

Proposed Changes to the Retraining & Return to Work and Supplement Job Displacement Benefit Regulations

Format Note:

Plain text is current codified language

Proposed changes are shown in underline and ~~strikeout~~

CALIFORNIA CODE OF REGULATIONS, TITLE 8 DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS CHAPTER 4.5. DIVISION OF WORKERS' COMPENSATION SUBCHAPTER 1.5. INJURIES ON OR AFTER JANUARY 1, 1990

ARTICLE 6. RETRAINING AND RETURN TO WORK—DEFINITIONS AND GENERAL PROVISIONS

§ 10116.9. Definitions for Articles 6.5 and 7.5.

The following definitions apply to the provisions of Articles 6.5 and 7.5 governing injuries occurring on or after January 1, 2004:

(a) "Alternative work" means work (1) offered either by the employer who employed the injured worker at the time of injury, or by another employer where the previous employment was seasonal work, (2) that the employee has the ability to perform, (3) that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and (4) that is located within a reasonable commuting distance of the employee's residence at the time of injury.

(b) "Approved training facility" means a training or skills enhancement facility or institution that meets the requirements of section 10133.58.

(c) "Claims administrator" means a self-administered insurer providing security for the payment of compensation required by Divisions 4 and 4.5 of the Labor Code, a self-administered self-insured employer, a self-administered joint powers authority, a self-administered legally uninsured, or a third-party claims administrator for a self-insured employer, insurer, legally uninsured employer, or joint powers authority.

(d) "Employer" means the person or entity that employed the injured employee at the time of injury.

(e) "Essential functions" means job duties considered crucial to the employment position held or desired by the employee. Functions may be considered essential because the position exists to perform the function, the function requires specialized expertise, serious results may occur if the function is not performed, other employees are not available to perform the function or the function occurs at peak periods and the employer cannot reorganize the work flow.

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(f) "Furnished" means five days after the date of deposit in the United States mail or the date of personal service.

(g) "Insurer" has the same meaning as in Labor Code section 3211.

(h) "Modified work" means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

(i) "Nontransferable voucher" means a document provided to an employee that allows the employee to enroll in education-related training or skills enhancement. The document shall include identifying information for the employee and claims administrator.

(j) "Notice" means a required letter or form generated by the claims administrator and directed to the injured employee.

(k) "Offer of modified or alternative work" means an offer to the injured employee of medically appropriate employment with the date-of-injury employer through the use of Form DWC-AD 10133.53, Notice of Offer of Modified or Alternative Work for Injuries Occurring Between 1/1/04 – 12/31/12, Inclusive or Form 10133.35 Notice of Offer of Regular, Modified, or Alternative Work for Injuries Occurring on or after 1/1/13.

(l) "Parties" means the employee, the claims administrator and their designated representatives, if any.

(m) "Permanent and stationary" means the point in time when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment, based on (1) an opinion from a treating physician, AME, or QME; (2) a judicial finding by a Workers' Compensation Administrative Law Judge, the Workers' Compensation Appeals Board, or a court; or (3) a stipulation that is approved by a Workers' Compensation Administrative Law Judge or the Workers' Compensation Appeals Board.

(n) "Permanent partial disability award" means a final award of permanent partial disability determined by a workers' compensation administrative law judge or the appeals board.

(o) "Receipt" means the date of actual receipt by electronic delivery, personal service, or five days after the date of deposit in the United States mail.

(p) "Regular work" means the employee's usual occupation or the position in which the employee was engaged at the time of injury and that offers wages and compensation

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equivalent to those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

(q) "Seasonal work" means employment as a daily hire, a project hire, or an annual season hire.

(r) "Supplemental job displacement benefit" means an educational retraining or skills enhancement allowance for injured employees whose employers are unable to provide work consistent with the requirements of Labor Code sections 4658.5, 4658.6 and 4658.7.

(s) "Vocational & return to work counselor (VRTWC)" means a person or ~~entity~~ capable of assisting a person with a disability with development of a return to work strategy and whose regular duties involve the evaluation, counseling and placement of disabled persons. A VRTWC must have at least an undergraduate degree in any field and three or more years full time experience in conducting vocational evaluations, counseling and placement of disabled adults.

(t) "Work restrictions" means permanent medical limitations on employment activity established by the treating physician, qualified medical examiner or agreed medical examiner.

Authority: Sections 133, 4658.5, 4658.7 and 5307.3, Labor Code.

Reference: Sections 124, 4658.1, 4658.5, 4658.6 and 4658.7, Labor Code; and *Henry v. WCAB* (1998) 68 Cal.App.4th 981.

ARTICLE 7.5. SUPPLEMENTAL JOB DISPLACEMENT BENEFIT.

§ 10133.31. Supplemental Job Displacement Nontransferable Vouchers for Injuries Occurring on or After January 1, 2013

(a) This section shall apply to all injuries occurring on or after January 1, 2013.

(b) If the injury causes partial permanent disability, the employee shall be entitled to a Supplemental Job Displacement Benefit unless the employer makes an offer of regular, modified, or alternative work pursuant to section 10133.34 no later than 60 days after receipt by the claims administrator of the Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36) that indicates the work capacities and activity restrictions that are relevant to regular work, modified work, or alternative work.

(1) Upon receipt of the first Physician's Return-to-Work & Voucher Report (Form DWC-AD 10133.36), the claims administrator shall forward the form to the employer.

(2) If the claims administrator provides the physician with a job description of the employee's regular work, proposed modified work, or proposed alternative work, the

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physician shall complete the bottom portion of the Physician's Return-to-Work & Voucher Report (Form DWC-AD10133.36.)

(c) An employee who has lost no time from work or has returned to the same job for the same employer, is deemed to have been offered and accepted regular work in accordance with the criteria set forth in Labor Code section 4658.7(b).

(d) If no offer for regular, modified, or alternative work is made, pursuant to subdivision (b), the claims administrator shall furnish a "Supplemental Job Displacement Nontransferable Voucher For Injuries Occurring on or After 1/1/13" (Form DWC-AD 10133.32) within 20 calendar days from expiration of time for making an offer of regular, modified, or alternative work pursuant to paragraph (1) of subdivision (b).

(e) The voucher shall be redeemable up to an aggregate of six thousand dollars (\$6,000).

(f) The voucher may be applied to any of the following expenses at the choice of the injured worker:

(1) Payment for education-related training or skill enhancement, or both, at a California public school or with a provider that is approved and included on the list of approved training providers and schools maintained by EDD ~~certified on the state's Eligible Training Provider List at <http://etpl.edd.ca.gov>, <https://www.caljobs.ca.gov/vosnet/>~~ including payment of tuition, fees, books, and other expenses required by the school for retraining and skill enhancement.

(2) Payment for occupational licensing or professional certification fees, related examination fees, and examination preparation course fees.

(3) Payment for services of licensed placement agencies, vocational or return-to-work counseling, and resume preparation, all up to a combined limit of six hundred dollars (\$600).

(4) Purchase of tools required by a training or educational program in which the employee is enrolled.

(5) Purchase of computer equipment including, but not limited to monitors, software, networking devices, input devices (such as keyboard and mouse), peripherals (such as printers), and tablet computers of up to one thousand dollars (\$1,000) payable upon submission of a Request for Purchase of Computer Equipment (page 4 of the DWC-AD Form 10133.32) and submitted with appropriate documentation of either a written invoice payable to a computer retailer or itemized receipts showing the purchase(s) of computer equipment. At the time the voucher is provided, the claims administrator or employer may give the employee the option to obtain computer equipment directly from

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the employer. The employee shall not be entitled to reimbursement for purchase of games or any entertainment media.

(6) Up to five hundred dollars (\$500) as a miscellaneous expense reimbursement or advance, payable upon submission of a Request for Miscellaneous Expenses (page 3 of the DWC-AD Form 10133.32) and without need for itemized documentation or accounting. The claims examiner may provide an email address on Form [DWC-AD 10133.32 "Supplemental Job Displacement Nontransferable Voucher for Injuries Occurring on or After 1/1/13]; if an email address is provided, the employee can submit the request via email or regular mail. The employee shall not be entitled to any other voucher payment for transportation, travel expenses, telephone or internet access, clothing or uniforms or incidental expenses.

(g) The voucher will expire two years after the date it is furnished to the employee, or five years after the date of injury, whichever is later. The employee may not receive payment or reimbursement of any expenses that have not been incurred and submitted with appropriate documentation to the claims administrator prior to the expiration date.

(h) Settlement or commutation of a claim for the supplemental job displacement voucher is not permitted.

(i) An employer shall not be liable for compensation for injuries incurred by the employee while utilizing the voucher.

(j) The claims administrator shall issue the voucher payments to the employee or direct payments to the VRTWC, training providers, and/or computer retailer within 45 calendar days from receipt of the completed voucher, receipts, and documentation. If computer equipment will be provided directly to the employee, the employer must provide the computer equipment along with documentation of the cost of the computer equipment to the employee within 45 days of receipt of the Request for Purchase of Computer Equipment.

(k) Any VRTWC who requests the payment of a fee under Labor Code section 4658.5(c) or 4658.7(e)(3) shall provide an itemization of the services provided to the injured worker and to the claims administrator. The itemization shall include the time spent providing each service to the injured worker specified in the itemization. Only services performed by the VRTWC selected by the injured employee from the list maintained by Administrative Director pursuant to Section 10133.59 shall be compensated from the SJDB Voucher. The VRTWC billing the claims administrator must be the VRTWC or the VRTWC's employer.

Note: Authority cited: Sections 133, 4658.1, 4658.7 and 5307.3, Labor Code.
Reference: Sections 4658.6 and 4658.7, Labor Code.

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§ 10133.32 - Supplemental Job Displacement Nontransferable Voucher For Injuries Occurring on or After 1/1/13 (Form DWC-AD 10133.32)

Supplemental Job Displacement Nontransferable Voucher For Injuries Occurring on or After 1/1/13.

Note: Authority cited: Sections 133, 4658.1, 4658.7 and 5307.3, Labor Code.
Reference: Sections 4658.6 and 4658.7, Labor Code.

§ 10133.58. State Approved or Accredited Schools.

- (a) This section shall apply to all injuries occurring on or after January 1, 2004.
- (b) For injuries between January 1, 2004 and December 31, 2012, inclusive, private providers of education-related retraining or skill enhancement selected to provide training as part of a supplemental job displacement benefit shall be:
 - (1) approved by the Bureau for Private Postsecondary and Education (www.bppe.ca.gov), or a California state agency that has an agreement with the Bureau for the regulation and oversight of non-degree-granting private postsecondary institutions; or
 - (2) accredited by one of the Regional Associations of Schools and Colleges authorized by the United States Department of Education; or
 - (3) by a California State agency that has an agreement with the United States Department of Education or Regional Associations of School and Colleges for the regulation and oversight of non-degree granting private post secondary providers; or
 - (4) certified by the Federal Aviation Administration.
- (c) For injuries on or after January 1, 2013, ~~private providers of education-related retraining or skill enhancement selected to provide training as part of a supplement job displacement benefit shall be certified and on the state's Eligible Training Provider List at <http://etpl.edd.ca.gov/wiaetplind.htm>~~ no post-secondary educational program that is exempt from regulation by the Bureau of Private Post Graduate Education pursuant to Education Code section 94874 (f) shall be eligible to provide training as defined in Labor Code section 4658.7(e)(1). Information and a list of all eligible training providers in CA can be found on the CalJOBS website at <https://www.caljobs.ca.gov/vosnet/>.

Note: Authority cited: Sections 133, 4658.5, 4658.7 and 5307.3, Labor Code.
Reference: Sections 4658.5 and 4658.7, Labor Code.

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§10133.59. The Administrative Director's List of Vocational Return to Work Counselors.

- (a) This section shall only apply to injuries occurring on or after January 1, 2004.
- (b) The Administrative Director shall maintain a list of Vocational & Return to Work Counselors (VRTWC) who perform the work of assisting injured employees. A VRTWC who meets the qualifications specified in Section ~~40133.50(a)(15)~~ 10116.9(s) must apply to the Administrative Director at any point during the year to be included on the list, ~~throughout the year~~. The applications to become a VRTWC shall be signed under penalty of perjury. The list shall be reviewed and revised on a yearly basis updated by the Administrative Director or by a person designated by the Administrative Director on a monthly basis, and shall be made available on the website www.dir.ca.gov or upon request. All current VRTWC shall file an updated application for appointment as a VRTWC within 45 days of the adoption of these regulations by the Administrative Director. A VRTWC shall inform the Administrative Director within 20 days of any changes to the information in their application to become a VRTWC, by filing an updated application to become a VRTWC.
- (c) The injured employee may select a Vocational & Return to Work Counselor whenever the assistance of a Vocational & Return to Work Counselor is needed to facilitate an employee's vocational training or return to work in connection with the Supplemental Job Displacement Benefit set forth in this Article. Only persons identified by the Administrative Director on the VRTWC list maintained pursuant to this section shall be entitled to receive payment from the Supplemental Job Displacement Benefits.
- (d) The injured employee shall be responsible for providing the VRTWC with any necessary medical reports. However, a claims administrator shall provide a VRTWC with any medical reports, including permanent and stationary medical reports, upon an employee's written request and a signed release waiver.
- (e) The VRTWC shall communicate with the injured employee regarding the evaluation.
- (f) No VRTWC shall have a financial interest, as defined in Labor Code section 139.32(a)(1), in any entity that is capable of receiving the proceeds of a supplemental job displacement voucher as defined in Labor Code sections 4658.5, 4658.7 (e)(1) and (e)(2).

Note: Authority cited: Sections 133, 4658.5, 4658.7 and 5307.3, Labor Code.

Reference: Section 4658.5 and 4658.7, Labor Code.

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§10133.59.1. Removal from the Administrative Director's List of Vocational Return to Work Counselors

(a) The Administrative Director shall remove a VRTWC from the list upon a showing of proof that the VRTWC has either:

(1) Met the criteria for being suspended from the CA Workers' Compensation system pursuant to Labor Code section 139.21(a)(1)(A) and section 139.21(a)(4); or

(2) Made a material misrepresentation in the application to become a VRTWC; or

(3) Failed to disclose a financial interest as defined in Labor Code section 139.32; or

(4) Has failed to follow the rules and/or regulations promulgated by the Administrative Director or the Workers' Compensation Appeals Board.

(b) The Administrative Director shall issue a notice of removal to the VRTWC who has met at least one of the criteria above. The notice shall include:

(1) The statement that the VRTWC has been removed from the VRTWC list;

(2) The basis for removal;

(3) A statement that the removal is effective 30 days after mailing of the notice.

(4) A statement that the VRTWC has the right to request a hearing within 20 days from the date the notice is mailed;

(5) A statement that if no hearing is requested, the VRTWC shall be deemed to have waived any appeal or request for hearing.

(6) A description of the method for requesting the hearing, including instructions on how the request should be filed and served.

(7) The notice shall be served by registered or certified mail.

(c) A VRTWC who has been mailed a notice of removal from the list may request a hearing by filing a written request for hearing with the Administrative Director within 20 days from the date the notice is mailed. If a written request for hearing is not filed with the Administrative Director within 20 days of the mailing of the notice of removal, the VRTWC shall be deemed to have waived any appeal or request for hearing.

(d) Upon receipt by the Administrative Director of the VRTWC's timely request for hearing, the Administrative Director shall issue a notice of hearing setting forth the date, time, and place of a hearing to determine whether the VRTWC shall be removed from the VRTWC list. The date of the hearing shall be no later than 30 days after the receipt

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of the request for hearing, which shall be stated on the notice of hearing. The notice shall be served on the VRTWC by registered or certified mail.

(e) The Administrative Director shall designate a hearing officer to preside over the hearing, which need not be conducted according to the technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make the admission of the evidence improper over objection in civil actions. Oral testimony shall be taken only on oath or affirmation.

(f) The designated hearing officer shall issue a written recommended Determination and Order re: Removal, including a statement of the basis for the Determination, within ten (10) days of the date the case was submitted for decision, which shall be served on the Administrative Director. The time requirement of this subdivision is directory and not jurisdictional.

(g) The Administrative Director shall have ten (10) days from the date of receipt to adopt or modify the recommended Determination and Order re: Removal issued by the designated hearing officer. In the event the recommended Determination and Order of the designated hearing officer is modified, the Administrative Director shall include a statement of the basis for the Determination and Order re: Removal signed and served by the Administrative Director, or his or her designee. If the Administrative Director does not act within ten (10) days from the date of receipt of the recommended Determination and Order re: Removal, then the recommended Determination and Order re: Removal of the hearing officer shall become the Determination and Order re: Removal on the eleventh (11th) day.

(h) The Determination and Order re: Removal shall be served on the VRTWC by registered or certified mail by the Administrative Director, and shall become final on the day it is mailed.

(i) All appeals from the Determination and Order re: Removal shall be made to the Superior Court of California by writ as provided in the Code of Civil Procedure.

Authority cited: Sections 133, 4658.5, 4658.7 and 5307.3, Labor Code.

Reference: Section 4658.5, 4658.7 Labor Code.