WEST VIRGINIA
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OFFICE WEST VIRGINIA SECRETARY OF STATE

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

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

CITE AUTHORITY WV Code §§23-2C-22; 33-2-10(b); 33-2-21(a); and 33-46A-7

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code §§23-2C-5(c)(2) and 33-2-10(b)

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 31

TITLE OF RULE BEING ADOPTED: Professional Employer Organizations

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS November 21, 2008

Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

$8.60

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

SERIES 31
PROFESSIONAL EMPLOYER ORGANIZATIONS

Section

85-31-1. General.

85-31-2. Purpose of Rule.

85-31-3. Definitions.

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

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

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TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION 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. -- October 22, 2008.

1.5. Effective Date. -- November 21, 2008.

§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 a person employed by a client-employer for whom certain employer responsibilities are shared or allocated pursuant to a PEO agreement. Persons who are officers, directors, shareholders, partners and managers of the client-employer will be covered employees only to the extent expressly set forth in the professional employer agreement.

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, including experience under past direct purchase policies and PEO policies, as applicable.

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:

a. All the direct hire employees of the PEO;

b. All covered employees working for each client employer of the PEO; and

c. All other employees of the PEO or client employer required to be provided West Virginia workers' compensation coverage for whom there is no other workers' compensation policy providing coverage effective on the relevant date of injury.

6.2. A workers' compensation policy of insurance issued to a client employer on a multiple coordinated policy basis shall provide workers' compensation to all covered employees working for the client employer and all other employees of the PEO or client employer required to have West Virginia workers' compensation coverage for whom there is no other workers' compensation policy providing coverage effective on the relevant date of injury.

6.3. If on the relevant date of injury there is both a PEO workers' compensation policy in effect and a direct purchase policy in effect, the following shall apply:

a. If the claimant is a covered employee, then the PEO policy shall be the primary policy; or

b. If the claimant is not a covered employee, then the direct purchase policy shall be the primary policy.

6.4. Under no circumstances shall this section be interpreted to have any legal effect on the terms, conditions or legal rights as between a private carrier, PEO and client employer established pursuant to a valid PEO agreement or insurance contract, or the right of a private carrier, PEO or client employer to enforce the same through various legal remedies.

§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 approved by the carrier to its master policy, a private carrier or its agent, if applicable, 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, under a master policy, 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.

INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND PUBLIC COMMENTS RECEIVED ON W. VA. CODE ST. R. § 85-31-1 ET SEQ.

Introduction

Below is the written response of the Insurance Commissioner of West Virginia to the stakeholder and public comments received in regard to the new Title 85 Rule, W. Va. Code St. R. § 85-31-1 et seq. ("Rule 31" – Professional Employer Organizations), which was filed with the West Virginia Secretary of State for public comment on 08/12/2008. This response is itemized by topic, and addresses all of the comments received by the public at the 09/11/2008 Industrial Council meeting as well as other selected substantive written comments received by stakeholders.

Definition of "Covered Employee"

It was commented that the definition of "covered employee" in subsection 3.4. of the Rule is not consistent with the definition as set forth in W. Va. Code §33-46A-2(c). The Commissioner agrees, and has amended the Rule so that the definition of this term in the Rule reflects the definition in the Code.

Use of Master Policies in the Residual Market

Comment was made that subsection 4.3. of the Rule lacks clarity in that it does not expressly state that only multiple coordinated policies ("MCP's") could be used in West Virginia's residual market. The Commissioner disagrees. This provision reflects the law as stated in W. Va. Code §33-46A-7(c)(1), which states that master policies may only be used in the voluntary market (and therefore not in the residual market). Subsection 4.3. of the Rule goes on to state that workers' compensation policies for PEOs in the residual market shall only be issued on forms approved by the OIC. So, as long as the approved forms are not on master policies, which this provision and the Code prohibit, this provision is clear and consistent with the law.

Scope of Rule

Comment was made that in section 2, the description of the Rule lacks sufficient clarity, because it simply states that temporary help agencies and businesses engaged in the provision of contracted services are exempt from the Rule, but these types of entities are not defined in the Rule. The concern is that some entities will attempt to skirt regulation by claiming to be "temp agencies" rather than PEOs. The Commissioner understands this concern, but believes that it was sufficiently addressed by the Legislature in W. Va. Code §33-46A-1 et. seq., an Article in the WV Insurance Code dedicated to the regulation of PEO's. Specifically, this Article clearly defines what a PEO is and includes specific examples of what is not a PEO. This Rule, in turn, defines PEO as "a professional employer organization as defined in W. Va. Code §33-46A-2(g)", thereby incorporating this important language from the Code into this Rule. As such, the

Commissioner believes that the scope of the Rule is defined clearly in regard to the definition of PEOs.

Data Collection and Proof of Coverage Reporting

Several comments were made regarding section 5 of the Rule which addresses the requirement of data collection and proof of coverage reporting. First, comment was made that this section needs more detail regarding the right of a carrier to audit PEO policies frequently during the term of the policy. A carrier's right to audit workers' compensation policies is set forth clearly in W. Va. Code St. R. §85-8-5, which provides carriers the clear right to conduct reasonable audits. Therefore, there is no necessity to revisit this issue in this Rule.

Second, comment was made that subsection 5.2., pertaining to a client employer's experience modification factor in a "direct purchase" policy, needs clarification for instances when the client's experience includes both a direct purchase policy and a PEO policy (i.e., the client's employees have been "split" between two policies in the past). The Commissioner agrees, and language was added to make this clarification.

Multiple comments were made regarding subsection 5.4., which requires carriers to report proof of coverage data to the OIC's designated rating organization both for the PEO and each client. The concern is that the OIC's rating organization (currently NCCI) will not be able to accommodate such reporting. While the Commissioner understands this concern, there is no discretion under the law to not require this reporting. Specifically, W. Va. Code §33-46A-7(b)(2)(B) expressly requires carriers to report proof of coverage information at the client level. Moreover, for purposes of enforcing West Virginia's mandatory workers' compensation laws, having this level of detail in proof-of-coverage reporting is absolutely necessary. The Commissioner understands that in order to report this, the rating organization must permit a format on which this detailed reporting is available. Therefore, the Commissioner will work closely with industry and NCCI to be sure that carriers are able to report this information to NCCI. However, as stated above, the law provides no discretion to abrogate this requirement in this Rule.

Scope of Coverage Issues

There were multiple concerns expressed about section 6 of the Rule, which establishes certain parameters for the scope of coverage in policies issued to or on behalf of PEO's by carriers. The primary concerns were that this section establishes coverage for claimants under a PEO policy when other agreements or contracts, such as a PEO agreement, contemplate some of the PEO or client level employees being covered by the PEO policy, but others to be covered by a "direct purchase" policy. Several stakeholders stated that this provision created coverage where it would not be contemplated under the agreements and contracts between the carrier, PEO and clients.

The Commissioner understands the concern expressed by these stakeholders regarding these provisions. However, these concerns must be counter-balanced with

legitimate concerns about claimants being injured and their claims being denied because a client employer was supposed to have obtained a separate policy for certain "direct hire" employees, or because a PEO brought on a new client but failed to report it to the carrier. Ultimately, the Uninsured Fund should not be held responsible because a particular party was negligent in a PEO relationship.

The Uninsured Fund is in existence to pay for claims of claimants in situations where absolutely no workers' compensation insurance exists for the employer of the claimant at the time of injury. In other words, it is a fund of last resort. The Insurance Commissioner believes it is bad public policy to expand UEF coverage beyond this "last resort" scope and to potentially provide coverage under the UEF when there is a valid workers' compensation policy in existence at the time of injury.

Moreover, the Insurance Commissioner wants to emphasize that the scenarios causing concern to certain stakeholders under this section are completely avoidable if the carrier takes appropriate precautions when underwriting an insurance policy and continues to conduct appropriate audits on insureds in PEO relationships. For example, if a carrier issues a multiple coordinated policy ("MCP") to a client employer covering twenty (20) of its leased employees, but the client is also supposed to procure a direct purchase policy for its supervisors and executives who are not included within the purview of the PEO relationship, the carrier can simply require the client employer to provide a certificate of coverage evidencing the separate direct purchase policy prior to issuing the MCP PEO policy.

Additionally, the Commissioner does not see a fundamental difference between the potential scenarios causing concern regarding section 6 of this Rule and situations where an insured employer under a non-PEO policy adds large amount of payroll and fails to tell its carrier. In the latter situation, the carrier would still be liable for claims payments for the newly added payroll in the event of an injury, but of course could perform a "post-audit" on the employer and recoup premium payment that should have been paid were the new payroll timely reported. Likewise, in these various scenarios within the PEO realm, the carrier can always perform a post-audit on the PEO or applicable client employers and recoup the appropriate premium that should have been paid, but was not.

Finally, it should be emphasized that section 6 of this Rule in no way abrogates the ability of a carrier, PEO or client to seek appropriate legal remedies against any party in a PEO relationship who has breached its contractual obligations. For example, if a client employer was supposed to obtain a separate direct purchase policy, but did not, and the PEO insurer ended up having to pay a claim for an injured claimant who was a "direct hire" of the client, the insurer and/or PEO could very well have a legal remedy in the Courts against the client because the client acted negligently. This section does nothing to eliminate this type of legal remedy.

For these reasons, the Commissioner believes the provisions of section 6 of this Rule are consistent with the intent of the Legislature and public policy to protect injured

workers through workers' compensation insurance and to minimize exposure to West Virginia's Uninsured Fund. Therefore, the Commissioner is not inclined to make the substantive changes to this section suggested by various stakeholders. However, consistent with some of these comments, there were changes made to this section to provide more clarity on how it applies.

Certificates of Coverage and Notices of Cancellation or Non-renewal

Several comments were made regarding section 7 of the Rule, which addresses notice of coverage and cancellation for PEO policies. First, it was commented that subsection 7.2., requiring a certificate of coverage to be issued to clients that were added by the PEO under a master policy, implies that the carrier has to issue a certificate of coverage to any client the PEO wishes to add, regardless of whether the carrier approves. While this was not the intent of this section, the Commissioner can see how this confusion could occur. It was also appropriately noted that generally the agent, not the carrier, is responsible for issuing the certificate of coverage. Therefore, language was added clarifying that the carrier should promptly issue a certificate of coverage only when the carrier "approves" of the new client. Also, language was added clarifying the agent could issue the certificate of coverage.

Second, it was commented that the provisions of subsection 7.4. of the Rule which require thirty (30) days advanced notice of cancellation, renewal or non-renewal provide for a longer cancellation notice period than is required by W. Va. Code §23-2C-15(e) and W. Va. Code St. R. §85-8-9. While the Commissioner recognizes that this provision does require a slightly longer advance notice period than the provisions in the aforesaid Code and Rule sections, the Commissioner believes that this thirty (30) day period is justified by the unique nature of the PEO relationship. Specifically, in a PEO relationship, it is crucial that both the PEO and client employer are kept informed of coverage status for the workers involved, so that client employers are given ample time to procure coverage elsewhere in the event the PEO policy covering them is cancelled.

Moreover, the Legislature in W. Va. Code §33-46A-7(f) expressly provides the Insurance Commissioner and Industrial Council the ability to propose a rule addressing the manner in which notice of default under PEO policies must be given to employers, thereby implicitly carving out an exception to W. Va. Code §23-2C-15(e) . Therefore, the Commissioner does not believe that extending the notice period in PEO policies to thirty (30) days is unreasonable.

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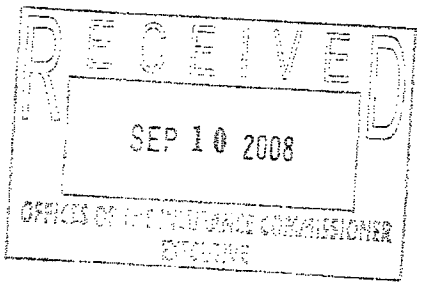
September 10, 2008



Jane L. Cline, Commissioner
West Virginia Division of Insurance
1124 Smith Street
P. O. Box 50545
Charleston, West Virginia 25305

Re: Comments on Workers Compensation Rules; Title 85, Series 19, 31

Dear Commissioner Cline:

These comments are submitted on behalf of the American Insurance Association (AIA), a national trade association representing property and casualty insurers. AIA members write a major share of property and casualty insurance, including workers' compensation insurance throughout the United States.

SERIES 19 – SELF INSURANCE RISK POOLS

Section 85-19-7 – Security Pool Funding

Subsection 7.2 provides that the Insurance Commissioner and Industrial Council shall identify and pursue "such alternative funding as shall be deemed necessary" in the event the proceeds identified under subsection 7.1 are inadequate to fully satisfy the obligations of the Security Pool.

We believe this extremely vague language must be modified to provide that insurers and/or insured employers shall not, under any circumstances, be considered sources of "alternative funding," since there is no reasonable justification for requiring these entities to pay for the insolvencies of self-insured employers.

SERIES 31 – PROFESSIONAL EMPLOYER ORGANIZATIONS

Section 85-31-7 – Notice of Coverage and Cancellation

Subsection 7.4 provides that "notice of cancellation of coverage to any client employer *for any reason* (emphasis added) shall not be effective without thirty (30) days advance written notice."

However, Section 23-2C-15(e) of the West Virginia Code provides that "cancellation of the policy by the carrier *for failure of consideration to be paid by the policyholder* (emphasis added) or for refusal to comply with a premium audit is effective after ten days advance written notice of cancellation to the policyholder."

Accordingly, we believe the rule must be amended to conform to the statutory authority.

Respectfully submitted
on behalf of American Insurance Association

By: T. Randolph Cox, III
T. Randolph Cox, Retained Counsel

TRC/lb;1148668

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September 11, 2008

Jane L. Cline, Commissioner
West Virginia Division of Insurance
1124 Smith Street
P. O. Box 50545
Charleston, West Virginia 25305

Re: Comments - Professional Employer Organizations
Title 85, Series 31

Dear Commissioner Cline:

These comments are submitted on behalf of AIG Commercial Insurance Group.

The Office of the Insurance Commissioner on June 13, 2008 issued notice of emergency rules regarding certain underwriting procedures and policies to be effective July 1, 2008.

AIG has received requests from our PEO clients to provide Workers Compensation Coverage in West Virginia effective 7-1-08.

Page 2, of the eleven page document indicates the voluntary market can issue a master and or MCP but currently we have no approved forms for doing so. We are waiting for our designated rating advisory board (NCCI) to re-file in West Virginia.

The rules seem to imply that a 60 day advance filing of policy forms is required by the insurance carrier. Thus, it is impossible for us to meet our client's request of providing coverage effective 7-1-08 unless carriers are allowed to backdate coverage.

On Page 4 we have concerns with section 6.2 and 6.3 (specific comments below) as they seem almost contradictory. Since there are no approved endorsements to review, we have no ability to determine if a client purchasing a WC policy in their own name will have the ability to exclude the employees covered under the leasing agreement with the PEO.

6.2 implies that when a Master policy is issued to a PEO, a claim cannot be denied for WC, for any client company, regardless of whether the client was reported to the insurance carrier, was termed properly by the PEO and or was told that they need to purchase their own policy by a PEO.

Insurance carriers need proper reporting by the PEO of all insured entities to facilitate proper rating, claim handling, safety and loss control, etc. The rules should support the timely and proper reporting of individual insured's by the PEO. However, we do agree no injured worker should go without benefits simply due to the lack of reporting of an insured entity by the PEO.

In 6.3, however, if the West Virginia client has a separate WC policy on a direct purchase basis in the clients own name and is also covered on a master policy, issued to a PEO, the Covered employees that are on direct purchase policy shall be covered under that policy as the primary policy to provide coverage for their WC benefits. This seems to imply that if a client has a policy in their own name it will be providing the coverage for the employees of the client that are actually covered by the PEO master policy.

As a carrier, we need to be able to determine exactly which employees are to be covered under the PEO policy. The ability to exclude employees covered under other policies, to avoid confusion between carriers is critical to the underwriting, claims, rating, and reporting process.

Each policy is designed to cover a specific group of employees. Claims need to be matched to the appropriate policy for proper rate making, etc. It is critical that language be revised to allow each policy to clearly detail which employees are covered, and which are excluded (if needed).

Section 85-31-7 Notice of Coverage

The Insurance carrier traditionally does not issue certificates. Carriers issue policies and endorsement. The broker or agent issues certificates. This language should be modified to accommodate usual and customary business practices for carriers who operate using the broker / agency system.

Respectfully submitted
on behalf of AIG Commercial Insurance Group

By: _____
T. Randolph Cox, Counsel

TRC/lb;1148668

BrickStreet INSURANCE
Legal Department

September 11, 2008

Members of the Industrial Council
c/o Ryan Sims, Associate Counsel
WV Office of the Insurance Commissioner
P.O. Box 50540
Charleston, WV 25305-0540

Re: Comments on Proposed 85 CSR 31,
"Professional Employer Organizations"

Members of the Industrial Council:

BrickStreet Insurance appreciates the opportunity to participate in this public process and offer comments regarding the proposed rule.

Workers' compensation insurance is entirely about responsibility. Employers purchase coverage from insurance companies to comply with their legal obligations. Insurance companies examine the risk and determine whether coverage may be offered at the rates allowed to be charged. The employer knows that if its loss experience is worse that its peers, then its experience factor will increase and that will result in an increase in the amount charged for coverage. Thus, the employer has an increased financial stake in making sure that a safe working environment is offered to the worker.

PEO/client employer relationships blur and complicate the responsibility to provide a safe workplace for employees. Care should be taken to make sure that PEOs and client employers continue to have a stake in keeping the workplace safe for their workers. If either can avoid or shift responsibility, workplace safety will be compromised and injuries will increase. It is with this thought in mind that we offer the following comments.

§85-31-2. Purpose of Rule.

Comment: §2. This provision states the purpose of the rule and provides that 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."

The previous version of this rule, "Employee Leasing," contained definitions for "temporary help agency," "temporary worker," and "contracted services." Without these types of definitions, it will be very difficult to determine the entities that are PEOs. I note that the OIC's proposed legislative rule §114-85 has a definition of "temporary

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employee." If the exemptions aren't defined, then all who want to escape regulation will claim that they are in these categories. This has happened in the past, especially prior to the time that the term "contracted services" was defined by the previous rule.

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

Comment §5.1: This provision provides that 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.

If the private carrier is required to collect this data in order to provide for individual experience ratings for all of the client employers who contract with a PEO. It should be clear that carriers are allowed to modify their audit schedules for PEO policies and audit the policies frequently during the term.

Comment §5.2: This provision provides: "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."

The provision is unclear. The provision contemplates an arrangement with both a PEO policy and a direct purchase policy. An arrangement like this is common. The client-employer leases part of its employees and the remainder are direct hires. This provision seems to say that the experience factor for the client-employer will be based solely on the safety performance of its direct hires. Clarification is needed as to what the "client-employer's experience" really is.

In addition, the provision does not address what happens when the PEO relationship terminates. As an example: The PEO arrangement terminates. All of the former PEO employees remain at the site and become direct hires of the client employer. The provision, as written, seems to say that the experience factor is based solely on the performance of the direct hires. The **past** safety performance of the PEO arrangement at the employer's worksite does not appear to be relevant under the proposal. The experience of the direct hires and the leased workers should be blended to present a truer picture of the safety experience at the worksite. If the client employer starts off with a clean slate and is able to "wash" its past responsibility for the leased workers, then safety will be compromised. Please note, if the employer's safety experience is better than its peers, the experience factor is reduced.

Suggestion: Add to §5.2.-- "A client-employer's own experience shall include its experience under the direct purchase policy combined with its experience under its PEO arrangement(s)."

Comment §5.4: This provision provides that, "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." (Emphasis added.)

These provisions involve reporting information to the OIC through its rating organization, NCCI. Our NCCI reporting expert was asked about this provision. The response follows.

In the draft proposal, the word **separately** is highlighted because to do what the rule proposes is outside of the scope of the data reporting mechanism that NCCI provides. With regard to master policies, any activity on the policy is reported 1 time with the PEO as the primary named insured and the client employers as secondary names. While NCCI may be able to parse out these records into a separate format for their delivery mechanism to the OIC, private carriers with automated processes should not be handling them separately.

When read with the proposed §7, the rule, as drafted, precludes a carrier's ability to cancel the PEO's master policy on a 10 day no pay time frame while simultaneously notifying and canceling (and reporting) the clients on a 30 day time frame.

1 policy = 1 cancellation notice time period = 1 cancellation effective date, and 1 report to the OIC should be the requirement for Master policies.

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

There are two primary methods of issuing policies in PEO arrangements, multiple coordinated policies and master policies.

Multiple coordinate policies are fairly straightforward. A separate policy is issued to or on behalf of each client-employer. Policy communications and payment obligations are coordinated through the PEO.

Master policies are a different animal. One policy is issued to a PEO to cover more than one client-employer and the PEO's direct staff. A master policyholder is charged a blended experience factor. Responsibility for workers' injuries can become blurred.

Comment §6.1 & 6.2.: These provisions provides that a master policy will provide coverage to all covered employees, including the PEO's direct hires and all employees working for the PEO, regardless of whether the private carrier has been made aware of the relationship or whether the client-employer has been added to the

policy. Private carriers who issue master policies are prohibited from denying a workers' compensation claims because the PEO has failed to properly notice the carrier regarding the retention of a new client.

This is patently unfair. Insurance carriers are in the business of measuring risk. These provisions effectively negate the ability to measure risk. For example, a private carrier issues a policy to a PEO who provides workers to an environment with a relatively low risk, e.g. clerical workers. The proposed provisions would allow the PEO to add demolition workers to the mix prior to informing the private carrier. The PEO on a master policy, in effect, becomes the underwriter by selecting the risk for the private carrier.

If the private carrier has no say over whether a risk is acceptable to be added to a master policy, then other problems will occur. As of January 1, 2009, employers who cannot obtain coverage in the private market will be placed in the residual market. If a carrier cannot properly underwrite its risks by accepting or rejecting coverage, then master policies may become a dumping ground for bad risks that would have otherwise made their way to the residual market. PEO client employers will subsidize high risk employers. Again, the PEO becomes the underwriter by selecting the risk for the private carrier.

Comment §6.3: This provision provides that, if on the date of injury, there is both a direct purchase policy and a master policy in place, then the direct purchase policy will provide the primary coverage.

Individual employees are not named on workers' compensation policies.

There are many instances where two or more policies will be issued for a workplace. One policy through a PEO may cover leased workers. Another policy may cover supervisory personnel. The provision, as crafted, ignores the facts of any specific instance. Who paid the employee? Under which policy was the individual's payroll reported for the purpose of calculating premium? Was the work performed typically done by PEO employees or direct employees?

There does not seem to be any rational basis to include this provision to override the facts of a given case.

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

Comment §7.2: This provision requires a private carrier, upon receiving notice that the PEO has added a client to the master policy, to issue a certificate of coverage.

Again, this provision removes the ability of a carrier to properly underwrite and accept or reject risks. The PEO provides the measure of who is an acceptable risk for the insurer to cover. This provision removes a carrier's control over its business.

Comment §7.4: This provision requires private carriers to provide thirty (30) days advance notice of cancellation to client employers of PEOs regardless of the reason for the cancellation.

While general provisions require cancellation notices to be issued thirty (30) days in advance of the date of cancellation, the provisions of W. Va. Code §23-2C-15(e) provides that the carrier may provide ten (10) days advance written notice in the event of cancellation for failure by the policyholder to pay premiums or for the policyholder's failure to allow a premium audit.

PEOs and client employers voluntarily enter into their relationship with one another. The proposed provision requires a carrier to treat a client-employer of a PEO better than all of its other policyholders. This provision requires insurance carriers to develop two different processes for notifying client-employers of PEOs that their policy is being cancelled for non-payment. The rule cannot trump the clear provisions of the statute.

Thank you for the opportunity to offer public comment on this important rule proposal.

Very truly yours,

Randall B. Suter

Randall B. Suter, Esq.

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September 11, 2008

Mary Jane Pickens, General Counsel
West Virginia Office of the Insurance Commissioner
1124 Smith Street
P. O. Box 50540
Charleston, WV 25305-0540

Re: 85 C.S.R. Series 31

Dear Ms. Pickens:

Enclosed are comments from the West Virginia Chamber of Commerce to 85 C.S.R. Series 31, Professional Employer Organizations.

The Chamber thanks the Commissioner for her consideration of these comments.

Very truly yours

Henry C. Bowen
Chair, Workers Compensation Committee

HCB/hkj
Enclosure

CH.4983263

RULE 31

Section 6.1.b Comment:

By providing coverage to employees who have not been specifically covered through a policy of insurance with a carrier, this section could result in claims being paid for which no premium has been collected resulting in such costs being passed on to other policy holders. This section should be amended to require notification to the carrier before coverage is extended.

Section 6.2 Comment:

See comments to Section 6.1.b above.

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

SERIES 31
PROFESSIONAL EMPLOYER ORGANIZATIONS

Section

85-31-1. General.

85-31-2. Purpose of Rule.

85-31-3. Definitions.

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

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

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

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

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. Filing Date. -- .

1.4. 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.

Comment: NAPEO is concerned that the language in 3.4 is inconsistent with the statutory definition of covered employee and as written would have an effect contrary to the statute. As written in this regulation, the definition would require a full coverage worksite policy and only a full coverage worksite policy for both leased and non leased employees of a client. NAPEO is concerned that this is inconsistent with what the statute says, and in speaking with carriers including Brickstreet, AIG and Zurich, we believe it is inconsistent with what carriers understood the statute to permit. NAPEO is concerned with this expansion of the definition of "covered employee" beyond that specifically provided by the legislature. NAPEO would suggest the definition track the statute to read:

(c) "Covered employee" means a person employed by a client-employer for whom certain employer responsibilities are shared or allocated pursuant to a PEO agreement. Persons who are officers, directors, shareholders, partners and managers of the client-employer and who perform day-to-day operational services for the client-employer will be covered employees only to the extent expressly set forth in the professional employer agreement. § 33-46A-2(c)

(a) The responsibility to obtain workers' compensation coverage for covered employees in compliance with all applicable law shall be specifically allocated in the professional employer agreement to either the client-employer or the PEO. § 33-46A-7

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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. *NAPEO Question: Does this mean that MCPs are to be used in the residual market? NAPEO would request a bit more clarification.*

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.

NAPEO Comment: 5.1 above represents a sligh change from the statute that is not significant UNLESS the advisory organization (NCCI) is going to mandate PEO data in some elaborate format that is overly burdensome. NAPEO would recommend that the regulation track the statutory language a bit closer. That language reads:

(2) The insurer shall report: (A) Payroll and claims data for each client-employer to the commissioner or his or her designated advisory organization in a manner that identifies both the client-employer and PEO; and (B) Coverage status with respect to each client-employer in accordance with the proof of coverage requirements provided for in statute and rules. ~~§ 33-46A-7(b)(2)~~]

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.]] *NAPEO Question: NAPEO is unclear what the bracketed information refers to above. NAPEO would suggest further clarification of this section.*

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.

NAPEO Comment: As stated above, NAPEO is concerned with the definition of covered employee and the use of it in diction b above. NAPEO believes that under the current regulatory definition of covered employee, the regulation would require full worksite coverage whether or not the employee was a PEO co-employee or a client direct hire employee. NAPEO believes this is not what the statute provides.

West Virginia Insurance Federation

September 11, 2008

BY HAND-DELIVERY

Ryan Sims
Associate Counsel
Legal Division
Office of the West Virginia Insurance Commissioner
1124 Smith Street
Charleston, West Virginia 25301

RE: Comments to Proposed Administrative Rules
Title 85, Series 8

Dear Mr. Sims:

These comments to the proposed amendments to 85 CSR 31 relating to "Professional Employer Organizations ("PEOs")" are submitted on behalf of the West Virginia Insurance Federation ("WVIF"), the state trade association for property and casualty insurance companies doing business in West Virginia.

Based on its evaluation of the proposed Rule, the WVIF offers the following comments for consideration:

1. **Proposed Section 6 – Scope of Coverage for Master Policies**. Proposed Sections 6.1, 6.3, and the definition of "Covered employee" contained in Proposed Section 3.4. appear to conflict. Specifically, Proposed Section 6.1 provides that

> [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.

On the other hand, Proposed Section 6.1 states that

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[i]f 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.

And, Proposed Section 3.4 defines "Covered employee" as "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."

The WVIF suggests the deletion of Section 6.3. As an alternative, the addition of a clarifying statement would eliminate this conflicting language by stating that the only way a PEO could allow a client to cover the leased employees on the client's "direct purchase policy" would be when they have a MCP policy.

2. **Proposed Section 7 - Notice of Coverage and Cancellation.** The WVIF suggests the deletion of the Notice of Coverage requirement included in Section 7. Currently, we believe that North Carolina is the only state where this is required. As in other states, by virtue of identifying the PEO as the named insured and including the client in the policy form on the Master policy, this information is submitted directly to that state to establish proof of coverage. The Certificate of Insurance is issued by the Broker/Agent as a general service for all other states, not the carrier.

Thank you for your consideration of these comments. If you have any questions or need additional information of any kind, please let me know.

Very truly yours,

Jill C. Bentz
President

cc: The Honorable Jane L. Cline
Mary Jane Pickens, Esquire

PUBLIC HEARING

SEPTEMBER 11, 2008

OFFICES OF THE WEST VIRGINIA INSURANCE COMMISSIONER
WORKERS' COMPENSATION INDUSTRIAL COUNCIL

TITLE 85, SERIES 31
"PROFESSIONAL EMPLOYER ORGANIZATIONS

Transcript of the Public Hearing held on Thursday, September 11, 2008, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
Charles Bayless, Chairman
Bill Dean
Kent Hartsog
Dan Marshall
Walter Pellish (via telephone)

Chairman Bayless: This is Title 85, Series 31. This is for professional PEO's, Professional Employer Organizations. Does any member of the staff have any comments?

Mary Jane Pickens (General Counsel OIC): No.

Ryan Sims (Associate Counsel, OIC): No.

Chairman Bayless: Does any of the Commissioner's have any comments? Does any member of the public have any comments? Please identify yourself.

Todd Cohn (NAPEO): Thank you very much. My name is Todd Cohn. I represent the National Association of Professional Employer Organizations. I promise I will be very brief with my comments today. We've also submitted some written comments to the Department.

I wanted to take the opportunity today to really highlight three main areas of concern and recommendations we have from the perspective of the PEO industry. I'll detail them as briefly as possible, and certainly if any questions I can answer, I will.

First, our biggest concern is a definitional concern. It really does translate to the application within the terminology of the proposed regulation, and that is the definition of "covered employee." As it translates from the statute that was passed into this rule, there are some significant but small changes that do have the ability to really change how the workers' compensation system could work under the proposed rule. We believe that the definition that exists in the rule is a bit contrary to what the intent of the statute was. Well, the statute in fact differentiates the differences between "leased" and "non-leased" employees with regard to a client of a PEO, and I think it was unintentional. But the way that the definition is drafted within the regulation it doesn't contemplate a differentiation between the two.

For example, you could have a client that we'll say has eight employees and decides to lease six of those employees through a PEO and has two direct hire employees. In the case of the statute, the statute would provide that two workers' compensation policies be in place. One for the direct hire employees of the client and the other for the leased employees, which the PEO would have the policy covering the leased employees. That's under the statutory definition. Under what we believe the definition in the proposed regulation, it would require a full workforce coverage; meaning that there have to be one policy to cover all those folks – both the leased and the non-leased. We believe that's a stark contrast to what the statute has to say. We have also inquired with insurers that we in fact insure PEO's, and they've also told us that they have some concern with that as well. We've issued that in our comments as well. Some suggested changes that we feel might make it more congruent with what the statute says.

Our second main area of concern is in the event in which there is, in fact, a master policy covering, as I mentioned before in the scenario of an eight employee workforce, six of which are leased and two which are direct hired. In the event of an injury, and it is unclear of the time of the injury, when there are two policies in place which of the two policies will pick up that injury if there is a dispute of some sort.

The way it is currently written is a bit contrary to what we believe the NEIC has had to say. The NEIC worked with regulators from around the country for about three and a half years on a model PEO guideline that at least gives some guidance to regulators and to legislators around the country on certain issues in the PEO relationship, this being one of them. And we would recommend at least from just an educational standpoint that the Insurance Commission's office look into what the NEIC

has had to say on this. I think it provides a little bit more clarity with regard to this particular situation.

My last comment is really more of a clarity and clarification. Under the master policy provisions contained in the proposed Rule 31, we believe a bit more attention could be given to some of the provisions on data collection with regard to carriers and what they need to report to NCCI. As it's left to right now, I think it gives a fair amount of discretion to NCCI on their part to require what the carriers have to submit to them. There are concerns in a marketplace like West Virginia where you want to encourage as many insurers to insure as many folks as possible. That NCCI could create some barriers to have insurers want to underwrite PEO's in the marketplace. We've had some experience in the past, not only here in West Virginia but some other states, in which NCCI has made it quite prohibitive for insurers to report that data that is needed to calculate EMods at the end of a termination of a PEO relationship with a client. We would urge that the Insurance Commissioner's Office look into providing a little more guidance so NCCI doesn't have as much discretion with regard to requiring carriers to report information in a certain way. With that, that is my brief comments and I would be happy to answer any question or clarify anything, if anyone has any questions.

Chairman Bayless: Does any member of the staff or anyone else have any questions? Thank you.

Mr. Cohn: Thank you.

Chairman Bayless: Does anyone else have any comments on Series 31?

Industrial Council Meeting
PUBLIC HEARING
Title 85, Series 31, Professional Employer Organizations
Offices of the West Virginia Insurance Commissioner
1124 Smith Street, Room 400, Charleston, WV
September 11, 2008

Name	Address	Telephone Number	Group Affiliation	Do you desire to address the Council?	Agenda item to which you desire to speak
Todd Cohn			NAPEO	Yes	Rule 31