INITIAL STATEMENT OF REASONS

The Employment Training Panel (Panel) is proposing to amend Section 4400 and repeal Sections 4407, 4425 and 4441.5 in Title 22 of the California Code of Regulations. The Panel took action to approve these proposed regulatory actions at its regularly-scheduled meetings on September 22, 2006 and October 27, 2006.

Specific Purpose of the Action

The proposed amendment would revise the definition of "frontline worker" at Section 4400(ee) to bring it into conformity with state and federal labor law.

The three proposed repeals would remove unnecessary or outdated procedures regarding: 1) Structured On-Site Training (SOST), 2) the delegation of contract approval authority to Workforce Investment Boards (WIBs), and 3) the need for six-month training schedules.

Necessity

Amend Section 4400(ee)

The pertinent statute, Unemployment Insurance Code Section 10200(a), establishes that "frontline worker" means a person who directly produces or delivers goods or services. The Panel interpreted this definition, and made it more specific, in existing regulation Section 4400(ee).

The existing regulation establishes two methods of determining when a worker is "frontline" by reference to state and federal labor law standards for exemption from the payment of overtime compensation. These methods appear in Subsections (1) and (3) of the existing regulation. [Note: Minor clarity revisions are proposed for Subsections (2) and (4), as discussed later.]

The existing regulation Subsections (1) and (3) are shown in full below:

> (1) is not exempt from overtime under state or federal law, providing he or she directly produces or delivers goods or services;
>
> (3) is exempt from overtime under state or federal law and not covered by a collective bargaining agreement <u>if</u> his or her primary job responsibility is directly producing or delivering goods or services.

Exempt status is important because it means the employee is not eligible for overtime. This body of law is construed in favor of eligibility, to protect workers. The actual job duties, not job title, are used to determine exempt status.

To qualify for exempt status under state law, employees must be “primarily engaged” in job duties whereby they customarily and regularly exercise discretion and independent judgment. “Primarily engaged” means that employees must be engaged in exempt job duties “more than one-half” the time. Specific exemption standards apply to executive, administrative and professional employees. Under state law, there are further distinctions for certain types of advanced practice nurses and other healthcare professionals; and, employees in the computer software field. (See Labor Code Sections 515, 515.5 and 516.)

The determination of exempt status is made in the first instance by the employer, subject to regulations adopted by the Industrial Welfare Commission and enforced by the Division of Labor Standards Enforcement (DLSE) in the Department of Industrial Relations. (See DLSE Enforcement Manual at Sections 51.1 and 51.2.)

Under state and federal labor law, an employee who is primarily responsible for producing goods or delivering services is <u>not exempt</u> from overtime. This standard is incorrectly stated in Subsection (3) and must be corrected. However, the obverse is not necessarily true. That is, an employee may directly produce goods or deliver services and still be <u>exempt</u> from overtime, in which case the Panel may make a determination of his or her “frontline worker” status. To put it another way, the Panel has sole authority to determine when an individual is eligible to participate in ETP-funded training as a frontline worker, although it may follow labor law and guidelines.

In summary, the standards in Subsections (1) and (3) should be amended in conformity with state and federal labor law. The amendment at Subsection (3) would clarify the Panel’s authority to make a case-by-case determination of frontline worker status with reference to pertinent labor law and guidelines.

Also, a potentially confusing repetition of the Unemployment Insurance Code standard “directly producing goods or delivering services” would be removed from Subsections (1), (2) and (3). Finally, the amendment would make minor revisions to Subsection (4) on the subject of entrepreneurial training, for clarity.

Repeal Section 4407

The pertinent statutes, Unemployment Insurance (UI) Code Sections 10204(b) and 10205(f), authorize the Panel to enter a particular type of contract with Workforce Investment Boards (WIBs).

UI Code Section 10204(b) is specific to the needs of small business, and allows the Panel to delegate its authority to approve subcontracts for new hire training to a WIB if the following conditions are met (emphasis added):

a) The panel determines that an entity to which it is delegating . . . meets the same standards as required of training agencies in Section 10210.

b) The panel delegates its authority . . . by a contract with the entity which limits the total amount of Employment Training Fund . . . [disbursements] which are available to the entity . . . and provides that no subcontract approved by the entity shall exceed fifty thousand dollars ($50,000) per project without prior approval by the Panel.

c) The subcontracts with employers and training agencies approved by the . . [WIB] shall be for new hire training only and shall meet all the requirements of this Chapter and the policies established by the Panel.

What is clear on the face of this statute is that the Panel may authorize a WIB to "approve contracts for new hire training" which is not the same as delegating its own contracting authority. As set forth in Subsections (2) and (3), the Panel can only delegate authority to subcontract for new hire training.

It should be equally clear that the Panel cannot delegate its own contracting authority, which was delegated to it in the first place by the Legislature. Only a state agency such as the Panel can authorize the disbursement of state funds. (See UI Code Sections 10205 and 10206 for the Panel's funding authorization.)

In existing regulation Section 4407, the Panel interpreted the provisions of UI Code Sections 10204(b) and 10205(f). Section 4407 repeats the statute's purpose and funding limitations, and also sets forth the standards a WIB must meet to qualify as a training agency, which are taken almost verbatim from the statutory definition at Section 10210. (See also T.22, C.C.R. Section 4426.)

However, existing regulation Section 4407 omits many essential components of the statutory scheme. For example, there is no reference to the specific authorization under Section 10205(f). There is no mention of a contractual relationship between the Panel and a WIB, nor is it made clear that a WIB may only subcontract for new hire training.

Also, this regulation is somewhat confusing because it refers to the authority to approve "projects" which implies authority to disburse from the Employment Training Fund. This is inconsistent with the enabling law, since Section 10204(b) only provides for a delegation of authority to approve "contracts" for new hire training – in other words, subcontracts.

Finally, this regulation is unnecessary because the Panel is already authorized to contract with WIBs under a Multiple Employer Contract. In that case, the rather stringent standards of a training agency do not apply, the approved amount of funding would not be limited, and the WIB could still subcontract for training (or administrative) services.

Repeal Section 4425

The existing regulation, enacted in 1995, sets parameters for Structured On-Site Training (SOST) in keeping with the Panel's overall contracting authority under Unemployment Insurance Code Section 10205. These parameters were designed to limit the extent to which trainees would be directly producing goods or services during SOST. However, even with these parameters in place, the Panel had concerns over the problems inherent in this method of training delivery and whether its funds were being put to the best use.

Given these concerns, the Panel imposed a moratorium on SOST funding in August 2002 and retained researchers at California State University, Northridge (CSUN) to study this method of delivery. The CSUN report identified the following problems: 1) SOST funding often supports normal supervision activities; 2) employers use unstructured coaching, mentoring and coaching instead of structured training; 3) contract administrators focus on trainer hours rather than training competencies; 4) accurate monitoring is difficult; 5) SOST funding is often unrelated to the actual cost of training delivery; and 6) the cost is often above market as compared to classroom training.

Based on the report, as summarized in a memorandum to the Panel dated February 27, 2003, the panel continued the moratorium on SOST, and has not lifted it since. However, the Panel now recognizes the cost of providing structured on-the-job training that is tied to classroom training as in-kind employer contributions.

In short, SOST is no longer being funded, nor is it likely to be funded in the foreseeable future. Should the Panel decide to begin funding SOST again, the parameters should be reevaluated based on prior experience and a new regulation could be enacted with revised parameters.

Repeal Section 4441.5

The existing regulation requires a "detailed roll out schedule" for the first six months of training the must be available at the start of training and updated throughout the project, subject to monitoring by ETP. It has been staff's experience that a detailed six-month schedule is not always practical or even necessary at the start of training. Instead, contractors must have the flexibility to adjust their training schedules as their projects progress.

ETP staff has been working closely with potential contractors to develop a realistic schedule that takes into consideration business production needs and cycles. In so doing, staff emphasizes that training must be completed in time to meet retention requirements for all trainees, and other factors unique to the ETP program.

Also, staff continues to provide guidance as part of their ongoing monitoring duties. In short, Section 4440.5 is potentially confusing because it conflicts with actual

practice. And, it is unnecessary because staff provides guidance to contractors on creating and maintaining a realistic training schedule as part of the development and monitoring process.

Studies, Reports or Documents Relied Upon

The Panel relied on the following documents, located in the Rulemaking File:

- Memorandum to the Panel dated February 27, 2003.
- Memorandum to the Panel dated September 22, 2006.
- Memorandum to the Panel dated October 27, 2006.

The Panel did not consider technical, theoretical, or empirical studies, reports or documents.

Alternatives Considered or Rejected

No other alternatives were presented to or considered in connection with the proposed regulatory actions.

Alternatives that Would Lessen Adverse Impact on Small Business

The proposed regulatory actions would have no adverse impact on business small or otherwise, as discussed in more detail below. Thus, there are no alternatives that would lesson said impact.

The Panel has not identified any alternatives that would lessen any adverse impact on small businesses. The proposed actions would not have an adverse impact on small business.

Evidence of No Significant Adverse Impact on Business

The proposed regulatory actions are ultimately designed to facilitate ETP funding for training that allows various businesses to improve the skill levels of their employees located in California. Businesses are not required to apply for this funding. Intrinsically, these actions would have no adverse economic impact on business, significant or otherwise.