

WORKERS' COMPENSATION (C) TASK FORCE

Workers' Compensation (C) Task Force Sept. 22, 2009, Minutes

Workers' Compensation (C) Task Force Proposed 2010 Charges (Attachment One)

Professional Employer Organization Model Law (C) Working Group, Sept. 22, 2009, Minutes (Attachment Two)

Workers' Compensation (C) Task Force
Washington, DC
September 22, 2009

The Workers' Compensation (C) Task Force met in Washington, DC, Sept. 22, 2009. The following Task Force members participated: Merle D. Scheiber, Chair (SD); William W. Deal, Vice Chair (ID); Linda S. Hall represented by Sarah McNair-Grove (AK); Jim L. Ridling represented by David Parsons (AL); Jay Bradford represented by Alice Jones (AR); Steve Poizner represented by Christopher Citko (CA); Thomas R. Sullivan represented by Mark Franklin (CT); Gennet Purcell represented by Clark Simcock (DC); Kevin McCarty represented by Richard Koon (FL); J.P. Schmidt represented by Paul Yuen (HI); Michael T. McRaith represented by John Gatlin (IL); Sharon P. Clark represented by Sharron Burton (KY); James J. Donelon represented by Ed O'Brien (LA); Ralph S. Tyler, III represented by Randi Johnson and Tinna Quigley (MD); Mila Kofman represented by Bob Wake (ME); John Huff represented by Angela Nelson (MO); Ann Frohman represented by Alan Wickman (NE); Roger A. Sevigny represented by Kent Dover (NH); Scott J. Kipper represented by Marie Holt (NV); Kim Holland represented by Jonathan Small and Russell Valleroy (OK); Teresa Miller represented by Rae Taylor (OR); Joseph Torti, III represented by Paula Pallozzi (RI); and Jane L. Cline represented by Bill Kenny (WV).

1. Proposed H.R. 635—Update

Amanda Yanek (NAIC) said that since she reported on H.R. 635 during the Summer National Meeting, the proposed National Commission on State Workers' Compensation Laws Act of 2009 has picked up additional co-sponsors—now totaling nine. She said opposition to the bill remains strong. The National Conference of Insurance Legislators (NCOIL) opposed the bill in July. Also notable in opposition: American Insurance Association (AIA); National Association of Professional Insurance Agents; Property Casualty Insurers Association of America; and U.S. Chamber of Commerce.

H.R. 635 was introduced Jan. 22 by U.S. Rep. Joe Baca (D-CA). The bill would create the National Commission on State Workers' Compensation Laws. This commission would be tasked with reviewing the findings of the 1972 *Report of the National Commission on State Workmen's Compensation Laws* and its recommendations; studying and evaluating state workers' compensation laws in order to determine if such laws provide an adequate, prompt and equitable system of compensation for injury or death arising out of or in the course of employment; and studying and evaluating whether additional remedies should be recommended to ensure prompt and good faith payment of benefits and medical care to injured workers and their families.

Ms. Yanek said the bill is, therefore, concerned with the workers' compensation benefit structure, which is the purview of the state workers' compensation administrators—not insurance regulators. Thus, the NAIC has not taken a position either for or against the bill.

Bruce Wood (AIA) said H.R. 635 is pending in the House of Representatives, and to date there is no Senate counterpart. AIA feels H.R. 635 will move, perhaps as an amendment to another bill, though the organization believes it is a bad bill, and there is a broad coalition against it. States have passed many workers' compensation reforms since the 1972 Report of the National Commission on State Workmen's Compensation Laws, Mr. Wood observed, and these have overall been very good changes that have endured. The workers' compensation systems have come a long way, and to have the federal government now try to tell the states how to run workers' compensation seems true folly. The AIA and many other organizations fear that in the long term, such a commission as being proposed under H.R. 635 would lead to a national system—which would be harmful, he concluded.

2. Proposed Rockefeller Coverage Amendment No. 4

Mr. Wood gave a presentation on a new amendment (Amendment No. 4) introduced Sept. 20 by Sen. Jay Rockefeller (D-WV) to the U.S. Senate Committee on Finance. Amendment No. 4 is titled "Universal 24-Hour Health Coverage" and applies to the proposed America's Healthy Future Act of 2009.

Mr. Wood explained that Amendment No. 4 promotes universal 24-hour health coverage to be provided through single policies covering medical benefits for all of an employee's injuries and diseases, whether work-related or not, as well as the medical portion of auto liability insurance policies. According to the draft amendment, consolidating the medical payments components of these lines of insurance would result in a reduction in controllable administrative costs for claims and general administration, reserves, and marketing costs...

Mr. Wood stated that the AIA opposes the amendment and believes it would be completely disruptive to the property and casualty insurance industry and workers' compensation self-insurers. He noted that this is yet another example of the unpredictability insurance faces in the current political climate.

3. Longshore and Harbor Workers' Compensation Act and its Extensions

John Chamberlain (U.S. Department of Labor—DOL) gave a presentation on how the federal government administers the Longshore and Harbor Workers' Compensation Act (LHWCA) and its extensions. He said the LHWCA, which became law in 1928, is administered by the Division of Longshore and Harbor Workers' Compensation, part of the DOL Office of Workers' Compensation Programs. Benefits under the LHWCA are extended by the Outer Continental Shelf Lands Act, the Non-Appropriated Fund Instrumentalities Act, and the Defense Base Act. He explained who is covered by each of the Acts and possible consequences if employers do not provide insurance.

Mr. Chamberlain said that in reviewing whether to authorize an insurance company to write LHWCA, the DOL looks at a number of factors, including the company's Best Rating (must be a B+ or better) and its five-year history in regard to net worth and risk-based capital ratio. He said the DOL would want to know who will be handling their claims, and does not authorize third-party adjusters or administrators. The company must submit its policy forms to the DOL before using them. The usual policy is the standard workers' compensation policy with a LHWCA endorsement.

Mr. Chamberlain said that for there to be a valid policy of insurance, the DOL requires that there be a workers' compensation policy with a longshore extension, a payroll declaration showing at least one "F" class, and an authorized carrier. He noted that all policies issued for the longshore act or its extensions must be reported to DOL district offices.

The DOL currently has 358 authorized carriers, of which 163 reported payment of claims in 2008. Between 50% and 60% of the annual payments are made by self-insured employers or their captive insurance companies.

Mr. Chamberlain said his presentation was a first step on the part of his DOL office (Branch of Financial Management, Insurance and Assessments) to begin dialogue with insurance regulators through the NAIC on LHWCA. He said the law permits the DOL to take into consideration the recommendation of any state authority having supervision over carriers or over workers' compensation.

He said the DOL would like to ensure that its authorization procedures are consistent with those of the various states, and that they represent the current "best practices." For instance, the DOL would like to ensure that when an authorized carrier changes its name, re-domesticates, merges, changes ownership, or any similar alteration in status, that his office is notified.

4. Implementation Commentary—Update

Mr. Wake said a Sept. 13 draft Implementation Commentary—Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements was reviewed by the Professional Employer Organization Model Law Working Group. He said it was determined that while the draft white paper was very close to being considered for adoption, it would need a few additional changes, most notably those involving data reporting of master policies. Therefore, the draft is to be revised for consideration of adoption by the Working Group prior to the Winter National Meeting.

The purpose of the draft white paper is to assist states, professional employer organizations, and the insurance industry with implementation of a regulatory framework consistent with the Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements, adopted by the NAIC in 2007. The Guidelines were designed to provide the states with a regulatory framework for addressing the most significant workers' compensation issues that have arisen to date in professional employer organization relationships, with an emphasis on a clear allocation of the respective rights and responsibilities of professional employer organizations, clients, and insurers.

5. Draft NCOIL Independent Contractor Model Law—Update

Bob Card (NAIC) announced that the NAIC/IAIABC Joint Working Group recently formed the National Conference of Insurance Legislators (NCOIL) Independent Contractor Model Law Subgroup to review and provide comment to NCOIL in regard to that organization's latest draft "Proposed Construction Industry Workers' Compensation Coverage Act" (i.e., a workers' compensation independent contractor model law). The first conference call of the Subgroup was Aug. 24 and allowed both NAIC and International Association of Industrial Accident Boards and Commissions (IAIABC) comments on the then-latest draft to be sent to NCOIL. Mr. Card said there have been no further conference calls of the Subgroup due to

the short turnaround period provided by NCOIL for review of its various drafts. NCOIL has held conference calls on different versions of its draft Aug. 28, Sept. 8, Sept. 14 and Sept. 18.

Mr. Card said NCOIL will review its latest draft independent contractor model law, dated Sept. 21, during its next conference call, scheduled for Sept. 28. All drafts had been distributed to Subgroup members and interested regulators prior to the NCOIL conference calls, so a Subgroup member or interested regulator had time to join the call or submit comments directly to NCOIL.

Mr. Card said it was his understanding that NCOIL was planning to continue this fast pace until they had a draft appropriate to bring for consideration of adoption during its 2009 Annual Meeting in New Orleans, Nov. 19–22. He said they planned to have a finished draft ready for public comment at least 30 days prior to their national meeting. At that time, if not before, the Subgroup should again become active to provide meaningful comment on the draft to NCOIL.

Susan Nolan (NCOIL) said NCOIL is now focusing on the last sections of the draft model law. She said the model law focus has been narrowed to apply only to the construction industry. A nine-point bright-line test to determine the status of independent contractors has been removed from the draft, as there were questions as to how that bright-line test might play out with the majority of states.

6. Draft Third Party Administrator (TPA) Guidelines—Update

Mr. Wickman said the draft TPA Guidelines still await final comments from the Regulatory Framework (B) Task Force to complete proposed health insurance changes. He anticipates that these comments will be provided in the next few weeks, so the draft TPA Guidelines can be readied for final review by both the Producer Licensing (EX) Task Force and the Large Deductible Study Implementation Working Group prior to the Winter National Meeting.

The draft TPA Guidelines are being developed by the Large Deductible Study Implementation (C) Working Group to replace eventually the current TPA Statute (NAIC model law). The revision will add workers' compensation and provide updating, including a few changes pertaining to health insurance.

7. Presentation: “Bringing Workers’ Compensation Benefits into the 21st Century”

Annmarie Lipold (Lipold Communications, LLC) gave a presentation on improving workers' compensation benefits, saying it was time to reconsider what is best for injured workers and their employers. She emphasized the importance of improving “return-to-work” programs for injured workers, as studies show that the longer employees are off the job because of disability, the more difficult it is to return to work.

She encouraged regulators to take a much broader view of workers' compensation—encouraging returning to work with greater emphasis by more actively shortening the time lag of claims filing, adopting a sports medicine approach to recovery, and improving claims processes and medically feasible return to work.

8. Working Group Summaries Adopted

Upon motion by Mr. Wickman, and second by Director Deal, the Task Force adopted quarterly summaries for the following groups: Large Deductible Study Implementation Working Group; NAIC/IAIABC Joint Working Group. The Task Force also adopted the minutes of the Professional Employer Organization Model Law Working Group Sept. 22 meeting (Attachment Two).

9. Task Force 2010 Charges Adopted

Mr. Card presented draft 2010 charges for consideration of adoption. The primary difference between them and the 2009 charges was that the draft 2010 charges included appointment of a Model Law Review Working Group to review older workers' compensation model laws and regulations for relevance, and for the Task Force to provide assistance to participating states in conducting a 2010 multi-state examination of the National Council on Compensation Insurance.

Upon motion by Mr. Wickman, and second by Mr. Kenny, the Task Force, adopted the charges (Attachment One).

Having no further business, the Workers' Compensation (C) Task Force adjourned.

**2010 PROPOSED CHARGES
NEW OBJECTIVES AND GOALS**

As of: 8/19/09

WORKERS' COMPENSATION (C) TASK FORCE

The mission of the Workers' Compensation (C) Task Force is to study the nature and effectiveness of state approaches to workers' compensation and related issues—including, but not limited to, assigned risk plans; safety in the workplace; treatment of investment income in rating; occupational disease; and cost containment—and the relevance of adopted NAIC model laws pertaining to workers' compensation.

Ongoing Maintenance and/or Necessary Updates to NAIC Programs, Products or Services:

1. Discuss issues arising with respect to advisory organization and insurer filings for workers' compensation.—*Essential*
2. Appoint a Large Deductible Study Implementation Working Group to ensure that the NAIC charges presented in the Findings and Recommendations of the NAIC *Workers' Compensation Large Deductible Study* are properly completed. The Working Group is to report the results of their ongoing charge on a quarterly basis.—*Important*
3. Appoint an NAIC/IAIABC Joint Working Group as it studies issues of mutual concern to insurance regulators and workers' compensation administrators. Review relevant model laws and papers and consider possible charges in light of Working Group recommendations. The Working Group is to report the results of their ongoing charge on a quarterly basis.—*Important*
4. Appoint a Professional Employer Organization Model Law Working Group to complete development of a paper to be of assistance to the states in the implementation of the NAIC Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements (#1950), to coordinate with other NAIC groups on issues relating to professional employer organizations, and to follow changes in the professional employer organization marketplace. The Working Group is to report the results of their ongoing charge on a quarterly basis.—*Important*

New Objectives and Goals Representing New NAIC Programs

1. Appoint a Model Law Review Working Group to review older workers' compensation model laws and regulations for relevance, in accordance with NAIC Standards for Model Law Review. Make recommendations regarding whether the particular model law or regulation should be deleted, amended or kept in its current form. The Working Group is to report the results of their ongoing charge on a quarterly basis.—*Deferrable*
2. Provide assistance to participating states in conducting a 2010 multi-state examination of the National Council on Compensation Insurance.—*Essential*

Sponsors for 2010 Charges
(Except as noted, I support all charges)

SIGNATURE	STATE

Draft: 9/30/09

Professional Employer Organization Model Law (C) Working Group
Washington, DC
September 22, 2009

The Professional Employer Organization Model Law (C) Working Group of the Workers' Compensation (C) Task Force met in Washington, DC, Sept. 22, 2009. The following Working Group members participated: Robert Wake, Chair (ME); Alice Jones (AR); Christopher Citko (CA); Mark Franklin (CT); Richard Koon (FL); Ted Clark (KS); Brian Pennington (MN); Mary Kempker and Angela Nelson (MO); Alan Wickman (NE); Marie Holt (NV); Kathie Stepp (OK); Tanja Northrup (UT); and Tim Murphy (WV). Also participating was: John Kissling (IN).

1. Opening Comments

Mr. Wake remarked that Working Group last met at the 2006 Winter National Meeting. During that meeting, the Working Group adopted its Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements (Guideline #1950), which were then adopted by the full NAIC membership in 2007. He said the Working Group formed the PEO Guidelines Implementation Paper Drafting Group on June 10, 2006, to develop a white paper titled, *Implementation Commentary: Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements*, for the purpose of serving as a companion document to assist the states, professional employer organizations (PEOs), and the insurance industry with implementing a regulatory framework consistent with the Guidelines. Members of the PEO Guidelines Implementation Paper Drafting Group, he said, included himself (chair), Mr. Wickman, Mona Carter (National Council on Compensation Insurance—NCCI) and Bill Schilling (National Association of Professional Employer Organizations—NAPEO).

About the Guidelines, Mr. Wake noted that they require changes to a state's regulatory structure, in addition to how PEOs, insurance companies and advisory organizations conduct their workers' compensation business. The primary purpose of the Guidelines, which pertain only to workers' compensation, is to ensure that PEOs and their clients properly obtain insurance coverage for all of their employees, including direct-hire employees and persons employed under PEO agreements. Mr. Wake said that the draft "Implementation Commentary" is to explain 1) the background of the Guidelines; 2) what the Guidelines do and why; 3) various PEO issues and challenges; and 4) what needs to be done by regulators and the private sector to implement the Guidelines.

He said that the first publicly exposed draft (June 11, 2009) of the "Implementation Commentary" was first presented to the Workers' Compensation (C) Task Force during the Summer National Meeting. Comments since received on that draft were reviewed for incorporation into the latest draft, dated Sept. 13, for discussion during this Working Group meeting. Notes were added in the margins, he said, for reference to those comments and changes made.

Mr. Wake, and others, identified an oversight in the current draft found in Footnote No. 6, as Colorado needed to be added to the listing of 32 states that had enacted some form of registration or licensing legislation for the PEO industry. That will be corrected moving forward, he said. Mr. Wake also stated that he believed the draft white paper might be ready for consideration of adoption by the Working Group at this meeting. He then asked the Working Group for input.

2. Working Group Discussion

Mr. Wickman said that, while the paper looked good, it could use more work on Appendix B. NCCI developed Appendix B to provide alternatives and technical supplement on data reporting. In particular, Mr. Wickman was concerned with the way "Data Reporting Options for the Master Policy" were presented under the three options provided in Appendix B. Primarily for this reason, Mr. Wickman did not think the draft was ready to be adopted by the Working Group at this meeting, but would need more review regarding data reporting and statistical matters.

Ms. Carter remarked that one of the main reasons the draft "Implementation Commentary" was developed was because the Guidelines have been reported by the industry and regulators as being somewhat difficult to fully understand and implement. A number of states, she said, have expressed interest in obtaining a companion document to assist with implementation of the Guidelines—so this paper is timely. Ms. Carter noted that Appendix B was developed for the draft to lay out some client-level data reporting options (e.g., payroll and losses) for the carriers to follow—based on which states they write PEO coverage in—so that the workers' compensation data stream flows in compliance to all points needed for proof-of-coverage,

experience rating, the claims process, the judicial process, etc. Mr. Wickman commented that Appendix B should be written for the regulatory audience, as well as carriers.

Mr. Schilling said the draft needed more work regarding data reporting and statistical matters as would pertain to master policies. He added that a \$63 billion payroll is now handled by the PEO industry, with approximately 95% of it handled without any problems. Mr. Wake noted that if 5% of the PEO industry has problems, that still leaves \$3 billion not getting correctly handled—which is worthy of regulator attention. Mr. Schilling then replied that the 5% is probably an overestimation.

Mr. Citko commented that he did not believe the draft was ready to be considered for adoption until further refinements to it were completed.

Ms. Carter said in regard to Appendix B, that the Multiple Coordinated Units concept, as outlined under Option 2—which requires the reporting of separate unit data (payroll and loss) for each client—would bring significant changes to the industry and might be difficult and costly to implement. The concept essentially means a redesign of the platform system, which few carriers, she suggested, would be interested in participating in voluntarily. She also mentioned that 13 states currently allow PEO master policies to be written only in the voluntary market. She inferred that this restriction typically evolved from the state not wanting to allow master policies to be written in its residual market, so this possibility was banned through statutes declaring (for example) that “master policies must be written in the voluntary market.” Mr. Wake asked Ms. Carter to send him a copy of a state law requiring all PEO master policies to be written only in the voluntary market, as he thought mention of this should be included within the draft “Implementation Commentary.”

Mr. Kissling expressed concern that the Guidelines may not always mesh well with PEO activities covered under other lines of insurance (e.g., employee dishonesty coverage). He mentioned, in particular, definitional differences, such as how the word “employee” is interpreted under general liability coverage, employee dishonesty coverage and workers' compensation PEO coverage—that might possibly lead to unintended consequences.

Mr. Wickman replied that he was not aware of such conflicts between the Guidelines' definitions (there are two options) of a PEO co-employee and employees of other lines that would lead to such concerns. However, if direct conflicts do occur, they should be addressed by the underwriter, so that policy language changes may be sought. Mr. Schilling mentioned that at one of the very first discussion meetings, the Working Group decided to limit the Guidelines to only workers' compensation, rather than taking on all lines that could be involved with the PEO work environment.

Mr. Wake noted that the draft “Implementation Commentary” addresses this matter under the following: II. Some Legal Issues Relating to Implementation; B. Key Issues Beyond the Scope of the Guidelines. The subsection, in part, reads:

The Guidelines relate only to workers' compensation insurance issues. A state considering updating its regulation of PEOs through adoption of the Guidelines should consider whether or not it wishes to approach this area through a comprehensive statute addressing the regulation of the PEO industry, or a global effort to ensure that existing pieces of legislation are consistent with one another and gathering them into a single regulatory scheme, rather than piecemeal rulemaking addressing a limited set of issues against the background of existing law. This is a policy decision that should be addressed with the state Legislature, and should depend in part on how recent and how thoroughly integrated the existing regulatory framework is.

Mr. Wake added that after the NAIC adopted its Guidelines, the National Conference of Insurance Legislators (NCOIL) decided to delve into these issues. It had generally been the desire of the Working Group that NCOIL go further by designing a comprehensive PEO model law that would encompass additional lines of insurance. However, he said, NCOIL was even more limited by restricting its “Model Act Regarding Workers' Compensation Insurance Coverage in Professional Employer Organization (PEO) Relationships” (dated Nov. 17, 2007) to focus on experience rating.

3. Next Steps

It was agreed that Mr. Wake would revise the draft "Implementation Commentary" for consideration of adoption during a Working Group conference call prior to the Winter National Meeting. Among changes to be made to the draft, as discussed, would be the following:

- Colorado would be added as the 32nd state under Footnote No. 6.
- Ms. Carter is to send to Mr. Wake an example of a state statute that requires PEO master policies to be written only in the voluntary market (in lieu of the residual market).
- Mr. Wickman is to work with other members of the PEO Guidelines Implementation Paper Drafting Group to revise Appendix B, as discussed.

With these changes, the Working Group expressed confidence that a final draft might be ready to present to the Workers' Compensation Task Force for consideration of adoption during the Winter National Meeting.

The Working Group conference call to consider adoption of a revised draft "Implementation Commentary" will be announced prior to the Winter National Meeting. Scheduling will need to allow adequate time for completing the draft revision and distributing it for comment. Scheduling of the call also will need to anticipate that, if the draft is adopted, the Workers' Compensation Task Force will require adequate time for review before the Winter National Meeting.

Having no further business, the Professional Employer Organization Model Law (C) Working Group adjourned.

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