

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

**INITIAL STATEMENT OF REASONS**

**Subject Matter of Regulations: Utilization Review Enforcement**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS  
SECTIONS 9792.11 – 9792.15**

Section 9792.11	Investigation Procedures: Labor Code § 4610 Utilization Review Violations
Section 9792.12	Penalty Schedule for Labor Code § 4610 Utilization Review Violations
Section 9792.13	Assessment of Administrative Penalties – Penalty Adjustment Factors
Section 9792.14	Liability for Penalty Assessments
Section 9792.15	Administrative Penalties Pursuant to Labor Code § 4610 – Order to Show Cause, Notice of Hearing, Determination and Order and Review Procedure

**BACKGROUND TO REGULATORY PROCEEDING**

In the fall of 2003, SB 228 (Alarcon) was enacted as part of workers' compensation reform legislation intended by the Legislature and the Governor to reduce unnecessary medical and litigation expenses, among other things, in workers' compensation cases in California. [Stats. 2003, ch. 639] The bill added Labor Code section 4610, as one of its provisions. Section 4610 requires every employer to have and use a utilization review process which conforms to the requirements of section 4610. In addition, the section sets out specified timelines and conditions to be met whenever a request for authorization of medical treatment in a workers' compensation claim will be delayed, modified or denied.

Regulations implementing the provisions of Labor Code sections 4610(a) through 4610(h) became final and effective on September 22, 2005. [OAL Regulatory Action Number 05-0810-01c] These regulations are set out in sections 9792.6 through 9792.10 of Title 8 of the California Code of Regulations.

This rulemaking action proposes regulations to implement the provisions of Labor Code section 4610(i). Section 4610(i) authorizes the Administrative Director of the Division of Workers' Compensation ("DWC") in the Department of Industrial Relations to assess administrative penalties against an employer, insurer or other entity subject to Labor Code section 4610, for each failure to meet any of the timeframes set out in section 4610 or failure to comply with any other requirement in that section.

Section 4610 of the Labor Code sets out the standards for the utilization review process for requested medical treatment in workers' compensation cases. The section does not require every request or recommendation for treatment to be reviewed in the utilization review process. Where, however the employer, insurer or other entity subject to Labor Code section 4610 is inclined to *delay, modify or deny* the requested treatment, the employer or employer's agent (insurer, third party administrator or utilization review vendor) is required to use a decision-making process that conforms to the provisions of section 4610. That process involves a relatively quick, informal 'dispute' resolution process whereby: a) treatment decisions are guided by evidenced-based medical guidelines (Lab. Code sections 4610(c), 4610(f).); b) decisions to delay, modify or deny care must be made only by competent medical personnel within the scope of their license and practice (Lab. Code section 4610(e); 8 Cal. Code Regs. section 9792.7(b)(2)); c) specific information explaining the decision including the medical criteria or guidelines used and the clinical reasons regarding medical necessity used must be provided in writing (8 Cal. Code Regs. section 9792.9(i)); d) the requesting (treating) physician must be provided the name and phone number of the medical reviewer who made the decision and may contact that medical reviewer to attempt to informally resolve the 'dispute' (delay, modification or denial of treatment authorization) (8 Cal Code Regs. section 9792.9(k)); and e) any remaining 'disputed' matter pertaining to the authorization of such medical treatment must be resolved through the procedures set out in Labor Code section 4062 for obtaining medical/legal reports and a hearing before a workers' compensation judge. (Lab. Code section 4610(g)(3); 8 Cal. Code Regs. sections 9792.10(a); 9792.10(b).)

Prior to the adoption of Labor Code section 4610, workers' compensation insurers and self insured employers that did any form of utilization review to manage medical treatment authorization and costs were required by regulation to have a utilization review process similar to the requirements of Labor Code section 4610 before delaying, modifying or denying requested treatment. (See section 9792.6 of Title 8 of the California Code of Regulations, operative 7/20/95 [Register 95., No.29] and operative 1/1/98 [Register 98, No. 46].)

In summary, the proposed regulations in this rulemaking: 1) describe the investigation procedures to be used by the Administrative Director in determining whether Labor Code section 4610 has been violated (section 9792.11); 2) set out a penalty schedule for violations (section 9792.12); 3) identify factors the Administrative Director will consider in adjusting the proposed penalty amounts for violations (section 9792.13); 4) address liability for penalties among principals, agents and successors of an entity found in violation of Labor Code section 4610 (section 9792.14); and 5) explain the charging, appeal and hearing process to be used after violations are found (section 9792.15).

## **NECESSITY**

Labor Code section 4610(i) authorizes the Administrative Director to assess penalties for violations found of the utilization review requirements of section 4610. It also requires that an employer found in violation of section 4610 be given appropriate notice and an

opportunity be heard prior to the issuance of an order assessing administrative penalties. Accordingly, these regulations clarify and make specific the criteria to be used by the Administrative Director for conducting such investigations, determining whether violations have occurred, assessing penalties and for providing notice and a fair hearing process.

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

The Division relies on the same documents cited during the rulemaking for sections 9792.6 through 9792.10 of Title 8 of the California Code of Regulations:

- (1) The Commission on Health and Safety and Workers' Compensation, Workers' Compensation Medical Care in California: Costs, Fact sheet Number 2, August 2003: [http://www.dir.ca.gov/chswc/WC\\_factSheets/WorkersCompFSCost.pdf](http://www.dir.ca.gov/chswc/WC_factSheets/WorkersCompFSCost.pdf)); and
- (2) Outline: Estimating the Range of Savings from Introduction of Guidelines Including ACOEM (Revised), Frank Neuhauser, UC DATA/Survey Research Center, University of California, Berkeley, October 20, 2003: <http://www.dir.ca.gov/CHSWC/allreports.html>).

## **SPECIFIC TECHNOLOGIES OR EQUIPMENT REQUIRED (if applicable)**

No specific technologies or equipment are required by these proposed regulations. These regulations require compliance with Labor Code section 4610 and the Utilization Review Standard regulations. The Utilization Review Standard regulations only require that claims administrators, who receive requests for treatment authorization or communicate decisions on such requests, do the following: 1) maintain telephone access during business hours (between 9 AM and 5:30 PM Pacific Time) on normal business days; 2) have a facsimile number available for physicians to request authorization; and 3) maintain a process to receive communications from health care providers requesting authorization after normal business hours. A voicemail system or facsimile number satisfies the requirement to have a process. (8 Cal. Code Regs. section 9792.9(h)) All of these technologies are among the general technologies already used by business entities that perform workers' compensation claims adjusting or utilization review in their normal course of business.

## **FACTS ON WHICH THE AGENCY RELIES IN SUPPORT OF ITS INITIAL DETERMINATION THAT THE REGULATIONS WILL NOT HAVE A SIGNIFICANT ADVERSE IMPACT ON BUSINESS**

The Administrative Director has determined that these proposed regulations will not have a significant adverse impact on business because the regulations allow penalties to be assessed only where the Administrative Director determines that a business entity is

operating in violation of the existing California laws and regulations that govern the utilization review process for medical treatment in workers' compensation claims. All California employers are required to have workers' compensation insurance, or to be lawfully self insured or lawfully uninsured (Lab. Code section 3700). All employers in California are also required to have a utilization review process in place (Lab. Code section 4610(a)) and to meet specified timelines, use competent medical personnel to assess the request and to respond to the request in specified ways when a request for authorization for treatment will be delayed, modified or denied in a workers' compensation claim. More than two thirds of all workers' compensation claims are handled by an insurance adjuster or third party adjuster. These entities will be the businesses that either perform or contract with another vendor for the utilization review process in workers' compensation cases. Self insured employers may adjust and perform utilization review in their employees' workers' compensation claims by use of in-house personnel employees although most use other contract claims administrators. As long as the utilization review process used by an employer complies with the existing law in Labor Code section 4610 and sections 9792.6 through 9792.10 of Title 8 of the California Code of Regulations, there will be no cost or adverse impact on business by the regulations proposed in this rulemaking. At the time section 4610 was enacted, the Legislature believed that the utilization review process would reduce unnecessary medical expenses for employers.

#### **SECTION 9792.11:**

##### Specific Purpose of This Section:

Section 9792.11 describes the investigation process to be used by the Administrative Director, or his or her delegees, to investigate potential and suspected violations of Labor Code section 4610. The purpose of the section is to implement, interpret and make specific the manner in which the Division's employees will conduct such an investigation, the types of businesses, records and places the Division may review during the investigation, and how utilization review investigations may relate to audit investigations conducted by the Division pursuant to Labor Code sections 129 and 129.5.

##### Necessity:

This section is necessary to explain to the workers' compensation community how investigations of suspected utilization review procedure violations will be initiated, conducted and coordinated by the Division. Labor Code section 4610(i) provides that "If the administrative director determines that the employer, insurer, or other entity subject to this section has failed to meet any of the timeframes in this section, or has failed to meet any other requirement of this section, the administrative director may assess..." Therefore, it is necessary to set forth how the Administrative Director will determine if the employer, insurer or other entity has failed to comply with Labor Code section 4610. In order to make that determination, it is necessary to require the claims administrator to provide the Administrator Director with the records pertaining to the utilization review process under investigation and to provide the identifying information regarding the

employer, if requested. It is necessary to set forth the timeframes and procedures to ensure the claims administrators' due process rights. Subsection (f) is necessary to make it clear that any entity's liability for administrative penalties under Labor Code section 4610 is limited to investigations and conduct occurring on or after August 1, 2006.

Consideration of Alternatives:

At this time, the Administrative Director has not identified any more effective nor any equally effective yet less burdensome alternative manner to conduct investigations of potential utilization review violations.

**SECTION 9792.12**

Specific Purpose of This Section:

Section 9792.12 lists the types of violations of Labor Code section 4610 identified by the Administrative Director as warranting an administrative penalty and the maximum amount of penalty for such a violation. The purpose of this section is to describe and make specific the types of violations that will carry an administrative penalty allowed under Labor Code section 4610(i). The section separates the more serious violations ("single instance penalties) from the lesser violations ("multiple instance penalties").

Necessity:

This section explains to the workers' compensation community the amount of the potential penalty for violating various parts of the requirements regarding utilization review stated in Labor Code section 4610 and sections 9792.6 through 9792.10 of Title 8 of the California Code of Regulations. The Administrative Director's intent in establishing this schedule of penalties is to provide a clear and effective disincentive to practices under which injured workers are improperly delayed or denied the medical treatment that has been recommended by their treating physicians.

Also, the proposed regulation is intended to ensure that amounts imposed as penalties be in proportion to the nature, severity, frequency and duration of the particular types of violations for which they are imposed.

Consideration of Alternatives:

At this time, the Administrative Director has not identified any more effective yet less burdensome alternative to carry out the mandate for administrative penalties under Labor Code section 4610(i).

**SECTION 9792.13**

Specific Purpose of this Section:

Section 9792.13 describes the factors to be considered when the Administrative Director determines it is appropriate to adjust the recommended administrative penalty for violations of Labor Code section 4610. As provided in Labor Code section 4610(i), this proposed regulation also provides that both an administrative penalty pursuant to section 4610 and a civil penalty pursuant to Labor Code section 129.5 may be assessed based on the same violation(s) of Labor Code section 4610. Finally the section provides that where an injured worker's or a requesting provider's refusal to cooperate prevents a claims administrator from determining whether there is a legal obligation to act, the Administrative Director may forego any administrative penalty for the related violation.

Necessity:

This section is necessary to specify the equitable factors to be considered by the Administrative Director in adjusting the scheduled penalties as he or she may deem appropriate in particular cases. Subdivision (c) is necessary to explain how the penalties will be calculated for the multiple instance penalties.

Consideration of Alternatives:

No more effective alternative to this section, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

**SECTION 9792.14**

Specific Purpose of this Section:

Section 9792.14 sets out the circumstances in which penalties may be assessed against more than one business entity responsible for a worker's compensation file during the utilization review process. It also addresses the liability of agents and successors.

Necessity:

Because there are often more than one claims administrator that has been responsible for a claims file and because claims administrators may employ a separate business to administrate the utilization review process, this section is necessary to set forth who may be liable for penalties for violations of the statutes and regulations governing the utilization review process in workers' compensation claims.

Consideration of Alternatives:

No more effective alternative to this section, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

**SECTION 9792.15**

Specific Purpose of this Section:

This section describes the Order to Show Cause Re: Assessment of Administrative Penalties and Notice of Hearing to be issued by the Administrative Director once violations of section 4610 are found. It explains the contents of the Order and Notice, the time and manner for responding to the Order and for requesting a hearing, and the procedures to be used for designating a hearing officer, holding pre-hearing conferences and discovery, the rules of procedure and evidence to be used at the hearing, the time for issuing a determination of violations and penalty amounts based on the hearing record, when a determination becomes final and the manner and time for appealing from a final determination and penalty assessment issued by the Administrative Director.

Necessity:

This section explains how penalty assessments will be issued, how the affected entity may request a hearing, how the hearing officer will be appointed, the powers and authority of the hearing officer, how and when a Final Determination after hearing will be made, when the payment of final penalties is due and, in the alternative, how to appeal the Final Determination.

This section is necessary to ensure that the standards of due process are observed by the Administrative Director in performing the duties mandated by Labor Code section 4610.

Subdivisions (a) through (g) are necessary to ensure, upon the Administrative Director's finding that an entity has violated Labor Code section 4610, that entity shall be given notice of the facts upon which the Order to Show Cause is based, the amount of administrative penalties assessed, and the right to admit or deny the allegations.

Subdivision (h) is necessary to specify rights and obligations regarding a supplemental complaint or an amended Order.

Subdivision (i) is necessary to provide for an informal pre-hearing conference, at the Administrative Director's discretion, to pursue the possibility of resolving a contested penalty matter without the need for an evidentiary hearing.

Subdivisions (j) through (q) are necessary to specify the procedures to be observed to ensure due process regarding evidentiary administrative hearings regarding penalties under Labor Code section 4610.

Subdivisions (r) through (u) are necessary to specify the procedures to be observed to ensure due process regarding the Administrative Director's recommended determination and final determination regarding administrative penalties under Labor Code section 4610.

Subdivision (v) is necessary to specify that administrative penalties must be paid within 30 days after service of the Administrative Director's final order.

Subdivision (v) is necessary to specify the procedures to be observed to ensure due process with regard to appealing the Administrative Director's final decision to the Workers' Compensation Appeals Board.

Consideration of Alternatives:

No more effective alternative to this section, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.