STATE OF CALIFORNIA

**DEPARTMENT OF INDUSTRIAL RELATIONS**

**Division of Workers’ Compensation**

### NOTICE OF PROPOSED RULEMAKING

# **Subject Matter of Regulations: Workers’ Compensation – Medical-Legal Fee Schedule**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS**

**Sections 9793, 9794 & 9795**

**NOTICE IS HEREBY GIVEN** that the Administrative Director of the Division of Workers’ Compensation, pursuant to the authority vested in him by Labor Code sections 59, 133, 4603.5, 5307.3 and 5307.6 proposes to amend sections 9793, 9794 and 9795, in Article 5.3 of Division 1, Chapter 4.5, Subchapter 1, of title 8, California Code of Regulations, relating to the Medical-Legal Fee Schedule.

## PROPOSED REGULATORY ACTION

The Division of Workers’ Compensation proposes to modify existing regulations, related to the Medical-Legal Fee Schedule by amending Article 5.3 of Chapter 4.5, Subchapter 1, Division 1, of Title 8, California Code of Regulations. The following regulations are proposed for amendment:

Section 9793 Definitions

 [amend]

Section 9794 Reimbursement of Medical-Legal Expenses

 [amend]

Section 9795 Reasonable Level of Fees for Medical-Legal Expenses, Follow-up, Supplemental and Comprehensive Medical-Legal Evaluations and Medical-Legal Testimony

[amend]

## AN IMPORTANT PROCEDURAL NOTE ABOUT THIS RULEMAKING:

The Medical-Legal Fee Schedule "establish(es) or fix(es) rates, prices, or tariffs" within the meaning of Government Code section 11340.9(g) and is therefore not subject to Chapter 3.5 of the Administrative Procedure Act (commencing at Government Code section 11340) relating to administrative regulations and rulemaking.

This rulemaking proceeding to amend the Medical-Legal Fee Schedule is being conducted under the Administrative Director’s rulemaking power under Labor Code sections 59, 133, 4603.5, 5307.3 and 5307.6. This regulatory proceeding is subject to the procedural requirements of Labor Code section 5307.4.

This Notice and the accompanying Initial Statement of Reasons are being prepared to comply with the procedural requirements of Labor Code section 5307.4 and for the convenience of the regulated public to assist the regulated public in analyzing and commenting on this non-APA rulemaking proceeding.

## TIME AND PLACE OF VIRTUAL PUBLIC HEARING

In light of the COVID-19 public health emergency and in compliance with California’s four-phase reopening plan, a public hearing via the ZOOM meeting platform has been scheduled in lieu of an in-person public hearing to permit all interested persons the opportunity to present oral statements or arguments with respect to the proposed Medical-Legal Fee Schedule on the following date:

**Date: December 14, 2020**

**Time: 10:00 a.m. to 5:00 p.m., or until conclusion of business**

[**Access Information**](https://dir-ca-gov.zoom.us/j/92474087436) **-** Join from PC, Mac, Linux, iOS or Android: https://dir-ca-gov.zoom.us/j/92474087436

**Or Telephone**;

Dial:

+1 253 215 8782 +1 301 715 8592 +1 312 626 6799 +1 346 248 7799

+1 669 900 6833 +1 929 205 6099

USA 8664345269 (US Toll Free)

 Conference code: 956474

[Find local AT&T Numbers:](https://www.teleconference.att.com/servlet/glbAccess?process=1&accessNumber=2532158782&accessCode=956474)

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Alternate formats, assistive listening systems, sign language interpreters, or other types of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the Statewide Disability Accommodation Coordinator, Maureen Gray, 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 ZOOM format public 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 amendment to modify existing regulations, related to the Medical-Legal Fee Schedule to the Department of Industrial Relations, Division of Workers’ Compensation. The written comment period closes on December 15, 2020.The Division of Workers’ Compensation will only consider comments received at the Department of Industrial Relations, Division of Workers’ Compensation by that date. Again, equal weight will be accorded to oral comments presented at the ZOOM format public hearing and written materials.

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

Maureen Gray

Regulations Coordinator

Department of Industrial Relations

P.O. Box 420603

San Francisco, CA 94142

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.

Ms. Gray must receive all written comments no later than 11:59 p.m. on December 15, 2020.

## CONTACT PERSON

Inquiries concerning this action, such as requests to be added to the mailing list or requests for copies of the text of the proposed regulations may be directed to the contact person:

Maureen Gray

Regulations Coordinator

Department of Industrial Relations

Division of Workers’ Compensation

P.O. Box 420603

San Francisco, CA 94142

E-mail: mgray@dir.ca.gov

Telephone: (510) 286-7100

## AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in him by Labor Code sections 59, 133, 4603.5, 5307.3, and 5307.6. In addition, this rulemaking is authorized by the provisions of Government Code section 11340.9(g).

Reference is to Labor Code sections 4620, 4621, 4622, 4625, 4626, 4627, 4628, 5307.3, 5307.4 and 5307.6.

## INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of his or her employment. The adjudication of workers' compensation claims requires the use of written reports of Qualified Medical Evaluators (QMEs). Under existing law, payment for medical-legal expenses is governed by Labor Code sections 4620-4628. Labor Code section 5307.6 requires the Administrative Director to adopt and revise a Medical-Legal Fee Schedule for medical-legal expenses. The fees for preparing the written reports and the rules for determining the fees have been established by Title 8, California Code of Regulations, sections 9793, 9794 and 9795.

The implementation of a predominantly fixed fee for all procedure billing codes is anticipated to reduce frictional costs. Moving to a flat-fee-based schedule and removing complexity factors is contemplated to reduce the incidence of disputes over billing. The proposed regulations were finalized after the Division of Workers’ Compensation posted two previous proposals for new medical-legal fee schedule regulations on the DWC forum. The DWC reviewed the comments to the two previous postings, held a public meeting in October of 2018 to discuss the parameters of a new fee schedule, and solicited proposals for the structure of a new fee schedule from all involved and interested parties.

The fee schedule was formulated after numerous stakeholder meetings where carriers, employers, physicians, attorneys for injured workers, attorneys for employers, and medical management companies were all represented. These meetings were convened to discuss the various proposals proffered by DWC and industry stakeholders for a new medical-legal fee schedule. Many but not all of the stakeholders who took part in the meetings had provided a draft of their proposal for a new fee schedule to the DWC.

The stakeholder meetings, which took place over the course of approximately three months, involved extensive discussion over every facet of the proposed regulations. Consensus was reached among the competing factions on almost every aspect of the proposed new fee schedule. In addition, after the conclusion of the stakeholder meetings, the DWC posted the proposed regulations on its forum for a 15-day comment period. At the close of the comment period, the DWC reviewed and considered the industry feedback and made revisions to the proposal accordingly.

### Objective and Anticipated Benefits of the Proposed Amendments to the Regulations:

The objective of the rulemaking action is to amend the Medical-Legal Fee Schedule to increase the relative value of payments made under the fee schedule, implement a new system based on flat fees for services provided, and to eliminate the use of complexity factors and the majority of hourly billing under the Medical-Legal Fee Schedule. This is expected to lead to a standardized method for calculating proper payment under the Medical-Legal Fee Schedule, increase the fees paid to physicians under the fee schedule, and to eliminate improper billing.

### Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Administrative Director has determined that these proposed amendments to the regulations are not inconsistent or incompatible with existing regulations.

The Administrative Director now proposes to amend the Medical-Legal Fee Schedule for physician and services. The proposed regulations implement, interpret, and make specific Labor Code sections 4620, 4621, 4622, 4625, 4626, 4627, 4628 and 5307.6 as follows:

**Section 9793: Definitions.**

This section sets forth and defines the terms used in the regulations. The purpose of the definitions is to ensure that the meaning of the terms is clearly understood by the regulated community. The definitions of several terms in the regulation are changed to comport with the changes in the calculation of the reimbursement levels for evaluations in section 9795. The definitions are clarified and amended to reflect the recent renumbering of the Workers’ Compensation Appeals Board’s (WCAB) regulations cited in this regulation. A new subdivision is added to define the meaning of “Record Review” for purposes of the new fee schedule.

Subdivision (c) sets forth the parameters of a Comprehensive Medical-Legal Evaluation. Language is added to make clear that it includes an actual examination. The subdivision is also amended to take into account renumbering of WCAB regulations. Subdivision (g) is amended to take into account renumbering of WCAB regulations and to change the time period for a Follow-Up Medical-Legal Evaluation. Subdivision (*l*) is amended to add language to clarify the documents that should be provided to the Administrative Director upon request. Subdivision (m) is amended to take into account renumbering of the WCAB regulations cited therein. A new Subdivision (n) is added is added to define the meaning of “Record Review” for purposes of the new fee schedule.

**Section 9794: Reimbursement of Medical-Legal Expenses.**

This section sets forth the billing and reimbursement procedures for medical-legal expenses authorized under Labor Code section 4620, et seq.

Subdivision (a)(1) sets forth the parameters for proper billing and payment related to diagnostic tests and services. Language is added to make clear that only diagnostic services and tests can be billed under the Official Medical Fee Schedule in connection with a medical-legal report or evaluation. Subdivision (h) of this section is amended to reflect the change in numbering of the WCAB regulation cited therein. There is also a non-substantive amendment to change a duplicate subdivision (i) to a new subdivision (k).

**Section 9795: Reasonable Level of Fees for Medical-Legal Expenses, Follow-up, Supplemental and Comprehensive Medical-Legal Evaluations, and Medical-Legal Testimony.**

This section sets forth the parameters for different types of medical-legal evaluations, and the fees to be allowed for the evaluations. Section 9795 also provides fee schedule codes that are used to describe and pay for medical-legal evaluations and testimony.

*ML-100 through ML-106 –* The 100 series designation for these billing codes has been deleted. The designation has been changed to a 200 series for purposes of clarification between the old and new fee schedules. In addition, the use of complexity factors has been eliminated from the schedule.

ML-200is added to replace ML 100. It provides a set value and other parameters for billing a missed appointment fee.

ML-201is added to implement the new terms of a Comprehensive Medical-Legal Evaluation. The reimbursement is now in the form of a fixed fee for the evaluation, coupled with a per page fee for review of records in excess of 200 pages.

ML-202is added to implement the new terms of a Follow-Up Medical-Legal Evaluation. The reimbursement is now in the form of a fixed fee for the evaluation, coupled with a per page fee for review of records in excess of 200 pages. The code applies to evaluations taking place within 18 months of a prior Comprehensive Medical-Legal Evaluation.

ML-203is added to implement the new terms of the fees for Supplemental Medical-Legal Evaluations. The reimbursement is now in the form of a fixed fee for the evaluation, coupled with a per page fee for review of records in excess of 50 pages.

ML-204 is added to implement the new terms of the fees for Medical-Legal Testimony. The multiplier for calculating fees for medical-legal testimony is increased. The minimum paid for a scheduled deposition is increased to two hours.

ML-205 is added to implement the new terms of the fees for review of Sub Rosa Recordings. The fee is calculated on an hourly basis.

ML-206 is added for communication purposes only. No fees or compensation are provided for under this code. The billing code is added to define the parameters of the new “Unreimbursed Supplemental Medical-Legal Evaluation”. The code defines the parameters for a supplemental medical-legal report that does not meet the requirements for billing under ML-203.

ML-220 is added for useto identify charges for review of records in excess of pages included in medical-legal numerical billing codes, ML-200, ML-201, ML-202 and ML-203.

*Section 9795(d):* Subsection (d) of the regulation is amended to account for the changes and renumbering of the billing codes. In addition, new modifiers are added to increase the remuneration under certain billing codes to account for an evaluation dealing with psychiatry or psychology, toxicology, or oncology as the primary focus of the evaluation.

## DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Administrative Director has made the following initial determinations:

* Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.
1. Adoption of these regulations will not: (1) create or eliminate jobs within the State of California, (2) create new businesses or eliminate existing businesses within the State of California, or (3) affect the expansion of businesses currently doing business in California.
2. Effect on Housing Costs: None.
3. The Division of Workers’ Compensation is unaware of cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Claims administrators may need to modify medical-legal bill payment systems to accommodate the changes in the schedule that imposes flat fees and eliminates complexity factors and most of the hourly billing provisions under the medical-legal fee schedule. Evaluators should experience an increase in income based upon the 25% increase in the relative value for calculating payments under the fee schedule.

## EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed regulations will affect small business, primarily providers of medical-legal services. Medical providers who act as evaluators should experience an increase in their income as a result of the increases in the relative value payments under the new medical-legal fee schedule. Employers and insurance carriers will experience an increase in the amounts paid for medical-legal expenses. However, this increase in costs should be manageable with the adoption of a medical-legal fee schedule that will provide certainty as to amounts payable and thereby reduce frictional costs.

## FISCAL IMPACTS

* Costs or savings to state agencies: The state will experience the same costs and savings as other employers.
* Costs/savings in federal funding to the State: None.
* Local Mandate: None. The proposed amendments to the regulations will not impose any new mandated programs or increased service levels on any local agency or school district. The potential costs imposed on all public agency employers by these proposed amendments, although not a benefit level increase, are not a new State mandate because the regulations apply to all employers, both public and private, and not uniquely to local governments. The California Supreme Court has determined that an increase in workers’ compensation benefit levels does not constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.
* Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None.
* Other nondiscretionary costs/savings imposed upon local agencies: None. To the extent that local agencies and school districts are self-insured employers who must reimburse physicians or other providers for medical-legal services for industrially injured employees, they will be subject to the same cost impacts as all other employers in the state. These impacts are discussed in more detail elsewhere in this Notice.

# **CONSIDERATION OF ALTERNATIVES**

The Administrative Director invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

**AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE / INTERNET ACCESS**

An Initial Statement of Reasons and the text of the proposed regulations 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. However, documents subject to copyright may be inspected but not copied.

As of the date of this notice, the rulemaking file consists of the notice, the initial statement of reasons, the proposed text of the regulations, and the documents incorporated by reference.

In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the [Division’s website](http://www.dir.ca.gov/dwc/rulemaking/dwc_rulemaking_proposed.html) at:

http://www.dir.ca.gov/dwc/rulemaking/dwc\_rulemaking\_proposed.html

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, 18th Floor, Oakland, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday, unless the state office is closed for a state holiday. 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

## CONTACT PERSON

Inquiries concerning this proposed action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed amendments to the regulation, 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

Post Office Box 420603

San Francisco, CA 94142

E-mail: mgray@dir.ca.gov

The telephone number of the contact person is (510) 286-7100.

## BACKUP CONTACT PERSON

In the event the contact person is unavailable, inquiries should be directed to the following backup contact person:

Winslow F. West, Industrial Relations Counsel

Department of Industrial Relations

Division of Workers’ Compensation

Post Office Box 420603

San Francisco, CA 94142

E-mail: wwest@dir.ca.gov

The telephone number of the backup contact persons is (510) 286-7100.

## FORMAT OF REGULATORY TEXT

Text proposed to be added is displayed in underscore type.

Text proposed to be deleted is displayed in strikeout type.

## AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

## AVAILABILITY OF THE 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 [website](http://www.dir.ca.gov/dwc/rulemaking/dwc_rulemaking_proposed.html):

http://www.dir.ca.gov/dwc/rulemaking/dwc\_rulemaking\_proposed.html

## AUTOMATIC MAILING

A copy of this Notice will automatically be sent to those interested persons on the Administrative Director’s mailing list.

If adopted, the regulations as adopted will appear in Article 5.3 of Division 1, Chapter 4.5, Subchapter 1, title 8, California Code of Regulations commencing with section 9793.