

**TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION 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. -- October 22, 2008.

1.5. Effective Date. -- November 21, 2008.

§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 a “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.

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 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.

4.1. The purpose of this section is to implement W. Va. Code §33-46A-7 relating to workers’ compensation policies for PEOs and their client-employers.

4.2. In the voluntary market, workers’ compensation policies for PEOs and their client employers may be issued on a master policy basis, MCP basis or such other form as approved by

the Commissioner.

4.3. Policies of worker's compensation insurance for PEOs and their client employers in the residual market shall not be issued on a master policy basis. Such policies shall only be issued on forms submitted by servicing carriers and approved by the Commissioner.

4.4. Every policy form of workers' compensation insurance to be used for PEOs and their client-employers must be filed by the private carrier using the policy or the Commissioner's designated rating organization no less than sixty (60) days in advance of such policy being used by the private carrier. At the expiration of the sixty (60) day period, unless the period was extended by the Commissioner to obtain additional information from the private carrier, the form is deemed to be approved unless prior thereto it was affirmatively approved or disapproved by the Commissioner. Approval of any form under this subsection by the Commissioner constitutes a waiver of any unexpired portion of the sixty (60) day period.

§85-31-5. Data Collection and Proof of Coverage Reporting.

5.1. Regardless of the basis on which coverage is provided for PEOs and their client employers, the private carrier shall collect and maintain payroll and claims data for each client employer in a manner that will permit an experience modification factor to be calculated separately for each client-employer who is eligible to be experience rated.

5.2. When a client employer, for whatever reason, purchases workers' compensation coverage on a direct purchase basis, the client employer's experience modification factor shall be based solely upon the client-employer's own experience, including experience under past direct purchase policies and PEO policies, as applicable.

5.3. Carriers providing workers' compensation insurance to PEOs shall comply with all data reporting requirements pursuant to the appropriate rating manual and rules submitted by the Commissioner's designated rating organization for workers' compensation.

5.4. Regardless of the basis on which coverage is provided for PEOs and their client employers, the private carrier is required to timely and accurately report information regarding policy issuance, renewal and cancellation as required by the provisions of W. Va. Code §23-2C-15(f) and W. Va. Code St. R. §85-8-9. The carrier must be able to report such information separately regarding both the PEO and each client employer.

5.5. Failure of the private carrier to collect, maintain and report data as required by this section may result in appropriate regulatory measures being taken against the carrier pursuant to 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:

- a. All the direct hire employees of the PEO;
- b. All covered employees working for each client employer of the PEO; 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. 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 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.

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, under a master policy, 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.