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SUBCHAPTER B. RETURN TO WORK

§§137.41 - 137.48

1. INTRODUCTION. The Commissioner of Workers' Compensation adopts new Subchapter B, §§137.41 – 137.48, concerning the return-to-work pilot program for small employers and the workers' compensation return-to-work account. Sections 137.41 - 137.44 and 137.46 - 137.48 are adopted with changes to the proposed text as published in the December 23, 2005 issue of the *Texas Register* (30 TexReg 8621). Section 137.45 is adopted without changes.

2. REASONED JUSTIFICATION. The new sections are necessary to implement Labor Code §413.022, which requires the Commissioner of Workers' Compensation to establish by rule a return-to-work pilot program designed to promote the early and sustained return to work of an injured employee who has a compensable injury and to provide reimbursement from the return-to-work account to participating eligible employers for eligible expenses. The purpose of the return-to-work pilot program for small employers is to promote the early and sustained return to work of injured employees in modified or alternate duty job assignments through reimbursements to small employers for the costs of workplace modifications and other costs that were necessary to return injured employees back to work.

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The return-to-work pilot program for small employers becomes effective on January 1, 2006 pursuant to the requirements of House Bill 7 (79th Legislature, Regular Session, 2005) enacted as Labor Code §413.022. The return-to-work pilot program for small employers and return-to-work account expires on September 1, 2009 pursuant to the Labor Code §413.022(e), unless subsequently extended or reauthorized by the Legislature.

Effective January 1, 2006, eligible small employers may submit an application for reimbursement for workplace modification expenditures that were necessary to return an injured employee to work. An eligible employer will have to have already made the expenditure prior to submitting the application for possible reimbursement for the workplace modifications. The Division will dispense funds from the account for approved reimbursements to eligible employers depending on the availability of funds in this account. The maximum reimbursement that a single eligible employer may receive is \$2,500 annually for all workplace modifications.

Legislative appropriations that provide funding for the workers' compensation return-to-work account are made on a state fiscal year basis. The state's fiscal year begins September 1 and ends August 31 of the following year. Beginning January 1, 2006, the effective date of the program, approved reimbursements will be processed for funding from the return-to-work account in the order that applications are received by the Texas Department of Insurance, Division of Workers' Compensation.

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When all available funds in the return-to-work account are disbursed, reimbursements from the account will not be approved or authorized during the remainder of the current state appropriation year. Neither the applications received nor approved reimbursements will be carried forward to the next state appropriation year once the available funds are disbursed during the current fiscal year. Each subsequent \$100,000 of funding will be available at the beginning of the next state fiscal year for eligible employers to submit application for reimbursements.

3. HOW THE SECTIONS WILL FUNCTION. Section 137.41 sets out the purposed of the sections. Section 137.42 provides definitions applicable to the program. Section 137.43 provides for the appointment of a return-to-work account administrator. The return-to-work account and criteria for reimbursements to eligible employers from the account are described in §137.44. Eligibility requirements for small employers to participate in the pilot program are set forth in §137.45. Instructions to participating small employers for submitting an application for reimbursement from the return-to-work account for workplace modifications are provided in §137.46. Section 137.47 presents criteria that the return-to-work account administrator shall use to evaluate applications from participating small employers, and §137.48 provides guidance to the return-to-work account administrator in making determinations regarding verification of employer

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eligibility, workplace modifications, related costs, on-site evaluations of workplace modifications, approval or denial of applications, and reimbursements from the account.

The Division has changed §137.41 by replacing the term “this subchapter” with “§§137.41 - 137.48” to clarify that only a portion of Subchapter B addresses the return to work pilot program for small employers. Subchapter B will contain other rules regarding the Division’s return-to-work initiatives in addition to the pilot program rules.

The Division has made a grammatical correction to the definition of eligible expenses in §137.42, which clarifies that an eligible expense for reimbursement may include either a single or multiple workplace modifications.

The Division recognizes that the definitions of alternative duty and modified duty should allow for an employer to provide a workplace modification that enables an injured employee to perform the regular, pre-injury job duties with the workplace modification provided. The primary focus of the pilot program is to promote the early and sustained return to work of an injured employee who has a compensable or work-related injury. Reimbursements to eligible employers for workplace modifications are to facilitate the injured employee’s return to modified or alternative work. A workplace modification may have the desirable effect of enabling the injured employee to perform the regular, pre-injury job duties. The Division has changed the alternative duty and modified duty definitions to ensure that performing regular, pre-injury job duties is not a barrier to reimbursement.

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The Division has also changed §137.44(f) by adding the word “completed” to clarify that only completed applications for reimbursements will be processed in the order received. The Division believes this change helps clarify the reimbursement process, which may be particularly helpful to eligible employers due to the limited amount of funds available for reimbursement.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE TO COMMENTS.

Comment: A commenter believes the pilot program is an important benefit to injured employees, and the program will bring savings to the workers' compensation system. The commenter requests increasing the maximum annual reimbursement amount so that more employers and employees, than the approximately 40 employers based on \$2,500 per employer, will benefit from the reimbursement program.

Agency Response: In establishing the workers' compensation return-to-work account, the 79th Legislature in House Bill 7 specified a maximum annual amount for the account of \$100,000. The Legislature has set the maximum amount for the pilot program and only specific legislative authorization can increase this annual amount.

Comment: A commenter inquires whether the program requirement that an eligible employer have at least two but not more than 50 employees applies per worksite or to the entire state.

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Agency Response: The statute and rules make no distinction regarding the number of worksites that a single employer may have throughout the state. The maximum reimbursement amount of \$2,500 would apply to a single employer who employs at least two but not more than 50 employees regardless of the number of worksite locations operated by the employer. If the multiple worksites are operated under the same federal identification number, the employer is considered a single employer, and the maximum reimbursement amount is \$2,500.

Comment: A commenter suggests changing the definitions of “alternative duty” and “modified duty” because of the temporary nature of modified work.

Agency Response: The Division understands the commenter’s concerns and has changed the definition to ensure that performing regular, pre-injury job duties is not a barrier to reimbursement. The Division notes that modified and alternative duties may be temporary in nature or become permanent if approved by the employer. The Division agrees that the definitions of alternative duty and modified duty should allow for an employer to provide a workplace modification that enables an injured employee to perform the regular, pre-injury job duties with the workplace modification provided. The primary focus of the pilot program is to promote the early and sustained return to work of an injured employee who has a compensable or work-related injury. Reimbursements to eligible employers for workplace modifications are to facilitate the injured employee’s return to modified or alternative work. A workplace modification may

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have the desirable effect of enabling the injured employee to perform the regular, pre-injury job duties.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For: Crawford Company; Summit Consulting, Inc.

Against: None.

6. STATUTORY AUTHORITY. The new sections are adopted under Labor Code §§413.022, 402.00111, and 402.061. Section 413.022 requires the Commissioner of Workers' Compensation to establish by rule a small employer return-to-work pilot program designed to promote the early and sustained return to work of an injured employee who sustains a compensable injury. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

7. TEXT.

§137.41. Purpose. The purpose of §§137.41 - 137.48 is to set forth the terms, conditions, and requirements for the return-to-work pilot program for small employers.

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§137.42. Definitions. The following words and terms shall have the following meanings only for the purposes of the return-to-work pilot program for small employers:

(1) **Alternative duty**—Job duties that are different from the injured employee's normal or regular pre-injury job duties and that are assigned specifically to facilitate the injured employee's doctor-identified work restrictions or limitations.

(2) **Eligible employer**—Any employer that:

(A) is not a state agency or political subdivision of the state;

(B) employs at least two but not more than 50 employees on each business day during the preceding calendar year; and

(C) has workers' compensation insurance coverage in Texas.

(3) **Eligible expense**—An expenditure of funds or costs incurred by an eligible employer on or after January 1, 2006 for workplace modifications or other costs that are necessary to reasonably facilitate an injured employee's doctor-identified restrictions that are intended to facilitate the early and sustained return to work of an employee who has a compensable injury. An indemnity benefit, medical benefit, or health care for which an insurance carrier is liable is not an eligible expense.

(4) **Modified duty**—The injured employee's normal or regular pre-injury job with workplace modifications or changes to facilitate doctor-identified work restrictions or limitations.

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(5) Return-to-work account (account)—The Texas Department of Insurance, Division of Workers' Compensation's return-to-work account for small employers.

(6) Return-to-work account administrator (administrator)—The administrator of the Texas Department of Insurance, Division of Workers' Compensation's return-to-work account and the return-to-work pilot program for small employers.

(7) Single employer—An employer operating one or more businesses under the same federal employer identification number. In the absence of a federal employer identification number, a single employer is established by the employer's social security number.

(8) State appropriation year—The State of Texas' fiscal accounting year that begins September 1 and ends August 31 of the following year.

(9) Workplace modification—Physical adjustments or adaptations to the worksite; or equipment, devices, furniture, or tools that are necessary to reasonably facilitate an injured employee's doctor-identified restrictions to return the employee to modified or alternative duty.

§137.43. Return-to-Work Account Administrator. The Commissioner of Workers' Compensation shall appoint a qualified employee of the Texas Department of

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Insurance, Division of Workers' Compensation (Division) to serve as the return-to-work account administrator to implement the provisions of this subchapter.

§137.44. Return-to-Work Account for Small Employers.

(a) The workers' compensation return-to-work account is a special account in the general revenue fund. The Texas Department of Insurance, Division of Workers' Compensation shall deposit into the account an amount not to exceed \$100,000 each state appropriation year from administrative penalties received by the Division. The maximum amount of disbursements from the account may not exceed \$100,000 each state appropriation year.

(b) Disbursements of funds from the account are dependent on the availability of funds in the account.

(c) The total reimbursement that any single employer may receive from the account is \$2,500 for all workplace modification expenditures made during the state appropriation year for all injured employees.

(d) Disbursements from the account to approved eligible employers shall be made on a reimbursement basis subject to verification of employer eligibility, receipts and expenditures, workplace modifications, the employee's return to work, and approval of the employer's application.

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(e) For purposes of making disbursements from the account, the date the employer's completed application for reimbursement from the return-to-work account is received by the Division shall be considered the official date of service.

(f) Reimbursements shall be processed in the order that completed applications are received by the Division.

(g) Reimbursements of approved applications shall be funded from the account in the state appropriation year in which the application is received.

(h) Approved reimbursements shall be immediately processed for funding subject to the availability of funds in the account. Applications may be denied in whole or in part due to the lack of available funds in the account.

§137.45. Employer Eligibility for Reimbursement from the Return-to-Work Account.

(a) In order to be eligible to receive reimbursement from the return-to-work account, an employer must:

- (1) be an eligible employer that has incurred an eligible expense;
- (2) have Texas workers' compensation insurance in effect on the date the employee is injured and be able to provide proof of coverage;
- (3) submit an Application for Reimbursement from the Return-to-Work Account for Small Employers; and

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(4) provide any additional or supplemental information to the return-to-work account administrator that may be deemed necessary by the Division.

(b) An employer that willfully applies for or receives reimbursement from the account knowing that the employer is not an eligible employer commits a violation.

§137.46. Application for Reimbursement from the Return-to-Work Account.

(a) An eligible employer seeking reimbursement from the return-to-work account shall submit to the Division an Application for Reimbursement from the Return-to-Work Account for Small Employers.

(b) Applications shall be available on the Division's website (www.tdi.state.tx.us/wc) and at the Division's central office. Upon request, the Division shall provide an application form to an employer.

(c) Applications shall be submitted to the Division in the manner prescribed by the Division.

(d) The date the completed application is received by the Division shall be the official date for purposes of processing the application.

(e) An application that has information missing or that does not include itemized expenditures, receipts, or other documentation necessary to support the application and to justify the workplace modification may be returned to the employer for completion, documentation supplementation, or the application may be denied.

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(f) Upon completion of the application evaluation, the return-to-work account administrator shall notify the employer in writing of the approval or denial of the application.

§137.47. Criteria for Evaluation of Applications. An employer must provide the following information on the application to be considered for reimbursement from the account:

(1) The date the employee returned to work, and if available, the injured employee's Texas Department of Insurance, Division of Workers' Compensation claim number.

(2) A statement or certification that the injured employee returned to work in either a modified or alternative duty capacity.

(3) A statement or certification that the employer was able to sustain the employment of the injured employee as a result of the workplace modification.

(4) A copy of the Division's "Work Status Report" from the injured employee's examining doctor that specifies the injured employee's physical restrictions or limitations, which necessitated the provision of a workplace modification in order for the employee to return to work in a modified or alternative duty capacity.

(5) A detailed description of the workplace modification, including any supporting information such as receipts, photos or diagrams of the modification, and how the modification facilitates the doctor-identified physical restrictions or limitations.

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(6) Documentation of the expenses that provided the workplace modification or other costs necessary to facilitate the injured employee's return to work.

§137.48. Return-to-Work Account Administrator Determinations.

(a) The administrator shall make determinations regarding the following:

- (1) the employer's eligibility to participate in the program;
- (2) the appropriateness of the workplace modification in facilitating the injured employee's return to work based on doctor-identified restrictions;
- (3) the effectiveness of the workplace modification in facilitating the injured employee's early and sustained return to work;
- (4) the cost of the workplace modification in relation to usual and customary costs of the same or similar modification; and
- (5) the appropriateness of other costs incurred by the employer to return the injured employee to work in a modified or alternate duty capacity.

(b) The administrator or designee may make an on-site evaluation or request information from the employer or providers of a workplace modification in order to verify that:

- (1) the workplace modification was provided;
- (2) the workplace modification was a reasonable modification and expenditure; and

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(3) the injured employee returned to work as a result of the workplace modification.

(c) The administrator shall utilize the National Institute of Health's "Searchable Online Accommodation Resource," U.S. Department of Labor resources, Texas Department of Assistive and Rehabilitative Services resources, or similar resources in evaluating and verifying workplace modifications and associated costs. The administrator may consult with a rehabilitation counselor or specialist when verifying the appropriateness of workplace modifications and costs.

(d) The administrator may approve or deny in whole or in part the employer's request for reimbursement from the account.

(e) Decisions regarding approval or denial of applications, the reason for approval or denial of an application, and the amount to be disbursed from the account may not be appealed and are the sole discretion of the return-to-work account administrator.

CERTIFICATION. This agency certifies that the adopted sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Issued at Austin, Texas, on _____, 2006.

Norma Garcia
General Counsel
Division of Workers' Compensation
Texas Department of Insurance

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that new §§137.41 – 137.48 concerning the return-to-work pilot program for small employers and the workers' compensation return-to-work account are adopted.

AND IT IS SO ORDERED.

Albert Betts
Commissioner of Workers' Compensation

ATTEST:

Norma Garcia
General Counsel

COMMISSIONER'S ORDER NO. **DWC 06-0011**