

CHAPTER 124: CARRIERS: REQUIRED NOTICES AND MODE OF PAYMENT

Title 28 §124.5 and §124.6

1. INTRODUCTION.

The Texas Department of Insurance, Division of Workers' Compensation proposes amendments to §124.5, concerning mode of payment made by insurance carriers, and new §124.6, concerning electronic transfer payments made through an access card. These amended and new sections are necessary to implement Labor Code §409.0231, concerning payment by electronic funds transfer (EFT). Labor Code §409.0231, in part, requires that an insurance carrier offer electronic funds transfer as a mode of payment for employees entitled to benefits for a period of sufficient duration. New §124.6 is necessary to implement Labor Code §402.021, entitled Goals; Legislative Intent; General Workers' Compensation Mission of Department. Labor Code §402.021(b)(3) requires that injured employees are provided income and medical benefits in a timely and cost-effective manner. New §124.6 is also necessary to ensure that claimants receive medical benefit payments in a timely and accurately manner, as required by Labor Code §408.081.

Since 1999, §124.5 provided a method by which insurance carriers could offer claimants the option of receiving income or death benefits through an access card; however the rules currently in place regarding the issuance of access cards do not specify prohibited fees or require plain language disclosures. After receiving several solicitations from companies marketing access cards for use in workers' compensation claims, the Division determined that the fees did not appear to be appropriate for use in workers' compensation claims. As a result, the Division determined that existing rules needed to be clarified to ensure that claimants who choose to receive income benefits through an

access card are not charged excessive fees to access their benefits and have access to plain language notices regarding any allowed fees so that they may make an informed decision about the use of these cards. Informal drafts of amended §124.5, concerning mode of payment made by insurance carriers, and new §124.6, concerning electronic payments made through an access card, were posted on the Division's website on December 9, 2013 and February 19, 2014. The Division reviewed informal comments received throughout the development process.

The Division determined that prepaid access card use is a new and emerging technology that must be addressed in the workers' compensation system. Labor Code §402.021(b)(9) states that one of the goals of the workers' compensation system is to take maximum advantage of technological advances to provide the highest levels of service possible to system participants and to promote communication between system participants. According to Bankrate, an aggregator of financial rate information, in their 2013 Prepaid Debit Cards survey, in the private sector, almost \$77 billion dollars were loaded on to prepaid debit cards in 2012, a number expected to more than double by 2015 (available at <http://www.bankrate.com/finance/banking/prepaid-debit-cards-close-gap-checking.aspx>). At least \$100 billion was distributed in 2011 on cards for 158 federal, state and local governments' payment programs (Federal Reserve, *Report to the Congress on Government-Administered, General-Use Prepaid Cards* (July 2012), available at <http://www.federalreserve.gov/publications/other-reports/files/government-prepaid-report-201207.pdf>). Because there is a current lack of federal regulation regarding prepaid cards, the Division believes it is necessary to implement protections for claimants using these cards to assess their income or death benefits. Unlike traditional debit cards, prepaid cards are not covered by federal Regulation E. Regulation E is the comprehensive federal regulatory regime that, "applies to any electronic transfer that authorizes a financial institution to debit or credit a consumer's account" (12 C.F.R §205.3(a)). The Bureau of Consumer Financial Protection, that implements the Electronic Fund Transfer Act

(EFTA), provides that, although, many prepaid debit card providers offer contractual protections similar to those provided in Regulation E for payroll cards, such provisions may vary, and are subject to unilateral change (77 FR 30923, available at https://www.federalregister.gov/articles/2012/05/24/2012-12565/electronic-fund-transfers-regulation-e?utm_content=previous&utm_medium=PrevNext&utm_source=Article).

The new rule offers multiple benefits for claimants. Claimants are always entitled to income or death benefit payments by check or EFT, the new rule just provides them with the option, subject to agreement by the carrier, to have the ease and convenience of a prepaid card. Claimants will also be given explicit disclosures of the terms of the access card so that they are provided with all the necessary information to decide whether to utilize the benefits offered by access cards.

The Division proposes non-substantive changes to amended § 124.5. These non-substantive changes include relettering sections, updating citations, adding the word “insurance” before the word “carrier” in the heading of § 124.5 and in § 124.5(b) – (d) and (f) - (i), and adding the phrase “income or death” before the term “benefits” in §124.5(f), (h), and (i) for clarity.

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

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

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

Existing §124.5(e) is deleted because the requirements for electronic transfer payments made through an access card are found in new §124.6. Existing §124.5(e)(1) is deleted because the requirement for a signed agreement and disclosure is in new §124.6(b) and (f). Existing §124.5(e)(2) is deleted because new §124.6(d) and (e) prohibit any fees or charges other than expedited card replacement and international transactions. Account maintenance fees are prohibited under existing §124.5(e), and new §124.6 continues this prohibition, but lists the types of prohibited fees individually in §124.6(d)(3)(G) - (I). Existing §124.5(e)(3) is deleted because under new §124.6(l), an insurance carrier is considered to have made a income or death benefit payment under Labor Code §409.0232 on the date when the payment is deposited in the account and available on the access card. If the claimant has not received the access card, the payment is not available on the access card. Existing §124.5(e)(4) is deleted because an insurance carrier is prohibited from removing the account under new §124.6(j).

Existing §124.5(f) is redesignated as amended §124.5(e).

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

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

to clarify that payments made through an access card under new §124.6 are voluntary on the part of both the insurance carrier and the claimant.

Section 124.6 addresses **Electronic Transfer Payments Made Through an Access Card**.

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

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

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

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

New §124.6(d) outlines requirements and prohibited fees for the carrier and their agents.

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

New §124.6(d)(3) prohibits an insurance carrier or its agent from reducing income or death benefits paid to a claimant through an access card for certain enumerated fees, surcharges, and adjustments. New §124.6(d)(3) clarifies that the Division considers the enumerated fees a reduction in benefits. New §124.6(d)(3) is necessary to ensure the carriers pay and the injured employees

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

New §124.6(d)(3)(A) prohibits an insurance carrier or its agent from reducing income or death benefit payments to a claimant for fees charged after a financial institution pays a transaction (including a check or other item) when the claimant has insufficient or unavailable funds in the account. The Division determined that the prohibition of overdraft fees is necessary to sufficiently protect claimants from a reduction in income or death benefits through the use of access cards. According to the Center for Responsible Lending (CRL), a non-profit organization that works to protect consumers from predatory lending practices, in 2009, before federal regulations mandated that overdraft protection become an opt-in service, over 50 million Americans overdrew their checking account at least once over a 12-month period, with 27 million accountholders incurring five or more overdraft fees at an average of \$34 dollars per transaction (available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/crl-overdraft-explosion.pdf>). Moreover, banks generally charge a fixed overdraft fee regardless of the size of the transaction covered. According to a survey done by the CRL, of the 33 percent of account holders who opted-in to overdraft coverage, 60 percent did so to avoid a fee if their debit card was declined, 64 percent did so to avoid bouncing paper checks, and almost 50 percent responded that stopping the bank from bombarding them with opt-in messages by mail, phone, email, in person, and online banking was a factor in their decision. This is evidence of consumer misunderstanding because current overdraft protection covers only debit card and ATM transactions. Therefore, the Division determined that an opt-in structure for overdrafts would not sufficiently protect claimants from a reduction in income or death benefits through the use of access cards.

New §124.6(d)(3)(B) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for an ATM withdrawal or point of sale purchase when the transaction is

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

New §124.6(d)(3)(C) and (D) prohibit fees for both in-network and out-of-network ATMs. An in-network ATM is an ATM that is owned or operated by a financial institution or by multiple financial institutions that have contracted together so that their customers can access the ATM at no cost. An out-of-network ATM is not owned and operated by a consumer's financial institution. The Division clarifies that an out-of-network ATM operator may charge the account a surcharge for use of the ATM, but any out-of-network fees charged by the insurance carrier or its agent are prohibited. The fees prohibited in §124.6(d)(3)(C) and (D) do not include surcharges that might be imposed by an out-of-network ATM operator. These out-of-network ATM operator surcharges are federally regulated and beyond the scope of new §124.6.

New §124.6(d)(3)(C) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for ATM balance inquiries. New §124.6(d)(3)(C) is necessary to permit the claimant to monitor their benefit payments by identifying unauthorized use of the access card or payment errors efficiently.

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

New §124.6(d)(3)(E) prohibits an insurance carrier or its agent from reducing a claimant's benefits for withdrawing income or death benefit payments from a teller. A fee for withdrawing money from a teller is considered a reduction in benefits because ATMs set limits on the amount of money that can be withdrawn in one day and may only dispense money in small increments. New §124.6(d)(4)(E) is necessary to prevent out-of-network ATM operator surcharges and to ensure there are no hurdles to claimants accessing their benefit payments.

New §124.6(d)(3)(F) prohibits an insurance carrier or its agent from reducing a claimant's benefits for customer service calls and is necessary to ensure a claimant can contact a customer service representative to facilitate the resolution of problems with the access card and answer any account questions.

Account maintenance fees for access cards are prohibited under existing §124.5(e), and new §124.6 continues this prohibition, but lists the fees individually in §124.6(d)(3)(G) - (I). Account maintenance fees are charged to the consumer to cover the cost of maintaining the account; fees include account activation, closure, and continuing to maintain the account. Account maintenance fees are considered a reduction in benefits because they shift the cost of receiving payments from the insurance carrier or its agent to the claimant.

New §124.6(d)(3)(G) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for activating the access card. Card activation fees are fees imposed so that the claimant can access the income or death benefit payments in the account. New §124.6(d)(3)(H) prohibits inactivity fees for not using the card, and inactivity fees are also prohibited under existing §124.5(e), which prohibits account maintenance fees. The Division acknowledges that inactive accounts may create liability issues for the insurance carrier or its agent, who must pay to keep the account open and bear the risk of unauthorized fund transfers on accounts that hold only a minimal amount of funds. Rather than allowing the claimant to bear the costs of keeping the account

open through inactivity fees, the insurance carrier or its agent may close the account under §124.6(j) by issuing a check to the claimant with the remaining account balance if the account has been inactive for 12 months or longer. New §124.6(d)(3)(l) prohibits fees for closing an account.

New §124.6(d)(3)(J) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits to replace a lost access card through standard U.S. mail. New §124.6(d)(3)(J) is necessary to ensure claimants are not charged a fee to obtain a replacement for a lost or stolen card and to ensure that claimants are able to access their income or death benefit payments.

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

New §124.6(d)(3)(L) prohibits an insurance carrier or its agent from reducing a claimant's income or death benefits for point of sale purchases to ensure claimants do not have hurdles to accessing their benefit payments through an access card. Transactions that result in a fee for each purchase whether the claimant signs or uses a personal identification number are point of sale fees. New §124.6(d)(3)(L) is necessary to ensure the carriers pay and the injured employees receive all benefits as required by Labor Code §§408.081(a), 415.002(a)(2), 415.002(a)(16), 402.021(b)(3), and 402.021(b)(8).

New §124.6(d)(3)(M) prohibits any other fees or charges that are not authorized under subsection (e) of new §124.6. New §124.6(d)(3)(M) is necessary to ensure the carriers pay and the

injured employees receive all benefits as required by Labor Code §§ 408.081(a), 415.002(a)(2), 415.002(a)(16), 402.021(b)(3), 402.021(b)(8), and 409.024 and to ensure that the income or death benefit payments claimants receive are not affected by means of delivery.

New §124.6(e) lists fees, surcharges, and adjustments that the insurance carrier or its agent may charge the claimant. These fees, surcharges, and adjustments are permitted because they allow the claimant to choose to pay for a service that may not be offered without the surcharge. New §124.6(e)(1) allows the insurance carrier or its agent to charge the claimant a surcharge for expedited card replacement. New §124.6(e)(1) is necessary because there is a no fee replacement option available to the claimant and expedited shipping is a cost to the insurance carrier or its agent.

New §124.6(e)(2) permits the insurance carrier or its agent to charge a claimant for international transaction fees. An international transaction fee is charged for making purchases outside the U.S. Permitting international transaction fees and expedited card replacement in new §124.6(e)(2) is necessary to implement Labor Code §409.0231 because the failure to permit insurance carriers or their agents to charge these fees, surcharges, and adjustments deprives the claimant of the opportunity to obtain benefits.

New §124.6(f) requires insurance carriers or their agents to provide the claimant with a copy of the mandatory disclosures at the time the claimant agrees to receive payments through electronic fund transfer. Labor Code §402.002(8) outlines the workers' compensation system's goal to effectively educate and clearly inform each person who participates in the system of the person's rights and responsibilities under the system and how to appropriately interact within the system. This subsection provides guidance on how access cards can be used to ensure claimants understand all the potential requirements, risks, and limitations of receiving benefits income or death through an access card.

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

New §124.6(f)(2) requires the insurance carrier or its agent to disclose the telephone number and address of the person or office for the claimant to notify the carrier of an unauthorized electronic fund transfer. New §124.6(f)(2) is necessary to fulfill the goals of Labor Code §402.002(8) because communication between the claimant and the insurance carrier or its agent regarding unauthorized transfers through an access card is crucial to preventing loss of benefits and aiding in the prevention of fraudulent activity.

New §124.6(f)(3) requires the insurance carrier or its agent to disclose the type of electronic fund transfers that the claimant may make and any limitations on the frequency and dollar amount of transfers. This is necessary to fulfill the goals of Labor Code §402.002(8) because any limitations on the claimant's ability to access or use their income or death benefit payments should be disclosed to the claimant so they have all the necessary information to make an informed decision about whether to receive their benefits through an access card.

New §124.6(f)(4) requires the insurance carrier or its agent to disclose any fees imposed for electronic fund transfers or for the right to make transfers including a statement that fees may be imposed by an automated teller machine operator that is out-of-network. New §124.6(f)(4) is necessary to fulfill the goals of Labor Code §402.021(b)(8) to ensure that claimants are notified that

out-of-network surcharges are separate from the prohibited out-of-network ATMs fees. Transparent fee schedules allow claimants to make informed decisions about whether to receive their income or death benefits through an access card and provide claimants the information they need to avoid unnecessary fees.

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

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

New §124.6(f)(7) requires the insurance carrier or its agent to provide a full disclosure of the locations of both bank locations and in-network ATMs in the United States where the claimant can access his or her funds at no cost. This is necessary to fulfill the goals of Labor Code §402.021(b)(8) because a full disclosure of the bank locations and in-network ATMs in the United States will allow the claimant to be informed of where they can access their funds without out-of-network ATM surcharges.

New §124.6(f)(8) requires the insurance carrier or its agent to provide a statement informing the claimant that they have a right to receive payments directly into their personal bank account through direct deposit. Labor Code §409.0231 requires that an insurance carrier offer electronic

funds transfer as a mode of payment for employees entitled to benefits. New §124.6(f)(8) is necessary to fulfill the goals of Labor Code §402.021(b)(8) by ensuring that claimants are informed of all their benefit payment options prior to agreeing to accept payment through an access card.

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

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

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

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

New §124.6(g)(4) requires that written disclosure and term of notice or condition changes under this section be appropriately divided and captioned in a meaningful sequence such that each

section contains an underlined, boldfaced, or otherwise conspicuous title or caption at the beginning of the section that indicates the nature of the subject matter included in or covered by the section.

New §124.6(g)(4) is necessary to ensure that the disclosures are in a format that ensures the claimants can recognize the significance of important account information.

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

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

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

fulfill the goals of Labor Code §402.002(8) by ensuring that the claimant is provided the changes of terms and conditions to their access card agreement.

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

New §124.6(j) requires the insurance carrier and the claimant to include a provision allowing the insurance carrier or its agent to close the account by issuing a check to the claimant with the remaining balance if the access card account has been inactive for 12 months or longer. The Division considered the liability issues that inactive accounts may create for the insurance carrier or its agent, who must pay to keep the account open and potentially bear the risk of unauthorized fund transfers on accounts that hold only a minimal amount of funds. The Division decided that rather than allowing the claimant to bear the costs of keeping the account open through inactivity fees, the insurance carrier or its agent could close the account after it has been inactive 12 months or longer to ensure that the claimant receives their full income or death benefits.

New §124.6(k) prohibits an insurance carrier or its agent from removing money from the account, except for expedited card replacement fees, international transaction fees, and account closure. An insurance carrier or its agent must comply with 28 TAC §126.16 (relating to Procedures for Recouping Overpayments of Income Benefits). This is necessary to clarify that recoupment procedures in 28 TAC §126.16 apply to access cards in Chapter 124.

New §124.6(l) clarifies that, for state reporting purposes under Labor Code §409.0232, an insurance carrier is considered to have made an income or death benefit payment the date when the

payment is deposited in the account and available on the access card. This is necessary to clarify that the paid date is when the payment is deposited in the account, not the date when the insurance carrier sends the payment to its agent.

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

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

2. FISCAL NOTE

Brent Hatch, Director of Return-to-Work and Special Initiatives, has determined that for each year of the first five years the amendments and new section are in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the proposal and there will be no measurable effect on local employment or the local economy as a result of the proposal. The proposed rules do not require state or local governments to provide access cards.

3. PUBLIC BENEFIT/COST NOTE.

Mr. Hatch has also determined that, for each year of the first five years that amended §124.5 and new §124.6 are in effect, there are several public benefits anticipated because of the enforcement and administration of the proposal, as well as potential costs for persons to comply with the proposal.

ANTICIPATED PUBLIC BENEFITS

The public benefits anticipated as a result of the proposal include (i) clarification of existing rules to facilitate compliance and implementation of the use of access cards for income or death benefit payments to claimants; (ii) proscribing prohibited and permitted insurance carrier fees for use of the access card to ensure claimant's income and death benefit payments are received in a timely

and cost-effective manner; and (iii) protection of Texas workers' compensation claimants by mandating the insurance carrier provide disclosures to the claimant contemporaneously with the written mutual agreement to pay benefits through an access card.

ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL

Mr. Hatch anticipates that there will be no required costs to comply with these rules. Carriers are not required to offer access cards. However, in the event they elect to offer access cards, there are probable costs to persons required to comply with several of the proposed new sections during each year of the first five years will be in effect.

New §124.6 allows the insurance carrier to pay income or death benefits to a claimant through an access card. If they elect to offer access cards, insurance carriers may incur costs setting up and maintaining the access card program either internally or through a third party payment facilitator. However, the Division does not anticipate that the requirements §124.6 create additional costs for insurance carriers. The decision to enter into the contract to provide benefit payments to claimants through an access card will be a business decision of the insurance carrier. The Division anticipates that the individual or entity required to comply with a proposed provision will have the information necessary to determine its individual cost and savings and decide whether to offer claimants the option to receive income or death benefit payments through an access card.

New §124.6(b), (f), and (i)

If an insurance carrier elects to offer access cards, the Division anticipates costs for compliance with new §124.6(b), (f), and (i). While the Division anticipates that individuals and insurance carriers in Texas may utilize the convenience offered by conducting business with claimants online or through email, insurance carriers may incur costs to submit the required written mutual agreement, disclosures, and notice of term or condition changes through regular mail under new §124.6(b), (f), and (i). According to the U.S. Postal Service business price calculator, available

at: <http://dbcalc.usps.gov/>, the cost to mail machinable letters in a standard business mail envelope with a weight limit of 3.3 ounces to a standard five-digit ZIP code in the United States is 27 cents. The Division determined that the cost of a standard business envelope is two cents. Accordingly, the Division estimates each mailing would be no more than 29 cents. The insurance carrier may incur additional costs if it includes a return address envelope with the initial written agreement and disclosures required under new §124.6(b). The U.S. Postal Service also offers Business Reply Mail. In addition to an annual fee of \$885, each returned written agreement will cost 48 cents. There is no charge for unreturned reply mail. Accordingly, for each additional mailing where the reply is returned it is estimated that the total mailing cost would be no more than 77 cents. The Division anticipates that the individual or entity required to comply with a proposed provision will have the information necessary to determine its individual cost, including the number of mailings and the number of pages to be mailed.

If an insurance carrier elects to offer access cards, the insurance carrier may incur costs for an administrative assistant to mail and process the written agreements. An administrative assistant working in an insurance-related industry in Texas earns a median hourly wage of \$22.98, according to the Texas Workforce Commission OES Report available at:

<http://www.texasindustryprofiles.com/apps/win/eds.php?geocode=4801000048&indclass=8&indcode=5242&occcode=43-6011&compare=2>. The number of hours that will be required to comply with a particular proposed requirement will vary, and as a result, any total cost, can best be determined by the insurance carrier.

New §124.6(b)

If an insurance carrier elects to offer access cards, new §124.6(b) requires that the insurance carrier maintain accurate records of the signed mutual agreement for, at a minimum, 401 weeks from the date of injury. The Division anticipates that insurance carriers may incur costs associated with

storing the signed mutual agreement for 401 weeks from the date of injury. Each insurance carrier using electronic record keeping must develop and maintain a system under which the insurer maintains the records. This will require hardware and software. Each insurance carrier's actual costs will depend on their existing record keeping system, location, transmission requirements, and existing staff. To analyze the current systems and develop the necessary features to comply with the proposal, the insurer may need the services of systems software engineers for computer applications and software development, computer programmers, and accountants. The Division has determined that the total estimated cost for an insurance carrier to comply with new §124.6(b) could vary based upon the cost of storing the required information and for at least 401 weeks. The Division estimates that insurance carriers have the cost and other available information necessary to determine their individual storage costs to comply based on their current document storage practices.

Therefore, each insurance carrier has the flexibility to determine the most economical means of complying with the §124.6(b) requirements. While it is not feasible to determine actual cost of employees for all insurers, the United States Department of Labor, Bureau of Labor Statistics' May 2012, Occupational Employment Statistics indicates that the average hourly wage for these professions in Texas are: \$47.80 for software engineers; (<http://www.bls.gov/oes/current/oes151133.htm#st>); \$37.78 for computer programmers, (<http://www.bls.gov/oes/current/oes151133.htm#st>); \$34.54 for accountants and auditors. It is not feasible to estimate the cost of contracting for each service for all insurance carriers. The method of compliance, and ultimate cost of compliance, is a business decision of the insurance carrier and not a requirement of this proposal. Additionally, 28 TAC §102.9 already places the requirement on insurance carriers to provide information at such times in such manner and format as necessary to effectively and efficiently administer the Act or commissioner rules.

New §124.6(k)

If an insurance carrier elects to offer access cards, new §124.6(k) allows the insurance carrier or its agent to close the account by issuing a check to the claimant with the remaining account balance if the account has been inactive for 12 months or longer. The cost estimates of issuing checks vary greatly. It costs the federal government \$1.05 to print and mail a check compared with 9 cents for an electronic transfer (available at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=328365>). The Division anticipates that the individual or entity required to comply with a proposed provision will have the information necessary to determine its individual cost.

New §124.6(g)(2)

If the insurance carrier elects to offer access cards, new §124.6(g)(2) requires that written disclosures and term of notice or condition changes provided to claimant include the full text in English, Spanish, and any other language common to the claimant population. The United States Department of Labor, Bureau of Labor Statistics' May 2012, Occupational Employment Statistics indicates that the average hourly wage for translators in Texas is \$22.1 per hour, available at <http://www.bls.gov/oes/2012/may/oes273091.htm>. The Division estimates that more than one translator will be needed to fulfill the requirement for all languages common to the claimant population. It is not feasible to estimate the cost of contracting for each service for all insurance carriers. The Division anticipates that insurance carriers may incur cost complying with the requirement in new §124.6(g)(2).

New §124.6(h)

If the insurance carrier elects to offer access cards, new §124.6(h) requires customer service personnel to be available by phone Monday – Friday, normal business hours 8:00 a.m. - 5:00 p.m. The Division anticipates that the individual or entity required to comply with the proposed provision

will have the information necessary to determine its individual cost. Under §102.4, concerning general rules for non-commission communications, insurance carriers or their agents are required to provide a toll free telephone number for receipt of communication from claimants and/or their representatives with a sufficient quantity of lines to service their volume of business. Therefore, the Division estimates that insurance carriers may already have the information necessary to determine whether they will incur additional costs to comply with the §124.6(h) requirements.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.

In accordance with the Government Code §2006.002(c), the Division has determined that these proposed amendments will not have an adverse economic effect on small or micro businesses because the proposed rule primarily implements statutory requirements and definitions. The proposed rules do not require small or micro businesses to provide access cards. Therefore, in accordance with the Government Code §2006.002(c), the Division is not required to prepare a regulatory flexibility analysis.

5. TAKINGS IMPACT ASSESSMENT.

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

6. REQUEST FOR PUBLIC COMMENT.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on August 4, 2014. Comments may be submitted via the internet through the Division's website at www.tdi.texas.gov/wc/rules/proposedrules/index.html, by email at

rulecomments@tdi.texas.gov or by mailing or delivering your comments 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. Comments received after the close of comment will not be considered.

A request for a public hearing must be submitted separately to the Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-1, 7551 Metro Center Drive, Austin, Texas 78744 by 5:00 p.m. CST by the close of the comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

7. STATUTORY AUTHORITY.

The amendments and new section are proposed under the Labor Code §§409.0231, 402.021(b)(3), 402.021(b)(9), 402.021(b)(8), 409.024, 415.002(a)(2), 415.002(a)(16), 414.0012, 413.053 and 402.00111 and 402.061. Labor Code §409.0231, concerning payment by electronic funds transfer requires that an insurance carrier offer electronic funds transfer as a mode of payment for employees entitled to benefits. Labor Code §402.021(b)(3) states that the Texas Workers' Compensation System must provide appropriate income benefits and medical benefits in a manner that is timely and cost-effective. Labor Code §402.021(b)(9) states that one of the goals of the workers' compensation system is to take maximum advantage of technological advances to provide the highest levels of service possible to system participants and to promote communication between system participants. Labor Code §402.021(b)(8) outlines the workers' compensation system's goal to effectively educate and clearly inform each person who participates in the system of the person's rights and responsibilities under the system and how to appropriately interact within the system. Labor Code §408.081 provides that an employee is entitled to timely and accurate income benefits. Labor Code §409.024 provides that an insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds to terminate or reduce benefits, as determined

by the commissioner. Labor Code §415.002(a)(2) states that an insurance carrier or its representative commits an administrative violation if that person terminates or reduces benefits without substantiating evidence that the action is reasonable and permitted by law. Labor Code §415.002(a)(16) states that an insurance carrier or its representative commits an administrative violation if that person fails or refuses to pay benefits from week to week as and when due directly to the person entitled to the benefits. Labor Code §414.0012 requires the division to monitor the conduct of system participants for compliance with commissioner rules, the Labor Code, and other laws relating to workers' compensation. Labor Code §413.053 provides that the commissioner by rule shall establish standards of reporting and billing governing both form and content. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

8. CROSS REFERENCE TO STATUTE.

The following statutes are affected by this proposal: §§409.0231, 402.021(b)(3), 402.021(b)(9), 402.021(b)(8), 408.081, 409.024, 415.002(a)(2), 415.002(a)(16), 414.0012, 413.053 and 402.00111 and 402.061.

9. TEXT.

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

(a) The insurance carrier shall make all medical benefit and burial payments [~~payments other than income or death benefits~~] by:

- (1) check or other readily negotiable instrument; or

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

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

(1) check or other readily negotiable instrument to the order of the claimant [~~injured employee~~]; or

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

(c) An insurance [A] carrier that routinely pays benefits by check or other negotiable instrument to the claimant drawn on an out-of-state financial institution shall accompany each instrument with written information about the insurance carrier's office location and telephone number where the claimant may call, at the insurance carrier's expense, to obtain help with cashing the instrument, if necessary.

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

~~[(e) If agreed to by the claimant and the carrier, payments by electronic transfer can be made to an account set up by the carrier and accessible by the claimant through an access card provided by the carrier or other mutually acceptable means. A carrier that intends to make payments under this subsection shall:]~~

~~(1) only set up and utilize this payment system if the claimant signs an agreement in which the carrier has disclosed all of the requirements, risks, and limitations of receiving benefits in this manner;~~

~~(2) ensure that the claimant is not charged an account maintenance fee for the account;~~

~~(3) continue to make payments by check until the carrier has verified that the claimant has received the information and/or card needed to access the account; and]~~

~~(4) not remove money from the account.]~~

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

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

~~(1) requests in writing that payment be made by electronic transfer;~~

~~(2) provides the information required by subsection (d) of this section; and~~

~~(3) is reasonably expected to be entitled to receive income or death benefits for a period of [sufficient duration of] eight weeks or more from the point that paragraphs (1) and (2) of this subsection [subsections (g)(1) and (g)(2) of this section] are satisfied.~~

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

~~(g) [(h)] An insurance [A] carrier is relieved of the responsibility to make payment of temporary income benefits, impairment income benefits, and supplemental income benefits by electronic transfer if the mode of payment has been switched at the request of the claimant three times after initially changing to electronic payments.~~

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

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

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

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

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

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

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

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

(2) not pay income or death benefits on an access card that permits a negative balance;

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

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

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

(C) ATM balance inquiries;

(D) withdrawing money from ATMs;

(E) withdrawing money from a teller;

(F) customer service calls;

(G) activating the card;

(H) fees for card inactivity;

(I) closing account;

(J) access card replacement through standard mail;

(K) withdrawing the entire payment in one transaction;

(L) point of sale purchases; or

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

(e) Permitted fees. An insurance carrier may charge the claimant for the following:

(1) access card replacement through an expedited mail service; and

(2) international transaction fees.

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

(1) a summary of the claimant's liability for unauthorized electronic fund transfers;

(2) the telephone number and address of the person or office to be notified when the claimant believes that an unauthorized electronic fund transfer has been or may be made;

(3) the type of electronic fund transfers that the claimant may make and any limitations on the frequency of transfers;

(4) any fees imposed for electronic fund transfers or for the right to make transfers including a statement that fees may be imposed by an automated teller machine operator that is out-of-network;

(5) fees for expedited card replacement or international transaction fees will be removed from the balance maintained in the bank account linked to the access card;

(6) a summary of the claimant's right to receipts and periodic statements;

(7) all bank locations and in-network ATMs in the United States where the claimant can access his or her funds at no cost;

(8) a statement informing the claimant that they have a right to receive payments directly into their personal bank account through direct deposit.

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

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

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

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

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

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

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

(2) shall include on its face a toll-free customer service number and website address. Customer service personnel shall be available by phone Monday – Friday, normal business hours as outlined in §102.3 of this title (relating to Computation of Time).

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

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

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

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

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

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

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

(n) Effective date. This section is effective on January 1, 2015.

10. CERTIFICATION.

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

Issued at Austin, Texas, on June 18, 2014.

X

Dirk Johnson
General Counsel
Texas Department of Insurance,