

TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 152: ATTORNEY FEES

Title 28 TAC §152.3, §152.4, and §152.6

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (division) proposes the repeal and re-enactment of 28 Texas Administrative Code (TAC) §152.3, *Approval or Denial of Fee by the Commission*, and §152.4, *Guidelines for Legal Services Provided to Claimants and Carriers*. The division also proposes new §152.6, *Attorney Withdrawal*, along with the repeal and re-enactment of §152.3 and §152.4.

Labor Code §408.221, *Attorney's Fees Paid to Claimant's Counsel*, and §408.222, *Attorney's Fees Paid to Defense Counsel*, require the commissioner of workers' compensation to approve attorney fees for representing a claimant or defending an insurance carrier in a workers' compensation action. Chapter 152 implements the requirements set out in these sections. The repeal and re-enactment of §152.3 and §152.4 is necessary to update the attorney fee rules for the first time since 1991. The scope of the amendments required to reflect changes in the industry over the 25 years since the rules were originally adopted necessitate the repeal. The repeal is also necessary to permit the simultaneous adoption of new §152.3 and §152.4.

Under new §152.6, attorneys are required to comply with the Texas Disciplinary Rules of Professional Conduct when withdrawing representation. The requirements of

new §152.6 are necessary to help prevent an attorney's withdrawal from having a materially adverse effect on a client, which is a violation of the Texas Disciplinary Rules of Professional Conduct. Additionally, the notification requirement will help the division track representation within the system, ensure communication with the correct parties, and inform the division when an injured employee may need assistance from the Office of Injured Employee Counsel (OIEC).

An informal working draft of the rule text was published on the division's website on April 1, 2016, and an informal stakeholder meeting was held April 25, 2016. The division received 47 comments.

The repeal of §152.3 and §152.4 becomes effective January 30, 2017, when the new §152.3, §152.4, and §152.6 rules become effective.

Section 152.3 addresses **Approval or Denial of Fee by the Division**. New §152.3(a) requires an attorney to submit a complete and accurate application for attorney fees in order to claim a fee. This application must be in the form and manner prescribed by the division. New §152.3(a) helps ensure the division receives the necessary information to fulfill its duties under Labor Code §408.221 and §408.222 to approve attorney fees, and that the information provided is not misleading or incorrect. Receiving the information necessary in the form of an application helps the division to process requests for attorney fees in an efficient and timely manner. The division has provided the DWC Form-152, *Application for Attorney Fees*, as a standardized form for attorneys to request attorney fees. The application may be submitted in paper form by hand delivery, mail, or facsimile, or it may be submitted through the Web-Enabled

Attorney Fee Processing System (WAFPS). Attorneys can access WAFPS after submitting the DWC Form-151, *Attorney Application for Web Access*, and receiving an access code.

New §152.3(b) specifies the information that an attorney must provide to the division on an application for attorney fees, and is substantially similar to previous requirements. New §152.3(b)(1) and (2) require each attorney's name and bar card number, as well as the law firm's name, phone number, and mailing address. This information is necessary for efficient processing of attorney fee requests and to help the division identify not only the requestor, but where to direct payment of approved fees. New §152.3(b)(3) and (4) require the injured employee's name, date of injury, and DWC claim number, and when applicable, the beneficiary's name, type, contact information, and social security number. This information is necessary to ensure the requested attorney fees are properly attributed to the correct claimant. New §152.3(b)(5) requires the dates of legal service for the application. This information is necessary to help the division collect data relating to attorney fees and track representation within the workers' compensation system. This information also helps the division protect against mistaken or fraudulent billing, including duplicate bills, by specifying the dates of service to which the application applies. New §152.3(b)(6) requires the hourly rate and number of hours for each attorney and legal assistant providing services, and new §152.3(b)(7) requires an itemized list of the services performed and expenses incurred, the attorney or legal assistant who provided the service, the date it was provided, and the hours or amount requested. This information is necessary to determine the time and labor required to

represent the claimant or insurance carrier, a factor Labor Code §408.221(d) and §408.222(b) require the division to consider in approving an attorney's fee. For purposes of billing under the guidelines for legal services, the itemized list of the services performed and expenses incurred should identify the type of action performed. The division emphasizes that, under this subsection, an attorney is not required to provide any information considered privileged or confidential. New §152.3(b)(6) and (7) are also necessary to determine compliance of an application for attorney fees with the hourly rate and the guidelines for legal services established in new §152.4. New §152.3(b)(8) requires a certification that every statement, numerical figure, and calculation in the application is within the attorney's personal knowledge, is true and correct, and represents services, charges, and expenses provided by the attorney or a legal assistant under the attorney's supervision. The certification is necessary to ensure the application for attorney fees contains true and correct information. Under Labor Code §408.221(b) an attorney's fee is based on the attorney's time and expenses according to written evidence provided to the division. The division relies on this written evidence of an attorney's fee when approving, partially approving, or denying an application. Therefore it is essential the information contained in an application is accurate. The attorney is in the best position to know whether the application is reflective of the accurate time and expenses, and so it is the attorney's responsibility to ensure the application is correct. New §152.3(b)(9) requires additional case-specific justification for any fee request that would exceed the guidelines for legal services contained in §152.4(c). This paragraph is necessary to ensure the division receives the

justification required under new §152.4(b) when an attorney is requesting hours that exceed the guidelines for legal services. The justification is necessary for the division to determine whether the circumstances of the case warrant an exception to the number of hours provided for in §152.4(c). The division emphasizes that whether the attorney requests to exceed the guidelines for legal services in a single application, or over the course of multiple applications, additional case-specific justification for the fee request is required. If justification is not included, the portion of the fee request exceeding the guidelines for legal services may be denied automatically.

New §152.3(c) provides that the division may approve, partially approve, or deny an application based on the division's determination whether the requested time and expenses are reasonable according to new §152.4, Labor Code §408.221 and §408.222, and the written evidence presented to the division. New §152.3(c) further explains that the division will then issue an order approving, partially approving, or denying the application. This subsection is necessary to inform system participants of the possible outcomes of the division's review of an application for attorney fees and the factors the division will take into consideration when evaluating fee requests. Informed system participants will help the application process and workers' compensation system, generally, run more efficiently and effectively by limiting submission of applications that are incomplete or lacking sufficient justification. Additionally new §152.3(c) reminds attorneys that, as system participants, they are subject to review for compliance under Labor Code Chapter 414, and the issuance of a division order approving, partially approving, or denying an application for attorney fees does not limit

the commissioner's enforcement authority. Labor Code §414.002(a), *Monitoring Duties*, requires the division to monitor for compliance with commissioner rules, the Texas Workers' Compensation Act (Act), and all laws relating to workers' compensation, the conduct of persons subject to the Act. Under §414.002(a), persons to be monitored include attorneys and other representatives of parties. Additionally, §414.002(b) requires the division to monitor the conduct described in Labor Code §415.001, *Administrative Violation by Representative of Employee or Legal Beneficiary*, and Labor Code §415.002, *Administrative Violation by Insurance Carrier*. Labor Code §415.001 and §415.002 make it an administrative violation to violate a commissioner rule. New §152.3(c) is necessary to remind attorneys of the division's enforcement authority, including the statutorily imposed duty to monitor attorneys for compliance, and emphasize that the issuance of an order in response to an application for attorney fees is not a defense against any administrative violations attached to that application or the actions of the attorney in submitting it. Last, new §152.3(c) states that at any time the division may refer an attorney whose application is found to contain false or inaccurate information to enforcement or other authorities, including licensing agencies, district and county attorneys, or the attorney general for investigation and appropriate proceedings. This subsection is necessary to remind attorneys of the division's statutory authority to refer persons to other authorities under Labor Code §414.006, *Referral to Other Authorities*.

New §152.3(d) requires an attorney, claimant, or insurance carrier to request a contested case hearing (CCH) in order to contest a division order approving, partially

approving, or denying an application for attorney fees. Submission of an application requesting fees for the same services or expenses addressed in any previous application is prohibited. This subsection is necessary to emphasize that resubmitting an application, or submitting a second application that includes requested fees for the same services or expenses addressed in a previous division order, is prohibited. A request for a CCH must comply with the dispute resolution process outlined in 28 TAC Chapters 140 – 144 and must be made no later than the 20th day after receipt of the order. It is necessary for the request to be made according to the established dispute resolution process to ensure timely and efficient resolution of disputes, and to further the division's duty under Labor Code §402.021(b)(8) to effectively educate and clearly inform participants of their rights, their responsibilities, and how to appropriately interact within the system. Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of Department*, obligates the division to resolve disputes promptly and fairly when implementing the goals of the workers' compensation system. Requiring that a request for a CCH follow the established dispute resolution process helps the division meet the requirements of the Labor Code and encourages efficiency within the workers' compensation system. It is necessary for the division to receive the request for a CCH within 20 days after receipt of the order to ensure prompt resolution of any disputes and prevent issues from becoming stale. It is also necessary to conform to similar division dispute processes while allowing sufficient time for parties to receive notice, consider the options available, and, when applicable, make the necessary request. Additionally, the division recognizes that previous regulations required

attorneys to send a copy of the application for attorney fees to their client at the same time as submitting it to the division, and allowed for 15 days to contest a fee after receipt of the order. Under new §152.3(a), attorneys are no longer required to send a copy of the application for attorney fees to the client because the Attorney Fees Processing System (AFPS) allows for issuance of an order in response to an application on the same day it is submitted. Thus, a client could receive the copy of the application at the same time as the corresponding division order, which fails to provide any additional notice to the attorney's client. By allowing for 20 days following receipt to contest an order, the division is aligning the process with similar dispute timeframes found in the rules and providing for a more efficient application process overall. A request for a CCH by the attorney or insurance carrier must be submitted by personal delivery, first class mail, or facsimile to the division, and a copy must be sent to the other parties by personal delivery, first class mail, or electronic transmission on the same day it is submitted to the division. It is necessary for a request for a CCH to be made by personal delivery, first class mail, or facsimile to ensure the division receives it in a timely manner and is able to begin the dispute resolution process immediately. It is necessary for a copy of the request for a CCH to be sent to the other parties by personal delivery, first class mail, or electronic transmission to put all parties to a dispute on notice of the issue and avoid any *ex parte* communications, which are prohibited under Labor Code §410.167, *Ex Parte Contacts Prohibited*. Electronic transmission is defined in 28 TAC §102.4(m), *General Rules for Non-Commission Communication*, as transmission of information by facsimile, electronic mail, electronic

data interchange, or any other similar method and does not include telephonic communication. Therefore, unlike the requirements for submitting the request to the division, an attorney may e-mail a copy of the request to the other parties. A claimant may request a CCH by contacting the division in any manner. Allowing a claimant to request a CCH by contacting the division in any manner is necessary to help further the basic goals of the system found in Labor Code §402.021, including ensuring each injured employee has access to a fair and accessible dispute resolution process. A simplified process for requests helps provide access to claimants disputing their attorney's fees, who are often unrepresented on this issue.

New §152.3(e) requires an attorney, claimant, or insurance carrier who wishes to contest a division order after a CCH under subsection (d) to request review by the appeals panel. This is necessary to inform system participants of the dispute resolution process following a CCH on an issue. It is also necessary to further the division's duty under Labor Code §402.021(b)(8) to effectively educate and clearly inform participants of their rights, their responsibilities, and how to appropriately interact within the system. New §152.3(e) further states a request for review by the appeals panel must be made pursuant to the provisions of §143.3, *Requesting the Appeals Panel to Review the Decision of the Hearing Officer*. It is necessary that the request for review be made in accordance with §143.3 to help promptly and efficiently resolve the dispute. Labor Code §402.021 requires that the division resolve disputes promptly and fairly when implementing the goals of the workers' compensation system. Requiring that a request for review by the appeals panel follow the established dispute resolution process helps

the division meet the requirements of the Labor Code and encourages efficiency within the workers' compensation system.

New §152.3(f) provides that a division order approving, partially approving, or denying an application for attorney fees is binding during a contest or an appeal. Additionally, the insurance carrier is not relieved of the obligation to pay attorney fees according to the division order despite a contest or appeal. Labor Code §415.021(a), *Assessment of Administrative Penalties*, states that a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with the Act or a rule, order, or decision of the commissioner. This subsection is necessary to ensure parties comply with the division order approving, partially approving, or denying an application for attorney fees until a subsequent decision or order requires otherwise.

New §152.3(g) provides that a final order or decision will be issued by the division following a contest or appeal under subsection (d) or subsection (e). This subsection is necessary to inform system participants of the outcome of a contest or appeal under the attorney fee rules and their rights in accordance with Labor Code §402.021. New §152.3(g) further states that when a final order or decision requires an attorney to reimburse funds, reimbursement must be made no later than 15 days after receipt of the final order or decision. It is necessary for an attorney to reimburse funds within 15 days of receipt of the final order or decision to accomplish timely recovery of the client's overpaid funds. In cases where a claimant's attorney is involved, timely recovery of the overpaid funds is important as the funds are part of the injured employee or beneficiary's benefits.

New §152.3(h) establishes a delayed effective date for §152.3 of January 30, 2017. A delayed effective date is necessary to ensure system participants and the division are afforded sufficient time to prepare and update the necessary systems to reflect the repeal and re-enactment of §152.3. The division emphasizes that attorney and legal assistant services rendered prior to January 30, 2017, must be billed in accordance with existing §152.3. An application for attorney fees may not contain dates of legal services spanning across the effective date. Therefore, one application must be submitted for services rendered as of January 30, 2017, and a separate application must be submitted for services provided prior to and including January 29, 2017. This subsection is necessary to inform system participants of the effective date of new §152.3.

Section 152.4 addresses **Guidelines for Legal Services Provided to Claimants and Carriers**. New §152.4(a) outlines the different factors the division will consider when determining the reasonableness of a request for attorney fees. Based on the guidelines for legal services, the maximum hourly rate for legal services, the criteria outlined in Labor Code §408.221 and §408.222, and the written evidence presented, the division will approve, partially approve, or deny the request for attorney fees. This subsection is necessary to inform system participants what factors the division will take into consideration when evaluating the fee request. Informed system participants help the processing of applications for attorney fees and the workers' compensation system run more efficiently and effectively by limiting the submission of applications that are incomplete or lacking sufficient justification.

New §152.4(b) allows an attorney to request additional hours that exceed the guidelines for legal services if the attorney demonstrates that the higher fee was justified based on the circumstances of the claim and the factors laid out in Labor Code §408.221 and §408.222. The division emphasizes that whether the attorney requests to exceed the guidelines for legal services in a single application or over the course of multiple applications additional case-specific justification for the fee request is required. If a justification is not included, the portion of the fee request exceeding the guidelines for legal services may be denied automatically. This subsection is necessary to account for circumstances where the case-specific considerations, such as the novelty and difficulty of the questions involved in the dispute, warrant additional hours.

New §152.4(c) establishes the guidelines for legal services provided to claimants and insurance carriers. Figure: 28 TAC §152.4(c) includes the allotted maximum hours for each service the division has identified as part of the attorney's representation. The figure reads as follows: one hour for initial interview and research; half of an hour for setting up the file and completing and filing forms; three hours each month for communications with the client, health care providers, and other persons involved in the case; three and a half hours each month for direct dispute resolution negotiation with the other party; two hours for preparation and submission of an agreement or settlement; the actual time in a benefit review conference (BRC) plus two additional hours for participation in a BRC; the actual time in the CCH plus four additional hours for participation in a CCH; five hours for participation in the administrative appeal process; and the actual costs that are reasonable and necessary for travel each month.

This subsection is necessary to help fulfill the division's statutory duty to provide guidelines for maximum attorney fees for specific services, and is substantially similar to the previous requirements. In setting the maximum hours for each legal service, the division began by considering the applicable factors laid out in Labor Code §408.221, including the skill, time, and labor required to perform each specific legal service properly. The division then considered system goals, such as minimizing the likelihood of disputes by emphasizing informal mediation rather than litigation, providing injured employees with access to a fair and accessible dispute resolution process, and resolving disputes promptly and fairly when they do arise. Additionally, the division looked to the guidelines for legal services that have been in place since 1991. While the guidelines for legal services are substantially similar to previous requirements, additional hours have been allotted for direct dispute resolution negotiation, communications, and preparation and submission of an agreement or settlement form. These additional hours are necessary to encourage both early communication between the parties and resolution of disputes before the parties enter the formal administrative resolution process. The guidelines for legal services are intended to encourage early resolution of claim disputes by allowing time each month for activities such as communications with the client and other persons and negotiating with the other party. When negotiations are successful, a separate two hours are provided for the preparation and submission of an agreement or settlement. When they are not, hours have been allotted for the BRC and CCH stages of the dispute resolution process. At the BRC and CCH stage, actual time in each proceeding as well as two and four hours

for preparation, respectively, have been allotted based on previous requirements, the goals of the workers' compensation system, and the factors in Labor Code §408.221 and §408.222. Last, five hours have been provided for participation in the administrative appeal process to account for disputes that are not resolved at the end of a CCH. Each of the service categories contained in the guidelines for legal services is necessary to allow time for attorney preparation and participation at each stage of representation, including initial interview, research and setting up the client's file, and the workers' compensation dispute resolution process. The service categories were determined based on a balancing of the system goals described above, the requirements of Labor Code §408.221 and §408.222, and the guidelines provided in previous regulations.

New §152.4(d) establishes a maximum hourly rate reasonable for workers' compensation disputes in Texas of \$200 for attorneys and \$65 for legal assistants (not to include hours for general office staff). This subsection is necessary to help fulfill the division's statutory duty to provide guidelines for maximum attorney fees for specific services. In setting the maximum hourly rate for legal services, the division considered the factors established in Labor Code §408.221(d), which include: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal services properly; (4) the fee customarily charged in the locality for similar legal services; (5) the amount involved in the controversy; (6) the benefits to the claimant that the attorney is responsible for securing; and (7) the experience and ability of the attorney performing the services. Labor Code §408.221(d) and §408.222(b) require the division to consider these factors when approving an attorney's request for

attorney fees. According to the Texas Workforce Commission, the median hourly wage for all attorneys in 2014 was \$57.00 and for legal assistants it was \$24.93

(<http://www.texaswages.com/index3.aspx>). The State Bar of Texas Department of Research & Analysis provides a median hourly rate for attorneys in private practice of \$242 in 2013

(https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=27264) and \$121 for paralegals in 2014

(<https://txpd.org/files/file/SalarySurvey/2014%20Salary%20Survey%20Results%20Final.pdf>). While these numbers are helpful to quantify some of the factors required by Labor Code §408.221 and §408.222, namely the fee customarily charged in the locality for similar legal services, they are just one factor of the larger consideration by the division in fulfilling its statutory duty. Therefore, the division balanced the above numbers against other factors, including system goals, such as encouraging early resolution of disputes, providing access to effective attorney representation, limiting the adverse effect of attorney fee liens on a claimant's ability to obtain quality legal representation later in a dispute, the administrative nature of the workers' compensation dispute resolution process, and the statutory provision limiting attorney's fees to 25 percent of the injured employee's recovery. The division also considered Texas's position relative to other states that prescribe a maximum attorney fee rate for workers' compensation claims. After balancing the above considerations, the division determined that \$200 an

hour for attorneys and \$65 an hour for legal assistants is the maximum hourly rate reasonable for workers' compensation disputes in Texas.

New §152.4(e) requires attorneys to bill using their own state bar card number. This subsection is necessary to help the division monitor against fraud and improper billing practices by requiring attorneys to use their own bar card number when requesting attorney fees. Providing a uniform, single identifier ensures that requested hours are attributed accurately to each attorney.

New §152.4(f) establishes a delayed effective date for §152.4 of January 30, 2017. A delayed effective date is necessary to ensure system participants and the division are afforded sufficient time to prepare and update the necessary systems to reflect the repeal and re-enactment of §152.4. The division emphasizes that attorney and legal assistant services rendered prior to January 30, 2017, must be billed in accordance with existing §152.4. An application for attorney fees may not contain dates of legal services spanning across the effective date. Therefore, one application must be submitted for services rendered as of January 30, 2017, and a separate application must be submitted for services provided prior to and including January 29, 2017. This subsection is necessary to inform system participants of the effective date of new §152.4.

Section 152.6 addresses **Attorney Withdrawal**. New §152.6(a) requires an attorney to submit a notice of withdrawal under subsection (b) or a motion to withdraw under subsection (d) when withdrawing representation. This is necessary to inform system participants of the differing requirements of withdrawal. The specific explanation

and justification for both subsection (b) and subsection (d) are included below. New §152.6(a) also requires an attorney to comply with the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas when withdrawing representation. Labor Code §415.021(a) states it is an administrative violation for a person to violate, fail to comply with, or refuse to comply with, the Act or a rule, order, or decision of the commissioner. Additionally, Labor Code §415.001 and §415.002 state that it is an administrative violation for a representative of an employee, legal beneficiary, or insurance carrier to violate a commissioner rule. 28 TAC §150.1, *Minimum Standards of Practice for an Attorney*, requires an attorney in practice before the division to observe the rules, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed. Furthermore, §415.001(8) provides that it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas. Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct governs declining or terminating representation. As such, new §152.6(a) emphasizes that attorneys in the workers' compensation system must comply with Rule 1.15 when withdrawing representation of a claimant or an insurance carrier. This section is necessary to emphasize that failure to comply with the Texas Disciplinary Rules of Professional Conduct when withdrawing is an administrative violation that may be referred to enforcement or other authorities. Additionally, §152.6 reiterates the Texas Disciplinary Rules of Professional Conduct requirement to surrender papers and property to the client upon withdrawal. This subsection is necessary to emphasize the requirement in Rule 1.15(c) and help ensure

that claimants and insurance carriers obtain the portion of the case file they are entitled to. The proper transfer of appropriate papers and property to the client helps the transition between attorneys or to an OIEC ombudsman move more quickly and smoothly and contributes to an overall efficient dispute resolution process.

New §152.6(b) addresses withdrawal before notice of a BRC or CCH is received and requires an attorney withdrawing representation to notify the division in the form and manner prescribed. New §152.6(b) requires notice of withdrawal in two circumstances. The first circumstance is any time the attorney may withdraw representation without a motion to withdraw described by subsection (d). The notice of withdrawal requirement is necessary to allow for better tracking and data on how attorneys are operating within the workers' compensation system; ensure the correct parties are receiving communications from the division; and to put the division on notice when an injured employee may need assistance from the OIEC. The second circumstance is any time the attorney's client terminates the attorney's representation. This subsection is necessary to ensure there is no delay in a claimant or insurance carrier's ability to obtain subsequent representation or assistance when they choose to discharge their attorney. Under these circumstances, notification is necessary to ensure the division has the required data to track the operation of attorneys in the system; ensure the correct parties are receiving communications from the division; and to put the division on notice that an injured employee may need assistance from OIEC. The division emphasizes that when new §152.6(b)(1) is applicable both the attorney and the attorney's client may terminate the attorney-client relationship with immediate effect.

The required notice of withdrawal informs the division of a change in the representative relationship, but does not affect the date of termination.

New §152.6(c) states the notice of withdrawal must be provided to the division by personal delivery, first class mail, or facsimile no later than the 10th day following withdrawal, and the attorney must provide a copy of the notice to their client and opposing party by personal delivery, first class mail, or electronic transmission on the same day the notice is submitted to the division. It is necessary for the notice of withdrawal to be submitted to the division by personal delivery, first class mail, or facsimile to ensure the division receives the notification in a timely manner and is able to update the claimant or insurance carrier's representative information. It is necessary for the copy to be provided by these means to avoid any miscommunication or delay in the notice to the attorney's client or the opposing party. Section 102.4(m) defines electronic transmission as facsimile, e-mail, electronic data interchange, or any other similar method, but it does not include telephone communication. It is necessary for the division to receive timely notification of an attorney's withdrawal to allow for better tracking and data on how attorneys are operating within the system; ensure the correct parties are receiving communications from the division; and to put the division on notice when an injured employee may need assistance from OIEC. It is necessary for the attorney's client and opposing party to receive a copy of the notice of withdrawal to ensure all parties are up to date on the representation involved in the dispute. The division has provided the DWC Form-150a, *Notice of Withdrawal of Representation*, as a standardized form for attorneys to notify the division of withdrawal of representation.

The notice may be submitted to the division by personal delivery, mail, or facsimile.

New §152.6(c) further specifies the information that an attorney must provide to the division on the notice of withdrawal. New §152.6(c)(1) and (2) require the attorney's name, bar card number, and contact information, as well as the law firm's name, when applicable. This information is necessary for the division to efficiently process attorney withdrawal notifications, ensure the system accurately reflects the claimant or carrier's current representation, if any, and properly process any future applications for attorney fees. New §152.6(c)(3) and (4) require the injured employee's information, including name, date of injury, and DWC claim number, and the beneficiary's information, when applicable. This information is necessary to ensure the correct claimant's information is properly updated to note the withdrawal of representation, and helps the division collect data and track representation of claimants in the workers' compensation system. New §152.6(c)(5) requires the insurance carrier name. This information is necessary to help the division collect data and track representation of carriers in the workers' compensation system. New §152.6(c)(6) requires the effective date of the attorney's withdrawal of representation. The effective date is necessary to ensure proper tracking of attorney representation within the system; facilitate processing of any future applications for attorney fees; and to verify the attorney met the requirement to submit the notification to the division within the 10 day period established by rule. The division emphasizes that the effective date of the attorney's withdrawal is the actual date the representative relationship ended under paragraph (1) or (2) of subsection (b), and it is not tied to the submission date of the notice of withdrawal. New §152.6(c)(7) requires

the attorney's signature. The DWC Form-150a, *Notice of Withdrawal of Representation*, may also be used by the attorney's client to notify the division that the attorney-client relationship has been terminated. The attorney's signature is necessary to ensure the division can verify the party submitting the notice of withdrawal.

New §152.6(d) addresses withdrawal after notice of a scheduled BRC or CCH is received and before resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A – E. When new §152.6(d) applies, an attorney seeking withdrawal from representation may do so only after submitting a motion to withdraw and receiving a division order granting the motion. Labor Code §415.021(a) states that a person commits an administrative violation if they violate, fail to comply with, or refuse to comply with this subtitle or a rule, order, or decision of the commissioner. Additionally, Labor Code §415.001 and §415.002 state that it is an administrative violation for a representative of an employee, legal beneficiary, or insurance carrier to violate a commissioner rule. Section 150.1, requires an attorney in practice before the division to observe the rules, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed. Furthermore, §415.001(8) provides that it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas. Under the Texas Disciplinary Rules of Professional Conduct, Rule 1.15, an attorney may not withdraw from representing a client unless withdrawal can be accomplished without material adverse effect on the interests of the client. Oftentimes, the withdrawal of an attorney prior to a scheduled BRC or CCH can

lead to continuances, which delay the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affect the efficiency of the overall dispute resolution process. Unnecessary delays can also prevent injured employees from receiving needed medical attention, income benefits, or returning to work. Once a BRC or CCH has been scheduled by the division, the time for a new attorney or ombudsman to prepare for the proceeding after the current attorney has withdrawn is cut short and can affect the resolution of the dispute. Once the CCH is completed, the deadline to file a written request for appeals panel review is statutorily set and cannot be extended. Thus, an attorney's withdrawal during this time period may affect the client's ability to timely appeal the decision of the hearing officer. If neither party files a request for appeals panel review, the division's dispute resolution process has resolved the disputed issues. If a request for appeals panel review is filed and the appeals panel reverses the decision of the hearing officer and renders a new decision, or affirms the decision of the hearing officer, the division's dispute resolution process has resolved the disputed issues. Additionally, if at any time the parties resolve all of the disputed issues by agreement or settlement under Labor Code §410.029, the division's dispute resolution process has resolved the disputed issues. However, if the appeals panel reverses the decision of the hearing officer and remands the case for further consideration in accordance with Labor Code §410.203(b), a motion to withdraw is still required for an attorney to withdraw representation. Under Labor Code §410.203(d), a hearing on remand must be accelerated and the commissioner must adopt rules to give priority to hearings in these circumstances.

Thus, an attorney's withdrawal after a decision has been remanded would provide little time for a new attorney or ombudsman to prepare for the proceeding and can affect the resolution of the disputed issues. If appeals panel review is requested by a party after the expedited, or accelerated, CCH, the appeals panel may either reverse and render a new decision or affirm the decision of the hearing officer. At this point, the division's dispute resolution process has resolved the disputed issues. This subsection is necessary to help prevent a materially adverse effect on the interests of claimants and insurance carriers by an attorney's withdrawal during the division's dispute resolution process. Additionally, continuances and delays during the dispute resolution process can negatively impact the effectiveness and fairness of the workers' compensation system. Labor Code §402.061, *Adoption of Rules*, provides the commissioner with authority to adopt rules as necessary for the implementation and enforcement of the Act. Labor Code §402.021(a)(2) states a basic goal of the workers' compensation system is that each injured employee must have access to a fair and accessible dispute resolution process, and (b)(5) establishes the prompt and fair resolution of disputes as another system goal. Labor Code §402.00128(b), *General Powers and Duties of Commissioner*, provides the commissioner with the power to hold hearings and to exercise other powers as necessary to implement and enforce the Act. Thus, new §152.6(d) is also necessary to help the division meet the statutorily imposed duty under Labor Code §402.021(a)(2) to provide a fair and accessible dispute resolution process and Labor Code §402.021(b)(5) to resolve disputes promptly and fairly.

New §152.6(e) requires that a motion to withdraw provide good cause for withdrawing from the case. Good cause is necessary to prevent a materially adverse effect on the attorney's client as a result of the withdrawal. As described above, the withdrawal of an attorney during the dispute resolution process may have a material adverse effect on the claimant and the insurance carrier. Therefore, the division requires good cause to show that the attorney's withdrawal from the case is warranted. This requirement is consistent with the Texas Disciplinary Rules of Professional Conduct, which state an attorney may not withdraw representation unless withdrawal can be accomplished without a material adverse effect on the interests of the client. Texas Disciplinary Rule 1.15(c) states a lawyer shall continue representation notwithstanding good cause for terminating the representation when ordered to do so by a tribunal. New §152.6(e) simply requires a showing of good cause to withdraw during the dispute resolution process. New §152.6(e) further requires the motion to withdraw include a certification that the attorney's client has knowledge of and has approved, or refused to approve, the withdrawal or that the attorney made a good faith effort to notify the client and the client could not be located. The certification is necessary to ensure the participants, namely the attorney and the attorney's client, are communicating with one another and to provide information necessary under new §152.6(g)(5) when the hearing officer considers the motion to withdraw. The division emphasizes that the client's approval of an attorney's withdrawal is not the same as the client's termination of the attorney-client relationship under new §152.6(b)(2).

New §152.6(f) requires the attorney submit the motion to withdraw to the division by personal delivery, first class mail, or facsimile, and to provide a copy of the motion to the attorney's client and the opposing party. It is necessary for the motion to withdraw to be submitted to the division by personal delivery, first class mail, or facsimile to help ensure the division receives and considers the motion in a timely manner. It is necessary for the attorney's client and opposing party to receive a copy of the motion to withdraw to ensure all parties are up to date on the representation involved in the dispute and to avoid any ex parte communications, which are prohibited under Labor Code §410.167. The copy must be provided by personal delivery, first class mail, or electronic transmission on the same day the motion is submitted to the division. It is necessary for the copy to be provided by these means to avoid any miscommunication or delay in the notice to the attorney's client or the opposing party. Electronic transmission is defined in §102.4(m) as transmission of information by facsimile, electronic mail, electronic data interchange, or any other similar method and does not include telephonic communication. Therefore, unlike the requirements for submitting the motion to the division, an attorney may e-mail a copy of the motion to the other parties.

New §152.6(g) outlines the factors the hearing officer will rely on in determining whether good cause exists for the attorney's withdrawal, beginning with Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct. This subsection is necessary to inform system participants how a hearing officer determines whether to approve or deny a motion to withdraw. The considerations are necessary to help protect the attorney's client from experiencing a material adverse effect due to the attorney's withdrawal.

Labor Code §415.021(a) states that a person commits an administrative violation if they violate, fail to comply with, or refuse to comply with this subtitle or a rule, order, or decision of the commissioner. Additionally, Labor Code §415.001 and §415.002 state that it is an administrative violation for a representative of an employee, legal beneficiary, or insurance carrier to violate a commissioner rule. Section 150.1 requires an attorney, in practice before the division to observe the rules, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed. Furthermore, §415.001(8) provides that it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas. Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct governs declining or terminating representation. It is necessary for the hearing officer to begin by considering Rule 1.15 to help ensure the attorney is not committing an administrative violation by withdrawing representation at that time. New §152.6(g)(1) states the hearing officer will consider how close in time the withdrawal is to the scheduled BRC or CCH. Oftentimes, the withdrawal of an attorney prior to a scheduled BRC or CCH can lead to a continuance, which delays the resolution of the dispute, provide the claimant with inadequate subsequent representation or assistance due to timing constraints, and affects the efficiency of the overall dispute resolution process. Unnecessary delays can also prevent injured employees from receiving needed medical attention, income benefits, or returning to work. Once a BRC or CCH has been scheduled by the division, the time for a new attorney or ombudsman to prepare for the proceeding once the current attorney has

withdrawn is cut short and can affect the resolution of the dispute. This paragraph is necessary to help ensure the attorney's withdrawal is not so close in time as to lead to a rescheduled dispute proceeding or continuance. New §152.6(g)(2) and (3) state the hearing officer will consider the amount of attorney fees that have been requested and approved, as well as the attorney's willingness to waive payment of any portion of the approved fees outstanding at the time of withdrawal. Under Labor Code §408.221, a claimant attorney's fee is paid out of the claimant's recovery and may not exceed 25 percent of the recovery. Under Labor Code §408.203, *Allowable Liens*, any unpaid income or death benefits are subject to liens for attorney fees. Because attorney fees are capped at 25 percent of each income or death benefit check, there are often approved attorney fees operating as a lien on the claimant's benefits, sometimes through exhaustion of the available benefits. Therefore, unless an attorney is willing to waive outstanding fees when withdrawing from a case, any subsequent attorney will only receive a fee for representing the claimant after the original lien has been paid out. This can operate as a hindrance to injured employees and beneficiaries seeking access to an attorney in their dispute. The workers' compensation dispute resolution process does not require attorney representation in order for injured employees or beneficiaries to navigate their claim or obtain effective assistance, or any party to obtain private counsel. The OIEC ombudsman program is available to assist injured employees, and parties are able to obtain other forms of qualifying non-attorney representation. The considerations in new §152.6(g)(2) and (3) are necessary to help enable claimants in the system who want attorney representation to obtain a subsequent attorney if their

current attorney withdraws. New §152.6(g)(4) considers the attorney's reason for withdrawing representation. This consideration is necessary as a corollary to Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct. Under Rule 1.15, there are specific circumstances where an attorney is required to withdraw or is permitted to withdraw barring an order stating otherwise from a tribunal. This paragraph is necessary to encompass those reasons and put the hearing officer on notice of the attorney's reason for withdrawing representation during the dispute resolution process. However, the division emphasizes that an attorney is not required to provide any information that is considered privileged or confidential in stating the reason for withdrawal. Finally, new §152.6(g)(5) considers whether the attorney's client refused to approve the withdrawal. New §152.6(e) requires the motion to withdraw to include a statement reflecting whether the attorney's client has approved or refused to approve the withdrawal, unless the attorney certifies a good faith effort to notify the client regarding the withdrawal was made and the client could not be located. It is necessary for the hearing officer to consider whether the attorney's client has refused to approve the withdrawal, where applicable, to provide the claimant or insurance carrier an opportunity for their position to be heard. A consideration of good cause that includes the claimant or insurance carrier's voice helps encourage communication within the representation relationship and the workers' compensation system as a whole, as well as notify the hearing officer that there is a possible material adverse effect to the client if withdrawal occurs at that time.

New §152.6(h) requires an attorney to continue to represent the client until resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A – E. Rule 1.15(c) of the Texas Disciplinary Rules of Professional Conduct states that a lawyer shall continue representation notwithstanding good cause for terminating the representation when ordered to do so by a tribunal. Under the Texas Disciplinary Rules of Professional Conduct, a "tribunal" is defined as any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy and includes administrative agencies when engaging in adjudicatory activities, arbitrators, mediators, hearing officers, and comparable persons. New §152.6(e) requires a motion to withdraw show good cause for withdrawing from the case during the dispute resolution process, and is necessary to prevent a materially adverse effect on the attorney's client. It is necessary for an attorney to continue representation if their motion to withdraw is denied because withdrawal at that point would have a material adverse effect on the client that is not otherwise justified. This subsection tracks the requirements of the Texas Disciplinary Rules of Professional Conduct.

New §152.6(i) clarifies that nothing in §152.6 prevents a client from terminating the attorney-client relationship with immediate effect, or notifying the division of the termination of the attorney-client relationship. This subsection is necessary to emphasize that when the attorney's client terminates the representative relationship, these rules should not hinder the claimant or insurance carrier from obtaining immediate subsequent assistance from OIEC or representation from another attorney. Additionally,

under §152.6(b) the attorney has 10 days to meet the requirement of submitting a notice of withdrawal. However, the client may seek immediate assistance from OIEC or subsequent representation following the attorney's withdrawal. In these instances, the attorney's client should not be prevented from notifying the division and obtaining assistance from OIEC or subsequent representation just because the attorney has not yet submitted the notice of withdrawal. Lastly, the division emphasizes that new §152.6(i) still requires the attorney to submit a notice of withdrawal under §152.6(b), regardless of whether the attorney's client has provided notification. This requirement helps to ensure the division is receiving the necessary information for tracking and data on how attorneys are operating within the system; to ensure the correct parties are receiving communications; and to provide consistent and clear application of the requirements. Consistent and clear application of the withdrawal requirements is necessary to ensure the division is receiving all of the requested information on the DWC Form-150a. While an injured employee, beneficiary, or insurance carrier may submit the form to the division, participants other than the attorney are not required to. Therefore, new §152.6(i) requires attorneys to always submit the notice of withdrawal when applicable and helps ensure the division is receiving all of the necessary required information established in new §152.6(b).

New §152.6(j) establishes a delayed effective date for §152.6 of January 30, 2017. A delayed effective date is necessary to ensure system participants and the division are afforded sufficient time to prepare and update the necessary systems to reflect the new requirements contained in §152.6. This subsection is necessary to inform

attorneys when the requirements of §152.6, including a notice of withdrawal under subsection (b) or a motion to withdraw under subsection (e), become effective.

FISCAL NOTE. Kerry Sullivan, Deputy Commissioner for Hearings, has determined that for each year of the first five years the new sections are in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposed new sections. Any economic costs to those state and local governments that provide workers' compensation coverage are discussed below.

PUBLIC BENEFIT/COST NOTE. Mr. Sullivan has also determined that for each of the first five years new §152.3, §152.4, and §152.6 are in effect there will be a number of public benefits. The public benefits anticipated as a result of the proposed sections include: (i) helping to ensure there is quality representation available within the workers' compensation system; (ii) allowing for additional time at the beginning of a dispute for preparation and case management in order to encourage early resolution of claim disputes; (iii) helping to prevent an attorney's withdrawal from having a material adverse effect on their client; (iv) establishing clear and consistent guidelines for submission of required information and requests; (v) resolving disputes fairly and promptly by minimizing delays and continuances in the dispute resolution process; (vi) ensuring injured employees have access to a fair and accessible dispute resolution process by protecting against disparate impact between parties, and; (vii) educating and clearly

informing system participants of their rights under the system by providing for consistent notice of all disputes and issues.

ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL. Mr. Sullivan anticipates that, for each of the first five years new §152.3, §152.4, and §152.6 are in effect, there will be costs to persons required to comply with the new sections. The division notes that many of these costs, particularly under new §152.3 and §152.4, are substantially similar to the costs experienced under repealed §152.3 and §152.4.

New §152.3(a) requires an attorney to submit an application for attorney fees to the division in order to request a fee. Labor Code §408.221 and §408.222 require the division or court to approve all attorney fees based on written evidence presented to the division. Thus, the only costs to an attorney resulting from new §152.3 are the actual costs relating to submitting the application to the division. There are a number of options available to the attorney for submitting the application, including the free online WAFPS. The proposed subsection allows the attorney the flexibility to determine which allowable method of submission to use when requesting a fee, and costs will vary depending on the method the attorney chooses. If an attorney decides to mail, facsimile, or personally deliver the application there is an estimated printing cost associated of \$.10 per 8.5 x 11 piece of paper. A blank application for attorney fees is five pages in length and, when printed front and back, would result in a printing cost of approximately \$.30 per application. If an attorney decides to mail the application there is also a mailing cost of approximately \$.47 per application. Additionally, the division notes that the proposed

subsection provides flexibility for the attorney to determine how often to submit the application for attorney fees, and costs will vary depending on the frequency the attorney chooses.

New §152.3(d) and (e) require a party other than the claimant, such as the attorney or the insurance carrier, who contests an attorney fee order to request a CCH or an appeals panel review, respectively. The request must be submitted to the division by personal delivery, first class mail, or facsimile. Thus, there is a printing cost associated of approximately \$.10 per 8.5 x 11" piece of paper for any requests submitted to the division under (d) or (e). If the party mails the request to the division, there is also a mailing cost of approximately \$.47. Additionally, (d) and (e) require a copy be sent to the other parties, including the claimant, attorney, and insurance carrier. Under §152.3(d), the copies may be sent at no cost by email. However, if the copies are sent by one of the other available means there are printing and mailing costs associated, which are consistent with those described above, for each required party. The division also recognizes that there may be costs to parties under new §152.3 resulting from the time it takes to complete the request for a CCH or review by the appeals panel. However, these costs are not feasible for the division to quantify, as the party is in the best position to determine the time it will take to fulfill the requirements. Additionally, costs may vary depending on the complexity of the circumstances or the person's familiarity with the processes. Parties who opt to request a CCH under new §152.3 may incur certain legal costs or costs in the form of time as a result of attending these hearings. However, these costs are ultimately the result of division policies

regarding the rights of parties to request CCHs, and are substantially similar to the costs associated with the processes found in repealed §152.3.

New §152.4 establishes the maximum hourly rate for attorneys and legal assistants, as well as the legal services guidelines outlining the services and hours that may be requested. Mr. Sullivan anticipates that there will be probable costs to the workers' compensation system as a result of the repeal and re-enactment because new §152.4 increases the maximum hourly rate for attorneys and legal assistants, and includes increased hours under the legal services guidelines. Specifically, the maximum hourly rate will increase by \$50 for attorneys and \$15 for legal assistants with the repeal and re-enactment of §152.4. Additionally, amendments to §152.4(c) increase the number of hours an attorney may request for communications per month (with client, health care providers, or other persons involved in the case) by 30 minutes, for direct dispute resolution negotiation per month by 30 minutes, and for preparation and submission of an agreement or settlement by one hour. It is challenging for the division to estimate the exact fiscal impact of the repeal and re-enactment to claimants and insurance carriers for a number of reasons. For example, to estimate the fiscal impact, the division must rely on past billing behavior; however, increases in the hourly rate and guidelines for legal services may result in a change in billing behavior, which would affect any calculation of costs. Additionally, the division anticipates the increase in costs to claimants and insurance carriers will be at least partially offset by the quicker resolution of cases resulting from increased available hours at the front end of the dispute resolution process. Last, the division is able to determine the total amount of

attorney fees approved, but does not have available data on the total amount of attorney fees actually paid out in the system. For claimant attorneys, this is due in part to the statutory cap of 25 percent found in Labor Code §408.221, which only allows 25 percent of each benefit check to be allocated to attorney fees and does not provide for further recovery of any outstanding approved balance once the benefits are exhausted. For insurance carrier attorneys, there are often contracts between the attorney and the insurance carrier that provide for a fee below the amount approved by the division. Essentially, the division may approve a specific amount of fees, but the division does not have information on the actual fees paid out by the parties, which is often less than what was approved. There are also no previous amendments for the division to base an estimate of costs on, as the rules have been in place since originally adopted in 1991. All of these circumstances operate to hinder the division's ability to provide an exact estimate of the costs to participants and the system as a whole that would result from the increase in the hourly rate and guidelines for legal services. However, the division can provide estimates based on the information readily available, including the total amount in attorney fees approved each year, which is subject to the 25 percent statutory cap for claimant attorneys and contracts for insurance carrier attorneys, and the total amount that could possibly be requested if billing behavior were to change and attorneys began billing at the maximum allowable rate and hours.

For attorney fees, the division estimates that the total amount approved by the division would increase by approximately \$20 million per year. The division reached this estimate by relying on past billing behavior and the total number of approved hours in

Calendar Year 2015; multiplying the difference in the maximum hourly rate, \$50, by the total number of approved attorney fees in 2015. Overall, at a new hourly rate of \$200--multiplied by the 2015 approved hours--the division would approve approximately \$81 million in attorney fees. For legal assistants, the division estimates an increase of approximately \$1.2 million per year as a result of the repeal and re-enactment of §152.4. This estimate is based on multiplying the difference in the maximum hourly rate, \$15, by the total number of approved hours of legal assistant fees in 2015. Another approach the division took to estimate the impact was to look at the total amount of attorney fees that could possibly be billed in the system. This estimate does not take into account actual billing practices, such as the total number of hours actually billed or the current data showing that attorneys do not bill the maximum amount of hours allowed in every dispute. Instead, this estimate focuses on the total amount that could be billed by multiplying the new hourly rate of \$200 by the new maximum number of hours allowed in the legal services guidelines. Per dispute, a total of approximately \$4,200 can be billed under new §152.4, which is an increase of \$1,350 from the repealed version. If billing behavior were to change and attorneys began billing at or near the maximum hours allowed in the guidelines for legal services, as well as the maximum hourly rate each time, a total of approximately \$152 million could be billed in the workers' compensation system under new §152.4. This is a change of approximately \$50 million from the repealed rule. Finally, new §152.4(b) allows attorneys to request hours above the guidelines for legal services when case-specific justification is attached. An additional cost of \$200 per additional hour would be

applicable in those instances where additional hours are requested and approved by the division.

New §152.6(b) and (d) require an attorney to submit a notice of withdrawal or a motion to withdraw, respectively, to the division when withdrawing their representation. There is a printing cost associated with the notification and motion of \$.10 per 8.5 x 11" piece of paper, and when mailed, a mailing cost of approximately \$.47. Under (b) and (d), the notification and motion must also be provided to the attorney's client and the opposing party. The proposed subsection allows the attorney the flexibility to determine which allowable method of submission to use when providing a copy of the notification or motion, and costs will vary depending on the method the attorney chooses. The copies may be sent at no cost by email. If the copies are sent by one of the other available means, there are printing and mailing costs associated, which are consistent with those described above, for each required party. The division also recognizes that there may be costs to attorneys under new §152.6 resulting from the time it takes to complete the notice of withdrawal or motion to withdraw. However, these costs are challenging for the division to quantify, as the attorney is in the best position to determine the time it will take to fulfill the requirements. Additionally, costs may vary depending on the complexity of the circumstances or the attorney's familiarity with each document.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS
FOR SMALL AND MICRO-BUSINESSES.** Government Code §2006.002(c) provides

that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines “small business” as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. Government Code §2006.001(1) defines “micro business” similarly to “small business” but specifies that such a business may not have more than 20 employees.

In accordance with Government Code §2006.002(c), the division has determined that the costs to comply with the proposed new sections may have an adverse economic impact on attorneys and insurance carriers who qualify as small or micro-businesses. According to the United States Census Bureau’s North American Industry Classification System (NAICS), in 2014 there were 547,190 employers doing business in the state of Texas. Of those, 532,229 have 99 or less employees and 460,181 have 19 or less employees (<http://censtats.census.gov/cbpnaic/cbpnaic.shtml>). The division is not able to determine the total number of regulated entities that will be required to comply with §152.3 and §152.6 because information regarding attorney and insurance specific industries is not available. However, the cost of compliance with the proposal will not vary between large businesses and small or micro-businesses. Thus, the

division's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal is equally applicable to small and micro-businesses.

Two possible alternative regulatory methods of achieving the purposes of the proposed sections without adversely affecting small or micro-businesses are (i) modifying the proposed requirements for small and micro-businesses; and (ii) exempting small or micro-businesses from the requirements of the proposed sections. Under Government Code §2006(c-1), an agency is required to consider alternative regulatory methods only if the alternative methods are consistent with the health, safety, environmental and economic welfare of the state. The division has determined that the proposed new sections substantially contribute to the economic welfare of the state and system participants by ensuring all parties to a dispute receive notice regarding any new issues and avoid ex parte communications, which are prohibited under Labor Code §410.167. The purposes of the regulations also include furthering the system goals as laid out in Labor Code §402.021; resolving disputes fairly and promptly by minimizing delays in dispute resolution; ensuring injured employees have access to a fair and accessible dispute resolution process by protecting against disparate impact between parties; and educating and clearly informing system participants of their rights under the system by providing for consistent notice of all disputes and issues. Any variance in the requirements of §152.3 and §152.6 would defeat the purposes of the rules, would not be consistent with the economic welfare of the state, and would result in a disparate effect between parties to a dispute, particularly an attorney's client when an attorney fee order is being contested or the attorney is withdrawing representation. Additionally, in

establishing the requirements the division has included less burdensome options for complying with many of the proposed new sections. In §152.3(a), an attorney may submit an application through WAFPS, which would eliminate the printing and mailing costs of submitting the application in a paper format. WAFPS is provided as a free online system for attorneys to submit applications for attorney fees. In §152.3(d), the party requesting a CCH to dispute an attorney fee order may provide copies to the other parties, including the insurance carrier, claimant, or their attorney, by email. In §152.6(b) and §152.6(d), an attorney may provide the required copies of the notice of withdrawal and motion to withdraw to their client and opposing party via email. Therefore, the division has determined that there are no regulatory alternatives, including waiving or modifying the requirements of proposed sections, which will sufficiently protect the health, safety, and economic welfare of the state.

TAKINGS IMPACT ASSESSMENT. The division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on September 19, 2016. A request for a public hearing must be sent separately from your written comments. Send written comments

or hearing requests by email to Rulecomments@tdi.texas.gov or by mail to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If a hearing is held, the division will consider written comments and public testimony presented at the hearing.

STATUTORY AUTHORITY. Existing §152.3 and §152.4 are repealed under the authority of Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation, Separation of Authority, Rulemaking*; and Labor Code §402.061, *Adoption of Rules*.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

TEXT.

~~**§152.3. Approval or Denial of Fee by the Commission.**~~

~~**§152.4. Guidelines for Legal Services Provided to Claimants and Carriers.**~~

STATUTORY AUTHORITY. New §152.3, §152.4, and §152.6 are proposed under the authority of Labor Code §402.00111, *Relationship Between Commissioner of Insurance*

and Commissioner of Workers' Compensation, Separation of Authority, Rulemaking; Labor Code §402.061, Adoption of Rules; Labor Code §402.021, Goals, Legislative Intent, General Workers' Compensation Mission of Department; Labor Code §408.221, Attorney's Fees Paid to Claimant's Counsel; Labor Code §408.222, Attorney's Fees Paid to Defense Counsel; Labor Code §415.021, Assessment of Administrative Penalties; Labor Code §402.00128, General Powers and Duties of Commissioner; Labor Code §415.001, Administrative Violation by Representative of Employee or Legal Beneficiary; Labor Code §415.002, Administrative Violation by Insurance Carrier; Labor Code §414.002, Monitoring Duties; Labor Code §414.006, Referral to Other Authorities; Labor Code §408.203, Allowable Liens; and Labor Code §410.167, Ex Parte Contacts Prohibited.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

Labor Code §402.021 requires that, in implementing the goals described in the section, the workers' compensation system must minimize the likelihood of disputes and resolve them promptly and fairly when identified, as well as promptly detect and appropriately address acts or practices of noncompliance with the Act and rules. Labor Code §402.021 states a basic goal of the workers' compensation system is that each injured employee must have access to a fair and accessible dispute resolution process.

The section further requires the workers' compensation system effectively educate and clearly inform each person who participates in the system as a claimant, employer, insurance carrier, health care provider, or other participant of the person's rights and responsibilities under the system and how to appropriately interact within the system.

Labor Code §408.221 requires an attorney's fee, including a contingency fee, for representing a claimant before the division or court under the Act to be approved by the commissioner or court, to be paid from the claimant's recovery, and to be based on the attorney's time and expenses according to written evidence presented to the division or court. Labor Code §408.221 further requires the commissioner or court to consider a number of factors when approving an attorney's fee and to provide guidelines for maximum attorney's fees for specific services by rule.

Labor Code §408.222 requires an attorney's fee for defending an insurance carrier in a workers' compensation action brought under the Act to be approved by the division or court and determined by the division or court to be reasonable and necessary. Labor Code §408.222 further requires the division or court consider issues analogous to those listed under §408.221(b) when determining whether a fee is reasonable.

Labor Code §415.021 states that a person commits an administrative violation if they violate, fail to comply with, or refuse to comply with the Act or a rule, order, or decision of the commissioner.

Labor Code §402.00128(b) provides the commissioner with the power to hold hearings and to exercise other powers and perform other duties as necessary to implement and enforce the Act

Labor Code §415.001 states it is an administrative violation for a representative of an employee or legal beneficiary to violate the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas or a commissioner rule.

Labor Code §415.002 states it is an administrative violation for an insurance carrier or its representative to violate a commissioner rule or fail to comply with a provision of the Act.

Labor Code §414.002 requires the division to monitor for compliance with commissioner rules, the Act, and other laws relating to workers' compensation the conduct of persons subject to this title, including attorneys and other representatives of parties. Labor Code §414.002 further requires the division to monitor the conduct described in Labor Code §415.001 and §415.002 and refer persons engaging in that conduct to the division of hearings.

Labor Code §414.006 authorizes the division to refer persons involved in a case subject to an investigation to other appropriate authorities for further investigation or the institution of appropriate proceedings, including licensing agencies, district and county attorneys, or the attorney general.

Labor Code §408.203 provides that an income or death benefit is subject to liens or claims for an attorney's fee for representing an employee or legal beneficiary in a matter arising under the Act.

Labor Code §410.167 states that a party and a hearing officer may not communicate outside a CCH unless the communication is in writing with copies provided to all parties or relates to a procedural matter.

TEXT.

§152.3. Approval or Denial of Fee by the Division

(a) To claim a fee, an attorney representing any party must submit to the division a complete and accurate application for attorney fees in the form and manner prescribed by the division.

(b) An application for attorney fees must include:

(1) each attorney's name and bar card number;

(2) the law firm name, phone number, and mailing address;

(3) the injured employee's name, date of injury, and DWC claim number;

(4) the beneficiary's name, type, contact information, and social security number, if applicable;

(5) the dates of legal service;

(6) the hourly rate and number of hours for each attorney and legal assistant providing legal services;

(7) an itemized list of each legal service performed and expense incurred representing the claimant or insurance carrier that identifies the attorney or legal assistant who provided the service, the date the service was provided, and the hours or amount requested;

(8) a certification that every statement, numerical figure, and calculation in the application for attorney fees submitted to the division is within the attorney's personal knowledge, is true and correct, and represents services, charges, and expenses provided by the attorney or a legal assistant under the attorney's supervision; and

(9) additional case-specific justification for any fee that exceeds the guidelines for legal services.

(c) The division may approve, partially approve, or deny an application for attorney fees based on the division's determination of whether the requested time and expenses are reasonable according to the guidelines for legal services and maximum hourly rate established in §152.4 of this title, Labor Code §408.221 and §408.222, and written evidence presented to the division. The division will issue an order approving, partially approving, or denying an application for attorney fees. Submission of an application requesting fees for the same services or expenses addressed in any previous application is prohibited. Attorneys are subject to review for compliance with commissioner rules, the Act, and other laws under Labor Code Chapter 414. An order approving, partially approving, or denying an application for attorney fees does not limit the commissioner's authority to enforce a sanction, administrative penalty, or other remedy authorized by the Act. At any time an attorney whose application is found to contain false or inaccurate information may be referred to enforcement or other authorities, including licensing agencies, district and county attorneys, or the attorney general for investigation and appropriate proceedings.

(d) To contest a division order approving, partially approving, or denying an application for attorney fees, an attorney, claimant, or insurance carrier must request a contested case hearing through the dispute resolution process outlined in Chapters 140 – 144 of this title. A request must be submitted by personal delivery, first class mail, or facsimile to the division no later than the 20th day after receipt of the division's order. A claimant may request a hearing by contacting the division in any manner no later than the 20th day after receipt of the division's order. A contesting party other than a claimant must send a copy of the request by personal delivery, first class mail, or electronic transmission to the insurance carrier and the other parties, including the claimant and attorney, on the same day the request is submitted to the division.

(e) After a contested case hearing under subsection (d), an attorney, claimant, or insurance carrier must request review by the appeals panel pursuant to the provisions of §143.3 of this title (Requesting the Appeals Panel To Review the Decision of the Hearing Officer) to contest the division order approving, partially approving, or denying an application for attorney fees.

(f) The division's order approving, partially approving, or denying an application for attorney fees is binding during the pendency of a contest or an appeal of the order. Notice of a contest or an appeal does not relieve the insurance carrier of the obligation to pay attorney fees according to the division order.

(g) Following a contested case hearing or appeals panel review of an order approving, partially approving, or denying an application for attorney fees under subsection (d) or subsection (e), the division will issue a final order or decision. If the

final order or decision of the division requires an attorney to reimburse funds, the reimbursement must be made no later than the 15th day after receipt of the final order or decision.

(h) This section is effective January 30, 2017.

§152.4. Guidelines for Legal Services Provided to Claimants and Insurance

Carriers

(a) The division will consider the guidelines for legal services outlined in subsection (c), the maximum hourly rate for legal services in subsection (d), Labor Code, §408.221 and §408.222, and written evidence presented to the division, when approving, partially approving, or denying an application for attorney fees.

(b) An attorney may request, and the division may approve, a number of hours greater than those allowed by the guidelines for legal services if the attorney demonstrates to the satisfaction of the division that the higher fee was justified based on the circumstances of the specific claim and Labor Code, §408.221 and §408.222.

(c) The guidelines for legal services provided to claimants and insurance carriers are as follows:

Figure: 28 TAC §152.4(c)

	Service Maximum	Total Hours
1.	a. initial interview and research	1.0

	b. setting up file; completing and filing forms	0.5
2.	Communications per month (with client, health care providers, other persons involved in the case)	3
3.	Direct dispute resolution negotiation with the other party (per month)	3.5
4.	Preparation and submission of an agreement or settlement	2
5.	Participation in benefit review conference	Actual time in BRC + 2.0
6.	Participation in contested case hearing	Actual time in CCH + 4.0
7.	Participation in administrative appeal process	5.0

8.	Travel (per month)	Actual costs that are reasonable and necessary
----	--------------------	--

(d) The maximum hourly rate for legal services shall be as follows. Hourly rate:

(1) attorney--\$200; and

(2) legal assistant (not to include hours for general office staff)--\$65.

(e) Each attorney must bill for hours using that attorney's state bar card number.

(f) This section is effective January 30, 2017.

§152.6. Attorney Withdrawal

(a) An attorney withdrawing representation must submit a notice of withdrawal under subsection (b) or a motion to withdraw under subsection (d) and comply with the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas, including surrendering papers and property to the client as required.

(b) An attorney must submit a notice of withdrawal in the form and manner prescribed by the division when:

(1) the attorney withdraws representation and a motion to withdraw under subsection (d) is not required; or

(2) the attorney's representation is terminated by the attorney's client.

(c) An attorney must submit a notice of withdrawal under subsection (b) to the division by personal delivery, first class mail, or facsimile no later than the 10th day

following withdrawal. An attorney must provide a copy of the notice to the attorney's client and the opposing party by personal delivery, first class mail, or electronic transmission on the same day the notice is submitted to the division. The notice of withdrawal must include:

(1) the attorney's name, bar card number, and contact information;

(2) the law firm name, if applicable;

(3) the injured employee's name, contact information, date of injury, and

DWC claim number;

(4) the beneficiary's name, contact information, and social security number, if applicable;

(5) the insurance carrier name;

(6) the effective date of the attorney's withdrawal of representation under paragraph (1) or (2) of subsection (b); and

(7) the attorney's signature.

(d) Except when the attorney's representation is terminated by the attorney's client, an attorney withdrawing representation must submit a motion to withdraw to the division, and receive a division order granting the motion to withdraw, after notice of a scheduled benefit review conference or contested case hearing has been received and until resolution of the disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A – E.

(e) The motion to withdraw must provide good cause for withdrawing from the case and a certification that states:

(1) the attorney's client has knowledge of and has approved or refused to approve the withdrawal; or

(2) the attorney made a good faith effort to notify the attorney's client and the attorney's client cannot be located.

(f) An attorney must submit the motion to withdraw to the division by personal delivery, first class mail, or facsimile. An attorney must also provide a copy of the motion to the attorney's client and the opposing party by personal delivery, first class mail, or electronic transmission on the same day the motion is submitted to the division.

(g) The hearing officer will determine whether good cause exists for the attorney's withdrawal based on Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct and other factors, including:

(1) how close in time the attorney withdrawal is to a scheduled benefit review conference or contested case hearing;

(2) the amount of attorney fees that have been requested and approved by the division;

(3) whether the attorney is willing to waive payment of any portion of the approved fees;

(4) the attorney's reason for the withdrawal; and

(5) whether the attorney's client refused to approve the withdrawal, if applicable.

(h) If the hearing officer determines good cause does not exist for the attorney's withdrawal, the attorney must continue to represent the party until resolution of the

disputed issues through the division's dispute resolution process provided in Labor Code Chapter 410, Subchapters A – E.

(i) This section does not prevent the attorney's client from terminating the attorney-client relationship or notifying the division of the termination of the attorney-client relationship. If the attorney's client notifies the division of a termination, the attorney is not relieved of the duty to submit to the division a notice of withdrawal under subsection (b).

(j) This section is effective January 30, 2017.

CERTIFICATION.

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

Issued at Austin, Texas, on August 2, 2016.

✕

Nicholas Canaday III
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation