WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: **W. Va. Workers' Compensation Division**
Bureau of Employment Programs TITLE NUMBER: **85**

CITE AUTHORITY: §§21A-2-6(1) & -6(2); §§21A-3-7(b) & -7(c); §23-1-1; §23-2-4.

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE **X**

CITE STATUTE(s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

§21A-3-7(c), *W. Va. Code*

AMENDMENT TO EXISTING RULE: YES ____ **NO X**

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: **31**

TITLE OF RULE BEING PROPOSED: **EMPLOYEE LEASING**

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS **September 1, 2000**

William F. Vieweg
Authorized Signature

William F. Vieweg, Commissioner,
Chairman, Compensation Programs
Performance Council

$26.60

Cecil H. Underwood
Governor

William F. Vieweg
Commissioner

West Virginia Bureau of Employment Programs
• Job Service/Job Training Programs • Labor Market Information
• Unemployment Compensation • Workers' Compensation
an equal opportunity/affirmative action employer

July 20, 2000

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, West Virginia 25305

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

Dear Secretary Hechler:

Please consider this letter to be my written approval for the final filing of the above-noted procedural rule. On July 20, 2000, the Compensation Programs Performance Council, of which I am its Chairman, adopted this rule and ordered it filed with an effective date thirty days thereafter.

Pursuant to *W. Va. Code*, §21A-3-7(c), the rules adopted by the Compensation Programs Performance Council are not subject to legislative approval as would otherwise be required under *W. Va. Code*, §29A-3-1, *et seq*. 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 of the Governor, the Commissioner of the Bureau of Employment Programs is empowered to promulgate rules without the consent or approval of a department secretary.

Yours truly,

William F. Vieweg, Commissioner,
Chairman, Compensation Programs
Performance Council

RSS:kll

Legal Services Division
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TITLE 85
EXEMPT LEGISLATIVE RULE

WORKERS' COMPENSATION DIVISION
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.

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.*

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*.

§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.

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.

4.3. Any person or entity filing an application required by this rule is required to notify the division 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 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 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.

§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, 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 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 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 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 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.

§85-31-9. 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.

From: Rick Staton <rstaton@mail.wvnet.edu>
To: <RSTEPHEN@WVBEP.ORG>
Date: 4/24/00 10:53AM
Subject: Temp employee rule

The Division currently has authority to identify any misclassifications of employers. Currently P05/9550 class/code is provided for employment agencies. The assignment of a single class code is consistent with the assignment of one classification to other employers. This greatly reduces the administrative burden of both the division and the employer. Correct classification is an issue for everyone. Specific criteria needs to be established for assignment of employers to P05/9550. The client/staffing agency relationship must be a legitimate arms length transaction. The companies involved should not have common ownership or affiliation. The staffing agency must provide placement services to multiple clients. Employers that have been incorrectly assigned P05/9550 should simply be reclassified. The potential for companies to be incorrectly classified is not limited to the P05/9550 classification. Removal of P05/9550 is perhaps a 'knee-jerk' reaction to an improper assignment of P05/9550 on several isolated instances. Assignment criteria in conjunction with the increased frequency of audits will greatly reduce the occurrence of abuse in the P05/9550 classification as well as other classifications where abuse occurs.

I feel that there are several major problems with the proposed rule. The proposed rule is very broad and general in description. It could inadvertently apply to many contracting relationships that should not be affected by this rule. The transfer of liability to client businesses is incorrect. The organization that hires an individual and is responsible for issuing that employees paycheck should be solely responsible for payment of workers compensation premium for that employee. The utilization of the experience modification factor of the client allows the employee leasing organization to operate without any accountability or responsibility in areas of safety, claims management, and litigation of claims, while greatly complicating the rate making process for the Division. All employers should have the responsibility and incentive to maintain a safe workplace.

The rule appears to extend both criminal and civil liability to the client for the delinquency and default of the employee leasing firm and goes far beyond what is allowed in the current statute. This rule would require a change in the statute.

The Joint Judiciary Committee has authorized a study of this issue during interim meetings. The co-chairs of this subcommittee are Senator Kessler and Delegate Amores. The Division and the Compensation Programs Performance Council should delay any action on the regulations/rules until the study is complete.

Sincerely,

W. Richard Staton,

Chairman

Committee on the Judiciary

PROFESSIONAL SERVICES OF AMERICA, INC.

April 24, 2000

Richard S. Stephenson
Bureau of Employment Programs
One Players Club Drive
Charleston, WV 25311

Dear Mr. Stephenson:

Our company has several concerns and questions regarding proposed Series 31 (Employee Leasing and Contracted Operations). I have listed those questions below:

1. In 3.5 within the definition of "employee leasing arrangement" it is stated as follows, "employee leasing arrangements include, but are not limited to, full service employee leasing arrangements, professional employer organization leasing arrangements, long-term temporary arrangements and any other arrangement which involves the allocation of sharing of employment responsibilities among two or more entities. My question is, "Would you please define long-term temporary arrangements?" In addition, what type of documentation would we be required to present to back up whether an employee is a temporary employee as opposed to an employee on a long-term temporary arrangement? Our company feels that long-term temporary arrangement needs to be better defined because this is too broad. There is too much discretion left up to a company to have the ability to put an employee in one category based upon whichever rate is lower. Our suggestion would be, all workers on an assignment be subject to the rate of the applicable client employer. The only workers not subject to this would be the staffing company's administrative employee's. This will resolve the conflict that will occur regarding the definitions of "temporary", "leased worker", and "contract operation worker". Those definitions would be irrelevant under our suggestion.

2. My understanding is that we will continue to have the same Workers Compensation Code of 9550, but we will now have separate reporting for employees if they are leased or a contracted operation worker? Is that correct?

3. In 3.6 within the definition of "employee leasing firm" it is stated, "means an entity or any affiliate whose principal business is to provide 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 or contracted operation arrangement. In 3.13 within the definition of "temporary help agency" it is stated, "means an entity or any affiliate whose principal business is to provide temporary workers, etc.

   The question or argument is what is the definition of principal business? What if your business performs both of these functions?

4. What if an employer that you lease a worker to does not have a policy in West Virginia? How would that fall under your reporting guidelines? Our example is an employee is working from their home. The client employer is based in another state and does not have an office in WV.

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5. My understanding is that for a leased worker or a contracted operation worker the rate that I will pay on these employees is based on the client employer's base rate multiplied by the client employer's e-mode factor. Is that correct?

6. In addition, my understanding is that any on the job injuries for a leased worker or a contracted operation worker will only affect the client employer's e-mode factor. Is that correct?

7. In regards to a workers compensation claim for a leased worker or a contracted operation worker, does the client employer have the right to defend the claim?

8. If a company performs a contract operation arrangement for a client employer and one of the owners/officers of the company substantially performs the service do we have to allocate a portion of that employee's salary to 9550 and the remainder to the new reporting guidelines? If so, how should this be allocated?

9. Are client employers to be advised of these changes and by whom?

If there are any questions regarding these matters, please feel free to contact me at 304-485-1278.

Sincerely,

Jeff Taberner

Jeff Taberner, CPA
Controller/Treasurer

Acordia

April 25, 2000

Mr. Richard S. Stephenson
Bureau of Employment Programs
Legal Services Division
1 Players Club Drive
Charleston, WV 25311

Re: Series 31 Rules and Regulations

Dear Richard:

This letter will provide our comments regarding the proposed Series 31 rules and regulations which are titled "Employee Leasing and Contracted Operations."

First, we feel this rule, as written, does not adequately define employee leasing arrangements. The West Virginia Tax Department has defined employee leasing companies, and we suggest the West Virginia Workers' Compensation Division use that same definition to identify the companies that are intended to be covered by this rule. A part of this definition states that a company is a leasing company if it provides at least 50% of the workforce to a client employer. Further, we recommend that this rule state that it would also pertain to a client employer's operation where 50% or more of the workers at the client employer's location are supplied by one or more outside leasing firms. We believe in this instance the rule should state that all such companies providing employees to such a client employer will be deemed employee leasing companies for purposes of this rule when at least 50% of the employees of the client employer are provided by general employers.

As an example of the above recommendation, let us assume that ABC Manufacturing Company has 500 individuals on their premises. Let us assume that 200 of them are employees of ABC Manufacturing Company and the other 300 are employees of various staffing companies. Because ABC Manufacturing Company's operations involve 60% of the employees coming from staffing firms, all the employers providing the employees should be deemed to be leasing companies for purposes of this rule.

Under Section 3.5 of the proposed rule, it talks about "long-term temporary arrangements."

Acordia Employers Service

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However, no definition of this is contained in the rule itself. For instance, if an employer has an employee who comes in for one week every quarter to complete certain tasks, does this qualify as a long-term temporary arrangement? We do not believe it should.

In Section 3.6, "employee leasing firms" is defined. However, this definition sounds like a temporary help firm. This rule previously states the rule is not intended to cover temporary help firms, except for contracted operations. We believe the rule should deal solely with employee leasing companies and not with contracted operations. Contracted operations, such as security, janitorial, or any number of other functions, are neither staffing nor leasing functions and should not be subject to this rule.

In Section 3.11, it states "premium tax" includes premium tax deposit. However, the premium tax deposit should not be considered part of the premium tax. The premium tax deposit is a form of security that is given to the Workers' Compensation Division in case of delinquency or default of an employer. If an employer pays all of their premium as required by the law, any remaining deposit should be refunded to that employer.

Section 3.13 defines "temporary help agency." The term "finite temporary time period" used in this definition is not defined. Most of the assignments involved in a temporary help agency are not defined in terms of time. The time frames differ based upon the needs of the client employer. This same section also uses the term "special situations." However, the examples of special situations are inadequate.

Section 5.5 states that any employee leasing firm which was doing business in this state prior to the adoption of this rule shall make special application as an employee leasing firm within 30 calendar days of the effective date of this rule. Our question is, how are these companies going to know this rule exists? Is the Workers' Compensation Division going to provide a special notice to these employers, and how is the Workers' Compensation Division going to make sure all such employers in West Virginia receive a copy of this rule?

Section 7.1 states the client employer shall be responsible for the payment of premium for workers who are provided to it. However, we do not believe this is the intent of this rule. The client employer will be responsible for the payment of premium only if the employee leasing firm fails to pay. We believe this section needs to be rewritten to invoke payment by the client employer only in the event the leasing company fails to make the required payments.

Section 7.2.2 states that upon the employee leasing firm's failure to pay or timely reporting of their premium, both employers will be delinquent, and if the delinquency is not cured, then both employers will be in default. If the employee leasing firm is delinquent, it may have employees at 50 different locations. We do not believe it would be prudent for the Workers' Compensation Division to consider all of these employers to be delinquent. If the Workers' Compensation Division is talking about the "joint account" that will be established between the leasing company and the client employer, it will be the employee leasing firm's responsibility to pay, and the client employer is responsible to make payments if the employee leasing firm fails to pay. However, the client employer's own account should not be considered to be delinquent as a result of the employee leasing company's failure to pay.

The reason for our feelings in this matter is the fact that premium is built into the override charged to the client employer. Therefore, if the employee leasing firm fails to pay, the client employer could end up paying twice. We want to make sure a client employer's responsibility only kicks in when the employee leasing firm fails to pay their premium for the employees that are working for the specific client employer.

We believe the Workers' Compensation Division should consider the impact of this rule on various types of employee leasing situations. Those would include custodial services, security services, mail services, landscaping services, etc. Will the Workers' Compensation Division consider these types of services to be employee leasing situations? We do not believe they should be considered employee leasing situations, but as the rule is currently written, it appears they will be considered to be such. As stated above, contracted operations should not be subject to this rule.

We thank you for the opportunity to provide our comments on this rule and ask that if you have any questions, please contact our office.

Sincerely,

Michael Idleman, ARM
Vice President
Risk Management
(304) 556-1116
E-mail: midleman@empserv.com

MI/jfe

cc: Commissioner William F. Vieweg - Workers' Compensation Division
Mr. Ed Burdette - Workers' Compensation Division
Mr. George L. Flick III - Workers' Compensation Division
Performance Council
Mr. H. Herchiel Sims Jr. - Acordia Employers Service.

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PERSONNEL MANAGEMENT COMPANY
A PROFESSIONAL EMPLOYER ORGANIZATION

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ion

RE: Comments to Proposed rule Title 85 Series 31 Employee Leasing and contracted operations

Employee leasing or Professional Employer Organizations, or "PEO" are a growing segment of the national economy. The proposed rule places requirement upon the industry to release information regarding their clients. Confidentiality of client information could not be guaranteed by the division under this rule. The administrative burden upon the Division would be enormous. The rule does not address the timing of information exchange between the leasing company and division. The division is not known for its ability to quickly change or modify subscriber accounts. We do not think that the procedures referred to in the rule would be accurately performed by the division. The potential for incorrect premium tax reports and subsequent incorrect collection attempts and delinquency proceedings is obvious. The rule attempts to extend both criminal and civil liability to the client for the delinquency and default of the leasing company. This may not be allowed under the current statute. The division's approach to this issue is seriously flawed. The proposed rule would create confusion and potential unknown liability for existing and future clients of legitimate employee leasing companies. There are many advantages that are created for the division when clients utilize a legitimate PEO.

IMPACT OF PEOs ON THE WORKERS' COMPENSATION SYSTEM

PEO staffing arrangements are mainly focused towards small and medium size businesses, a sector of the economy which has accounted for most of the new jobs created over the last ten years. This market segment has been underserved by the insurance markets which have traditionally been inefficient in controlling costs for smaller employers. In addition, small business generally is not equipped with the tools, resources, economies of scale and expertise needed to properly control the risks and costs associated with workers' compensation coverage. As a result, workers' compensation insurance costs have skyrocketed in recent years to the point that many small employers are faced with the reality of failure if these costs cannot be controlled.

Reputable PEOs have demonstrated a unique ability to cure many of the ills of the workers' compensation system and as such should be viewed as an ally of the system. The following is a discussion of the positive impact that has on the workers' compensation system.

A. The Value of PEOs to the Workers' Compensation System

PEOs today are a recognized and valuable tool for both small business and insurance markets to better manage and control the risks and costs associated with workers' compensation. By consolidating the employees provided to many businesses under a PEO, who accepts responsibility for the provision and management of workers compensation benefits, the necessary resources to better manage the risk and control the costs are affordable because of the efficiencies created. Properly carried out, such a PEO staffing arrangement actually enhances the workers' compensation system. It does so in the following ways:

1. PEOs improve the underlying risk. As the employer for all placed workers and a subscriber to the fund, PEOs accept the financial risk of being the policy holder for workers' compensation coverage. The PEO has an inherent incentive to introduce risk management practices into the client workplace. A competent PEO improves the underlying risk to itself, the employees, the client, the fund, and the workers' compensation system by layering improved hiring practices, pre-employment screening, loss control and safety procedures, claims management of injuries, safety training, employee assistance plans, back-to-work programs, drug free workplace programs, setting out written employment policies and other services. It is important to note that prior to entering a PEO staffing arrangement, most clients never had the time, expertise or resources to effectively control workers' compensation costs.

2. PEOs have a greater incentive to reduce costs. A PEO contracts with its clients to provide employees for a defined price. The staffing firm incurs the business risk of profit or loss based on its ability to deliver its services at a cost less than that price. If it allows its costs to exceed that price it will suffer losses. A PEO that accepts the responsibilities of being an employer and accepts the risks of being the policy holder for workers' compensation coverage for those employees, has both a vested financial incentive to control its costs of workers' compensation and the ability to commit the appropriate resources to achieve a safer workplace.

3. PEOs improve premium determination. The PEO **as an employer of employees** for many small businesses, maintains on a consolidated basis the information necessary for premium determination. Through the increased expertise and resources of the PEO, better accuracy is achieved in the proper classification of workers and the proper reporting of payroll dollars on which premiums are based.

4. PEOs provide a better audit trail. A major benefit of PEOs are that they bring administrative discipline and expertise to clients in the payroll and personnel areas. Therefore, consolidated payroll and personnel records are more accurate, current and complete; thus, reducing the audit burden on the workers' compensation system.

5. PEOs better accommodate the needs of the injured worker. PEOs have the unique ability as a large, multi-location employer, to move injured employees among client locations to provide suitable light duty job assignments for injured workers. This flexibility reduces the amount of lost time days incurred and better accommodates the needs of the injured worker.

6. PEOs enhance the credibility of the experience rating system. The experience rating formula was designed to adjust the premium for a given risk to reflect the actual loss experience of that risk. The experience rating process assigns pooling levels for individual claims based on the premium volume of the risk. Smaller premium volume risks are experience rated using a lower pooling threshold level for individual claims thus the resulting experience modification is less credible and less reflective of the actual experience of the risk than that of a larger premium risk. PEOs consolidate the risk and associated premium from its many client locations under a single policy with a much larger premium. The resulting experience modification of the PEO is more credible and reflective of the actual experience of the consolidated risk thereby enhancing the credibility of the experience rating system.

AN ALTERNATIVE SOLUTION

We support the position that a PEO which clearly establishes itself as an employer, and continues to retain and perform responsibilities of an employer, has the right to be the policy holder for workers' compensation coverage for its employees. We believe that in order for any regulatory approach to PEOs and workers' compensation to be effective and fair, it must preserve the legitimate industry's right to be an employer.

We submit the following alternative to the proposed rule as appendix A.

Sincerely,

Dwayne K Cline

Dwayne K Cline
President
Owners Solution, Inc.

APPENDIX A

H. B. XXXX

[to be Introduced during interim meetings 2000; referred to the Committee on the Judiciary.]

A BILL to amend article two, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section one-e, relating to classification of Diversified Employment Agencies.

Be it enacted by the Legislature of West Virginia:

That article two, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section one-e, to read as follows:

ARTICLE 2. EMPLOYERS AND EMPLOYEES SUBJECT TO CHAPTER.

§23-2-1e. Classification of Diversified Employment Agencies.

(a) For the purposes of this section:

(2) "Diversified Employment Agency" means a person engaged

in the business of providing individuals to perform services for multiple unrelated business entities. "Diversified Employment Agency" includes all employment agencies that provide employees for temporary employment, permanent employment, and all other staffing and leasing arrangements. "Diversified Employment Agency" does not include labor organizations;

b) Due to the different types of employment categories of "Diversified Employment Agencies", all employers of this type shall be classified as '9950' Diversified Employment Agency. Exception Classifications will include '8810' Clerical, '1016' Underground coal Mining, '1005' Surface Coal Mining, '2702' Logging. Employees will be classified in the exception classifications only when applicable. This will provide for a more fair and equitable method of classification while protecting the solvency of the West Virginia Workers Compensation Fund.

(c) The experience modification factor for the 'Diversified Employment Agency' will be applied to all classifications assigned to the 'Diversified Employment Agency.

(d) The commissioner shall administer this section and shall propose rules for approval by the compensation programs performance council in accordance with the provisions of section seven, article three, chapter twenty-one-a of this code, to carry out the provisions of this section.

(e) The provisions of this section are in addition to, and do not alter, the usual common law rule applicable in determining when an employer-employee relationship exists.

NOTE: The purpose of this bill is to more accurately classify diversified employment agencies.

This section is new; therefore, strike-throughs and underscoring have been omitted.

H.B. XXXX

Workers Compensation Coverage for Diversified Employment Agencies

Talking Points

1. Currently all Temporary, Staffing, and Employee Leasing Agencies are assigned class code 9550 'Diversified Employment Agencies' The base rate for this class is 5.04 % of Gross Wages. All employment by these employers, regardless of the type of work performed is classified in this category. If an agency has employees that perform Logging, Underground Coal Mining, or Surface Mining, the rates for this exposure is grossly lower than for other employers in West Virginia.

2. H.B. XXXX or "The Bill" provides for exception classification codes for Underground Coal Mining, Surface Mining, Logging, and Clerical Classifications. Employees working in any of the exception classifications will be better classified and the correct premium tax will be paid to the WV Workers Compensation Fund.

3. This solution is very simple and will not be a burden on employers or the WV Workers Compensation Fund.

4. Does not create any classification or experience modification issues.

5. Eliminates to potential for Fraud by unscrupulous persons that might be taking advantage of the Diversified Employment Agency classification by operating primarily in the highest risk industries.

One Valley Bank
One Valley Square, P.O. Box 1793
Charleston, WV 25326
(304) 348-7281

PHYLLIS HUFF ARNOLD
President and
Chief Executive Officer

ONE VALLEY BANK

April 27, 2000

Mr. Richard Stephenson
Bureau of Employment Programs
Legal Services Division
1 Players Club Drive
Charleston, WV 25311

Re: Series 31 Rules and Regulations

Dear Mr. Stephenson:

I wish to register serious concerns regarding the proposed Series 31 Rules and Regulations. Reviews by attorneys and human resource professionals have identified numerous problems concerning liability issues and employee benefits issues.

Clearly, the impact of the proposed regulations extends far beyond bona fide employee leasing arrangements to include all sorts of temporary help and contractual relationships. Implementation of Series 31 in its present form will be very disruptive to current operating procedures of One Valley Bancorp and the business community at large.

I would like to request that Series 31 not go forward in its present form and that adequate input be afforded all parties to identify a more workable resolution of the problems encountered by the Workers' Compensation Division regarding leasing operations.

Thank you for your consideration of this request.

Very truly yours,

Phyllis H. Arnold

Phyllis H. Arnold

Comment on Proposed Rule
Title 85, Series 31
Employee Leasing and Contracted Operations
Prepared by
Acordia Employers Service

Acordia Employers Service agrees that rules to define and govern employee-leasing operations in the state of West Virginia are needed. We commend the Division on this attempt to create such a rule but think that, as written, the rule is fundamentally flawed in it's approach to the experience rating process.

We realize that the intent of the rule is to assign loss experience to the special employer so that all accounts utilizing leased employees in the conduct of their business are held responsible for loss experience in the most direct manner possible. While this may seem the most logical approach upon first review, we would argue that the opposite is true. In addition, this approach removes one of the advantages that employee leasing arrangement offers to smaller businesses.

It is our position that true employee leasing operations should have multiple classifications that would cover all leased employees under a single policy. In fact, the requirements for multiple classification are the perfect test to determine whether a company is a leasing or a temporary employment company. Leasing company employees are employed in different locations, are not used interchangeably and are not in supportive or incidental roles.

Through multiple classification the division would promote leasing arrangements that are more sensitive to loss. The arrangement would be more conducive to the provision of safety and loss control programs by the employers in this state that are the least likely to provide them otherwise.

Allowing multi-class rating is more likely to result in benefits for all concerned because it will make leasing arrangements more attractive. Benefits of leasing can include:

1. Reduced administrative costs
2. Increased human resources expertise
3. Improved employee benefits
4. Employee protection under federal laws
5. Safety and loss control services
6. Help with employment law compliance

Employee leasing is growing tremendously nationally. It is to the advantage of the State of West Virginia that we remain competitive in this area. A multiple class rating of employee leasing companies would be an asset in this regard.

Acordia Employers Service

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SNELLING™
PERSONNEL SERVICES

May 1, 2000

William F. Vieweg
Commissioner
WV Bureau of Employment Programs
Workers' Compensation Division
P. O. Box 3064
Charleston, West Virginia 25334-3064

Dear Mr. Vieweg:

The Workers' Compensation § 85 CSR.28 Employee Leasing Summary of the Rule ("The Rule") is unfair because the new actions, if implemented, are likely to doom my two Snelling Personnel Services franchises future ability to continue business. Our customers who purchase services will be affected by the complex proposed rule that would only be present in West Virginia that add to the negatives an employer faces in doing business in our State. Our employees, especially those in a temp-to-hire scenario, will be affected due to the likelihood less employers will be using our services. Unfortunately, we currently have more employees than customers, and "The Rule" will widen the gap resulting in less employment opportunities.

"The Rule" changes are mixing leasing employee and temporary help approaches to providing services to customers. "The Rule" does not clearly define an employee leasing scenario. In addition, the definition is different from the West Virginia Tax Department 's definition. Why would Workers' Compensation use a new a new definition? The West Virginia Tax Department's definition would limit "The Rule" to leasing companies and exclude temporary help companies who are providing temporary help and temp-to-hire future employees.

"The Rule," because the process is unclear due to confusing language in Section 3.11, "premium tax," includes premium tax deposit. We would expect to have a deposit returned instead of kept when no longer an employer.

There is more confusion in Section 3.5, because "The Rule" doesn't define a "long-term temporary arrangement" clearly. When Snelling places a worker, often we do not know the length of the assignment and do not have any contract term. A leasing company usually has a term in contract with its customer, a significant difference in how our business approaches differ.

Snelling Personnel Services
3624 MacCorkle Avenue, S. E. • P. O. Box 4522

I believe "The Rule" should only apply to a leasing company and should not apply to a temporary help company. In Section 3.5, "The Rule" definition of "employee leasing firms" appears to be a temporary help firm. There is more confusion because "The Rule" previously states "The Rule" is not intended to cover temporary help. "The Rule" once again mixes leasing and temporary help firms.

Finally, the lack of understanding the difference between Snelling Personnel Services and a leasing firm is the only clear message I understand from "The Rule." The Workers' Compensation Division's efforts to model itself after an insurance company is not progressing well if "The Rule" is implemented. The State is not at risk like my business, so experiments like "The Rule" do not have the same cost. Please further study how to achieve "The Rule" purpose.

Please call me if you have any questions about my comments, which I appreciate the opportunity to make.

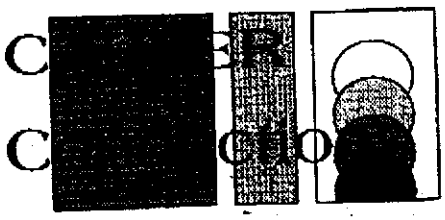
Sincerely,

James L Teed

James L. Teed, CPA

JLT/lgw

cc: Mr. Richard S. Stephenson, Bureau of Employment Programs
Mr. Ed Burdette, Workers' Compensation Division
Mr. George L. Flick, III, Workers' Compensation Division Performance Council



CAREER CONNECTIONS, INC.
"Temporary Staffing & Executive Recruitment"
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E-Mail: careerct@aol.com

FAX TRANSMITTAL: 304-558-6101

TO: Richard S. Stephenson
BEP Legal Services Division

FROM: N. Jane Diggs
Career Connections, Inc.

DATE: May 2, 2000

SUBJECT: Exempt Legislation, Title 85, Employee Leasing and Contracted Operations

Mr. Stephenson:

Career Connections, which is a temporary staffing and executive recruitment company, is responding to the Employee Leasing and Contracted Operations legislation with regards to written comments. I personally feel that the legislation as I have reviewed is very confusing. I do not fully understand the legislation, nor do I comprehend the difference between a leased employee or a temporary employee as it is outlined in the rule. Prior to this becoming law in the state of West Virginia, I would highly recommend that your legal division get advise from the American Staffing Association's legal unit, via Ms. Elizabeth Harkins, 703-253-2020. This is a very important rule which has implications of changing workers compensation rates and as the owner of a temporary staffing agency, I want the state of West Virginia to be fully and correctly informed. The American Staffing Association is the voice of temporary staffing in America and my company as well as the majority of the staffing agencies in West Virginia are members.

Once the rule has been rewritten, please provide me with a copy. Thank you for your assistance in this matter. I can be contacted at my office 344-0361 if you have questions..

WEST VIRGINIA STATE BUILDING AND CONSTRUCTION TRADES COUNCIL AFL-CIO

2301 SEVENTH AVENUE – CHARLESTON, W. VA. 25312
PHONE (304) 346-1367
FAX (304) 346-3862

STEVE BURTON
PRESIDENT

ROY M. SMITH
SECRETARY-TREASURER

Testimony of Roy Smith
Secretary-Treasurer
WV State Building & Construction Trades Council
2301 Seventh Avenue
Charleston, WV 25312

Wednesday, May 3, 2000

COMMENTS ON PROPOSED RULE 31:
EMPLOYEE LEASING AND CONTRACTED OPERATIONS

The Building and Construction Trades Council and the Affiliated Construction Trades Foundation supports the proposed rule. We urge its quick adoption.

In recent years, this Council has rightfully focused its attention on reducing the long-practiced institution in this State of one industry subsidizing the workers' compensation premiums of another. Historically it has been small, low-hazard businesses that have been forced to subsidize high-hazard employers. A system that was designed to base premiums on the risk of injury instead forced businesses across West Virginia to pay more than their share in order to permit some to pay less.

One area where that practice continues is the contracted and leased employee industry. Today, there are individuals working as leased employees in the construction industry -- a high hazard occupation -- for which the Fund is receiving premiums as if the worker was sitting in an office. In addition, the construction company that is employing the services of the leased employee is reaping an unfair economic advantage over companies that are paying their fair share of workers' compensation premiums. It is a system that is bad for the Fund, bad for injured

workers, and bad for legitimate employers. It is a system that should be ended.

The proposed rule will abrogate the fictitious employee leasing arrangements which are designed to avoid the payment of workers' compensation premium taxes and other employee benefits at the full rate that should be charged based upon the actual work of the employees. The rule adequately places the obligation to pay premium tax payments upon both employers involved in the situation and ensures that both employers will lose the protection of the Workers' Compensation Act while insuring that premiums will be collected to pay just benefits
to injured employees. It is the right approach to ending this practice and it should be adopted by the Council.

We have one important concern. The proposed rule as it is drafted does not apply to temporary help agencies unless and until such an agency engages in providing leased or contract workers. We believe that such an exemption may undercut the effectiveness of the rule. Temporary help agencies can and do undertake the same abuses as those agencies which provide contract and leased employees. For example, we know of situations, in West Virginia, where temporary employees performed demolition work while being categorized for purposes of workers' compensation in a category with piano tuners. In addition, too often workers are employed in "temporary" situations for days, weeks, months or even years. We urge the Council to remove this exemption from the proposed rule.

Thank-you for this opportunity to present the views of the West Virginia Building and Construction Trades Council and the ACT Foundation. We urge this Council to take quick action on this long-overdue proposal.

QuantumResources

Comments to Proposed Employee Leasing

And Contracted Operations Rules Title 85 Series 31

General Comments

The Division initially justified the need for a rule regulating employee leas ng on the basis that a significant number of companies were abusing the current system resulting in substantial underpayment of premium. Under the current rules, the Division has authority to identify any abusers of the system and properly reclassify that company. Proper classification will place companies in the class with a rate that most closely matches the exposure thereby providing premiums sufficient to cover claims.

The proposed rule is written so broadly that it could apply to many businesses outside of the traditional employee leasing and contract operations realm. The definitions are not sufficiently specific, particularly to the time periods that define an employee leasing arrangement and a temporary staffing arrangement. In fact, the way the rule is written, some temporary agencies might qualify as both a leasing company and a temporary staffing company at the same client. That would be impossible to administer.

The transfer of liability for defaulted accounts to client businesses is likely to discourage future employee leasing or temporary contract staffing arrangements. If co-employment can be applied in workers' compensation situations, the courts may see fit to apply it in other situations making potential risk to the client employer so significant that consequently such a rule will significantly reduce if not eliminate the use of employee leasing or contract staffing companies in the future. It would also decrease the ability of contract staffing companies to compete against other contract staffing companies who fall outside the Employee Leasing/Contract Management definition and are not faced with the co-employment issue.

§ 85-31-3.22

This section does not specify what constitutes "long term or permanent."

§ 85-31-3.5

This section does not define a specific period of time beyond which a temporary arrangement becomes a long-term arrangement subject to this rule.

§ 85-31-3.6

The definition of employee leasing is so broad that it may include employees of many contracted operations working on an employer's premises, such as engineering and information technology services.

§ 85.31-3.13

This section does not delineate the specific time period necessary to determine what constitutes a "finite temporary time period" which is key to an arrangement being temporary versus long term.

§ 85-31-3.14

This section attempts to define a "temporary worker" by utilizing the phrase employed for a "finite temporary time period" without defining what constitutes such time period or how the same is measured.

§ 85-31-7

This section puts responsibility for payment of the premium tax on both the employee leasing firm and the client employer. It also purports to make the client employer responsible for any delinquency or default that occurs as a result of the employee leasing firm failing to properly report or pay premium on each of the leasing firms employees situated on the client employer's premises. Additionally this section appears to extend the criminal and civil liability to the client employer for the delinquency

and/or default of the employee leasing firm and appears to go far beyond what is currently provided for in the statute.

§ 85-31-9

This section purports to require notification of employment. However, as written it is unclear what the nature of the notification is to be, and who is to supply the notification.

Respectfully,

Harvey D. Wright, Jr.

Chief Financial Officer

Quantum Resource Corporation

JACKSON & KELLY PLLC

ATTORNEYS AT LAW

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1144 MARKET STREET
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WASHINGTON, D.C. 20037
TELEPHONE 202-973-0200

MEMBER OF LEX MUNDI,
THE WORLD'S LEADING ASSOCIATION
OF INDEPENDENT LAW FIRMS.

340-1301

May 3, 2000

Richard S. Stephenson, Esquire
Bureau of Employment Programs
Legal Services Division
One Players Club Drive
Charleston, West Virginia 25311

RE: Written Comments to Series 31 Rules

Dear Mr. Stephenson:

Please find enclosed herewith comments to the proposed Series 31 Rules regarding Employee Leasing and Contracted Operations, which I wish to file for review and consideration by the Performance Council.

Very truly yours,

TIMOTHY E. HUFFMAN

TEH:tsn

Enclosure

C0381897.1

COMMENTS TO PROPOSED EMPLOYEE LEASING AND CONTRACTED OPERATIONS RULES TITLE 85 SERIES 31

General Comments

The Division initially justified the need for a rule regulating employee leasing, on the basis that a significant number of companies were abusing the current system resulting in substantial underpayment of premium. However, the Division has recommended a base rate decrease for Class PO5, the classification which contains diversified employment agencies.

The proposed rules are necessary to address the problem, if it does exist. Under the current rules, the Division has authority to identify any abusers of the system and properly reclassify that company. Promulgation of a new and complicated rule such as the proposed Series 31 rule will not compensate for the Division's lack of enforcement of the existing rules.

Additionally, the proposed rule is very broad as written and could apply to many businesses outside the traditional employee leasing realm. The definitions are not sufficiently specific, particularly as to the time periods which define an employee leasing arrangement.

Finally, the transfer of liability, particularly the civil and criminal liability for defaulted accounts, to client businesses with whom the employee leasing organizations currently do business, will likely discourage future employee leasing arrangements. The potential risk to a client employer is significant and consequently, such a rule will significantly reduce if not eliminate the use of employee leasing arrangements in the future.

§85-31-3.2.2

This section while attempting to define "contracted operation arrangement", does not specifically delineate what constitutes "long term or permanent."

§85-31-3.5

In attempting to define an "employee leasing arrangement", this definition does not delineate the specific period of time, beyond which a temporary arrangement becomes a long term arrangement subject to this rule.

§85-31-3.6

This section attempts to define "employee leasing firm" and sufficiently broad so that it may include the employees of many contracted operations working on an employer's premises, such as janitorial services or security guards.

§85-31-3.13

This section attempts to define a "temporary help agency" which is excluded from the rule. However, it does not delineate the specific time period necessary to determine what constitutes a "finite temporary time period" which is key to an arrangement being temporary verses long term.

§85-31-3.14

This section attempts to define a "temporary worker" by utilizing the phrase employed for a "finite temporary time period" without defining what constitutes such time period or how the same is measured.

§85-31-7

This section places the responsibility for payment of the premium tax on both the employee leasing firm and the client employer. It also purports to make the client employer responsible for any delinquency or default that occurs as a result of the employee leasing firm failing to properly report and pay premium on each of the leasing firm's employees situate on the client employer's premises. This section also appears to extend both criminal and civil liability to the client employer for the delinquency and/or default of the

employee leasing firm and appears to go far beyond what is currently provided for in the statute and would likely require a statutory change. If such shifting and/or sharing of liability is desirable, our current statute should be amended to make provision for an appropriate notification procedure and opportunity by the client employer to terminate its contract with employee leasing company before incurring liability. A system similar to that which is contained in West Virginia Code §23-2-1d with regard to primary contractor liability, would be most equitable to all parties. To implement such a system would require a change in the statute.

§85-31-9

This section purports to require notification of employment. However, as written, it is unclear what the nature of the notification is to be, and who is to supply the notification.

WEST VIRGINIA CONSTRUCTION COUNCIL

1627 Bigley Avenue · Charleston, WV 25302 · (304) 342-7141

May 3, 2000

Mr. William Vieweg, Commissioner
WV Bureau of Employment Programs
Charleston, WV 25305

RE: Employee Leasing and Contracted Operations

Dear Commissioner Vieweg:

On behalf of the West Virginia Construction Council, I urge the Performance Council to adopt its proposed Rule 31 and to incorporate coverage of temporary help agencies into the proposal.

The West Virginia Construction Council represents some 1500 building contractors throughout West Virginia. These independent businesses build the future of our state every day in all phases of the construction industry. They pay wages, benefits and taxes to thousands of construction workers. All they ask is for fair competition for the construction work available in our State. By taking the right action today you can help make that a reality.

The proposed rule takes the important step of ensuring that contracted and leased employees are treated as employees of both the leasing company and the company which benefits from the work. In addition, under the proposal workers compensation premiums will be based on the actual work performed by the workers as it should be. The changes included in this proposal reflect the reality of the workplace and should be adopted.

In addition, the WV Construction Council urges the Performance Council to review the coverage of temporary help agencies which are currently all but exempt from this proposal. Our members are forced to compete against contractors who benefit from the artificially low workers' compensation premiums pay for temporary construction workers who are "employed" by these agencies.

Legitimate businesses who are playing by the rules are being undercut by those who cheat the system. The Fund as well is being cheated out of premiums it deserves to cover the risk associated with the work performed by the "temporary" workers. We urge the Council to close this loophole.

Once again, thank you for allowing me to testify on this important proposal. The West Virginia Construction Council stands ready to work with you to see that there is a level playing field for all West Virginia businesses.

Sincerely,

Jim Cerra
President

JC/jlw

cc: Tom Cerra
Rose Stemple
Bob Worcester
Steve White
Roy Smith

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Sam Cipoletti
Manager - Government Relations & External Affairs

May 3, 2000

Bell Atlantic

Richard Stephenson , Esquire
Bureau of Employment Programs
Legal Services Division
1 Players Club Drive
Charleston, West Virginia 25311

Re: 85 CSR 28 - Employee Leasing And Contracted Operations

Dear Mr. Stephenson:

Please consider the following comments on behalf of Bell Atlantic - West Virginia, Inc. related to the proposed new regulations on employee leasing.

1. The application of the proposed regulations should be limited.

Bell Atlantic is committed to providing a safe work environment, and we applaud efforts by the Division to enhance work place safety. However, if there have been abuses which these proposed regulations are intended to address, the scope of the rule reaches far beyond the intended targets. Defining a "client employer" as an entity which obtains "one or more" leased workers from an employee leasing company is so broad as to affect companies that lease a single extra secretary to help service a new customer.

We recommend that the proposed regulations and the relevant definitions be limited to apply to companies that lease more than 50% of their employees from one or more employee leasing firms.

2. The proposed rule could stifle work force flexibility, to the detriment of both our company and our workers.

Bell Atlantic employs nearly 3,300 employees in West Virginia, the vast majority of whom are full-time employees. In our continuing efforts to expand our business and to remain competitive in today's economy, we are committed to maintaining a work force that is highly skilled, and we have placed work force development and training as a high priority. We are concerned that the proposed regulations could limit our flexibility to obtain skilled personnel, including some of our retirees, on a contract or leased basis. We are particularly concerned that some of our retired workers could lose company benefits if we are considered a joint employer under your regulations, and within the meaning of our benefits plans and relevant tax and other benefits laws. Thus, in addition to being less competitive, we could lose valuable personnel who are assets to our organization, and our former employees could lose the opportunity to remain a part of our team.

This lack of flexibility also could affect our efforts to centralize work centers here in West Virginia that serve Bell Atlantic customers regionally. The proposed regulations would make us less competitive not only with outside companies but also with other locations within the Bell Atlantic region. This would harm our efforts at economic development, and inevitably result in a loss of new jobs.

As an alternative to recommendation #1 above, we recommend that you adopt a public utility or other exemption so as not to restrict our competitiveness and the rights of our contracted retirees.

3. West Virginia Code §23-2-1d provides a more appropriate procedure.

West Virginia Code § 23-2-1d provides a procedure related to workers' compensation liability concerning the use of contracted and sub-contracted labor. This statute provides adequate and more appropriate protection than these proposed regulations for companies that lease or contract less than 50% of their work force. In addition, the bookkeeping and paper work necessary internally for employers, as well as the responsibility for the Workers' Compensation Division to monitor compliance with these proposed regulations for a very small number of contracted/leased employees, clearly outweighs the potential benefits of the proposed regulations.

If you do not adopt recommendations #1 or #2 above, we recommend that, at the very least, the notice provisions to employers contained in West Virginia Code § 23-2-1d should be incorporated in these regulations. Thus, responsible employers such as Bell Atlantic - West Virginia can avoid liability through an established and fair process.

4. The West Virginia Legislature has recently rejected the substance of the proposed regulations.

Finally, we note that legislation with similar provisions as are contained in the proposed regulations was introduced in the 2000 legislative session, and the concept was not favorably received by lawmakers. The West Virginia Legislature is the more appropriate forum for a public debate about this labor and employment issue.

We recommend that the Compensation Programs Performance Council defer this issue to the West Virginia Legislature.

Thank you for considering our comments.

Very truly yours,

cc: Acordia Employers Service

American Staffing Association
277 South Washington Street, Suite 200 • Alexandria, VA 22314-3646

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703.253.2053 fax
asa@staffingtoday.net
www.staffingtoday.net

May 3, 2000

Mr. Richard S. Stephenson
BEP Legal Services Division
One Players Club Drive
Charleston, WV 25311

Dear Mr. Stephenson;

I am writing regarding the proposed rules on employee leasing and contracted operations (Title 85, Workers' Compensation Division, Series 28). We are concerned that the proposed regulations place onerous burdens on staffing firms supplying non-leasing staffing services.

The American Staffing Association represents over 1,400 staffing firms nationwide. In West Virginia in 1999, approximately 54 staffing firms employed over 6,500 employees on average each day. We appreciate the state's efforts to clarify how the workers' compensation laws apply to employee leasing arrangements. We are, however, concerned that the proposed regulations are written too broadly and could subject to regulation a whole range of staffing services that do not engage in the practices that were intended to be regulated.

A. Definitions are Overbroad

We believe the regulations are overbroad. Specifically, the definition of "employee leasing arrangement" includes "long-term temporary arrangements and any other arrangement that involves the allocation or sharing of employment responsibilities among two or more entities." While assignments of temporary help are excluded, this broad language could be construed to include virtually every service business in West Virginia. For example, this definition would include managed services providers such as companies that provide cleaning or security guard services. These arrangements are not "employee leasing."

"Employee leasing" is a distinct business service that provides a range of long-term, administrative and human resources services, such as payroll and benefits administration, to most if not all of a client's entire existing workforce. The primary purpose of employee leasing is not to recruit and assign employees with particular skills to perform services for clients, but to administer a range of services, such as payroll and benefits to a client's existing workforce. Such arrangements generally involve the client's entire existing workforce at a worksite, or substantially all of it, not just a select few employees. In contrast, staffing firms recruit and assign employees with particular skills to perform services for clients on a supplemental or as-needed basis.

American Staffing Association

In the revised edition of his book, "The Business of Employee Leasing" (Aegis Group, 1993 edition), T. Joe Willey, a leading commentator on the business of employee leasing, supports the above view of how employee leasing operates. On page 5, he describes the employee leasing business as follows:

> "service firms...operating in the employee leasing industry, provide complete integrated payroll, employee benefits, and routine personnel administrative services to their subscribers. Greater emphasis is placed on providing employee administrative services, or employer services, as compared to the temporary or security guards which supply labor. The beginning point in providing these services is also quite different, ...an employee leasing firm somehow convinces their subscribers...to share employment of their long-term, regular, dedicated workers and place these workers on the leasing firm's payroll" (emphasis added).

B. Employee Leasing and Mod-Swapping

No one can reasonably dispute that the vast majority of the arrangements that have been of concern to state regulators in the areas of workers' compensation, unemployment insurance, and self-insured health plans, have involved the kind of leasing arrangements described above, i.e., those in which a business transferred all or substantially all of its existing work force to the payroll of a leasing firm. The reason that these arrangements have been subject to special regulation is because of the potential for a client to shift responsibility for its workers to the leasing firm to take advantage of the leasing firm's lower experience rating. This so-called "mod-swapping" occurs only when a client shifts a substantial number of its employees to a leasing arrangement. Hence, the element of "payroll transfer" involving all or substantially all of a client's employees at a worksite is, in our view, an essential element of the definition of employee leasing, at least for the purpose of the kind of broad regulation being considered in West Virginia.

The distinction between employee-leasing and non-leasing arrangements is critical. If the concern is that some businesses are trying to reduce their workers' compensation insurance costs by shifting their employees to the payroll of a company with lower costs, the rules should focus on those arrangements in which that situation can occur, i.e., those involving the shifting *of most or all* of a business's existing payroll to another entity. Staffing arrangements do not involve such shifting. Staffing firms recruit and assign their own workers and hence there is no experience shifting.

This broad definition of employee leasing arrangements could subject West Virginia employers to a cumbersome set of requirements meant only to target one narrow business. If the proposed regulation is specifically intended to regulate "employee leasing" for workers' compensation, then we believe the definition must be narrowed.

American Staffing Association

C. Burden on Non-leasing Staffing Services Would be Substantial

We are concerned that this regulation would impose significant burdens on non-leasing staffing services in West Virginia. For example any firm supplying any "employee leasing arrangement" as defined by the regulations would be required to, among other things, fill out a "special application" as an employee leasing firm (§85.28.5.1); notify the state within thirty days any time any of the information on the application changes (§85.28.5.3); file separate premium payments per customer (§85.28.6.3); remit detailed lists of per-customer and per-employee-per customer information for each "leased employee" (§85.28.6.2). Finally, the regulations give the state blanket authority to request "any other information" to administer the act (§85.28.5.4). The rules are also exempt from legislative scrutiny. We believe that without legislative consideration, the authority of the department should be narrowly focused on solving the alleged abuses in the workers' compensation system.

The regulations are also especially burdensome to staffing firms which often have hundreds of different clients, in contrast to employee leasing firms which generally have far fewer. Again, a more precise definition of "employee leasing arrangements" that does not include non-leasing staffing services will eliminate these problems and ensure appropriate applicability of the rule.

D. Proposed Definitions

ASA, on behalf of the temporary help and staffing industry, and the National Association of Professional Employer Organizations (NAPEO) which represents the "employee leasing" industry have agreed upon definitions which recognize "employee leasing" as a distinct service apart from the supply of temporary help and other non-leasing services. Recognition of the critical difference between employee leasing and non-leasing services will ensure that only employee leasing companies are subject to the rule. For example, the Commonwealth of Virginia recently adopted legislation to regulate professional employer organizations, or employee leasing arrangements, under the state workers' compensation code. ASA and NAPEO supported this effort. We offer a copy of the definitions used in this legislation (enclosed) as a sample.

We strongly urge you to deal with any abusive practices through narrowly targeted regulations aimed specifically at those practices, rather than overbroad general regulations.

Sincerely,

Edward A. Lenz

Enclosure

2000 SESSION

ENROLLED

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact §§ 38.2-1901, 65.2-101 and 65.2-801 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 38.2-1921.1 and 65.2-803.1, relating to workers' compensation and professional employer organizations generally.

[H 1271]

Approved

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-1901, 65.2-101 and 65.2-801 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 38.2-1921.1 and 65.2-803.1 as follows:

§ 38.2-1901. Definitions.

As used in this chapter:

"Classification system" or "classification" means the plan, system, or arrangement for grouping risks with similar characteristics or a specified class of risk by recognizing differences in exposure to hazards.

"Client company" shall have the same meaning ascribed to it in § 65.2-101.

"Coemployee" shall have the same meaning ascribed to it in § 65.2-101.

"Experience rating" means a statistical procedure utilizing past risk experience to produce a prospective premium credit, debit, or unity modification.

"Market segment" means any line or class of insurance or, if it is described in general terms, any subdivision of insurance or any class of risks or combination of classes.

"Professional employer organization" shall have the same meaning ascribed to it in § 65.2-101.

"Professional employer services" means services provided to a client company pursuant to a written agreement with a professional employer organization, including, at a minimum, the payment of wages of the coemployees, the reservation of the right of direction and control over the coemployees, and the responsibility for the withholding and payment of payroll taxes of the coemployees.

"Prospective loss costs" means historical aggregate losses and loss adjustment expenses projected through development to their ultimate value and through trending to a future point in time. Prospective loss costs do not include provisions for profit or expenses other than loss adjustment expenses.

"Rate service organization" means any entity, including its affiliates or subsidiaries, which either has two or more member insurers or is controlled either directly or indirectly by two or more insurers, other than a joint underwriting association under § 38.2-1915, which assists insurers in ratemaking or filing by (i) collecting, compiling, and furnishing loss statistics; (ii) recommending, making, or filing prospective loss costs or supplementary rate information; or (iii) advising about rate questions, except as an attorney giving legal advice. Two or more insurers having a common ownership or operating in this Commonwealth under common management or control constitute a single insurer for purposes of this definition.

"Retrospective rating plan" means a rating plan that adjusts the premium for the insurance to which it applies on the basis of losses incurred during the period covered by that insurance.

"Statistical plan" means the plan, system, or arrangement used in collecting data for rate making or other purposes.

"Supplementary rate information" includes any manual or plan of rates, experience rating plan, statistical plan, classification, rating schedule, minimum premium, or minimum premium rule, policy fee, rating rule, rate-related underwriting rule, and any other information not otherwise inconsistent with the purposes of this chapter required by the Commission.

"Supporting data" includes:

1. The experience and judgment of the filer and, to the extent the filer wishes or the Commission requires, the experience and judgment of other insurers or rate service organizations;

2. The filer's interpretation of any statistical data relied upon;

3. Descriptions of the actuarial and statistical methods employed in setting the rates; and

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4. Any other relevant information required by the Commission.

§ 38.2-1921.1. Professional employer organization workers' compensation rating.

A. Whenever any professional employer organization enters into an agreement with a client company to provide professional employer services, the experience rating of the professional employer organization shall be used for voluntary market workers' compensation insurance premium computation purposes with respect to such coemployees. In the event that the agreement between a client company and a professional employer organization is terminated, the coemployees shall become solely the employees of the former client company. If the coemployees have been covered as employees of the professional employer organization under a voluntary market workers' compensation insurance policy for a period of three consecutive years or more, the workers' compensation insurance premium applicable to the policy of the former client company shall be based upon the rating of the professional employer organization until the former client employer has developed sufficient experience to be rated on its own or no longer qualifies for experience rating. If the coemployees have been covered as employees of the professional employer organization for a period of less than three consecutive years, the workers' compensation insurance premium applicable to the policy of the former client company shall be based upon the experience of the former client company which reflects its experience during the experience period specified by the approved experience rating plan, including, if available, experience incurred for coemployees under the professional employer services agreement.

B. Insurers may conduct periodic audits of any professional employer organization, including payrolls, operations and records as related to individual client company operations in order to ensure that the appropriate premium is charged for workers' compensation insurance coverage. Such audits may include audits of the client company in order to verify payroll, losses and classifications, and inspections of the premises where the coemployees work.

C. A professional employer organization may aggregate its coemployees under a single employer plan for the purpose of providing employee benefits provided that the professional employer organization meets the regulatory licensure and filing requirements promulgated by the Commission for fully insured multiple employer welfare arrangements. The following information required to be filed shall be confidential and shall not be disclosed to the public: (i) all information related to the names and addresses of employers participating in the plan and (ii) all information pertaining to the adequacy of the plan's level of reserves and contributions; however, nothing herein shall (i) prevent the Commission from using such information in any regulatory proceeding or (ii) be interpreted to prohibit or limit the production of documents containing such information from the professional employer organization pursuant to an otherwise lawful subpoena issued by a court of competent jurisdiction.

D. The Commission may promulgate regulations as it deems necessary for the administration of this section.

§ 65.2-101. Definitions.

As used in this title:

"Award" means the grant or denial of benefits or other relief under this title or any rule adopted pursuant thereto.

"Average weekly wage" means:

1. a. The earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days during such period, although not in the same week, then the earnings for the remainder of the fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. When the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results fair and just to both parties will be thereby obtained. When, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being

earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

b. When for exceptional reasons the foregoing would be unfair either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

2. Whenever allowances of any character made to an employee in lieu of wages are a specified part of the wage contract, they shall be deemed a part of his earnings. For the purpose of this title, the average weekly wage of the members of the Virginia National Guard, the Virginia Naval Militia and the Virginia State Defense Force, registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth, volunteer firefighters engaged in firefighting activities under the supervision and control of the Department of Forestry, and forest wardens shall be deemed to be such amount as will entitle them to the maximum compensation payable under this title; however, any award entered under the provisions of this title on behalf of members of the National Guard, the Virginia Naval Militia or their dependents, or registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth or their dependents, shall be subject to credit for benefits paid them under existing or future federal law on account of injury or occupational disease covered by the provisions of this title.

3. Whenever volunteer firefighters, volunteer lifesaving or volunteer rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians and members of volunteer search and rescue organizations are deemed employees under this title, their average weekly wage shall be deemed sufficient to produce the minimum compensation provided by this title for injured workers or their dependents. For the purposes of workers' compensation insurance premium calculations, the monthly payroll for each volunteer firefighter or volunteer lifesaving or volunteer rescue squad member shall be deemed to be $300.

4. The average weekly wage of persons, other than those covered in subdivision 3 of this definition, who respond to a hazardous materials incident at the request of the Department of Emergency Services shall be based upon the earnings of such persons from their primary employers.

"Change in condition" means a change in physical condition of the employee as well as any change in the conditions under which compensation was awarded, suspended, or terminated which would affect the right to, amount of, or duration of compensation.

"Client company" means any person that enters into an agreement for professional employer services with a professional employer organization.

"Coemployee" means an employee performing services pursuant to an agreement for professional employer services between a client company and a professional employer organization.

"Commission" means the Virginia Workers' Compensation Commission as well as its former designation as the Virginia Industrial Commission.

"Employee" means:

1. a. Every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except (i) one whose employment is not in the usual course of the trade, business, occupation or profession of the employer or (ii) as otherwise provided in subdivision 2 of this definition.

b. Any apprentice, trainee, or retrainee who is regularly employed while receiving training or instruction outside of regular working hours and off the job, so long as the training or instruction is related to his employment and is authorized by his employer.

c. Members of the Virginia National Guard and the Virginia Naval Militia, whether on duty in a paid or unpaid status or when performing voluntary service to their unit in a nonduty status at the request of their commander.

Income benefits for members of the National Guard or Naval Militia shall be terminated when they are able to return to their customary civilian employment or self-employment. If they are neither employed nor self-employed, those benefits shall terminate when they are able to return to their military duties. If a member of the National Guard or Naval Militia who is fit to return to his customary civilian employment or self-employment remains unable to perform his military duties and thereby suffers loss of military pay which he would otherwise have earned, he shall be entitled to one

day of income benefits for each unit training assembly or day of paid training which he is unable to attend.

d. Members of the Virginia State Defense Force.

e. Registered members of the United States Civil Defense Corps of this Commonwealth, whether on duty or in training.

f. Except as provided in subdivision 2 of this definition, all officers and employees of the Commonwealth, including forest wardens, judges, clerks, deputy clerks and employees of juvenile and domestic relations district courts and general district courts, who shall be deemed employees of the Commonwealth.

g. Except as provided in subdivision 2 of this definition, all officers and employees of a municipal corporation or political subdivision of the Commonwealth.

h. Except as provided in subdivision 2 of this definition, (i) every executive officer, including president, vice president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation, municipal or otherwise and (ii) every manager of a limited liability company elected or appointed in accordance with the articles of organization or operating agreement of the limited liability company.

i. Policemen and firefighters, sheriffs and their deputies, town sergeants and their deputies, county and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, and clerks of circuit courts and their deputies, officers and employees, who shall be deemed employees of the respective cities, counties and towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable.

j. Members of the governing body of any county, city or town in the Commonwealth, whenever coverage under this title is extended to such members by resolution or ordinance duly adopted.

k. Volunteers, officers and employees of any commission or board of any authority created or controlled by a local governing body, or any local agency or public service corporation owned, operated or controlled by such local governing body, whenever coverage under this title is authorized by resolution or ordinance duly adopted by the governing board of any county, city, town, or any political subdivision thereof.

l. Except as provided in subdivision 2 of this definition, volunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians and members of volunteer search and rescue organizations, who shall be deemed employees of (i) the political subdivision or state institution of higher education in which the principal office of such volunteer fire company, volunteer lifesaving or rescue squad, volunteer law-enforcement chaplains, auxiliary or reserve police force, auxiliary or reserve deputy sheriff force, volunteer emergency medical technicians or members of volunteer search and rescue organizations is located if the governing body of such political subdivision or state institution of higher education has adopted a resolution acknowledging such volunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians, members of volunteer search and rescue organizations as employees for the purposes of this title or (ii) in the case of volunteer firefighters or volunteer lifesaving or rescue squad members, the companies or squads for which volunteer services are provided whenever such companies or squads elect to be included as an employer under this title.

m. (1) Volunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians, members of volunteer search and rescue organizations and any other persons who respond to an incident upon request of the Department of Emergency Services, who shall be deemed employees of the Department of Emergency Services for the purposes of this title.

(2) Volunteer firefighters when engaged in firefighting activities under the supervision and control of the Department of Forestry, who shall be deemed employees of the Department of Forestry for the purposes of this title.

n. Any sole proprietor or all partners of a business electing to be included as an employee under the workers' compensation coverage of such business if the insurer is notified of this election. Any sole proprietor or the partners shall, upon such election, be entitled to employee benefits and be

subject to employee responsibilities prescribed in this title.

When any partner or proprietor is entitled to receive coverage under this title, such person shall be subject to all provisions of this title as if he were an employee; however, the notices required under §§ 65.2-405 and 65.2-600 of this title shall be given to the insurance carrier, and the panel of physicians required under § 65.2-603 shall be selected by the insurance carrier.

o. The independent contractor of any employer subject to this title at the election of such employer provided (i) the independent contractor agrees to such inclusion and (ii) unless the employer is self-insured, the employer's insurer agrees in writing to such inclusion. All or part of the cost of the insurance coverage of the independent contractor may be borne by the independent contractor.

When any independent contractor is entitled to receive coverage under this section, such person shall be subject to all provisions of this title as if he were an employee, provided that the notices required under §§ 65.2-405 and 65.2-600 are given either to the employer or its insurance carrier.

However, nothing in this title shall be construed to make the employees of any independent contractor the employees of the person or corporation employing or contracting with such independent contractor.

p. The legal representative, dependents and any other persons to whom compensation may be payable when any person covered as an employee under this title shall be deceased.

q. Jail officers and jail superintendents employed by regional jails or jail farm boards or authorities, whether created pursuant to Article 3.1 (§ 53.1-95.2 et seq.) or Article 5 (§ 53.1-105 et seq.) of Chapter 3 of Title 53.1, or an act of assembly.

2. "Employee" shall not mean:

a. Officers and employees of the Commonwealth who are elected by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate. This exception shall not apply to any "state employee" as defined in § 51.1-124.3 nor to Supreme Court Justices, judges of the Court of Appeals, judges of the circuit or district courts, members of the Workers' Compensation Commission and the State Corporation Commission, or the Superintendent of State Police.

b. Officers and employees of municipal corporations and political subdivisions of the Commonwealth who are elected by the people or by the governing bodies, and who act in purely administrative capacities and are to serve for a definite term of office.

c. Any person who is a licensed real estate salesperson, or a licensed real estate broker associated with a real estate broker, if (i) substantially all of the salesperson's or associated broker's remuneration is derived from real estate commissions, (ii) the services of the salesperson or associated broker are performed under a written contract specifying that the salesperson is an independent contractor, and (iii) such contract includes a provision that the salesperson or associated broker will not be treated as an employee for federal income tax purposes.

d. Any taxicab or executive sedan driver, provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act.

e. Casual employees.

f. Domestic servants.

g. Farm and horticultural laborers, unless the employer regularly has in service more than two full-time employees.

h. Employees of any person, firm or private corporation, including any public service corporation, that has regularly in service less than three employees in the same business within this Commonwealth, unless such employees and their employers voluntarily elect to be bound by this title. However, this exemption shall not apply to the operators of underground coal mines or their employees. An executive officer who is not paid salary or wages on a regular basis at an agreed upon amount and who rejects coverage under this title pursuant to § 65.2-300 shall not be included as an employee for purposes of this subdivision.

i. Employees of any common carrier by railroad engaging in commerce between any of the several states or territories or between the District of Columbia and any of the states or territories and any foreign nation or nations, and any person suffering injury or death while he is employed by such carrier in such commerce. This title shall not be construed to lessen the liability of any such common carrier or to diminish or take away in any respect any right that any person so employed, or the personal representative, kindred or relation, or dependent of such person, may have under the act of

Congress relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22, 1908, or under §§ 8.01-57 through 8.01-62 or § 56-441.

j. Employees of common carriers by railroad who are engaged in intrastate trade or commerce. However, this title shall not be construed to lessen the liability of such common carriers or take away or diminish any right that any employee or, in case of his death, the personal representative of such employee of such common carrier may have under §§ 8.01-57 through 8.01-61 or § 56-441.

k. Except as provided in subdivision 1 of this definition, a member of a volunteer fire-fighting, lifesaving or rescue squad when engaged in activities related principally to participation as a member of such squad whether or not the volunteer continues to receive compensation from his employer for time away from the job.

l. Except as otherwise provided in this title, noncompensated employees and noncompensated directors of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of 1954).

m. Any person performing services as a sports official for an entity sponsoring an interscholastic or intercollegiate sports event or any person performing services as a sports official for a public entity or a private, nonprofit organization which sponsors an amateur sports event. For the purposes of this subdivision, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper or other person who is a neutral participant in a sports event. This shall not include any person, otherwise employed by an organization or entity sponsoring a sports event, who performs services as a sports official as part of his regular employment.

"Employer" includes (i) any person, the Commonwealth or any political subdivision thereof and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay and (ii) any volunteer fire company or volunteer lifesaving or rescue squad electing to be included and maintaining coverage as an employer under this title. If the employer is insured, it includes his insurer so far as applicable.

"Executive officer" means (i) the president, vice president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation and (ii) the managers elected or appointed in accordance with the articles of organization or operating agreement of a limited liability company. However, such term does not include noncompensated officers of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of 1954).

"Filed" means hand delivered to the Commission's office in Richmond or any regional office maintained by the Commission; sent by telegraph, electronic mail or facsimile transmission; or posted at any post office of the United States Postal Service by certified or registered mail. Filing by first-class mail, telegraph, electronic mail or facsimile transmission shall be deemed completed only when the application actually reaches a Commission office.

"Injury" means only injury by accident arising out of and in the course of the employment or occupational disease as defined in Chapter 4 (§ 65.2-400 et seq.) of this title and does not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes. However, such term does not include any injury, disease or condition resulting from an employee's voluntary participation in employer-sponsored off-duty recreational activities which are not part of the employee's duties.

"Professional employer organization" means any person that enters into a written agreement with a client company to provide professional employer services.

"Professional employer services" means services provided to a client company pursuant to a written agreement with a professional employer organization whereby the professional employer organization initially employs all or a majority of a client company's workforce and assumes responsibilities as an employer for all coemployees that are assigned, allocated, or shared by the agreement between the professional employer organization and the client company.

"Staffing service" means any person, other than a professional employer organization, that hires its own employees and assigns them to a client to support or supplement the client's workforce. It includes temporary staffing services that supply employees to clients in special work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects.

§ 65.2-801. Insurance or proof of financial ability to pay required.

A. Every employer subject to this title shall secure his liability thereunder by one of the following methods:

1. Insuring and keeping insured his liability in an insurer authorized to transact the business of workers' compensation insurance in this Commonwealth;

2. Receiving a certificate pursuant to § 65.2-808 from the Workers' Compensation Commission authorizing such employer to be an individual self-insurer; ~~or~~

3. Being a member in good standing of a group self-insurance association licensed by the State Corporation Commission; *or*

4. Entering into an agreement with a professional employer organization for professional employer services which includes voluntary market workers' compensation insurance for coemployees of the professional employer organization and the client company procured from an insurer authorized to transact the business of workers' compensation insurance in this Commonwealth. A professional employer organization may obtain voluntary market workers' compensation insurance in its own name for all coemployees which it shares or which are assigned or allocated to it pursuant to the agreement between the professional employer organization and the client company. The client company shall maintain separate voluntary market workers' compensation insurance insuring any and all employees of the client company not insured through the policy obtained by the professional employer organization.

B. An employer who satisfies the requirements of this section shall be certified by the Workers' Compensation Commission as an individual self-insurer and permitted to pay direct the compensation in the amount and manner and when due as provided for in this title. The Commission shall not certify an employer as a self-insurer unless it receives in such form as it requires satisfactory proof of the solvency of such employer, the financial ability of the employer to meet his obligations and the ability of the employer to pay or cause to be paid the compensation in the amount and manner and when due as provided for in this title. The Commission shall establish reasonable requirements and standards for approval of an employer as a self-insurer including, without limitation, the quality and amount of security deposits, bonds or indemnity, the amount of advance payments and reserves required, the investment of such funds, and the form and content of financial information to be submitted by the employer and the frequency of such submissions. For the purposes of any debt/equity ratio (total liabilities to net worth) minimum standard, a ratio of less than 2:2 shall be deemed satisfactory. The Commission shall, after notice and hearing, embody such requirements and standards and such other requirements as may be reasonably necessary for the purposes of this section in regulations. The Bureau of Insurance of the State Corporation Commission shall, at the request of the Commission, assist the Commission in establishing the reasonable requirements and standards for approval and certification of an employer as a self-insurer. The Workers' Compensation Commission may in its discretion require the deposit of an acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred.

C. The State Treasurer shall be the custodian of securities deposited by the employer under the requirements of this section, or under § 65.2-802, and for such services he shall receive a compensation of one-tenth of one percent per year of the amount of securities deposited with him, payable by or on behalf of such employers.

§ 65.2-803.1. Requirements for registration as professional employer organization; annual assessment.

A. Any person desiring to engage in the business of providing professional employer services shall register with the Commission before it undertakes to provide such services.

B. Each registered professional employer organization shall notify the Commission and the Bureau of Insurance of the State Corporation Commission within thirty days of all new or terminated, in whole or in part, client companies. Upon registration and annually thereafter, each registered professional employer organization shall notify the Commission and the Bureau of Insurance of the State Corporation Commission of all client companies. Such notice shall be confidential and shall not be disclosed to the public, provided that the Commission may respond to inquiries as to whether a client company has workers' compensation coverage; however, nothing herein shall be interpreted to prohibit or limit the production of documents containing such information from the professional

employer organization pursuant to an otherwise lawful subpoena issued by a court of competent jurisdiction. Each such notification shall indicate, by client company, if the professional employer organization will provide voluntary market workers' compensation insurance and whether the client company will obtain separate workers' compensation insurance. The Commission may require such other information as it deems necessary for the administration of this section.

C. All agreements for professional employer services shall be in writing and shall provide a description of the respective rights and obligations of the professional employer organization and the client company. The professional employer organization shall provide a written summary of such rights and obligations to each coemployee, including information concerning filing for workers' compensation and unemployment benefits. No agreement for professional employer services shall alter or affect the terms and conditions of any collective bargaining agreement between the client company and its employees without the consent of the parties to such collective bargaining agreement.

D. A professional employer organization that is registered with the Commission and operating in compliance with the requirements of this section shall be deemed to be an employer of its coemployees and may assume responsibilities as an employer of its coemployees for the term of its agreement with a client company. A professional employer organization may secure and provide all required voluntary market workers' compensation insurance for its coemployees under a master workers' compensation insurance policy in the name of the professional employer organization.

E. A professional employer organization shall notify in writing the client company and coemployees of its intent to terminate any agreement for professional employer services with a client company at the time of or prior to termination. Such notice shall advise the client company of its obligation to secure workers' compensation coverage. The professional employer organization shall provide a copy of such notice to the Commission and the insurer at the time notice is given to the client company. Workers' compensation insurance coverage shall continue until termination or for fifteen days after receipt of notice of termination by both the Commission and the client company, whichever is later. This section shall not alter the notice obligations of an insurer seeking to cancel workers' compensation coverage pursuant to subsection B of § 65.2-804. If a professional employer organization has received notice that its workers' compensation insurance policy will be cancelled or nonrenewed, the professional employer organization shall notify the client companies within fifteen days after receipt of the notice. Failure of the professional employer organization to provide such notice to the client companies subrogates the Commission, upon payment of a claim from the Uninsured Employer's Fund to any coemployee of a client company that did not receive notice, to any right to recover damages which the injured coemployee or his personal representative may have against the professional employer organization.

F. This section shall not exempt a client company from any other license requirements imposed under federal, state, or local law, and a coemployee shall be recognized as an employee of the client company for all purposes. For purposes of licensing requirements, a professional employer organization shall not be deemed to be engaged in the occupation, trade or profession of the client company solely through the provision of professional employer services to that client company.

G. Where a professional employer organization or a staffing service has obtained workers' compensation insurance to secure its obligations under this title with respect to compensation on account of injury or death by accident, the rights and remedies available to the employee or coemployee under this title shall be exclusive as to both the client company and the professional employer organization or staffing service in accordance with this title.

H. A professional employer organization that fails to comply with the provisions of this title or with the regulations of the Commission shall be subject to the requirements of Chapter 9 (§ 65.2-900 et seq.) of this title. The Commission is authorized to revoke or suspend any registration hereunder if the professional employer organization fails to comply with the provisions of this title or with the regulations of the Commission. If a registration is revoked as herein provided, the Commission may allow the professional employer organization to reregister upon application therefor if, when and after the conditions upon which revocation was based have been corrected and the professional employer organization has complied with all provisions of this title and applicable regulations. Whenever a registration is revoked or suspended the Commission may request the Office of the Attorney General to petition the circuit court of the jurisdiction in which the professional employer

organization is located for an injunction to cause such professional employer organization to cease providing professional employer services. Suspension of a registration shall in all cases be for an indefinite time and the suspension may be lifted and rights under the registration fully or partially restored at such time as the Commission determines that the rights of the registrant appear to so require and the interests of the public will not be jeopardized by resumption of operation.

I. Notwithstanding any provision of this title to the contrary, each registered professional employer organization shall be assessed annually by the Commission, in addition to any other assessments provided in this title, an assessment in an amount not to exceed the sums necessary for the registration and supervision of all professional employer organizations. The assessment shall be apportioned and assessed and paid in proportion to the aggregate of the annual payroll of all coemployees shared by or assigned or allocated to the professional employer organization.

J. The Bureau of Insurance of the State Corporation Commission may request and shall receive information filed with the Commission by a professional employer organization. Such information shall be confidential and shall be used solely for informational purposes by the Bureau of Insurance and its staff.

K. No person shall solicit, negotiate, procure or effect contracts of insurance for or on behalf of a professional employer organization unless such person is licensed for that class of insurance as an insurance agent, as defined in § 38.2-1800.

L. The Commission may promulgate regulations as it deems necessary for the administration of this section.

2. That the provisions of this act shall be effective with respect to any workers' compensation insurance policy issued to or renewed with a professional employer organization on or after January 1, 2001.

West Virginia State Building and Construction Trades Council, AFL-CIO

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Steven L. Burton
President

Roy M. Smith
Secretary-Treasurer

Testimony of Roy Smith
Secretary-Treasurer
WV State Building & Construction Trades Council
2301 Seventh Avenue
Charleston, WV 25312

Wednesday, May 3, 2000

COMMENTS ON PROPOSED RULE 31:
EMPLOYEE LEASING AND CONTRACTED OPERATIONS

The Building and Construction Trades Council and the Affiliated Construction Trades Foundation supports the proposed rule. We urge its quick adoption.

In recent years, this Council has rightfully focused its attention on reducing the long-practiced institution in this State of one industry subsidizing the workers' compensation premiums of another. Historically it has been small, low-hazard businesses that have been forced to subsidize high-hazard employers. A system that was designed to base premiums on the risk of injury instead forced businesses across West Virginia to pay more than their share in order to permit some to pay less.

One area where that practice continues is the contracted and leased employee industry. Today, there are individuals working as leased employees in the construction industry -- a high hazard occupation -- for which the Fund is receiving premiums as if the worker was sitting in an office. In addition, the construction

company that is employing the services of the leased employee is reaping an unfair economic advantage over companies that are paying their fair share of workers' compensation premiums. It is a system that is bad for the Fund, bad for injured workers, and bad for legitimate employers. It is a system that should be ended.

The proposed rule will abrogate the fictitious employee leasing arrangements which are designed to avoid the payment of workers' compensation premium taxes and other employee benefits at the full rate that should be charged based upon the actual work of the employees. The rule adequately places the obligation to pay premium tax payments upon both employers involved in the situation and ensures that both employers will lose the protection of the Workers' Compensation Act while insuring that premiums will be collected to pay just benefits to injured employees. It is the right approach to ending this practice and it should be adopted by the Council.

We have one important concern. The proposed rule as it is drafted does not apply to temporary help agencies unless and until such an agency engages in providing leased or contract workers. We believe that such an exemption may undercut the effectiveness of the rule. Temporary help agencies can and do undertake the same abuses as those agencies which provide contract and leased employees. For example, we know of situations, in West Virginia, where temporary employees performed demolition work while being categorized for purposes of workers' compensation in a category with piano tuners. In addition, too often workers are employed in "temporary" situations for days, weeks, months or even years. We urge the Council to remove this exemption from the proposed rule.

Thank-you for this opportunity to present the views of the West Virginia State Building and Construction Trades Council, AFL-CIO, and the ACT Foundation. We urge this Council to take quick action on this long-overdue proposal.

KELLY SERVICES

May 23, 2000

Mr. Richard S. Stephenson
BEP Legal Services Division
One Players Club Drive
Charleston, West Virginia 25311

Dear Mr. Stephenson:

I am writing regarding the proposed rules on employee leasing and contracted operations (Title 85, Workers' Compensation Division, Series 28). We appreciate the state's efforts to clarify how the workers' compensation laws apply to employee leasing arrangements. We are, however, concerned that the proposed regulations are written too broadly and could subject the regulation to a whole range of staffing services that do not engage in the practices that are intended to be regulated. We also believe that they impose an unnecessarily broad administrative burden.

A brief explanation of who we are may be helpful. Kelly Services, Inc., is a Fortune 500 services company that offers staffing services to a broad spectrum of customers. In West Virginia we have seven offices and we employed approximately 3,000 employees last year. We provide both temporary help and employee leasing services to customers throughout the country, which we believe provides us with a good perspective from which to offer what we hope you will regard as constructive suggestions. Kelly Services is also a member of the American Staffing Association and supports the comments that the association has submitted regarding these proposed rules.

We submit the following comments for your consideration.

Primarily, we are concerned that the definitions are not precise enough at distinguishing temporary help from employee leasing. As currently written, "employee leasing arrangements" include "long-term temporary arrangements and any other arrangement that involves the allocation or sharing of employment responsibilities among two or more entities." This broad language could be construed to include virtually every service business in West Virginia. These arrangements do not necessarily constitute employee leasing.

Employee leasing is a distinct business service that provides a range of long-term administrative and human resources services, such as payroll, benefits and employment tax administration to **most if not all** of a client's entire **existing** workforce. The primary purpose is not to recruit and assign employees with particular skills to perform services for clients, but rather to maintain the administrative systems for the client's existing workforce. In contrast, staffing firms recruit and assign employees with particular skills to perform services for clients on a supplemental or as-needed basis.

A more definitive definition of "employee leasing arrangements" that does not include non-leasing staffing services will help eliminate these problems and ensure appropriate

PROFESSIONAL SERVICES OF AMERICA, INC.

May 19, 2000

Mr. Richard S. Stephenson
BEP Legal Services Division
One Players Club Drive
Charleston, WV 25311

Dear Mr. Richard Stephenson:

- The proposed rules on employee leasing and contracted operations (Title 85, Workers' Compensation Division, Series 28) will place burdens on staffing firms supplying non-leasing staffing services.
- The definitions are broad.
- The definition of "employee leasing arrangement" includes "long-term temporary arrangements and any other arrangement that involves the allocation or sharing of employment responsibilities among two or more entities."
- Employee leasing is a distinct business service that provides a range of long-term, administrative and human resources services, such as payroll and benefits administration, to most if not all of a client's entire existing workforce.
- The primary purpose of employee leasing is not to recruit and assign employees with particular skills to perform services for clients, but to administer a range of services, such as payroll and benefits to a client's existing workforce. Such arrangements generally involve the client's entire existing workforce at a worksite, or substantially all of it, not just a select few employees.
- In contrast, staffing firms recruit and assign employees with particular skills to perform services for clients on a supplemental or as-needed basis.
- This broad definition of employee leasing arrangements could subject West Virginia employers to a cumbersome set of requirements meant only to target one narrow business. If the proposed regulation is specifically intended to regulate "employee leasing" for workers' compensation, then we believe the definition must be narrowed.
- The regulations are also especially burdensome to staffing firms which often have hundreds of different clients, in contrast to employee leasing firms which generally have far fewer.
- A more precise definition of "employee leasing arrangements" that does not include non-leasing staffing services will eliminate these problems and ensure appropriate applicability of the rule.
- We strongly urge you to deal with any abusive practices through narrowly targeted regulations aimed specifically at those practices, rather than broad general regulations.

Sincerely,

Jeff Taberner

Jeff Taberner, CPA
Controller/Treasurer

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May 24, 2000

HAND DELIVERED

Richard Stevenson
Bureau Of Employment Programs
Legal Services Division
One Players Club Drive
Charleston, WV 25311

Re: Comments on proposed Workers' Compensation Regulation § 85-28-1 – Employee Leasing and Contracted Operations

Dear Mr. Stevenson:

As a law firm representing a variety of small and medium size local businesses engaged in the service industry, we respectfully submit the following comments on the proposed Regulation pending before the Performance Council on "Employee Leasing and Contracted Operations":

I. Definitional Clarity. The proposed rule broadly and somewhat inconsistently defines an employee leasing arrangement with such broad, sweeping terminology that it inadvertently encompasses many businesses in the service industry such as janitorial services, security guard services, building and equipment maintenance and temporary service agencies.

For example, § 3.5 defines "employee leasing arrangement" to include "long term temporary arrangements". According to the American Heritage Dictionary, the term temporary means: "lasting or used for a limited time". The combination of the phrases "long term" and "temporary" creates an oxymoron in the definition.

The proposed rule does not exclude part time workers. For example, if a janitorial service regularly provides an employee who works one day per week at five different businesses, will all five businesses be brought under the ambit of this leased employee rule?

The proposed rule excludes a "temporary help agency" from coverage under the employee leasing rule but limits that exclusion to employees provided for a "finite temporary time period" without defining or circumscribing: (1) how long is a temporary time period; (2)

must the time period be determined or limited at the initiation of the engagement; or (3) whether the determination of a "finite temporary time period" will be made by a State auditor in retrospect at the end of the engagement.

II. Safe Harbors.

Other attempts by legislatures and government agencies to define "employee leasing" have included, in most instances, safe harbors to avoid including service businesses that historically provide workers on a customer's business site. Some of those safe harbors include:

(A) IRC § 414[n] adopted by Congress in 1982 with the Tax Equity and Fiscal Responsibility Act [attached hereto as Exhibit A]. That statute includes three primary safe harbors to prevent temporary or service workers from inadvertently falling into "leased employee" status. Those safe harbors are: (1) requiring the worker to be "on a substantially full time basis for a period of at least one year"; (2) a control test under which the employee must be under the primary direction or control of the recipient business; and (3) exclusion of workers provided by outside vendors if less than twenty percent of the recipient's non-highly compensated workforce. Additionally, the legislative history of the rule indicates that the employee leasing rules do not apply to services historically performed by independent businesses. [See attached legislative history Exhibit B.]

(B) The Florida regulatory and Workers' Compensation statutes provide a 50% safe harbor under which "employee leasing" does not occur if the number of individuals assigned to the recipient organization comprise less than 50% of the client's workforce. [See attached Florida statute Exhibit C.]

(C) The West Virginia Tax Department, in its TAA 95-008, created a requirement for employee leasing that serves as a possible additional model for a safe harbor for this rule. In the Tax Department's pronouncement, employee leasing does not occur until more than 50% of the workers come from the leasing firm on a full time basis. [Exhibit D]

(D) The West Virginia Tax Credit Statute 11-13N-2 excludes "temporary employees" from the definition and defines temporary employees as "an employee performing services under contractual arrangement with the employer of two years or less duration". [Exhibit E]

In summary, the efforts to define "employee leasing" has oftentimes included one or more safe harbors. We respectfully suggest that any definition of "employee leasing" under the Workers' Compensation regulations be limited to exclude: (1) service businesses historically providing goods or services to customers through its own employees; (2) providing workers for a job site where the original employer maintains control and supervision of the worker; (3) contractual arrangements between employer and customer under which the customer receives less than a fixed percentage of his work force from the service company; and (4) limiting "employee leasing" to employees with a minimum of one year or more of full time service with the recipient.

III. Other Issues. The proposed rule provides that the common law "lent employee doctrine" is "recognized" and applied by this rule". Neither the West Virginia statutes nor recent West Virginia case law adopts or recognizes a "lent employee doctrine". In the common law tort arena, an analogous doctrine of a "borrowed servant" rule exists. However, the borrowed servant rule is not an absolute or strict liability rule as proposed by this regulation. The borrowed servant doctrine requires the recipient organization to exercise primary control, supervision and direction of the worker:

> Under the so-called 'borrowed servant' rule, a general employer remains liable for the negligent acts of his servant unless it affirmatively appears that he has completely relinquished control of the servant's conduct from which the alleged negligence arose to the person for whom the servant is engaged in performing a special service.

AT&T vs. Ohio Valley Sand Company, 131 W.Va. 736 [1948]. See also Burdette vs. Maust, Cole & Coke Corporation, 159 W.Va. 535 [1976]. Likewise, the "lent employee doctrine", as used in other states generally requires a finding that the recipient of services actually exercises supervision and control over the worker. In essence, the "lent employee" and its first cousin, the "borrowed servant" doctrine, incorporate the old common law test of control in determining the identity of the true employer. The proposed rule misstates and misapplies these doctrines because it fails to incorporate and apply the control test.

IV. Summary. In summary, the proposed rule too broadly defines "employee leasing" by including many businesses and services historically performed by independent companies. Under the proposed rule, security guard services, janitorial services, maintenance services and temporary service agencies that historically select, hire, train, supervise and discharge their own employees would now find themselves as "leasing" companies within the meaning of this rule. The administrative burden on small business would be onerous and oppressive. Moreover, the joint liability on both the service provider and the service recipient for the Workers' Compensation premiums means that every business that contracts with a service provider for janitorial services, security guards, temporary service workers or maintenance workers must now concern itself with the credit worthiness of its vendors. Whenever the local vendor must prove credit worthiness in order to deal with another company, this naturally creates a discriminatory impact upon local as opposed to national companies that have larger balance sheets. By requiring the recipient company to vouch for the credit worthiness of its vendor, this rule unfairly and unjustly discourages the hiring of small and local West Virginia businesses.

We respectfully request that these comments be included for consideration under the proposed rule as specified in the Notice filed with the West Virginia Secretary of State for the hearing date of May 24, 2000.

Yours truly,

James M. Sturgeon, Jr.

JMS,Jr./rsr
Attachments

(n) EMPLOYEE LEASING

(1) IN GENERAL

For purposes of the requirements listed in paragraph (3), with respect to any person (hereinafter in this subsection referred to as the "recipient") for whom a leased employee performs services--

(A) the leased employee shall be treated as an employee of the recipient, but

(B) contributions or benefits provided by the leasing organization which are attributable to services performed for the recipient shall be treated as provided by the recipient.

(2) LEASED EMPLOYEE

For purposes of paragraph (1), the term "leased employee" means any person who is not an employee of the recipient and who provides services to the recipient if--

(A) such services are provided pursuant to an agreement between the recipient and any other person (in this subsection referred to as the "leasing organization"),

1 year

(B) such person has performed such services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, and

control

(C) such services are performed under primary direction or control by the recipient.

(3) REQUIREMENTS

For purposes of this subsection, the requirements listed in this paragraph are--

(A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401(a),

(B) sections 408(k), 408(p), 410, 411, 415, and 416, and

(C) sections 79, 106, 117(d), 120, 125, 127, 129, 132, 137, 274(j), 505, and 4980B.

(4) TIME WHEN FIRST CONSIDERED AS EMPLOYEE

EXHIBIT
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(A) IN GENERAL

In the case of any leased employee, paragraph (1) shall apply only for purposes of determining whether the requirements listed in paragraph (3) are met for periods after the close of the period referred to in paragraph (2)(B).

(B) YEARS OF SERVICE

In the case of a person who is an employee of the recipient (whether by reason of this subsection or otherwise), for purposes of the requirements listed in paragraph (3), years of service for the recipient shall be determined by taking into account any period for which such employee would have been a leased employee but for the requirements of paragraph (2)(B).

(5) SAFE HARBOR

(A) IN GENERAL

In the case of requirements described in subparagraphs (A) and (B) of paragraph (3), this subsection shall not apply to any leased employee with respect to services performed for a recipient if--

(i) such employee is covered by a plan which is maintained by the leasing organization and meets the requirements of subparagraph (B), and

(ii) leased employees (determined without regard to this paragraph) do not constitute more than 20 percent of ~~the~~ recipient's nonhighly compensated work force.

20% Safeharbour

(B) PLAN REQUIREMENTS

A plan meets the requirements of this subparagraph if--

(i) such plan is a money purchase pension plan with a nonintegrated employer contribution rate for each participant of at least 10 percent of compensation,

(ii) such plan provides for full and immediate vesting, and

(iii) each employee of the leasing organization (other than employees who perform substantially all of their services for the leasing organization) immediately participates in such plan.

Clause (iii) shall not apply to any individual whose compensation from the leasing organization in each plan year during the 4-year period ending with the plan year is less than $1,000.

(C) DEFINITIONS

For purposes of this paragraph--

(i) HIGHLY COMPENSATED EMPLOYEE

The term "highly compensated employee" has the meaning given such term by section 414(q).

(ii) NONHIGHLY COMPENSATED WORK FORCE

The term "nonhighly compensated work force" means the aggregate number of individuals (other than highly compensated employees)--

(I) who are employees of the recipient (without regard to this subsection) and have performed services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, or

(II) who are leased employees with respect to the recipient (determined without regard to this paragraph).

(iii) COMPENSATION

The term "compensation" has the same meaning as when used in section 415; except that such term shall include--

(I) any employer contribution under a qualified cash or deferred arrangement to the extent not included in gross income under section 402(e)(3) or 402(h)(1)(B),

(II) any amount which the employee would have received in cash but for an election under a cafeteria plan (within the meaning of section 125), and

(III) any amount contributed to an annuity contract described in section 403(b) pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D)).

(6) OTHER RULES

For purposes of this subsection--

(A) RELATED PERSONS

The term "related persons" has the same meaning as when used in section 144(a)(3).

(B) EMPLOYEES OF ENTITIES UNDER COMMON CONTROL

The rules of subsections (b), (c), (m), and (o) shall apply.

1984. The employee leasing provisions are effective for plan years beginning after December 31, 1983. The provisions relating to collective bargaining agreements are effective after March 31, 1984.

[The regulations rule takes effect on the date of enactment. Ed.]

* * * * * *

Effective Date. The provision takes effect on April 1, 1984.

[¶4141.04] ('82 Tax Equity and Fiscal Responsibility Act, P.L. 97-248, 9/3/82). Management organizations and employee leasing.

[Conference Report]

* * * * * *

Organizations performing management functions. The conference agreement expands the class of employers which, under the present-law rules for affiliated service groups (sec. 414(m)), are to be treated as a single employer for purposes of certain of the tax-law rules for qualified pension, etc., plans (including the rules for top-heavy plans), cafeteria or medical reimbursement plans, or simplified employee pensions (SEPs). Under the provision, if an organization's principal business is performing, on a regular and continuing basis, management functions for another organization, the person performing the functions and the organization for whom the functions are performed are treated as a single employer.

Under the provision, any person related to the organization performing the management functions is also included in the group which is treated as a single employer. An organization related to the organization for whom the functions are performed is included in the group under the management function rules, if the management functions are also performed, on a regular and continuing basis, for such related organization. However, the provision does not change present law under which aggregation of employers is otherwise required.

For purposes of the provision, the term "organization" includes an individual, corporation, partnership, etc. Whether organizations are related is determined under present law (sec. 103(b)(6)(C)).

The conferees intend that the provision is to apply only where the management functions performed by one person for another are functions historically performed by employees, including partners or sole proprietors in the case of unincorporated trades and businesses. For this purpose, the present-law rules relating to affiliated service organizations and to services historically performed by employees in the case of an affiliated service organization are to apply.

Employee leasing. The conference agreement also provides that, for purposes of certain of the tax-law rules for qualified pension, etc., plans (including the rules for top-heavy plans) and SEPs, an individual (a leased employee) who performs services for another person (the recipient) may be treated as the recipient's employee where the services are performed pursuant to an agreement between the recipient and a third person (the leasing organization) who is otherwise treated as the individual's employer. Under the provision, the individual is to be treated as the recipient's employee only if the individual has performed services for the recipient (or for the recipient and persons related to the recipient) on a substantially full-time basis for a period of at least 12 months, and the services are of a type historically performed by employees in the recipient's business field. For this purpose, the present-law rules relating to services historically performed by employees in the case of an affiliated service organization are to apply.

The employee leasing rules do not apply where services in a particular business field historically have been performed by one person for another. For example, some prepaid health care service programs organized on a group practice basis involve two or three components: the health plan, a separate medical group that provides or arranges physicians' services to the health plan members, and often a related hospital. The hospital and the medical group each may employ its own staff (nurses, technicians, etc.), but both sets of employees may be jointly managed. Alternatively, the staff that supports the medical group may be employed by the health plan. These forms of operation are well established in the group practice prepaid health care field. The conferees intend that the "historically performed" exception is to apply in these cases (whether the form of operation is currently in effect or put into effect for existing components of an established group practice prepaid health care service program or for the components of a new

EXHIBIT
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The 1999 Florida Statutes

468.520 Definitions.--As used in this part:

(1) "Applicant" means a business or individual seeking to be licensed under this part.

(2) "Board" means the Board of Employee Leasing Companies.

(3) "Department" means the Department of Business and Professional Regulation.

(4) "Employee leasing" means an arrangement whereby a leasing company assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client. The term does not include the following:

(a) A temporary help arrangement, whereby an organization hires its own employees and assigns them to a client to support or supplement the client's workforce in special work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects.

(b) An arrangement in which an organization employs only one category of employees and assigns them to a client to perform a function inherent to that category and which function is separate and divisible from the primary business of the client.

(c) A facilities staffing arrangement, whereby an organization assigns its employees to staff, in whole or in part, a specific client function or functions, on an ongoing, indefinite basis, provided that the total number of individuals assigned by that organization under such arrangements comprises no more than 50 percent of the workforce at a client's worksite and provided further that no more than 20 percent of the individuals assigned to staff a particular client function were employed by the client immediately preceding the commencement of the arrangement.

(d) An arrangement in which an organization assigns its employees only to a commonly controlled company or group of companies as defined in s. 414 of the Internal Revenue Code and in which the organization does not hold itself out to the public as an employee leasing company.

(e) A home health agency licensed under chapter 400, unless otherwise engaged in business as an employee leasing company.

(f) A health care services pool licensed under s. 402.48, unless otherwise engaged in business as an employee leasing company.

(5) "Employee leasing company" means a sole proprietorship, partnership, corporation, or other form of business entity engaged in employee leasing.

(6) "Client company" means a person or entity which contracts with an employee leasing company and is provided employees pursuant to that contract.

(7) "Controlling person" means:

(a) Any natural person who possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of any employee leasing company, including, but not limited to:

1. Direct or indirect control of 50 percent or more of the voting securities of the employee leasing company; or

2. The general power to endorse any negotiable instrument payable to or on behalf of the employee leasing company or to cause the direction of the management or policies of any employee leasing company; or

(b) Any natural person employed, appointed, or authorized by an employee leasing company to enter into a contractual relationship with a client company on behalf of the employee leasing company.

History.--ss. 2, 17, ch. 91-93; s. 4, ch. 91-429; s. 31, ch. 94-119; s. 145, ch. 94-218.

The 1999 Florida Statutes

468.529 Licensee's insurance; employment tax; benefit plans.--

(1) A licensed employee leasing company is the employer of the leased employees, except that this provision is not intended to affect the determination of any issue arising under Pub. L. No. 93-406, the Employee Retirement Income Security Act, as amended from time to time. An employee leasing company shall be responsible for timely payment of unemployment taxes pursuant to chapter 443, and shall be responsible for providing workers' compensation coverage pursuant to chapter 440. However, no licensed employee leasing company shall sponsor a plan of self-insurance for health benefits, except as may be permitted by the provisions of the Florida Insurance Code or, if applicable, by Pub. L. No. 93-406, the Employee Retirement Income Security Act, as amended from time to time. For purposes of this section, a "plan of self-insurance" shall exclude any arrangement where an admitted insurance carrier has issued a policy of insurance primarily responsible for the obligations of the health plan.

(2) An initial or renewal license may not be issued to any employee leasing company unless the employee leasing company first files with the board evidence of workers' compensation coverage for all leased employees in this state. Each employee leasing company shall maintain and make available to its workers' compensation carrier the following information:

(a) The correct name and federal identification number of each client company.

(b) A listing of all covered employees provided to each client company, by classification code.

(c) The total eligible wages by classification code and the premiums due to the carrier for the employees provided to each client company.

(3) A licensed employee leasing company shall within 30 days of initiation or termination notify its workers' compensation insurance carrier, the Division of Workers' Compensation, and the Division of Unemployment Compensation of the Department of Labor and Employment Security of both the initiation or the termination of the company's relationship with any client company.

(4) An initial or renewal license may not be issued to any employee leasing company unless the employee leasing company first provides evidence to the board, as required by board rule, that the employee leasing company has paid all of the employee leasing company's obligations for payroll, payroll-related taxes, workers' compensation insurance, and employee benefits. All disputed amounts must be disclosed in the application.

(5) The provisions of this section are subject to verification by department or board audit.

History.--ss. 11, 17, ch. 91-93; s. 4, ch. 91-429; s. 42, ch. 94-119.

The 1999 Florida Statutes

468.520 Definitions.--As used in this part:

(1) "Applicant" means a business or individual seeking to be licensed under this part.

(2) "Board" means the Board of Employee Leasing Companies.

(3) "Department" means the Department of Business and Professional Regulation.

(4) "Employee leasing" means an arrangement whereby a leasing company assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client. The term does not include the following:

(a) A temporary help arrangement, whereby an organization hires its own employees and assigns them to a client to support or supplement the client's workforce in special work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects.

(b) An arrangement in which an organization employs only one category of employees and assigns them to a client to perform a function inherent to that category and which function is separate and divisible from the primary business of the client.

(c) A facilities staffing arrangement, whereby an organization assigns its employees to staff, in whole or in part, a specific client function or functions, on an ongoing, indefinite basis, provided that the total number of individuals assigned by that organization under such arrangements comprises no more than 50 percent of the workforce at a client's worksite and provided further that no more than 20 percent of the individuals assigned to staff a particular client function were employed by the client immediately preceding the commencement of the arrangement.

(d) An arrangement in which an organization assigns its employees only to a commonly controlled company or group of companies as defined in s. 414 of the Internal Revenue Code and in which the organization does not hold itself out to the public as an employee leasing company.

(e) A home health agency licensed under chapter 400, unless otherwise engaged in business as an employee leasing company.

(f) A health care services pool licensed under s. 402.48, unless otherwise engaged in business as an employee leasing company.

(5) "Employee leasing company" means a sole proprietorship, partnership, corporation, or other form of business entity engaged in employee leasing.

(6) "Client company" means a person or entity which contracts with an employee leasing company and is provided employees pursuant to that contract.

EXHIBIT tabbies C

(7) "Controlling person" means:

(a) Any natural person who possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of any employee leasing company, including, but not limited to:

1. Direct or indirect control of 50 percent or more of the voting securities of the employee leasing company; or

2. The general power to endorse any negotiable instrument payable to or on behalf of the employee leasing company or to cause the direction of the management or policies of any employee leasing company; or

(b) Any natural person employed, appointed, or authorized by an employee leasing company to enter into a contractual relationship with a client company on behalf of the employee leasing company.

History.--ss. 2, 17, ch. 91-93; s. 4, ch. 91-429; s. 31, ch. 94-119; s. 145, ch. 94-218.

The 1999 Florida Statutes

468.529 Licensee's insurance; employment tax; benefit plans.--

(1) A licensed employee leasing company is the employer of the leased employees, except that this provision is not intended to affect the determination of any issue arising under Pub. L. No. 93-406, the Employee Retirement Income Security Act, as amended from time to time. An employee leasing company shall be responsible for timely payment of unemployment taxes pursuant to chapter 443, and shall be responsible for providing workers' compensation coverage pursuant to chapter 440. However, no licensed employee leasing company shall sponsor a plan of self-insurance for health benefits, except as may be permitted by the provisions of the Florida Insurance Code or, if applicable, by Pub. L. No. 93-406, the Employee Retirement Income Security Act, as amended from time to time. For purposes of this section, a "plan of self-insurance" shall exclude any arrangement where an admitted insurance carrier has issued a policy of insurance primarily responsible for the obligations of the health plan.

(2) An initial or renewal license may not be issued to any employee leasing company unless the employee leasing company first files with the board evidence of workers' compensation coverage for all leased employees in this state. Each employee leasing company shall maintain and make available to its workers' compensation carrier the following information:

(a) The correct name and federal identification number of each client company.

(b) A listing of all covered employees provided to each client company, by classification code.

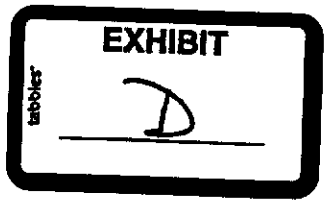
(c) The total eligible wages by classification code and the premiums due to the carrier for the employees provided to each client company.

(3) A licensed employee leasing company shall within 30 days of initiation or termination notify its workers' compensation insurance carrier, the Division of Workers' Compensation, and the Division of Unemployment Compensation of the Department of Labor and Employment Security of both the initiation or the termination of the company's relationship with any client company.

(4) An initial or renewal license may not be issued to any employee leasing company unless the employee leasing company first provides evidence to the board, as required by board rule, that the employee leasing company has paid all of the employee leasing company's obligations for payroll, payroll-related taxes, workers' compensation insurance, and employee benefits. All disputed amounts must be disclosed in the application.

(5) The provisions of this section are subject to verification by department or board audit.

History.--ss. 11, 17, ch. 91-93; s. 4, ch. 91-429; s. 42, ch. 94-119.



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TECHNICAL ASSISTANCE ADVISORY 95-008

SUBJECT: Consumers Sales and Service Tax--Exemption for Services of Employee to Employer--Applicability to Service of Employee to Joint Employers

This is in reply to your correspondence wherein you request issuance of a technical assistance advisory, as provided in W. Va. Code §11-10-5r, based upon facts submitted in support of the said request.

FACTS

Personnel Employer Organization (hereinafter "Company") is a corporation formed to provide employment services to businesses looking for ways to reduce labor costs, paperwork and other administrative burdens of having employees. Company will enter into long-term employee leasing agreements with its clients. The client's employees will then become employees of Company and will be on Company's payroll and participate in Company's benefit programs. Company will, in turn, lease the employees back to the client. Company will be responsible for payment of payroll taxes, employer withholding taxes, workers' compensation premiums, obtaining group health care insurance for its employees, and preparing and filing necessary tax returns and other documents. In exchange for its services, Company will receive a fixed administrative fee per employee/per pay period and will be reimbursed for all monies disbursed for payroll, employment and withholding taxes, workers' compensation premiums, or other employee benefit payments relating to the leased employees.

Although on Company's payroll, Company's clients will continue to supervise the leased employees. Clients will retain total control over the hiring, firing, wage rates and salary increases of employees. Clients will also be responsible for training employees and directing their day-to-day activities. If a client terminates Company's services, the employees will continue to work for the client, presumably on the client's payroll, and will terminate their employment with Company. If a client terminates an employee, the employee will not continue to work for Company. No Company leased employee will work for more than one client, and Company will not maintain an inventory of temporary employees to send out to its clients on an as needed basis. Company will not operate a temporary service or labor broker type business. The employees involved will be the regular, dedicated work forces of Company's clients. While Company will be the employer of record and will assume significant employer/employee responsibility, this arrangement will create a shared employer or co-employer environment with its clients.

In all of the above respects, Company is very different from a temporary services agency ("Temp Agency"). Temp Agencies typically hire employees who are available to work for any client of the agency on a day-to-day basis. Temp Agencies control the hiring, firing, wage rates and training of their employees. Temp Agencies set the hourly rates at which employees with specific skills are provided to their clients. The employees of a Temp Agency may work for many different clients during a pay period. If a particular client terminates its relationship with the Temp Agency, the agency's employees remain with the agency and work for its other clients.

Company requests a ruling from the Tax Commissioner that, under the facts set forth for purposes of this ruling, Company will be required to collect the West Virginia consumers sales and service tax on its flat per-employee/per-pay period fees, but will not be required to collect consumers sales and service tax on amounts received from its clients solely to reimburse Company for payroll, employment and withholding taxes, and other employment benefit amounts remitted to Company by its clients.

DISCUSSION AND ANALYSIS

The West Virginia consumers sales and service tax (hereinafter "consumers sales tax") is imposed on the sale of tangible personal property in West Virginia and on the furnishing of selected services. Selected services is defined in W. Va. Code § 11-15-2(s) to exclude services rendered by an employee to his or her employer.

As described in detail above, Company will enter into long-term employee leasing arrangements with its clients. Company will prepare periodic payrolls, prepare and file required withholding and other employment returns, and perform other required administrative functions. Company will receive a fixed administrative fee per employee/per pay period as its compensation for providing these services. Company will also be reimbursed for payroll, employment and withholding taxes, and other employment benefit amounts attributable to the leased employees. Company argues that no consumers sales tax is

due with respect to such reimbursements from clients because such amounts constitute reimbursements to Company for monies paid on behalf of its clients for services rendered by an employee to his or her employer.

Company suggests that consumers sales tax should not be collected when: (1) the contract between Company and its client, pursuant to which employee leasing services are provided, is in writing and of at least one year's duration; and (2) the employees whose wages and benefits are reimbursed are assigned to the client on a permanent basis.

Section 110-15-60 of legislative rules for consumers sales tax sets forth the analysis to be used when determining whether or not, for consumers sales tax purposes, an employee and employer relationship exists, as distinguished from the independent contractor and principal relationship. This section is based upon the common law analysis of the employer/employee (master/servant) relationship and reads:

§

110-15-60. Employee or Independent Contractor

60.1 Services rendered by an employee to his or her employer are exempt from the consumers sales and service tax and use tax. On the other hand, services rendered by an employee to his or her employer which do not fall within the scope of the employee-employer relationship or the contract of employment, and services rendered by independent contractors are subject to the consumers sales and service tax and use tax unless some other exemption provision in Section 9 of these regulations applies.

60.2 There may be situations where the issue is whether a person is an employee or an independent contractor. Generally, the relationship is that of employer-employee if the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is accomplished.

60.3 Following are factors to be considered when determining the nature of the relationship. The factors are designed to be only guidelines and where appropriate, the Tax Department will look beyond the formal aspects of the relationship to determine its substance.

60.3.1 **Instructions.** - A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee.

60.3.2 **Training.** - Requiring a worker to receive training shows that the person or persons for whom the services are performed wants the services performed in a particular way.

60.3.3 **Integration.** - Integrating the worker's services into the business operations generally shows that the worker is subject to direction and control.

60.3.4 **Services Rendered Personally.** - This shows the person for whom the services are performed is interested in the methods used to accomplish the work, as well as the results, and indicates the person exercises control.

60.3.5 **Hiring, Supervising, and Paying Assistants.** - If a person for whom services are performed hires, supervises, and pays assistants, this generally shows control over the workers on the job. But if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, then this indicates an independent contractor status.

60.3.6 **Continuing Relationship.** - This indicates an employer-employee relationship. It may exist where work is performed at frequently recurring although irregular intervals.

60.3.7 **Set Hours of Work.** - This is a factor indicating control.

60.3.8 **Full Time Required.** - Shows control over the amount of time the worker spends working and impliedly restricts the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

60.3.9 **Doing Work on Employer's Premises.** - Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

60.3.10 **Order or Sequence Set.** - If the person for whom the services are performed has the right to establish the routines and schedules to be followed, that right is a factor indicating control.

60.3.11 **Oral or Written Reports.** - A requirement that the worker submit regular or written reports to the person for whom services are rendered indicates a degree of control.

60.3.12 **Payment by Hour, Week, Month.** - This indicates an employer-employee relationship provided it's not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

60.3.13 **Payment of Business and Traveling Expenses.** - An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

60.3.14 **Furnishing Tools and Materials.** - Tends to show an employer-employee relationship.

60.3.15 **Significant Investment.** - If a worker invests in facilities that he uses in a performing service and that are not typically maintained by employees (such as maintaining an office rented at fair market value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. Special scrutiny is required for certain types of facilities, such as home offices.

60.3.16 **Realization of Profit or Loss.** - For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor.

60.3.17 **Working for More Than One Firm at a Time.** - This generally indicates an independent contractor status. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

60.3.18 **Making Service Available to General Public.** - Doing so on a regular and consistent basis indicates an independent contractor relationship.

60.3.19 **Right to Discharge.** - This is a factor indicating that the worker is an employee and the person possessing the right to discharge is an employer. An independent contractor cannot be fired so long as he produces a result that meets the contract specifications.

60.3.20 **Right to Terminate.** - If a worker has the right to quit at any time without incurring liability, this indicates an employer-employee relationship.

60.4 **Temporary Employment Agencies.** - Persons hired by employers through temporary employment agencies are not considered to be employees within the scope of the exemption. Instead, the temporary employment agency is considered to be rendering services to the employer which are subject to consumers sales and service tax unless some other provision in Section 9 of these regulations applies.

Comparison of the facts presented for purposes of this advisory with the factors listed in this legislative rule discloses that, except for payment of wages to the workers for their services, the factors indicate existence of an employee/employer relationship between the client and the employee:

(1) **Instructions.** -- These employees will take their instructions from the client about when, where, and how they are to work.

(2) **Training.** -- The client will train these employees, and Company will not.

(3) **Integration.** -- The worker's services will be integrated into the clients' business operations, but not into the operations of Company, and the employees will be subject to the direction and control of the clients.

(4) **Services Rendered Personally.** -- Employees will render their services solely for a particular client. Methods used to accomplish the work, as well as the results of that work, are controlled solely by the client.

(5) **Hiring, Supervising, and Paying Assistants.** -- The clients hire and supervise employees, but only indirectly pay employees. The clients generally control the workers on the job. Company does not interview, hire or supervise the employees. There is no contract under which Company agrees to provide materials and labor for the accomplishment of a given task. However, Company pays employees directly and is reimbursed by the client.

(6) **Continuing Relationship.** -- There is a continuing relationship between the clients and the leased employees which will survive termination of the contract for services between the client and Company. The contract between Company and clients is itself a long term contract.

(7) **Set Hours of Work.** -- The clients set hours of work for employees.

(8) **Full Time Required.** - The request for this technical assistance advisory is silent on whether any distinction will be made between full-time versus part-time employees. Presumably, clients, in determining work hours, will control full-time and part-time scheduling. However, no Company employee will work for more than one client.

(9) **Doing Work on Employer's Premises.** -- The clients, and not Company, will have exclusive control over the place of work, and clients will presumably have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

(10) **Order or Sequence Set.** -- The clients, and not Company, have the right to establish the routines and schedules to be followed by employees.

(11) **Oral or Written Reports.** -- The request for this technical assistance advisory is silent as to whether Company will require any reporting from the leased employees. However, the arrangement between Company and its clients clearly leaves each client with the authority to require employees to submit regular oral or written reports to the client, should a client choose to impose such a requirement.

(12) **Payment by Hour, Week, Month.** -- The described arrangement clearly anticipates periodic payments to employees, rather than lump sum payments. However such payments will be made by Company, which will be reimbursed by client.

(13) **Payment of Business and Traveling Expenses.** -- The request for this technical assistance advisory is silent on how employee travel and business expenses will be handled. However, the described arrangement does not prohibit such reimbursements between clients and employees, or between Company and the employees through the payment mechanism described in the request for this technical assistance advisory.

(14) **Furnishing Tools and Materials.** -- The request for this technical assistance advisory is silent on who furnishes the tools, equipment and supplies. However, consistent with the concept of the employees working at the client's premises and at the client's direction, it is logical to assume that the client or the employee, and not Company, will supply necessary tools, equipment and supplies.

(15) **Significant Investment.** -- The request for this technical assistance advisory contemplates client investment in or proprietary control of, facilities where employee services are to be rendered, rather than investment in facilities by employees. It does not appear that Company will have any investment interest in facilities of their clients.

(16) **Realization of Profit or Loss.** -- The potential for profit and loss falls upon the clients and Company in their respective roles, and not upon employees, who will be paid salaries or wages.

(17) **Working for More Than One Firm at a Time.** -- Although Company will have contracts with several clients no leased employee will work for more than one client.

(18) **Making Service Available to General Public.** -- Company's services will be offered to the general public, and clients will presumably be businesses generally offering their goods and services on the public market. However, the contracts between the clients and Company will provide that no leased employee will work for more than one client.

(19) **Right to Discharge.** -- The right to discharge a leased employee will reside solely with the client.

(20) **Right to Terminate.** -- Although this request for a technical assistance advisory is silent on this issue, leased employees will presumably have the right to quit at any time, in accordance with resignation policies of the client.

Given the authority and control which Company's clients have over employees leased by the client, we believe Company and its clients are joint employers of the employees Company leases to the client.

We now address how services of an employee rendered to his or her joint employer are treated for consumers sales tax. We begin with the definition of selected service in W. Va. Code § 11-15-2(s) which reads:

"Selected service" is defined in W. Va. Code § 11-15-2(s) to include:

"Service" or "selected service" includes all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property, but shall not include contracting, personal services or services rendered by an employee to his employer or any service rendered for resale.

"Personal service" is defined in W. Va. Code § 11-15-2(m) to include those:

(1) Compensated by the payment of wages in the ordinary course of employment; and

(2) Rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, shoe shining [while shoes on customer], manicuring and similar services. (Emphasis added.)

The measure of tax are gross proceeds which the vendor receives from selling tangible personal property or dispensing certain selected services in this State. "Gross proceeds" is defined in W. Va. Code § 11-15-2(i) to mean:

the amount received in money, credits, property or other consideration from sales and services within this state, without deduction on account of the cost of property sold, amounts paid for interest or discounts or other expenses whatsoever. Losses shall not be deducted, but any credit or refund made for goods returned may be deducted.

The consumers sales tax law does not define the term "employee," "employer," "wages," or "ordinary course of employment." Legislative rules for the consumers sales tax do define and discuss, at length, the term "employer" for purposes of distinguishing between an employee and an independent contractor.

For consumers sales tax purposes, services furnished by an employer to his or her employer pursuant to his or her contract of employment with that employer that are compensated by the payment of wages are "personal services," as defined in W. Va. Code § 11-15-2(m). As such, the services are not "selected services," as defined in W. Va. Code § 11-15-2(s), and, therefore, are not subject to consumers sales tax.

However, the definition of "selected services" excludes both "personal services" and "services rendered by an employee to his [or her] employer." The question becomes whether in the definition of "selected service" the words "services rendered by an employee to his employer" are surplus verbiage because such services are embodied in the definition of "personal services," or does "services rendered by an employee to his employer" have a larger meaning and, thereby, include services of a leased employee to his or her joint employer.

As enacted in 1937, the consumers sales tax law defined the term "personal service" to include "(a) [those] compensated by the payment of wages in the ordinary course of employment" and defined "selected services" to exclude "professional and personal services, and . . . services furnished by corporations subject to the control of the public service commission and the state road commission." W. Va. Code §§ 11-15-2(11)(a) and 11-15-8 [1937].

In 1939, section 11-15-2 of the consumers sales tax law was rewritten. While the numbering of the definition of personal service changed, the text of the definition did not change. At that same time, a definition was added in section 11-15-2 for the term "selected service":

(11) "Service, or selected service" shall include all non-professional activities engaged in for other persons for a consideration which involve the rendering of a service as distinguished from the sale of tangible personal property, but shall not include personal services or the services rendered by an employee to his employer or any service rendered for resale. (Emphasis added.)

The text of the definition of "selected service" was last amended in 1987 by including a specific exception for contracting services. After amendment, section 11-15-2(i) read:

(i) "Service, or selected service" shall include all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property, but shall not include contracting, personal services or the services rendered by an employee to his employer or any service rendered for resale. (Emphasis added.)

In 1994, the definitions in section 11-15-2 were placed in alphabetical order, resulting in the definition of "service" or "selected service" being moved to subsection 11-15-2(s). As previously observed, the consumers sales tax law does not define the term "employee" or "employer."

In *Woodell v. Dailey*, 160 W.Va. 65, 230 S.E.2d 466 (1976), the issue before the court was whether services of an interior decorator are professional services exempt from consumers sale tax or are taxable services. The case was difficult because the consumers sales tax law did not define either "professional services" or "nonprofessional activities." The court wrote, at page 469 (S.E.2d):

The absence of such definitions makes it impossible for us to say that this statute is clear and unambiguous. Consequently, there is no room for the application of the well-recognized principle that a statute which is clear and unambiguous should be applied and not construed. *See Tax Comm'r v. Veterans of Fgn. Wars*, 147 W.Va. 645, 129 S.E.2d 921 (1963). *See also Eggleton v. State Workmen's Compensation Comm'r*, W.Va., 214 S.E.2d 864 (1975); *Russell Transfer, Inc. v. Moore*, W.Va., 212 S.E.2d 433 (1975), and *State v. Carman*, 145 W.Va. 635, 116 S.E.2d 265 (1960).

Generally, tax laws are strictly construed, and when there is doubt regarding the meaning of such laws they should be construed in favor of the taxpayer. *See State ex rel. Battle v. Baltimore and Ohio Railway Co.*, 149 W.Va. 810, 143 S.E.2d 331 (1965), *cert. denied*, 384 U.S. 970, 86 S.Ct. 1859, 16 L.Ed.2d 681 (1966), and *State v. Carman, supra.* However, a tax law under which a person claims an exemption is strictly construed against the person claiming the exemption. *Owens-Illinois Glass Co. v. Battle*, 151 W.Va. 655, 154 S.E.2d 854 (1967); *Tax Comm'r v. Veterans of Fgn. Wars, supra*, and *State v. Carman, supra.*

In interpreting the statute involved in this case, we are guided by and apply the following principles of statutory construction: (1) Effect should be given to the spirit, purpose and intent of the lawmakers without limiting the interpretation in such a manner as to defeat the underlying purpose of the statute; *See Tax Comm'r v. Veterans of Fgn. Wars, supra*; (2) Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language; *See Wilson v. Hix*, 136 W.Va. 59, 65 S.E.2d 717 (1951), and *Fielder and Turley v. Adams Express Co.*, 69 W.Va. 138, 71 S.E. 99 (1911); (3) Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning; *See Davis v. Hix*, 140 W.Va. 398, 80 S.E.2d 404 (1954), and *Miners v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941); and (4) If technical words are involved they will be presumed to have been used in a technical sense and will ordinarily be given their strict meaning; *See Lane v. Board of Education of Lincoln County*, 147 W.Va. 737, 131 S.E.2d 105 (1963).

Applying these principles, we believe the consumers sales tax law demonstrates clear legislative intent to exclude from the definition of "selected service" both personal services, which includes those compensated by the payment of wages in the ordinary course of employment, W. Va. Code § 11-15-2(m), and services rendered by an employee to his or her employer, W. Va. Code § 11-15-2(s).

In *Woodell*, the court found that "[a] legislative enactment which uses an undefined term referring generally to professions or professional services will and should be considered as having been used in its broadest modern technical and general sense. We consider the expression 'professional services' to have been so used in the taxing statute involved in this case.

Thus, we do not limit 'professional services' merely to services performed in the practice of law, theology or medicine or in the pursuit of occupations specifically recognized as professions by statute. Other professions are clearly contemplated by the taxing statute here involved. However, any such other profession must be clearly established as a profession by the one who asserts that services rendered by him in connection therewith are 'exempt' or 'excepted' and hence not taxable." 230 S.E.2d at 470.

Like *Woodell*, the legislative enactment involved here uses undefined terms, referring generally to "employer" and to "services rendered by an employee to his employer." Like the phrase "professional services," "services rendered by an employee to his employer" should be considered as having been used in its broadest modern technical and general sense. When so construed, the phrase "services rendered by an employee to his employer" is not limited to "services compensated by the payment of wages in the ordinary course of employment." Thus, the statute clearly contemplates that an employee may have more than one employer and that the services rendered to each are exempt from consumers sales tax.

Clearly, the contract between Company and its client is for the provision of contract services for which Company will receive gross proceeds which are the sum of (1) the gross payroll of the employees leased to the client, (2) payroll taxes attributable to such gross payroll, (3) workers compensation premiums attributable to the employees leased to the client, (4) reimbursement of costs paid by Company for employee benefits of the employees leased to the client, such as a group health coverage, and (5) an administrative fee which includes Company's profit. In many respects, the reimbursement is not unlike that typically found in a cost plus arrangement.

The contract between Company and its client will give the client considerable authority and control over the leased employee. This control and authority is such that if there was no common law employee/employer relationship between Company and the leased employee, the client would be the common law employer for consumers sales tax purposes. Moreover, if the client terminates the services of the leased employee, that employee's employment with Company is also terminated; and if the client terminates its contract with Company, the employment relationship Company has with the employees leased to that client is also terminated and the leased employees go back on the payroll of the client.

Under the facts presented here, Company is the common law employer of the leased employees. However, the facts disclose that the clients of Company are also employers of the employees leased to them due to the authority and control they have over the leased employees and that the services of the leased employees are for the benefit of both employers. As such, Company is the general employer and Company's clients are special employers of the leased employees. As such, Company and its clients are joint employers of the leased employees.

CONCLUSIONS:

Based upon the specific facts presented for purposes of this advisory and the preceding discussion, the Tax Commissioner rules:

1. A person who is not the common law employer of the leased employee and for whom a leased employee performs services under factual circumstances like those here, where but for the existence of the common law employer/employee relationship between the leased employee and the General employer, the leased employee would be the common law employee of the Special employer, the leased employee will also be treated as the employee of the Special employer for purposes of the consumers sales and service tax. Therefore, the Company will not be required to collect consumers sales and service tax on amounts received from its clients solely to reimburse Company for payroll, employment and withholding taxes, and other employment benefit amounts remitted to Company by its clients. Company will be required to collect and remit tax on its gross proceeds attributable to its administrative services including any profit.

2. The term "leased employee" means, for purposes of the consumers sales and service tax, any person who is the common law employee of his or her leasing organization (General employer), who is not the common law employee of the recipient organization (Special employer), and who provides employee services to the recipient if--

a. such services are provided pursuant to a written agreement between the recipient (Special employer) and the leasing organization (General employer) lasting for more than one year,

b. at least fifty percent of the leased employees performed such services for the recipient (or for the recipient and related persons as defined for purposes of section 414(n) of the Internal Revenue Code of 1986, as amended), on substantially a full-time basis in a permanent employment position of the recipient that existed for a period of at least one year prior to execution of the employee leasing agreement and the rest of the employees leased to the recipient fill permanent employment

positions with that recipient. As used here, "permanent employment position" means a position intended by the recipient to last for more than one year that is neither a temporary nor seasonal position,

c. the services of the leased employee for the Special employer are of a type historically performed, in the business field of the recipient (Special employer), by its employees, and

d. if the Special employer had a qualified pension plan as defined for federal income tax purposes, whether or not the Special employer has such a plan, the leased employees must be included in the plan for the plan to be a qualified plan.

Conclusions reached in this technical assistance advisory are based upon the facts submitted and application of current law. In the event there is a material change in the facts, or if it is determined that material facts were omitted or are materially different from those furnished to us for purposes of this ruling, or there is a material change in the applicable law, the conclusions reached in this advisory may no longer apply.

Declaration of Presidential Value. – Under W. Va. Code §11-10-5r(b), a technical assistance advisory has no precedential value, except to the taxpayer who requests the advisory, unless the Tax Commissioner specifically states that it has precedential value. **Due to the specialized nature of the question presented for ruling,** this technical assistance advisory is declared to have no precedential value, and may not be relied upon by any person other than the specific taxpayer that requested the advisory.

Publication. -- Under W. Va. Code §11-10-5r(e), the Tax Commissioner is required to release Technical Assistance Advisories to the public after they are modified to delete identifying characteristics. This advisory will be released as Technical Assistance Advisory 95-008.

Issued: December 18, 1995 James H. Paige III

Secretary/Tax Commissioner

(18) "Temporary employee" means an employee performing services under a contractual arrangement with the employer of two years or less duration.

WV Code 11-13N-2

EXHIBIT
E

BEFORE THE WEST VIRGINIA WORKERS' COMPENSATION
PERFORMANCE COUNCIL

IN RE: RULE 31
EMPLOYEE LEASING AND CONTRACTED
CONTRACTED OPERATIONS

TRANSCRIPT OF PROCEEDINGS had and public statements taken at the administrative hearing held in the above referenced matter on Wednesday, May 24, 1999, at 10:00 A.M. at the Charleston Civic Center, Parlor D, 200 Civic Center Drive, Charleston, West Virginia, pursuant to notice given to all interested parties.

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ATTENDING REPORTER: John T. Berkhouse

APPEARANCES:

PERFORMANCE COUNCIL MEMBERS PRESENT:

Gene F. Bailey

Thad Epps

Richard Humphreys

Chris E. Jarrett

John Johnson

Everett Sullivan

Fred Tucker

Paul Thompson

OTHER WORKERS' COMPENSATION PERSONNEL:

Richard S. Stephenson, Esq.

Jamie J. Chenoweth

George "Gere" Flick

I N D E X

MR. TUCKER: I would like to call the public hearing for the proposed Rule 31, Employee Leasing and Contracted Operations, to order. The purpose of this meeting today is for public comments pertaining to the Rule, as I identified, Rule 31.

A little housecleaning before we get started. Jamie, I understand that the written comment period has expired; is that correct?

MS. CHENOWETH: That is correct.

MR. TUCKER: Okay. If you have already made written comments, you can still feel free to make oral comments today; but this will be your last opportunity to speak to this rule, if you haven't addressed it, written.

I am not going to go in any particular order. I am just going to take the sheets as I have them. The people that wish to speak have identified so. Now, if you have changed your mind during the proceeding and you didn't sign up to speak, let me know and we will give you that opportunity.

The first person is Mr. James Sturgeon.

MR. STURGEON: My name is Jim Sturgeon. I am with the law firm Pauley, Curry, here in Charleston. We represent a variety of small and medium-sized businesses, a lot of them principally in the cleaning and service industry. I have some suggestions in connection with the proposed rule, hopefully for clarification, as well as for improvement.

The proposed rule does not address the issue how to characterize part-time employees. It does not provide any safe harbor for any employers who are providing contracted services; whether they are a Manpower type of operation, or whether they are a janitorial service, or they are a security guard service, or they are a maintenance company, to make certain when they are providing leased employees and when they are not. We suggest that there be some safe harbors put into the proposed regulation to define clearly when those boundaries have been crossed.

As a way of suggestion, I would like to make a couple of comments about the other types of

applications or safe harbors in the employee-leasing arena. For example, in the Internal Revenue Code, when you define employee leasing for pension and employee benefit purposes, there are a series of safe harbors. An employee leasing arrangement does not occur unless the employee, the worker, has been on-site with the customer for a minimum period of one year. It does not apply unless the leasing company is providing more than 20 percent of the workforce. It does not apply to services historically performed by service companies, like janitorial services, security guard companies, and Manpower-type operations. Those safe harbors that are in the Legislative history and the statutes of the tax rules in connection with employee benefits need to be incorporated, in one form or another, into this proposal in order to provide clarity and clear dividing lines so that local service providers will not overstep the bounds and walk in with vagueness of whether they are employee leasing or are not.

As a way of background, this is a complex

issue. When the Internal Revenue Service, through the Treasury Department, tried to write regulations to implement this tax statute, they proposed it in 1987, they let them out in proposed form and withdrew them in 1993 and decided that they don't want to venture further into this field, because of the complexity of it, in spite of the fact that the Statute itself has a series of safe harbors.

The proposal here is to adopt a quote "Lent employee doctrine" into West Virginia. Our brief research into this issue indicates that insofar as the lent employee doctrine, there is no lent employee phrase in the West Virginia Code and there's none in any West Virginia judicial decisions. Missing from this definition of lent employee in this proposed regulation is the reference to what other states have incorporated by judicial decision into that doctrine, which is the doctrine of control. The lent employee doctrine, which is proposed to be sort of an absolute liability under this reg, is not applied normally in other states in that way. We understand it to be on

the basis of the fact that the service provider is providing the worker, where the recipient organization actually is supervising, hiring, firing, maintaining, and directing that worker, the concept of control, who really has control of the worker is what seems to be driving the lent employee doctrine in other states. So when we talk about adopting a lent employee doctrine here in West Virginia, which has not been done, we suggest it at least ought to be referenced to the way it is adopted by other states, and incorporates a concept if the recipient of that service really has absolute control of the worker, and that would exclude a lot of local businesses that provide workers on a contract basis to the recipient customer; specifically, janitorial services, security guard companies, Manpower-type operations, maintenance companies, where they hire, supervise, fire, and direct their own employees. Those people should not be brought within the quote "Leased employees" and subject them to this administrative burden.

Lastly, I would like to suggest that

there are at least two other analogous applications of this rule that might provide you some good research material. The first is the Florida Statute. The Florida Workers' Comp Statute has a safe harbor. It says, "Employee leasing does not occur unless more than 50 percent of the recipient's workforce comes from leased employees." That's a safe harbor that provides a clear guidance, a clear dividing line for the employer community.

Lastly, that 50 percent threshold has been picked up by the West Virginia Tax Department when they issued Technical Assistance Advisory 95-001, which says that employee leasing only occurs when the service provider provides more than half of the workers for the recipient organization.

All of these precedents and analogies that I'm citing to you, or suggesting, are directed to one fundamental purpose, providing clarity in the rule and providing a safe harbor so that local small businesses, janitorial services, security guard companies, Manpower, temporary agencies, and others,

will not inadvertently fall into the trap of the quote "Employee leasing" and run into this administrative burden that should not be imposed on local service providers that historically provide services with their own employees, where they hire them, they fire them, and they supervise them, they should not be leased employees under the rule. The way the rule is written in proposed form, that clearly is not there. We suggest it be included. Thank you.

MR. TUCKER: Thank you.

MR. HUMPHREYS: Mr. Chairman, are we going to have an opportunity to raise questions?

MR. TUCKER: Mr. Sturgeon, would you come back up?

MR. STURGEON: I'm sorry. I was trying to speed through this without wasting any more of your time.

MR. TUCKER: No problem, sir. Mr. Humphreys, do you have question?

MR. HUMPHREYS: I'm trying to picture, given the parameters that you suggested, when Rule 31

as it is conceived would be applicable?

MR. STURGEON: The way the proposed rule reads, in our reading of it, and by the way, also the reading of a lot of our business clients, they view it as somewhat ill-defined as to when a janitorial service, when a security guard company, when a Manpower operation, whatever, step over the line being in the employee leasing business. If there is a local business that provides, for example, several janitors to a particular plant or a particular office building, and they work in that building as their principal work site, but they are hired, supervised, and directed by the janitorial service, is that within the ambit of this employee leasing rule? The way that it is written, it could very easily be interpreted by an auditor as being within that rule, and I don't think that's what's intended. Clearly it would be disadvantageous to local businesses to have a local janitorial service or a security guard company be told that you are engaged in employee leasing when, at some point in time, your employees are on a particular site

too long; and there's no time limit here. There is no, "You have to be on site for a year before you are a leased employee." There is no safe harbor in this context. I hope I am answering your question.

MR. HUMPHREYS: I'm visualizing, trying to pick up on the point you've made, a case where it wouldn't be applicable in terms of the rate, unless a leased employee had been on site for one year or more, that a matter of control had been established, and that the leasing agency would have provided 20 to 50 percent of the workforce?

MR. STURGEON: Yes, Your Honor. Those are all suggestions, from actual applications of regulations and statutes from other states, and other contexts dealing with employee leasing. I'm just trying to provide sort of a cafeteria of different options for safe harbors. But, clearly, something that sets a minimum, that you have to meet 20 percent of the recipients workforce and that employee has to be on site for a year. The reason for the tax rule for a year was that when you have a worker on site for

a year, after that year, if the leased employees or workers provided by the other company are more than 20 percent of your workforce, after a year they have to come into the pension plan. It's not a retroactive application; only after they have been there for a year; and then only when it meets a 20 percent threshold.

MR. JARRETT: Mr. Sturgeon, before you step down.

MR. STURGEON: Yes, sir.

MR. JARRETT: My understanding was something about a 1,000 hour rule a year?

MR. STURGEON: Well, 1,000 hours is used to determine when the year has occurred. Under the pension rules, 1,000 hours is determined to be the breakpoint at which an employee, during a 12-month period, has -- it's counted over a calendar year --

MR. JARRETT: But it's deemed to be a year, though?

MR. STURGEON: Full-time for a year means that if you work during that one year for a

minimum of 1,000 hours; but you are only deemed an employee after that one-year period, and after that one-year period if you have met the 1,000 threshold.

MR. JARRETT: I'm just trying to get something clarified. You said one year; people would think you had to work there a full year. But it's 1,000 within a calendar year?

MR. STURGEON: Yes, sir.

MR. JARRETT: Then you are deemed to have worked a year under that rule?

MR. STURGEON: There's a safe harbor -- there's a double safe harbor to say that you have to be on site for a year, and during that one-year calendar period you have to have logged 1,000 hours of service.

MR. JARRETT: If you get that 1,000 hours done in five months, are you deemed to be a year?

MR. STURGEON: Only at the end of the 12-month period. So, you still don't shorten the 12-month period; but for purposes of determining -- the

1,000 hours is to determine not the year, but to determine whether you have actually worked full-time during that year.

MR. JARRETT: Okay. Theoretically, you could do your 1,000 hours and no longer work there for the next seven months, then next year you would become a full-time employee?

MR. STURGEON: If they are still on the payroll.

MR. JARRETT: If they are not there anymore?

MR. STURGEON: If they are not there anymore, they won't participate in the pension and they wouldn't be a leased employee, they wouldn't fall within this rule anyway.

MR. JARRETT: All right. If they hire them again next year?

MR. STURGEON: Then they will have been deemed to have been there --

MR. JARRETT: And they work them another 1,000 the second year?

MR. STURGEON: 1,000 the second year --

MR. JARRETT: If they hire them in July of the next year and work them 1,000 hours, and then lay them off in December.

MR. STURGEON: When they come back to work, they would automatically come under the pension plan at that point.

MR. JARRETT: Even though they had a break in service?

MR. STURGEON: Unless that break in service, under the pension rules, lasted more than five years, they are in.

MR. JARRETT: Have you provided any comments?

MR. STURGEON: No, Your Honor.

MR. JARRETT: If you have any notes you like to give us, I would be happy to take them.

MR. STURGEON: I will be glad to submit them before the end of the day.

MR. TUCKER: Anyone else have any questions?

(no response)

MR. TUCKER: Thank you, Mr. Sturgeon. The next speaker is Marty Chapman with the Charleston Chamber.

MR. CHAPMAN: My name is Marty Chapman, I am the Vice President of the Charleston Regional Chamber of Commerce.

I am here representing our membership of about 1,100 businesses, also in conjunction with the Huntington Regional Chamber of Commerce and its 750 member businesses. I am here, simply, today to speak to comments we have received from our memberships, and expressing their concerns with this regulation.

Both organizations have received numerous comments from our membership expressing their concern and opposition to the proposed Employee Leasing Regulation and the adverse impact it would have.

Their concerns include, number one, contracted operation arrangements would make local service providers employees of the customer. The definition proposed within the regulation would bring

the employees of a service provider under the employment scope of the customer. This would encompass security guards, janitorial services, maintenance services and other businesses historically providing services to their customers.

Second would be the administrative burden that it would cause. Contractual service providers with multiple clients would have to report different rate and experience levels for each customer. For janitors, security guards and others who work at multiple locations throughout the week, the complexity is mind-boggling.

Number three, the proposal provides unjustified risk shifting between service provider and customer. By assigning the customer's experience rate to a service provider, the proposed rule provides no incentive for the provider to install and maintain good safety practices.

Last, the proposed rule creates legal uncertainty for employers. The proposed regulation makes the temporary worker an employee of the

customer. This would impact potential employee benefit plans, and the flexibility a business has in offering the best in benefit packages possible to long-term employees.

For the concerns previously stated, the members of the Charleston Regional Chamber of Commerce and the Huntington Regional Chamber of Commerce urge the Performance Council to reconsider and modify the Workers' Compensation employee leasing regulation.

Thank you.

MR. TUCKER: Does anyone have any questions for Mr. Chapman?

Mr. Jarrett?

MR. JARRETT: Have you submitted any written documentation of your comments?

MR. CHAPMAN: No, sir.

MR. JARRETT: Do you have some prepared?

MR. CHAPMAN: Yes.

MR. JARRETT: I would be happy to take them if you would like to give them to us.

MR. CHAPMAN: Okay. Thank you.

MR. BAILEY: Same here. My name is Gene Bailey, Mr. Sturgeon and Mr. Chapman; I would like to have your written comments, also, even though the Division does not accept them at this time.

MR. TUCKER: The next speaker is Marie Lewis.

MS. LEWIS: My name is Marie Lewis and I am with Manpower Temporary Services; and I am not an eloquent speaker like Mr. Sturgeon.

The reason that I wanted to talk is because I am confused when I read this rule. I know that I am a temporary help service. Manpower has provided these services for many years. But when I read this rule, I even called Gere Flick to ask him, "Please send someone to our operation, tell me what kind of operation we do." I know our industry is unique, it's very unique. We have people that we do send on an assignment for one week, one day, four hours, one month, three years. When I say three years, I'm talking specifically about, we have the

contract with the State of West Virginia, which I don't know if you know or not; but we have had people at the State for as long as three years at one time. They were our employees. We advertised, we interviewed them, we tested them, we train them on things, on computer software, so that they have that. We hire them, we select them to go to that site; and then if there is a problem, we address the problems, the disciplinary problems, and we fire them, if need be. They are our employee. And, according to Gere Flick, he made a comment that we did all of those things. So, in that situation, it would not be a leased employee situation. But that was his comments; it's not written like that. I don't know if we have a situation like that, if I am going to have an auditor come in and see me and say, "This person should have been leased." And in my definition, it was a temporary situation, but yet it turned into long-term. When the State calls us, or anyone calls us, and says, "I want a temporary for an indefinite time-frame," it might be a month, like I said, it might end up being

three months or continuing on for six months. It just depends. We never know. I don't want us to get into the situation where we have someone on an assignment, then all of a sudden someone come in and says, "Oh, this should have been leased." Well, our profit, as a temporary help service, is based on our costs of payroll taxes. If we don't know our exact cost for Workers' Comp, we don't know what kind of money we are making. It's a very competitive business, and we have to know what we are doing. My fear is that someone would come in later and say, "This should have been leasing," and then I am going to have to go to my customer and say, "What was your rate," and we may or may not have made money. I don't know if my customer is going to give me a hard time because they look to us for a temporary employee and we were supposed to be taking care of all of these costs. That's one of my concerns.

My other concern is the administrative burden. The fact that in this proposal it states that if you have contracted employees, which, again, I

don't really know what that is, that you have to submit to the fund where they are working, how long they are working there, their Social Security number, your customer's risk number, as well as their rates. And even if you don't have a contract employee there, it says, "All other employees," also; which would mean -- we had over 8,000 employees last year -- we would have to somehow come up with a plan. It would take us forever just to do our quarterly reports. I can't even begin to tell you the time frame involved. I would need -- I don't even know what, to figure out how to do this. I can't even think about the way we would have to set it up. We have tried, for the last year and a half we have talked about getting multi-classes. So, we prepared for multi-classes in our operation. We were ready for that; then that was halted. Now, we are trying to figure out a way that we could even begin to report all of these wages like this.

Another issue is the confidentiality issue. I know you are thinking that's ridiculous, but

the truth of the matter is, like I say, we are in a very competitive industry. I don't particularly want all of my customers names out there somewhere for anybody to just know who all of our customers are. That's our business.

A couple of other things, and I think Jim Sturgeon said the safe harbor rule. I don't understand what safe harbor is, but I can tell you that the definition is what bothers me. I don't know the timeline, when it says finite timeline. Again, we have had someone at the State for a long period of time; and is one year going to be it? It shouldn't be always. If you hire that person and fire them and take care of them, discipline them, the whole bit. So that's one of the things that I am not sure of the timeline, the whole thing of it.

I have a couple of other comments here. Another thing, if we do have to get this information from our customers, their rates, their risk number, how are we going to do this? Are we going to have them send us a copy of their -- they can't give us a

copy of their Workers' Comp Certificate, because that doesn't have rates on it. They would almost have to send us a copy of their quarterly premium report. I don't know how often they would give it to us. Are we going to, if we do have someone on an assignment and they say, "We are only going to use them for six months," how do we know that it's not going to be longer than that? Are we going to have to have them sign something that says, "We'll only use you for six months," and then this person won't be there anymore? Are we going to have to have them say, "This is truly our rate"? I mean, how are we going to get this information from them?

How are we going to know, when we start out, how am I going to feel comfortable that someone is not going to come into my operation and say, "This should have been leased," whenever I don't have a clear definition of it? I guess that's my biggest concern, is I need a clear definition.

MR. JOHNSON: Let's get back to the element of control, mentioned by Mr. Sturgeon, which

makes a whole lot of sense to me. To what extent do you actually have control over the Manpower employee? Do you direct the daily activities of that particular employee, or does the employer direct the daily activities?

MS. LEWIS: Okay. We have people, and we bring them in, we test them on numerous tests, we decide what their level of interest is, as well as their level of skills. We assess all of that. When someone calls, let's say, West Virginia American Water, someone calls from there and says, "I need a temporary to do data entry." Okay? And we look through our files, we find someone who we think will qualify and we call them and we tell them to go to this customer, tell them what they are going to be doing. We give them a complete job description, based on what our customer has told us. We give them pay rates, we tell them their lunch time, we tell them everything. They go to work; and during the course of the day, the customer is the one telling them what they want them to be doing that day. We are the ones

who have hired this person and sent them to do this assignment. It's the same thing as the janitorial service. Whenever you send somebody to do your janitorial service, you, as a customer has said, "I need somebody to come in and sweep and mop and do the garbage and clean the dishes, and the whole bit; and while they are there, they know that's what they are supposed to be doing. If you were there on site and you see that they missed a trash can, you are going to tell them to pick up that trash can. If we send an employee out, we should have had a good job description from our customer before we send them out, which we do. So we tell them what they are supposed to be doing, their activities. Once they are there, if there is any disciplinary problem -- if they are going to be late for work, they are to call us and then we call our customer and tell them that they are going to be late for work. If they are not going to be able to come in because they have a baby-sitting problem or a sick child or they are sick, or whatever, they are to call us. We, in turn, call our customer

and say, "Susie can't come to work today because blah, blah, blah. Do you want me to send another temporary for the day?" So, we have daily knowledge, if there is an issue going on.

Every week, we call our customer. We say, "How did Susie do this week? Is there any issues, any concerns; can I do anything?" We call our customer every week and find out. We also send, what we call, quality performance. We send a letter out, a form, asking them to rate our temporaries, so we will know what kind of performance they are doing.

We do the same thing for our employees. We send them a note saying, "Tell me what you thought about our services and our customer," you know, "was safety an issue." We send out safety information all the time. We have safety committees. We constantly are involved with our employees. We send birthday cards to them; we send anniversary cards to them. If there is a disciplinary issue, we do have the discussion with the employee. I am not going to sit here and tell you for one minute that we haven't had a

customer who gets hot and says, "Get out of here," you know. That happens; but they contact us immediately; we contact the employee, we have them come in, we discuss the situation. We determine if that employee is no longer working for Manpower or if we send them to another assignment. So, our customer may chose to remove them from their particular assignment, but that doesn't mean they are fired from us. We continue with that relationship.

Does that answer your question?

MR. JOHNSON: But on a daily basis, the employee is under the direct supervision and direction of the employer?

MS. LEWIS: Yes, they are being supervised. The employer there is telling them, "This is what you need to be doing today." But they have given us the job description, so we can let the person know what their job is supposed to be at a particular assignment.

MR. TUCKER: Any other questions?

MR. SULLIVAN: On the people that you

employ, how do you determine -- do you have classifications for all of these folks?

MS. LEWIS: Yes.

MR. SULLIVAN: And you have the wage determined for that particular class?

MS. LEWIS: Yes. It depends on a lot of different things. It depends on their experience; because we might have a data entry operator who is just going to sit there and key in very little, doesn't have to have a lot of background. She or he may make a lower wage than someone who has complete word processing and knows how to do everything, every single program out there. So it depends on their level and the customers' needs.

MR. SULLIVAN: What areas do you furnish employees for? Do you have a restricted area that you just specialize in --

MS. LEWIS: Oh, yes.

MR. SULLIVAN: -- or do you have an umbrella where that you cover everyone who wants an employee?

MS. LEWIS: Oh, no, we do not. Actually, we have a whole manual -- not a manual, but a several page booklet that has prohibitive guidelines. We are very, very, very cautious about safety. That's a major issue at our company. I would invite each of you to come and see our safety program. We are so proud of it. But the first thing that we always want to know is what the job is, because we also do commercial work, industrial work. We don't lift over certain pounds, we don't go underground, we don't work with chemicals. We always ask a lot of questions about that. We go on site; before we ever service a customer, we go to their job site to make sure it is a safe environment. It's not just on an industrial assignment. If it's a clerical assignment, even, we go there and ask our customer all kinds of questions. What are they going to be doing, what kind of machines are they going to be working on; and, if it's a clerical job in a plant, we want to know if they have to walk through a plant to get to their assignment. We are very cautious about that. So,

that's kind of how we start.

Does that answer your question?

MR. SULLIVAN: Well, I was under the impression if I was an employer and I needed someone to roof a building --

MS. LEWIS: No. We do not do it. We do not --

MR. SULLIVAN: You don't do any construction work at all?

MS. LEWIS: If we have ever done construction work, it is if a construction company calls and wants us to do cleanup, cleaning up areas or whatever; but we do not do ladders, we don't climb up more than one story; that's all we will do. We do not do roofing work of any kind. No.

MR. SULLIVAN: You don't run a Skil saw? You don't --

MS. LEWIS: No, none of that stuff.

MR. SULLIVAN: You don't drive any nails?

MS. LEWIS: I don't know about that. I

wouldn't say that we wouldn't drive a nail; no. I wouldn't say that.

We have sent painters, sent people to paint.

MR. SULLIVAN: If I went out as a tender to a bricklayer, do you have a job classification or wage determination for that particular service?

MS. LEWIS: Okay. There's different instances. For instance, if I was sending someone to work doing some landscaping, as long as there are no major chemicals involved. If they are going to work at someplace like the U. S. Post Office, for instance, it's going to be a different rate, because it might be a wage-determined rate. I have to pay the employee more than if I were sending them to work at your company, whatever that might be.

MR. SULLIVAN: So, you just pay what you have to?

MS. LEWIS: Exactly. We pay what is necessitated by the customer and skills.

MR. SULLIVAN: Nothing less than minimum

wage?

MS. LEWIS: Oh, yes.

MR. SULLIVAN: Thank you.

MR. JARRETT: Your company has a rate for Workers' Comp?

MS. LEWIS: Yes, sir.

MR. JARRETT: One rate?

MS. LEWIS: There are two rates, actually.

MR. JARRETT: When you send a painter to a company to fill in, whether it's commercial or residential or whatever, the company that hired them has a rate for payment. If I am a painting company and I supply painters all over the place and I am short one and I call you up and say, "Hey, I need a painter, a week or two weeks or three weeks," is it fair to say that the rate that you pay, as far as Workers' Comp rates, would be less than the company that is full-time in the painting business?

MS. LEWIS: Probably not; but I am not sure what a painting company's rate is.

MR. JARRETT: But they can't go up more than one floor, they can't climb a ladder, they can't do all of this other stuff?

MS. LEWIS: No.

MR. JARRETT: This Council has looked at and tried to figure out how to stop -- if you are a full-time painting company and you have 50 painters and you paint bridges and you paint tanks or you paint something, chemical companies. They go out and they hire temporary, two or three from you, or five, or whatever number you supply, and are able to pay a lower rate and yet expose them to the same hazards and dangers that their full-time employees are, and yet they are not paying a comparable rate. There is an enticement there for that company not to hire full-time and hire temporary people.

MS. LEWIS: And I understand that.

MR. JARRETT: And that's something this whole Council is wrestling with. How do we stop that, somebody that abuses the system. There's got to be a way that you identify when temporary employees are

exposed to those types of hazards and are down there for months or years or whatever, and the employer is paying a lesser rate, so as to avoid -- he's not hiring full-time employees, he's using temporaries so he can avoid the rate. He may have a high factor and this is a way to go around it; and then these boys get hurt and it goes back on you, your Worker's Comp --

MS. LEWIS: I understand that problem, I truly do; and I know that, and I recognize that. I can't -- personally, I'm talking from Manpower, because I know how careful about who we send and what we send them to do. We even have service reps, I'm not kidding you, who will go out if someone is on the midnight shift, we will occasionally do spot safety checks to make sure our customers are not subjecting our employees to jobs they are not supposed to be doing, number one.

Number two, to make sure our employees are wearing any safety equipment they are supposed to, just for safety checks; and we even have them go out at midnight, at times. I swear to you, we do. I

would welcome any of you to come in and review my operation. Like I asked Gere Flick, please give me a definition, what do we do. Are we going to be classified as this? That's all I want.

MR. JARRETT: I understand. We are wrestling with how do we address the issue, on a much larger scale, on some of these that may not do the job that you are doing. They are out there and they are supplying people, and it's just not fair to all employees. I need a painter and put them in a hazardous condition and pay them a clerical rate, for example, because they are on a temporary basis. Somehow, we have got to make a definition that fits somehow. I don't know what that --

MS. LEWIS: At one point, I even suggested to -- I don't know if it was to Mr. Flick or who, but even to make every one of us accountable, and if they want to have the people to come to our operation to audit us, to make us come to them, even, and show whatever needs to be shown to that individual, as to what our operations are.

MR. JARRETT: It sounds very simple to me. But, whatever my rate is as an employer and I have got a full-time person and I hire somebody to come in and replace them, they ought to pay the same rate I have to pay my permanent person. That seems fair to me. If I have a labor worker, and I want to go hire a temporary laborer, I would pay whatever rate I would normally pay if I employed this worker, I think, at least that's fair; but we are not doing that.

MS. LEWIS: Okay. But when you pay us, as a service, whenever we send you someone, we are giving you a rate, let's just use $10 as an example. Incorporated in that $10 rate is our employee's pay wage, our portion of the FICA taxes, our portion of that, as well as Federal unemployment, State unemployment, Workers' Compensation, our insurance. We have to have liability and bonding insurance on our employee, because if they come to your work site and they damage your property, we have to take care of that, as well as our administrative cost and our

profit.

MR. JARRETT: All of those are the same for employers, the same FICA rate, the same State unemployment rate, the same Federal rate --

MS. LEWIS: You mean for our employers?

MR. JARRETT: No, me as an employer; hiring somebody, you hiring somebody. Both pay the same rates.

MS. LEWIS: Not the same rates. It depends on your experience. Not for FICA --

MR. JARRETT: I understand. An employer can have a rate of a mod factor of three and they are paying $9.00 per hundred. You get a person with the same talent and you are going to pay $3.00. That's the issue. That's really what we are looking at. How do we make it fair, that this guy has got a $9.00 per hundred rate; let's go out and hire a bunch of temporary people and pay $3.00.

MS. LEWIS: Is it one person, is it 100 people? Because --

MR. JARRETT: There are companies that

may have 50 or 100 or whatever the numbers are.

MS. LEWIS: And I understand that.

MR. JARRETT: Clearly, we ought to be able to give you what you have asked for, and you're justifiable.

MR. TUCKER: Mr. Johnson had another question.

MR. JOHNSON: How many employees do you represent?

MS. LEWIS: Last year, we had over 8,000 W-2s, but that incorporates a lot of turnover, because we are a temporary help service. We may have someone who goes to work for two weeks and never comes back again. On a weekly basis, we have anywhere from 1,700 to 2,000 employees in our franchise here.

MR. JOHNSON: Can you state whether the incidents of accidents of injuries for the employees that you supply is less than the rate for other employers that work at the same locations, the same categories? You emphasized your training program and the restrictions on what they can and cannot do. Does

that translate into a safer work environment than --

MS. LEWIS: It doesn't, unless we have cooperation with our customer. Whenever we start having a lot of injuries -- we have a case right now that we are looking at, because we are having some carpal tunnel injuries, and we are having more than we think we should have. So we are in the process of talking to our customer. We have gone out on more than one occasion -- we have to be a partner with our customer. We have gone out on more than one occasion and reviewed and actually did the job for a few hours, trying to get the whole feel of it and asked for their cooperation; and, most of the time, the safe customers, the ones who are concerned about this, are going to work with you.

If they don't want to work with you, then you have to make a decision if you want to continue servicing this customer. So far, we haven't had a major issue, with the exception of one employer, and we are no longer servicing that employer and haven't for several years, because they didn't want to work

with us. I can't say that our employees have less or more, because, honestly, we don't always see their OSHA laws. We have that right, and I know that we do now, and we will -- the only reason that I know this is because we had a special safety meeting a couple of months ago and had an OSHA person come in and talk to us, because we wanted to make sure that we were recording everything correctly and make sure of just different issues. He told us that we have the right to see our customers' OSHA laws. Well, we have asked for them before, we haven't been able to see them. Now we know. So, I can't tell you at this point in time if there is more or less, because most of the time we don't have a lot of employees at any one place. I can think of one particular customer that we do have a lot of employees at. The majority of them are two, five, 10, 20, maybe; but, as a rule, we don't have a lot of employees at any one place.

MR. JOHNSON: So, as a general rule, you don't have a feel for whether the safety record of your employees is less than those of the general

population, therefore, the lower rate for Manpower would be justified?

MS. LEWIS: That's hard for me to answer.

MR. TUCKER: Does your company have a standard for your customers that they have to meet certain criteria pertaining to a safety record before you will send your employees to work for them?

MS. LEWIS: For instance, am I going to ask my customer, "What is your line factor, what is your --"

MR. TUCKER: No. If you are going to send me to do some painting or whatever, and company ABC calls you and says they need a temporary, my question is, does your corporation, Manpower, have a standard that your customers have to meet, as far as safety is concerned, before you will send your employee out to perform work for that customer?

MS. LEWIS: Yes, because we go on site.

MR. TUCKER: How do you establish that?

MS. LEWIS: Okay. This is an example.

We have had someone call before and say, "I need a painter." Okay? Well, we want to know what they are painting; and we have been told that they will be painting one thing, okay. Whenever we have gone out and inspected the site, we seen a huge tank, and this was in the Bridgeport area, I don't even know the customer's name, but it was a huge tank, and they wanted our people to go down inside of this tank and paint. They would have had to wear oxygen masks and the whole bit. We weren't going to allow that. So, the way that we established that is we go and visit each site, and if it's a site where it's a remote site, we still, if we can't get to that site or know what's going on, we won't send our people there. We try very hard to know exactly what's going on. We don't ask our customers what their EMR rating is; we don't do that, no. But, we do go on site and if we see machines that don't have safety guards on them, if we see chairs that are wobbly at a machine, we are not going to send anybody to work on that.

MR. TUCKER: If you maintain a list of

customers, how often do you do what you just said?

MS. LEWIS: When we first establish a customer, we do that. We make, what we call, service calls from that customer, to establish rapport and to get to know them and to do inspections and, not really -- we don't do it as, "You're a bad customer, we have got to make sure you are doing everything right." We do it because we are interested in what they are doing, if we can help them more. As we are doing this, we are looking and we are asking questions. Probably quarterly we try to do that. If not quarterly, then semi-annually. Every year we go out and do another in-depth, walk through the entire place and ask all of the same questions again, just to make sure nothing has changed.

MR. TUCKER: Does anyone else have any questions?

MS. LEWIS: We also have -- are you familiar Best Manuals? It's an insurance company that has established what each industry's problems are, what questions you should ask about safety. We have

huge manuals that we pay a lot of money for, so that whenever we get a unique situation from a company we don't know anything about, we can ask them. Our service reps can go to these books and they can look up this particular kind of business, so that they can be aware of what their safety number is. For instance, one to 10; it could be a 10, being a very high-risk company, one being a low risk company. Then there is a list of questions to ask. For instance, if we were to send somebody to help somebody clean up at a construction site, we have to ask and go on site and check about asbestos. We just can't send someone to in to tear down a building, if someone is doing that around there; so we do that to establish the best we can.

MR. TUCKER: Thank you. Mr. Thompson.

MR. THOMPSON: Do you check them for their green card?

MS. LEWIS: Oh, yes. Everyone that applies with us, we have them complete an I-9, yes.

MR. TUCKER: Any other questions?

(no response)

MR. TUCKER: Thank you, ma'am. We appreciate your comments. William Whyte with Security America.

MR. WHYTE: My name is Bill Whyte and I am vice president of Security America. We are primarily a security officer provider. We contract with firms throughout the State of West Virginia and within the region and neighboring states.

I don't want to repeat all of the things that have been said before. As folks have been talking, I am in agreement with what's been said to this point. I wanted to, perhaps, personalize the issues that we have to deal with as a security officer provider under contract with firms throughout the state.

First of all, we are the largest -- we are a West Virginia company. We were formed here in Charleston, created in 1982. We hire West Virginia citizens throughout the state to provide services. All of our work is competitively bid. When we work

for a firm, be it a bank or a coal mine or a manufacturing company, and provide security services for them, we typically have to enter into a competitive bid situation with other companies that are in this business. A number of them are large national and international firms. Last year, we had approximately 800 employees working in West Virginia, some of them for very short periods of time; and some of the contracts we enter into are temporary. They may only be for four hours or eight hours, where somebody has a specific activity where they simply need one officer to provide security for that period of time.

The bulk of our work, however, is based on a one-year contract, many of them renewable. We have a number of companies that we have been providing security officers for, for five, 10, 15 years.

Our employees work as security officers. They don't go to work for a manufacturing company to assist that company in manufacturing their product. They don't go to a coal mine to assist the coal mine

operator in mining coal. They don't go to a bank to assist the bank in doing their banking business. We are hired to do security, which usually involves access control, management of personnel coming on and off the property, patrols of the property to insure that nobody is trespassing, no damage being done to the property. We are the employer of these people. We recruit them, we test them, we hire them, we train them, and we assign them to the contracts that we have. The duties that they perform are security duties that we have trained them to do. We conduct inspections on a regular basis of our personnel, to make sure they are doing their duties. The company philosophy is that we visit 70 percent of all of our work sites every week; and, as it has been mentioned earlier, those visitations take place at midnight, three in the morning. These employees answer to us. Now, on a day to day basis, since it is a contractual agreement that we have with the firm, if the people with whom we have the contract with want the employee to do something differently, then they may, in fact,

give some direction during the day.

What we establish at the beginning of the contract, we do a security survey, we sit down with the person who is contracting with us, develop post order, specific duties of the officers on site. Our concern is that, although the largest security officer provider in West Virginia, we are still a small company. We are competing against very large companies, such as Pinkerton. At any given time, I may have 300 to 400 employees working at various sites throughout the state; and, yet, our corporate office works with less than 10 employees.

We are very concerned, in reading these regulations, that -- I understand that if every contract is competitively bid, everybody will be bidding the same Workers' Compensation rates, and so the competition will be equal in that sense. Where we are not being equal would be with the larger firms with larger resources, able to handle the administrative burden of multiple rates, Workers' Compensation rates, for individuals being able to do

that with greater efficiency than we, as a smaller firm, would be able to do. Worst case scenario, as we read these regulations, if we were to fall under this, we feel that we may have to increase by one additional person just to simply handle this issue for us in our paperwork.

Although many of our contracts are long-term, individuals assigned to the contract may not work for just the one company. In other words, Bill Whyte may be assigned to work at West Virginia Water two days a week and at Huntington Bank or up here on the river at one of the coal barge companies for three days a week. So I would be dealing with one individual having Workers' Compensation rates for one company and another company every pay week. That's the kind of complexity we were afraid of, and we are not sure of what the definitions are, as we read what you have; whether we would fall under that, and if we do, how that will impact on us. I guess, primarily, that's the issue, is the definitions of temporary, definitions of a leased employee. If we are providing

a security employee who is out at a gate checking cars off of a coal mine, we don't feel that it is quite appropriate for us to be charged the same Workers' Compensation rate as the coal miner who is working heavy equipment and going down in the mine.

We have worked very hard with Workers' Compensation for the past few years in reducing our Workers' Compensation rates, so that we can be competitive. We have reduced it the last two years by 30 percent. That's something that we are very proud of. We've developed, as I said, I agree with Manpower, we are very proud of the safety record that we have and the effort that we have put into the safety training. If we, then, were thrown into the same category, for example, as a coal mine, we feel that that would be unfair pay back on all of the work that we have put into developing our employees and our business. That's essentially it.

MR. TUCKER: Does anyone have any questions of Mr. Whyte?

(no response)

MR. TUCKER: Thank you, sir, for your time. Mr. Tim Huffman.

MR. HUFFMAN: Mr. Chairman, members of the Council, thank you. Most of you know me, but I will tell you anyway. My name is Tim Huffman; I'm from the law firm of Jackson & Kelly. We represent a number of employers, both large and small, many of whom have the same concerns that have been expressed to you today about this rule. I also appear here today on behalf of the West Virginia Chamber, who also shares those concerns. I will tell you that I did file written comments. I have brought more copies with me today, which I will give you when I am done. I won't go over again a lot of what's been covered in these comments, but I will talk to you about some other points that I want to make.

The first real problem that I see identified in my comments is, as you will note from most of the comments that you have heard thus far, the Rule as it is written is far too broad. It applies or could potentially apply to a number of parties and

businesses far outside the realm of either temporary or long-term leasing. I think that presents a problem in itself. I think you have heard examples of that already given to you. If you are able to identify and correct the problems with this rule, as far as tightening up the definition so that you can find a group of employers that you do wish it to apply to, I think there are other problems with the rule. The primary concern is, in this Rule there is shifting of civil and criminal liability from different parties, which I think probably takes a statutory change. I don't think it is something that you can accomplish through the Rule. Quite frankly, if that is a route that this Division and the Council pursue, there are probably better ways to do that. Quite frankly, I'm looking at that. I think we have a current situation now in our regulations and in our statute that deals with primary contractors and subcontractors, where you would at least have an opportunity to be advised of the default of the company that you are doing business with and terminate that contract before you incur

liability. That same opportunity doesn't exist under these rules, and would not exist if this Rule were passed as it sits.

Finally, I would state to you, as I listened to everyone talk, listened earnestly, particularly when Mr. Jarrett asked the question, how do we address this issue. I think, quite frankly, what you have got to decide is what the issue really is to be addressed. If the issue that you think that you are addressing is there are employers out there, who the Division has identified, who have intentionally misclassified their employees in order to gain some advantage with the system, you don't need this Rule to take care that. Those can be dealt with. If, however, the situation you believe needs to be addressed is the situation where you have employees working for employers who are not properly classified for the risks that they are taking, there also is a way to deal with that. That is, multiple classes for those employees. The Rule, as written, is not necessary in order to do that.

Again, I would say to you, the Rule as written should not be passed. It requires substantial revision. Quite frankly, before you get to that point, in my opinion, I think you need to decide what the problem is that you are attempting to address and make certain that the rule you are about to pass addresses that problem.

I will be happy to respond to any questions.

MR. TUCKER: Thank you, Mr. Huffman. Any questions for Mr. Huffman?

(no response)

MR. TUCKER: Thank you, Mr. Huffman.

MR. HUFFMAN: I will leave copies of the written comments that I have filed with the reporter.

MR. TUCKER: Thank you. Mr. Mike Idleman.

MR. IDLEMAN: Thank you, Mr. Chairman, members of the Performance Council. My name is Mike Idleman; I am with Acordia Employer Service. We represent over 1,200 employers in West Virginia. Many

of the employers that we represent have great concerns over the proposed rule. I previously provided to each of you a copy of my comments, by letter dated April 25th. Unlike Mr. Huffman, I didn't come prepared with additional copies today; but I hope that each of you have had a chance to read those.

I want to take this opportunity to briefly express my concerns over this proposed rule. The Workers' Compensation Division feels that they have major problems with employee leasing companies. However, I would note that the classification that these companies assigned, which is Class P, as in Paul, 05 recently had a decrease in the base rate from $5.04 to $4.39. This represents a 12.9 percent reduction. Based on this reduction, one would have to question the extent of the problem.

The major problem with this Rule, as Tim previously stated, is it is too broad. It will affect many more West Virginia employers than what it would appear upon the base of the Rule itself. The reason for this is the end part of the Rule, contracted

operations. The Rule is entitled, "Employee Leasing and Contracted Operations." If the Division has problems with employee leasing companies, then those need to be addressed. Where it becomes so broad is the contracted operations part of that.

Basically, any employer who is using, what I would term, subcontractors, for lack of a better term, on a routine basis will be adversely affected by this Rule. We have heard from some of those folks already this morning.

This Rule reminds me a story, and bear with me just a second, about a friend who works for US Air, and they occasionally are allowed to switch the times in which they work. Well, occasionally, those people will mess up and one forgets to cover for the other. So, instead of penalizing the parties who screwed up, they penalized everybody by saying, "You can't switch shifts anymore." To me that is what's happening here. There is purportedly a problem. If there is a problem that needs to be addressed, the Workers' Compensation Division currently has the laws

and rules and regulations that are in place to address these types of problems; and, instead of affecting many other employers, going through this Rule and making it so broad, the problem employers themselves are not being addressed, specifically.

If a problem truly exists, as I mentioned, the Workers' Compensation needs to deal with those problem employers, but they don't need to mix in others who are already paying their fair share. If the Workers' Compensation Division can demonstrate that they truly have a problem with employee leasing companies, then only deal with employee leasing companies.

The State Tax Department has already given special tax consideration to employee leasing companies. So they have already identified who they consider to be employee leasing companies. The Workers' Compensation Division could simply obtain a list of the employee leasing companies from the State Tax Department and then conduct a review of each of those employers, see what they are doing and if they

are properly classified.

Chris had asked the question a little bit ago to Marie about painters; and Chris is exactly right. Under the current structure, if Marie goes out and gets a painter, the chances are the painter is going to have a lesser rate being employed by Marie then they would through a painting company. I agree with you that that's a problem.

The other example is Marie has a lot of clerical people. What percentage of your work is clerical, Marie?

MS. LEWIS: Probably 60 to 70 percent.

MR. IDLEMAN: 60 to 70 percent. Those people, she is going to be paying a $4.00 or $5.00 premium rate on, whereas as bank, for instance, that has nothing but clerical people, has a $0.70 rate. Okay. So 60 to 70 percent of her people she is even going to be paying more than someone else. If the Division has a problem, the current rules and regulations allow them to assign multiple classes. You could go that route. The idea behind putting

these types of employers in a diversified employment classification where they are currently, is that it is a blended rate. Yeah, you are going to have some painters, as the example was, but you are going to have some clerical people, too. That's the whole idea behind blending these types of employers. So, either you stick with what you've got or you are going to have to assign a classification for what the employee is doing. You cannot assign it based upon what the company that they are working for is. Again, using a bank as an example. If you send a person, a painter, to the bank, under this rule they get the bank's clerical rate. That's not going to work.

So this thing goes both ways. So either you are going to have to stick with the one class system or you are going to have to go to multiple classes, based upon the work that the employee is performing.

Any questions?

MR. TUCKER: Any questions for Mr. Idleman?

(no response)

MR. TUCKER: Mr. Idleman, I have a question for you. Sometime back, if my memory serves me, this Council entertained, maybe not in rule form, but in discussion, multiple classes. If my memory serves me correctly, also, that, for example, like if we had a clerk that took care of payroll and time cards at a coal facility, he or she was on the property, didn't enter the mine, they were a clerk, they were not in the actual production of or processing of the coal, this Council was going to address that issue. I believe this Council was told that multiple classes, and no disrespect to anyone, but the TPAs were the ones that said that that would be a nightmare for their clients. What I am asking is this: before we make a decision on anything pertaining to that, I don't expect you to comment on it today, but the people that do this type of work and advise people in multiple classes, I would like to hear in detail, or in written form, something pertaining to multiple classes procedures. Is that still the

feeling of the general community out there? In other words, if we are going to have multiple classes, the lady from Manpower would probably have, like you just said, she has 70 percent of her people that is doing clerical work, she's paying 20 times what One Valley would pay for the people doing the same thing. I would like, for my edification, is it feasible to get a feel from the general public, the people who represent these folks, on the multiple classes situation? You don't have to do it today; but before this -- I would like to have it sometime before the discussion on this Rule is over.

MR. IDLEMAN: What you are referring to is what is known in the industry as standard exceptions. Most other states have three standard exceptions. Those are clerical, outside sales people, and drivers. Throughout the nation, those are routinely given to employers. They have a main class and then they automatically get those three. Any other classes are based on merit, based upon what you are actually performing.

MR. TUCKER: Right. I would just like to find out whether those are still feasible.

MR. IDLEMAN: When the Division thought about doing this two or three years ago, whenever that was, the question most of our clients asked was, "Well, is this going to reduce my premium;" and basically the answer is no, it's not going to reduce their premiums. It may change the distribution of the premium; but, overall, premiums would still need to be the same. So the feeling, if it's really not going to change the premium, then why put the administrative burden on us, having to keep track of the individual class by class.

MR. TUCKER: Out of pure ignorance, let me ask another question. When you talk about multiple classes with a leasing contractor -- if I am diversified enough that I send out everything from a secretary to a welder, or a coal miner, whatever, are you saying that we have a class for each type of work that that leasing company does?

MR. IDLEMAN: Yes.

MR. TUCKER: In other words, when you talk about multiple classes, if I have got 50 people that work for me, as a leasing company, I've got five coal miners, I've got 15 secretaries, I've got general laborers and maybe four or five different types of work that I perform. It would be a little bit different from Mr. Whyte. Mr. Whyte's company, from what I understand from him, his people do only one thing, they go out and they provide, as he described, security or accountability measures for employers all the way from banks to coal mines. His company deals with one aspect of work, and that's it. Now, if we have a company like Manpower or somebody else that is diversified and they do these types of things, are you saying that we have Manpower, not picking on Manpower, I'm just using that for an example, no offense, but we have five classes within Manpower, and Manpower establishes X amount of people in class one, X amount of people in class two, X amount of people in class three, four and five, they report that with the Division?

MR. IDLEMAN: That could be the case.

MR. TUCKER: Would you have five different rates?

MR. IDLEMAN: You could, sure. You know, getting back to some of the examples earlier --

MR. TUCKER: I'm just trying to -- my concern is, I have no, speaking as a member of the Council, what I wanted to make sure is that we don't, and I'm not accusing anyone in this room, I don't want someone using a leasing company for the sole purpose of getting out of paying the proper rate that they are supposed to pay. That's my concern. I don't want to make a hardship on anybody to do business. I encourage it. In this day and age, you know, these leasing companies is a last resort for too many people, because they can't find regular employment or they wouldn't be going that way. My concern is that we try to deal with that situation; but in my mind do we have Manpower -- when the Division deals with Manpower as a company, and they establish rates for their company, when you were talking about multiple

classes, the Division takes a look at the type of work they report they do and they tell Manpower, "You have six classes. You send Mr. Epps to do work; you send myself to do work; you pay a class for him and you pay a different class for me, if we do different things. Is that what we are talking about? Am I correct?

MR. IDLEMAN: Mr. Epps is going to do clerical work and you are going to go underground and mine coal?

MR. TUCKER: Yes.

MR. IDLEMAN: The only way to get around your concern, to address your concern, is to assign that company multiple classes based upon the work that the employee is performing, not based upon the classification of where you are sending that person. The reason I said that, your example of a clerical person at coal mine; that person is a clerical person, like you said, they are not going underground, they are not exposed to hazardous coal mining. They shouldn't have to pay coal mining rates, they should be paying a clerical rate. But, turning that around

the other way, if you send a painter to a bank, they shouldn't pay the bank rates, they should pay a painter's rates. So the only way you could address it is based upon the work the employee is performing.

MR. TUCKER: I just wanted to make sure I understood, you know, when we talk about multiple classes and the memory that serves me. That clarifies that for myself. So, conceivably, if we've got multi-talented people in an agency doing multi-jobs, then we could be multi-classifications. That's where the multi-classifications would come in; is that correct?

MR. IDLEMAN: And the existing rules already provide for that.

MR. TUCKER: Does anyone else have any questions?

(no response)

MR. TUCKER: Thank you very much, sir. Mr. Brad Sims.

MR. SIMS: Mike did a pretty good job of addressing most of my concerns, as did James, Marie and Tim. I'm Brad Sims from United Talent, and my

major concerns with the Rule are with the definition. As Mike suggested, I would like to suggest that the Division consider employing the State Tax Department's definition of a leased employee in order to distinguish between leasing and temporary help. Under definitions in the Rule, this is just an example of my concern with the Rule. Section 3.5 says, "Employee leasing arrangements include long-term temporary arrangements." And in the same paragraph it says, "An employee leasing arrangement does not include an assignment of temporary help." That is a bit ambiguous, and I have a little bit of trouble, as Marie was, with exactly what is going to be considered temporary help and what would be considered leasing. As Marie stated, I do have a desire to know exactly what our costs are going to be to an assignment. So, I think we need to more clearly define the difference between the two.

MR. TUCKER: Thank you, sir. Does anyone have any questions for Mr. Sims?

(no response)

MR. TUCKER: Thank you for being here today, sir. Mr. Roy Smith.

MR. SMITH: Thank you, Mr. Chairman. My name is Roy Smith; I'm the Secretary/Treasurer of the West Virginia State Building and Construction Trades Council. My comments today are on behalf of the Building Trades Council, and also the Affiliated Construction Trades Foundation, which is a division of our Council. If it would please the Chairman, I have written copies of that I have brought along of my comments.

Mr. Chairman, I will say that I was a little confused over the processes after I learned that the previous public hearing was going to be canceled. I did mail my comments, as well as fax them, to one of your Staff attorneys.

The Building and Construction Trades Council and the Affiliated Construction Trades Foundation supports the proposed rule. We urge its quick adoption.

In recent years, this Council has

rightfully focused its attention on reducing the long-practiced institution in this State of one industry subsidizing the Workers' Compensation premiums of another. Historically, it has been small, low-hazard businesses that have been forced to subsidize high-hazard employers. A system that was designed to base premiums on the risk of injury instead forced businesses across West Virginia to pay more than their share to permit some to pay less.

One area where the practice continues is the contracted and leased employee industry. Today there are individuals working as leased employees in the construction industry -- a traditionally high-hazard occupation -- for which the Fund is receiving premiums as if the worker was sitting in an office. In addition, the construction company that is employing the services of the leased employee is reaping an unfair economic advantage over companies that are paying their fair share of Workers' Compensation premiums. It is a system that is bad for the Fund, bad for the injured workers, and bad for

legitimate employers. It is a system that should be ended.

The proposed rule will abrogate the fictitious employee leasing arrangements which are designed to avoid the payment of Workers' Compensation premium taxes and other employee benefits at the full rate that should be charged based upon the actual work of the employees. The rule adequately places the obligation to pay premium taxes upon both the employers involved in the situation and ensures that both employers will lose the protection of the Workers' Compensation Act while insuring that premiums will be collected to pay just benefits to injured employees. It is the right approach to ending this practice and it should be adopted by the Council.

We have one important concern. The proposed rule as it is drafted does not apply to temporary help agencies unless and until such an agency engages in providing leased or contract workers. We believe that such an exemption may undercut the effectiveness of the rule. Temporary

help agencies can and do undertake the same abuses as those agencies that provide contract and leased employees. For example, we know of situations, in West Virginia, where temporary employees performed demolition work while being categorized for purposes of Workers' Compensation in a category with piano tuners. In addition, too often workers are employed in temporary situations for days, weeks, months or even years. We urge the Council to remove this exemption from the proposed rule.

Thank you for this opportunity; and I would like to make a couple of additional comments, if I might, Mr. Chairman.

MR. TUCKER: Yes, sir.

MR. SMITH: The State Building Trades Council does not believe that there should be any safe harbor -- rates being paid on employees, based upon what situation they are put in. I don't think the application of pension or taxes or what the Tax Department calls a temporary employee has anything to do with Workers' Comp rates. I think those that

advocate special consideration are merely looking for ways to go around the law; and that's what this Council has set out to do, make it fair to everyone and be equal to all. Is it fair for the employer to accept the responsibility of an employee and have to compete with someone who is paying a fraction of what that person has to pay?

Just as an example, you can call temporary agencies and maybe get a qualified person; we are not talking about their qualifications; but you call a temporary agency and get a person from them that competes directly with my membership.

Let's say they are tearing down a building. Your proposed rates for next year for a demolition contractor is 50 percent. Now, employees that come from the temporary agency are coming out there at five percent or less. Now, who is that fair to? It's certainly not fair to the businesses who are willing to accept the responsibility of having an employee and paying them what's right to the State and all of its divisions.

So, I would urge the Council to adopt this rule. I would urge you to expand it to include all employees. It would seem to me to be a relatively simple operation. I know there is some paperwork involved in it, but when you send a leased, temporary, contracted, however you want to term them, when you send that person out to work, simply ask the employer that you are sending them to what their rate is, what their multiplier is, so that that person can be charged at the very same rate when they come from any of the agencies. That way, you don't have unfair competition. You don't have employers who are looking to duck their employees so they can deal with temporary agencies.

I think what you started out to do is a very fair thing, and I would urge you to continue on. Thank you very much, Mr. Chairman.

MR. TUCKER: Thank you, Mr. Smith. Does anybody have any questions for Mr. Smith?

MR. JOHNSON: Mr. Smith, assuming the rates were equal between the leased employers and the

employees in this instances that are contracted, your group wouldn't have a problem with being equally liable for payment of the compensation premiums? Am I reading that correctly?

MR. SMITH: Say it one more time, Mr. Johnson.

MR. JOHNSON: That assuming that the rates are equal, which is what you are basically calling for, equal playing field there, your group that you represent would have no problem in being equally liable for Workers' Comp premiums as to leasing companies? That's how I interpreted --

MR. SMITH: My group is not a leased company, so to speak. We don't participate -- although we do assign employees to employers, they go on the payroll of that employer at whatever Workers' Compensation rate that employer has earned over the years, which includes the base rate and the multiplier that goes with it. That's what that employer pays for when my members to go on their construction sites.

MR. JOHNSON: I understand that, but in

the paragraph on the second page it says, "The rule adequately places the obligation to pay premium tax payment upon both employers." Your group supports that, has no problem with being liable for, equally liable, for Workers' Comp premiums as would be the leasing company?

MR. SMITH: I have no problem, Mr. Johnson, with the way I understand that. It places that responsibility for the Workers' Comp payments equally on the person who is dispatching that employee, as well as the person who is providing employment.

MR. JOHNSON: All right. I just wanted to be clear on that. Thank you.

MR. TUCKER: Any other questions for Mr. Smith?

(no response)

MR. TUCKER: Jeff Taberner.

MR. TABERNER: I won't go into a bunch of details, a lot of things have been covered. I won't repeat. I have written comments on two separate

occasions, which were addressed to Richard Stephenson, Bureau of Employment Programs. I did not bring copies of those for you today.

The gentleman that just got up in front of me had some good comments in regards to rates being unequal; and he has a good point with that. I am a CPA for a staffing company mainly doing business in West Virginia. We have business in other states.

Another example is, we are unfairly competing against an engineering company that has a much lower rate than us, potentially. As the rules have been written, there is some vagueness in the definitions regarding employee leasing arrangements, long-term arrangements, and temporary arrangements. By the definition of other states that we are doing business in, we are not an employee leasing company. We do not come close to providing an employee leasing service. But, as I read the rules, the proposed rules, we potentially would be under this employee leasing arrangement in West Virginia for some of our workers. I believe the rules as they are written give

too much interpretation to a company like ours to unfairly put somebody in a category that they are not.

The rule does not address, if somebody is a leased employee, according to the rule, would get the rate for the customer that they are supplying to. If the customer they are supplying to does not have a Workers' Comp policy in the State of West Virginia, that's not addressed, how that would be handled. We have some situations like that, where the client that we supply employees to do not have a policy in this state.

A question that I don't feel that has been addressed is in regards to a Workers' Comp claim in regards to somebody that meets this employee leasing definition. Who is going to have the right to defend the claim; the staffing company, if they are working for a staffing company; or the client employer? Because the client employer, by my reading of the rule, is going to be -- it's going to affect their E mod factor for all injuries from here on forth if this rule is put into place.

That's pretty much all I am going to go over, because a lot things have been repeated already. But, if anybody has any questions, I will try to answer them.

MR. TUCKER: Does anyone have any questions of Mr. Taberner?

MR. BAILEY: Sir, I have a question. You said you sometimes supply or your firm supplies to companies that do not have a working arrangement with Workers' Compensation in West Virignia. Are these out of state employers, is that what you are talking about?

MR. TABERNER: Right. A good example is we are in, what I call, a non-traditional staffing company. We are privately owned; we don't do a lot of the things that Marie's firm does. Manpower does a lot of temporary, one day, two days, three days, a week, and sometimes takes on assignments to fill a function of mailing literature, or whatever it may be, for a company, and handling phone calls for that company. We have people that work out of their homes

that do that. We have people that work in our office that do that.

MR. BAILEY: Where are you physically located?

MR. TABERNER: We are physically located in Parkersburg, West Virginia.

MR. BAILEY: I assume you are on the Board?

MR. TABERNER: Yes. The client in that situation is an international company that, I think their U. S. operation is in Pennsylvania.

One thing that was brought up earlier, this is a good point, we do business in Ohio; we have no problem with the guidelines that they have for the staffing industry, which is multiple classifications. It sometimes is difficult -- before we take on a new client, we do know before we put somebody on a job site what our Workers' Comp rate is going to be. That's the only variable; before you put a new person in -- you don't know the cost. You know the cost before you put that person to work, what that rate is

going to be, and get the rate that the client employer has. Just like somebody else spoke earlier, in Ohio and some other states also, that client employer has at least two Workers' Comp codes, clerical and there's a code for the nature of their business, and maybe have more.

MR. BAILEY: So the main difference that you see between Ohio and West Virginia is that your firm here might be placed in the employer leasing program, according to the rule we have in front of us, and in the State of Ohio you are not considered in that?

MR. TABERNER: They have a definition of employee leasing, also. When I would call them and get a new code and say, "I'm picking up a new manufacturing client that I am supplying --" we do mostly clerical, "-- a clerical person and maybe a light industrial person." I get a description of what that person is doing and where they are going to be working. In this employee leasing definition -- and I am not doing employee leasing in Ohio at all; I still

get a multiple class in Ohio.

MR. BAILEY: That's my question. Thank you.

MR. TUCKER: Anyone else?

(no response)

MR. TUCKER: Ned Rose.

MR. ROSE: My name is Ned Rose; I am General Counsel for the Mayflower Vehicle System, which has facilities in South Charleston, South Charleston Stamping and Manufacturing, employs about 1,000 people in the automotive industry.

I come to you with a different perspective. First of all, the shared employer would be a big benefit to us. We maintain a number of temporary employees, or leased employees, without the benefit of any immunity, Workers' Comp immunity. We also come with the perspective that our current temporary agency carries a much higher rate and mod factor than the West Virginia facility. Therefore, the implementation of this rule would result in our rates going up and their rates coming down. There may

be a number of reasons why that is; but, in any case, that is the case. So we are an example of Mr. Jarrett's going the other direction, we increase Workers' Comp costs when we bring in temporary employees at South Charleston Stamping.

In that regard, the most specific question that I have today, with regard to the way the rule is drafted, is what happens to our rates if this rule is implemented and we change temporary agencies, completely change temporary staff, will we be stuck with the mod factor from our previous temporary agency or will we be charged with the rates of the new supplier? If it's the latter, it makes it difficult for us.

It's obviously a safety issue to the extent that we improve the safety performance of both the permanent and temporary employees. I think such an application would be counterproductive. I can't read the rule and be able to tell what the consequence of that would be for us. If it's any comfort to you, we like that portion -- somebody likes something in

that rule besides the Commission.

MR. TUCKER: Does anyone have any questions of Mr. Rose?

MR. SULLIVAN: Mr. Rose, do you get your temporary employees from an agency, or do you just hire them temporarily?

MR. ROSE: Agency.

MR. TUCKER: Anyone else?

MR. JARRETT: It works both --

MR. ROSE: It's a two-way street.

MR. TUCKER: Anyone else?

(no response)

MR. TUCKER: Thank you, sir. Ladies and gentlemen, going through the sign-in sheets, that's the only names that I have seen that indicated -- is there anyone that has changed their mind that wishes to speak. Yes, sir, if you would come and identify yourself, please.

MR. CIPOLETTI: I am Sam Cipoletti, Manager of Government Relations for Bell Atlantic. I do have a copy of my comments, which I supplied

earlier; but I want to articulate them here today for the benefit of everyone.

First of all, the proposed rule, the application of the proposed regulation should be limited. Bell Atlantic is committed to providing a safe work environment, and we applaud the efforts by the Division to enhance workplace safety. However, if there have been abuses, which these proposed regulations are intended to address, the scope of the rule reaches far beyond the intended target. Defining a client employer as an entity which contains one or more leased workers from an employee leasing company is so broad as to affect companies that might lease a single extra secretary to service one new customer.

We recommend in this regard that the proposed regulation and the relevant definitions be limited to apply to companies that lease more than 50 percent of their employees from one or more employee leasing firms. If that's not the right threshold, maybe it is some other threshold; but it should be some significant number.

Number two, the proposed rule could stifle workforce flexibility to the detriment of both our company and our workers. I don't think we've heard this angle yet this morning.

A little bit of background. Bell Atlantic employs nearly 3,300 employees in West Virginia, and a vast majority of those are full-time employees. In our continuing efforts to expand our business and to remain competitive in today's economy, we are committed to hiring a workforce that's highly skilled; and, therefore, workforce development and training is a high priority.

We are concerned that the proposed regulations could limit our flexibility to obtain skilled personnel, including some of our retirees, on a contract or leased basis. We are particularly concerned that some of the retired workers could lose company benefits if we are considered a joint employer under your regulations and within the medium of benefit plans and relevant tax and other benefit laws. Thus, in addition to being less competitive, we could

lose valuable personnel who are assets to our organization, and our former employees could lose the opportunity to remain a part of our team. Many of them do that willingly.

This lack of flexibility could also affect our efforts to centralize work centers here in West Virginia to service Bell Atlantic customers regionally and nationally. As many of you know, we have attracted several hundred jobs to the state in the last few years, and this would have an adverse affect on the business climate, how they perceive West Virginia.

The proposed regulations would make us less competitive, not only with outside companies, but also with other locations within Bell Atlantic. This could hamper economic development and actually, inevitably, result in a loss of new jobs.

So, as an alternative to number one, if you don't accept the 50 percent threshold ideas, then maybe you would consider some type of an exemption for companies like ours and others, so as not to restrict

their competitiveness and the rights of their contracted retirees to work for us.

Number three, West Virginia Code 23-2-1(b) provides a more appropriate procedure. Some others have talked about this procedure this morning; but, basically, it relates to the Workers' Comp liability concerning the use of contracted and subcontracted labor. The Statute provides adequate and more appropriate protection than these proposed regulations for companies that lease or contract less than 50 percent of their workforce.

In addition, the bookkeeping and paperwork necessary, internally, for employers, as well as the responsibility of the Workers' Comp Division, to monitor compliance with these proposed regs for a very small number of contracted, leased employees; it clearly outweighs the potential benefits of the proposed regulations.

So, here again, is another alternative. If you don't accept recommendations one or two, we recommend that at the very least, the notice

provisions to employers as contained in the West Virginia Code should be incorporated into these regulations. Therefore, responsible employers, such as Bell Atlantic could avoid liability through an already established and fair process.

Lastly, a point I want to make is the West Virginia Legislature recent rejected the substance of these proposed regulations. As many of you probably know, there was legislation with very similar provisions introduced in the last legislative session and it was not received by lawmakers at that time. We would submit that the West Virginia Legislature is the right, appropriate forum for a public debate about this important labor and employment issue. So, we would hope that you would consider deferring the matter if you don't adopt any of these other regulations.

Thank you for your time and attention, and I will be happy to answer any questions.

MR. TUCKER: Does anybody have any questions?

MR. BAILEY: One quick one, Mr. Tucker. Sorry I wasn't here for your opening remarks, but did you submit a written --

MR. CIPOLETTI: Yes, I did, to Mr. Stephenson. I don't know if everybody got copies or not.

MR. BAILEY: Thank you.

MR. JOHNSON: If the rule was adopted as is, do you think it would have adverse employment prospects for Bell Atlantic in the state?

MR. CIPOLETTI: I think it certainly could. I have been advised that it would be looked upon unfavorably when the corporation is looking -- right now, we are only in 17 states; maybe, pretty soon, we will be in many other states, if we were to complete the merger. But it could affect where they decide to locate work centers.

MR. TUCKER: Thank you, sir. Anyone else who wishes to speak?

MR. STURGEON: Mr. Chairman, may I mention one item, which is a procedural issue?

MR. TUCKER: Sir, would you come up? We are recording this, if you don't mind, sir. Just reidentify yourself.

MR. STURGEON: I am Jim Sturgeon. I want to make one procedural note. I am going to copy the notice that was filed with the Secretary of State's Office for the hearing today. There seems to be some confusion about the issue of written comments. The notice that went to the Secretary of State's Office indicated that oral and written comments would be received today, and the written comments would be received up through 5:00 this afternoon.

MR. TUCKER: That could very well be. That's why I asked the question -- that would be -- if we stand corrected, then you can have written comments accepted by the close of business today, which would normally constitute 5:00 p.m. Mr. Stephenson, do you want to address that, sir?

MR. STEPHENSON: Not in my legal opinion. The Rules of Administrative Law provide only for a 30-day written comment period. It was

previously published as a notice with a 30-day written comment period. It terminated on May 3rd. The error that was made in the new notice that postponed the hearing was an error. That doesn't mean that we won't unofficially look at the comments, but from the perspective of what are official comments, we believe that it was limited to the first 30 days.

MR. TUCKER: Let's try to do it this way, in all fairness to everyone. I think this Council would entertain any help that we can get with this situation. I will take the liberty of, unless the members of this Council overrules, that we will gladly accept anything that comes in, not addressing the issue of Mr. Stephenson, I don't disagree with his interpretation; but I think that we need all of the help that we can get. Does the Chair hear any objections to anyone being able to provide comments to us today in any way they want to do them?

MR. SULLIVAN: Just for the day, Mr. Chairman?

MR. TUCKER: Beg your pardon?

MR. SULLIVAN: Do you mean the close --

MR. TUCKER: 5:00 today; and that's not impeding upon any of the procedures under the Administrative Law pertaining to the Secretary of State's office. I won't get into that; but this committee will entertain anything that we can get to help us. If there is no objection, the Chair will so rule.

MR. STURGEON: Thank you, Mr. Chairman.

MR. TUCKER: A couple of things that I want to try to get established. A question for the Division pertaining to the comments you have heard today, this Council would like to hear the Division's response to these. What kind of time frame do you need? I would like to not adjourn this meeting, I would like to recess it and try to establish a date that you could come back solely for the purpose of the Division addressing, digesting the comments that you have received and give us your version of what you agree or disagree with for our consideration.

MR. FLICK: We would be ready in

probably four weeks if we have the transcript in two weeks.

MR. TUCKER: Okay. A month. So we are talking, by the 7th we will have the transcript, and then --

MR. FLICK: The 7th --

MR. TUCKER: Of June.

MR. FLICK: On the 7th of June --

MR. TUCKER: I'm talking about the 28th of June.

MR. FLICK: Mr. Chairman, the Division is going to be putting on several seminars in June and July and I just want to make sure that we don't end up with a conflict on that date. I can check and let you know.

MR. TUCKER: If we tentatively set it for the 28th and see if it can be accommodated by the Division, is there any objections to that?

(no response)

MR. TUCKER: That allows two weeks for the Court Reporter to get the transcript and then two

weeks to make their presentation, if it's possible.

Also, we would like to request -- I have heard people say that they have written comments that have been sent in. The only one that I have received anything from so far, and that was hand delivered to me, is by Mr. Idleman. If we have any that's in the record that's been sent to the Division, we would appreciate that all members of the Council be provided with that.

MR. BAILEY: Mr. Tucker, on the 28th, this will be the response of the Division --

MR. TUCKER: Yes.

MR. BAILEY: -- not necessarily going to be a vote that day --

MR. TUCKER: No, sir.

MR. FLICK: The Division, we have to leave for Wheeling that afternoon, if we can do it at 10:00 in the morning. We can set a response for 10:00 in the morning.

MR. TUCKER: On the 28th?

MR. FLICK: Yes.

MR. TUCKER: Do you have a question, Mr. Smith?

MR. SMITH: Mr. Chairman, I may have misunderstood what you just said; but I sent written comments on the proposed rule to Mr. Stephenson.

MR. STEPHENSON: Mr. Smith, I already received those.

MR. SMITH: Those are the same comments I redistributed. I just understood him to say that he hadn't seen anything from anybody.

MR. BAILEY: What Mr. Tucker said is that we, as individuals, have not received --

MR. TUCKER: They haven't been forwarded to us, Mr. Smith, is what I am saying, sir. That is what I was requesting, sir, that's what you and somebody else had said that they had sent written comments; but, as Chairperson, I have not received those comments until you gave them to me physically today, other than Mr. Idleman. My request was that any comments that had been sent in, that will be forwarded, should be sent to the members of the

Council.

So we will set the Division's response 10:00 a.m., Wednesday, June 28th, at a place to be determined later.

I have one more request. I would like to have someone at that same time from the Division, there's been much said about, this is from my own ignorance, I guess, what the West Virginia tax law says about -- I would like for this Committee to be furnished with an explanation from the Legal Division as to what that means. Is there any objection from anyone on that?

(no response)

MR. TUCKER: There has been much reference made to that.

MR. FLICK: I will ask Mr. Stephenson to furnish you with the comments that have been filed and separate the ones filed within the 30-day period, officially filed --

MR. TUCKER: That will be fine, sir. Let the record reflect that the Chair does not

disagree with Mr. Stephenson, pertaining to the requirement; but as an assistance to this Committee, we would appreciate, if anybody wants to send anything in, I think we need to take everything from everyone into consideration, in all fairness.

Does any member of the Committee have any response they want to make today before we recess?

MR. EPPS: I do. Mr. Chairman, I guess my comments will be more directed to the Division than anybody else; but Mr. Huffman, I think raised a very good question in his question. He said that what we need to do is define what the issue is; and I agree with him.

It seems to me that the issue, the very simple issue here, is to ensure that Workers' Comp premiums that are paid for a worker are commensurate with the work and the environment that that worker is doing. That doesn't sound too complicated to me.

Now, I think the process needs to accomplish that objective as fairly as possible to all of the employers and as hassle free as possible to all

of the employers in the Division. I understand that the Devil is in the details; and based on the number of comments we have got today, the Devil has been at work. I think that -- I admonish the Division -- I think you have got a lot of work ahead of you, based on the comments that we have heard today. I hope that when you take these comments in mind and when you do your thing and get back to us on the 28th, I hope that the rule that you come back to us with sort of is focused on what the purpose of the rule is all about. That's my comment.

MR. TUCKER: In closing, before I recess, this meeting, once it is concluded will not adjourned, it will be recessed officially until 6-28, 10:00 in the morning, at a place to be determined later.

Once again, for the record, the Chair does not want to imply that we will make a practice of extending anything beyond the 30-day time frame. But out of courtesy, because we did have a rule resubmitted, there was some confusion over it, this

Committee has allowed that. I would like the record to reflect that we stand by what the rules and procedures are in the process of dealing with the Secretary of State's office, and those rules will be applied with vigor, as we have in the past. But due to this circumstance, I just wanted that to be clarified for the record.

Does anyone else have anything that they want to add to this public hearing before we recess?

MR. STEPHENSON: Mr. Chairman, would you please ask that the written comments that were provided today be passed to the court reporter so that we can get them --

MR. TUCKER: I sure will, sir. Thank you very much, sir. Anyone that passed out written comments today will be given to the court reporter prior to leaving the meeting. Mr. Smith passed some out; I don't know if anyone else did; but if you did do that, see that the court reporter has it.

Once again, does anybody from the visitors today or any members of the Committee have

anything they want to add to this public hearing?

(no response)

MR. TUCKER: If not, I declare it recessed until June 28th at 10:00 at a place to be determined later.

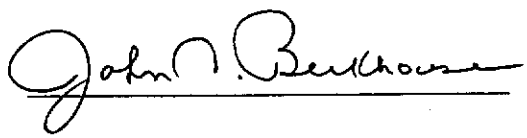
(WHEREUPON, the hearing was recessed.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, John T. Berkhouse, Subcontractor for Rebecca L. Baker, Certified Court Reporter under contract with the West Virginia Bureau of Employment Programs, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the caption thereof.



John T. Berkhouse
Court Reporter

COMMENTS TO PROPOSED EMPLOYEE LEASING AND CONTRACTED OPERATIONS RULES TITLE 85 SERIES 31

General Comments

The Division initially justified the need for a rule regulating employee leasing, on the basis that a significant number of companies were abusing the current system resulting in substantial underpayment of premium. However, the Division has recommended a base rate decrease for Class PO5, the classification which contains diversified employment agencies.

The proposed rules are not necessary to address the problem, if it does exist. Under the current rules, the Division has authority to identify any abusers of the system and properly reclassify that company. Promulgation of a new and complicated rule such as the proposed Series 31 rule will not compensate for the Division's lack of enforcement of the existing rules.

Additionally, the proposed rule is very broad as written and could apply to many businesses outside the traditional employee leasing context. The definitions are not sufficiently specific, particularly as to the time periods which define an employee leasing arrangement.

Finally, the transfer of liability, particularly the civil and criminal liability for defaulted accounts, to client businesses with whom the employee leasing organizations currently do business, will likely discourage future employee leasing arrangements. The potential risk to a client employer is significant and consequently, such a rule will significantly reduce if not eliminate the use of employee leasing arrangements in the future.

§85-31-3.2.2

This section while attempting to define "contracted operation arrangement", does not specifically delineate what constitutes "long term or permanent."

§85-31-3.5

In attempting to define an "employee leasing arrangement", this definition does not delineate the specific period of time, beyond which a temporary arrangement becomes a long term arrangement subject to this rule.

§85-31-3.6

This section defines "employee leasing firm" in sufficiently broad terms so that it may include the employees of many contracted operations working on an employer's premises, such as janitorial services or security guards.

§85-31-3.13

This section attempts to define a "temporary help agency" which is excluded from the rule. However, it does not delineate the specific time period necessary to determine what constitutes a "finite temporary time period" which is key to an arrangement being temporary verses long term.

§85-31-3.14

This section attempts to define a "temporary worker" by utilizing the phrase employed for a "finite temporary time period" without defining what constitutes such time period or how the same is measured.

§85-31-7

This section places the responsibility for payment of the premium tax on both the employee leasing firm and the client employer. It also purports to make the client employer responsible for any delinquency or default that occurs as a result of the employee leasing firm failing to properly report and pay premium taxes on each of the leasing firm's employees situate on the client employer's premises. This section also appears to extend both criminal and civil liability to the client employer for the delinquency and/or default of the

employee leasing firm and appears to go far beyond what is currently provided for in the statute and would likely require a statutory change. If such shifting and/or sharing of liability is desirable, our current statute should be amended to make provision for an appropriate notification procedure and opportunity by the client employer to terminate its contract with employee leasing company before incurring liability. A system similar to that which is contained in West Virginia Code §23-2-1d with regard to primary contractor liability, would be most equitable to all parties. To implement such a system would require a change in the statute.

§85-31-9

This section purports to require notification of employment. However, as written, it is unclear what the nature of the notification is to be, and who is to supply the notification.

WEST VIRGINIA STATE BUILDING AND CONSTRUCTION TRADES COUNCIL AFL-CIO

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STEVE BURTON
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ROY M. SMITH
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Testimony of Roy Smith
Secretary-Treasurer
WV State Building & Construction Trades Council
2301 Seventh Avenue
Charleston, WV 25312

Wednesday, May 3, 2000

COMMENTS ON PROPOSED RULE 31: EMPLOYEE LEASING AND CONTRACTED OPERATIONS

The Building and Construction Trades Council and the Affiliated Construction Trades Foundation supports the proposed rule. We urge its quick adoption.

In recent years, this Council has rightfully focused its attention on reducing the long-practiced institution in this State of one industry subsidizing the workers' compensation premiums of another. Historically it has been small, low-hazard businesses that have been forced to subsidize high-hazard employers. A system that was designed to base premiums on the risk of injury instead forced businesses across West Virginia to pay more than their share in order to permit some to pay less.

One area where that practice continues is the contracted and leased employee industry. Today, there are individuals working as leased employees in the construction industry -- a high hazard occupation -- for which the Fund is receiving premiums as if the worker was sitting in an office. In addition, the construction

company that is employing the services of the leased employee is reaping an unfair economic advantage over companies that are paying their fair share of workers' compensation premiums. It is a system that is bad for the Fund, bad for injured workers, and bad for legitimate employers. It is a system that should be ended.

The proposed rule will abrogate the fictitious employee leasing arrangements which are designed to avoid the payment of workers' compensation premium taxes and other employee benefits at the full rate that should be charged based upon the actual work of the employees. The rule adequately places the obligation to pay premium tax payments upon both employers involved in the situation and ensures that both employers will lose the protection of the Workers' Compensation Act while insuring that premiums will be collected to pay just benefits
to injured employees. It is the right approach to ending this practice and it should be adopted by the Council.

We have one important concern. The proposed rule as it is drafted does not apply to temporary help agencies unless and until such an agency engages in providing leased or contract workers. We believe that such an exemption may undercut the effectiveness of the rule. Temporary help agencies can and do undertake the same abuses as those agencies which provide contract and leased employees. For example, we know of situations, in West Virginia, where temporary employees performed demolition work while being categorized for purposes of workers' compensation in a category with piano tuners. In addition, too often workers are employed in "temporary" situations for days, weeks, months or even years. We urge the Council to remove this exemption from the proposed rule.

Thank-you for this opportunity to present the views of the West Virginia Building and Construction Trades Council and the ACT Foundation. We urge this Council to take quick action on this long-overdue proposal.

Charleston Regional Chamber of Commerce
Huntington Regional Chamber of Commerce
Concerns Regarding Proposed Worker's Compensation
Employee Leasing Regulation 85 C.S.R 28

My name is Marty Chapman, Vice President of the Charleston Regional Chamber of Commerce. I am here representing our membership of 1,100 businesses, also in conjunction with The Huntington Regional Chamber of Commerce and its 750 member businesses, represented today by President Ken Busz.

Both organizations have received numerous comments from member businesses expressing their concern and opposition to the proposed Employee Leasing Regulation and the adverse impact it would have.

Their concerns include:

1. Contracted Operation Arrangements Would Make Local Service Providers "Employees" of the Customer.
   The definition proposed within the Regulation would bring the employees of a service provider under the employment scope of the customer. This would encompass security guards, janitorial services, maintenance services and other businesses historically providing services to their customers.

2. Administrative Burden
   Contractual Service Providers with multiple clients would have to report different rate and experience levels for each customer. For janitors, security guards and others who work at multiple locations throughout the week, the complexity is mind-boggling.

3. The Proposal Provides Unjustified Risk Shifting Between Service Provider and Customer
   By assigning the customer's experience rate to a service provider, the proposed rule provides no incentive for the provider to install and maintain good safety practices.

4. The Proposed Rule Creates Legal Uncertainty For Employers
   The proposed regulation makes the temporary worker an employee of the customer. This would impact potential employee benefit plans, and the flexibility a business has in offering the best in benefit packages possible to long term employees.

For the concerns previously stated the Members of The Charleston Regional Chamber of Commerce and The Huntington Regional Chamber of Commerce urge The Performance Council to reconsider and modify Worker's Compensation Employee Leasing Regulation 85 C.S.R. 28.

Proposed Rule 85 CSR 31 Comments

Arnold, Phylis — ***Written*** Y — ***Oral*** N — ***Represents*** One Valley Bank

Comments	***Response***
Definitions and coverage of the rule is too broad and would be extended to cover temporary help and contractual operations.	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers.

Cerra, Jim — ***Written*** Y — ***Oral*** N — ***Represents*** West Virginia Construction Council

Comments	***Response***
Supports rule and would like it expanded to cover temporary agencies.	

Chapman, Marty — ***Written*** N — ***Oral*** Y — ***Represents*** Charleston Regional Chamber of Commerce

Comments	***Response***
Definitions would include service industries. If this is done, it will create an administrative burden on the industry. Experience rate should not be applied to the provider in the case of the service industry. Makes a temporary employee a worker of the customer.	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers.

Cipoletti, Sam — ***Written*** Y — ***Oral*** Y — ***Represents*** Bell Atlantic

Comments	***Response***
Needs to be a threshold. Could affect an employer's ability to hire persons on a contract basis or leased basis. If lent employee doctrine must stay, include warnings as in 23-2-1b primary contractor subcontractor. 50% threshold on leased employees. Adopt exemptions for public utilities. Primary contractor-subcontractor rules should cover defaulting subcontractors or incorporate notification of employers in this rule also. Lent employee doctrine should be removed.	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers. Sections relating to the "lent employee" doctrine have been removed precluding the need to provide a "safe harbor" for client employers through a notification process.

Cline, Dwayne	***Written*** Y	***Oral*** N	***Represents***	Personnel Management Company, Diversified Employment, Owners S

Comments	***Response***
PEO should retain employer status. Would like one composite rate with exclusions for clerical, logging, coal only.	Employee leasing firm will retain status as the employer. Claims defense would be negotiable between the client employer and the leasing firm. One composite rate does not support a sound experience rating system or provide sufficient incentives for safety and health in the workplace. A composite rate also would not be fair and equitable to all employers. It would give some employers an unfair advantage to others.

Diggs, N. Jane	***Written*** Y	***Oral*** N	***Represents***	Career Connections, Inc.

Comments	***Response***
Definintions between employee leasing and temporary staffing are confusing.	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers.

Huffman, Tim	***Written*** Y	***Oral*** Y	***Represents***	Jackson & Kelly - West Virginia Chamber of Commerce

Comments	***Response***
Can use multiple classes to accomplish the same purpose. Existing rules are not being enforced. The rate reduction for this class indicates there may not be a problem. Definitions need to be revised to limit the scope of the rule and exclude service companies and temporary agencies. Section 7 goes beyond current statute. Section 9 is unclear.	Multiple classes would not maintain experience by client employer as is required for a sound experience rating system. The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers. Employers currently in the 9550 class include firms with temporary staffing employment, leasing operations with clerical, professional or other low hazard employment, as well as higher hazard employments. The reduction in rates is not reflective of the true experience of the group as there is a significant mix of exposures. Section 7 has been removed.

Idleman, Mike	*Written* Y	*Oral* Y	*Represents*	Acordia Employers Service

Comments	*Response*
Use tax and revenue definition of employee leasing. Define finite for temporary work. How will section 5.5 work? How will the Division notify the affected employers? How will the Divison know who they are? Section 7.1 requires client to pay and should be re-written to indicate in the event the leasing employer does not pay. It is not prudent for the Division to place all employers of the leasing firm in a delinquent status if the leasing firm is delinquent. We want to make sure the client employer does not pay twice. Should use multiple classes.	Tax department definition applies to sales tax. It is not based on exposure to injury, our concern. Again, multiple classes will not maintain the integrity of the experience rating system. Multiple classes will also lead to shopping for leasing companies. The result would be companies changing leasing companies and their employees not know who they work for. Additionally, there would be no safety incentive for the client employer as they would just shop the emf. There would also be an increased potential for fraud. Leasing companies would churn to manipulate the emf. It would make is almost impossible for the Division to audit to determine proper classifications. The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers.

Lenz, Edward	*Written* Y	*Oral* N	*Represents*	American Staffing Association

Comments	*Response*
Definitions are too broad and would include staffing and service companies. The State of Virginia recently adopted definitions supported by the staffing and PEO industries.	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers.

Lewis, Marie	*Written* N	*Oral* Y	*Represents*	Manpower Temporary Services

Comments	*Response*
If this applies to a temporary agency the administrative burden would be overbearing. Confidentiality of client lists.	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers.

Rose, Ned	*Written* N	*Oral* Y	*Represents*	Mayflower Vehicle Systems

Comments	*Response*
Shared employer doctrine would help them. Their rates for temporary (leased?) employees is higher than their regular employees.	The rule needs to assure that employee safety is a primary aspect.

Sims, Brad	*Written* N	*Oral* Y	*Represents* United Talent

Comments	*Response*
Use tax department definition	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers.

Smith, Roy	*Written* Y	*Oral* Y	*Represents* WV State Building and Construction Trades Council

Comments	*Response*
Supports the rule and believes is should include Temporary Agencies.	

Staton, Rick	*Written* Y	*Oral* N	*Represents* Self (House of Delegates)

Comments	*Response*
Strict criteria for assignment to 9550. Removal of 9550 a Knee Jerk reaction.	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers. A composite rate for the leasing industry will significantly reduce the fairness, accuracy, reliability, and stability of the experience rating system. It would provide significant competitive advantage to a group of employers, based on workers compensation costs and not be based on exposure to loss. Workers compensation should not be the determining factor, or a consideration when entering into a leasing arrangment. Safety incentives for high hazard industries are removed from both the leasing firm and the client employer.

Sturgeon, Jim	*Written* Y	*Oral* Y	*Represents* Pauley & Curry

Comments	*Response*
Issue are that the definitions cover industries never intended to be covered. Lent employee doctrine is not part of current West Virginia law. Need Safe Harbor to protect service industries	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers. Based on the changes that have been made to the rule, we do not believe there is a need for a "safe harbor" provision.

Taberner, Jeff	*Written*	Y	*Oral*	Y	*Represents*	CPA with a staffing company

Comments	*Response*
How are employers who do not have an account in West Virginia going to be handled? Who has the right or obligation to defend the claim? They would not know the cost for WC when bidding a job. Define long term temporary arrangements. What documentation would be required? All employees on an assignment be subject to the rate of the client employer. Basically, include temporary and leased employees in the same category. What if the principal business is to provide temporary workers? No policy in West Virginia. Who has the right to defend the claim? Allocation of officer wages if they do admin and leased work.	Employers who do not have employees in this state but lease their employees will be required to have coverage in West Virginia. The right or obligation to defend claims can be negotiated between the leasing firm and the client employer. The cost for WC would be immaterial to the contract. Our purpose is to remove WC as an incentive or as an issue in the leasing contract. All employees under a leasing arrangement would pay the premium tax rate of the client firm. The governing class principles will still apply to leasing arrangements. Under this method, the bidding of the job would exclude consideration of the workers compensation rates as the rate of the client employer would carry over to the leasing firm, for those leased employees. Officer of the leasing firm could elect out of coverage or their wages would be subject to the minimum/maximum reporting provisions. When an client employer leases all of its employees including officers, those officers may not elect out of coverage as they are now employees of the leasing firm and not officers, as required by law. Extra-territorial issues would apply here.

Teed, James	*Written*	Y	*Oral*	N	*Represents*	Snelling Personnel Services

Comments	*Response*
Definitions are too broad and vague.	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers.

Whyte, Bill	*Written*	N	*Oral*	Y	*Represents*	Security America

Comments	*Response*
Service Firms should not be included in the rule	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers.

Wright, Harvey	*Written*	Y	*Oral*	N	*Represents*	Quantum Resources

Comments	*Response*
Clarify the definitions and sections 7 and 9	The revised definitions and removal of the contracted operations language should sufficiently focus the rule on employee leasing and exclude temporary help/staffing agencies and contracted service employers. Section 7 has been removed.

INTEROFFICE MEMORANDUM

TO: COMPENSATION PROGRAMS PERFORMANCE COUNCIL

FROM: GERE FLICK

SUBJECT: 85 CSR 31- EMPLOYEE LEASING

DATE: 07/19/00

CC: COMMISIONER VIEWEG, CHERYL RANSON, RICHARD STEPHENSON

RESPONSE TO PERFORMANCE COUNCIL COMMENTS

Comment: The rule only addresses employee leasing and should include temporary agencies. What is the difference?

Response: There are significant differences between the two industries. This has been made quite clear to us by both industries throughout the rule development. For instance, in an employee leasing arrangement, the client employer has the ability to hire and fire employees, provide supervision and total direction of the work of the leased employee. In a temporary staffing arrangement, the client does not have the right to hire or fire the employee. They do have the right to have the employee replaced with another. The client also does not direct the assignment of the temporary staffing firm employees. As the Performance Council will recall, the original concept was to include both employee leasing and temporary staffing. The industries both stated that the differences in the industries required that they not be covered under the same rule.

There are other factors that will provide the differentiation. In order to determine if a firm is engaged in employee leasing or temporary/staffing, the underwriter will review:

- the terms agreement between the client employer and the leasing or temporary firm;
- the number of employees involved;
- the functions the employees perform;

As with many underwriting functions, there are areas where differences of opinions will exist. Through training, those differences are minimized. Additionally, the proposed approach has been effectively used in many jurisdictions, using definitions essentially the same as those contained in the proposed rule.

Employers who feel they have been improperly classified always have the ability to protest the decisions of the Division and have their case reviewed through the administrative hearing process.

Comment: The definitions in 3.3 and 3.9 need to be tightened up more.

Response: Based on the public comments, the Division revised the definitions. The revisions were based on Florida statutes provided by one of the commentors. These definitions have been in effect for several years. The use of percentages or time periods would have the effect of creating loopholes and significant enforcement issues.

Comment: Review the use of the word "regulate". In the purpose of the rule.

Response: The rule has been changed to state "regulate, for workers compensation purposes,".

Comment: Add " of the employee leasing firm" in section 5.2(2).

Response: The phrase has been added.

Comment: Where does the rule specifically state that the employee leasing firm will pay the premium tax rate of the client employer.

Response: Under section 5, the leasing firm will receive a quarterly report from the Division for each client employer with that client employer's premium tax rate. The employee leasing firm will report the wages for the leased employees working at the client employer's location(s) and pay premium tax based on those wages and premium tax rates.

Comment: How will the Division establish a premium tax rate for a self-insurer who uses leased employees?

Response: The premium tax rate for the leased employees of a self-insurer will pay a premium tax at the base rate for the class of the self-insurer. As experience is developed for the leased employees, and experience modification factor will be developed.

Comment: Why not use a single rate for employee leasing and have exceptions form high and low risk employment?

Response: This methodology creates some problems. First, you are combining dissimilar exposures to risk on a magnified basis. This adversely impacts the reliability and credibility of the experience rating system. Additionally, it creates competitive inequities between similar employers by giving an advantage to one employer, based on workers compensation costs on a basis other than safety performance. This approach can also remove incentives for strong safety and health programs.

Comment: What is the Division's enforcement plan?

Response: The Division has already developed the internal systems to implement the rule. We need to identify each employee leasing firm and obtain a current list of their clients. This will enable us to provide them with the proper premium tax rate for each of their client employers and to enter them into the system and produce the quarterly reports. During this initial phase, the underwriters will be trained in the rule and determination of employee leasing versus temporary/staffing agencies. The actual initial underwriting will be accomplished by Sandra Brunty and Diana Parsons, two senior underwriting staff members who have been working on this process. They will train the individual underwriters at the same time.

We will also provide training for the Combined Audit Group's auditors. The audit function is critical to the success of this program. Each firm registered as an employee leasing firm, as well as temporary/staffing agencies will be audited annually. The audit will include a review of the leasing agreements.

As part of the audit and annual review of the leasing firms, we have the capability to track the movement of employees between employers. This will provide us with additional information needed to effectively enforce the provisions of this rule.