

SUBCHAPTERS B, C, D, AND E

28 TAC §§112.101, 112.102, 112.203, 112.301, AND 112.401

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts amendments to 28 Texas Administrative Code §§112.101, 112.102, 112.203, 112.301, and 112.401 concerning the scope of liability for compensation. The amendments to §§112.101, 112.102, 112.203, and 112.301 are adopted without changes to the proposed text as published in the November 13, 2020, issue of the Texas Register (45 TexReg 8099) and will not be republished. The amendments to §112.401 are adopted with one change to the proposed text published in the November 13, 2020, issue of the Texas Register (45 TexReg 8099). DWC deleted the implementation date that originally appeared in the proposed text of §112.401, concerning Election of Coverage by Certain Professional Athletes, to make the effective date of these amendments 20 days after the date on which they are filed with the secretary of state. Section 112.401 will be republished.

REASONED JUSTIFICATION. The adopted amendments are necessary to update the rule language to conform with the changes the Legislature made to Texas Labor Code §406.145 under House Bill (HB) 1665, 86th Legislature, Regular Session (2019). The adopted amendments also delete the headings for Subchapters B, C, D, and E in Chapter 112 to simplify how the rules are organized and make them easier to access and more-user friendly. Only the headings used for Subchapters B, C, D, and E are deleted. The sections in Subchapters B, C, D, and E are not deleted.

The amendments to §112.101(a), (b), (c)(2), (d), and (e) replace "shall" with "must." The amendments to §112.101(d) add "insurance" before "carrier" and amend §112.101(e) to

1 remove "the" before "Texas" and the comma after "Code." DWC also amends the title of
2 §112.101 to replace "Regarding" with "regarding" and "Between" with "between." These
3 amendments clarify the meaning of the rules and conform them to current agency style.

4

5 The amendments to §112.102(b), (d), (e), and (f) replace "shall" with "must." The
6 amendments to §112.102(f) remove "the" before "Texas," as well as "Workers'
7 Compensation Act," and the comma after "§406.005." The amendments add "Labor Code"
8 after "Texas." These amendments clarify the meaning of the rules and conform them to
9 current agency style.

10

11 The amendments to §112.203(a) remove "the Commission and" from the hiring contractor
12 filing requirements and are consistent with Labor Code changes in HB 1665, 86th
13 Legislature, Regular Session (2019) that now require a copy of a subsequent hiring
14 agreement, to which the joint agreement under Labor Code §406.145 does not apply, to
15 be filed with DWC only on request. This amendment is necessary to reflect DWC's intent
16 that the agreement no longer must be filed with DWC. DWC also amends §112.203(b) and
17 (d) to replace "Commission" with "division." These amendments are necessary to reflect
18 DWC's current agency name and are consistent with the amendments made to Chapter
19 112 in 2018. DWC also amends the title of §112.203 to replace "To" with "to." This
20 amendment conforms to current agency style.

21

22 DWC amends the title of §112.301 to "Labor Agent's Notification of Coverage for Certain
23 Farm or Ranch Employees." This amendment adds clarity to the section title in the absence
24 of subchapter titles.

25

1 The amendments to §112.401(e) expand the acceptable ways to deliver the agreement or
2 contract between a professional athlete and a franchise. The amendments to §112.401(b)
3 replace "Texas Workers' Compensation Commission" with "Texas Department of
4 Insurance, Division of Workers' Compensation," and amendments to §112.401(d) replace
5 "Commission" with "division." DWC also amends the required language of the agreement
6 or contract between a professional athlete and a franchise. The amendments are
7 necessary to reflect the division's current name and conform this section to current agency
8 style.

9

10 **SUMMARY OF COMMENTS AND AGENCY RESPONSE.**

11 **Commenter:** DWC received one written comment from the Office of Injured Employee
12 Counsel (OIEC) in support of the proposal.

13

14 **Agency Response to the Comment:** DWC appreciates the comment.

15

16 **28 TAC §§112.101 and 112.102**

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18 **STATUTORY AUTHORITY.** The commissioner of workers' compensation adopts the
19 amendments to §§112.101 and 112.102 under Labor Code §§402.00111, 402.00116,
20 402.061, 406.122, and 406.123.

21 Labor Code §402.00111(a) states that, except as otherwise provided, the
22 commissioner of workers' compensation will exercise all executive authority, including
23 rulemaking authority, under Title 5 of the Labor Code.

1 Labor Code §402.00116 provides that the commissioner of workers' compensation
2 will administer and enforce this title, other Texas workers' compensation laws, and other
3 laws granting jurisdiction or applying to DWC or the commissioner.

4 Labor Code §402.061 authorizes the commissioner to adopt rules as necessary to
5 implement and enforce the Texas Workers' Compensation Act.

6 Labor Code §406.122 states that a subcontractor and the subcontractor's
7 employees are not employees of a general contractor if the subcontractor and general
8 contractor have entered into a written agreement where the subcontractor assumes the
9 responsibilities of an employer. The section further provides that an owner operator and
10 the owner operator's employees are not employees of a motor carrier if the owner
11 operator and motor carrier have entered into an agreement where the owner operator
12 assumes the responsibilities of an employer.

13 Labor Code §406.123 provides that a general contractor and a subcontractor may
14 enter into certain agreements and requires the general contractor to file a copy of the
15 agreement with their insurance carrier. The general contractor must file a copy with the
16 division only if they are a certified self-insurer. The section further allows motor carriers
17 and owner operators to enter into agreements where the motor carrier agrees to provide
18 workers' compensation insurance to the owner operator.

19

20 **TEXT.**

21 §112.101. Agreement regarding Workers' Compensation Insurance Coverage between
22 General Contractors and Subcontractors.

23 (a) An agreement between a general contractor and a subcontractor made in
24 accordance with Texas Labor Code §406.123(a), (d), (e), or (l) must:

25 (1) be in writing;

1 (2) state that the subcontractor and the subcontractor's employees are
2 employees of the general contractor for the sole purpose of workers' compensation
3 coverage;

4 (3) indicate whether the general contractor will make a deduction for the
5 premiums;

6 (4) specify whether this is a blanket agreement or if it applies to a specific
7 job location and, if so, list the location;

8 (5) contain the signatures of both parties;

9 (6) indicate the date the agreement was made, the term the agreement will
10 be effective, and estimated number of workers affected by the agreement.

11 (b) The workers' compensation insurance coverage provided by the general
12 contractor under the agreement will take effect no sooner than the date the agreement
13 was executed, and deductions for the premiums must not be made for coverage provided
14 before that date.

15 (c) If a person who is covered by a subcontractor agreement signed under this
16 section is found to be an employee of the general contractor, the person:

17 (1) is covered under the general contractor's workers' compensation policy;
18 and

19 (2) must receive a refund from the general contractor for all amounts
20 improperly deducted as premium.

21 (d) The general contractor must maintain the original and file a legible copy of the
22 agreement with the general contractor's workers' compensation insurance carrier within
23 10 days of the date of execution. An agreement is not considered filed if it is illegible or
24 incomplete. If a general contractor and subcontractor enter into a written agreement in
25 which the subcontractor assumes the responsibilities of an employer as provided in Texas

1 Labor Code §406.122(b), the general contractor must provide a copy of the agreement to
2 its insurance carrier within 10 days of execution. After January 1, 1993, a general contractor
3 who is a certified self-insurer must file a copy of the agreement with the division within
4 10 days of the date of execution. The filing must be made in the form and manner
5 prescribed by the division.

6 (e) The general contractor must give the subcontractor's employees the notice
7 required under Texas Labor Code §406.005 when such an agreement is made.

8 (f) If a subcontractor makes an agreement in accordance with this rule, an
9 employee of the subcontractor may elect to retain his common law rights as provided by
10 the Texas Labor Code, §406.034.

11

12 §112.102. Agreements between Motor Carriers and Owner Operators.

13 (a) A motor carrier and an owner operator may enter into an agreement which
14 requires the owner operator to assume the responsibilities of an employer for the
15 performance of work.

16 (b) An agreement made under subsection (a) of this section must be made at or
17 before the time the contract for the work is made and must:

18 (1) be in writing;

19 (2) state that the owner operator assumes the responsibilities of an
20 employer for the performance of work;

21 (3) contain the signatures of both parties;

22 (4) indicate the date the agreement was made, the term the agreement will
23 be effective, the estimated number of workers affected by the agreement, the federal tax
24 identification number of the parties; and

1 (5) be provided to the insurance carrier of the motor carrier within 10 days
2 of execution.

3 (c) A motor carrier and an owner operator may enter into an agreement under
4 which the motor carrier provides workers' compensation insurance coverage to the owner
5 operator and the owner operator's employees.

6 (d) An agreement made under subsection (c) of this section must be made at or
7 before the time the contract for the work is made and must:

8 (1) be in writing;

9 (2) indicate whether the motor carrier will make a deduction for the
10 premiums;

11 (3) contain the signatures of both parties;

12 (4) indicate the date the agreement was made, the term the agreement will
13 be effective, the estimated number of workers affected by the agreement, the federal tax
14 identification number of the parties; and

15 (5) be filed with the insurance carrier of the motor carrier within 10 days of
16 execution.

17 (e) The workers' compensation insurance coverage provided by the motor carrier
18 under the agreement must take effect no sooner than the date the agreement was
19 executed, and deductions for the premiums must not be made for coverage provided
20 before that date.

21 (f) The motor carrier must be required to give the owner operator's employees the
22 notice required under Texas Labor Code §406.005 when such an agreement is made.

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24 **28 TAC §112.203**

25

1 **STATUTORY AUTHORITY.** The commissioner of workers' compensation adopts the
2 amendments to §112.203 under Labor Code §§402.00111, 402.00116, 402.061, 406.122,
3 406.123, 406.144, and 406.145.

4 Labor Code §402.00111(a) states that, except as otherwise provided, the
5 commissioner of workers' compensation will exercise all executive authority, including
6 rulemaking authority, under Title 5 of the Labor Code.

7 Labor Code §402.00116 provides that the commissioner of workers' compensation
8 will administer and enforce this title, other Texas workers' compensation laws, and other
9 laws granting jurisdiction or applying to DWC or the commissioner.

10 Labor Code §402.061 authorizes the commissioner to adopt rules as necessary to
11 implement and enforce the Texas Workers' Compensation Act.

12 Labor Code §406.122 states that a subcontractor and the subcontractor's
13 employees are not employees of a general contractor if the subcontractor and general
14 contractor have entered into a written agreement where the subcontractor assumes the
15 responsibilities of an employer. The section further provides that an owner operator and
16 the owner operator's employees are not employees of a motor carrier if the owner
17 operator and motor carrier have entered into an agreement where the owner operator
18 assumes the responsibilities of an employer.

19 Labor Code §406.123 provides that a general contractor and a subcontractor may
20 enter into certain agreements and requires the general contractor to file a copy of the
21 agreement with their insurance carrier. The general contractor must file a copy with the
22 division only if they are a certified self-insurer. The section further allows motor carriers
23 and owner operators to enter into agreements where the motor carrier agrees to provide
24 workers' compensation insurance to the owner operator.

1 Labor Code §406.144 states a hiring contractor is not responsible for providing
2 workers' compensation insurance coverage for an independent contractor unless the
3 hiring contractor and independent contractor enter into an agreement under which the
4 hiring contractor, for the purpose of providing workers' compensation insurance
5 coverage, is the employer of the independent contractor.

6 Labor Code §406.145 permits a hiring contractor and an independent
7 subcontractor to enter into a joint agreement declaring the subcontractor as an
8 independent contractor and not an employee of the hiring contractor for workers'
9 compensation purposes. The joint agreement applies to each hiring agreement between
10 the parties until the first anniversary of its filling date unless a later hiring agreement
11 expressly states the joint agreement does not apply.

12

13 **TEXT.**

14 §112.203. Exception to Application of Agreement to Affirm Independent Relationship for
15 Certain Building and Construction Workers.

16 (a) If a subsequent hiring agreement is made that expressly states that the joint
17 statement made under §112.202 of this title (relating to Joint Agreement To Affirm
18 Independent Relationship for Certain Building and Construction Workers) does not apply
19 to that hiring agreement, the hiring contractor must maintain the original and file a legible
20 copy of the agreement with the hiring contractor's insurance carrier. Nothing in this
21 section otherwise nullifies the joint statement as it applies to other hiring agreements
22 made during the term of the joint statement.

23 (b) The notification must be filed in the form and manner prescribed by the division
24 and must:

1 (1) specify the date the agreement to affirm an independent relationship
2 was made;

3 (2) specify the parties to the agreement and the location of the job site(s);

4 (3) specify the date this agreement was made;

5 (4) contain the signatures of both parties.

6 (c) If a person who is covered by an independent contractor agreement signed
7 under this section is found to be an employee of the hiring contractor, the person:

8 (1) is covered under the hiring contractor's workers' compensation policy;

9 (2) must receive a refund from the hiring contractor for all amounts
10 improperly deducted as premium.

11 (d) The notification must be provided in the form and manner prescribed by the
12 division no later than 10 days from the date the subsequent hiring agreement was
13 executed. An agreement is not considered filed if it is illegible or incomplete.

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15 **28 TAC §112.301**

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17 **STATUTORY AUTHORITY.** The commissioner of workers' compensation adopts the
18 amendments to §112.301 under Labor Code §§402.00111, 402.00116, 402.061, and
19 406.163.

20 Labor Code §402.00111(a) states that, except as otherwise provided, the
21 commissioner of workers' compensation will exercise all executive authority, including
22 rulemaking authority, under Title 5 of the Labor Code.

23 Labor Code §402.00116 provides that the commissioner of workers' compensation
24 will administer and enforce this title, other Texas workers' compensation laws, and other
25 laws granting jurisdiction or applying to DWC or the commissioner.

1 Labor Code §402.061 authorizes the commissioner to adopt rules as necessary to
2 implement and enforce the Texas Workers' Compensation Act.

3 Labor Code §406.163 states that a labor agent must notify each person the agent
4 contracts with whether the agent has workers' compensation insurance coverage. If the
5 agent has workers' compensation insurance coverage, they must present evidence of the
6 coverage to each person the agent contracts with.

7

8 **TEXT.**

9 §112.301. Labor Agent's Notification of Coverage to Certain Farm or Ranch Employees.

10 (a) A labor agent must notify each person the labor agent contracts with to provide
11 the services of migrant and seasonal workers whether or not the labor agent has workers'
12 compensation insurance coverage.

13 (b) The notification must be in writing and must be given at the time the contract
14 for the services of the migrant or seasonal workers is made. The notification must be
15 signed and dated by both parties and each party must retain a copy of the notice.

16 (c) If the labor agent does have workers' compensation insurance coverage, the
17 labor agent must present evidence of the workers' compensation insurance coverage to
18 each person the agent contracts with to provide the services of migrant and seasonal
19 workers. The evidence of coverage must be in writing and must be presented at the time
20 the notification of coverage is made. Each party must retain a copy of the evidence of
21 coverage with the copy of the notice. A certificate of insurance is considered adequate
22 evidence of coverage.

23 (d) The notice and evidence of coverage, if applicable, must be given each time a
24 labor agent makes a contract with a person to provide migrant or seasonal workers. Any

1 notice and evidence of coverage provided for a prior contract between the parties is
2 considered insufficient to meet the requirements of this section.

3 (e) If coverage is terminated during the period of the contract for employment, the
4 labor agent must notify:

5 (1) the person with whom the agent contracted to provide the services of
6 migrant and seasonal workers; and

7 (2) the migrant and seasonal workers affected that the workers'
8 compensation insurance coverage has been terminated.

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10 **28 TAC §112.401**

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12 **STATUTORY AUTHORITY.** The commissioner of workers' compensation adopts the
13 amendments to §112.401 under Labor Code §§402.00111, 402.00116, 402.061, and
14 406.095.

15 Labor Code §402.00111(a) states that, except as otherwise provided, the
16 commissioner of workers' compensation will exercise all executive authority, including
17 rulemaking authority, under Title 5 of the Labor Code.

18 Labor Code §402.00116 provides that the commissioner of workers' compensation
19 will administer and enforce this title, other Texas workers' compensation laws, and other
20 laws granting jurisdiction or applying to DWC or the commissioner.

21 Labor Code §402.061 authorizes the commissioner to adopt rules as necessary to
22 implement and enforce the Texas Workers' Compensation Act.

23 Labor Code §406.095 states a professional athlete employed under a contract for
24 hire or a collective bargaining agreement, who sustains an injury in the course and scope
25 of the athlete's employment, must elect to receive either the benefits available under this

1 subtitle or the benefits under the contract or agreement. Labor Code §406.095(b) states
2 the commissioner by rule will establish the procedures and requirements for an election
3 under this section.

4

5 **TEXT.**

6 §112.401. Election of Coverage by Certain Professional Athletes.

7 (a) A professional athlete employed by a franchise with workers' compensation
8 insurance coverage and subject to Texas Labor Code §406.095 must elect to receive either
9 the benefits available under the Act or the equivalent benefits available under the athlete's
10 contract or collective bargaining agreement. The election must be made not later than
11 the 15th day after the athlete sustains an injury in the course and scope of employment.
12 If the athlete fails to make an election, the athlete will be presumed to have elected the
13 option which provides the highest benefits.

14 (b) When a contract is signed by a professional athlete, the employer must give the
15 athlete a copy of the following statement: "(Name of employer) has workers'
16 compensation coverage from (name of insurance carrier). If the benefits available to you
17 under your contract and any applicable collective bargaining agreement are equivalent to
18 or greater than those available to you under Texas Labor Code §406.095, you are required
19 to elect whether to receive the benefits available to you under the Act or the benefits
20 available to you under your contract and any applicable collective bargaining agreement.
21 You must make this election no later than 15 days after sustaining an injury. If you elect
22 to receive the benefits available to you under your contract and any applicable collective
23 bargaining agreement, you cannot obtain workers' compensation income or medical
24 benefits if you are injured. You can get more information about your workers'
25 compensation rights and the benefits available to you under the Act from any office of

1 the Texas Department of Insurance, Division of Workers' Compensation, or by calling 1-
2 800-252-7031."

3 (c) The election must be in writing and must:

4 (1) indicate the date of the injury for which the election is being made;

5 (2) indicate whether the athlete elects to receive the benefits available under
6 the Act or the benefits provided under the contract or agreement; and

7 (3) be signed by the athlete and the employer.

8 (d) If the athlete elects to receive the benefits available under the Act, a legible
9 copy of the election must be provided to the division in the form and manner prescribed
10 by the division within 10 days of the date of execution. A copy must also be provided to
11 the franchise's workers' compensation insurance carrier within 10 days of the date of
12 execution. The franchise must maintain the original election and provide a copy to the
13 athlete.

14 (e) If the athlete elects to receive the benefits available under the contract and any
15 agreement, the election must be filed with the franchise's workers' compensation
16 insurance carrier within 10 days of the date of execution. An agreement is not considered
17 filed if it is illegible or incomplete. Both the athlete and the franchise must keep a copy of
18 the election.

19 (f) An election made under this section is irrevocable and binding on the athlete
20 and the athlete's legal beneficiaries for a compensable injury incurred on the date
21 specified in the election.

22

23 **CERTIFICATION.** This agency certifies that legal counsel has reviewed the adoption and
24 found it to be a valid exercise of the agency's legal authority.

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1 Issued in Austin, Texas, on January 20, 2021.

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Kara Mace
Deputy Commissioner for Legal Services
TDI, Division of Workers' Compensation

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11 The commissioner adopts amendments to 28 TAC §§112.101, 112.102, 112.203, 112.301,
12 and 112.401.

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Cassie Brown
Commissioner
TDI, Division of Workers' Compensation

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22 Commissioner's Order No. _____