

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION COMMISSION RULES OF THE WEST VIRGINIA
INSURANCE COMMISSIONER

SERIES 31
PROFESSIONAL EMPLOYER ORGANIZATIONS

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§85-31-1. General.

1.1. Scope. -- This exempt legislative rule provides for the adoption and implementation of rules to regulate professional employer organizations ("PEOs") regarding workers' compensation.

1.2. Authority. -- W. Va. Code §§23-2C-22; 33-2-10(b); 33-2-21(a); and 33-46A-7. Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules proposed by the Commissioner and adopted by the Industrial Council are not subject to legislative approval as would otherwise be required under W. Va. Code §29A-3-1, et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Repeal of former rule. -- This exempt legislative rule repeals and replaces WV 85CSR31 "Employee Leasing" filed December 2, 2005 and effective January 2, 2006.

1.4. Filing Date. --

1.5. Effective Date. --

§85-31-2. Purpose of Rule.

The purpose of this rule is to establish certain standards and provisions applicable to workers' compensation insurance being provided to entities known as "PEOs", as defined in this rule. The rule does not apply to temporary help agencies or those businesses engaged in the provision of contracted services, which are the primary or only services provided. However, it does apply to any temporary help agency which also enters into agreements to provide professional employer services to client employers, but the applicability of this rule is limited to such instances.

§85-31-3. Definitions.

As used in this rule, the following terms, words and phrases have the meanings stated unless, in any instance where such term, word or phrase is used, the context expressly indicates that another meaning is intended.

3.1. "Agreement" means a written contract by and between a client-employer and a PEO under which a PEO contracts to provide professional employer services for an administrative fee, as otherwise consistent with the provisions of W. Va. Code §33-46A-6.

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3.2. "Client employer" means an entity who enters into a professional employer agreement with a PEO.

3.3. "Commissioner" means the Insurance Commissioner of West Virginia.

3.4. "Covered employee" means ~~any person working for a client employer who is required to be provided workers' compensation insurance under chapter twenty-three of the West Virginia Code and rules promulgated thereunder and is not covered by a policy issued on a direct purchase basis between the client employer and a private carrier~~ a person employed by a client-employer for whom certain employer responsibilities are shared or allocated pursuant to a PEO agreement. Persons who are officers, directors, shareholders, partners and managers of the client-employer will be covered employees only to the extent expressly set forth in the professional employer agreement.

3.5. "Direct hire employee" means an individual who is an employee of the PEO and has no employment or working relationship with any client employer.

3.6. "Direct purchase basis" means an arrangement in which all contractual obligations under the insurance policy run directly between the insurer and the client employer without the involvement of the PEO.

3.7. "Master Policy Basis" means an arrangement under which a single policy issued to a PEO covers more than one client-employer.

3.8. "Multiple Coordinated Policy Basis" or "MCP Basis" means an arrangement under which a separate policy is issued to or on behalf of each client-employer but certain payment obligations and policy communications are coordinated through the PEO.

3.9. "PEO" is a professional employer organization as defined in W. Va. Code §33-46A-2(g).

3.10. "Private Carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.11. "Residual Market" is the market of workers' compensation insurance written pursuant to the assigned risk plan developed pursuant to W. Va. Code §23-2C-10.

3.12. "Voluntary Market" has the same meaning ascribed to it in W. Va. Code §23-2C-2(u).

§85-31-4. PEO Workers' Compensation Insurance Policies.

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chapter thirty-three of the West Virginia Code, including, but not limited to, fines, termination of ability to write workers' compensation coverage to PEOs and termination of the carrier's certificate of authority in West Virginia.

§85-31-6. Scope of Coverage for Master Policies.

6.1. A workers' compensation policy of insurance issued to a PEO on a master policy basis shall provide workers' compensation to all covered employees, including, but not limited to:

a. All the direct hire employees of the PEO; and

b. All covered employees working for each client employer of the PEO, regardless of whether the private carrier has been made aware of the PEO's relationship with the client employer or whether the client employer has yet been added to the policy; and

c. All other employees of the PEO or client employer required to be provided West Virginia workers' compensation coverage for whom there is no other workers' compensation policy providing coverage effective on the relevant date of injury.

~~6.2. Under no circumstances may a private carrier deny a workers' compensation claim involving a workers' compensation policy issued to a PEO on a master policy basis based upon the PEO's failure to properly notice the carrier regarding the retention of a new client employer or that the scope of the agreement between the PEO and client employer excludes workers' compensation coverage.~~

6.2. A workers' compensation policy of insurance issued to a client employer on a multiple coordinated policy basis shall provide workers' compensation to all covered employees working for the client employer and all other employees of the PEO or client employer required to have West Virginia workers' compensation coverage for whom there is no other workers' compensation policy providing coverage effective on the relevant date of injury.

6.3. If on the relevant date of injury there is in effect both a workers' compensation policy issued to the client employer on a direct purchase basis and a master policy covering the covered employees, the direct purchase policy shall be the primary policy to provide coverage for workers' compensation benefits. If on the relevant date of injury there is both a PEO workers' compensation policy in effect and a direct purchase policy in effect, the following shall apply:

a. If the claimant is a covered employee, then the PEO policy shall be the primary policy; or

b. If the claimant is not a covered employee, then the direct purchase policy shall be the primary policy.

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6.4. Under no circumstances shall this section be interpreted to have any legal effect on the terms, conditions or legal rights as between a private carrier, PEO and client employer established pursuant to a valid PEO agreement or insurance contract, or the right of a private carrier, PEO or client employer to enforce the same through various legal remedies.

§85-31-7. Notice of Coverage and Cancellation.

7.1. Upon issuing a workers' compensation policy to a PEO and its client employer on a master policy or MCP basis, the carrier shall promptly issue a certificate of coverage to each client covered under the policy.

7.2. Upon receiving notice that the PEO has added a client employer approved by the carrier to its master policy, a private carrier or its agent, if applicable, shall promptly issue a certificate of coverage to the newly added client employer.

7.3. A certificate of coverage issued under this section shall specify the effective date of the client employer's coverage and the expiration date of the master policy under which such coverage is being provided.

7.4. In all workers' compensation policies issued to PEOs and their client employers, the private carrier shall comply with W. Va. Code §23-2C-15(e) and W. Va. Code St. R. §85-8-9 regarding providing notice of cancellation, renewal and non-renewal: *Provided*, That notice of cancellation of coverage to any client employer for any reason shall not be effective without thirty (30) days advance written notice. Every notice provided under this subsection shall be sent both to the PEO and client: *Provided*, That the client employer does not need to be provided notice of a renewal under the provisions of W. Va. Code St. R. §85-8-9.9.