

TITLE 12. CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS

[Notice published September 2, 2016]

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the California Department of Veterans Affairs ("CalVet") is proposing to take the action described in the Informative Digest after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

CalVet will hold a public hearing starting at 10:00 a.m. on October 19, 2016, at the Medal of Honor Hall ("MOH"), on the first floor of CalVet's Headquarters Building located at 1227 O Street, Sacramento, California 95814. The MOH is wheelchair accessible. At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. CalVet requests, but does not require, that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to CalVet. Comments may also be submitted by facsimile (FAX) at (916) 653-2456 or by e-mail to phil.mcallister@calvet.ca.gov. The written comment period closes at **5:00 p.m. on October 17, 2016**. CalVet will consider only comments received at CalVet offices by that time. Submit comments to:

Phil McAllister, Regulatory Actions Coordinator
California Department of Veterans Affairs
1227 O Street, Suite 300
Sacramento, California 95814

AUTHORITY AND REFERENCE

Military and Veterans Code sections 74(a), 79.2(a), 79.2(c) and 1014 authorize CalVet to adopt this proposed regulation. The proposed regulation implements, interprets, and makes specific Health and Safety Code sections and 38 CFR section 51.210.

INFORMATIVE DIGEST/ POLICY STATEMENT OVERVIEW

A. Informative Digest

Military and Veterans Code section 74(a) provides, in part, that the Secretary is the "chief administrative officer" of CalVet.

Military and Veterans Code section 1014 provides that the Veterans Homes of California (Homes) "shall be under the management and control of [CalVet] and subject to the policies adopted by the California Veterans Board."

Military and Veterans Code section 79.2(a) provides that the Governor shall appoint a Deputy Secretary of Veterans Homes “who shall be responsible for the administration of all sites of the California veterans home[s].”

Military and Veterans Code section 79.2(c) specifies that “the role of the deputy secretary [of veterans homes] shall be to oversee and monitor **all** aspects of medical care that is being provided to men and women veterans who are residents in any California veterans home.” (Emphasis added.)

These sections make clear that CalVet has authority to adopt a regulation specifying how the requirements of the Act are to be reconciled with applicable federal law, which strictly prohibits any involvement by state officials in assisting in any activities under the California End of Life Option Act (the Act). (See Cal. Code Regs., tit. 1, § 14, subd. (a)(2).)

Reconciling these conflicting legal requirements on a statewide basis is clearly an “administrative” function within the purview of the Secretary’s duties as “chief administrative officer” of CalVet. Furthermore, the Deputy Secretary of Veterans Homes is charged with the duty of “oversee[ing] and monitor[ing] all aspects of medical care . . . provided . . . in any California veterans home.” Clearly, whether or not to provide aid-in-dying drugs to Homes’ members falls within the broad category of “all aspects of medical care.”

Read together, these statutory provisions authorize CalVet to adopt statewide regulations reconciling state and federal requirements concerning one aspect of medical care – namely, the implementation of the Act.

Proposed 12 CCR 509 would provide as follows:

Section 509(a)

This subdivision states that all terminally ill members are entitled to customary medical care, including counseling, hospice and palliative care. This subdivision is needed in order to make clear that the Homes will provide all necessary end of life care to members, except for aid-in-dying drugs.

Section 509(b)

This subdivision specifies that the Homes will not provide aid-in-dying drugs, as defined in California Health and Safety Code section 443.1, subdivision (b). This subdivision is needed to make clear that the Homes will not jeopardize their continued eligibility for United States Department of Veterans Affairs (USDVA) per diem funding by providing aid-in-dying drugs to members.

This subdivision also prohibits any CalVet employee, contractor, or other person or entity from providing aid-in-dying drugs to any member. This subdivision is needed, in part, to make clear that employees, independent contractors, and other specified persons will not be allowed to provide aid-in-dying drugs to members or to participate in any activities under the Act.

This subdivision also clarifies that the prohibition on employee participation is confined to acts on the premises of the Homes, or actions taken in the course and scope of employment by, or

contract, with the Homes. This subdivision is needed to ensure that employees, independent contractors, and other specified persons do not engage in acts while on the premises of the Homes, or while acting within the course and scope of employment by, or contract with, the Homes that would jeopardize the Homes' continued eligibility to receive USDVA per diem funding.

Section 509(c)

This subdivision states that any member desiring to take an aid-in-dying drug must first discharge from the Home. This subdivision is needed to make clear what procedure must be followed if a member wishes to exercise the end of life option.

Section 509(d)

This subdivision provides that if a member discharges from a Home in order to take an aid-in-dying drug, but has a change of heart and decides to not take the drug, then the Home is mandated to re-admit the member and again provide appropriate and necessary medical care.

B. Policy Statement Overview

CalVet proposes this rulemaking action to make permanent California Code of Regulations, title 12, section 509. This rulemaking action will resolve a conflict between the Act and existing federal laws governing the operations of the Homes.

Beginning in 1884 with the opening of one of the nation's first long term care homes for Civil War veterans, California has maintained an historic commitment to caring for veterans and their families. Under the direction of its Secretary, CalVet currently operates Homes in Yountville, Barstow, Chula Vista, Lancaster, Ventura, West Los Angeles, Fresno and Redding. The Homes, which provide long term health care services for thousands of elderly and disabled veterans and their spouses, are certified by the United States Department of Veterans Affairs (USDVA) and licensed by the California Department of Public Health and the California Department of Social Services, allowing them to carry out CalVet's goal of providing its Homes' members with the continuum of long-term care needed throughout the aging process.

Once admitted to one of the Homes, each member benefits from a broad range of services throughout his or her life regardless of whether the services are provided at the Domiciliary (independent living), Residential Care for the Elderly (assisted living), Intermediate Care (licensed nursing assistance required), Skilled Nursing (round-the-clock care by licensed nurses and certified nursing assistants), or Memory Care/Dementia Care level of care. In order to achieve the goal of providing the foregoing array of services to the Homes' members as their needs change, CalVet receives significant financial assistance in the form of per diem payments from the USDVA as it seeks to fulfill those needs through changes in programs, technology, and staffing.

The specific problem being addressed in this regulatory action is the conflict between a recently enacted California statute and existing federal law.

With the passage of the Act, California became the fifth state to permit physicians to prescribe terminally ill patients medication to end their lives. Specifically, the Act allows terminally ill adults who have the capacity to make medical decisions to be prescribed an aid-in-dying drug if

specified conditions are met. The act went into effect on June 9, 2016, ninety (90) days after the adjournment of the special legislative session in which it was passed. (Health & Safety Code §§ 443-443.22.)

After passage (but prior to implementation) of the Act, CalVet learned of the existence of a conflict between the Act and existing federal law that significantly affects the operation of the Homes, which would prevent CalVet from permitting: (a) Homes members to consume an aid-in-dying drug while residing in a Home; or (b) Homes' employees from participating in the activities under the Act.

The Act authorizes a mentally competent adult, who has been determined by his or her attending physician (and confirmed by a consulting physician), to be suffering from a terminal disease (as specified in the Act) to make a request for a drug for the purpose of ending his or her own life. The Act further establishes a procedure for making these requests, and additionally requires specified information to be documented in the individual's medical record, including all oral and written requests for an aid-in-dying drug.

Because the Homes receive federal funding, federal law prohibits them from furnishing items or services (including assistance of any kind) for the purpose of causing (or assisting with causing) the suicide, euthanasia, or mercy killing of any individual. (42 U.S.C. § 14402; 38 C.F.R. § 51.210, subd. (s).)

On June 9, 2016, all eligible California citizens became entitled to request an aid-in-dying drug for the purpose of ending their lives. In response to the Act's implementation, CalVet filed an emergency regulatory action with the Office of Administrative Law (OAL) on June 8, 2016. OAL approved this emergency regulation on June 17, 2016.

The emergency regulation, pursuant to Government Code section 11346.1(e), will be in effect for 180 days, and thereafter repealed, unless CalVet either: (a) permanently adopts it in compliance with the notice and comment requirements of the Administrative Procedure Act (APA); or (2) readopts the regulation on an emergency basis.

The purpose of this regulatory action is to make permanent the emergency regulation, pursuant to Government Code section 11346.1(e). At the conclusion of this regular rulemaking proceeding CalVet will certify that it has complied with the APA notice and comment requirements.

Anticipated Benefits of the Proposed Regulation:

The objective of this proposed regulation is to ensure the Homes' continued eligibility to receive \$67,721,000.00 annually (or \$185,000.00 per day) in USDVA funding.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

After conducting an evaluation for any regulations related to this area, CalVet has found that these are the only regulations concerning end of life options for veterans in Veterans Homes in California. Therefore, the proposed regulations are neither inconsistent nor incompatible with existing state regulations

DISCLOSURES REGARDING THE PROPOSED ACTION

CalVet has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: The proposed regulation would preserve approximately \$67,721,000.00 annually (or \$185,000.00 per day) in USDVA funding. This funding is returned to the General Fund and used to pay the equivalent of more than 1,200 staff members working in the Homes.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: The proposed regulation would preserve approximately \$67,721,000.00 annually (or \$185,000.00 per day) in USDVA funding. This funding is returned to the General Fund and used to pay the equivalent of more than 1,200 staff members working in the Homes.

Cost impacts on a representative private person or businesses: CalVet is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.

Significant effect on housing costs: None.

RESULTS OF ECONOMIC IMPACT ASSESSMENT / ANALYSIS

CalVet does not anticipate that there will be significant impacts on the public, private persons, or business due to the proposed regulation. CalVet does not anticipate that there will be an expansion of existing business in California. No jobs will be created; none will be eliminated. No new businesses will be created; no existing businesses will be eliminated. CalVet anticipates that the regulation will result in the following benefit to the health and welfare of California residents: the regulation makes clear how issues arising under the Act will be resolved for persons who are Homes' members. CalVet has not identified any benefits in the areas of worker safety or the state's environment. Any member who discharges from the Homes under this proposed regulation would be discharged with a plan to meet his or her care needs. This plan might involve care provided by relatives, home-based care services, private facilities, or hospice.

Benefits of the Proposed Action:

The proposed regulation would preserve approximately \$67,721,000.00 annually (or \$185,000.00 per day) in USDVA funding. This funding is returned to the General Fund and used to pay the equivalent of more than 1,200 staff members working in the Homes.

Small Business Determination:

CalVet has determined that the proposed regulation will not affect small business. This proposed regulation will not affect small business because this proposed regulation simply seeks to simply reconcile the conflict between the Act and existing federal law which impacts the operation of the Homes, a state entity. This proposed regulation does not apply to small business in any manner, it simply conforms state law to federal law.

Business Report

The proposed regulation does not require a business report.

CONSIDERATION OF ALTERNATIVES

CalVet must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

Alternative 1: Prohibit a member from consuming an aid-in-dying drug while on the grounds of the Home, and prohibit Home staff from participating in activities under the Act. If a member requests an aid-in-dying drug, the member would be entitled to transfer to a third-party facility that is willing to prescribe the drug to the member and allow the member to consume the drug at the third-party facility. The member would not discharge from the Home, and the Home would be ultimately responsible for any unreimbursed costs of care associated with the transfer to the third-party facility.

Analysis: While this alternative may be more advantageous to a member desiring to take an aid-in-dying drug, CalVet believes, based upon guidance it received from the USDVA, that this alternative would similarly jeopardize the Homes' continued eligibility to receive \$67,721,000.00 annually (or \$185,000.00 per day) in USDVA funding.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

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Sacramento, California 95818
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Fax: (916) 653-2456
Email: phil.mcallister@calvet.ca.gov

The backup contact person for these inquiries is:

Todd D. Irby
Deputy Secretary and Chief Counsel
1227 O Street, Room 306
Sacramento, CA 95814
Telephone: (916) 654-7022
Fax: (916) 653-2456
Email: todd.irby@calvet.ca.gov

Please direct requests for copies of the proposed text (the "express terms") of the regulations, the initial statement of reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based to Phil McAllister at the above address.

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

CalVet will make the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, the initial statement of reasons, the text of the California End of Life Option Act and relevant federal law in conflict with the Act. Copies may be obtained by contacting Phil McAllister at the address or phone number listed above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, CalVet may adopt the proposed regulations substantially as described in this notice. If CalVet makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before CalVet adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Phil McAllister at the address indicated above. CalVet will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Phil McAllister at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through our website at <https://www.calvet.ca.gov/about-us/laws-regulations>.

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