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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Workers' Compensation Commission TITLE NUMBER: 85

RULE TYPE: Exempt Legislative CITE AUTHORITY: W. Va. Code §§23-1-1a(j)(3)

AMENDMENT TO AN EXISTING RULE: YES X NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 31

TITLE OF RULE BEING AMENDED: Employee Leasing

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: ____

TITLE OF RULE BEING PROPOSED: ____

DATE OF PUBLIC HEARING: August 16, 2005 TIME: 1:00 p.m.

LOCATION OF PUBLIC HEARING: Rooms 207-209
Charleston Civic Center
Charleston, West Virginia

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

T.J. Obrokta, General Counsel
Executive Offices
Workers' Compensation Commission
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

Fax # (304) 926-5372

The Department requests 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.

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Authorized Signature

Insuring a Working West Virginia
Workers' Compensation Commission
Gregory A. Burton, Executive Director

Office of General Counsel
4700 MacCorkle Avenue, S. E.
Charleston, West Virginia 25304
Phone Number (304) 926-3423
Fax Number (304) 926-5441

July 13, 2005

The Honorable Betty Ireland
Secretary of State
State Capitol Complex
Building 1, Room W-157
Charleston, West Virginia 25305

Re: Proposed Rule
Title 85, Series 31
"Employee Leasing"

Dear Secretary Ireland:

Please consider this letter to be my written approval for the filing of the above-noted proposed Rule.

Pursuant to Senate Bill 2013, Second Extraordinary Session, 2003, the Workers' Compensation Commission is established as a government entity separate from the Bureau of Employment Programs. The Board of Managers of the Workers' Compensation Commission has approved the enclosed 85 C.S.R. 31 for filing as a proposed rule of the Workers' Compensation Commission.

Thank you very much for your assistance in this matter.

Very truly yours,

Gregory A. Burton
Executive Director

Enclosure

FISCAL NOTE FOR PROPOSED LEGISLATIVE RULES

Rule Title: Title 85 Series 31: Employee Leasing

Type of Rule: X Legislative Exempt ___Interpretive ___Procedural

Agency: Workers' Compensation Commission

Address: 4700 MacCorkle Ave. S.E.

Charleston, WV 25304

1. Effect of Proposed Rule

	Annual		Fiscal Year		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	0	0	0	N/A	N/A
PERSONAL SERVICES	0	0	0	N/A	N/A
CURRENT EXPENSE	0	0	0	N/A	N/A
REPAIRS & ALTERNATIONS	0	0	0	N/A	N/A
EQUIPMENT	0	0	0	N/A	N/A
OTHER: Benefit related payments	0	0	0	N/A	N/A

2. Explanation of above estimates:

Proposed changes since the last filing for this rule address the responsibilities of client employers and employee leasing firms related to employee leasing arrangements and their workers' compensation coverage together with specific requirements established by the Workers' Compensation Commission (commission), private carriers, and/or the Insurance Commissioner, whichever is applicable, related to employee leasing arrangements and workers' compensation coverage. The above estimates are based on the assumption that the rule changes become effective in the current fiscal year (FY'06). There should be no significant change in the estimated costs associated with the commission as a result of employee leasing arrangements thru 12/31/05. Subject to the governor issuing the proclamation set forth in chapter twenty-three, article 2C of the Code of West Virginia that terminates the Workers' Compensation Commission, after December 31, 2005, any registration requirements for employee leasing firms will be under the authority of the Insurance Commission.

3. Objectives of this rule:

This rule establishes and defines the guidelines and requirements established for workers compensation coverage mandated as a result of employee leasing arrangements.

Rule Title: Title 85 Series 31: Employee Leasing

4. **Explanation of Overall Economic Impact of Proposed Rule.**

   A. **Economic Impact on State Government.**

      It is expected that the there will be no direct economic impact from the rule changes.

   B. **Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.**

      It is expected that there will be no impact from the rule changes.

   C. **Economic Impact on Citizens/Public at Large.**

      The rule changes will not have a direct economic impact on the citizens of West Virginia.

Date: 7/13/05

Signature of Agency Head or Authorized Representative

Gregory A. Burton
Executive Director, Workers' Compensation Commission

SUMMARY OF PROPOSED RULE
STATEMENT OF CIRCUMSTANCES
TITLE 85, SERIES 31
Employee Leasing

Pursuant to Senate Bill 1004, First Special Session, 2005, the Workers' Compensation Commission may terminate. Thereafter, Workers' Compensation insurance in West Virginia will be provided through the successor to the Commission and other private insurance carriers.

This rule is amended to address the termination of the Commission and to transition certain activities to Office of the Insurance Commissioner.

The provisions of this rule create new options under which a private carrier may write workers' compensation coverage to employee leasing firms. The overall purpose of the rule is to ensure that loss experience and payroll information is captured for all of the client employer's leased and direct hire workers and that the employees of the employee leasing firms are classified in accordance with the classification of the client employer for whom services are provided.

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION ~~DIVISION~~ COMMISSION

SERIES 31
EMPLOYEE LEASING

§85-31-1. General.

1.1. Scope. -- This exempt legislative rule provides for the adoption and implementation of rules to regulate employee leasing arrangements by employee leasing firms.

1.2. Authority. ~~-- W. Va. Code, §§21A-2-6(1) & 6(2); 21A-3-7(b) & -7(c); 23-1-1; and 23-2-4. Pursuant to W. Va. Code, §21A-3-7(c), rules adopted by the compensation programs performance council and the commissioner 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. Pursuant to enrolled committee substitute for house bill 4030, regular session, 1994, the department of commerce, labor and environmental resources was abolished. Pursuant to that same bill and to executive order no. 5-94 by the governor, the commissioner of the bureau of employment programs is empowered to promulgate rules and regulations without the consent or approval of a departmental secretary.~~ W.Va. Code §§23-1-1a. Pursuant to West Virginia Code §23-1-1a(j)(3), rules adopted by the Board of Managers and the Commission are not subject to legislative approval as would otherwise be required under West Virginia Code §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. ~~-- July 20, 2000~~.

1.4. Effective Date. -- ~~September 1, 2000~~.

§85-31-2. Purpose of Rule.

The purpose of this rule is to regulate, for workers' compensation purposes, employee leasing firms engaged in employee leasing arrangements and to provide a method to accurately calculate and assess the proper workers' compensation premium tax attributable to leased workers. The rule provides and is designed so that incurred experience is used in calculating loss experience to ensure that premium tax is paid commensurate with exposure and anticipated claims experience. 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 engages also in providing leased workers in any employee leasing arrangement, but such application of this rule is limited to those engagements.

§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. "Client employer" or "lessee" means an entity whose work force consists of one or more leased workers from an employee leasing firm.

3.2. ~~"Division" means the workers' compensation division within the bureau of employment programs as provided for by W. Va. Code, §§21A-1-4 and 23-1-1, et seq.~~ "Commission" means the Workers' Compensation Commission created pursuant to the provisions of W.Va. Code §23-1-1.

3.3. "Employee leasing arrangement" means an arrangement, under contract or otherwise, expressed or implied, where an employee leasing firm assigns its employees to a client employer and allocates the direction of and control over the leased employees between the leasing firm and the client employer. Employee leasing arrangements include, but are not limited to, full-service employee leasing arrangements and professional-employer-organization employee leasing arrangements. For purposes of this rule, an employee leasing arrangement does not include an assignment of temporary help.

3.4. "Employee leasing firm" or "lessor" means an entity which provides workers to another entity to perform work in furtherance of the industry, service or business of the other entity at the business premises of or at locations designated by the other entity under an employee leasing arrangement.

3.5. "Entity" means and includes, but is not limited to, any person or individual, sole proprietor, firm, partnership, limited partnership, limited liability partnership, professional limited liability partnership, limited liability company, professional limited liability company, joint venture, association, corporation, professional or legal 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.

3.6. "Firm" means and includes any business or other entity.

3.7. "Leased worker" means a person who is employed by an employee leasing firm and is working for a client employer under an employee leasing arrangement.

3.8. "Regular or direct employee" means an employee who is not a leased worker.

3.9. "Temporary help agency" means an entity or any affiliate whose principal business is to provide temporary workers to client employers and which hires its own employees and assigns them to client employers to support or supplement the client employer's work force in special situations, such as employee absences, temporary skill shortages or seasonal workloads.

3.10. "Temporary worker" means a person employed by a temporary help agency to perform work for a client employer to support or supplement the client employer's work force in special situations, such as employee absences, temporary skill shortages or seasonal workloads, where the client employer exercises no control over the hiring or assignment of the person provided by the temporary help agency.

3.11. "Workers' compensation act" or "act" means the West Virginia workers' compensation act at chapter 23 of the West Virginia Code.

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

3.13. "Private carrier" means any insurer, including the successor to the Commission, authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.14. "Contracted services" means that the labor provided is outside the client employer's general business operation and that the labor provided is the primary or only service provided by the contractor. For example, the provision of security guards to a manufacturing operation would constitute "contracted services."

§85-31-4. Application.

4.1. An employee leasing firm which provides leased workers who are persons employed in the service of an employer within the meaning of and subject to the workers' compensation act in this state, as provided in sections 23-2-1, -1a and other provisions of the act, to another business or businesses or another entity or entities, that is, to any client employer, pursuant to any employee leasing arrangement shall make special application (hereafter "application" with the workers' compensation ~~division~~ commission.

4.2. The application shall require such information as is needed to carry out the purposes, provisions and administration of this rule and shall be made in form, forms or format prescribed by the ~~division~~ commission.

4.3. Any person or entity filing an application required by this rule is required to notify the ~~division~~ commission of any changes in any information provided pursuant to this rule within thirty (30) calendar days of such change.

4.4. Whenever a client employer has not subscribed for coverage under the workers' compensation act because the client employer has no employees who are subject to the act, or for any other reason has not complied with the act, the employee leasing firm, the client employer or the ~~division~~ commission shall make application for a policy account for the client employer so that the provisions of this rule may be effected and administered.

4.5. The ~~division~~ commission shall prescribe such other forms as are necessary to promote the efficient administration of this rule.

~~4.6. Any employee leasing firm which was doing such business which was subject to the workers' compensation act in this state prior to the adoption of this rule shall make special application as an employee leasing firm within thirty (30) calendar days of the effective date of this rule.~~

4.6. Upon termination of the commission, the insurance commissioner may require an employee leasing firm to register as an employee leasing firm with the office of the insurance commissioner and provide such information as is required by the insurance commissioner.

§85-31-5. Reporting.

5.1. The employee leasing firm is responsible for and subject to the reporting and payment requirements of the act, for its employees who are leased to a client employer as well as for its regular employees.

5.2. The employee leasing firm is required to file, in a separate periodic premium tax report for each client employer with which the employee leasing firm had an employee leasing arrangement during the reporting period, in form or format prescribed by the ~~division~~ commission, the following information for the reporting period:

(1) The name, business address and policy number of each client employer;

(2) The total gross wages payroll of the leased workers attributed to each client employer;

(3) The premium tax rate for each client employer;

(4) The calculated premium tax and premium tax deposit payment for each client employer; and,

(5) The name and social security number of each leased worker attributed to each client employer.

5.3. The employee leasing firm is required to file, in a separate premium tax report for itself and its regular employees, the total gross wages payroll attributed to its regular employees; the premium tax rate applicable to its regular employees; and, the calculated premium tax and premium tax deposit payment for its regular employees.

5.4. The employee leasing firm is required to file any other information which may be recognized as needed or required by the ~~division~~ commission to administer this rule.

5.5. The requirement that an employee leasing firm shall file a premium tax report and payment does not change or affect the requirement of the act and of the rules that the client employer shall file a premium tax report and payment for its employees who are not leased workers under this rule.

~~5.6. Any employee leasing firm which is subject to the provisions of this rule because it is engaged in any employee leasing arrangement with any client employer on the effective date of this rule or during the periodic reporting period prior to the first day of the next reporting period following the effective day of this rule, shall be required to file its first periodic report and payment under these provisions for leased workers for the reporting period which begins next after the effective date of this rule.~~

§85-31-6. Classification of Risk; Loss Experience Assignment.

6.1. An employee leasing firm shall be placed into a premium rate risk classification and industrial code pursuant to the provisions of the workers' compensation act and applicable rule~~, 85 C.S.R. 9, risk management~~.

6.2. For ratemaking purposes only, the claims experience and gross wages of the leased workers working for or for the benefit of the client employer shall be charged to the client employer. The methodology for experience rating shall be determined ~~by the compensation programs performance council~~ in accordance with its authority under the law applicable to rate making.

6.2.1. The employee leasing firm will pay premium tax for each client employer based on the client employer's premium tax rate before the application of any credits.

6.2.2. Where there is an employee leasing arrangement between an employee leasing firm and a self-insurer, the premium tax rate for the leased employees will be base rated until enough time has elapsed for them to be experience rated.

6.3. The experience modification factor and premium tax rate of the employee leasing firm will be based on the claims experience and gross wages of the regular or direct employees of the employee leasing firm.

6.4. Either the client employer or the employee leasing firm employer, but not both, may litigate and defend employee injury claims made under the act, according to the terms and conditions of their employee leasing arrangement.

§85-31-7. Notification; No Amendment or Abrogation of Employment Law or Employee Rights.

7.1. The employers are responsible for compliance with the employment laws and tax laws affecting their employment relationships with employees whenever an employment is commenced or terminated so that one may commence or end an arrangement which is regulated partially by this rule. While compliance with those laws should insure that every employee knows who employs him or her, the employer shall further give immediate notice to each affected employee of any employee leasing arrangement in which he or she is employed by the employer. Notification shall be given in writing in form prescribed by the ~~division~~ <u>commission</u> and shall also be posted in a conspicuous place at the chief works of the client employer.

7.2. This rule is not intended to, nor does it, amend or abrogate any employment law or employee right under the law.

§85-31-8. Coal-Workers' Pneumoconiosis Fund.

8.1. A client employer may insure itself for coverage under the coal-workers' pneumoconiosis fund by separate subscription.

8.2. An insured subscriber to the coal-workers' pneumoconiosis fund shall report the gross wages of its insured regular employees and its leased workers, if any, and calculate the subscription premium tax and premium tax deposit due on the periodic reports prescribed by the ~~division~~ <u>commission</u> and shall pay the calculated amount to that fund as provided by the workers' compensation act and the rules.

8.3. The employee leasing firm may, at the request of the insured client employer, be included as an "additional named insured" on the coal-workers' pneumoconiosis fund policy.

<u>**§85-31-9. Transition.**</u>

<u>9.1. Upon termination of the Commission, the relationship between the private carrier, employee leasing firm and the client employer shall be governed in accordance with the terms of the workers' compensation policy issued to the employee leasing firm and any applicable client employers.</u>

<u>9.2. The private carrier may only issue policies that meet the overall purpose of this rule so that incurred experience is used in calculating loss experience to ensure that premium is paid commensurate with exposure and anticipated claims experience.</u>

<u>a. The terms of the agreement shall ensure that loss experience and payroll information is captured for all of the client employer's leased and direct hire workers.</u>

<u>b. The terms of the agreement shall ensure that employees of employee leasing firms are classified in accordance with the classification of the client employer for whom services are provided.</u>

<u>9.3. An employee leasing firm and a client employer in an employee leasing arrangement shall fulfill their statutory responsibility to secure workers' compensation coverage under the workers' compensation act in one of the following ways:</u>

<u>a. The client employer obtains a standard workers' compensation policy from a private carrier on a direct purchase basis, covering all leased and direct hire employees, subject to the same requirements and conditions as if the lessee were the sole employer of its leased employees.</u>

1. "Direct purchase basis" means an arrangement in which all contractual obligations under the insurance policy run directly between the private carrier and the client employer without the involvement of the employee leasing firm.

b. The employee leasing firm purchases insurance for the client employer on a multiple coordinated policy basis in compliance with this rule.

1. "Multiple coordinated policy basis" means an arrangement under which a separate policy is issued to or on behalf of each client employer or group of affiliated client employers but certain payment obligations and policy communications are coordinated through the employee leasing firm.

c. The employee leasing firm purchases a master policy covering the client employer in compliance with this rule.

1. "Master policy basis" means an arrangement under which a single policy issued to the lessor covers more than one lessee. Two or more lessees that are insured under the same policy solely because they are under common ownership are considered a single lessee for purposes of this definition.

d. The employee leasing firm purchases a policy whose reporting and loss experience assignment methodologies are in compliance with sections five and six of this rule.

9.4. A private carrier, who offers coverage to an employee leasing firm, is not required to offer each type of policy option and may offer one or more types of coverage in its discretion.

§85-31-~~9~~ 10. 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.