OFFICE OF THE SECRETARY OF STATE
STATE OF WEST VIRGINIA

Betty Ireland
Secretary of State

2008 JUL -8 AM 9:

July 7, 2008

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Insurance Commissioner

RULE: New Rule, 114CSR85, Professional Employer Organizations

DATE FILED AS AN EMERGENCY RULE: June 19, 2008

DECISION NO. 7-08

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

BETTY IRELAND
Secretary of State

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

Telephone: 304-558-6000 · Toll Free: 866-SOS-VOTE · Corporations: 304-558-8000 · Fraud Hotline: 877-FRAUD-WV · Fax: 304-558-0900 · www.wvvotes.com · www.wvsos.com

EMERGENCY RULE DECISION
(ERD 7-08)

AGENCY: Insurance Commissioner
RULE: New Rule, 114CSR85, Professional Employer Organizations
FILED AS AN EMERGENCY RULE: June 19, 2008

par. 1 The Insurance Commissioner (Commissioner) has filed the above new rule as an emergency rule.

par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].

par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Commissioner filed this emergency rule with supporting documents with the Secretary of State June 19, 2008 and with the LRMRC June 19, 2008.

par. 7 It is the determination of the Secretary of State that the Commissioner has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- W. Va. Code §33-46A-7 reads:

§33-46A-7. Workers' compensation.
(a) The responsibility to obtain workers' compensation coverage for covered employees in compliance with all applicable law shall be specifically allocated in the professional employer agreement to either the client-employer or the PEO.
(b) If the responsibility is allocated to the PEO under the agreement:
(1) The agreement shall require that the PEO maintain and provide workers' compensation coverage for the covered employees from a carrier authorized to do business

in this state: Provided, That the provisions of section seven, article two, chapter twenty-three of this chapter may not be abrogated by a PEO agreement and the client-employer shall at all times remain ultimately liable under chapter twenty-three of this code to provide workers' compensation coverage for its covered employees;

(2) The insurer shall report:

(A) Payroll and claims data for each client-employer to the commissioner or his or her designated advisory organization in a manner that identifies both the client-employer and PEO; and

(B) Coverage status with respect to each client-employer in accordance with the proof of coverage requirements provided for in statute and rules.

(c) Workers' compensation coverage may be provided:

(1) On a master policy basis, under which a single policy issued to the PEO provides coverage for more than one client-employer, and may also provide coverage to the PEO with respect to its worksite employees: Provided, That on or before the first day of July, two-thousand eight, the commissioner shall promulgate an emergency legislative rule in accordance with the provisions of section fifteen, article three, chapter twenty-nine of this code, and shall also propose an exempt legislative rule for adoption by the industrial council in accordance with the provisions of subdivision (2), subsection (j), section one-a, article one, chapter twenty-three of this code, establishing standards for the reporting of client-employer experience in sufficient detail to enable the assignment of an experience modifier upon termination of the professional employer agreement: Provided, however, That no mandatory workers' compensation coverage may be provided through a PEO arrangement to any client-employers on a master policy basis other than through coverage in the voluntary market, as that term is defined in subsection (u), section two, article two-c, chapter twenty-three of this code.

(2) On a multiple coordinated policy basis, under which a separate policy is issued to or on behalf of each client-employer or group of affiliated client-employers with certain payment obligations and policy communications coordinated through the PEO; or

(3) On any other basis approved by the commissioner.

(d) This article does not prohibit grouping together the client-employers of a PEO for the purposes of offering dividend eligibility, applying a discount to the premium charged, applying a retrospective rating option arrangement or the use of any other loss sensitive rating options or large deductible policies as allowed under state law.

(e) The protection of the exclusive remedy provision of section six, article two, chapter twenty-three of this code, shall apply to the PEO, the client-employer, and to all covered employees and other employees of the client-employer irrespective of whether the PEO or the client-employer obtains the workers' compensation coverage.

(f) The commissioner shall propose rules in accordance with the provisions of subsection (c), section five, article two-c, chapter twenty-three of this code, for adoption by the Industrial Council, to effectuate the purposes of this section, including the manner in which notice of default of a master policy must be given to client-employers.

1.

par. 9 It is the determination of the Secretary of State that the Commissioner has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Commissioner are as follows:

On March 6, 2008,the WV Legislature enacted HB 4079, a bill which addresses Professional Employer Organizations ("PEOs"). PEOs provide various administrative services to employers such as payroll and maintaining insurance coverages.
W. Va. Code §33-46A-7(c)(1) (new) requires that the Insurance Commissioner promulgate an emergency legislative rule no later than July 1, 2008 "establishing standards for the reporting of client-employer experience in sufficient detail to enable the assignment of an experience modifier upon termination of the professional employer agreement". This essentially requires a rule clarifying that when PEOs obtain workers' compensation coverage for themselves & their client employers, the policies are written in a form & manner that enables data to accurately be recorded for each separate client employer in addition to the PEO. The proposed emergency rule achieves this objective.
HB 4079 also provides a licensing scheme for PEOs operating in WV, although PEOs have until mid-2009 to become licensed. The proposed rule sets out the licensing requirements (e. g. solvency standards) as well as related matters, e.g. record retention requirements, procedures for enforcement & penalties for noncompliance, etc.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "time limit established by the Code"

par. 14 This decision shall be cited as Emergency Rule Decision 7-08 or ERD 7-08 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Insurance Commissioner, the Attorney General and the Legislative Rule Making Review Committee.

BETTY IRELAND
Secretary of State

Entered_____

2008 JUL -8 AM 9: