

**State of California
Office of Administrative Law**

**In re:
California Victim Compensation and
Government Claims Board**

**Regulatory Action: Title 2
California Code of Regulations**

Amend section: 649.32

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2012-0316-01 SR

SUMMARY OF REGULATORY ACTION

In this regulatory action, the California Victim Compensation and Government Claims Board (Board) proposed to amend section 649.32 of Title 2 of the California Code of Regulations (CCR) to enhance income loss verification requirements and reduce fraud in the processing of crime victim compensation claims.

DECISION SUMMARY

On March 16, 2012, the Board resubmitted to the Office of Administrative Law (OAL) proposed amendments to section 649.32 of Title 2 of the CCR after having withdrawn the amendment of that section from OAL review in rulemaking action file number 2011-0520-06 on June 30, 2011. On April 11, 2012, OAL notified the Board that OAL disapproved the proposed amendment of section 649.32 for failure of the Board to comply with specified standards and procedures of the California Administrative Procedure Act (APA). The reasons for the disapproval are summarized below:

- A. the proposed regulation failed to comply with the clarity standard of Government Code section 11349.1(a)(3) and Title 1 CCR section 16;
- B. the agency failed to comply with procedural requirements of the APA and its implementing regulations.

All issues must be resolved prior to OAL approval of any resubmission.

BACKGROUND

Section 649.32 implements the Victim Compensation Program which provides compensation to victims or derivative victims of crimes for costs incurred as the result of crimes, including compensation for lost income or support during periods of physical or

psychological recovery. Specifically, section 649.32 establishes the requirements for the verification of income or support loss. The section also establishes a prohibition of claims for lost income based solely on an offer of employment when the claimant had not yet begun to work at the time he or she became the victim or derivative victim of the qualifying crime.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA review. (Gov. Code, secs. 11340.5 and 11346.) OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that required procedures are followed in order to provide meaningful public opportunity to comment on rules and regulations before they become effective.

A. FAILURE TO COMPLY WITH THE CLARITY STANDARD OF GOVERNMENT CODE SECTION 11349.1(a)(3).

(1) Proposed Amendments to Section 649.32(f).

The Board proposed to amend title 2 CCR section 649.32(f) as follows:

~~(f3) A disability statement should contain sufficient information to verify the disability period that is a direct result of the crime. The following methods~~ When a disability statement pursuant to subsection (g) is not available or does not contain sufficient information to verify the disability period, the Board may consult the following sources to verify a disability time period to ensure the disability time period is appropriate, also be used to verify disability time period, including but not limited to:

...

~~(2) The shortest time period in the "Medical Disability Advisor: Workplace Guidelines for Disability Duration" (5th Edition) for physical injuries and type of work done by the victim or applicant.~~

- The Medical Disability Advisor: Workplace Guidelines for Disability Duration
- WebMD

The proposed amendment leaves existing subsection (f) [now (g)(3)] unclear. There are, at present, as many as five editions of The Medical Disability Advisor: Workplace Guidelines for Disability Duration. The current regulation specifies which edition (5th Edition) of this document will be consulted for determining a disability time period and which time period will be selected from that edition, i.e., “the shortest time period,” in the event more than one disability time period is listed in an edition. The amended regulation could be interpreted as meaning that the Board may consult any edition of this document. The amended regulation is also unclear as to which disability time period may be selected by the Board from an edition of this document in the event more than one disability time period is listed. The regulation as proposed would have enabled the Board to select the shortest time period from a given edition, or to consult the edition of this document which contains the shortest time period, so as to reduce costs to the VCP program. On the other hand, the affected public could interpret the absence of any specified edition and the absence of the phrase “the shortest time period” as meaning that a claimant may be entitled to a longer or the longest time period identified by any edition of this document or to utilization of a greater or the greatest disability time period listed by a given edition, in the event more than one disability period is listed.

Prior to resubmission of proposed amendments to this subsection for OAL review, the agency must amend subsection (f), if at all, in a way which clearly indicates the edition of the source it is authorized to consult and the disability time period which will be selected by the Board in the event a source exists in multiple editions and/or lists more than one disability time period for a disability or condition.

(2) Proposed Amendments to Section 649.32(c).

The Board proposed to amend section 649.32(c) by repealing current subsection (c) and placing its provisions in a newly adopted subsection (d) as follows:

(d) Acceptable evidence of income loss shall be in the form of one or more of the following unless the individual is in a particular situation as stated in subsection (e) below:

(1) documentation from the California Franchise Tax Board...

(2) documentation from the Board of Equalization...and

(3) a statement under penalty of perjury from the employer...

Proposed new subsection (d) is unclear for two reasons.

First, the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning pursuant to title 1 CCR section 16(a)(1). Because of the use of the phrase “one or more of the following” in subsection (d), the subsection could be interpreted as requiring just one of the following: (1), (2), or (3). In the alternative,

because of the use of the word “and” after subdivision (2), the regulation could be interpreted as requiring (1), (2), and (3).

Second, the regulation is unclear because the language of the regulation conflicts with the agency’s description of the effect of the regulation pursuant to title 1 CCR section 16(a)(2). In the Board’s response to the oral comments of Phillip Ung at the public hearing of May 5, 2011 [Transcript pp. 11-12], the Board states that what it intends by the text of the “evidence of income loss” subsection is that a claimant must provide a statement under penalty of perjury from the employer *and* either: documentation from the California Franchise Tax Board, etc., *or* documentation from the California Employment Development Department. See Summary and Response to Public Comments matrix, p. 13. In other words, what the Board intends by new subsection (d) is a third interpretation of the subsection, i.e., that a claimant is required to provide the information specified in subdivisions (1) or (2) and (3).

Prior to resubmission of proposed amendments to this subsection for OAL review, the Board must amend new subsection (d), if at all, to make clear which of the categories of information listed in subdivisions (1), (2), and (3) are required to be submitted by claimants as evidence of income loss.

B. PROCEDURAL REQUIREMENTS OF THE APA.

(1) Failure of the Notice of the proposed amendment to identify savings to a state agency pursuant to Government Code Section 11346.5(a)(6).

The Board’s Notice published March 18, 2011, includes a series of disclosures regarding the proposed action. Among those is the cost or savings to a state agency, which the Board identifies as “None.” However, page four of the Form 399 (Economic and Fiscal Impact Statement) submitted to OAL with this rulemaking action identifies savings of approximately \$1.04 million to state government. In any notice of the availability of revised text, which the Board undertakes pursuant to Section A of this Decision of Disapproval, the Board must correct the information contained in its originally published notice concerning savings to state government.

(2) Failure of the Final Statement of Reasons in the rulemaking file to contain required information.

Pursuant to Government Code section 11346.9(a)(1), the Final Statement of Reasons (FSR) in a rulemaking file must update the information contained in the Initial Statement of Reasons (ISR). In this rulemaking file, the ISR contained a discussion of the purpose and necessity of various amendments to section 649.32, which were proposed in OAL file no. 2011-0520-06 prior to that section being withdrawn from OAL review. Section 649.32 was, thereafter, further amended and made available for public comments for 15 days pursuant to Government Code section 11346.8(c). The FSR in this rulemaking file contains no updating of the information contained in the ISR regarding the withdrawal,

further amendment, reasons for the further amendment, and 15-day availability of section 649.32.

Pursuant to Government Code section 11346.9(a)(2), the FSR of the rulemaking file must contain a determination as to whether amendment of a regulation imposes a mandate on local agencies or school districts. The FSR in this file contains no such determination.

Pursuant to Government Code section 11346.9(a)(3), the FSR of the rulemaking file must contain a summary of each objection or recommendation made regarding the proposed amendment of a regulation and an explanation of how the proposed action has been changed to accommodate each objection or recommendation. The rulemaking file in this action contains a separate summary and response to public comments matrix, but the matrix is not contained in the FSR or incorporated by reference or cross referenced by the FSR.

Prior to resubmission of proposed amendments to this section for OAL review, the Board must amend its FSR to address these deficiencies.

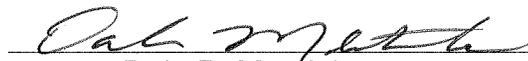
Miscellaneous.

OAL also notes that the Form 400 submitted with this rulemaking action fails to identify the dates of any 15-day availability period in Part B, Section 4. Prior to resubmission of amendments to this section for OAL review, the Board must list the beginning and ending dates of all 15-day availability periods in Part B, Section 4 of the Form 400.

CONCLUSION

For the foregoing reasons, OAL disapproves the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Board may resubmit the action to OAL within 120 days of its receipt of this Decision of Disapproval.

Date: April 24, 2012



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