



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Workers Compensation

TITLE-SERIES: 85-08

RULE TYPE: Legislative Exempt Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: WORKERS COMPENSATION POLICIES,
COVERAGE ISSUES AND RELATED TOPICS

CITE STATUTORY AUTHORITY: W. Va. Code §§23-2C-17(b), 23-2C-18(g), 23-2C-22, 33-2-10(b), 33-2-21(a),
23-2C-5(c)(2) and 33-2-10(b).

COMMENTS LIMITED TO:

Oral and Written

DATE OF PUBLIC HEARING: 08/26/2021 1:00

LOCATION OF PUBLIC HEARING:

900 Pennsylvania Avenue, Charleston, WV 25302

DATE WRITTEN COMMENT PERIOD ENDS: 08/10/2021 5:00

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Erin K. Hunter

ADDRESS: 900 Pennsylvania Ave, 9th Floor

EMAIL: erin.k.hunter@wv.gov

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: Yes

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This rule sets forth various regulations regarding workers' compensation policies, coverage issues, sets forth coverage elections and assignments, provides for exemptions from mandatory coverage, establishes extraterritorial coverage processes, provides for ratemaking and rating organizations, and processes for notification of renewal or termination of coverage. Relevant to the currently proposed amendments, the rule provides a definitions section that sets forth, among other things, a definition of independent contractor and employer.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

The proposed changes to this rule are being made due to Senate Bill 272 (2021), which created the West Virginia Employment Law Worker Classification Act. The Act sets forth a new definition in state law for independent contractor and provides that it applies to unemployment, workers' compensation and the Human Rights Act. This rule, in its current form, sets forth a conflicting definition of independent contractor that has been used in workers' compensation matters since, at least, 2008. The rule must be updated so that it does not conflict with the newly enacted statutory changes that became effective on June 9, 2021.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

The Insurance Commissioner does not believe these changes will have a measurable impact on revenues of state government.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

The Insurance Commissioner does not believe these changes will have a measurable impact on special revenue accounts.

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

The economic impact of the rule on the state or its residents is unknown. It was posited during the 2021 Legislative Session that the corresponding legislation would have a positive impact on employers in the state. However, it does not appear that a fiscal note was requested or filed.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2021 Increase/Decrease (use "-")	2022 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues			

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

N/A.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Allen R Prunty -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

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

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

§85-8-1. General.

1.1. Scope. -- This exempt legislative rule provides for: (1) Specific criteria, standards and other clarification as to which entities are required to carry West Virginia workers' compensation coverage and which individuals are considered employees entitled to benefits under chapter thirty-three of the West Virginia Code; (2) the minimum contents of a policy issued for workers' compensation insurance pursuant to West Virginia Code §23-1-1 *et seq.*; (3) ratemaking provisions applicable to workers' compensation insurance in West Virginia; (4) notice requirements regarding termination of coverage and renewal offers; and (5) coverage related topics.

1.2. Authority. -- W. Va. Code §§23-2C-17(b); 23-2C-18(g); 23-2C-22; 33-2-10(b); and 33-2-21(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), workers' compensation rules proposed by the Insurance Commissioner and approved 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. -- ~~July 18, 2008.~~

1.4. Effective Date. -- ~~August 17, 2008.~~

§85-8-2. Purpose of Rule.

This rule provides specific criteria, standards and other clarification as to which entities need to carry West Virginia workers' compensation coverage and which individuals are considered employees who are entitled to benefits under chapter twenty-three of the West Virginia Code, establishes the requirements of a basic policy to be used by private carriers of workers' compensation insurance, establishes ratemaking provisions applicable to workers' compensation insurance in West Virginia and addresses other workers' compensation coverage related topics.

§85-8-3. Definitions.

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

3.1. "Casual employer," as the term is used in W. Va. Code §23-2-1(b)(4) and this rule, means an employer who employs not more than three (3) employees for a period that is temporary, intermittent, and sporadic in nature and does not exceed ten (10) calendar days in any calendar quarter.

3.2. "Classification" means categorization of employees for the purpose of assessing risk, ratemaking, and developing premium charges.

3.3. "Domestic services" means services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. A private home is a fixed place of

abode of an individual or family. If a dwelling house is used primarily ~~as a boarding or lodging house~~ for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home and the services performed therein are not domestic services.

~~a.~~ 3.3.1. In general, services of a household nature in or about a private home include services performed by cooks, butlers, housekeepers, governesses, maids, valets, babysitters, caretakers, caregivers, medical providers, handymen, gardeners, and chauffeurs of automobile for family use.

~~b.~~ 3.3.2. The term “domestic services” does not include services of a household nature performed by an employee in or about the private home of a person when that employee is employed by someone other than a member of the household. For example, employees of maid services, temporary employment agencies, or other businesses do not provide domestic services under the provisions of this rule.

3.4. “Employee” has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a. “Employee” does not include a person hired as, and classified as, an independent contractor pursuant to the West Virginia Employment Law Worker Classification Act, as set forth in W.Va. Code §21-5I-1 et seq., and the test established within W.Va. Code §21-5I-4 for classification of independent contractors.

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

~~a.~~ 3.5.1. “Industry, service or business,” as the term is used in W. Va. Code §23-2-1(a) and this rule, means an occupation or an employment engaged in for the purposes of obtaining a livelihood or for profit or gain. This term includes any not-for-profit entity or volunteer organization to the extent that such entity or organization employs individuals.

~~b.~~ 3.5.2. “Carrying on any form of industry, service or business in this state,” as the term is used in W. Va. Code §23-2-1(a) and this rule, means that the employer:

~~1.~~ 3.5.2.a. Has obtained or is required to obtain authorization to do business in West Virginia; or

~~2.~~ 3.5.2.b. Operates a business or plant or maintains an office in West Virginia; or

~~3.~~ 3.5.2.c. Hires employees in West Virginia; or

~~4.~~ 3.5.2.d. Hires West Virginia residents to work at a West Virginia facility or office; or

~~5.~~ 3.5.2.e. Utilizes labor on a regular basis at a West Virginia facility for the employer; ~~or~~

~~e.~~ 3.5.3. An employer who meets one or more of the above stated criteria and otherwise meets the definition of “employer” may still be exempt from having to maintain workers’ compensation coverage under the provisions of W. Va. Code §23-2-1(b) or of ~~subsection~~ section 4.3. of this rule.

3.6. “Employment” or “regularly employing” means engaging the services of a person or persons as an employee or as employees in return for wages or other compensation.

3.7. "Extraterritorial employee" means an employee who is not a resident of the State of West Virginia and who is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than the State of West Virginia.

~~3.8. "Hazardous industry" is an industry involving any of the following types of work or business:~~

~~a. Construction, including, but not limited to, excavation or electrical work and the erection, maintenance, removal, remodeling, alteration or demolition of any structure.~~

~~b. Carriage by land, water or aerial service and loading or unloading in connection therewith, including, but not limited to, all common or contract carriers by motor vehicle.~~

~~c. Any business involving the extraction of natural resources, including, not limited to, mining, surface mining, quarrying, logging or oil and gas extraction.~~

~~d. Any business or enterprise wherein molten metal, or explosive or injurious gases, materials, chemicals, creosote and other preservatives for the treatment of wood, dusts or vapors, or inflammable vapors, dusts or fluids, corrosive acids, or atomic radiation are manufactured, handled, used, generated, stored or conveyed.~~

3.8. "Independent contractor" means a person classified as an independent contractor pursuant to the West Virginia Employment Law Worker Classification Act, as set forth in W.Va. Code §21-5I-1 et seq., and the test established within W.Va. Code §21-5I-4 for classification of independent contractors.

3.9. "Insurance Commissioner" or "Commissioner" means the Insurance Commissioner of West Virginia as provided for in section one, article two, chapter thirty-three of the West Virginia Code.

3.10. "Old Fund" means the fund created pursuant to W. Va. Code §23-2C-2(I).

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

3.12. "Payroll" means the term as defined in the most current approved filing of the Insurance Commissioner's designated rating organization for workers' compensation.

3.13. "Policy default" means a policyholder that had its policy cancelled as a result of a failure to comply with the terms of the policy.

3.14. "Policyholder" means an employer that has been issued a West Virginia workers' compensation insurance policy by a private carrier and currently has coverage under said policy.

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

3.16. "Self-insured employer" means an employer who is eligible and has been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.17. "Temporary" or "Temporarily," as the term is used in W. Va. Code §§23-2-1(b)(3); 23-2-1a(a)(1), and 23-2-1c(c), and in this rule, means for a period not exceeding thirty (30) calendar days within any three hundred and sixty-five (365) day period.

3.18. "Transitory," as the term is used in W. Va. Code §23-2-1a(a)(1) and this rule, means for a period not exceeding thirty (30) calendar days within any three hundred and sixty-five (365) day period.

3.19. “Temporary, intermittent and sporadic,” as the term is used in W. Va. Code §§23-2-1(b)(4) and in this rule, means for a period not exceeding ten (10) working days in any ninety (90) day period.

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

3.21. “Uninsured Employers’ Fund default” means being on the Insurance Commissioner’s default list, defined in W. Va. Code St. R. §85-11-1 *et seq.*, as a result of owing money to the Uninsured Employers’ Fund.

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

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

4.1. Duty to maintain insurance. Every employer is required to obtain West Virginia workers’ compensation coverage for the protection of its employees.

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

4.3. Exemptions. An employer who is otherwise required to maintain mandatory West Virginia workers’ compensation coverage is exempt from the requirement in the following circumstances:

~~a.~~ 4.3.1. An employer of domestic services as defined in ~~subsection~~ section 3.3 of this rule is not required to carry West Virginia workers’ compensation coverage for any individuals hired to perform such domestic services;

~~b.~~ 4.3.2. An employer of five (5) or fewer full-time employees in agricultural services is not required to carry West Virginia workers’ compensation coverage for those employees;

~~c.~~ 4.3.3. An employer who is a casual employer;

~~d.~~ 4.3.4. An employer who is a church;

~~e.~~ 4.3.5. An employer who is engaged in organized professional sports activities, including an employer of trainers and jockeys engaged in thoroughbred horse racing: *Provided*, That the employer must carry coverage for its employees who are not participating in the organized professional sports activities. For example, an employer of jockeys and trainers engaged in thoroughbred horse racing may exempt such jockeys and trainers, but if the same employer also employs a driver to transport horses and equipment, the driver must be provided coverage;

~~f.~~ 4.3.6. A volunteer rescue squad or volunteer police auxiliary unit organized under the auspices of a county commission, municipality or other government entity or political subdivision, or a volunteer organization created or sponsored by a government entity, political subdivisions or an area or regional emergency medical service board of directors in furtherance of the purposes of the emergency medical services act of article four-c [§§16-4C-1 *et seq.*], chapter sixteen of ~~this code~~ the West Virginia Code: *Provided*, That if any such employers have paid employees, they must provide West Virginia workers’ compensation for such paid employees; or

~~g. 4.3.7.~~ An employer of employees who are provided coverage for benefits under the federal *Longshore and Harbor Workers' Compensation Act*, 33 U. S. C. §901, *et seq.*, is exempt from having to carry West Virginia workers' compensation coverage for such employees, but must provide West Virginia workers' compensation coverage for employees who are not provided coverage for benefits under the federal *Longshore and Harbor Workers' Compensation Act*.

4.4. Application for letter of exemption. An employer may apply to the Insurance Commissioner on forms supplied by the Insurance Commissioner for a letter of exemption from coverage. The Insurance Commissioner will review the application and all evidence submitted by the employer and, based on the provisions of chapter twenty-three of the West Virginia Code and this rule, may make such determination as the Insurance Commissioner deems proper. The Insurance Commissioner shall charge a processing fee for each application in the amount of twenty-five dollars (\$25.00).

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

Each private carrier may include reasonable auditing, inspection and payroll reporting provisions in its policy, subject to the approval of the Insurance Commissioner.

§85-8-6. Employees Covered; Independent Contractors; Coverage Elections; and Assignment.

6.1. General. A West Virginia workers' compensation policy must cover all of the employees of the insured employer who are required to be provided West Virginia workers' compensation coverage under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

~~6.2. Independent contractors. All individuals performing services for compensation paid by an employer are presumed to be employees and required to be covered by a West Virginia workers' compensation insurance policy unless and until it is shown that the worker is an independent contractor. The burden of proving that an individual is an independent contractor is at all times, on the party asserting independent contractor status. For purposes of West Virginia workers' compensation coverage only, the following criteria are dispositive of whether an individual is an independent contractor:~~

~~a. For workers who are working in a hazardous industry, the following criteria must be met to be an independent contractor:~~

~~1. The individual holds himself or herself out to be in business for himself or herself. Examples of facts supporting this include, but are not limited to:~~

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

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

~~C. The individual has the right, pursuant to written contractual provisions entered into with the persons and/or entities for whom the work is being performed, to regularly solicit business from different persons or entities to perform for compensation the type of work that is being performed by the individual;~~

~~2. The individual has control over the time when the work is being performed, and the individual's work schedule is not dictated by the person or entity for whom the work is performed. This criterion does not prohibit the person or entity for whom the work is performed from reaching agreement~~

with the individual as to completion schedule, range of work hours, and maximum number of work hours to be provided by the individual, and, in the case of entertainment, the time such entertainment is to be presented;

~~3. The individual has control and discretion over the means and manner of performance of the work being performed and in achieving the result of the work. In other words, the individual is not being supervised by the person or entity for whom the work is performed on an ongoing basis, but rather, the individual is given a description and expectation of the work to be performed at the outset of the retention of the individuals' services and then is expected to perform the services contracted for without any ongoing supervision. The mere fact that a person or entity for whom the work is being performed checks on the status of the work from time to time, or otherwise monitors the work being performed for the purposes of legal compliance with federal or state laws related to safety does not constitute supervision on an ongoing basis;~~

~~4. Unless expressly required by law, the individual is not required to work exclusively for the person or entity for whom the work is performed; and~~

~~5. If the use of equipment is required to perform the work, the individual provides most significant equipment required to perform the job. Some examples would be:~~

~~A. An independently contracted truck or delivery driver must use his or her own truck or delivery vehicle;~~

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

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

~~In the above examples, "his or her own" means that the equipment is not provided by, loaned, or leased to the individual worker by the person or entity for whom the work is being performed, but rather, the individual performing the work owns, or legally obtains the equipment from a separate source (i.e., not the person or entity for whom the work is being performed), and has the legal right to use the same.~~

~~b. For all other workers (i.e., workers not involved in a hazardous industry), the following criteria must be met:~~

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

~~2. There is a written contract between the individual and the person or entity for whom the individual is performing services clearly establishing that the individual is an independent contractor and not an employee, and that the individual will not be provided workers' compensation coverage by the person or entity for whom the work is being performed; and~~

~~3. The individual maintains primary control over the time, means and manner of the work performed. For example, the person or entity for whom the services are being performed may specify that the contractee wants a particular project or type of work to be done and a certain time frame for the work to be completed, but the person or entity for whom the services are being performed cannot exert control over the day-to-day schedule of the individual or continuously supervise the individual as a boss would in an employment situation.~~

6.2. Independent Contractors.

6.2.1. A West Virginia workers' compensation policy issued to an insured employer is not required to cover persons hired and classified as independent contractors pursuant to the *West Virginia Employment Law Worker Classification Act*, as set forth in W.Va. Code §21-5I-1 *et seq.*, and the test established within W.Va. Code §21-5I-4 for classification of independent contractors.

6.2.2. Self-insured employers are not required to provide workers' compensation coverage to persons hired and classified as independent contractors pursuant to the *West Virginia Employment Law Worker Classification Act*, as set forth in W.Va. Code §21-5I-1 *et seq.*, and the test established within W.Va. Code §21-5I-4 for classification of independent contractors.

6.2.3. A person cannot simultaneously be classified as an employee and as an independent contractor of the same employer at the same time.

6.2.4. An employer is not required to classify a worker who meets the criteria contained within W.Va. Code §21-5I-4 as an independent contractor. The employer may choose to hire the worker as an employee. However, the terms should be clearly set forth at the outset so there is no confusion between the employer and the hired worker in regard to the hired worker's status.

6.2.5. Independent contractors are not employees of employers required to be covered under chapter twenty-three of the West Virginia Code and are not eligible to receive payments from the Workers' Compensation Uninsured Employer Fund established in W.Va. Code §23-2C-8.

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

~~a.~~ 6.3.1. An employer may elect not to provide coverage for certain corporate officers and all members of a corporation's board of directors. A corporate officer or member of a corporate board of directors elected out of coverage by an employer is not entitled to the benefits of the *West Virginia Workers' Compensation Act*, chapter twenty-three of the West Virginia Code.

~~1.~~ 6.3.1.a. The employers' election out of coverage of officers of a corporation is limited to four (4) principal officers for the employer: (1) president; (2) vice president; (3) secretary; and (4) treasurer. The four (4) principal officers must be elected or appointed by the corporation's board of directors as prescribed by the corporate bylaws. The employer may elect these four (4) officers out of coverage even though their activities include work that is ordinarily performed by an officer and work that is ordinarily performed by a worker, an administrator or other employee who is not an officer. An officer who performs both types of activities (officer/worker, administrator, or other employee who is not an officer) is deemed to be working in a "dual capacity."

~~2.~~ 6.3.1.b. No other officer or assistant officer engaged in dual capacity may be elected out of coverage.

~~3.~~ 6.3.1.c. Dual capacity is determined by the duties of the officer/employee. For an officer other than the four (4) principal officers stated in ~~paragraph 1 of this subdivision~~ 6.3.1.a of this rule to be eligible to be elected out of coverage, that officer cannot have duties and perform work that also would ordinarily be done by a worker, administrator or other employee who is not an officer. It is the employer's burden to show that duties performed by officers or assistant officers other than the four (4) principal officers are not dual capacity activities and that the work could only be performed by an officer of a corporation. Examples of such showings are a vice president within a corporation (not the one vice

president allowed to be elected out of coverage as one of the four (4) principal officers) who only attends board meetings and an assistant secretary whose only job is to affix the corporate seal to corporate papers.

~~4.~~ 6.3.1.d. Members of corporate boards of directors may be elected out of coverage by an employer, regardless of whether the member of the board of directors works in a dual capacity. It is the employer's burden to show that the individual elected out of coverage is, in fact, a member of the board of directors and is, in fact, vested with the authority to manage the affairs of the corporation as a member of the employer's board of directors. Members of corporate boards of directors who do not receive "gross wages" from the employer for their activities are not "employees" within the meaning of chapter twenty-three of the West Virginia Code and are not entitled to the benefits of chapter twenty-three of the West Virginia Code.

~~b.~~ 6.3.2. Certain members of a limited liability company may be elected out of coverage by an employer. "Limited liability companies" include those entities created pursuant to the *Uniform Limited Liability Company Act* of chapter thirty-one b of the West Virginia Code. These entities consist of all forms of limited liability companies, including, but not limited to, manager-managed limited liability companies, member-managed limited liability companies, foreign limited liability companies and professional limited liability companies.

~~4.~~ 6.3.2.a. Limited liability companies may elect not to include as an employee for purposes of workers' compensation coverage a total of not more than four (4) persons. Each of the persons elected out of coverage by the employer is required to be acting in the capacity of a manager, officer or member of the limited liability company.

~~2.~~ 6.3.2.b. All covered members of limited liability companies which are treated as partnerships for federal income tax purposes are subject to the calculation of premiums on the members as provided for partners in a partnership in W. Va. Code §23-2-1b.

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

~~a.~~ 6.4.1. Elections not to be covered made under ~~subsection~~ section 6.3 of this ~~section~~ rule are effective for the next policy period after the written notification in this ~~subsection~~ section is received by the private carrier and each policy period thereafter with the same private carrier without subsequent written notification.

~~b.~~ 6.4.2. Elections not to be covered are valid only for the individuals named in the written notice provided for in ~~this subsection~~ section 6.4 of this rule. An election is not valid for any individual who may later hold the same position, office or title until an amendment to the election is made in accordance with this rule.

~~e.~~ 6.4.3. Amendments to a written notification of an election may be made only for the purpose of:

~~4.~~ 6.4.3.a. Changing the named person for any office or position previously reported on the election; or

~~2.~~ 6.4.3.b. Making an election for persons who were not previously employed as a sole proprietor, partner, officer, or member of the board of directors on the date the election was made; or

~~3.~~ 6.4.3.c. Making an election upon changing private carriers: *Provided*, That an employer must disclose the written notification, in its entirety, to the new private carrier prior to the effective date of the insurance policy; or

~~4.~~ 6.4.3.d. Adding a person who has previously elected not to be covered under the provisions of ~~subsection~~ section 6.3 of this ~~section~~ rule if the private carrier receives written notification sixty (60) days prior to the coverage period in which coverage is sought. If written notification is not received by the private carrier sixty (60) days prior to the coverage period in which coverage is sought, then coverage shall not be extended to such person requesting coverage beginning that coverage period, but shall instead be extended to the following coverage period. The written notification shall clearly identify the coverage period in which coverage is sought to begin.

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

~~a.~~ 6.5.1. Employers that are required, but fail to maintain West Virginia workers' compensation coverage shall not be afforded coverage for the employers' partners, members, proprietor or corporate or executive officers, nor shall coverage or benefits be afforded through the Uninsured Employers' Fund or any other fund of the Insurance Commissioner to any individual for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or certain members of a limited liability company.

~~b.~~ 6.5.2. Employers who are in Old Fund, Uninsured Employers' Fund or policy default shall not be afforded workers' compensation coverage for the employers' partners, members, proprietor or corporate or executive officers, nor shall coverage or benefits be afforded through the Uninsured Fund or any other fund of the Insurance Commissioner to any individuals for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or members of a limited liability company.

~~1.~~ 6.5.2.a. Coverage for the individuals specified in this subsection shall not be afforded if the employer is in Old Fund, Uninsured Employers' Fund or policy default on the date of injury, and this exclusion will continue for the life of that injury. For example, if, at some time after the date of injury, the employer cures its default status, an individual specified in this subsection that incurs an injury on a date while the employer was in default status ~~nevertheless~~ will not be covered for the injury that occurred during the period of default, and benefits will never be payable for that injury.

~~2.~~ 6.5.2.b. Benefits paid during periods of Old Fund, Uninsured Fund or policy default for individuals denied coverage under this subsection shall be considered overpayments.

6.6. Duty to report all payroll.

~~a.~~ 6.6.1. Each employer has a duty to report the entire payroll of all employees to its private carrier.

~~b.~~ 6.6.2. The private carrier may make its own initial decision regarding the determination of all issues relevant to the classification of employees, rates and payroll: *Provided*, That any employer that disagrees with the decision made by its private carrier and is not able to reasonably resolve the dispute may file a protest with the Insurance Commissioner's designated rating organization for workers' compensation, or, in the event that the dispute involves issues of State law which the rating organization refuses to resolve, with the Insurance Commissioner. All private carriers issuing final decisions to

insured employers on matters discussed in this ~~subdivision~~ subsection shall provide clear instructions to the insured employer regarding the procedure for filing a protest to the private carriers' decision.

~~e. 6.6.3.~~ Nothing in this subsection shall be construed to permit an employer to deviate from the procedures set forth in ~~subsection~~ section 6.4 of this ~~section~~ rule regarding elections not to provide coverage to certain individuals.

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

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

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

7.1. Extraterritorial employees working in West Virginia on a temporary basis. Extraterritorial employees performing work in the State of West Virginia on a temporary basis (i.e., for a period not exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period) are not required to be covered with West Virginia workers' compensation coverage. If an extraterritorial employee is injured while working in this state on a temporary basis, the extraterritorial employee's exclusive workers' compensation remedy is under the laws of the state to which the extraterritorial employee is subject.

7.2. Extraterritorial employees working in West Virginia on a non-temporary basis. Extraterritorial employees who perform work in the State of West Virginia on a non-temporary basis (i.e., for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period) and are not otherwise exempt from West Virginia's workers' compensation laws must be covered with West Virginia workers' compensation coverage unless they enter into an agreement with their employer described under ~~subsection~~ section 7.4 of this ~~section~~ rule. An employer of extraterritorial employees has a duty to immediately advise its West Virginia private carrier when it reasonably believes it will be employing extraterritorial employees in the State of West Virginia on a non-temporary basis, so that premium can be adjusted accordingly.

7.3. Employment by a West Virginia employer outside of the State of West Virginia. Pursuant to West Virginia Code §23-2-1(b)(3) and ~~subdivision e., subsection 4.3.~~ subsection 4.3.3 of this rule, an employer that is otherwise subject to the provisions of chapter twenty-three of the West Virginia Code does not have to provide West Virginia workers' compensation coverage for employees who perform work for the employer in a state other than the State of West Virginia on a non-temporary basis (i.e., for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period): *Provided*, That the employer must provide West Virginia workers' compensation coverage for any employee working in the State of West Virginia and who is not otherwise exempt from West Virginia's workers' compensation laws on a non-temporary basis (i.e., for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period) unless the employee has entered into an extraterritorial agreement described in section 7.4 of this ~~section~~ rule.

7.4. Agreements to be covered in a state other than West Virginia. An employer and an employee who are both subject to the workers' compensation laws of a state other than West Virginia may enter into

a written agreement in which the employer and employee both agree to be bound by the laws of the other state: *Provided*, That any employee entering into such an agreement must physically work for the employer entering into such agreement outside of the State of West Virginia for a period of not less than thirty (30) calendar days in any three hundred and sixty-five (365) day period, and the employer must comply with the workers' compensation laws of the other state(s). Failure to meet these circumstances shall cause any agreement contemplated under this section to be void from its beginning: *Provided, further*, That an agreement entered into by an employer carrying West Virginia workers' compensation coverage shall immediately be provided to the employer's West Virginia carrier so that premium can be adjusted accordingly. If an employee who has entered into an extraterritorial agreement as described in this ~~subsection~~ section is injured, the extraterritorial employee's exclusive workers' compensation remedy is under the laws of the state to which the employee has agreed to be bound.

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

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

8.1. Each policy for West Virginia workers' compensation insurance shall comply with chapters twenty-three and thirty-three of the West Virginia Code.

8.2. Each West Virginia workers' compensation insurance policy shall provide coverage and benefit payments consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder for any bodily injury with a date of injury within the policy period and for all benefit types thereafter awarded, including all dependent benefits and related death benefits provided for under chapter twenty-three of the West Virginia Code. Each workers' compensation policy shall also provide coverage for any occupational disease or occupational pneumoconiosis award with a date of last exposure within the policy period, including all dependent benefits and related death benefits provided for under chapter twenty-three of the West Virginia Code.

8.3. Dependent and Death Benefits.

~~a.~~ 8.3.1. All dependent benefits payable to a claimant pursuant to W. Va. Code §23-4-10(a)-(d), for claims in which the decedent dies on or after January 1, 2006 shall, for purposes of responsibility and chargeability, be derivative of the decedent's underlying compensable injury or exposure which caused his or her death. This means that the carrier, self-insured employer or other fund responsible for paying the dependent benefits is the private carrier, self-insured employer or other fund providing workers' compensation coverage on the date of injury or last exposure giving rise to such dependent benefits. For all other purposes, including benefit rate and duration, the dependent benefits shall be a new right, separate and apart from the original date of injury or last exposure, to be paid in a manner otherwise consistent with statutory, regulatory and case law applicable to the same: *Provided*, That should the decedent's death result from a workplace injury or exposure for which there was no underlying attributable workers' compensation claim during the decedent's lifetime, the carrier, self-insured employer or other fund assigned to the compensable injury or exposure which is proven to have caused the decedent's death is responsible for the payment of the dependents' benefits.

~~b.~~ 8.3.2. All "104 weeks awards" payable to a dependent, pursuant to W. Va. Code §23-4-10(e), for claims in which the claimant dies on or after January 1, 2006, shall for purposes of responsibility and chargeability, be derivative of the deceased claimant's previously granted permanent total disability award. This means that the carrier, self-insured employer or other fund responsible for paying the "104 weeks award" is the private carrier, self-insured employer or other fund providing workers' compensation

coverage for the permanent total disability award giving rise to the “104 weeks award.” For all other purposes, including benefit rate and duration, the “104 weeks awards” shall be a new right, separate and apart from the original date of injury or last exposure, to be paid in a manner otherwise consistent with statutory, regulatory and case law applicable to the same.

~~e. 8.3.3.~~ Nothing in ~~subdivisions a. and b. of this subsection~~ subsections 8.3.1 or 8.3.2 of this rule shall alter the terms of any contract or agreement entered into prior to January 1, 2006, whereby any entity agreed to pay specified workers’ compensation benefits.

~~d. 8.3.4.~~ A private carrier, self-insured employer or other responsible fund that pays a “104 weeks award” to a dependent pursuant to W. Va. Code §23-4-10(e) has a right to full reimbursement from another private carrier, self-insured employer or other responsible fund that pays dependent benefits pursuant to W. Va. Code §23-4-10(a)-(d), no later than when the issue of compensability of the dependents’ claim is finally determined.

8.4. Upon issuance of a policy, each private carrier is deemed to have reserved its right to select, retain, and compensate legal counsel to defend any claims decisions made by the private carrier which are protested under article five, chapter twenty-three of the West Virginia Code and to settle said claims in accordance with all applicable statutes and rules.

8.5. Each private carrier shall assess its policyholders any applicable deficit reduction surcharge, Insurance Commissioner regulatory surcharge, Uninsured Employers’ Fund assessment, and/or Private Carrier Guaranty Fund assessment, and remit the same as directed by the Insurance Commissioner. The obligation of the private carrier is limited solely to the collection and remittance of the proper percentage amount of the surcharges and assessments as established by the Insurance Commissioner. The private carrier has no obligation to the Insurance Commissioner ~~or to the Debt Reduction Fund~~ to make up for surcharge amounts that are not collected as a result of the insured employer’s failure to pay their premium.

§85-8-9. Notification of Issuance, Renewal or Termination of Coverage.

9.1. Except as provided in ~~subsection~~ section 9.2 of this ~~section~~ rule, upon cancellation of a West Virginia workers’ compensation policy, every private carrier is required to notify the Insurance Commissioner’s designated rating organization of the cancellation at least ten (10) calendar days in advance of the effective date of termination of the coverage. The notification shall be on forms and/or other procedures developed by the Insurance Commissioner.

9.2. If an insured employer expressly requests in writing to the carrier that its West Virginia workers’ compensation policy be cancelled, the private carrier shall notify the Insurance Commissioner’s designated rating organization of said cancellation within ten (10) calendar days after receipt of the written request or any specified requested date of cancellation, whichever is later. Such a request by an insured employer shall not be deemed valid until received by the private carrier in writing.

9.3. Upon issuance or renewal of a West Virginia workers’ compensation policy, every private carrier is required to notify the Insurance Commissioner’s designated rating organization of said issuance or renewal within thirty (30) calendar days after the effective date of coverage, including the effective date of coverage and the date of expiration of the new policy. Notification shall be on forms and/or other procedures developed by the Insurance Commissioner.

9.4. If a carrier timely reports the information required by ~~subsection~~ section 9.3 of this ~~section~~ rule, it shall be deemed sufficient to meet the requirements of W. Va. Code §23-2C-15(f)(2) as this code provision relates to refusals to renew.

9.5. Failure of a private carrier to timely report information to the Insurance Commissioner as required by ~~subsections~~ sections 9.1, 9.2 and 9.3 of this ~~section~~ rule may subject the private carrier to a fine not to exceed five hundred dollars (\$500.00) per occurrence of untimely reporting.

9.6. A private carrier may cancel a workers' compensation policy for failure of the policyholder to timely remit adequate consideration upon the issuance of advance written notification to the policyholder of no less than ten (10) calendar days. The refusal of a policyholder to: (a) permit a premium audit by a private carrier; or (b) to pay any applicable surcharge or assessment that the carrier is required to collect pursuant to chapter twenty-three of the West Virginia Code, is considered "failure of the policyholder to timely remit adequate consideration" for purposes of this section. The effective date of cancellation shall be no earlier than ten (10) calendar days after issuance of advance written notice.

9.7. Except for the failure of the policyholder to timely remit adequate consideration, a private carrier may cancel a workers' compensation policy for reasons consistent with the terms of the policy, upon the issuance of advance written notification to the policyholder of no less than thirty (30) calendar days. The effective date of cancellation shall be no earlier than thirty (30) calendar days after issuance of advance written notice.

9.8. A private carrier may decline to renew a workers' compensation policy upon the issuance of advance written notification to the policyholder, or, if the policyholder purchased the policy through an insurer through an agent, the agent, of not less than sixty (60) calendar days prior to the expiration date of the current policy.

9.9. Any offer of renewal shall be sent to the policyholder, or, if the policyholder purchased the policy through an insurer through an agent, the agent, at least sixty (60) calendar days prior to the expiration date of the current policy.

9.10. All notifications and offers referenced in ~~subsections~~ sections 9.5 through 9.9 of this ~~section~~ rule must be forwarded to the insured or agent by mail. A cancellation, non-renewal or other termination of coverage must state with specificity the reason for and the specific effective date of the termination of coverage: *Provided*, That if the notification or offer is being sent to an agent, the carrier and agent may agree, pursuant to the provisions of W. Va. Code §39A-1-8, to send the notification or offer electronically. All private carriers must maintain proof or certificate of mailing for all notices sent.

§85-8-10. Rating Organizations.

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

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

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

§85-8-11. Ratemaking.

11.1. Beginning on the fiscal year commencing the first day of July, 2008, all private carriers shall determine their base rates from the actuarially determined loss costs filed by and approved for the designated rating organization. All private carriers shall additionally adhere to the rating rules filed by and approved for the designated rating organization unless the private carrier makes an approved filing permitting deviation from the same.

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

11.3. Private carriers may offer premium credits and debits through schedule rating plans which are consistent with industry practices. The ultimate premium net said credits and debits may not violate W. Va. Code §23-2C-18(c). All rating plans shall be subject to the filing requirements of chapter thirty-three of the West Virginia Code that are applicable to other commercial insurance lines. Any credit or debit applied to the insured shall reasonably reflect: (1) appropriate judgment of the private carrier as to the risk and/or exposure characteristics of the insured; (2) the private carrier's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations.

11.4. Deductible plans. Deductible workers' compensation plans are permitted subject to the approval of the Insurance Commissioner, including the underwriting standards used for issuing such plans. Under a deductible plan, an insured employer that fails to make a required deductible payment shall be deemed to be in default of the policy premium and subject to cancellation for its failure to timely remit adequate premium, but the default shall not affect the payment of all benefits in otherwise compensable claims made under a policy inclusive of a deductible plan. Under all deductible plans, the private carrier remains responsible for the payment of claims benefits and administration and defense of claims.

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