

August 8, 2008

TITLE 22. EMPLOYMENT DEVELOPMENT DEPARTMENT

**Amendment of Title 22, California Code of Regulations
Section 3254(i)-2**

VOLUNTARY PLANS - RISKS ADVERSE TO THE DISABILITY FUND

Notice of Proposed Rulemaking

The Employment Development Department (Department) proposes to amend California Code of Regulations (CCR), title 22, section 3254(i)-2 to enhance and update the voluntary plans (VP) Standards for Approval and authorize the Department to utilize viable sources of information, as an alternative to incurring cost prohibitive programming and procedural changes. This will result in a more efficient administration of the VP program.

The Department will adopt these regulations after considering all comments, objections, or recommendations regarding the proposed regulatory action.

Informative Digest/Policy Statement Overview:

The Department extends approval to employers to operate VPs for short-term disability insurance coverage, in lieu of State Disability Insurance (SDI) coverage, as set forth in Division 1, Part 2, Chapter 6, of the California Unemployment Insurance Code (UI) and CCR, title 22.

Existing statute and regulations allow a VP or a group of VPs to be underwritten by an admitted disability insurer under the condition that approval is only given if it would not result in a substantial selection of risks adverse to the Disability Fund. Existing regulations identify female claimants, claimants age 50 and over, and claimants earning less than \$3,600 in annual wages as less favorable risks in terms of disability insurance. Each year the Department determines the percentage of benefits paid to such claimants. Every insurer's experience with these groups is then compared to the total claims experience of the employed workers under the State plan and all VPs. The age, gender and wage distribution criteria were established to ensure the solvency of the Disability Fund.

Under Insurance Code Section 10270.2 (f), only the Department of Insurance (DOI) has authority to approve a VP insurance policy offered by an admitted

disability insurer. It is only after the policy is approved that the Department can review the application from an admitted disability insurer to administer a VP. To ensure a more equitable distribution of risks between the State and private insurers, the Department requires at the time of plan approval that the employees to be covered by the plan include a specified percentage of females, employees age 50 and over, and employees earning \$3,600 or less in annual wages. In order to retain approval status, an insurer's claims experience for the groups measured must be within five percent of the total experience. If an insurer's experience is five percent or more below the total experience in any of the groups measured, a substantial selection of risks is indicated and the director shall terminate approval of plans which have been measured for claims experience.

In order to assist the Department in determining whether to revise the existing eligibility criteria for private short-term disability insurance with respect to age, gender and wages, an actuarial study was conducted. The study relied primarily on contribution and benefit payment information provided by the Department as well as public information available from the United States Census based on data from 2002 through 2004. (See *California EDD: Private Insurance Voluntary Plans Analysis of Employee Demographic Criteria, December 2007.*)

The results of the study found that the existing eligibility criteria based on age and gender continue to be acceptable and reasonable standards and that no changes are required as to those criteria. However, the study determined that the existing annual wage criterion of \$3,600 is grossly inadequate and requires amendments to be made to the governing regulations. The study recommended that the Department establish an annual wage criterion of approximately \$30,000 (based on 2002 through 2004 data) to be commensurate with current economic standards.

The study utilized statewide wage data, as well as Department data on the Weekly Benefit Amount and the Maximum Benefit Amount to determine the income benefit ratio. Based on a thorough analysis of the wage and Disability Insurance (DI) claims data, the study determined that \$30,000 is the appropriate amount for 2004 at which private insurers could still participate in the DI insurance market without disadvantaging the Disability Fund. Specifically, \$30,000 is the minimum wage amount at which the benefit ratios for 2002 through 2004 were the closest to 100% (1.0) and the relativities for 2002 through 2004 were the closest to 1.0. Establishing the eligibility criteria at the point where the population has a benefit ratio of 1.0 or 100% (where the benefits paid roughly equals the amount of contributions paid) ensures that private insurers do not only cover a portion of the population that has a lower than average contribution ratio. Furthermore, establishing the eligibility criteria at the point where the population has a relativity of 1.0 (where the calculated benefit ratio roughly equals the average benefit ratio) ensures that private insurers do not only cover a portion of the population that has a lower than average contribution ratio.

However, the study also determined that, due to wage inflation, the appropriate cut-off point for the minimum wage amount will change and become outdated over time. In order to address this wage fluctuation in the future, the report recommends basing the wage distribution criteria as a percentage of the average weekly wage, as determined by the U.S. Department of Labor. Since the \$30,000 wage threshold is roughly 70% of the 2004 average weekly wage, the report recommends basing future wage thresholds on 70% of each year's average weekly wage.

Furthermore, over the past decade, the Department has experienced an array of database migrations resulting in age and gender information that was previously captured for VP reporting to no longer be readily available or accessible. This data is critical for determining the percentages of females and employees age 50 and older in subject employment for the purpose of establishing standards for approval with respect to gender and age. This leaves the Department with the option of either implementing programming and procedural changes to obtain such data, which has significant fiscal implications, or utilizing alternative sources of information readily available from the Bureau of Labor Statistics of the United States Department of Labor. The Department proposes to revise the regulation to incorporate the use of such alternative sources of information.

Under UI Code sections 305 and 306, the Director of the Department is authorized to adopt, amend, or repeal regulations for the administration of the functions of the Department and the enforcement of the Director's functions under the UI Code. Under UI Code sections 3251, 3253, 3254, and 3255, a qualified employer is able to provide Disability Insurance and Family Temporary Disability Insurance benefits to employees electing coverage under the employer's VP.

The following proposed amendments to CCR, title 22, section 3254(i)-2 will:

- Update the wage distribution criteria related to the standards for approval for a voluntary plan or a group of voluntary plans underwritten by an admitted disability insurer;
- Establish the wage distribution criteria as indexed for inflation, rather than being fixed, and allow for adjustments to be made by adopting a method based on the state average weekly wage; and
- Change the date by which the Director is required to establish the standards for approval with respect to gender, age and wage distribution from July 1 of each fiscal year to October 31 of each calendar year.
- Substitute the use of alternative sources of data available from the Bureau of Labor Statistics of the United States Department of Labor to establish the standards for approval with respect to gender and age.

The proposed amendments will address the above four bulleted items.

Authority and Reference:

Authority: Sections 305, 306, and 2602, Unemployment Insurance Code.

Reference: Sections 3254 and 3262, Unemployment Insurance Code.

Fiscal Impact:

Anticipated costs or savings in federal funding to the State: None

Anticipated costs or savings to any State Agency: None

Anticipated costs or savings to any local agency or school district: None

Significant statewide adverse economic impact: The Department does not anticipate the proposed amendments will result in any costs to the federal government, to State government, to local county governments, to private individuals, or to businesses or small businesses. Thus, no costs were shown on the Economic and Fiscal Impact Statement.

The Department has made an initial determination that the proposed amendments will not have a significant statewide adverse economic impact directly affecting businesses including the ability of California businesses to compete with businesses in other states. The proposed regulation amendments would enhance and update the VP Standards for Approval and authorize the Department to utilize viable sources of information, as an alternative to incurring cost prohibitive programming and procedural changes, resulting in a more efficient administration of the VP program with no adverse impact on VPs administered by an admitted disability insurer. The Department has determined that the proposed amendments will not affect the creation or elimination of jobs within the State of California, the creation of new businesses or the elimination of existing businesses within the State of California, or the expansion of businesses currently doing business within the State of California.

The cost impact on representative persons or businesses: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Anticipated impact on housing costs: The proposed amendments will have no effect on housing costs.

Anticipated nondiscretionary costs or savings imposed upon local agencies: None

Small Business Impact:

The Department has determined that the proposed amendments will have no effect on small businesses because the proposed amendments would enhance and update the VP Standards for Approval and authorize the Department to

utilize viable sources of information, as an alternative to incurring cost prohibitive programming and procedural changes, resulting in a more efficient administration of the VP program with no adverse impact on small businesses.

Local Mandate Determination:

The Department has determined that the proposed amendments will not impose any new mandates on school districts or other local governmental agencies or any mandates which must be reimbursed by the State pursuant to Part 7 (commencing with section 17500), Division 4 of the Government Code.

Consideration of Alternatives:

In accordance with section 11346.5(a)(13) of the Government Code, the Department must determine that no reasonable alternative considered or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulatory action.

Written Comment Period:

Any interested person, or his or her authorized representative, may submit written comments on the proposed action to Laura Colozzi via U.S. mail, e-mail, or fax (see U.S. mail and e-mail address and fax number indicated below).

E-mail comments should include true name and mailing address of the commentor. Written comments submitted via U.S. mail, e-mail, or fax, must be received by the Department no later than September 22, 2008, at 5 p.m.

Please submit any written comments before that time. The Department cannot accept written comments after the close of the public comment period.

Contact Persons

Inquiries or comments should be directed to:

(Mailing address) Laura Colozzi, Legal Analyst
Employment Development Department
P. O. Box 826880
Legal Office, MIC 53
Sacramento, CA 94280-0001

(Hand delivery) Laura Colozzi, Legal Analyst
Employment Development Department
800 Capitol Mall, Room 5020
Legal Office, MIC 53
Sacramento, CA 95814

Telephone No.: (916) 654-7712
Fax No.: (916) 654-9069
E-Mail Address: eddlegal@edd.ca.gov

Note: In the event Laura is unavailable, inquiries should be directed to the following backup contact persons at the same address as noted above:

Name: Penny Ayers, Legal Analyst
Telephone No.: (916) 654-8410

Questions regarding the substance of the proposed regulatory action should be directed to:

Name: Deanna Asuncion, Staff Counsel
Telephone No.: (916) 654-8410

Internet Website Access

The Department has posted on its internet website <http://www.edd.ca.gov> materials regarding the proposed regulatory action. Select "Proposed Regulations."

Public Hearing:

No public hearing has been scheduled on the proposed action. However, if any person desires to submit oral comments, the Department will schedule a public hearing upon that person's written request. **Such request must be received no later than 15 days prior to the close of the written comment period which is 5 p.m. on September 22, 2008.** A request for hearing can be made by contacting the persons noted above.

Modification of Proposed Action:

If the Department makes any additional changes based on public testimony, those changes (other than nonsubstantial or solely grammatical modifications) will be made available for public comment for at least 15 days before they are adopted. Copies of any additional changes regarding the proposed regulatory action will be mailed to all persons who testified or submitted written comments at the public hearing (if one is scheduled); whose comments were received by the agency during the public comment period; and who requested notification from the agency of the availability of such changes.

Final Statement of Reasons:

After the close of the 45-day public comment period, the Department will summarize and respond to all public comments in a written final statement of reasons. To obtain a copy of the final statement of reasons, contact the persons noted above, or access the Department's Internet website at <http://www.edd.ca.gov>.

Further Information:

The Department has prepared and has available for review, upon request, the text of the proposed regulations discussed in this notice, written in plain English; a statement of reasons setting forth the purpose of the proposed regulations; and the information upon which the Department relied in proposing the regulations. (If you received this notice by mail, a copy of the text of the proposed regulations and the statement of reasons were enclosed.) To obtain a copy, contact the persons noted above, or access the Department's Internet website at <http://www.edd.ca.gov>.

All the information upon which the proposed regulations are based is contained in the rulemaking file, which is available for public review. For inquiries regarding the rulemaking file or the regulations' process, contact the persons noted above.
