

WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #1

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FILED

2007 MAY -1 PM 2: 52

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY WV Code §§23-2C-17(b); 23-2C-18(g); 23-2C-22;
33-2-10(b); and 33-2-20(a)

AMENDMENT TO AN EXISTING RULE: YES X NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 8

TITLE OF RULE BEING AMENDED: Workers' Compensation Policies, Coverage Issues, Policy Defaults
and Related Topics

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED:

TITLE OF RULE BEING PROPOSED:

DATE OF PUBLIC HEARING: Thursday, May 31, 2007 TIME: 3:00 PM

LOCATION OF PUBLIC HEARING:

COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH X

NOTE: Comment Period for written
comments will end on May 31, 2007 at
3:00 PM.

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Ryan Sims, Associate Council

The Department request that persons wishing to make
comments at the hearing make an effort to submit written
comments in order to facilitate the review of these comments.

Offices of the WV Insurance Commissioner
P.O. Box 50540

The issues to be heard shall be limited to the proposed rule.

Charleston, WV 25305-0540

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL


James Robert Alsop
Cabinet Secretary
West Virginia Department of Revenue

Insurance Commissioner (Workers'
Compensation Rules)
Exempt Legislative Rule
Title 85, Series 8

WORKERS COMPENSATION POLICIES, COVERAGE ISSUES AND RELATED TOPICS
(New Title Pursuant to Amendment)

TITLE 85, SERIES 8

BRIEF SUMMARY OF RULE

This amended rule sets forth certain standards, clarification, guidelines and procedures applicable to workers' compensation policies, coverage issues and related topics. The original draft of W. Va. Code St. R. § 85-8-1 et seq. ("Rule 8", "Workers' Compensation Policies, Coverage Issues, Policy Default and Related Topics") was promulgated by the former West Virginia Workers' Compensation Board of Managers with an effective date of January 20, 2006.

As with all Title 85 Rule amendments following the passage of SB 1004 in 2005, this new amendment includes general technical and stylistic cleanup reflecting the termination of the former West Virginia Workers' Compensation Commission, privatization of West Virginia's workers' compensation insurance market, and the transfer of regulatory authority for workers' compensation to the Insurance Commissioner and Industrial Counsel. Additionally, several substantive changes were made to the Rule. Specifically, provisions were added providing clarification and guidance as to statutory exemptions from workers' compensation, independent contractor issues, cross-border and extra-territorial issues, dependent/death benefits, notice required for coverage cancellation, and rates and rating organizations.

Insurance Commissioner (Workers'
Compensation Rules)
Exempt Legislative Rule
Title 85, Series 8

**WORKERS COMPENSATION POLICIES, COVERAGE ISSUES AND RELATED TOPICS
(New Title Pursuant to Amendment)**

TITLE 85, SERIES 8

STATEMENT OF CIRCUMSTANCES

Pursuant to Senate Bill 1004, First Special Session, 2005, workers' compensation in West Virginia was changed from a state run, monopolistic system to a private market system. This bill also transferred all regulatory authority for workers' compensation insurance to the Insurance Commissioner.

To provide standards, clarification, guidelines and procedures applicable to workers' compensation policies, coverage issues and related topics, the former West Virginia Workers' Compensation Commission Board of Managers promulgated W. Va. Code St. R. § 85-8-1 et seq. ("Rule 8", "Workers' Compensation Policies, Coverage Issues, Policy Default and Related Topics") with an effective date of January 20, 2005. It has become apparent to the Insurance Commission that there is a need for certain stylistic, technical and substantive amendments to this Rule to properly reflect West Virginia's new privatized workers' compensation system and to otherwise reflect West Virginia's statutory law regarding workers' compensation. The substantive amendments are more specifically referenced in the "Brief Summary" for this Rule.

This amended rule is being promulgated to implement the above referenced changes necessary to Title 85, Series 8 of the West Virginia Code of State Rule.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Workers' Compensation Policies, Coverage Issues, ~~Policy Defaults~~ and
Related Topics - Title 85, Series 8

Type of Rule: X Exempt Legislative Interpretive Procedural

Agency: Insurance Commission

Address: Post Office Box 50540
1124 Smith Street, Greenbrooke Building
Charleston, West Virginia 25305-0540

Phone Number: (304) 558-0401 Email: Ryan.Sims@wvinsurance.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure
will have on costs and revenues of state government.

The rule will have no additional fiscal impact upon state government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of
Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	None	None	None
Personal Services	None	None	None
Current Expenses	None	None	None
Repairs & Alterations	None	None	None
Assets	None	None	None
Equipment	None	None	None
Other	None	None	None
2. Estimated Total Revenues	None	None	None

Rule Title: Workers' Compensation Policies, Coverage Issues, Policy Defaults and
Related Topics - Title 85, Series 8

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

N/A

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

N/A

Date: _____

Signature of Agency Head or Authorized Representative

Jane L. Cline, Insurance Commissioner

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

SERIES 8
WORKERS' COMPENSATION POLICIES, COVERAGE ISSUES, ~~POLICY DEFAULTS~~
AND RELATED TOPICS

Section

- 85-8-1. General.
- 85-8-2. Purpose of Rule.
- 85-8-3. Definitions.
- 85-8-4. Employers Required to Maintain Workers' Compensation Insurance;
Exemptions; Application for Letter of Exemption.
- 85-8-5. Auditing; Inspections; and ~~Gross Wage~~ Payroll Reporting.
- 85-8-6. Employees Covered; ~~Employers Required to Subscribe~~ Independent
Contractors; Coverage Elections; Assignment
- 85-8-7. Extraterritorial Coverage and Related Issues.
- ~~85-8-7~~ 85-8-8. The Workers' Compensation Insurance Policy.
- 85-8-9. Notification of Coverage, Change and Cancellation.
- 85-8-10. Rating Organizations.
- ~~85-8-8~~ 85-8-11. Ratemaking.
- ~~85-8-9.~~ ~~Rating Organizations.~~
- ~~85-8-10~~12. Severability.

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WORKERS' COMPENSATION COMMISSION RULES
OF THE WEST VIRGINIA INSURANCE COMMISSIONER

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 8

WORKERS' COMPENSATION POLICIES, COVERAGE ISSUES, ~~POLICY DEFAULTS~~
AND RELATED TOPICS

§85-8-1. General.

1.1. Scope. -- This exempt legislative rule provides for: (1) Specific criteria, standards and other clarification as to which entities need to carry West Virginia workers' compensation coverage and which individuals are considered employees entitled to benefits under chapter thirty-three of the West Virginia Code; (2) the minimum contents of a policy issued for workers' compensation insurance pursuant to West Virginia Code Section §23-1-1 et seq.; (2) (3) rate making and premium collection associated with a provisions applicable to workers' compensation insurance policy in West Virginia; (3) the consequences of entering policy default and resulting claim payments made from the uninsured employer fund; and (4) other coverage related topics.

1.2. Authority. -- W. Va. Code §§~~23-1-1a(j)(3);~~ 23-2C-17(b); 23-2C-18(g); 23-2C-8(a)(4) 23-2C-22; 33-2-10(b); and 33-2-20(a). Pursuant to W. Va. Code §§~~23-1-1a(j)(3)~~ §~~23-2C-5(c)(2)~~ and 33-2-10(b), workers' compensation rules adopted proposed by the insurance commissioner and approved by the Board of Managers and the Commission industrial council are not subject to legislative approval as would otherwise be required under ~~West Virginia~~ W. Va. Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- ~~December 20, 2005.~~

1.4. Effective Date. -- ~~January 20, 2006.~~

§85-8-2. Purpose of Rule.

This rule provides ~~for specific criteria, standards and other clarification as to which entities need to carry West Virginia workers' compensation coverage and which individuals are considered employees entitled to benefits under chapter twenty-three of the West Virginia Code,~~ establishes the requirements of a basic policy to be used by private carriers of workers' compensation insurance, establishes the criteria for ratemaking and premium collection by private carriers, establishes the assessment methodologies, rates, payments and penalties necessary to operate the uninsured employers' fund and provides rules regarding ratemaking provisions applicable to workers' compensation insurance in West Virginia and addresses other workers' compensation coverage

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related topics.

§85-8-3. 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 employed and the context expressly indicates that another meaning is intended.

~~3.1. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.~~

3.1. "Casual employer," as the term is used in W. Va. Code §23-2-1(b)(4) and this rule, means an employer whose number of employees does not exceed three and the period of employment is temporary, intermittent and sporadic in nature and does not exceed ten (10) calendar days in any calendar quarter.

~~3.2. "Base rates" means the loss cost calculated for each classification.~~

~~3.3. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W. Va. Code §23-1-1a.~~

~~3.4~~ 3.2. "Classification" ~~shall mean~~ means a categorization of ~~employers~~ employees for the purpose of assessing risk, rate making, and developing premium charges.

~~3.5. "Code of West Virginia" and "West Virginia Code" mean the West Virginia Code of 1931, as amended.~~

~~3.6. "Commission" means the Workers' Compensation Commission created pursuant to the provisions of W. Va. Code §23-1-1.~~

~~3.7~~ 3.3. "Domestic services" means services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. A private home is a fixed place of abode of an individual or family. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home and the services performed therein are not domestic services.

In general, services of a household nature in or about a private home include services performed by cooks, butlers, housekeepers, governesses, maids, valets, baby sitters, care-takers, medical providers, handymen, gardeners, and chauffeurs of automobile for family use.

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The term domestic services shall not include services of a household nature performed by an employee in or about the private home of a person when that employee is employed by someone other than a member of the household. For example, employees of maid services, temporary employment agencies, or other businesses do not provide domestic services under the provisions of this rule.

3.8 3.4. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

3.9 3.5. "Employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.

a. "Industry, service or business," as the term is used in W. Va. Code §23-2-1(a) and this rule, means an occupation or an employment engaged in for the purposes of obtaining a livelihood or for profit or gain. This term includes any not for profit entity or volunteer organization to the extent that such entity or organization employs individuals.

b. "Carrying on any form of industry, service or business in this state," as the term is used in W. Va. Code §23-2-1(a) and this rule, means that the employer:

1. Has obtained authorization to do business in West Virginia; or
2. Operates a business or plant or maintains an office in West Virginia; or
3. In a particular claim, hired the claimant in West Virginia; or
4. Hires other West Virginia residents to work at a West Virginia facility or office; or
5. In a particular claim, utilized labor on a regular basis at a West Virginia facility for the employer prior to the injury at issue;

Provided, That an employer that meets one or more of the above stated criteria and otherwise meets the definition of "employer" may still be exempt from having to maintain workers' compensation

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coverage under the provisions of W. Va. Code §23-2-1(b) or the provisions of subsection 4.3. of this rule.

3.6. "Employment" or "regularly employing" means engaging the services of a person or persons in return for wages or other compensation.

3.7. "Extraterritorial employee" means an employee who is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than the State of West Virginia.

~~3.10. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W.Va. Code §23-1-1b.~~

~~3.11. "Gross wages" means all wages paid to employees, whether payable in money or other valuable consideration, and shall include salaries, bonuses, commissions, profit sharing, and the reasonable money value of board, rent, housing, lodging and other goods and services. The commission retains the right to determine whether an item, not otherwise described in this provision, is reportable as "gross wages."~~

~~"Gross wages" include: W-2 items, vacation pay, including accrued vacation at time of dismissal, holiday pay, sick pay (excluding 3rd party sick pay), partnership and S-Corporation distributions of ordinary income from trade or business activities (do not report losses), draws taken for items other than business expenses, retroactive wages, bonuses, including stock options and stock bonuses, commissions, including draws against commissions, wages paid to summer interns, overtime wages, profit sharing, incentive programs, per diem payments to employees not directly related to travel, allocation to employees for such things as tools, equipment, machinery, etc. regardless if such allocation is labeled as per diem, hourly expense or other titles, stipend or other non-travel related payments to board members who are being covered under the employer's workers' compensation account, other compensation and perquisites paid to employees, owners and officers that have value, but are not per diem travel related, and value of gifts given to employees, owners, officers and board members.~~

~~"Gross wages" do not include: per diem expenses related to travel, the value of any special discount or markdown allowed a worker on goods or services purchased from or supplied by the employer if the purchase is optional with the worker and does not constitute regular or systematic remuneration for services, facilities or privileges such as cafeterias, restaurants, medical services or so-called 'courtesy discounts' on purchases furnished or offered by an employer merely as a convenience to workers or as a means of promoting their health, goodwill or efficiency, partnership and S-Corporation distributions other than ordinary income from trade or business activities,~~

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~~payments, not required under any contract of hire, made to an individual with respect to a period of training or service in the armed forces of the United States, severance pay, savings plan proceeds, third-party sick pay, and disability pay.~~

~~3.12~~ 3.8. "Insurance Commissioner" means the insurance commissioner of West Virginia as provided for in section one, article two, chapter thirty-three of the West Virginia Code.

~~3.13~~ 3.9. "Old Fund" means the fund created pursuant to ~~article two-e of chapter twenty-three of the West Virginia~~ W. Va. Code §23-2C-2(l).

3.10. "Old Fund default" means being on the insurance commissioner's commission default list as defined in W. Va. Code St. R. §85-11-1 et seq. as a result of owing money to the Old Fund.

~~3.14~~ 3.11. "Payroll" means the ~~entire gross wages of all employees not excluded under provisions of the Act or this rule, or such other wage related exposure base as may be determined pursuant to chapter 23 of the West Virginia Code~~ term as defined in the most current approved filing of the Insurance Commissioners' designated rating organization for workers' compensation.

~~3.15~~ 3.12. "Policy Default" means a policy holder that has failed having its policy cancelled as a result of a failure to comply with the terms of its ~~workers' compensation insurance~~ the policy and is consequently without workers' compensation coverage and shall include, but not be limited to, a policy holder's failure to pay the regulatory surcharge and deficit reduction surcharge required by ~~article two-e of chapter twenty-three of the West Virginia Code.~~

~~3.16~~ 3.13. "Policy holder" means an employer that has been issued a West Virginia workers' compensation insurance policy by a private carrier and currently has coverage under said policy.

~~3.17~~ 3.14. "Private carrier" means any insurer authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

~~3.18~~ 3.15. "~~Self insurer~~" and "~~self~~ Self-insured employer" ~~mean employers~~ means an employer who are is eligible and have has been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.16. "Temporary," as the term is used in W. Va. Code §§23-2-1(b)(3) and 23-2-1c(c), and in this rule, means for a period not exceeding ninety (90) working days within any three hundred and sixty-five (365) day period.

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3.17. "Temporary and transitory," as the term is used in W. Va. Code §23-2-1a(a)(1) and this rule, means for a period not exceeding ninety (90) working days within any three hundred and sixty-five (365) day period.

3.18. "Temporary, intermittent or sporadic," as the term is used in W. Va. Code §§23-2-1(b)(3) and in this rule, means for a period not exceeding ten (10) working days in any ninety (90) day period.

3.19. "This rule" means this exempt legislative rule designated as 85CSR8 W. Va. Code St. R. §85-8-1 et seq., "Workers' Compensation Policies, Coverage Issues, ~~Policy Defaults~~ and Related Topics."

3.20. "Uninsured Employers' Fund" means the fund created pursuant W. Va. Code §23-2C-2(o).

3.21. "Uninsured Employers' Fund default" means being on the insurance commissioner's commission default list as defined in W. Va. Code St. R. §85-11-1 et seq. as a result of owing money to the Uninsured Employers' Fund.

3.22. "West Virginia workers' compensation coverage" means workers' compensation coverage which provides the employees of the insured employer workers' compensation benefits consistent with chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

§85-8-4. Employers Required to Maintain Workers' Compensation Insurance; Exemptions; Application for Letter of Exemption.

4.1. Duty to ~~register~~ maintain insurance. Every employer ~~subject to the Workers' Compensation Act (W. Va. Code §23-1-1 et seq.)~~ is required to obtain a West Virginia workers' compensation policy coverage for the protection of its employees.

4.2. Every employer shall have a continuous and ongoing duty to maintain current information with its current private carrier about the employer's business activities, including all information that could affect the employer's payroll or premium.

4.3 Exemptions. An employer who is otherwise required to maintain West Virginia workers' compensation coverage may be exempt from having to maintain such coverage in the following circumstances:

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a. An employer of domestic services as defined in subsection 3.3 of this rule is exempt from having to carry West Virginia workers' compensation coverage for any individuals hired to perform such domestic services;

b. An employer of five (5) or fewer full-time employees in agricultural services is exempt from having to carry West Virginia workers' compensation coverage for the five (5) or fewer full-time employees in agricultural services;

c. An employer who is a casual employer does not need to carry West Virginia workers' compensation coverage;

d. An employer who is a church does not need to carry West Virginia workers' compensation coverage;

e. An employer who is engaged in organized professional sports activities, including an employer of trainers and jockeys engaged in thoroughbred horse racing, does not need to carry workers' compensation coverage for the employees participating in the organized professional sports activities: *Provided*, That the employer must carry coverage for its employees who are not participating in the organized professional sports activities; for example, an employer of jockeys and trainers engaged in thoroughbred horseracing may exempt such jockeys and trainers, but if the same employer also employs a driver to transport horses and equipment, the driver must be provided coverage;

f. Employers who are a volunteer rescue squad or volunteer police auxiliary unit organized under the auspices of a county commission, municipality or other government entity or political subdivision, or a volunteer organization created or sponsored by a government entity, political subdivisions or an area or regional emergency medical service board of directors in furtherance of the purposes of the emergency medical services act of article four-c [§§16-4C-1 et seq.], chapter sixteen of this code do not need to carry West Virginia workers' compensation coverage: *Provided*, That if any such employers have paid employees, they must provide West Virginia workers' compensation for such paid employees; or

g. An employer of employees who are provided coverage for benefits under the federal Longshore and Harbor Workers' Compensation Act, 33 U. S. C. §901, et seq., is exempt from having to carry West Virginia workers' compensation coverage for such employees, but must provide West Virginia workers' compensation coverage for employees who are not provided coverage for benefits under the federal Longshore and Harbor Workers' Compensation Act.

4.3 4.4. Exemption determination Application for letter of exemption. An employer shall

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~~make application~~ may apply to the insurance commissioner on forms supplied by the insurance commissioner for a letter of exemption from coverage. The insurance commissioner will review the application for exemption from coverage and all evidence submitted by the employer applying for the letter of exemption and, based on the provisions of chapter twenty-three of the West Virginia Code and this rule, may make such determination as ~~it~~ the commissioner deems proper. The insurance commissioner shall charge each applicant for a letter of exemption from coverage a processing fee for each application in the amount of twenty-five dollars (\$25).

§85-8-5. Auditing; Inspections; and ~~Gross Wage~~ Payroll Reporting.

5.1. Each private carrier may include reasonable auditing, inspection and ~~wage payroll~~ reporting provisions in its policy, subject to the approval of the insurance commissioner.

5.2. ~~A private carrier may cancel a policy after providing fifteen (15) days advance written notice to a policy holder of its failure to comply with auditing, inspection, or reporting requirements of its policy. A private carrier shall provide the Insurance Commissioner with all applicable notices of said cancellation. The effective date of the termination shall be upon expiration of said fifteen (15) days.~~

§85-8-6. Employees Covered; ~~Employers Required to Subscribe~~ Independent Contractors; Coverage Elections; Assignment.

6.1. General. ~~An employer's subscription for workers' compensation coverage~~ A West Virginia workers' compensation policy must cover all of its the employees of the insured employer who are mandated coverage and benefits by law under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

6.2. Independent contractors. ~~Services performed by a worker~~ All individuals performing services for wages are employment subject to this rule compensation paid by an employer are presumed to be employees and required to be covered by a West Virginia workers' compensation insurance policy unless and until it is shown to the satisfaction of the private carrier that the worker is an independent contractor. The burden of showing that an individual is an independent contractor shall at all times be on the party asserting independent contractor status. In determining whether an independent contractor relationship or an employment relationship exists between the parties, the private carrier will examine information that provides evidence of the degree of control and the degree of independence exhibited by the parties the following criteria are dispositive, and are all required before an individual may be determined to be an independent contractor:

~~Facts that provide evidence of the degree of control fall into three categories: behavioral~~

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~~control, financial control, and the type of relationship between the parties. As the degree of control rises, the more the facts indicate that an employee/employer relationship exists. The private carrier is provided with discretion to weigh out the degree of control. Neither all categories of the degree of control, nor each element of every category, is required to determine that an employment relationship exists.~~

~~a. Behavioral control is whether the business has a right to direct and control how the worker does the task for which the worker is hired. Evidence of behavioral control includes whether the worker is subject to the business' instructions about when, where, and how to work. The key consideration is whether the business has retained the right to control the details of a workers' performance or instead has given up that right.~~

~~b. Financial control is whether the business has a right to control the business aspects of a worker's job.~~

a. The individual holds himself or herself out to be in business for himself or herself; examples of facts supporting this include, but are not limited to:

1. The individual possesses a business license and/or any other license, permit or other certification required by federal, state and local authorities of businesses engaging in the type of work that is being performed by the individual;

2. The individual has entered into, or regularly enters into, verbal or written contracts with the persons and/or entities for whom the work is being performed, which have terms and conditions consistent with the other criteria stated in this subsection; and

3. The individual regularly solicits business from different persons or entities to perform for compensation the type of work that is being performed by the individual;

b. The individual has control over the time when the work is being performed, and the individual's work schedule is not dictated by the person or entity for whom the work is performed: *Provided*, That this criterion does not prohibit the person or entity for whom the work is performed from reaching agreement with the individual as to completion schedule, range of work hours, and maximum number of work hours to be provided by the individual, and, in the case of entertainment, the time such entertainment is to be presented;

c. The individual has control and discretion over the means and manner of performance of the work being performed by the individual and in achieving the result of the work; in other words, the individual is not being supervised by the person or entity for whom the work is

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performed on an ongoing basis, but rather, the individual is given a description and expectation of the work to be performed at the outset of the retention of the individuals' services, and then is expected to perform the services contracted for without any ongoing supervision: *Provided*, That the mere fact that a person or entity for whom the work is being performed checks on the status of the work from time to time does not constitute supervision on an ongoing basis;

d. The individual is not required at any time to work exclusively for the person or entity for whom the work is performed; and

e. If the use of equipment is required to perform the work, the individual provides the most significant equipment required to perform the job. Some examples would be:

1. An independently contracted truck driver must use his or her own truck and trailer;

2. An independently contracted taxi cab driver must use his or her own vehicle;

3. An independently contracted timbering worker must use his or her own timbering equipment.

6.3. Elections to not provide coverage. Elections to not provide coverage to certain individuals, such as partners of a partnership, sole proprietors, members and certain investors in limited liability companies or certain corporate officers, are governed by the provisions of W. Va. Code §§23-2-1(g) and 31B-12-1207.

a. Certain corporate officers and all members of a corporation's board of directors may be elected out of coverage by an employer. A corporate officer or member of a corporate board of directors elected out of coverage by an employer shall not be entitled to the benefits of the Workers' Compensation Act as provided in chapter 23 of the West Virginia Code.

1. The employers' election out of coverage of officers of a corporation is limited to four (4) principal officers (a president, a vice president, a secretary, and a treasurer) for the employer: (1) president; (2) vice-president; (3) secretary; and (4) treasurer. The four (4) principal officers must be elected or appointed by the corporation's board of directors as prescribed by the corporate bylaws. The employer is allowed to elect these four (4) officers out of coverage even though their activities consist of work that is ordinarily performed by an officer and work that is ordinarily performed by a worker, an administrator or an other employee who is not an officer. An officer who performs both types of activities (officer/worker, administrator, or other ~~worker~~

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employee who is not an officer) is deemed to be working in a "dual capacity."

2. ~~"Other officers" and "assistant officers" may only be elected out of coverage if they are engaged in activities exclusive to their function as a corporate officer. No other officer or assistant officer other than the four (4) principal officers stated in paragraph 1 of this subdivision may be elected out of coverage if they are engaged in a dual capacity of having duties and responsibilities for work ordinarily performed by an officer and also having duties and responsibilities for work ordinarily performed by a worker, administrator or employee who is not an officer.~~

3. Dual capacity is determined by the duties of the officer/employee. For an officer other than the four (4) principal officers stated in paragraph 1 of this subdivision to be eligible to be elected out of coverage, that officer cannot have duties and perform work that also would ordinarily be done by a worker, administrator or other employee who is not an officer. It is the employer's duty burden to show that work duties performed by ~~other~~ officers or assistant officers other than the four (4) principal officers are not dual capacity activities and that the work could only be performed by an officer of a corporation. Examples of such showings are a vice president within a corporation (not the one vice president allowed to be elected out of coverage as one of the four (4) principle officers) ~~that who~~ only attends board meetings and ~~the~~ an assistant secretary whose only job is to affix the corporate seal to corporate papers.

4. Members of corporate boards of directors may be elected out of coverage by an employer, regardless of whether the member of the board of directors works in a dual capacity. It is the employer's duty burden to show that the individual elected out of coverage is, in fact, a member of the board of directors and is, in fact, vested with the authority to manage the affairs of the corporation as a member of the employer's board of directors. Members of corporate boards of directors who do not receive "gross wages" from the employer for their activities are not "employees" within the meaning of ~~the Workers' Compensation Act chapter twenty-three of the West Virginia Code~~ and are not entitled to the benefits of the Act chapter twenty-three of the West Virginia Code.

b. Certain members of a limited liability company may be elected out of coverage by an employer. "Limited liability companies" include those entities created pursuant to the "Uniform Limited Liability Company Act" of ~~Chapter 31B chapter thirty-one b of the Code of West Virginia Code~~. These entities consist of all forms of limited liability companies, including, but not limited to, manager-managed limited liability companies, member-managed limited liability companies, foreign limited liability companies and professional limited liability companies.

1. Limited liability companies ~~that may elect not to include as an "employee"~~ for purposes of workers' compensation coverage a total of not more than four (4) persons. Each of

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the persons elected out of coverage by the employer is required to be acting in the capacity of a manager, officer or member of the limited liability company.

~~2. All covered members of limited liability companies which are treated as partnerships for federal income tax purposes shall be subject to the calculation of premiums on the members as provided for partners in a partnership in W. Va. Code §23-2-1b.~~

6.4. Manner of notification. In the event of an election under W. Va. Code §23-2-1(g) and subsection 6.3 of this rule section, the employer shall provide to the private carrier written notice naming the positions not to be covered and the names and social security numbers of the persons individuals occupying those positions, and shall not include such "~~employee's~~" individuals' gross wages for premium purposes in future payroll reports. Such partner(s), member/manager(s), proprietor(s) or corporate or executive officer(s) as named in the notification shall not be deemed an employee within the meaning of the Act chapter twenty-three of the West Virginia Code after such notice has been served.

a. Elections not to be covered made under subsection 6.3 of this rule section are effective for the next policy period after the written notification in this subsection is received by the private carrier and each policy period thereafter with the same private carrier without subsequent election written notification.

b. Elections not to be covered are valid only for the ~~persons~~ individuals named in the written notice ~~to the commission provided for in this subsection~~. Such an election is not valid for any ~~person individual~~ who may later hold the same position, office or title until an amendment to the election is made in accordance with this rule.

c. Amendments to a written notification of an election may be made only for the purpose of:

1. Changing the named person for any office or position previously reported on the election; or

2. Making an election for persons who were not previously employed as a sole proprietor, partner, officer, or member of the board of directors on the date the election was made; or

3. Making such election upon changing private carriers: Provided, That an employer must disclose the written notification, in its entirety, to the new private carrier prior to the effective date of the insurance policy; or

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4. Adding a person who has previously elected not to be covered under the provisions of subsection 6.3 of this ~~rule~~ section if the private carrier receives written notification sixty (60) days prior to the coverage period in which coverage is sought. If written notification is not received by the private carrier sixty (60) days prior to the coverage period (~~fiscal year July 1 through June 30~~) in which coverage is sought, then coverage shall not be extended to such person requesting coverage beginning that coverage period, but shall instead be extended to the following coverage period. The written notification shall clearly identify the coverage period in which coverage is sought to begin.

6.5. Owners and officers; Coverage denials when the employer is ~~delinquent or~~ in default.

a. Employers ~~who that are required, but fail to subscribe for~~ maintain West Virginia workers' compensation coverage shall not be afforded coverage for ~~its such employers' partners, the members, proprietor or its corporate or executive officers, nor shall coverage or benefits be afforded through the uninsured fund or any other fund of the insurance commissioner to any "employee" individual for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or certain members of a limited liability company.~~

b. Employers who are in ~~default or in~~ Old Fund, Uninsured Employers' Fund or policy default ~~of their workers' compensation obligations~~ shall not be afforded workers' compensation coverage for ~~its such employers' partners, the members, proprietor or its corporate or executive officers, nor shall coverage or benefits be afforded through the uninsured fund or any other fund of the insurance commissioner to any "employee" individuals for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or members of a limited liability company.~~

1. Coverage for the ~~"employees"~~ individuals specified in this ~~provision subsection~~ shall not be afforded if the employer is in ~~default~~ Old Fund, Uninsured Employers' Fund or in policy default on the date of injury, and this exclusion will continue for the life of that injury. For example, if, at some time after the date of injury, the employer cures its default status, ~~the "employee" an individual specified in this subsection that incurs an injury on a date while the employer was in default status nevertheless will not be covered for the injury that occurred during the period of default or delinquency and benefits will never be payable for that injury.~~

2. Benefits paid during periods of ~~default~~ Old Fund, Uninsured Fund or policy default for ~~"employees"~~ individuals denied coverage under this ~~provision subsection~~ shall be considered overpayments.

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~~3. When coverage for an injury is denied to an "employee" as a result of the employer's default or policy default, the injured "employee" may only contest the determination through the provisions of 85CSR7, "Rules for Selected Hearings," and the provisions of W. Va. Code §23-2-17. Until the conclusion of the W. Va. Code §23-2-17 process and the determination of whether the "employee" is afforded coverage, action in the claim will be held in abeyance.~~

~~6.6. Employment activities within and outside state borders; reporting.~~

~~a. The entire gross wages of employees, whose contracts of hire have been consummated within the borders of West Virginia, whose employment involves activities both within and without the borders of West Virginia, and where the supervising office of the employer is located in West Virginia, shall be included in the payroll report.~~

~~b. The gross wages of employees of other than West Virginia employers, who have entered into a contract of employment outside of West Virginia to perform transitory services in interstate commerce only, both within and outside the boundaries of West Virginia, shall not be included in the payroll report.~~

~~c. The office of the insurance commissioner respects the extra-territorial right of the workers' compensation insurance coverage of an out of state employer for his regular employees, whose contracts of hire have been consummated in some state other than West Virginia, while performing work in the state of West Virginia for a temporary period not to exceed ninety working (90) days in any three hundred sixty-five day period.~~

~~1. Employees whose contracts of hire are consummated at a job site in West Virginia or employees who have been hired to work specifically in West Virginia must be protected for workers' compensation insurance in accordance with the provisions of W. Va. Code §23-1-1 et seq.~~

~~d. Where there is a conflict with respect to the application of the workers' compensation law, the provisions of W. Va. Code §23-2-1e, apply. The employer requesting coverage under such provisions shall supply the names and social security numbers of each employee sought to be covered under such provisions to the office of the insurance commissioner.~~

~~e. Workers' compensation coverage for temporary or transitory employment activities outside the State of West Virginia extends only to the time limit as defined and determined by the requirements of coverage of such other state or other jurisdiction.~~

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6.6. Duty to report all payroll.

a. All employers have a duty to report the entire payroll of all employees to their private carrier.

b. The private carrier has an absolute right to make its own initial decision regarding the determination of all issues relevant to the classification of employees, rates and payroll: *Provided*, That any employer that disagrees with the decision made by its private carrier as described in this subdivision and is not able to reasonably resolve the dispute with the private carrier is permitted to file a protest with the insurance commissioner's designated rating organization for workers' compensation. All private carriers issuing final decisions to insured employers on matters as discussed in this subdivision shall provide clear instructions to the insured employer regarding the procedure for filing a protest to the private carriers' decision.

c. Nothing in this subsection shall be construed to permit an employer to deviate from the procedures set forth in subsection 6.4 of this section regarding elections not to provide coverage to certain individuals.

6.7. Limited partner. A "limited partner" as defined and provided by the Uniform Limited Partnership Act (W. Va. Code §47-9-1 et seq.) is not an employee of an employer which is a limited partnership subject to the mandatory or elective provisions of the Aet chapter twenty-three of the West Virginia Code, unless that person is employed in the service of the limited partnership for the purpose of carrying on the industry, business, service or work in which it is engaged.

6.8. Investors. A person who is solely an investor and who does not participate in the direction, administration, or control of a business or venture and its activities or investments is not an employee of an employer subject to the mandatory or elective provisions of the Aet chapter twenty-three of the West Virginia Code, unless that person is employed in the service of the business or venture for the purpose of carrying on the industry, business, service or work in which it is engaged.

§85-8-7. Extraterritorial Coverage and Related Issues.

7.1. Extraterritorial employees working in West Virginia on a temporary basis. Extraterritorial employees performing work in the State of West Virginia on a temporary basis (i.e., for a period not exceeding ninety (90) working days in any three hundred and sixty-five (365) day period) are not required to be covered with West Virginia workers' compensation coverage. If an extraterritorial employee is injured while working in this State on a temporary basis, the extraterritorial employee's exclusive workers' compensation remedy is under the laws of the state to which the extraterritorial employee is subject.

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7.2. Extraterritorial employees working in West Virginia on a non-temporary basis. Extraterritorial employees who perform work in the State of West Virginia on a non-temporary basis (i.e., for a period exceeding ninety (90) working days in any three hundred and sixty-five (365) day period) and are not otherwise exempt from West Virginia's workers' compensation laws must be covered with West Virginia workers' compensation coverage unless they enter into an agreement with their employer as described under subsection 7.4 of this section. An employer of extraterritorial employees has a duty to immediately advise its West Virginia private carrier when it reasonably believes it will be employing extraterritorial employees in the State of West Virginia on a non-temporary basis, so that premium can be adjusted accordingly.

7.3. Employment by a West Virginia Employer outside of the State of West Virginia. Pursuant to West Virginia Code §23-2-1(b)(3) and subdivision c, subsection 4.3 of this rule, an employer that is otherwise subject to the provisions of chapter twenty-three of the West Virginia Code does not have to provide West Virginia workers' compensation coverage for employees who perform work for the employer in a state other than the State of West Virginia on a non-temporary basis (i.e., for a period exceeding ninety (90) working days in any three hundred and sixty-five (365) day period): *Provided*, That the employer must provide West Virginia workers' compensation coverage for any employee working in the State of West Virginia on a non-temporary basis (i.e., for a period exceeding ninety (90) working days in any three hundred and sixty-five (365) day period) unless the employee has entered into an extraterritorial agreement as described in subsection 7.4 of this section.

7.4. Extraterritorial agreements to be covered in a state other than West Virginia. An employer and an extraterritorial employee who are both subject to the workers' compensation laws of a state other than West Virginia shall always be entitled to enter into a written agreement in which the employer and employee both agree to be bound by the laws of the other state: *Provided*, That any extraterritorial employee entering into such an agreement must physically work for the employer entering into such agreement outside of the State of West Virginia for a period of no less than ninety (90) working days in any three hundred and sixty-five (365) day period, and the failure of this circumstance being met shall deem any agreement contemplated under this section as being void from its beginning: *Provided further*, That when such an agreement is entered into by an employer carrying West Virginia workers' compensation coverage, the agreement shall immediately be provided to the employers' West Virginia carrier so that premium can be adjusted accordingly. If an employee who has entered into an extraterritorial agreement as described in this subsection is injured while working in this State, the extraterritorial employee's exclusive workers' compensation remedy is under the laws of the state to which the employee has agreed to be bound.

7.5. Agreements to be covered in West Virginia. With the consent of its West Virginia

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carrier, an employee and employer may agree to be bound by the workers' compensation laws of West Virginia, regardless of where and for what amount of time the work is being performed: Provided, That this subsection shall not be construed in any manner to effect the workers' compensation insurance requirements of a state other than West Virginia.

~~§85-8-7~~ 85-8-8. The Workers' Compensation Insurance Policy.

~~7.1~~ 8.1. Each policy for West Virginia workers' compensation insurance shall comply with ~~chapter chapters twenty-three and thirty-three of the West Virginia Code unless a waiver of a specific provision of Chapter 33 of the Code is secured by a private carrier from the West Virginia insurance commissioner.~~

~~7.2~~ 8.2. Each West Virginia workers' compensation insurance policy shall provide coverage and benefit payments consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder for any bodily injury with a date of injury within the policy period and for all benefits types thereafter awarded, including all dependent benefits and related death benefits provided for under chapter ~~23~~ twenty-three of the West Virginia Code. Each workers' compensation policy shall also provide coverage for any occupational disease or occupational pneumoconiosis award with a date of last exposure within the policy period, including all dependent benefits and related death benefits provided for under chapter ~~23~~ twenty-three of the West Virginia Code. Additionally, with regard to claims which can be allocated under the West Virginia Code, each policy shall be deemed to provide coverage for all payment obligations.

8.3. All dependents and death benefits under chapter twenty-three of the West Virginia Code for claims in which the claimant is deceased on or after January 1, 2006 shall, for all purposes, be deemed derivative of the deceased claimant's original date of injury or last exposure, and under no circumstances shall such dependent or death benefit claims be deemed to be a new or separate claims.

~~7.3~~ 8.4. Upon issuance of a policy, each private carrier is deemed to have reserved its right to select, retain, and compensate legal counsel to defend any claims decisions made by the private carrier which are protested under article five, chapter twenty-three of the West Virginia Code and to settle said claims in accordance with all applicable statutes and rules, and regulations, and to elect not to defend a protest.

~~7.4. The termination of a policy for failure to pay the initial premium shall be deemed effective as of the first date of the policy.~~

~~7.5~~ 8.5. Each private carrier shall assess its policyholders any applicable deficit reduction

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surcharge, or insurance commissioner regulatory surcharge, Uninsured Employers' Fund assessment, and/or Private Carrier Guaranty Fund assessment and remit as directed by the insurance commissioner. The obligation of the private carrier is limited solely to the collection and remittance of the proper percentage amount of the surcharges and assessments, as established by the insurance commissioner. The private carrier has no obligation to the insurance commissioner or to the Debt Reduction Fund to make up any difference in the amount projected to be collected as a result of the surcharge percentage set by the insurance commissioner and the amount actually collected for surcharge amounts that are not collected as a result of the insured employer's failure to pay their premium.

§85-8-9. Notification of Coverage, Change and Cancellation.

9.1. Upon cancellation or non-renewal of a West Virginia workers' compensation policy, every private carrier is required to notify both the insurance commissioner and its designated rating organization of said issuance, cancellation or non-renewal within three (3) business days of the effective date of cancellation. Such notification shall be on forms and/or other procedures developed by the insurance commissioner.

9.2. Upon issuance or renewal of a West Virginia workers' compensation policy, every private carrier is required to notify both the insurance commissioner and its designated rating organization of said issuance within ten (10) calendar days of the effective date of coverage. Such notification shall be on forms and/or other procedures developed by the insurance commissioner.

9.3. A private carrier may cancel a workers' compensation policy for failure of the policyholder to timely remit premium payments upon the issuance of advance written notification to the policyholder of no less than fifteen (15) calendar days. The effective date of cancellation shall be no earlier than the expiration of the fifteen (15) days of advance written notice.

9.4. Beginning July 1, 2008, private carriers may cancel or decline to renew a workers' compensation policy for reasons other than non-payment of premiums, consistent with the terms of the policy, upon the issuance of advance written notification to the policyholder of no less than sixty (60) calendar days. The effective date of cancellation shall be no earlier than the expiration of the sixty (60) days of advance written notice.

9.5. Advance written notification of cancellation or non-renewal to the insured by private carriers must be forwarded to the insured by certified mail, return receipt requested, and must state with specificity the reason for the cancellation or non-renewal and the specific effective date of cancellation or non-renewal.

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§85-8-10. Rating Organizations.

10.1. Consistent with the provisions of W. Va. Code §23-2C-18a(b), the insurance commissioner may designate a workers' compensation rating organization that has been licensed in accordance with W. Va. Code §33-20-6 to assist the commissioner with carrying out the commissioner's regulatory duties in regard to the workers' compensation insurance market.

10.2. Every workers' compensation private carrier shall: (1) record and report its workers' compensation experience to the designated rating organization as set forth in the uniform statistical plan submitted by the designated rating organization and approved by the insurance commissioner; and (2) adhere to the uniform classification plan and uniform experience rating plan developed by the designated rating organization and approved by the commissioner.

10.3. Upon the insurance commissioner's designation of a workers' compensation rating organization to be utilized by all insurers, the loss cost, rule, or form filings made by the designated rating organization shall be utilized by every member of the rating organization without modification and as of the effective date of the relevant rating organization filing unless the member specifically makes a request in writing to the insurance commissioner to deviate from the same and receives approval to do so, or unless the member makes an exception basis filing pursuant to W. Va. Code §33-6-8 or §33-20-4.

§85-8-8 85-8-11. Ratemaking.

8.1. Fiscal Year 2007.

~~a. For the fiscal year beginning the first day of July, 2006, the West Virginia Employers' Mutual Insurance Company shall determine premium rates based on the actuarially determined base rates for the fiscal year. The base rates shall be calculated by the Mutual and submitted for approval by the insurance commissioner.~~

~~b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.~~

~~c. In addition to said loss cost base rates, the premium rates charged by the Mutual may also include (1) a reasonable provision for expenses related to the administration costs of the~~

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~~Mutual, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the Mutual's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to approval by the insurance commissioner.~~

~~d. The Mutual may offer premium credits and debits through schedule rating plans which are consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the Mutual as to the risk and/or exposure characteristics of the insured; (2) the Mutual's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss-limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.~~

~~e. The Mutual may adopt tiered rating, scheduled rating plans, experience rating plans, deductible plans, retrospectively rated plans and other similar rating plans as it deems appropriate. All such rating plans shall be subject to the filing requirements of Chapter 33 of the Code that are applicable to commercial insurance lines. Under a deductible plan, an insured that fails to make a claim payment within the deductible shall be deemed uninsured for said claim and shall be subject to all penalties and consequences of being uninsured as set forth in Chapter twenty-three of the West Virginia Code.~~

~~f. In addition to the premium charges determined, the Mutual shall charge (1) all deficit reduction surcharges as provided for in chapter twenty three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.~~

~~8.2. Fiscal Year 2008.~~

~~a. For the fiscal year beginning the first day of July, 2007, the West Virginia Employers' Mutual Insurance Company shall determine premium rates based on the actuarially determined base rates for the fiscal year. The base rates shall be calculated by the Mutual and submitted for approval by the insurance commissioner.~~

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~~b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.~~

~~c. In addition to said loss cost base rates, the premium rates charged by the Mutual may also include (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the Mutual's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to approval by the insurance commissioner.~~

~~d. The Mutual may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the W. Va. Code § 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the Mutual as to the risk and/or exposure characteristics of the insured; (2) the Mutual's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.~~

~~e. The Mutual may adopt tiered rating, scheduled rating plans, experience rating plans, deductible plans, retrospectively rated plans and other similar rating plans as it deems appropriate. All such rating plans shall be subject to the filing requirements of Chapter 33 of the Code that are applicable to commercial insurance lines. Under a deductible plan, an insured that fails to make a claim payment within the deductible shall be deemed uninsured for said claim and shall be subject to all penalties and consequences of being uninsured as set forth in Chapter twenty-three of the West Virginia Code.~~

~~f. In addition to the premium charges determined, the Mutual shall charge (1) all deficit reduction surcharges as provided for in chapter twenty three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance~~

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8.3. Fiscal Year 2009.

a. ~~11.1. For the Beginning on the~~ the fiscal year beginning commencing the first day of July, 2008, all private carriers shall determine their premium base rates based on from the actuarially determined base rates loss costs filed by and approved for the designated rating organization. All private carriers shall additionally adhere to the rating rules filed by and approved for the designated rating organization unless the private carrier makes an approved filing permitting deviation from the same. The base rate shall be either 1) the base rate filed by a licensed rating organization and approved by the insurance commissioner; or 2) the base rate promulgated by the insurance commissioner; Provided that the private carrier may file for approval of a deviation of the base rate by classification in an amount not to exceed five percent (5%) of the approved or promulgated base rate.

b. ~~The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.~~

e ~~11.2. In addition to said loss cost base rates, the premium~~ The base rates charged by the private carriers may also include: (1) a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments, surcharges and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss costs base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the private carrier's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to approval by the insurance commissioner the file and use provisions of W. Va. Code §33-20-4. Any filing made to establish or amend a loss cost multiplier which accounts for expenses shall be deemed effective until such time as the private carrier makes another filing to adjust the same.

d ~~11.3. Private carriers may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section W. Va. Code §23-2C-18(c). All such rating plans~~

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shall be subject to the filing requirements of chapter thirty-three of the West Virginia Code that are applicable to other commercial insurance lines. Any credit or debit applied to the insured shall reasonably reflect: (1) appropriate judgment of the private carrier as to the risk and/or exposure characteristics of the insured; (2) the private carrier's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. ~~All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.~~

~~e 11.4. Private carriers may adopt tiered rating, scheduled rating plans, experience rating plans, deductible plans, retrospectively rated plans and other similar rating plans as it deems appropriate. All such rating plans shall be subject to the filing requirements of Chapter 33 of the Code that are applicable to commercial insurance lines. Deductible plans. Deductible workers' compensation plans are permitted subject to the approval of the insurance commissioner, including the insurance commissioner's approval of the underwriting standards used for issuing such plans. Under a deductible plan, an insured employer that fails to make a claim payment within the deductible required deductible payment shall be deemed uninsured for said claim and shall be subject to all penalties and consequences of being uninsured as set forth in Chapter twenty-three of the West Virginia Code to be in default of the policy premium, but such default shall not affect the payment of all benefits in otherwise compensable claims made under a policy inclusive of a deductible plan. Under all deductible plans, the private carrier shall remain responsible for payment of claims benefits and administration and defense of claims.~~

~~8.4. Fiscal Year 2010.~~

~~a. For the fiscal year beginning the first day of July, 2009, all private carriers shall determine their premium rates based on the actuarially determined base rates. The base rate shall be either 1) the base rate filed by a licensed rating organization and approved by the insurance commissioner; or 2) the base rate promulgated by the insurance commissioner; Provided that the private carrier may file for approval of a deviation of the base rate by classification in an amount not to exceed ten percent (10%) of the approved or promulgated base rate.~~

~~b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.~~

~~c. In addition to said loss cost base rates, the premium rates charged by the private~~

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carriers may also include (1) a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the private carrier's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to approval by the insurance commissioner.

d. ~~Private carriers may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the private carrier as to the risk and/or exposure characteristics of the insured; (2) the private carrier's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.~~

e. ~~Private carriers may adopt tiered rating, scheduled rating plans, experience rating plans, deductible plans, retrospectively rated plans and other similar rating plans as it deems appropriate. All such rating plans shall be subject to the filing requirements of Chapter 33 of the Code that are applicable to commercial insurance lines. Under a deductible plan, an insured that fails to make a claim payment within the deductible shall be deemed uninsured for said claim and shall be subject to all penalties and consequences of being uninsured as set forth in Chapter twenty-three of the West Virginia Code.~~

§ 11.5. In addition to the premium charges determined, private carriers shall charge (1) all deficit reduction Deficit Reduction Fund surcharges as provided for in chapter twenty-three of the West Virginia Code and W. Va. Code St. R. §85-6-1 et seq.; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry as provided for in chapter twenty-three of the West Virginia Code and W. Va. Code St. R. §85-6-1 et seq.; and (3) all assessments made by the insurance commissioner for the funding of the Uninsured Employers' Fund or the Private Carrier Guaranty Fund as defined in W. Va. Code §23-2C-1 et seq. All collected surcharges shall be remitted as directed by the insurance commissioner.

§85-8-9. Rating Organizations.

9.1. ~~All private carriers may become a member of an advisory organization and/or a rating~~

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organization as provided for in Chapter thirty-three of the West Virginia Code to perform said duties set forth in Chapter thirty-three of the West Virginia Code; Provided that said advisory organization and/or rating organization has otherwise complied with Chapter thirty-three of the West Virginia Code.

~~9.2. The Insurance Commissioner may designate a workers' compensation rating organization that has been licensed in accordance with West Virginia Code §33-20-6 to assist the commissioner in gathering, compiling, and reporting relevant statistical information and data. Each workers' compensation insurer shall record and report its workers' compensation experience to the designated rating organization as set forth in the uniform statistical plan submitted by the designated rating organization and approved by the Insurance Commissioner. The designated worker's compensation rating organization may develop (i) a uniform policy form (ii) statistical plans, (iii) experience rating plans, (iv) classification systems and other rating plans for use by its members and subscribers in the provision of workers' compensation insurance and the reporting of the experience of this line of insurance. The rating organization may also develop manual rules for the recording and reporting of experience data of members pursuant to its uniform plans and systems. Such uniform plans, systems, and rules shall be filed with the insurance commissioner by the rating organization pursuant to the same process that applies to other commercial lines prior to their use by members of the rating organization.~~

~~9.3. Each workers' compensation insurer must be a member or subscriber of the designated workers' compensation rating organization. Every workers' compensation insurer shall adhere to policy forms, rules, uniform classification system and uniform experience and retrospective and other rating plans that have been filed with the commissioner by such designated rating organization and approved by the commissioner.~~

§85-8-10 12. Severability.

If any provision of these rules or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of these rules which can be given effect without the invalid provisions or application and to this end the provisions of these rules are declared to be severable.