

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR**

**REVISED INITIAL STATEMENT OF REASONS
Subject Matter of Regulations: Return to Work Supplement Program
California Code of Regulations, Title 8, Article 1
Sections 17300-17310**

1. Introduction.

This Initial Statement of Reasons (“ISOR”) describes the purposes, rationales, and necessity of the Department of Industrial Relations (“DIR”) regulations establishing a return-to-work supplement program.

In passing Senate Bill 863 (Statutes of 2012, Chapter 363) (“SB 863”), the Legislature created a return-to-work program to be administered by the Director of Industrial Relations. This program has as its purpose the making of supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earning loss. This Initial Statement of Reasons fulfills the requirements of California’s Administrative Procedure Act (see Government Code section 11340 et seq.).

Under SB 863, the Director has been authorized to establish a return-to-work supplement program. The authorizing statute, Labor Code section 139.48, requires the Director to adopt regulations for determining eligibility for supplemental payments from the fund established in section 139.48(a).

To implement these SB 863 changes, DIR proposes to add sections 17300 to 17310 to Subchapter 8 of Article 1 of Title 8, California Code of Regulations.

The proposed amendments define certain terms, establish eligibility criteria, detail the method for application and provide for payment from the fund established in section 139.48.

DIR welcomes comments on the ISOR and on the proposed regulations that the ISOR describes. Please see the accompanying Notice of Rulemaking for instructions on how to submit comments electronically, on paper, and orally at the DIR hearing on the proposed regulations.

2. Technical, Theoretical, or Empirical Studies, Reports, or Documents.

DIR relied on the following studies: Identifying Permanently Disabled Workers with Disproportionate Earnings Loss for Supplemental Payments, RAND, February 2014; Workers' Compensation Reform and Return to Work: The California Experience, RAND, 2011; An Evaluation of California’s Permanent Disability Rating System, 2005.

3. Problem Addressed with this Rulemaking.

This rulemaking allows the Department to comply with SB 863's mandate to establish eligibility for payments and the amount of payments from the return-to-work program for injured workers established by that bill.

4. Specific Technologies or Equipment.

The proposed regulations require applications for the Return to Work Supplement to be submitted electronically via the Department website. This will require internet access. In addition, the electronic application process requires the attachment of supporting documents in PDF or TIFF file formats. This will require the use of a document scanner or digital camera.

While the Director realizes that not all potential applicants for this benefit may have internet access in their homes, the Department is addressing the access issue by setting up access kiosks at the Information and Assistance Offices at all Workers' Compensation Appeals Board ("WCAB") District Offices. The Board access kiosks will have the necessary document scanning capabilities. The Director also notes that free internet access is available at many public libraries and other public locations.

5. Reasonable Alternative to the Proposed Regulations and Reasons for Rejecting Those Alternatives.

The Director has not identified 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.

The Director considered two alternatives. One would have provided this Supplement to those workers whose wage loss was 30% greater than average. This alternative was rejected because of higher administrative costs and because of the delay introduced by having to determine the average wage loss and the individuals wage loss. The second rejected alternative would have provided the supplement to those individuals who received a Supplemental Job Displacement Benefit and whose actual wage loss was greater than average. Again, the administrative costs were too high and the delay imposed by having to determine the average wage loss would postpone payment of the supplement. In the case of both these rejected alternatives the amount of the supplement would not have substantially changed.

6. 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. There are no federal regulations that prescribe rules for a Return-to-Work Supplement.

7. Facts, Evidence, Documents, Testimony, or Other Evidence on Which the Agency Relies to Support an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business. (Gov. Code section 11346.2(b)(6)(A)).

The Director has determined that the proposed regulations will not have a significant adverse economic impact on business. These regulations concern eligibility for a return-to-work supplement and the process for applying for the supplement. As such the regulations do not have a significant impact on business.

8. Economic Impact Analysis ((Gov. Code section 11346(b)(1)(A)-(D)).

Purpose

The proposed regulations implement a program for a return-to-work supplement found in Labor Code section 139.48 as a result of the passage of SB 863 and are designed to create a process for applying for the Return to Work Supplement as well as establishing the level of payment for injured workers. (A more detailed explanation of the regulatory changes is stated in the introduction section above.) A Standardized Regulatory Impact Assessment is provided with this Initial Statement of Reasons.

The Creation or Elimination of Jobs within the State of California

The Director has determined that the proposed regulations will not have a significant impact on jobs within the State of California. SB 863 mandates the creation of the return-to-work supplement fund.

This should not result in the elimination of jobs in California. To the contrary, jobs within the State of California may be created as a result of this program as it may support workers who have lost employment due to an industrial injury.

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

The Director has determined that the proposed regulations will not significantly create or eliminate businesses within the State of California. The additional costs to businesses due to the SB 863 mandatory changes should be absorbable by existing businesses and should not result in either a substantial change in their existing business practices or their elimination. The primary new requirement under SB 863 that could result in the creation of some new businesses is the addition of funds directly provided to workers most suffering wage loss as a result of industrial injury. The regulations do not impose new requirements but rather implement the return-to-work program in Labor Code section 139.48

The Expansion of Businesses Currently Doing Business within the State of California

The Director has determined that the proposed regulations will not significantly expand businesses within the State of California.

Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The proposed regulations will establish eligibility criteria for the return-to-work program created by Labor Code section 139.48 and will set the amount of payments to injured workers under that program. These payments are intended to assist injured workers who cannot return to the job they had at the time of their industrial injury.

9. The Specific Purpose, Rationale, and Necessity of Each Section of the Proposed Revisions and Proposed New Regulations to the Return-to-Work Program (Gov. Code section 11346.2(b)(1)).

The specific purpose, rationale, and necessity of each section of the proposed revisions and proposed new regulations to the RTW statute, in accordance with Government Code section 11346.2(b)(1) is provided below.

Section 17300. General, Scope and Application of Article.

Specific Purpose:

This section sets out general background for the return-to-work program. The section gives the name and address of the program and describes the scope and purpose of the program

Necessity:

It is necessary to clearly identify how the program will be referenced and to provide an address for members of the public to contact to program. This section is also necessary to set out the purpose of the program and to identify the particular study relied on by the Director in carrying out the legislative mandate which required that the program be based on findings from studies carried out by the Director.

Section 17301. Definitions.

Specific Purpose:

This section defines terms that are used on the remaining regulations.

Necessity:

This section is necessary to provide clear definitions and to allow the public to more easily follow the meaning of the regulations.

Section 17302. Eligibility.**Specific Purpose:**

This section defines who are eligible for the Return-to-Work Supplement. The Labor code established this program for workers whose permanent disability benefits are low compared to their wage loss. Under the regulation an individual must have a work related injury that results in an inability to return to the work they were doing at the time of the injury. Inability to return to the employment the worker was doing at the time of injury has been shown to be linked to higher than average wage loss. Those individuals who receive the Supplemental Job Displacement Benefit under Labor Code section 4658.7 meet the criteria of being unable to perform the work they were doing at the time of the injury. The regulation further requires that an individual who receives the Return-to-Work Supplement may not receive a second Return-to-Work Supplement unless that individual returns to the work force and suffers an additional injury that prevents that individual from continuing in that job.

Necessity:

This section is necessary to implement the changes to Labor Code section 139.48 by establishing eligibility criteria for the legislatively mandated Return-to-Work Supplement. Because the benefit amount in has been established based on the spectrum of uncompensated losses resulting from individual industrial injuries identified by the Rand study “Identifying Permanently Disabled Workers with Disproportionate Earnings Losses for Supplemental Payments,” the proposed regulation specifies that an individual may only receive one Return-to-Work Supplement in relation to a particular industrial injury. An individual who returns to work and suffers a subsequent industrial injury would not, however, be precluded from applying for and receiving a Return-to-Work Supplement in relation to the subsequent injury.

Section 17303. Notice.**Specific Purpose:**

An individual who receives the Supplemental Job Displacement Benefit under Labor Code section 4658.7 because that individual cannot return to the job they were performing when they were injured receives a voucher evidencing the promise to make payments under section 4658.7. That voucher is on a form mandated by California Code of Regulations, title 8, section 10133.32. Commencing 30 days after the effective date of the proposed regulations, and continuing until the Administrative Director of the Division of Workers’ Compensation amends the voucher form to include notice language about the Return-to-Work Supplement, this section requires that a cover sheet accompanying the voucher contain a notice that the individual may be eligible for the Return-to-Work Supplement and is intended to advise those individuals who may wish to apply

for the Return-to-Work Supplement about the program and how to get additional information. The section also provides that the Director will arrange for publication of this notice targeted at those who have already received a voucher.

Necessity:

This section is necessary to implement the changes to Labor Code section 139.48 by providing notice of existence of the Return-to-Work Supplement. The proposed regulation contains a 30-day grace period after the effective date of the proposed regulations to give claims administrators who issue the vouchers to injured workers time to come into compliance with the notice requirement. Since receipt of the voucher is the triggering event establishing eligibility for the Return-to-Work Supplement, the Department has determined that the most effective way to inform injured workers who may be eligible for the new benefit is to provide notice of their potential eligibility either within the text or the voucher itself or as an attachment to the voucher. Until the Administrative Director of the Division of Workers' Compensation amends the voucher form to include notice language, the proposed regulation will require claims administrators to provide notice of the benefit via a cover sheet attached to the voucher.

The Department will also be making efforts to reach out to individuals who have already qualified for the benefit but are no longer directly interacting with the system to facilitate their ability to apply for the benefit. Because the vouchers are issued by the various claims administrators and not by the Department, the Director believes that the most effective way to provide this notice is via a page on the Department website explaining the eligibility requirements and application process for the Return-to-Work Supplement benefit.

Section 17304. Deadline for Application.

Specific Purpose:

This section establishes a one year deadline for an injured worker to apply for the Return-to-Work Supplement.

Necessity:

This section is necessary to alert potential applicants that there is a time limit for applying for the Return-to-Work Supplement. The proposed regulation adopts the one year limitations period to apply for Workers' Compensation medical and disability benefits set by Labor Code section 5405. Under the proposed regulation the triggering event that begins the one year limitations period to apply for the Return-to-Work Supplement is receipt of a voucher under Labor Code section 4658.7. To protect the ability of individuals whose entitlement to receive a Return-to-Work Supplement is based on receipt of a voucher after January 1, 2013, the effective date of Labor Code section 139.48, and before the effective date of these regulations, individuals who received vouchers in that time period will be given a period of one year after the effective date of these regulations to apply for the benefit.

Section 17305. Method of Application.

Specific Purpose:

This section creates the process for an individual to apply for the Return-to-Work Supplement. The regulation requires that all applications be made electronically through DIR's web site, and further provides that DIR will make access to the web site available at each Information and Assistance Office location in the state. These offices are located at the Workers' Compensation Appeals Board's District Offices.

Necessity:

This section is necessary to implement the changes to Labor Code section 139.48 in order to establish the means by which an individual may apply for the Return-to-Work Supplement. One of the significant goals in developing these regulations and the Return-to-Work Supplement application process was to keep administrative costs for this benefit to a minimum and to avoid placing any additional burdens on claims administrators in the provision of the benefit. After considering all of the alternatives, the Director determined that a fully electronic application process was the most cost effective and efficient. Maintaining alternative processes to allow application both on-line or by mail and requiring claims administrators to submit copies of the Vouchers to the Department would require the creation of paper files for each application which would add significantly to the administrative costs for the benefit and place an additional burden on claims administrators. While the Director realizes that not all injured workers may have internet access in their homes, the Department is addressing the access issue by setting up access kiosks at the Information and Assistance Offices at all Workers' Compensation Appeals Board District Offices.

Section 17306. Application Contents.

Specific Purpose:

This section spells out the contents of the application which must be filed to apply for the Return-to-Work Supplement.

Necessity:

This section is necessary to implement the changes to Labor Code section 139.48 by establishing the information and documents necessary to apply for the Return-to-Work Supplement. To keep the application process as simple and efficient as possible, only the information absolutely necessary to establish eligibility for the benefit will be required. The applicant's first, middle, and last names and social security number are necessary to confirm the applicant's identity; the case number of the Workers' Compensation case for the industrial injury under which eligibility for the benefit has arisen is necessary for record keeping purposes and to insure that only one Return-to-Work Supplement payment is issued in a particular case; and the applicant's current contact information is necessary to confirm that the benefit payment is sent to the applicant at his or her most current address if the application is approved.

Because the vouchers are issued directly to eligible individuals by the claims administrators administering their Workers' Compensation claims without participation by, or notice to, the Department, it is necessary for applicant to provide a copy of the voucher establishing his or her eligibility for a Return-to-Work Supplement as part of the application. To integrate this element into the electronic application process, the proposed regulations require submission of an electronic copy of the voucher in PDF or TIFF format which the Department has determined to be two of the most common electronic formats. Scanning facilities will be available at the Board access kiosks established pursuant to proposed section 17305 and assistance with scanning issues will be available from the Information and Assistance Officers.

While information on California residency status is not explicitly required by Labor Code section 139.48, the Director has been advised by Department Accounting that a Payee Data Record (STD. 204), which includes California residency status as one of its mandatory fields, may need to be prepared before payment can be issued to some individuals. This information will be collected for that purpose only and has no effect on eligibility for the Return-to-Work Supplement.

Finally, in accord with the application requirements for other similar benefits which are subject to the False Claims Act, Government Code sections 12650 through 12656, the application requires a declaration under penalty of perjury that the information provided is true and correct.

Section 17307. Processing of Applications and Decision on Applications.

Specific Purpose:

This section establishes a time frame of 60 days for reviewing applications and for making a decision on an application. It also provides for the method of notifying applicants of the decision and establishes the decision as a final decision of the Director.

Necessity:

This section is necessary to implement the changes to Labor Code section 139.48 by establishing a time frame for decisions and method of providing notice. A 60-day time frame for processing and issuing decisions on applications for a Return-to-Work Supplement was determined to be necessary based on review of the workflow of other similar processes conducted by the Department. 60 days was determined to be a realistic and sustainable time frame that would provide decisions to applicants without undue delay. Mail notification of the decision was chosen as the default as it is the normal means of communication between the Department and parties involved in Workers' Compensation cases. While email addresses are not always provided to the Department by applicants for Workers' Compensation benefits, the alternative of email communication of the decision on an application for a Return-to-Work Supplement has been included in the proposed regulation to provide applicants with a faster notification process if they elect to provide their email addresses. The proposed regulation designates the decision as a final decision of the Director to establish the applicant's appeal rights to the WCAB.

Section 17308. Supplement Payment.

Specific Purpose:

This section establishes the amount of the Return-to-Work Supplement and sets out the time frame for payment. This section further allows the Director to adjust the amount of the payment based on further studies of wage loss and permanent disability and also based on consideration of the number of anticipated recipients.

Necessity:

This section is necessary to implement the changes to Labor Code section 139.48 by establishing the actual amount of the payment to those individuals who are eligible and by further allowing the Director to adjust the amount of the Return-to-Work Supplement to reflect the most up to date information about wage loss and level of permanent disability benefits and to assure the maximum distribution of the funds authorized by the Legislature to fund this benefit. The proposed regulation sets a conservative initial benefit amount of \$5,000.00, which is at the lower end of the spectrum of uncompensated losses in the Rand study, to make the benefit available to as many eligible injured workers as possible. As specified in Labor Code section 139.48 and the proposed regulation, however, the benefit amount is subject to adjustment based on further studies. The 25-day time frame for payment of the benefit was determined to be necessary based on review of the workflow of other similar payments issued by the Department. In accord with the goal of keeping administrative costs for this benefit to a minimum, it was determined that it would be most efficient and economical to issue the full benefit as a lump sum payment rather than in installments and to restrict assignability. In addition, prohibiting assignment of the benefit before payment protects the individual from having the benefit payment garnished to pay liens that may be owed in his or her Workers' Compensation case and guarantees that the full benefit amount will be paid to the individual to replace lost income in furtherance of the Legislative mandate of Labor Code section 139.48. Finally, the proposed regulation reiterates the Director's authority to set the benefit amount pursuant to Labor Code section 139.48 based on studies which may consider, among other things, the number of individuals applying for the benefit in order to maximize distribution of the funds authorized by the Legislature to fund this benefit.

Section 17309. Appeal to the WCAB.

Specific Purpose:

Labor Code section 139.48 requires that appeals of decisions concerning the Return-to-Work Supplement be handled at the Workers' Compensation Appeals Board trial level. This section establishes a time frame for such appeals and allows the Return-to-Work Supplement Program to correct errors or otherwise modify decisions.

Necessity:

This section is necessary to implement the changes to Labor Code section 139.48 which require that decisions by the Director on Return-to-Work Supplement applications be subject to review by the Workers Compensation Appeals Board at the trial level. As required by Labor Code section 139.48, the appeal process specified by the proposed regulation parallels the procedure prescribed for petitions for reconsideration by the WCAB under Labor Code sections 5900, 5902, 5903 and 5905. The proposed regulation incorporates the 20-day time for filing and grounds for reconsideration specified by Labor Code section 5903, the requirement to specify the basis of the appeal from Labor Code section 5902, and the service requirements of Labor Code section 5905. Because Labor Code section 139.48 specifies that review is at the trial level of the WCAB before a Workers' Compensation Judge, the proposed regulation specifies that the appeal must be filed at the applicable WCAB District Office. The applicant's name and ADJ case number are necessary to identify which Workers' Compensation case the appeal is in relation to. Service of a copy on the appeal on the Return-to-Work Program is necessary to provide notice of the appeal and provide an opportunity for the Return-to-Work Program to correct any errors or otherwise modify the decision if appropriate. The provisions of the proposed regulation authorizing the Return-to-Work Program to amend, modify or rescind decisions, setting timing requirements for further action, and establishing the beginning of the limitations period for appealing an amended or modified decision are identical to the authority and timing requirements for amendment, modification or rescission of an order, decision or award by a Workers' Compensation after filing of a petition for reconsideration under California Code of Regulations, title 8, section 10859. In accord with Labor Code section 139.48, the proposed regulation states that all appeals are subject to review at the trial level of the WCAB upon the same grounds prescribed for petitions for reconsideration.

Section 17310. False Claims.**Specific Purpose:**

This section provides notice to individuals that the application for the Return-to-Work Supplement is a claim for benefits from the state and advises of the consequences of making a false claim.

Necessity:

This section is necessary to implement the changes to Labor Code section 139.48 by providing clear notice that this is a claim for benefits from the State.