

## **INITIAL STATEMENT OF REASONS:**

### **Problem Being Addressed:**

The California Prison Industry Authority (CALPIA) and the California Prison Industry Board (PIB) propose to repeal sections 8111 and 8112 of Title 15. Originally enacted in 2015, Sections 8111 and 8112 have not had any substantial regulatory changes made since that time. These regulations have been determined to be unclear, cumbersome, outdated, potentially confusing, inconsistent, and duplicative. Existing laws, regulations and court decisions address the topics covered in Section 8111 and 8112. For these reasons, it is necessary to repeal Sections 8111 and 8112. This proposed regulatory action is intended to address these issues by repealing the older and duplicative version.

### **Necessity**

The repeal of Sections 8111 and 8112 is necessary to ensure consistency with the Americans with Disabilities Act (ADA) and the Fair Employment and Housing Act (FEHA) to remove duplicative regulations, and to reduce the possibility of confusion with the regulated community.

### **Anticipated Benefits of Repeal of the Regulations:**

The repeal of these regulations will result in consistency, clarity, and eliminating duplicative regulations providing for a more streamlined and efficient regulatory scheme. The proposed regulatory change will modernize, clarify, and streamline existing regulations to repeal unnecessary regulations. Removing Sections 8111 and 8112 benefit those affected, CALPIA employees, by eliminating unnecessary regulations which are not consistent with or are duplicative of existing laws, regulations, and court decisions. As a result, no CALPIA regulations are required to apply the requirements of Sections 8111 and 8112. Repeal will also reduce confusion that could result from inconsistent regulatory provisions concerning reasonable accommodation and modified duty assignments.

### **Basis and Rationale:**

According to Government Code section 11342.2, the proposed repeal of regulations is consistent and not in conflict with PC sections 2801 through 2808 (Prison Industry Authority) and is reasonably necessary to effectuate the purpose of PC sections 2801 through 2808. Repealing sections 8111 and 8112 is necessary as they are duplicative of controlling legal authorities, statutes and regulations and may be interpreted as ambiguous or inconsistent with existing legal authorities, statutes, and regulations.

**Penal Code Section 2800:** In 1982, the California Legislature restructured the Department of Corrections' industries and vocational training program for incarcerated individuals abolishing the Correctional Industries Commission and replacing it with the newly created Prison Industry Authority (PIA) (subsequently renamed CALPIA) under the direction of the Prison Industry Board.

**Penal Code Section 2807(a):** Section 2807(a) provides that CALPIA is authorized and empowered to operate industrial, agricultural, and service enterprises which provide products and services needed by the state, or any political subdivision thereof, or by the federal government, or any department, agency, or corporation thereof, or for any other public use. By giving CALPIA these duties and power by statute, the Legislature implicitly

delegated rulemaking authority to CALPIA to adopt those rules and regulations necessary for the exercise of powers expressly granted to CALPIA.

**Penal Code Section 2802:** Section 2802 provides for the existence and powers of a Prison Industry Board (PIB).

**Penal Code Section 2808:** In Penal Code (PC) section 2808 the California Legislature provided the PIB with *"all powers to do all of the things that the board of directors of a private corporation would do . . ."* including approving CALPIA's rulemaking proposals

### **Specific Purpose and Rationale, Per Government Code 11346.2(b)(1):**

#### **Specific Regulatory Actions and Reasons:**

To satisfy the Necessity standard, the rulemaking record must contain "substantial evidence" supporting the rulemaking agency's determination that the regulation is necessary. "Substantial evidence" is commonly defined to mean: "Such evidence that a reasonable mind might accept as adequate to support a conclusion." Black's Law Dictionary (Fifth edition, 1968) p.1281. CALPIA provides here additional information and rationale to meet the necessity standard for specific provisions of the proposed regulatory changes.

**Section 8111 is repealed.** The contents of sections 8111 are covered under the California Fair Employment and Housing Act (FEHA), the Americans with Disabilities Act (ADA), and workers' compensation statutes and regulations<sup>1</sup>.

Section 8111 provides:

#### ***"§ 8111. Light Duty Assignments and Reasonable Accommodations.***

*(a) Light Duty Assignment. For the purposes of this section and Section 8112, "light duty assignment" means a temporary work assignment for an employee with documented medical restrictions arising out of a work-related injury or illness or a non-industrial injury or illness, who cannot perform the essential functions(s) of his or her job, for a limited duration.*

*(b) Reasonable Accommodation. For the purposes of this section, "reasonable accommodation" means any modifications or adjustments to a job or work environment essential functions of the job. Essential functions cannot be waived as a form of reasonable accommodation.*

*(c) All light duty assignments or reasonable accommodations shall be determined by the General Manager or the General Manager's designee.*

*(d) Employees shall submit requests for light duty assignment or reasonable accommodations to their supervisor.*

*(e) Upon receipt of an employee's request, the supervisor shall immediately contact the Return-to-Work Coordinator (RTWC) at Central Office regarding the employee's request. The supervisor and the RTWC shall work cooperatively to immediately begin the interactive process with the employee regarding light duty assignment or reasonable accommodation."*

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<sup>1</sup> See Labor Code Sections 3351, 3700, 4658, 4700, 5401, 5402, 5405, *et. seq.*, among others.

**Section 8111(a) is repealed.**

Section 8111(a) is repealed because light duty defined in subsection (a), can be misinterpreted, or applied inconsistently because it describes light duty as both for an industrial (workers' compensation) injury and for a non-industrial limitation, which could require reasonable accommodations under the California FEHA and the federal ADA. In workers' compensation cases, employees are expected to remain on the job if it is determined they can safely perform a modified duty. This modified duty may be referred to as "light duty." Modified duty is a temporary adjusted work assignment given to a worker injured on the job to accommodate his or her physical limitations while recovering from the injury. *Kelly v. County of Los Angeles* (2006) 71 Cal. Comp. Cases 934, 936.

Often an employee suffers an injury or condition that results in certain physical restrictions upon the employee's ability to return to work. Those restrictions may be limitations on their ability to lift certain weights, or to repetitively push or pull or bend or twist. The employee may be required to stand or sit or walk around from time to time. Sometimes the doctor even makes an express notation that the employee is released to light duty work only. A statement made by an employee or employee's doctor for modified or light duty is treated as a request for reasonable accommodation.

CALPIA is required to engage in a timely good faith interactive process when presented with a request for accommodation. (Gov. Code, 12940, subd. (n).) Presentation of a return to work note from a doctor with restrictions is sufficient to constitute a request for accommodation. A light duty assignment is reasonable accommodation. The interactive process contemplates a case-by-case interaction between the employee and the employer whereby several things must occur. Primarily the process is to interactively review and understand the employee's restrictions and compare them to the employee's job or other jobs available, and to determine if there is a way to accommodate those restrictions. The term light duty is misleading and confusing given that restrictions or accommodations are covered through the interactive process and are not a one-size for all modified (light duty) assignment. In addition, the definition of "modified work" is set out in CA Code of Regulations, Title 8 Ch. 4.5 Division of Workers Compensation Section 10116.9 as follows:

"Modified work" means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

Sufficient statutes, regulations rules and policies already exist encompassing the definition of light duty also known as modified duty that it is warranted now to repeal section 8111(a).

**Section 8111(b) is repealed.**

First, subsection (b) is repealed because current statutes and regulations already address the definition of reasonable accommodation. Sufficient statutes, regulations rules and policies already exist encompassing the definition of reasonable accommodation that it is warranted now to repeal section 8111(b). For example, the Judicial Council of California

Civil Jury Instructions (2020 edition), defines the phrase “reasonable accommodation” under instruction 2542. The Judicial Council references the definition of “Reasonable Accommodation” under Government Code section 12926(p). “Reasonable Accommodation” is also defined under Cal. Code Regs., tit. 2, § 11068(a).

Secondly, the statement that essential duties cannot be waived as reasonable accommodation is unnecessary as this question is addressed by DFEH regulations and FEHA. In Section 11068, of Title 2, Code of California Regulations, subsection (b), the regulations states that no elimination of essential functions of a job is required for an employer to provide reasonable accommodation. Therefore, it is warranted to repeal this sentence in subsection (b) as it purports to restate existing laws, therefore is duplicative.

In addition, subsection (b) may contradict employment laws and regulations or court decisions which are often changing over time. Note should be taken of the Ninth Circuit Court’s decision *Villalobos v. TWC Administration LLC*, which provides that anti-discrimination statutes such as the Americans with Disabilities Act (ADA) and the disability provisions of the California Fair Employment and Housing Act (FEHA) may require an employer to provide additional leave beyond the full extent of the leave laws as a reasonable accommodation of an employee’s disability. *Villalobos v. TWC Administration LLC (9th Cir. 2017).720 F. App’x 839, 842.*

**Section 8111(c) is repealed.**

The determination of modified duty (also known as light duty) under workers’ compensation and return to work is made by CALPIA’s return-to-work coordinator. The determination of a reasonable accommodation is made by CALPIA’s reasonable accommodation coordinator. Subsection (c) is therefore unnecessary and outdated. Removal of this section will align CALPIA’s operations with the day-to-day practice and ensure the General Manager or the General Manager’s designee is no longer tasked by this regulation subsection with responsibilities handled by CALPIA staff.

**Section 8111(d) is repealed.**

There is no statutory requirement (such as under the Fair Employment and Housing Act (FEHA)<sup>2</sup> or the Americans with Disabilities Act (ADA)<sup>3</sup>) that a request for reasonable accommodation must be submitted by an employee to their direct supervisor. CALPIA staff submit reasonable accommodation requests to the CALPIA reasonable accommodation coordinator, and therefore subsection (d) is now unnecessary. Removal of this section will align CALPIA’s operations with the day-to-day practice and ensure that direct supervisors are no longer tasked by this regulation subsection with responsibilities handled by the CALPIA reasonable accommodation coordinator.

**Section 8111(e) is repealed.**

Subsection (e) is repealed as it is confusing, misleading, and out-of-date with current CALPIA practice. A request for reasonable accommodation is made to the CALPIA reasonable accommodation coordinator. The return to work coordinator handles return-to-work after a workplace injury. Both may involve staff working with a supervisor; however, a regulation is not necessary to delineate the immediacy of working together to engage in the interactive process for reasonable accommodation or for a modified work

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<sup>2</sup> Government Code §§12900 - 12996.

<sup>3</sup> Americans with Disabilities Act of 1990, 42 USC § 12101, *et seq.*

assignment. According to DFEH, mentioned at its October 2020 Board meeting, the interactive process is to begin immediately. The interactive process must be timely. See 2 Cal. Code Regs., tit. 2, § 11069. A delay with the interactive process, or lack of good faith in substantive negotiation, may be deemed a violation of requirements for reasonable accommodation.

The employer is required to proceed without delays for both engaging in the interactive process for reasonable accommodation or for providing a modified work assignment. The California DFEH provides that an employer must engage in timely interactive process. The California Judicial Council also applies this requirement through Jury Instruction No. 2546 (CACI 2020) applying Government Code Section 12840(n) (requirement of good faith interactive process). Responding to a request for a modified work assignment is a form of reasonable accommodation, and therefore, must also be completed timely, without delay to be in good faith. Because acting without delay is already required by statute, this regulation is duplicative, and on this basis is repealed.

### **Section 8112 is repealed.**

Section 8112 provides:

#### **§ 8112. Limited-Term Light Duty Assignments.**

*(a) The General Manager may utilize limited-term light duty assignments to allow an employee with documented medical limitations to work. The General Manager may place the employee in a vacant budgeted position within the employee's bargaining unit or the employee may be permitted to work in his or her current position, while temporarily waiving the essential functions of his or her job.*

*(b) Positions will not be permanently identified as "light duty." Limited-term light duty for one employee shall not exceed 60 calendar days in a 6-month period for medical condition(s).*

### **Section 8112(a) is repealed.**

As noted above in reference to Section 8111, CALPIA now utilizes a return to work coordinator to handle modified duty work for employees returning to work from an industrial injury and a reasonable accommodation coordinator. Therefore, section 8112(a) is unnecessary. Section 8112(a) is also unnecessary now, as noted above in reference to Section 8111, because existing laws and regulations address and apply to the use of modified duty, including and not limited to FEHA, ADA, and California workers' compensation laws. Subsection(a) is also repealed because it uses the word "may" which allows for potential inconsistent application of a regulation. Subsection(a) is also repealed regarding the temporary waiver of the essential functions of an employee's job as this is contained within existing FEHA laws, regulations, and court decisions as noted above in reference to Section 8111.

### **Section 8112(b) is repealed.**

The first sentence of subsection (b) referring to "light duty" position is out of date due to the fact that light duty is also known as modified duty, and that modified duty may be provided as a reasonable accommodation under the FEHA and ADA, among other applicable statutes. Reasonable accommodation may have varied time lengths or be permanent. Therefore, the first sentence of subsection (b) is repealed as it is inconsistent with FEHA, ADA, and regulations of the DFEH, as noted above, that provide modified

duty may be a reasonable accommodation. The second sentence of subsection (b) is similarly repealed because it sets a limit on modified duty that conflicts with reasonable accommodation requirements, which may be permanent. Subsection (b) may also conflict with the FEHA because all that is required is that the employer has knowledge of functional work limitations to require a reasonable accommodation is provided. See 2 Cal. Code Regs., tit. 2 § 11069(d)(1).

**ECONOMIC IMPACT ASSESSMENT:**

The purpose of repealing Sections 8111 and 8112 is:

1. To clarify and streamline existing regulations.
2. To delete inoperative and outdated regulation language.
3. To maintain consistency with controlling laws regarding reasonable accommodations and modified (or light) duty under workers' compensation.

Per Government Code Section 11346.3(b), CALPIA has made the following assessments regarding the proposed regulations:

**Significant Statewide Adverse Economic Impact on Business:**

CALPIA has determined that the proposed repeal of regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the application of reasonable accommodation or modified duty for CALPIA employees. There is no actual change expected to current operations. As a result, there will be no significant statewide adverse economic impact on businesses.

**Creation or Elimination of Jobs within the State of California:**

CALPIA has determined that the proposed repeal of regulations will have no impact on the creation or elimination of existing jobs or businesses within California because those jobs or businesses are not affected by this change which will have no actual change to operations, and will not require any change to any businesses or individuals not employed by CALPIA. . There is no actual change expected to operations. As a result, there will be no creation or elimination of jobs within the State of California because of these regulatory amendments.

**Creation of New Businesses or Elimination of Existing Businesses within the State of California:**

The current regulations and laws pertaining to the subject of Sections 8111 and 8112 apply to employees of CALPIA. CALPIA has determined the proposed repeal of regulations will have no effect on the creation of new or elimination of existing businesses with the State of California because those businesses are not affected by the application of reasonable accommodation or modified duty for CALPIA employees. No actual change is expected to operations. As a result, there will be no creation or elimination of existing businesses within the State of California because of these regulatory amendments.

**Expansion of Businesses Currently Doing Business within the State of California:**

The current regulations and laws pertaining to the subject of Sections 8111 and 8112 apply to employees of CALPIA. CALPIA has determined the proposed repeal of regulations will not affect the expansion of businesses currently doing business within the State of California because they are not affected by the application of reasonable accommodation or modified duty for CALPIA employees. FEHA and ADA apply to reasonable accommodation for CALPIA employees, and existing workers' compensation laws apply to return-to-work modified duty assignments. As a result, there will be no anticipated expansion of businesses currently doing business within the State of California because of these regulatory amendments.

**Benefits of Regulatory Action:**

As stated above, the proposed repeal of Sections 8111 and 8112 streamline the regulatory scheme, increasing clarity, removal of duplication of authorities, and address changes in practice, including repealing regulation language no longer applicable. The proposed regulatory action will, as described above and herein, benefit the general welfare of California residents by increasing clarity, eliminating potential confusion, conflict or ambiguity in interpretation or application of these regulations, and streamlining existing regulations under the jurisdiction of CALPIA and the Prison Industry Board.

**Specific Technologies or Equipment:**

These regulations do not require the use of any specific technologies or equipment.

**Consideration of Alternatives**

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made more specific.

**Statement of Purpose and Issues Being Addressed:**

The purpose of repeal of these regulations will result in consistency, clarity, and eliminating duplicative regulations providing for a more streamlined and efficient regulatory scheme.

**Duplication or Conflicts with Federal Regulations:**

The proposed repeal of regulations does not conflict with any federal standards and duplicates provisions of the Federal Americans with Disabilities Act and related federal regulations pertaining to reasonable accommodations.

**Technical, Theoretical, or Empirical Studies, Reports and Documents Relied Upon:**

None.

The proposed repeal of regulations will be vetted through the public process of the PIB and promulgated through the regulatory process as specified in the Administrative Procedures Act (APA). All rulemaking documents will be filed with the Office of Administrative Law (OAL) and are all available to the public on CALPIA's website.