WEST VIRGINIA
SECRETARY OF STATE
Betty Ireland
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE

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

RULE TYPE: Exempt Legislative CITE AUTHORITY WV Code §§23-2C-22, 33-2-10(b), 33-2-21(a), and 33-46A-7

AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 31

TITLE OF RULE BEING AMENDED: ~~Employee Leasing~~ Professional Employer Organizations

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ____________

TITLE OF RULE BEING PROPOSED: ____________

DATE OF PUBLIC HEARING: Thursday, September 11, 2008 TIME: 3:00 PM

LOCATION OF PUBLIC HEARING: Offices of the WV Insurance Commissioner
1124 Smith Street – 4th Floor – Room 400
Charleston, WV 25301

COMMENTS LIMITED TO: ORAL ☐ WRITTEN ☐ BOTH ☒

DATE WRITTEN COMMENT PERIOD ENDS: Thursday, Sept. 11, 2008 TIME: 3:00 PM

WRITTEN COMMENTS MAY BE MAILED TO:

Ryan Sims, Associate Counsel
Offices of the Insurance Commissioner
P.O. Box 50540
Charleston, WV 25305-0540
Ryan.Sims@wvinsurance.gov

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

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

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Virgil T. Helton

Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

Insurance Commission
Exempt Legislative Rule
Title 85, Series 31

PROFESSIONAL EMPLOYER ORGANIZATIONS

TITLE 85, SERIES 31

BRIEF SUMMARY OF RULE

Title 85, Series 31 ("Rule 31," "Professional Employer Organizations") sets forth standards, clarification, guidelines and procedures regarding the issuance of workers' compensation policies to companies known as professional employer organizations ("PEOs"). PEOs provide certain employment services to other companies, such as payroll, employee benefit programs and insurance procurement. The initial version of this rule was promulgated by the former Workers' Compensation Commissioner with an effective date of December 2, 2005.

This rule is being updated with necessary technical and stylistic cleanup. Additionally, several substantive changes are being made. Because the changes to this rule are so comprehensive, it is more efficient to draft a completely new version than make edits and amendments to the current version. The new version includes substantive sections addressing the following areas:

- File and use of workers' compensation policy forms by PEOs;
- Data collection, maintenance and reporting requirements by carriers writing workers' compensation insurance to PEOs;
- The scope of coverage provided in workers' compensation policies issued to PEOs; and
- Requirements of notice to policy holders for issuance and cancellation of workers' compensation policies issued to PEOs and their client employers.

Insurance Commission
Exempt Legislative Rule
Title 85, Series 31

PROFESSIONAL EMPLOYER ORGANIZATIONS

TITLE 85, SERIES 31

STATEMENT OF CIRCUMSTANCES

Professional employer organizations, known as "PEOs", provide certain employment services to other companies, such as payroll, employee benefit programs and insurance procurement. Because of the unique nature of services provided by PEOs, there is a need for heightened regulation of this industry regarding certain areas of insurance, including workers' compensation. Title 85, Series 31 ("Rule 31," "Professional Employer Organizations"), which was originally promulgated by the former Workers' Compensation Commission with an effective date of December 2, 2005, sets forth standards, clarification, guidelines and procedures regarding the issuance of workers' compensation policies to PEOs.

It has become apparent to the Insurance Commissioner that there is a need for certain stylistic, technical and substantive amendments to this rule to properly reflect West Virginia's new privatized workers' compensation system and to otherwise reflect West Virginia's statutory law regarding workers' compensation. More specifically, HB 4079, enacted by the West Virginia Legislature in 2008 with an effective date of March 6, 2008, includes a provision addressing PEOs and workers' compensation and further requiring the Offices of the Insurance Commissioner to promulgate a rule in this regard (see W. Va. Code §33-46A-7(f)). Because the changes to this rule are so comprehensive, it is more efficient to draft a completely new version than make edits and amendments to the current version. The new version of the rule is more specifically referenced in the "Brief Summary" for this rule.

This amended rule is being promulgated to implement the above referenced changes necessary to Rule 31.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Professional Employer Organizations (Title 85, Series 31)

Type of Rule: X Exempt Legislative ___ Interpretive ___ Procedural

Agency: Insurance Commission

Address: Post Office Box 50540

1124 Smith Street, Greenbrooke Building

Charleston, West Virginia 25305-0540

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

Fiscal Note Summary

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

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

Fiscal Note Detail

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

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	N/A	N/A	N/A
Personal Services	N/A	N/A	N/A
Current Expenses	N/A	N/A	N/A
Repairs & Alterations	N/A	N/A	N/A
Assets	N/A	N/A	N/A
Equipment	N/A	N/A	N/A
Other	N/A	N/A	N/A
2. Estimated Total Revenues	N/A	N/A	N/A

Rule Title: Professional Employer Organizations (Title 85, Series 31)

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

N/A

MEMORANDUM

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

Date: ______________________________

Signature of Agency Head or Authorized Representative

____
Ryan Sims, Associate Counsel

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

SERIES 31
PROFESSIONAL EMPLOYER ORGANIZATIONS

Section

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

SERIES 31
PROFESSIONAL EMPLOYER ORGANIZATIONS

§85-31-1. General.

1.1. Scope. -- This exempt legislative rule provides for the adoption and implementation of rules to regulate professional employer organizations ("PEOs") regarding workers' compensation.

1.2. Authority. -- W. Va. Code §§23-2C-22; 33-2-10(b); 33-2-21(a); and 33-46A-7. Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules proposed by the Commissioner and adopted by the Industrial Council are not subject to legislative approval as would otherwise be required under W. Va. Code §29A-3-1, et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Repeal of former rule. -- This exempt legislative rule repeals and replaces WV 85CSR31 "Employee Leasing" filed December 2, 2005 and effective January 2, 2006.

1.4. Filing Date. --

1.5. Effective Date. --

§85-31-2. Purpose of Rule.

The purpose of this rule is to establish certain standards and provisions applicable to workers' compensation insurance being provided to entities known a "PEOs", as defined in this rule. The rule does not apply to temporary help agencies or those businesses engaged in the provision of contracted services, which are the primary or only services provided. However, it does apply to any temporary help agency which also enters into agreements to provide professional employer services to client employers, but the applicability of this rule is limited to such instances.

§85-31-3. Definitions.

As used in this rule, the following terms, words and phrases have the meanings stated unless, in any instance where such term, word or phrase is used, the context expressly indicates that another meaning is intended.

3.1. "Agreement" means a written contract by and between a client-employer and a PEO under which a PEO contracts to provide professional employer services for an administrative fee, as otherwise consistent with the provisions of W. Va. Code §33-46A-6.

3.2. "Client employer" means an entity who enters into a professional employer agreement with a PEO.

3.3. "Commissioner" means the Insurance Commissioner of West Virginia.

3.4. "Covered employee" means any person working for a client employer who is required to be provided workers' compensation insurance under chapter twenty-three of the West Virginia Code and rules promulgated thereunder and is not covered by a policy issued on a direct purchase basis between the client employer and a private carrier.

3.5. "Direct hire employee" means an individual who is an employee of the PEO and has no employment or working relationship with any client employer.

3.6. "Direct purchase basis" means an arrangement in which all contractual obligations under the insurance policy run directly between the insurer and the client employer without the involvement of the PEO.

3.7. "Master Policy Basis" means an arrangement under which a single policy issued to a PEO covers more than one client-employer.

3.8. "Multiple Coordinated Policy Basis" or "MCP Basis" means an arrangement under which a separate policy is issued to or on behalf of each client-employer but certain payment obligations and policy communications are coordinated through the PEO.

3.9. "PEO" is a professional employer organization as defined in W. Va. Code §33-46A-2(g).

3.10. "Private Carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.11. "Residual Market" is the market of workers' compensation insurance written pursuant to the assigned risk plan developed pursuant to W. Va. Code §23-2C-10.

3.12. "Voluntary Market" has the same meaning ascribed to it in W. Va. Code §23-2C-2(u).

§85-31-4. PEO Workers' Compensation Insurance Policies.

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

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

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

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

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

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

5.2. When a client employer, for whatever reason, purchases workers' compensation coverage on a direct purchase basis, the client employer's experience modification factor shall be based solely upon the client-employer's own experience.

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

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

5.5. Failure of the private carrier to collect, maintain and report data as required by this section may result in appropriate regulatory measures being taken against the carrier pursuant to chapter thirty-three of the West Virginia Code, including, but not limited to, fines, termination of ability to write workers' compensation coverage to PEOs and termination of the carrier's certificate of authority in West Virginia.

§85-31-6. Scope of Coverage for Master Policies.

6.1. A workers' compensation policy of insurance issued to a PEO on a master policy basis shall provide workers' compensation to all covered employees, including, but not limited to:

a. All the direct hire employees of the PEO; and

b. All covered employees working for each client employer of the PEO, regardless of whether the private carrier has been made aware of the PEO's relationship with the client employer or whether the client employer has yet been added to the policy.

6.2. Under no circumstances may a private carrier deny a workers' compensation claim involving a workers' compensation policy issued to a PEO on a master policy basis based upon the PEO's failure to properly notice the carrier regarding the retention of a new client employer or that the scope of the agreement between the PEO and client employer excludes workers' compensation coverage.

6.3. If on the relevant date of injury there is in effect both a workers' compensation policy issued to the client employer on a direct purchase basis and a master policy covering the covered employees, the direct purchase policy shall be the primary policy to provide coverage for workers' compensation benefits.

§85-31-7. Notice of Coverage and Cancellation.

7.1. Upon issuing a workers' compensation policy to a PEO and its client employer on a master policy or MCP basis, the carrier shall promptly issue a certificate of coverage to each client covered under the policy.

7.2. Upon receiving notice that the PEO has added a client employer to its master policy, a private carrier shall promptly issue a certificate of coverage to the newly added client employer.

7.3. A certificate of coverage issued under this section shall specify the effective date of the client employer's coverage and the expiration date of the master policy under which such coverage is being provided.

7.4. In all workers' compensation policies issued to PEOs and their client employers, the private carrier shall comply with W. Va. Code §23-2C-15(e) and W. Va. Code St. R. §85-8-9 regarding providing notice of cancellation, renewal and non-renewal: *Provided,* That notice of cancellation of coverage to any client employer for any reason shall not be effective without thirty (30) days advance written notice. Every notice provided under this subsection shall be sent both to the PEO and client: *Provided,* That the client employer does not need to be provided notice of a renewal under the provisions of W. Va. Code St. R. §85-8-9.9.