

SUBCHAPTER B. MEDICAL BENEFIT REGULATION
28 TAC §180.23

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes to amend 28 TAC §180.23, concerning division-required training for doctors. Section 180.23 implements Labor Code §408.1225, concerning designated doctor certification and training.

EXPLANATION. The amendments make editorial changes, updates for plain language and agency style, and updates to conform the rule to related rules in 28 Texas Administrative Code (TAC) Chapter 127. The amendments also make the rule easier to navigate by adding subsection headers. The purpose of the amendments is to attract and retain doctors in the maximum medical improvement (MMI) and impairment rating certification program by revising training and testing requirements to ensure that they are consistent, reducing confusion and administrative burdens.

Amending §180.23 is necessary to remove references to recertification training requirements under 28 TAC Chapter 127 because DWC's proposed changes to Chapter 127 include a combined process for certification and recertification under §127.100. As a result, any references to recertification under §127.110 will soon be obsolete. The amendments to §180.23 also align the testing requirements for MMI and impairment rating certifications with the updated procedure in DWC's Chapter 127 proposal.

Informal Comments. DWC posted two informal working drafts of text for §180.23 and related text for Chapter 127. DWC posted the first informal working draft on March 3, 2022, and the second on June 1, 2022, and held a stakeholder meeting on June 7, 2022, to discuss the drafts. DWC received comments on Chapter 127, but no comments on §180.23 at the meeting or on either informal working draft of §180.23.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Deputy Commissioner of Business Process Joseph McElrath has determined that during each year of the first five years the proposed amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections, other than that imposed by the statute. This determination was made because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Deputy Commissioner McElrath does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Deputy Commissioner McElrath expects that enforcing and administering the proposed amendments will have the public benefits of ensuring that DWC's rules conform to Labor Code §§408.0041 and 408.1225, and 28 TAC Chapter 127, and that they are current and accurate, which promotes transparent and efficient regulation. The proposed amendments will also have the public benefit of increasing doctor participation rates in the MMI and impairment rating certification program by ensuring that the certification training requirements are consistent with current related rules and practices, which reduces confusion and administrative burdens.

Deputy Commissioner McElrath expects that the proposed amendments will not increase the cost to comply with Labor Code §§408.0041 and 408.1225, or with 28 TAC Chapter 127, because they do not impose requirements beyond those in the statutes and associated rules, and because the proposed amendments do not create obligations beyond those in the current rule.

Labor Code §408.0041 governs designated doctor examinations to resolve questions about an employee's injury, including questions about MMI and impairment. Labor Code §408.1225 requires in part that the commissioner by rule develop a process for certification of a designated doctor, and that those rules must require standard training and testing. Section 408.1225 also requires that DWC develop guidelines for certification training programs to ensure a designated doctor's competency in providing assessments, and allows DWC to authorize an independent training and testing provider to conduct the certification program under those guidelines. 28 TAC Chapter 127 sets specific procedures and requirements for the designated doctor program. Section 180.23 governs authorization for certification of MMI, determination of impairment, and assignment of impairment ratings, which complies with Labor Code §§408.0041 and 408.1225, and conforms with 28 TAC Chapter 127.

The proposed amendments implement and conform with the requirements in Labor Code §§408.0041 and 408.1225, and in 28 TAC Chapter 127, and do not impose new substantive duties or affect additional people. As a result, any cost associated with the proposed amendments to §180.23 does not result from the enforcement or administration of the proposed amendments.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. DWC has determined that the proposed amendments will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities, because the proposed amendments make editorial changes, updates for plain language and agency style, and updates to conform the rule to related rules in 28 TAC Chapter 127 only. The proposed amendments do not change the people the rule affects or impose additional costs. As a result, and in accordance with Government Code §2006.002(c), DWC is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. DWC has determined that this proposal does not impose a possible cost on regulated persons. As a result, no additional rule amendments are required under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT. DWC has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the agency;
- will not require an increase or decrease in fees paid to the agency;
- will not create a new regulation;
- will not expand, limit, or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule's applicability; and
- will not positively or adversely affect the Texas economy.

DWC made these determinations because the proposed amendments make editorial changes, updates for plain language and agency style, and updates to conform the rule to related rules in 28 TAC Chapter 127. They do not change the people the rule affects or impose additional costs.

TAKINGS IMPACT ASSESSMENT. DWC has determined that no private real property interests are affected by this proposal, and this proposal does not restrict or limit an

owner's right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. DWC will consider any written comments on the proposal that DWC receives no later than 5:00 p.m., Central time, on January 30, 2023. Send your comments to RuleComments@tdi.texas.gov; or to Texas Department of Insurance, Division of Workers' Compensation, Legal Services, MC-LS, P.O. Box 12050, Austin, TX 78711-2050.

DWC will also consider written and oral comments on the proposal at a public hearing at 10 a.m., Central time, on January 18, 2023. The hearing will take place remotely. DWC will publish details of how to view and participate in the hearing on the agency website at www.tdi.texas.gov/alert/event/index.html.

SUBCHAPTER B. MEDICAL BENEFIT REGULATION.

28 TAC §180.23.

STATUTORY AUTHORITY. DWC proposes amended §180.23 under Labor Code §§408.0041, 408.1225, 402.00111, 402.00116, and 402.061.

Labor Code §408.0041 provides in part that, at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination (a designated doctor examination) to resolve any question about the impairment caused by the compensable injury, the attainment of MMI, the extent of the employee's compensable injury, whether the injured employee's disability is a direct result of the work-related injury, the ability of the employee to return to work, or other similar issues.

Labor Code §408.1225 requires in part that the commissioner by rule develop a process for certification of a designated doctor, and that those rules must require standard training and testing. Section 408.1225 also requires that DWC develop guidelines for certification training programs to ensure a designated doctor's competency in providing assessments, and allows DWC to authorize an independent training and testing provider to conduct the certification program under those guidelines.

Labor Code §402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation shall administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation shall adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

CROSS-REFERENCE TO STATUTE. Section 180.23 implements Labor Code §408.1225, enacted by HB 7, 79th Legislature, Regular Session (2005); and amended by HB 2004, 80th Legislature, Regular Session (2007); HB 2605, 82nd Legislature, Regular Session (2011); and HB 2056, 85th Legislature, Regular Session (2017).

TEXT.

§180.23. Division-Required Training for Doctors.

(a) Applicability. This section governs authorization relating to certification of maximum medical improvement (MMI), determination of permanent impairment, and

assignment of impairment ratings in the event that a doctor finds permanent impairment exists.

(b) Authorization. Full authorization to assign an impairment rating and certify MMI in an instance where the injured employee is found to have permanent impairment requires a doctor to obtain division certification by ~~successfully~~ completing the division-prescribed impairment rating training and passing the test or meeting the training and testing requirements for designated doctor certification ~~[or recertification]~~ under §127.100 ~~[and §127.110]~~ of this title (relating to Designated Doctor Certification ~~[and Designated Doctor Recertification, respectively]~~). To remain certified, a doctor is required to ~~successfully~~ complete follow-up training ~~[and testing]~~ at least every two years.

(c) Training. A doctor who has not completed the required training under subsection (b) of this section but who has had similar training in the American Medical Association Guides from a division-approved vendor within the prior two years may submit the syllabus and training materials from that course to the division for review. If the division determines that the training is substantially the same as the division-required training and the doctor passes the division-required test, the doctor is fully authorized under this section. The ability to substitute training only applies to the initial training requirement~~[, not the follow-up training]~~.

(d) Exceptions. Notwithstanding any other provision of this section, a doctor who has not successfully completed training and testing required by this section for authorization to assign impairment ratings and certify MMI when there is permanent impairment may receive permission by exception to do so from the division on a specific case-by-case basis.

~~[(e) This section is effective September 1, 2012.]~~

CERTIFICATION. This agency certifies that legal counsel has reviewed the proposal and found it to be within the agency's authority to adopt.

Issued in Austin, Texas, on December 8, 2022.



Kara Mace
Deputy Commissioner for Legal Services
TDI, Division of Workers' Compensation