

**TITLE 28. INSURANCE**  
**PART 2. TEXAS DEPARTMENT OF INSURANCE,**  
**DIVISION OF WORKERS' COMPENSATION**  
**CHAPTER 124: CARRIERS: REQUIRED NOTICES AND MODE OF PAYMENT**  
**28 TAC §124.5 AND §124.6**

**1. INTRODUCTION**

The Texas Department of Insurance, Division of Workers' Compensation adopts amended §124.5, concerning mode of payment made by insurance carriers, and new §124.6, concerning electronic transfer payments made through an access card. These sections are adopted with changes to the proposed text published in the July 4, 2014, issue of the *Texas Register* (39 TexReg 5093). There was not a request for public hearing submitted to the Division. Informal drafts of amended §124.5, and new §124.6 were posted on the Texas Department of Insurance's website on December 9, 2013 and February 19, 2014.

The Division has adopted non-substantive changes to the text of amended §124.5 and new §124.6 for consistency and clarity. The Division made non-substantive changes to clarify that insurance carrier's toll-free customer service number and website address may either be on the front or back of the access card under §124.6(h)(2). The Division also made non-substantive changes to §124.6(k) to clarify that insurance carriers may remove permitted fees under §124.6(e) from the claimant's account or access card.

In response to formal public comments, the Division deleted the prohibition against an insurance carrier paying income or death benefits on an access card that permitted negative balances in §124.6(d)(2); amended §124.6(d)(2)(D) to specify that the prohibition on fees for withdrawing money from ATMs refers to network ATMs; and amended §124.6(e) to permit insurance

carriers to pay income or death benefits on an access card that allows out-of-network automated teller machine (ATM) fees. The Division also changed the effective date of the rule from January 1, 2015 to June 1, 2015 in §124.6(n) and added a June 1, 2015 effective date in amended §124.5(j).

None of these changes materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In accordance with Government Code §2001.033, the Division's reasoned justification for these rules is set out in this order, which includes the preamble. The following paragraphs include a detailed section by section description and reasoned justification of amended §124.5 and new §124.6.

## **2. REASONED JUSTIFICATION.**

These amended and new sections are necessary to implement Labor Code §409.0231, concerning payment by electronic funds transfer (EFT). Labor Code §409.0231, in part, requires that an insurance carrier offer electronic funds transfer as a mode of payment for employees entitled to benefits for a period of sufficient duration. New §124.6 is necessary to implement Labor Code §402.021, entitled goals; legislative intent; general workers' compensation mission of department. Labor Code §402.021(b)(3) requires that injured employees are provided income and medical benefits in a timely and cost-effective manner. New §124.6 is also necessary to ensure that claimants receive income benefit payments in a timely and accurate manner, as required by Labor Code §408.081, concerning income benefits. New §124.6 protects the rights of injured employees who have given up their right to sue their employers in exchange for workers' compensation coverage.

Since 1999, §124.5 provided a method by which insurance carriers could offer claimants the option of receiving income or death benefits through an access card; however existing §124.5 does

not specify prohibited fees or require plain language disclosures. The Division determined that existing rules needed to be updated and expanded to ensure that claimants who choose to receive income benefits through an access card are not charged excessive fees to access their income or death benefits and have access to plain language notices regarding any allowed fees so that they may make an informed decision about the use of these cards as a mode of payment of income or death benefits.

The Division determined that prepaid access card use is a new and emerging technology that must be addressed in the Texas workers' compensation system. Labor Code §402.021(b)(9) states that one of the goals of the workers' compensation system is to take maximum advantage of technological advances to provide the highest levels of service possible to system participants and to promote communication between system participants. According to Bankrate, an aggregator of financial rate information, in their 2013 Prepaid Debit Cards survey, in the private sector, almost \$77 billion dollars were loaded onto prepaid debit cards in 2012, a number expected to more than double by 2015 (available at <http://www.bankrate.com/finance/banking/prepaid-debit-cards-close-gap-checking.aspx>). At least \$100 billion was distributed in 2011 on cards for 158 federal, state, and local governments' payment programs (Federal Reserve, Report to the Congress on Government-Administered, General-Use Prepaid Cards (July 2012), available at <http://www.federalreserve.gov/publications/other-reports/files/government-prepaid-report-201207.pdf>). Because there is a current lack of federal regulation regarding prepaid cards, the Division determined that it is necessary to implement protections for claimants using these cards to access their income or death benefits.

Unlike traditional debit cards, prepaid cards are not covered by federal Regulation E. Regulation E is the comprehensive federal regulatory regime that “applies to any electronic transfer

that authorizes a financial institution to debit or credit a consumer's account" (12 C.F.R §205.3(a)). The Bureau of Consumer Financial Protection, that implements the Electronic Fund Transfer Act (EFTA), provides that, although many prepaid debit card providers offer contractual protections similar to those provided in Regulation E for payroll cards, such provisions may vary, and are subject to unilateral change (77 FR 30923, available at [https://www.federalregister.gov/articles/2012/05/24/2012-12565/electronic-fund-transfers-regulation?utm\\_content=previous&utm\\_medium=PrevNext&utm\\_source=Article](https://www.federalregister.gov/articles/2012/05/24/2012-12565/electronic-fund-transfers-regulation?utm_content=previous&utm_medium=PrevNext&utm_source=Article)). New §124.6 ensures that claimants have consumer protections in the absence of Regulation E.

Section 124.5 addresses **mode of payment made by insurance carriers**. Amended §124.5(a) adds the phrase "medical benefit and burial payments" and deletes the phrase "payments other than income or death benefits" for clarity. This non-substantive change clarifies the modes of payment that must be used by the insurance carrier for medical benefit and burial payments. The Division clarifies that medical and burial payments are prohibited from being made through an access card under new §124.6 because medical benefit payments would likely involve other rule changes and are outside the scope of the current rule.

Amended §124.5(b)(1) adds the phrase "claimant" and deletes the phrase "injured employee" for consistent use of the term in Chapter 124.

Amended §124.5(b)(2) adds a reference to new §124.6 to permit insurance carriers to make payments of income or death benefits through an access card. Amended §124.5(b)(2) is necessary to correspond to new §124.6.

Existing §124.5(e) is deleted because the requirements for electronic transfer payments made through an access card are found in new §124.6. Existing §124.5(e)(1) is deleted because the requirement for a signed agreement and disclosure is in new §124.6(b) and (f). Existing

§124.5(e)(2) is deleted because new §124.6(d) and (e) prohibit any fees or charges other than expedited card replacement, international transactions, and out-of-network ATM fees. Account maintenance fees are prohibited under existing §124.5(e), and new §124.6 continues this prohibition, but lists the types of prohibited fees individually in §124.6(d)(2)(G) - (I). Existing §124.5(e)(3) is deleted because under new §124.6(l), an insurance carrier is considered to have made an income or death benefit payment for purposes of Labor Code §409.0232 on the date when the payment is deposited in the account and available on the access card. If the claimant has not received the access card, the payment is not available on the access card. Existing §124.5(e)(4) is deleted because an insurance carrier is prohibited from removing money from the claimant's account or access card except to remove permitted fees under subsection (e) of this section or to close the account for inactivity of a period of 12 months or more under new §124.6(k).

Existing §124.5(f) is redesignated as amended §124.5(e). Existing §124.5(g) is redesignated as amended §124.5(f). Amended §124.5(f)(3) deletes the phrase "sufficient duration of" because the period of sufficient duration is specified as eight weeks in existing §124.5(g), and inclusion of the phrase is redundant.

New §124.5(f)(4) adds the provision that the requirements for income or death benefit payments made by electronic transfer under subsection (f) do not apply to payments made through an access card. Section 124.5(f) requires an insurance carrier to initiate income or death benefit payments by electronic transfer on the written request of a claimant. New §124.5(f)(4) is necessary to clarify that payments made through an access card under new §124.6 are voluntary on the part of both the insurance carrier and the claimant.

Redesignated §124.5(g) - (i) amend "carrier" to "insurance carrier" and "benefits" to "income and death benefits" for consistency and clarity.

New §124.5(j) adds that the effective date for amended §124.5 is June 1, 2015.

Section 124.6 addresses **electronic transfer payments made through an access card**.

New §124.6(a) defines the term access card as used in 28 TAC Chapter 124. The Division clarifies that “access card” may include other mechanisms, such as a key fob or cell phone application, that access a financial account. The definition of “access card” in new §124.6(a) provides that the account tied to the access card is the insurance carrier’s account, not the claimant’s account.

New §124.6(b) requires the claimant and insurance carrier to mutually agree in writing for workers’ compensation income or death benefits to be made to an insurance carrier’s bank account and accessible by the claimant through an access card. New §124.6(b) is necessary to clarify that although insurance carriers are required to make income or death payments to claimants using EFT if requested and certain conditions are met, payment of benefits to a claimant through an access card is not required. New §124.6(b) also provides that an insurance carrier shall maintain the signed written agreement between the claimant and the insurance carrier for, at a minimum, 401 weeks after the date of injury. The retention time prescribed in §124.6(b) is necessary to ensure the signed written agreement is available if a dispute arose during the 401 weeks that the claimant is eligible for income benefits. New §124.6(b) is necessary to enable the Division to carry out its statutory obligations to monitor and regulate the Texas workers’ compensation system under Labor Code §414.002, as well as §§409.0231, 402.021, and 402.00128.

New §124.6(c) states that any person with whom an insurance carrier utilizes or contracts for the purpose of providing service or fulfilling duties under new §124.6 is an agent of the insurance carrier in accordance with 28 TAC §180.1(3) concerning definitions. Section 180.1(3) states that the system participant who utilizes or contracts with the agent may also be responsible for the administrative violations of that agent. New §124.6(c) reminds the insurance carrier that the

requirements also apply to the actions of a third party who it utilizes or contracts with for the purpose of providing service or fulfilling duties under new §124.6, and that the insurance carrier may commit an administrative violation if its agents fail to meet the requirements.

New §124.6(d) outlines requirements and prohibited fees for the insurance carrier and their agents. These requirements are necessary to ensure the insurance carriers timely pay and the injured employees receive all benefits as required by Labor Code §§408.081(a), 415.002(a)(2), 415.002(a)(16), 402.021(b)(3), 402.021(b)(8), and 409.024. Labor Code §408.081 provides that an employee is entitled to timely and accurate income benefits. Labor Code §409.024 provides that an insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds to terminate or reduce benefits, as determined by the Commissioner. Labor Code §415.002(a)(2) states that an insurance carrier or its representative commits an administrative violation if that person terminates or reduces benefits without substantiating evidence that the action is reasonable and permitted by law. Labor Code §415.002(a)(16) states that an insurance carrier or its representative commits an administrative violation if that person fails or refuses to pay benefits from week to week as and when due directly to the person entitled to the benefits. New §124.6(d)(1) permits the claimant to withdraw the entire balance on the access card in one transaction. New §124.6(d)(1) is necessary to ensure that claimants are provided income or death benefits in a manner that is timely, cost-effective, and accurate under Labor Code §402.021 and §408.081.

New §124.6(d)(2) prohibits an insurance carrier or its agent from reducing income or death benefits paid to a claimant through an access card for certain enumerated fees, surcharges, and adjustments. New §124.6(d)(2) clarifies that the Division considers the enumerated fees a reduction in benefits. New §124.6(d)(2) is necessary to ensure the insurance carriers pay and the injured

employees receive all benefits as required by Labor Code §§408.081(a), 415.002(a)(2), 415.002(a)(16), 402.021(b)(3), 402.021(b)(8), and 409.024.

New §124.6(d)(2)(A) prohibits an insurance carrier or its agent from reducing income or death benefit payments to a claimant for fees charged after a financial institution pays a transaction (including a check or other item) when the claimant has insufficient or unavailable funds in the account. The Division determined that the prohibition of overdraft fees is necessary to sufficiently protect claimants from a reduction in income or death benefits through the use of access cards. According to the Center for Responsible Lending (CRL), a non-profit organization that works to protect consumers from predatory lending practices, in 2009, before federal regulations mandated that overdraft protection become an opt-in service, over 50 million Americans overdrew their checking account at least once over a 12-month period, with 27 million accountholders incurring five or more overdraft fees at an average of \$34 dollars per transaction (available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/crl-overdraft-explosion.pdf>). Moreover, banks generally charge a fixed overdraft fee regardless of the size of the transaction covered. According to a survey conducted by the CRL, of the 33 percent of account holders who opted-in to overdraft coverage, 60 percent did so to avoid a fee if their debit card was declined, 64 percent did so to avoid bouncing paper checks, and almost 50 percent responded that stopping the bank from bombarding them with opt-in messages by mail, phone, email, in person, and online banking was a factor in their decision. This is evidence of consumer misunderstanding because current overdraft protection covers only debit card and ATM transactions. Therefore, the Division determined that an opt-in structure for overdrafts would not sufficiently protect claimants from a reduction in income or death benefits through the use of access cards.

New §124.6(d)(2)(B) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for an ATM withdrawal or point of sale purchase when the transaction is denied for lack of funds. Denied transactions fees are considered a reduction in benefits under Labor Code §409.024, because the insurance carrier or its agent bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction and these fees are not commonly charged for other types of consumer bank accounts according to the National Consumer Law Center (available at <http://www.nclc.org/images/pdf/pr-reports/uc-prepaid-card-report.pdf>).

New §124.6(d)(2)(C) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for ATM balance inquiries. New §124.6(d)(2)(C) is necessary to permit the claimant to monitor their benefit payments by identifying unauthorized use of the access card or payment errors efficiently.

New §124.6(d)(2)(D) prohibits fees for network ATMs. A network ATM is an ATM that is owned or operated by a financial institution or by multiple financial institutions that have contracted together so that their customers can access the ATM at no cost. An out-of-network ATM is not owned and operated by a consumer's financial institution. The fees prohibited in §124.6(d)(2)(C) and (D) do not include surcharges that might be imposed by an out-of-network ATM operator. These out-of-network ATM operator surcharges are federally regulated and beyond the scope of new §124.6.

New §124.6(d)(2)(D) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for withdrawing money from network ATMs. New §124.6(d)(4)(D) is necessary to ensure the insurance carriers pay and the injured employees receive all benefits as required by Labor Code §§408.081(a), 415.002(a)(2), 415.002(a)(16), 402.021(b)(3), 402.021(b)(8), and 409.024 by ensuring there are no hurdles to claimants accessing their benefit payments.

New §124.6(d)(2)(E) prohibits an insurance carrier or its agent from reducing a claimant's benefits for withdrawing income or death benefit payments from a teller. A fee for withdrawing money from a teller is considered a reduction in benefits because ATMs set limits on the amount of money that may be withdrawn in one day and may only dispense money in small increments. New §124.6(d)(2)(E) is necessary to prevent out-of-network ATM operator surcharges and to ensure there are no hurdles to claimants accessing their benefit payments.

New §124.6(d)(2)(F) prohibits an insurance carrier or its agent from reducing a claimant's benefits for customer service calls and is necessary to ensure a claimant may contact a customer service representative to facilitate the resolution of problems with the access card and answer any account questions.

Account maintenance fees for access cards are prohibited under existing §124.5(e), and new §124.6 continues this prohibition, but lists the fees individually in §124.6(d)(2)(G) - (I). Account maintenance fees are charged to the consumer to cover the cost of maintaining the account; fees include account activation, closure, and continuing to maintain the account. Account maintenance fees are considered a reduction in benefits because they shift the cost of receiving payments from the insurance carrier or its agent to the claimant.

New §124.6(d)(2)(G) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for activating the access card. Card activation fees are any fees or reduction in benefits imposed so that the claimant may access the income or death benefit payments in the account. New §124.6(d)(2)(H) prohibits inactivity fees for not using the card, and inactivity fees are also prohibited under existing §124.5(e), which prohibits account maintenance fees. The Division acknowledges that inactive accounts may create liability issues for the insurance carrier or its agent, who must pay to keep the account open and bear the risk of unauthorized fund transfers

on accounts that hold only a minimal amount of funds. Rather than allowing the claimant to bear the costs of keeping the account open through inactivity fees, the insurance carrier or its agent may close the account under §124.6(j) by issuing a check to the claimant with the remaining account balance if the account has been inactive for 12 months or longer. New §124.6(d)(2)(l) prohibits fees for closing an account.

New §124.6(d)(2)(J) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits to replace a lost access card through standard U.S. mail. New §124.6(d)(2)(J) is necessary to ensure claimants are not charged a fee to obtain a replacement for a lost or stolen card and to ensure that claimants are able to access their income or death benefit payments.

New §124.6(d)(2)(K) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for withdrawing the entire balance in one transaction to ensure the insurance carriers pay and the injured employees receive all benefits as required by Labor Code §§408.081(a), 415.002(a)(2), 415.002(a)(16), 402.021(b)(3), 402.021(b)(8), and 409.024. A fee for withdrawing the entire payment in one transaction is considered a reduction in benefits, in part, because claimants may choose to withdraw the entire payment at one time to avoid further surcharges from out-of-network ATM operators if no network ATMs are available.

New §124.6(d)(2)(L) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for point of sale purchases to ensure claimants do not have hurdles to accessing their benefit payments through an access card. Transactions that result in a fee for each purchase whether the claimant signs or uses a personal identification number are point of sale fees. New §124.6(d)(2)(L) is necessary to ensure the carriers pay and the injured employees receive all

benefits as required by Labor Code §§408.081(a), 415.002(a)(2), 415.002(a)(16), 402.021(b)(3), and 402.021(b)(8).

New §124.6(d)(2)(M) prohibits any other fees or charges that are not authorized under subsection (e) of new §124.6. New §124.6(d)(2)(M) is necessary to ensure the insurance carriers pay and the injured employees receive all benefits as required by Labor Code §§408.081(a), 415.002(a)(2), 415.002(a)(16), 402.021(b)(3), 402.021(b)(8), and 409.024 and to ensure that the income or death benefit payments claimants receive are not affected by means of delivery.

New §124.6(e) lists fees, surcharges, and adjustments that the insurance carrier may charge the claimant. These fees, surcharges, and adjustments are permitted because they allow the claimant to choose to pay for a service that may not be offered without the surcharge. The Division does not address third party fees, i.e., out-of-network ATM operators and wireless companies, because the Division does not have authority to regulate them and they are beyond the scope of this rule. The Division notes that permitted fees should be removed from the account after the full income or death payment is deposited in order to ensure that the full payment and paid date is recorded for the purposes of the insurance carrier fulfilling its income benefit data reporting requirements to the Division. New §124.6(e)(1) allows the insurance carrier or its agent to charge the claimant a surcharge for expedited card replacement. New §124.6(e)(1) is necessary because there is a no fee replacement option available to the claimant and expedited shipping is a cost to the insurance carrier or its agent.

New §124.6(e)(2) permits the claimant to be charged for international transaction fees. An international transaction fee is charged for making purchases outside the U.S. Permitting international transaction fees and expedited card replacement in new §124.6(e)(2) is necessary to implement Labor Code §409.0231 because the failure to permit insurance carriers or their agents to

charge these fees, surcharges, and adjustments deprives the claimant of the opportunity to obtain benefits.

New §124.6(e)(3) permits the claimant to be charged for out-of-network ATM fees. The claimant may choose to accept the out-of-network fee or go to a network ATM. The claimants will have access to a list of all available network ATMs.

New §124.6(f) requires insurance carriers or their agents to provide the claimant with a copy of the mandatory disclosures at the time the claimant agrees to receive payments through electronic fund transfer. Labor Code §402.021(b)(8) outlines the workers' compensation system's goal to effectively educate and clearly inform each person who participates in the system of the person's rights and responsibilities under the system and how to appropriately interact within the system. This subsection provides guidance on how access cards may be used to ensure claimants understand all the potential requirements, risks, and limitations of receiving benefits income or death through an access card.

New §124.6(f)(1) requires the insurance carrier or its agent to disclose a summary of the claimant's liability for unauthorized electronic fund transfers. Unauthorized electronic funds transfers are electronic fund transfers from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit (12 CFR §205.3(m)). Federal regulations set consumer liability limits for debit and credit cards in Regulation E. New §124.6(f)(1) is necessary to fulfill the goals of Labor Code §402.021(b)(8) because claimants may be familiar with federal liability limits, and may not be aware that access cards under this section are exempt from Regulation E.

New §124.6(f)(2) requires the insurance carrier or its agent to disclose the telephone number and address of the person or office for the claimant to notify the insurance carrier of an unauthorized

electronic fund transfer. New §124.6(f)(2) is necessary to fulfill the goals of Labor Code §402.021(b)(8) because communication between the claimant and the insurance carrier or its agent regarding unauthorized transfers through an access card is crucial to preventing loss of benefits and aiding in the prevention of fraudulent activity.

New §124.6(f)(3) requires the insurance carrier or its agent to disclose the type of electronic fund transfers that the claimant may make and any limitations on the frequency and dollar amount of transfers. This is necessary to fulfill the goals of Labor Code §402.021(b)(8) because any limitations on the claimant's ability to access or use their income or death benefit payments should be disclosed to claimants so they have all the necessary information to make an informed decision about whether to receive their benefits through an access card.

New §124.6(f)(4) requires the insurance carrier or its agent to disclose any fees imposed for electronic fund transfers or for the right to make transfers including a statement that fees may be imposed by an ATM operator that is out-of-network. New §124.6(f)(4) is necessary to fulfill the goals of Labor Code §402.021(b)(8) to ensure that claimants are notified that out-of-network surcharges are separate from out-of-network ATMs fees and may be charged in addition to out-of-network ATM fees. Transparent fee schedules allow claimants to make informed decisions about whether to receive their income or death benefits through an access card and provide claimants the information they need to avoid unnecessary fees.

New §124.6(f)(5) requires the insurance carrier or its agent to disclose that any fees, surcharges, or adjustments imposed will be removed from the balance maintained in the account. New §124.6(f)(5) is necessary to fulfill the goals of Labor Code §402.021(b)(8) to ensure claimants know that where the fees will be removed from so the claimant may avoid getting a negative balance on the access card account.

New §124.6(f)(6) requires the insurance carrier or its agent to provide a summary of the claimant's right to receipts for their income and death benefit payments and periodic statements of the access card account. This is necessary to fulfill the goals of Labor Code §402.021(b)(8) because disclosures on the number and frequency of receipts for their income and death benefit payments and periodic statements will allow claimants to make informed decisions about whether to receive their benefits through an access card.

New §124.6(f)(7) requires the insurance carrier or its agent to provide a full disclosure of the locations of both bank locations and network ATMs in the United States where the claimant may access his or her funds at no cost. The Division notes that the insurance carrier must provide this disclosure in a form that the claimant can access. Under the Texas Business and Commerce Code §322.008, concerning provision of information in writing; presentation of records, if parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. Additionally, 28 TAC §102.4 requires that all insurance carriers must ensure effective and timely communication with claimants and other parties in the system and that written communications to a claimant (who is either an employee, an employee's legal beneficiary, or a subclaimant) be sent to the most recent address or facsimile number supplied by the claimant. If an address has not been supplied by the claimant, the most recent address provided by the employer shall be used. The Division notes that if the claimant does not have access to the internet, and has not agreed to conduct transactions by electronic means, the insurance carrier may refer the claimant to the customer service telephone number required under §124.6(h)(2). This is necessary to fulfill the goals of Labor Code §402.021(b)(8) because a full disclosure of the bank locations and

network ATMs in the United States will allow claimants to be informed of where they may access their funds without out-of-network ATM surcharges.

New §124.6(f)(8) requires the insurance carrier or its agent to provide a statement informing claimants that they have a right to receive payments directly into their personal bank account through direct deposit. Labor Code §409.0231 requires that an insurance carrier offer electronic funds transfer as a mode of payment for employees entitled to benefits. New §124.6(f)(8) is necessary to fulfill the goals of Labor Code §402.021(b)(8) by ensuring that claimants are informed of all their benefit payment options prior to agreeing to accept payment through an access card.

New §124.6(g) requires the disclosure statement under subsection (f) be written in plain language. New §124.6(g)(1) - (4) are necessary to fulfill the statutory goal under Labor Code §402.021(b)(8) to effectively educate and clearly inform each person who participates in the system of the person's rights and responsibilities under the system and how to appropriately interact within the system. New §124.6(g) ensures that the claimant is provided with the terms of their account and information outlining the rights and liabilities associated with receiving their workers' compensation benefits through an access card in a manner that is easily readable and understandable.

New §124.6(g)(1) requires that the disclosure statement shall be printed in not less than 12-point font. This is necessary because disclosure statements must be noticeable to be effective and this requirement ensures that the information in the disclosure statement is in a large enough font where it will be noticeable and easily accessible to the claimant.

New §124.6(g)(2) requires that written disclosures and terms of notice or condition changes under this section include the full text in English, Spanish, and any other language common to the claimant population. New §124.6(g)(2) is necessary to ensure that the information is available to claimants whose primary language is not English.

New §124.6(g)(3) requires that written disclosures and terms of notice or condition changes under this section be written in a clear and coherent manner and wherever practical, words with common and everyday meaning shall be used to facilitate readability. New §124.6(g)(3) is necessary to ensure that the disclosures use language that is accessible to the general public.

New §124.6(g)(4) requires that written disclosures and terms of notice or condition changes under this section be appropriately divided and captioned in a meaningful sequence such that each section contains an underlined, boldfaced, or otherwise conspicuous title or caption at the beginning of the section that indicates the nature of the subject matter included in or covered by the section. New §124.6(g)(4) is necessary to ensure that the disclosures are in a format that ensures the claimants can recognize the significance of important account information.

New §124.6(h)(1) prohibits insurance carriers or their agents from including information that could reasonably identify the claimant as a participant in the workers' compensation system on an access card. This is necessary to fulfill the requirements of Labor Code §402.083 concerning confidentiality of injury information. Labor Code §402.083 states that information in or derived from a claim file regarding an employee is confidential.

New §124.6(h)(2) requires that the access card include on its face or the back of the card a toll-free customer service number and website address. Customer service personnel must be available by phone Monday – Friday, normal business hours 8:00 a.m. – 5:00 p.m., as outlined in 28 TAC §102.3 relating to computation of time. New §124.6(h)(2) is necessary to fulfill the goals of Labor Code §402.021(b)(8) by ensuring that claimants have customer service available to them during normal business hours and that the information needed to access the customer service is readily available. The website information will enable claimants to access information outside of normal business hours.

New §124.6(i) requires that the insurance carrier or its agent provide a written notice to the claimant at least 21 days before the effective date of any change in a term or condition of the mutual agreement or disclosures, including terminating the access card program, increased fees, or liability for unauthorized electronic fund transfers. New §124.6(i) specifies that any terms and conditions that violate the requirements of new §124.6(i) are null and void and are violations that may result in administrative penalties. New §124.6(i)(1) requires that the written notice of term or condition changes provide a comparison of the current terms and the changes. New §124.6(i)(1) is necessary to fulfill the goals of Labor Code §402.002(8) by ensuring that the claimant is provided the changes of terms and conditions to their access card agreement.

New §124.6(i)(2) requires the insurance carrier or its agent to give notice to the claimant of the options to change payment outlined in §124.5(i). Section 124.5(i) states that if claimants have previously been receiving income or death benefit payments by electronic transfer and wants to receive benefits by check, they shall initiate income or death benefit delivery by check starting with the first benefit payment due to the claimant on or after the 7th day after receiving a written request. New §124.6(i)(2) corresponds with new §124.5(i) and is necessary to allow the claimant to receive funds in a way that is most convenient for them.

New §124.6(j) requires the insurance carrier and the claimant to include a provision allowing the insurance carrier or its agent to close the account by issuing a check to the claimant with the remaining balance if the access card account has been inactive for 12 months or longer. The Division considered the liability issues that inactive accounts may create for the insurance carrier or its agent, who must pay to keep the account open and potentially bear the risk of unauthorized fund transfers on accounts that hold only a minimal amount of funds. The Division decided not to allow the claimant to bear the costs of keeping the account open through inactivity fees, instead the

insurance carrier or its agent can close the account after it has been inactive 12 months or longer to ensure that the claimant receives their full income or death benefits.

New §124.6(k) prohibits an insurance carrier or its agent from removing money from the account, except for permitted fees under §124.6(e) and account closure. An insurance carrier or its agent must comply with 28 TAC §126.16 relating to procedures for recouping overpayments of income benefits. This is necessary to clarify that recoupment procedures in 28 TAC §126.16 apply to access cards in Chapter 124.

New §124.6(l) clarifies that, for state reporting purposes under Labor Code §409.0232, an insurance carrier is considered to have made an income or death benefit payment the date when the payment is deposited in the account and available on the access card. This is necessary to clarify that the paid date is when the payment is deposited in the account and available on the card, not the date when the insurance carrier sends the payment to its agent.

New §124.6(m) clarifies that nothing in the section shall be construed to grant any rights otherwise prohibited under federal law.

New §124.6(n) provides the effective date for the rule. This is necessary in order to provide additional time for insurance carriers who choose to implement an access card program to implement a program fulfilling the requirements of this section.

### **3. SUMMARY OF COMMENTS AND AGENCY RESPONSES.**

#### **General**

**Comment:** A commenter states that some of the provisions in the proposed rules go beyond the scope of their intended effect, do not take into account industry standards, and make it extremely difficult for an insurance carrier to provide an access card program to claimants in the State of Texas.

**Division Response:** The Division disagrees that the rules go beyond the scope of their intended effect, do not take into account industry standards, and are written as such to make it extremely difficult for an insurance carrier to provide an access card program to claimants in the State of Texas. The Division considered many factors when drafting amended §124.5 and new §124.6. The Division weighed its statutory obligations to ensure timely, cost-effective, and accurate income benefits payments under Labor Code §402.021 and Labor Code §408.081 against the costs to regulated entities to comply with the proposed rules concerning electronic transfer payments of income and death benefits made through an access card. As previously discussed, Labor Code §409.0231, in part, requires that an insurance carrier offer electronic funds transfer as a mode of payment for employees entitled to benefits for a period of sufficient duration. New §124.6 is necessary to implement Labor Code §402.021 and Labor Code §402.021(b)(3), which requires that injured employees are provided income and medical benefits in a timely and cost-effective manner. New §124.6 is also necessary to ensure that claimants receive income benefit payments in a timely and accurate manner, as required by Labor Code §408.081. The Division also notes that existing §124.5 allowed the use of access cards for the payment of income and death benefits for workers' compensation claimants and that the existing rule required the use of these cards to be by written mutual agreement with the claimant. Additionally, the existing rule required written disclosure to the claimant of all "requirements, risks, and limitations" in the use of these cards and prohibited the charging of "account maintenance fees" to the claimant. Amended §124.5 and new §124.6 provide additional details to these existing requirements that explain how the disclosures to the claimant should operate and which specific fees are authorized and prohibited. These changes will aid both claimants and insurance carriers in ensuring compliance with income and death benefit payment requirements.

**Comment:** A commenter states that providing access cards to workers compensation claimants offers benefits and efficiencies not available through current payment methods.

A commenter is interested in permitting the use of access cards to ensure “that injured employees are provided income and medical benefits in a timely and cost-effective manner.” A commenter notes that permitting the use of access cards will provide several benefits especially to low income individuals, including: (1) the elimination of the need to use expensive alternative financial services, such as check cashing agencies, for insurance claimants who do not have bank accounts; (2) for insurance claimants who would otherwise deposit claims checks, immediate access to funds rather than waiting for a check to clear; (3) reduced risk of fraud and theft through the use of prepaid card PIN technology, the creation of an electronic payment record, and the ability of prepaid cards to be cancelled immediately and reissued to prevent exposure in these instances; and (4) additional protection of funds through other safety features including zero liability policies offered by certain access card and other networks and FDIC insurance.

**Division Response:** The Division appreciates the supportive comments.

#### **§124.5(a)(2)**

**Comment:** A commenter recommends the proposed rule be modified to permit medical benefit and burial payments on access cards.

A commenter recommends that §124.5(a)(2) be amended to state that the insurance carrier shall make all medical benefit and burial payments by “electronic transfer if required to under §124.5(f) or by mutual agreement between the insurance carrier and the claimant including an access card under §124.6 of this title (relating to Electronic Transfer Payments Made Through an Access Card).”

A commenter recognizes that the Division has specifically excluded medical and burial payments from being made through an access card because including medical benefit payment would likely involve other rule changes. The commenter strongly encourages the Division to undertake such other rule changes contemporaneously with the adoption proposal because access cards offer consumer benefits and individuals who require medical benefits and burial payments should have access to the same benefits of using access cards as individuals who receive other claims payments.

A commenter requests that the Division provide for medical benefits and burial payments on access cards at this time, but if this is not possible, then the commenter urges the Division to permit medical benefits payments through an access card as soon as reasonably practical.

**Division Response:** The Division declines to make the suggested change because it is outside scope of this rule. Amended §124.5 and new §124.6 permit workers' compensation income and death benefit payments through access cards.

**§124.6(a)**

**Comment:** A commenter recommends deleting the phrase "from an insurance carrier's bank account" because the funds underlying the access cards are not on deposit in an insurance carrier's bank account, rather, once the funds are paid to a claimant, those funds reside at the issuing bank. The term "access card" does not include stored value cards or prepaid cards that store funds directly on the card and that are not linked to an insurance carrier's bank account in §124.6 because funds are not in an insurance carrier's bank account but rather in a pooled account at the issuing bank with sub-accounts for each claimant.

**Division Response:** The Division declines to make the suggested change. New §124.6(c) states that any person with whom an insurance carrier utilizes or contracts for the purpose of

providing service or fulfilling duties under new §124.6 is an agent of the insurance carrier in accordance with 28 TAC §180.1(3) concerning definitions. Section 124.6 establishes requirements for insurance carriers should they choose to offer an access card program for income and death benefits. The requirements under §124.6 also apply to the actions of a third party who it utilizes or contracts with for the purpose of providing service or fulfilling duties under new §124.6. Any actions taken to the pooled account at the issuing bank with sub-accounts for each claimant are ultimately the responsibility of the insurance carrier. The Division also notes that the requirements of new §124.6 are consistent with the previous requirements in existing §124.5, which contemplate that the funds for income or death benefit payments are placed in an account set up by the insurance carrier and accessible by the claimant.

**§124.6(b)**

**Comment:** Commenters support the Division's proposed rules regarding access cards to that the extent the rules clarify that payment through an access card is voluntary and requires the mutual agreement of both the claimant and the carrier. The commenter notes that it would not be appropriate if the carrier were able to require an unwilling claimant to access benefits through an access card. The commenter notes that it would not be fair or even feasible if a carrier were required to establish an entire network access card system merely because, for example, a single claimant requested payment via an access card.

A commenter supports not making access cards a mandatory mode of electronic transfer for insurance carriers. The commenter notes that there are many jurisdictions, including Texas, that allow the use of access cards to provide electronic delivery of workers' compensation benefits. The commenter notes that there are no jurisdictions that mandate the use of access cards for electronic delivery of benefits. The commenter further states that access cards may be a reasonable mode for

electronic delivery of benefits for insurance carriers to consider. The commenter notes that recent security problems in Pennsylvania demonstrate that mandated usage would not be appropriate.

**Division Response:** The Division appreciates the supportive comments.

**Comment:** A commenter urges the Division to permit verbal approval of receipt of payments through access cards, bringing Texas in line with the federal government and the substantial majority of other states. The commenter notes that only six states continue to require written authorization to use access cards for workers' compensation payments. The commenter asks the Division to amend proposed §124.6(b) to state that an insurance carrier may pay income or death benefits, "to a claimant if there is written or verbal mutual agreement between the insurance carrier and the claimant." The commenter also asks that the Division delete the last sentence of proposed §124.6(b). A commenter notes that within the workers' compensation field, requiring written authorization has been a procedural barrier to the utilization of access cards and has inhibited the use of access cards, especially to low-income claimants. The commenter states that there are procedural barriers inherent in mandating signed consent forms. The commenter notes that after a claim notification is received from the employee, states normally require payment to be made within 14 days of claim notification. The commenter notes it normally takes the adjuster approximately 11 days to investigate a claim. The commenter notes that written consent forms are typically mailed with the first check. The commenter further states that only eight to 15% of the forms are returned. However, the commenter states, this low participation rate does not indicate a lack of interest in payment by access card. Rather, the commenter notes, that for the most part, low participation rates are due to lack of understanding or failure to read the mailed material by the claimant.

A commenter notes that the typical workers' compensation claimant does not have a face-to-face meeting with a state or company representative to complete the relevant forms and that virtually

all contact with the adjuster approving the payment, is by phone. The commenter notes that in states where verbal approval is allowed, acceptance rates range from 55% to 90% because a claimant may give verbal approval over the phone when talking to his or her adjuster.

**Division Response:** The Division declines to make the suggested change to allow for a claimant's verbal agreement to receive workers' compensation benefits through an access card. The Division notes that existing §124.5, which allows the use of access cards for income and death benefit payments already requires a written mutual agreement the injured employee and the insurance carrier. New §124.6(b) requires the insurance carrier to maintain the signed written agreement between the claimant and the insurance carrier for, at a minimum, 401 weeks after the date of injury in accordance with Labor Code §408.083, relating to termination of right to temporary income, impairment income, and supplemental income benefits. The retention of the signed written agreement between the claimant and the insurance carrier for 401 weeks is necessary to ensure that the signed agreement is available to the Division if a dispute arises. Requiring the opt-in agreement be in writing helps ensure the claimant has received the required disclosures and facilitates communication. Additionally, subsection (f) requires that disclosures be printed in not less than 12-point font. If verbal agreements are permitted than the 12-point disclosure requirement becomes moot. The requirement that the disclosure statement be printed in not less than 12-point font is necessary to implement Labor Code §402.021(b)(8), which outlines the workers' compensation system's goal to effectively educate and clearly inform each person who participates in the system of the person's rights and responsibilities under the system and how to appropriately interact within the system. This requirement ensures that the information in the disclosure statement is in a large enough font where it will be noticeable and easily accessible to the claimant.

**Proposed §124.6(d)(2); Deleted**

**Comment:** A commenter is concerned about how the prohibition of access cards that permit a negative balance in proposed §124.6(d)(2) relates to authorizations versus clearing messages.

The commenter notes that authorizations could come in for less than the clearing amount causing a negative account balance.

A commenter is concerned about the prohibition against negative balances in the proposed rules. The commenter notes that a merchant outside of the control of the card administrator may force a financial transaction causing a negative balance or force post. The commenter notes that a force post is usually a transaction that is deliberately posted to an account by a merchant, regardless of the fact that an authorization request was not approved. The commenter notes that force post transactions may also be considered “off-line” sales that occur when a merchant’s terminal is not working and they use a “paper” form for authorization. The commenter notes that though offline sales happen less frequently, as the industry has shifted away from paper forms and resulting from the creation of devices such as “Square”, they still can and sometimes do occur.

A commenter notes that cardholders under their program have zero dollar liability on the card should something occur that was not initiated by the cardholder. The cardholder requests clarification.

**Division Response:** The Division clarifies that proposed §124.6(d)(2) was not written as a liability provision and does not address the issue of liability. The Division deleted proposed §124.6(d)(2) based on stakeholder comments concerning the potential technical problems arising from force posts. The Division notes that the provision prohibiting overdraft service fees in §124.6(d)(3)(A) is not affected by this deletion. Claimants are still protected from overdraft fees and denied transaction fees.

**Proposed §124.6(d)(3); Redesignated as §124.6(d)(2)**

**Comment:** A commenter commends the Division for including the extensive list of prohibited fees, surcharges, and adjustment for which claimants are not responsible in proposed §124.6(d)(3)(A) - (M). The commenter agrees that claimants should not lose any portion of their benefits in those instances where they decide to avail themselves of the convenience of an access card.

A commenter agrees with the Division's concern that claimants should not experience reduction in benefits through the use of access cards and therefore fully support a prohibition on fees for the disbursement of funds to an access card or for the issuance or delivery of an access card.

**Response:** The Division appreciates the supportive comments.

**Comment:** A commenter states that any access card program will have certain fees that are incurred through networking processes. A commenter states that to do business, some of the fees must be recoupable in order to offer this payment option and pass the benefits of the program to claimants. The commenter states that because access cards are advantageous options for claimants, the possibility of incurring minimal fees as a result of action or inaction taken by the employee reduce the efficiency and saving possibilities made available.

A commenter encourages the Division to delete proposed §124.6(d)(3) because the objectives of the proposal should be to allow receipt of funds on an access card or through check on equal terms.

A commenter notes that the fees are for financial services and not imposed by the insurance carriers. The commenter notes that whether a consumer receives claim funds by check, direct deposit or access card, the financial services provider that arranges for the consumer to access his or her funds imposes fees for the services. A commenter notes that fees associated with access

cards may be likened to those associated with check cashing or deposit accounts upon which the Division has not placed any restrictions. The commenter notes states that the proposal should not by prohibit fees only on access card transactions, because doing so will discourage banks from issuing access cards, and would limit claimants' access to the benefits that they could receive from access cards.

**Division Response:** The Division declines to delete proposed 124.6(d)(3). The Division weighed the benefits of permitting the prohibited fees against the potential costs to the individual claimants and determined that the fee prohibitions were necessary to ensure that claimants are provided income and death benefits timely, cost-effectively, and accurately under Labor Code §402.021(b)(3) and Labor Code §408.081. The Division clarifies that a claimant may currently cash a check at the issuing bank or receive payment via direct deposit for no cost. The Division notes that providing income and death benefit payments through an access card is voluntary for both insurance carriers and claimants. The Division anticipates that the individual or entity required to comply with a proposed provision will have the information necessary to determine its individual cost and savings to determine whether to offer claimants income or death benefit payments through an access card. The Division also notes that new §124.6 details which fees are permitted or prohibited as a result of a mutual agreement between those parties to use an access card for the payment of income or death benefits. However, these rules do not regulate or prescribe the fee arrangements between the insurance carrier and its agent to provide access cards to the insurance carrier's claimants. Those fee arrangements are left to the insurance carrier and its agent to negotiate; however, these rules clarify which fees may be passed down to the injured employee in the form of permitted fees. The Division notes that insurance carriers who offer access card options to their claimants will no longer incur the costs of producing and mailing physical checks so there is a reasonable expectation that

the insurance carrier will incur some of the costs to offer an access card to its claimants if the insurance carrier chooses to make that option available.

**Proposed §124.6(d)(3)(C); Redesignated as §124.6(d)(2)(C)**

**Comment:** A commenter states that there is concern about the impact of the surcharge that an out-of-network ATM operator may charge for use of the ATM in proposed §124.6(d)(3)(C). The commenter states that such surcharges are federally regulated and beyond the scope of this rule, and the commenter recommends that the insurance carrier be required to reimburse claimants for those surcharges when no network ATM is available within a specified geographic area. The commenter notes that claimants in areas where ATM availability is limited should not lose benefits in order to make a withdrawal using an access card.

**Division Response:** The Division declines to make the suggested change. New §124.6 requires that the insurance carrier or its agent provide a full disclosure of the locations of both bank locations and network ATMs in the United States where the claimant may access his or her funds at no cost. The claimant may determine network ATM availability in their area and whether to receive income or death benefits through an access card. The use of an out-of-network ATM operator is a convenience that claimants may utilize, and claimants have the opportunity to accept or decline the out of network ATM fee before accessing their funds.

**Proposed §124.6(d)(3)(D); Redesignated as §124.6(d)(2)(D)**

**Comment:** A commenter notes that the language in proposed §124.6(d)(3)(D) prohibiting an insurance carrier or its agent from reducing a claimant's income or death benefits for withdrawing money from ATMs, could be read to imply that insurance carriers cannot reduce a claimant's benefit by ATM transactions.

A commenter states that proposed §124.6(d) creates ambiguity about whether an access card may include fees for transactions at an out-of-network ATM, because in delineating prohibited fees, it lists “withdrawing money from ATMs” as prohibited without clarifying whether there is a distinction between network ATMs and out-of-network ATMs.

A commenter states that proposed §124.6(d)(3)(D) should be amended to specify that an insurance carrier is prohibited from reducing income or death benefits paid to a claimant for withdrawing money from network ATMs.

A commenter notes that both informal draft rules prohibited fees for withdrawing money from network ATMs and permitted fees imposed by an ATM operator that is out-of-network. The commenter supported these provisions because the carrier and its agent have no control over fees imposed by financial institutions with which it has no contractual agreement. A commenter notes that the worker is protected because the worker may choose to accept the out-of-network fee or reject the fee and go to a network ATM. A commenter notes that these are the same choices that all consumers make with regard to ATM transactions and are also the choices that workers make when they take their paycheck or workers compensation indemnity check to a check-cashing service.

**Division Response:** The Division clarifies that the informal drafts posted on the Texas Department of Insurance’s website on December 9, 2013 and February 19, 2014 prohibited the insurance carrier from charging out-of-network ATM fees with the acknowledgement that out-of-network ATM operators may still charge the claimant for use of the ATM. The Division agrees that out-of-network ATM charges should be permitted because new §124.6 requires that the insurance carrier or its agent provide a full disclosure of the locations of both bank locations and network ATMs in the United States where the claimant may access his or her funds at no cost. The claimant may determine network ATM availability in their area before opting into the receipt of payments through

an access card. If the claimant decides to use an out-of-network ATM, then insurance carriers may charge an out of network ATM fee to the claimant.

**Proposed §124.6(d)(3)(H); Redesignated as §124.6(d)(2)(H)**

**Comment:** A commenter notes that the first informal draft of §124.6 included an inactivity period of twenty-four months and the TDI second informal draft reduced that period to twelve months. The commenter notes that the proposed rule completely prohibited fees for inactivity, regardless of the amount of time that has elapsed.

A commenter requests that insurance carriers be permitted to charge an inactivity fee after, at most, a twelve-month period. Inactivity fees exist in the debit card industry to alleviate liability concerns associated with funds that remain on cards with no transactions or history. A commenter notes that card issuers are liable for these funds and to reduce exposure, it is necessary to charge an inactivity fee.

**Division Response:** The Division declines to make the suggested change. The Division weighed the benefits of permitting insurance carriers to charge inactivity fees and the costs to individual claimants. The Division also considered the alternative of shortening the inactivity period that must elapse before the insurance carrier may close the access card account. The Division also considered stakeholder feedback. The Division determined that the current twelve-month inactivity period needed to close the account, rather than permitting inactivity fees, would address the concerns of insurance carriers being liable for inactive accounts while ensuring that claimants receive their workers' compensation income or death benefits with minimal associated costs. The insurance carrier or its agent may close the account under §124.6(j) by issuing a check to the claimant with the remaining account balance if the account has been inactive for twelve months or longer.

### **§124.6(e)**

**Comment:** A commenter states that proposed §124.6(e) regarding permitted fees creates ambiguity about whether an access card may include fees for transactions at an out-of-network ATM. The commenter state that proposed §124.6(e) only specifies that an insurance carrier may charge the claimant for “access card replacement through an expedited mail service” or for “international transaction fees.” A commenter states that out-of-network ATM fees are not specified as a permissible charge in proposed §124.6(e).

A commenter notes that the proposed rules prohibit fees for withdrawing money from all ATMs and removes out-of-network ATM fees from the list of allowable fees. The commenter state that these changes are troublesome because the insurance carrier and its agent cannot control the fees imposed by ATM operators with whom they have no contractual relationship.

A commenter recommends that access card fees be permitted for transactions involving out-of-network ATMs. The commenter notes this seems reasonable and is consistent with standard and customary practice.

A commenter recommends that the term “and” be added in proposed §124.6(e)(2). Commenters recommend that proposed §124.6(e) be amended to state “fees that may be imposed by an ATM operator that is out-of-network.”

**Division Response:** The Division agrees to make the suggested change. New §124.6(e) has been amended to permit out-of-network ATM fees.

### **§124.6(e)(1)**

**Comment:** A commenter suggests that proposed §124.6(e)(1) be amended to require the insurance carrier be liable to pay the fee for one expedited card replacement. The commenter notes that in many instances, injured employees who lose an access card will need a replacement quickly

because workers' compensation benefits are their only source of income. Accordingly, a commenter suggests that the rule provide for expedited replacement of a first lost card at no cost to the injured employee. Although, the commenter recognizes that expedited replacement of a lost card is an expense for the insurance carrier, it seems like one that is properly borne by the insurance carrier in a single instance per claim.

**Division Response:** The Division declines to make the suggested change because the claimant has the option of getting a free access card replacement through standard mail. If the claimant needs the card expedited, the claimant may choose to pay the additional fee. The disclosures required under adopted §124.6(f) include a disclosure that any fees for expedited card replacement or international transaction fees will be removed from the balance maintained in the bank account linked to the access card. However, the Division notes that new §124.6 does not prohibit an insurance carrier from offering cost-free expedited card replacement if it chooses to provide that as a benefit.

#### **§124.6(f)**

**Comment:** A commenter states that §124.6(f) strongly suggests that the access card may include fees for out-of-network use. The commenter notes that this seems appropriate and appears consistent with standard industry practice. The commenter also states that it is also consistent with the provisions in the prior informal draft rules circulated by the Division.

**Division Response:** The Division clarifies that the informal drafts posted on the Texas Department of Insurance's website on December 9, 2013 and February 19, 2014 prohibited the insurance carrier from charging out-of-network ATM fees with the acknowledgement that out-of-network ATM operators may still charge the claimant for use of the ATM. The Division agrees that out-of-network ATM charges should be permitted because new §124.6 requires that the insurance

carrier or its agent provide a full disclosure of the locations of both bank locations and network ATMs in the United States where the claimant may access his or her funds at no cost. The claimant may determine network ATM availability in his or her area before opting into the receipt of payments through an access card. If the claimant decides to use an out-of-network ATM, then insurance carriers may charge an out of network ATM fee to the claimant.

**§124.6(f)(1)**

**Comment:** A commenter asks for clarification of the limit of liability for unauthorized electronic fund transfers under §124.6(f)(1).

A commenter recommends that the limit of liability for unauthorized electronic fund transfers be set at no more than fifty dollars, the limit set for unauthorized use of a credit card. The commenter states that the better option would be that claimants not be responsible for any loss due to unauthorized use of the card. Alternately, the commenter recommends that a provision be included to require the insurance carrier to reimburse claimants for any loss resulting from unauthorized use. The commenter states that including such a provision furthers the acknowledged goal of minimizing the risk of loss associated with receipt of benefits by access card.

**Division Response:** The Division declines to make the suggested change. Disclosure of the insurance carrier's policy for liability of unauthorized transfers must be provided to the claimant in writing under adopted §124.6(f)(1). Claimants may choose to continue receiving their income or death benefits through check or direct deposit.

**§124.6(g)(1)**

**Comment:** A commenter is concerned with the requirement in §124.6(g)(1) that the disclosure statement shall be printed in not less than 12-point font. The commenter notes that there

is no way they will be able to fit their terms and conditions on the front and back of a document at 12-point font. The commenter notes the current font on their terms and conditions is 8-point font.

A commenter is concerned with the requirement that written disclosure statements and notice terms or conditions changes must be printed in a 12-point font. The commenter notes that the initial required disclosure, including the terms and conditions would increase from four to eight pages and will be an add administration cost to insurance carriers as well as the postage for dispatching the agreement.

A commenter suggests that allowing for a smaller, 4-point font would reduce administration costs for insurance carriers and ensure that the insurance carrier is able to offer a debit card option to claimants. With the 12-point font requirement currently required by §124.6(g)(1), some insurance carriers may not be able to bear the added costs and claimants would thereby not be able to benefit.

**Division Response:** The Division declines to make the suggested change. The 12-point font requirement ensures that claimants are informed about the terms and conditions in the access card agreement. Disclosure statements must be noticeable to be effective and this requirement ensures that the information in the disclosure statement is in a large enough font where it will be noticeable and easily accessible to the claimant. The Division notes that 4-point font is very difficult to read without a magnifying glass. Claimants who are unable to read the disclosure agreement have not been given actual notice of the terms and conditions of the access card agreement and are subsequently unable to make an educated choice about which method of payment is right for them. The Division also notes that the 12-point requirement in new 28 TAC §124.6 is also consistent with notice of network and acknowledgment form requirements for injured employees enrolled into certified workers' compensation health care networks in 28 TAC §10.63.

**§124.6(g)(2)**

**Comment:** A commenter asks whether the Division will provide a timeframe for meeting the additional language requirement in §124.6(g)(2) which requires written disclosures and term of notice or condition changes under this section include the full text in English, Spanish and any other language common to the claimant population.

**Division Response:** The Division declines to make the suggested change. However, the Division understands the commenter's concern that a January 1, 2015 effective date may not be a sufficient time period for insurance carriers to meet the requirements of amended §124.5 and new §124.6. The effective date for amended §124.5 and new §124.6 has been amended to apply to all income or death benefit payments due on or after June 1, 2015. Based on current rule requirements, employers should be able to supply insurance carriers with the necessary information about their claimant population and their language needs. The Division notes that the language requirement in §124.6(g)(2) reflects other Division and Department rules including 28 TAC §110.101 regarding covered and non-covered employee notices to employees; 28 TAC §110.108 regarding employer notice regarding work-related exposure to communicable disease/hiv: posting requirements; payment for tests; 28 TAC §110.110 regarding reporting requirements for building or construction projects for governmental entities); 28 TAC §120.2 regarding employer's first report of injury and notice of injured employee rights and responsibilities; 28 TAC §130.2 regarding certification of maximum medical improvement and evaluation of permanent impairment by the treating doctor; and 28 TAC §10.63 regarding plain language requirements.

**§124.6(i)**

**Comment:** A commenter asks for clarification on the meaning of "written" in adopted §124.6(i). Does this require mailing the terms and conditions to the cardholder? May the insurance

carrier just post the change of the terms and conditions on the web and place a popup notification?  
May an insurance carrier use interactive voice response and put a new message to visit the web for more information or request a written notice be mailed?

**Division Response:** The Division determined that the insurance carrier may mail or email the change of terms and conditions notice to the claimant at the most recent address, whether physical or electronic. The insurance carrier may not just post the change of the terms and conditions on their website and place a popup notification because that does not fulfill statutory requirements or Division rules regarding written communication. Under 28 TAC §102.4 regarding general rules for non-commission communications, written communications include all records, reports, notices, filings, submissions, and other information contained either on paper or in an electronic format. Additionally, under Texas Business and Commerce Code §322.008, concerning provision of information in writing; presentation of records, if parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. Additionally, 28 TAC §102.4 requires that all insurance carriers must ensure effective and timely communication with claimants and other parties in the system and that written communications to a claimant (who is either an employee, an employee's legal beneficiary, or a subclaimant) be sent to the most recent address or facsimile number supplied by the claimant. If an address has not been supplied by the claimant, the most recent address provided by the employer shall be used.

**§124.6(k)**

**Comment:** A commenter is concerned about how a duplicate deposit, payment in error, or an incorrect adjustment on a transaction should be dealt with under the prohibition in §124.6(k) which prohibits an insurance carrier or its agent from removing money from the account, except for expedited card replacement fees, international transaction fees, and account closure.

**Division Response:** In the case of overpayment through a duplicate deposit, payment in error, or an incorrect adjustment on a transaction, the insurance carrier must follow the recoupment guidelines set under 28 TAC §126.16. The Division notes that duplicate payments, lost payments, and other payment issues currently occur with income benefit payments made through checks and direct deposit, and that electronic payment issues involving access cards should be dealt with in the same manner.

**4. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.**

**For:**

None

**For, with changes:**

Datapath, American Insurance Association, Property Casualty Insurers, Office of Injured Employee Counsel, and Mastercard

**Against:**

None

**Neither for nor against:**

None

## **5. STATUTORY AUTHORITY.**

The amendments and new section are adopted under the Labor Code §§409.0231, 402.021(b)(3), 402.021(b)(9), 402.021(b)(8), 408.081, 409.024, 415.002(a)(2), 415.002(a)(16), 414.002, 408.083, 413.053, 402.00111 and 402.061. Labor Code §409.0231 requires that an insurance carrier offer electronic funds transfer as a mode of payment for employees entitled to benefits for a significant duration. Labor Code §402.021(b)(3) states that the Texas workers' compensation system must provide appropriate income benefits and medical benefits in a manner that is timely and cost-effective. Labor Code §402.021(b)(9) states that one of the goals of the workers' compensation system is to take maximum advantage of technological advances to provide the highest levels of service possible to system participants and to promote communication between system participants. Labor Code §402.021(b)(8) outlines the workers' compensation system's goal to effectively educate and clearly inform each person who participates in the system of the person's rights and responsibilities under the system and how to appropriately interact within the system. Labor Code §408.081 provides that an employee is entitled to timely and accurate income benefits. Labor Code §409.024 provides that an insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds to terminate or reduce benefits, as determined by the Commissioner. Labor Code §415.002(a)(2) states that an insurance carrier or its representative commits an administrative violation if that person terminates or reduces benefits without substantiating evidence that the action is reasonable and permitted by law. Labor Code §415.002(a)(16) states that an insurance carrier or its representative commits an administrative violation if that person fails or refuses to pay benefits from week to week as and when due directly to the person entitled to the benefits. Labor Code §408.083 states that an employee's eligibility for temporary income benefits, impairment income benefits, and supplemental income benefits

terminates on the expiration of 401 weeks after the date on which the benefits start to accrue. Labor Code §414.002 requires the Division to monitor the conduct of system participants for compliance with commissioner rules, the Labor Code, and other laws relating to workers' compensation. Labor Code §413.053 provides that the commissioner by rule shall establish standards of reporting and billing governing both form and content. 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 §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

## **6. TEXT.**

### **§124.5. *Mode of Payment Made by Insurance Carriers.***

(a) The insurance carrier shall make all medical benefit and burial payments by:

(1) check or other readily negotiable instrument; or

(2) electronic transfer by mutual agreement to an account designated in writing by the

payee.

(b) Except as provided by §126.2 of this title (relating to Payment of Benefits to Minors), insurance carriers shall make all payments of income or death benefits by:

(1) check or other readily negotiable instrument to the order of the claimant; or

(2) electronic transfer if required to under subsection (f) of this section or by mutual agreement between the insurance carrier and the claimant including an access card under §124.6 of this title (relating to Electronic Transfer Payments Made Through an Access Card).

(c) An insurance carrier that routinely pays benefits by check or other negotiable instrument to the claimant drawn on an out-of-state financial institution shall accompany each instrument with

written information about the insurance carrier's office location and telephone number where the claimant may call, at the insurance carrier's expense, to obtain help with cashing the instrument, if necessary.

(d) A claimant may request that the insurance carrier make benefit payments by electronic transfer to a personal bank account by providing the insurance carrier in writing: the name and routing transit number of the financial institution and the account number and type of account that the claimant wants the benefits electronically transferred to. The insurance carrier shall provide the claimant with a form to fill out the information required by this subsection within seven days of receiving a request for such a form from the claimant.

(e) Subsections (f) - (i) of this section apply to income or death benefit payments due on or after September 1, 2000.

(f) Unless relieved by subsection (g) of this section, the insurance carrier shall make income or death benefit payments by electronic transfer if the claimant:

- (1) requests in writing that payment be made by electronic transfer;
- (2) provides the information required by subsection (d) of this section; and
- (3) is reasonably expected to be entitled to receive income or death benefits for a period of eight weeks or more from the point that paragraphs (1) and (2) of this subsection are satisfied.

(4) This subsection does not apply to electronic transfer payments made through an access card under §124.6 of this title.

(g) An insurance carrier is relieved of the responsibility to make payment of temporary income benefits, impairment income benefits, and supplemental income benefits by electronic transfer if the

mode of payment has been switched at the request of the claimant three times after initially changing to electronic payments.

(h) The insurance carrier shall initiate payment by electronic transfer starting with the first income or death benefit payment due on or after the 21st day after the requirements of subsection (f) of this section are met but shall continue to timely make payments by check until the insurance carrier initiates benefit delivery by electronic transfer.

(i) If the claimant has previously been receiving income or death benefit payments by electronic transfer and wants to receive benefits by check, the insurance carrier shall initiate income or death benefit delivery by check starting with the first benefit payment due to the claimant on or after the 7th day after receiving a written request.

(j) Effective date. Unless otherwise specified, this section is effective for income or death benefit payments due on or after June 1, 2015.

**§124.6. *Electronic Transfer Payments Made Through an Access Card.***

(a) Access card. In this chapter, access card means any card or other payment method that may be used by a claimant to initiate an electric fund transfer from an insurance carrier's bank account. The term "access card" does not include stored value cards or prepaid cards that store funds directly on the card and that are not linked to an insurance carrier's bank account.

(b) Mutual agreement. An insurance carrier may pay income or death benefits through an access card to a claimant if there is written mutual agreement signed by the insurance carrier and the claimant. The insurance carrier shall maintain accurate records of the mutual agreement for, at a minimum, 401 weeks from the date of injury. The written mutual agreement shall contain an acknowledgement that the claimant received and agreed to the written disclosure in subsection (f) of this section.

(c) Agent of the insurance carrier. Any person with whom an insurance carrier utilizes or contracts for the purpose of providing service or fulfilling duties under this section is an agent of the insurance carrier under §180.1(3) of this title (relating to Definitions).

(d) Requirements and prohibited fees. An insurance carrier shall:

(1) permit the claimant to withdraw the entire amount of the balance of an access card in one transaction;

(2) not reduce income or death benefits paid to a claimant through an access card for the following fees, surcharges, and adjustments:

(A) overdraft services under which a financial institution pays a transaction (including a check or other item) when the claimant has insufficient or unavailable funds in the account;

(B) ATM withdrawal or a point of sale purchase for more than the card holds and the transaction is denied;

(C) ATM balance inquiries;

(D) withdrawing money from network ATMs;

(E) withdrawing money from a teller;

(F) customer service calls;

(G) activating the card;

(H) fees for card inactivity;

(I) closing account;

(J) access card replacement through standard mail;

(K) withdrawing the entire payment in one transaction;

(L) point of sale purchases; or

(M) any other fees or charges that are not authorized under subsection (e) of this section.

(e) Permitted fees. The claimant may be charged for the following:

- (1) access card replacement through an expedited mail service;
- (2) international transaction fees; and
- (3) out-of-network ATM fees.

(f) Required disclosure. Insurance carriers shall provide a written disclosure to the claimant contemporaneously with the written mutual agreement under subsection (a) of this section. The written disclosure shall include:

- (1) a summary of the claimant's liability for unauthorized electronic fund transfers;
- (2) the telephone number and address of the person or office to be notified when the claimant believes that an unauthorized electronic fund transfer has been or may be made;
- (3) the type of electronic fund transfers that the claimant may make and any limitations on the frequency of transfers;
- (4) any fees imposed for electronic fund transfers or for the right to make transfers including a statement that fees may be imposed by ATM operator that is out-of-network;
- (5) fees for expedited card replacement or international transaction fees will be removed from the balance maintained in the bank account linked to the access card;
- (6) a summary of the claimant's right to receipts and periodic statements;
- (7) all bank locations and network ATMs in the United States where the claimant may access his or her funds at no cost;
- (8) a statement informing the claimant that they have a right to receive payments directly into their personal bank account through direct deposit.

(g) Plain language requirement. An insurance carrier shall provide a written disclosure and notice of term or condition changes under this section that:

(1) are printed in not less than 12-point font;

(2) include the full text in English, Spanish, and any other language common to the claimant population;

(3) are written in a clear and coherent manner and wherever practical, words with common and everyday meaning shall be used to facilitate readability; and

(4) are appropriately divided and captioned in a meaningful sequence such that each section contains an underlined, boldfaced, or otherwise conspicuous title or caption at the beginning of the section that indicates the nature of the subject matter included in or covered by the section.

(h) Access card information. An access card issued to the claimant under the section:

(1) shall not bear any information that could reasonably identify the claimant as a participant in the workers' compensation system.

(2) shall include on the front or back of the access card a toll-free customer service number and website address. Customer service personnel shall be available by phone Monday through Friday, during normal business hours as outlined in §102.3 of this title (relating to Computation of Time).

(i) Written notice of term or condition changes. The insurance carrier shall provide a written notice to the claimant at least 21 days before the effective date of any change in a term or condition of the mutual agreement or disclosure, including terminating the access card program, increased fees, or liability for unauthorized electronic fund transfers. Any terms or conditions that violate the requirements of this section are null and void and may result in administrative penalties for the

insurance carrier. An insurance carrier shall provide a written notice of term or condition changes that:

(1) provides a comparison of the current terms and the changes; and

(2) references the claimant's ability to request a change in payment outlined in §124.5(i) of this title (relating to Mode of Payment Made by Carriers).

(j) Account closure. An insurance carrier may close the account by issuing a check to the claimant with the remaining balance of the access card if the account has been inactive for 12 months or longer.

(k) Recoupment of payment. The insurance carrier shall not remove money from the claimant's account or access card except to remove permitted fees under subsection (e) of this section or to close the account for inactivity of a period of 12 months or more. An insurance carrier seeking to recoup overpayments shall follow the procedures outlined in §126.16 of this title (relating to Procedures for Recouping Overpayments of Income Benefits).

(l) Paid date. An insurance carrier is considered to have made an income or death benefit payment the date the payment is available on the claimant's access card.

(m) No granting of rights. Nothing in the section shall be construed to grant any rights otherwise prohibited under federal law.

(n) Effective date. This section is effective for income or death benefit payments due on or after June 1, 2015.

**10. CERTIFICATION.**

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued at Austin, Texas, \_\_\_\_\_, 2015.

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Dirk Johnson  
General Counsel  
Texas Department of Insurance.

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that the amendments to 28 TAC §133.10 specified herein, concerning required billing forms and formats are adopted.

AND IT IS SO ORDERED.

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Ryan Bran Brannan  
COMMISSIONER OF WORKERS' COMPENSATION

TITLE 28. INSURANCE  
Part 2. Texas Department of Insurance,  
Division of Workers' Compensation  
Chapter 124 – Carriers: Required Notices and Mode of Payment

ATTEST:

X

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Dirk Johnson  
General Counsel

COMMISSIONER ORDER NO