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 7. PRACTICE PARAMETERS

Section 46.2 QME Emergency Regulations 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 a medical-legal evaluation may be necessary for purposes of determining an injured worker’s entitlement to workers’ compensation benefits or for their ability to return to work.
* 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 have access to certain qualified medical evaluations 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 certain medical-legal evaluations and to cancel, postpone, or arrange medical-legal evaluations at any available certified location 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 be compensated for services provided during the pendency of the stay-at-home order for the provision of certain medical-legal evaluations authorized during the emergency period.

## 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. These evaluations include a physical examination of the injured worker or specified periods of face-to-face time where the physician and injured worker are in the physical presence of each other. This in person face-to-face time may not be possible during the pendency of some stay-at-home orders.
* During this period of sheltering in place and social distancing, the use of telehealth or telemedicine has been proposed as an effective means of providing continued healthcare and observing social distancing.
* It is possible that certain qualified medical-legal evaluations can be performed effectively without the need of a physical examination. An emergency regulation is necessary to facilitate the performance and payment for these evaluations.

# 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, 139.2, 4603.5, 5307.3 and 5307, proposes to reestablish Article 4 of Chapter 1, Division 1, of Title 8 California Code of Regulations, and adopt section 46.2.

# 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)(C)(2) empowers the Administrative Director to develop procedures to be followed by all physicians in evaluating the existence and extent of permanent impairment and limitations resulting from an injury. Subsection (j)(5)(A) directs the Administrative Director to establish minimum times for patient contact for any medical-legal evaluations that are not valued pursuant to Labor Code section 5307.6.

**Labor Code section 4628** is an anti-ghostwriting statue enacted to govern the responsibilities of a reporting physician and requirements for a medical-legal report. An examination of the injured worker is one of the requirements enumerated in this statute.

**Labor Code section 5307.6** is the enabling statute directing the Administrative Director to adopt and revise a fee schedule for medical-legal expenses. Subsection (a) mandates that the procedure codes and relative values used in producing fees shall recognize the amount of time spent by the physician in direct contact with the patient.

# 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
* Federal Department of Homeland Security, web link,  [“Identifying Critical Infrastructure During COVID-19”](https://www.cisa.gov/identifying-critical-infrastructure-during-COVID-19) https://www.cisa.gov/identifying-critical-infrastructure-during-COVID-19
* 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 seeks a re-adoption of the administrative regulation governing the provision of telehealth medical-legal evaluations, and the conduct of taking telehealth histories and scheduling of medical- legal appointments during the pendency of executive orders occasioned by the COVID-19 virus. This regulation implements, interprets, and makes specific Labor Code sections 139.2, 4628, and 5307.6 during the pendency of various stay at home orders throughout the state as follows:

## Section 46.2 QME Emergency Regulations in Response to COVID-19

This section sets forth the process that addresses the ongoing need for medical-legal evaluations and to prevent a backlog of medical-legal evaluations resulting from stay-at-home orders. This regulation will help injured workers and employers continue to move their workers’ compensation claims towards a resolution and avoid additional or undue delay.

1. **Subsection (a)(1)** extends the time that a physician can reschedule currently calendared QME evaluations.
2. **Subsection (a)(2)** allows a physician to provide a record review and electronic interview summary report. The interview can be conducted with the injured worker by means of telecommunication, including the use of a telephone and/or video conferencing technology.
* The subsection sets forth the requirements for giving notice of the appointment, including what specific information the notice must contain and how it is to be served, as well as identifying the parties’ obligation to submit records to the QME in advance of the scheduled appointment.
1. **Subsection (a)(3)** establishes parameters for when a telehealth medical-legal evaluation can be performed if a physical examination is not necessary. These parameters include 1) no requirement for the injured worker to leave their immediate household; 2) there is a medical issue in dispute involving AOE/COE, termination of indemnity benefits, or appropriate work restrictions; 3) there is agreement to the evaluation by telehealth by all parties to the action; 4) the telehealth evaluation under the circumstances is consistent with appropriate and ethical medical practice, as determined by the QME, and 5) the physician attests that there is no need for a physical examination.
2. **Subsection (a)(4)** defines a telehealth medical-legal evaluation.
3. **Subsection (b)** extends the time period in which an appointment can be scheduled with a QME after the date of the appointment request.
4. **Subsection (c)** extends all of the current time periods for service of QME evaluation reports by 15 days.
5. **Subsection (d)** allows the initial QME evaluation to take place at any office that is certified for qualified medical evaluations as long as there is agreement to this arrangement by all of the parties to the action.
6. **Subsection (e)** recognizes that there may be a transition period after the lifting of the Governor’s stay-at-home order when medical-legal evaluations under this emergency regulation may still be taking place at the same time as regular evaluations under the non-emergency regulations start back up.
7. **Subsection (f)** mandates that any and all medical-legal evaluations that are conducted pursuant to this emergency regulation must also comply with the terms ofGovernor’s stay-at-home order and social distancing protocols.

# DETERMINATION OF SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

Physicians who provide medical-legal evaluations will be able to continue to earn income during the pendency of stay-at-home orders by providing these evaluations by means of telehealth.

The Department of Industrial Relations, Division of Workers’ Compensation, has made an initial determination that the continuation of this regulation will not have a significant, statewide adverse economic impact directly affecting business because of the limited duration of the fee schedule provisions. 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: (1) the establishment of differing fee schedule rates or reporting requirements or timetables that take into account the resources available to business; (ii) consolidation or simplification of reporting requirements for qualified medical evaluators; and (iii) the use of performance standards rather than telehealth.

# POLICY STATEMENT OVERVIEW

The objective of the proposed emergency regulation is to implement the provision of telehealth medical-legal evaluations during the pendency of stay-at-home orders and the medical crisis brought on by the COVID-19 virus, provide for the necessary re-adoption of time for the administration of the QME program during the pendency of stay-at-home orders and the crisis period, and to clarify the interpretation of the relevant statutes and regulations by way of the re-adoption of the 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 the re-adoption of this 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 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).