the CMS 1450/UB-04 form, and the links to download those forms is provided.
- Subdivision (c) provides that nothing in section 9789.92 precludes a provider and insurer claims administrator from entering into an agreement that the provider will be paid at rates higher or lower than those set forth in the home health care fee schedule.

Proposed Section 9789.93 – Table A

This section sets forth billing codes and payment rates which may be billed under the home health care fee schedule.

Objective and Anticipated Benefits of the Proposed Regulations:

The objective of the proposed regulations is to reduce disputes among home health care service providers and payors in the workers' compensation system, thereby making the system more efficient. The proposed fee schedule will reduce litigation and will provide more certainty to home health care service providers and parties in the workers' compensation system.

The proposed regulations will be beneficial to California employers and workers by reducing disputes and making the system more efficient.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Administrative Director has determined that the proposed regulations are not inconsistent or incompatible with existing. After conducting a review for any regulations that would relate to or affect this area, the Administrative Director has concluded that these are the only regulations that concern a home health care fee schedule for purposes of Labor Code section 4600, subdivision (h) and Labor Code section 5307.8.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Administrative Director has made the following initial determinations:

- Mandate on local agencies and school districts: None.
- Cost or savings to any state agency: The State Compensation Insurance Fund will have reduced workers' compensation costs. To the extent that state agencies are employers, there will be reduced workers' compensation costs.
- Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17500 through 17630: None.
- Other nondiscretionary cost or savings imposed on local agencies: None.
- Cost or savings in federal funding to the state: None.
- Cost impacts on a representative private person or business: The Administrative Director is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: The Administrative Director initially determines that the proposed regulations will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.
- Significant effect on housing costs: None.

Results of the Economic Impact Analysis/Assessment

The Administrative Director concludes that it is (1) unlikely the proposal will create jobs within the State of California, (2) unlikely that the proposal will eliminate any jobs within the State of California, (3) unlikely that the proposal will create new businesses within the State of California, (4) unlikely that the proposal will eliminate any existing businesses within the State of California, and (5) unlikely the proposal would cause the expansion of businesses currently doing business within the State of California.

Benefits of the Proposed Action: The proposed fee schedule will reduce litigation and will

provide more certainty to home health care services providers and parties in the workers' compensation system. The fee schedule will save costs by reducing disputes over appropriate fees for home health care services for injured workers. It will also allow providers to use the Independent Bill Review procedure for fee disputes instead of the more expensive and slower lien filing procedure. Less litigation means more system-wide savings. Injured workers will benefit by having uniform codes and fees adopted that will ensure that adequate and appropriate home health care services will be available to injured workers. A 2011 study by the California Commission on Health and Safety and Workers' Compensation (CHSWC) found that approximately 350,000 liens are filed per year, at an average cost of \$1,000.00. Of these liens, approximately 9361 would be for home health care services. The potential savings from reduced lien litigation could be as much as \$9,361,000.00 annually.

Small Business Determination: The Administrative Director has determined that the proposed regulations may affect small businesses, although not to a significant degree. There will be an impact on home health care services providers but, by reducing disputes regarding reasonable payments for home health care services and allowing such disputes as do occur to be submitted to the less expensive Independent Bill Review (IBR) procedure, it will probably save money rather than causing expense, as detailed above.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Administrative Director must determine that no reasonable alternative considered or brought to the attention of the Administrative Director's attention would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action 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 during the written comment period, or at the public hearing.

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 94612
E-mail: mgray@dir.ca.gov
Telephone: (510) 286-7100

CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

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

Lindsey Urbina
Industrial Relations Counsel
Division of Workers' Compensation
P.O. Box 420603
San Francisco, CA 94142
Email: lurbina@dir.ca.gov
Telephone: (510) 286-7100

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

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, proposed text of the regulations, pre-rulemaking comments and the Economic Impact Statement (Form STD 399). 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 http://www.dir.ca.gov/dwc/Laws_Regulations.htm. To access them, click on the "Proposed Regulations" link and scroll down the list of rulemaking proceedings to find the Copy Service Fee Schedule 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, 17th Floor, Oakland, California 94612, between 8:00 A.M. and 5:00 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 contact person.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received, the Administrative Director may adopt the proposed regulations substantially as described in this notice. If the Administrative Director makes modifications which are sufficiently related to the originally proposed text, the Administrative Director will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Administrative Director adopts the regulations as received.

AVAILABILITY OF 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 Division's website at www.dir.ca.gov.

AUTOMATIC MAILING

A copy of this Notice, the Initial Statement of Reasons, and the text of the 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 California Code of Regulations, title 8, commencing with section 9789.90. The text of the final regulations also may be available through the website of the Office of Administrative Law at www.oal.ca.gov.