FINDING OF EMERGENCY

OF THE

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF WORKERS’ COMPENSATION

REGARDING THE CALIFORNIA LABOR CODE

TITLE 8. CALIFORNIA CODE OF REGULATIONS

DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS

CHAPTER 1. DIVISION OF WORKERS’ COMPENSATION

Article 3. assignment of qualified medical evaluator’s, evaluation procedure

Section 36.7 QME Electronic Service Emergency Regulation

in Response to COVID-19.

Government Code Section 11346.1 requires a finding of emergency to include a written statement with the information required by paragraphs (2), (3), (4), (5) and (6) of subsection (a) of Section 11346.5 and a description of the specific facts showing the need for immediate action.

The Administrative Director of the Division of Workers’ Compensation (DWC) finds that a re-adoption of this regulation is necessary for the immediate preservation of the public peace, health and safety, or general welfare, as follows:

# **FINDING OF EMERGENCY**

## Basis for the Finding of Emergency

* On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19.
* On March 19, 2020, Governor Gavin Newsom issued Executive Order N-33-20, a stay-at-home order to protect the health and well-being of all Californians and to establish consistency across the state in order to slow the spread of COVID-19.
* On May 4, 2020, Governor Gavin Newsom issued Executive order N-60-20, directs residents to obey state public health directives.
* On November 19, 2020 Acting State Public Health Officer, Erica S. Pan, M.D., MPH issued a Limited Stay at home order, effective in counties under Tier One (Purple) of California’s Blueprint for a Safe Economy.
* On December 3, 2020 Acting State Public Health Officer, Erica S. Pan, M.D., MPH issued a Regional Stay at home order, effective in regions where the adult ICU bed capacity for the region is less than 15%.
* To protect public health, the stay-at-home orders are intended to reduce opportunities for disease transmission with the goal of decreasing the number of hours individuals are in the community and mixing with individuals outside of their household.
* The DWC recognizes that facilitating the receipt of medical-legal evaluation reports is necessary for purposes of determining an injured worker’s entitlement to workers’ compensation benefits, for their ability to return to work, and to facilitate continued settlement of workers’ compensation claims.
* Since the stay-at-home order is of unlimited duration and likely to remain in place for the foreseeable future, the Administrative Director finds that it is important to help injured workers and employers continue to move their workers’ compensation claims towards a resolution and avoid additional or undue delay, while still allowing observance of any stay-at-home order.
* Action is necessary in order to implement, on an emergency basis, the ability of participants in California’s workers’ compensation system to continue to receive on a timely basis medical-legal reports during the pendency of any stay-at-home order.
* Action is necessary in order to implement, on an emergency basis, the ability of Qualified Medical Evaluators to provide delivery of medical-legal reports by way of electronic service to alleviate the necessity of having clerical staff continue to come into the office to physically typographically complete and mail the medical- legal reports.

## Background

* The DWC develops regulations to implement, interpret, and make specific the California Labor Code.
* Qualified Medical Evaluators (QMEs) provide medical-legal evaluations of injured workers to resolve medical issues in dispute between parties to a claim or litigation regarding workers’ compensation. Evaluations lead to the production of a medical-legal report that is then served upon the parties to the action. This service is accomplished by physically delivering the report through the U.S. mail. The clerical completion of these reports and physical deposit in the mail could require a violation of the state or local stay-at-home order. During this period of sheltering in place and social distancing, the use of electronic service of the medical-legal reports has been proposed as an effective means of providing continued service of the reports and observing social distancing.

# **AUTHORITY AND REFERENCE**

The Administrative Director of the Division of Workers’ Compensation, pursuant to the authority vested in him by Labor Code sections 59, 111, 133, and 139.2, proposes to amend Article 3 of Chapter 1, of Division 1 of title 8 California Code of Regulations, and adopt section 36.7.

# **INFORMATIVE DIGEST**

Summary of Existing Laws

**Labor Code section 139.2** is the enabling statute enacted to establish the Qualified Medical Evaluator program in the California workers’ compensation system. Subsection (j)(1)(A) empowers the Administrative Director to develop procedures to be followed by all physicians in preparing and submitting the reports that are generated as a result of the evaluations performed to aid in the resolution of medical disputes, including the existence and extent of permanent impairment and limitations resulting from an injury.

**California Code of Civil Procedure section 1010.6** authorizes and governs the use of electronic service in litigated actions in California civil courts. The statute defines electronic service, and establishes the parameters for its use. The statute only allows electronic service when there is agreement among the parties to the electronic service or there is a specific court order mandating electronic service. The statute also authorizes courts to establish rules for the administration of electronic service in litigation.

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

* Erica S. Pan, M.D., MPH Acting State Public Health Officer - State of California – Health and Human Services Agency, California Department of Public Health –December 3, 2020 – [Regional Stay at Home Order](https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf) https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf
* Erica S. Pan, M.D., MPH Acting State Public Health Officer - State of California – Health and Human Services Agency, California Department of Public Health – November 19, 2020 – [Limited Stay at Home Order](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/limited-stay-at-home-order.aspx) https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/limited-stay-at-home-order.aspx
* Governor Gavin Newsom - [EXECUTIVE ORDER N-60-20](https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20-text.pdf), May 4, 2020 https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20-text.pdf
* Governor Gavin Newsom - [EXECUTIVE ORDER N-33-20](https://www.gov.ca.gov/wp-content/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf), March 19, 2020 https://www.gov.ca.gov/wp-content/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf
* Centers for Disease Control, web link, [“How to Protect Yourself”](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html) https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html

# **SUMMARY OF PROPOSED REGULATIONS**

The Administrative Director requests re-adoption of an administrative regulation governing the electronic service of medical-legal reports during the pendency of the executive order occasioned by the COVID-19 virus. This regulation implements, interprets, and makes specific Labor Code section 139.2 during the pendency of various stay at home orders throughout the state as follows:

## Section 36.7 QME Electronic Service Emergency Regulation in Response to COVID-19

This section sets forth the process and addresses the need for electronic service of medical-legal reports to prevent interruption in the receipt of medical-legal reports resulting from the various stay-at-home orders. This emergency regulation will help injured workers and employers continue to move their workers’ compensation claims toward resolution and avoid additional and undue delay.

1. **Subsection (a)(1)** defines “Electronic Service”, “Electronic Transmission” and “Electronic Notification”. It also prescribes how all three are accomplished.
2. **Subsection (a)(2)** mandates that there must be agreement by all parties to electronic service, and that the agreement must be confirmed in writing.
3. **Subsection (a)(3)** prohibits electronic service for an unrepresented injured worker.
4. **Subsection (a)(4)** establishes that electronic service must be transmitted to the electronic address provided to the physician with the consent to electronic service.
5. **Subsection (a)(5)** establishes when electronic service is complete and sets forth the time period to respond to or act on electronic service.
6. **Subsection (b**) establishes requirements for electronic service of a medical-legal report dealing with an injury to the psyche.
7. **Subsection (c)** establishes that all applicable terms of regulation 36 also apply to the service of medical-legal reports by electronic transmission.
8. **Subsection (d)** allows for the use of an Affidavit of Proof of Electronic Service and establishes the requirements for that document.
9. **Subsection (e)** mandates that the physician must maintain the original of the medical-legal report, with an original signature, for any medical-legal report served by means of electronic service.

# **DETERMINATION OF SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

Physicians who provide medical-legal evaluations will be able to continue to serve medical-legal reports without requiring the physician or the physician’s staff to go into the office to complete the clerical functions to allow for physical mail service of the

medical-legal report.

The Department of Industrial Relations, Division of Workers’ Compensation, has made an initial determination that the re-adoption of this regulation will not have a significant, statewide adverse economic impact directly affecting business because it merely changes the manner in which medical-legal reports are served, but does not add to or detract from the charges for providing these reports. The Division of Workers’ Compensation has not considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submission may include the following considerations: (i) the effect on the cost of providing a

medical-legal report that may be occasioned by service of the report by electronic means; (ii) establishment of differing requirements or timetables for service of the reports that take into account the resources available to business; (iii) simplification of service requirements for medical-legal reporting for qualified medical evaluators; and (iv) the use of electronic service rather than service by mail.

# **POLICY STATEMENT OVERVIEW**

The objective of the proposed emergency regulation is to implement the ability of medical-legal evaluators to serve their reports in a manner that does not require the evaluator or their staff to leave their home to accomplish the service during the pendency of any state or local stay-at-home order and the medical crisis brought on by COVID-19, and to clarify the interpretation of the relevant statutes and regulations by way of the proposed emergency regulation in a manner that allows for the above- referenced actions.

# **MATTERS PRESCRIBED BY STATUTE APPLICABLE TO THE AGENCY OR TO ANY SPECIFIC REGULATION OR CLASS OF REGULATIONS**

None.

# **MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS**

The Department of Industrial Relations, Division of Workers’ Compensation has determined that this proposed regulatory action would not impose a mandate on local agencies or school districts.

# **FISCAL IMPACT STATEMENT**

1. Cost or Savings to any state agency: NONE
2. Cost to any local agency required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4: NONE
3. Cost to any school district required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4: NONE
4. Other nondiscretionary cost or savings imposed on local agencies: NONE
5. Cost or savings in federal funding to the state: NONE

STATEMENT OF CONFIRMATION OF

MAILING OF FIVE-DAY EMERGENCY NOTICE

(Title 1, CCR section 50(a)(5)(A))

The Division of Workers’ Compensation sent notice of the proposed re-adoption of emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulations to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1(a)(2).