

SUBCHAPTER B. Return To Work
28 TAC §137.41, §137.49

1. INTRODUCTION. The Commissioner of Workers' Compensation ("Commissioner"), Texas Department of Insurance (Department), Division of Workers' Compensation ("Division") adopts an amendment to §137.41 and adopts new §137.49, concerning the optional preauthorization plan. This amendment and new section is adopted without changes to the proposal published in the December 7, 2007 issue of the *Texas Register* (32 TexReg 9095).

2. REASONED JUSTIFICATION. The adopted amendment and new section is necessary to implement amendments enacted under House Bill (HB) 886, by the 80th Legislature, Regular Session, to Labor Code §413.022 (relating to return-to-work pilot program for small employers; fund).

Labor Code §413.022, enacted by the 79th Legislature, Regular Session, establishes the workers' compensation return-to-work account, a special account in the general revenue fund funded by administrative penalties collected by the Division, and requires the Commissioner to establish by rule a return-to-work pilot program for small employers ("pilot program") designed to promote the early and sustained return to work of an injured employee who sustains a compensable injury. The pilot program reimburses from the return-to-work

account an eligible employer for expenses incurred by the employer in making workplace modifications and changes necessary to accommodate an injured employee's return to modified or alternative work. Reimbursement under this pilot program may not exceed \$2,500. In accordance with Labor Code §413.022, the Commissioner adopted 28 TAC §§137.41 – 137.48. These sections establish and set forth the terms, conditions, and requirements for the pilot program.

HB 886 described above amends Labor Code §413.022 by requiring the Commissioner to establish by rule an optional preauthorization plan for eligible employers who participate in the pilot program. The optional preauthorization plan allows small employers to obtain Division approval of workplace modifications and changes prior to incurring the out-of-pocket expenses associated with implementing the modifications and changes. HB 886 requires a small employer who wants to participate in the optional preauthorization plan to submit a proposal to the Division, in the manner prescribed by the Division, that describes the workplace modifications and other changes that the employer proposes to make to accommodate an injured employee's return to work. HB 886 provides that if the Division approves the employer's proposal, the Division will guarantee reimbursement of the expenses incurred by the employer in implementing the modifications and changes from the return-to-work account unless the Division determines that the modifications and changes differ

materially from the employer's proposal. Reimbursement under the optional preauthorization plan is subject to the \$2,500 limit.

The adopted amendment to §137.41 and new §137.49 establishes the optional preauthorization plan. The adopted amendment to §137.41 incorporates new §137.49 into the rules in Subchapter B that establish and set forth the terms, conditions, and requirements for the pilot program. New §137.49 establishes the procedures and requirements for the optional preauthorization plan whereby small employers may submit a proposal plan to the Division that describes the workplace modifications and other changes that the employer proposes to make to accommodate an injured employee's return to work. This new rule also provides that if the Division approves the employer's proposal, the Division will guarantee reimbursement of the expenses incurred by the employer in implementing the modifications and changes from the return-to-work account.

3. HOW THE SECTIONS WILL FUNCTION. The amendment to §137.41 adds new §137.49 to the purpose provision of Subchapter B. Amended §137.41 provides that the purpose of §§137.41 – 137.49 is to set forth the terms, conditions, and requirements for the return-to-work pilot program for small employers.

New §137.49(a) specifies who is eligible to apply for a guaranteed reimbursement of expenses from the return-to-work account. This subsection

states that an "eligible employer," which is defined by Labor Code §413.022(a)(2) and §137.42(2), may apply for a guaranteed reimbursement of expenses. This subsection also states that an eligible employer may apply for a guaranteed reimbursement of "eligible expenses." "Eligible expense" is defined by §137.42(3).

New §137.49(b) specifies how an eligible employer applies for a guaranteed reimbursement of expenses. This subsection requires the employer to submit to the Division a properly completed Preauthorization Proposal Plan (DWC Form – 008) that includes a description of the proposed modifications and changes, the estimated costs of those modifications and changes, and a copy of the Division's "Work Status Report" from the injured employee's examining doctor.

New §137.49(c) provides that an incomplete proposal plan may be denied or returned to the employer for additional information.

New §137.49(d) provides that the Division will make the Preauthorization Proposal Plan form available on the Division's website located at <http://www.tdi.state.tx.us/wc/index.html> and at the Division's central office and will provide the form to an employer upon request.

New §137.49(e) requires the return-to-work account administrator to review each submitted proposal plan in accordance with §137.48. This subsection provides that the administrator may approve or deny the proposal

plan in whole or in part or request additional information. The administrator must promptly notify the employer in writing of the approval or denial of the employer's proposal plan.

New §137.49(f) specifies the process the employer must follow to obtain reimbursement. This subsection requires the employer to complete the approved modifications and changes and to submit to the Division an application for reimbursement under §137.46 that contains the information under §137.47.

Upon receipt of a properly completed application for reimbursement and subject to §137.44, new §137.49(g) requires the Division to reimburse the employer the costs the employer incurred in making the approved modifications and changes. This subsection permits the Division to deny reimbursement if the Division determines that the modifications and changes differ materially from the proposal plan.

4. SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.

Comment: A commenter recommends that §137.49(c) provide, "An incomplete proposal plan shall be returned to the employer for additional information with an explanation of how or why the proposed plan is deficient or incomplete. An incomplete or deficient proposal plan may be denied upon resubmission to the Division." The commenter makes this recommendation arguing that an employer

should be entitled to an explanation of the deficiencies and given an opportunity to correct the deficiencies before having a proposal plan denied.

Agency Response: The Division disagrees that this additional language should be added. The Division believes new §137.49(c) and (e) address the commenter's concern. New §137.49(c) and (e) both provide that the Division may request the employer to provide additional information. These subsections permit the Division to inform an employer on what information is necessary to correct a deficient proposal plan. Further, in the case of a denial, new §137.49(e) provides that the Division will promptly notify the employer of the denial in writing. The Division interprets this subsection to require this written notification to include the reason(s) for the denial. Additionally, no rule prohibits an employer from resubmitting a corrected proposal plan after a denial.

Comment: A commenter states that requiring an employer to submit an application for reimbursement after completing the modifications and changes set out in an approved proposal plan is an unnecessary duplication of effort and requires a preauthorization applicant to do the same thing a non-preauthorization applicant must do thereby undermining the purpose and effectiveness of the optional preauthorization plan. Further, the commenter recommends requiring an employer seeking reimbursement to submit to the Division a certification stating the workplace modifications have been completed in accordance with the

approved proposal plan and that the criteria of §137.47(1), (2), and (3) has been satisfied.

Agency Response: The Division does not agree that requiring an application for reimbursement is an unnecessary duplication of effort nor undermines the purpose and effectiveness of the optional preauthorization plan.

The Division is requiring the employer to submit an application for reimbursement after implementing the modifications and changes because the Division anticipates that there may be cases where the modifications and changes implemented will deviate to a certain extent from those described in the approved proposal plan. The Division interprets the Labor Code and this rule to permit some deviations as long as those deviations are not material. In cases where there is a deviation, the Division must determine whether the deviation is material. A properly completed application for reimbursement will provide the Division with information to make this determination.

The DWC Form – 008 is a dual purpose form setting out the information required for both the proposal plan and the application for reimbursement. An employer may designate on this form which one is being submitted by checking the appropriate box at the beginning of the form. This form is available on the Division's website in both a .pdf and .doc format and both formats allow this form to be completed electronically and saved. Completing and submitting the application for reimbursement where there is an approved proposal plan should

be simple and not time consuming. An employer may utilize the electronic copy of the already completed and approved proposal plan when completing an application for reimbursement.

Further, this new section requires the Division to reimburse the employer upon Division receipt of a properly completed application for reimbursement. Receipt of the application for reimbursement triggers reimbursement. The application for reimbursement is not subject to the same evaluation as it is when an employer goes through the non-preauthorization process because the modifications and changes have already been reviewed and approved during the evaluation of the proposal plan. Thus, in the optional preauthorization plan, the application for reimbursement acts as a certification. The only instance where the Division must perform an additional evaluation of the application for reimbursement is if the modifications and changes implemented differ from those set out in the approved proposal plan. In this instance and as required by Labor Code §413.022 and new §137.49(g), the Division must determine whether the modifications and changes implemented differ materially from the proposal plan.

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

For: None

For with changes: Office of Injured Employee Counsel

Against: None

6. STATUTORY AUTHORITY. This proposed amendment and new section is adopted under Labor Code §§413.022, 402.00111, and 402.061.

Labor Code §413.022 requires the Commissioner of Workers' Compensation by rule to establish an optional preauthorization plan for eligible employers who participate in the return-to-work pilot program. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Labor Code Title 5. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

7. TEXT.

§137.41. Purpose.

The purpose of §§137.41 – 137.49 of this chapter (relating to Disability Management) is to set forth the terms, conditions, and requirements for the return-to-work pilot program for small employers.

§137.49. Optional Preauthorization Plan.

(a) An eligible employer who participates in the return-to-work pilot program for small employers may apply to the Division for a guaranteed

reimbursement of eligible expenses from the return-to-work account prior to making workplace modifications or other changes designed to accommodate an injured employee's return to work.

(b) To apply for a guaranteed reimbursement of eligible expenses, an eligible employer must submit to the Division a properly completed Preauthorization Proposal Plan (DWC Form – 008). An eligible employer must provide all information required by this form including:

(1) a description of the workplace modifications and other changes that the employer proposes to make to accommodate the injured employee's return to work;

(2) the estimated costs in making those proposed modifications and changes; and

(3) 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 necessitates the provision of a workplace modification in order for the employee to return to work in a modified or alternative duty capacity.

(c) An incomplete proposal plan may be denied or returned to the employer for additional information.

(d) The Preauthorization Proposal Plan form (DWC Form – 008) shall be available on the Division's website (<http://www.tdi.state.tx.us/wc/index.html>) and

at the Division's central office. Upon request, the Division shall provide a Preauthorization Proposal Plan form to an employer.

(e) The administrator shall review each submitted proposal plan in accordance with §137.48 of this title (relating to Return-to-Work Account Administrator Determinations). After review, the administrator may approve or deny the proposal plan in whole or in part or request additional information. The administrator shall promptly notify the employer in writing of the approval or denial of the proposal plan.

(f) Upon receipt of Division approval of the proposal plan, the employer may begin all approved modifications and changes set out in the approved proposal plan. Upon completion of the approved modifications and changes, the employer may obtain reimbursement from the return-to-work account by submitting to the Division a properly completed Application for Reimbursement under §137.46 of this title (relating to Application for Reimbursement from the Return-to-Work Account) that contains the information under §137.47 of this title (relating to Criteria for Evaluation of Applications).

(g) Upon receipt of the information described in subsection (f) of this section and subject to §137.44 of this title (relating to Return-to-Work Account for Small Employers), the Division shall reimburse the employer the costs incurred by the employer in making the approved modifications and changes unless the

Division determines that the modifications and changes differ materially from the employer's proposal.

8. CERTIFICATION. This agency hereby certifies that the adopted amendment and section has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas on _____, 2008.

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

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that the amendment to §137.41 and new §137.49 specified herein, concerning the optional preauthorization plan, is adopted.

AND IT IS SO ORDERED

ALBERT BETTS
COMMISSIONER OF WORKERS' COMPENSATION

TITLE 28. INSURANCE
Part 2. Texas Department of Insurance,
Division of Workers' Compensation
Chapter 137. Disability Management

Adopted Sections
Page 13 of 13

ATTEST:

Norma Garcia
General Counsel

COMMISSIONER'S ORDER NO. _____