

TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 112: Scope of Liability for Compensation Title 28 TAC §§112.101, 112.102, 112.201, and 112.202

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (division) proposes amendments to 28 Texas Administrative Code (TAC) §112.101, *Agreement Regarding Workers' Compensation Insurance Coverage Between General Contractors and Subcontractors*, §112.102, *Agreements Between Motor Carriers and Owner Operators*, §112.201, *Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers*, and §112.202, *Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers*.

In House Bill (HB) 2112, the 85th legislature primarily amended or repealed certain reporting and notification requirements throughout the Labor Code, including Labor Code §406.144, *Election to Provide Coverage; Agreement*, and §406.145, *Joint Agreement*. Labor Code §406.144 permits a hiring contractor and an independent contractor to enter into an agreement under which the hiring contractor, for the purpose of providing workers' compensation insurance coverage, is the employer of the independent contractor. HB 2112 repealed §406.144(c), which required an agreement to be filed with the division, and amended §406.144(d) to require the hiring contractor to send a copy of the agreement to the division when requested instead. Labor Code

§406.145 permits a hiring contractor and an independent subcontractor to enter into a joint agreement declaring the subcontractor an independent contractor and not an employee of the hiring contractor for workers' compensation insurance purposes. HB 2112 amended §406.145(c) to remove the requirement that a hiring contractor file the joint agreement with the division, and included a new requirement that a copy be sent to the division when requested instead. Amendments to §112.201 and §112.202 implement HB 2112 by removing the requirement that hiring contractors automatically file a copy of the agreement, under either scenario, to the division.

In addition, the proposal includes substantially similar amendments to §112.101 and §112.102 for consistency among the provisions and division reporting requirements. Labor Code §406.122, *Status As Employee*, states a subcontractor is not the employee of a general contractor if the parties have entered into a written agreement where the subcontractor assumes the responsibilities of an employer. The section further provides that an owner operator is not the employee of a motor carrier if the parties have entered into a similar agreement. In contrast, Labor Code §406.123, *Election to Provide Coverage; Administrative Violation*, permits a general contractor and a subcontractor to enter into a written agreement for the general contractor to provide workers' compensation insurance coverage to the subcontractor. The section further provides that a motor carrier and an owner operator may enter into a written agreement where the motor carrier provides workers' compensation insurance coverage to the owner operator. Existing §112.101 and §112.102 require the parties to file a copy of an agreement under §406.123, establishing that a general contractor or a motor carrier will

provide workers' compensation insurance coverage to the subcontractor or owner operator, respectively, with the division. Amendments to §112.101 and §112.102 and are necessary to alleviate these system participant filing requirements.

Section 112.101 addresses **Agreement Regarding Workers' Compensation Insurance Coverage between General Contractors and Subcontractors**. The division amended §112.101(d) to remove "and the Commission" from the general contractor filing requirements. This amendment is necessary to reflect the division's intent that the agreement no longer be automatically filed with the division. Removing the requirement alleviates system participant reporting requirements and is consistent with the Labor Code changes in HB 2112, as well as other TAC changes found throughout the proposal. The division also amended §112.101(d) to replace "Division of Self Insurance Regulation" and "Commission" with "division." These amendments are necessary to reflect the division's current agency name.

Section 112.102 addresses **Agreements between Motor Carriers and Owner Operators**. The division amended §112.102(d)(5) to remove "the commission in Austin and" from the subparagraph. This amendment is necessary to reflect the division's intent that the agreement no longer be automatically filed with the division. Removing the requirement alleviates system participant reporting requirements and is consistent with the Labor Code changes in HB 2112, as well as other TAC changes found throughout the proposal.

Section 112.201 addresses **Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers**. The division amended

§112.201(c) to reflect a change in the agency's name by deleting "commission" and adding "division." The division amended §112.201(g) to delete "the hiring contractor shall file a legible copy of the agreement with the commission, in the form and manner prescribed by the Commission." This amendment is necessary to reflect statutory changes in HB 2112 and the division's intent that the agreement no longer be automatically filed with the division. Removing the requirement also alleviates system participant reporting requirements.

Section 112.202 addresses **Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers**. The division amended §112.202(b) and (b)(6) to reflect a change in the agency's name by deleting "Commission" and adding "division." The division amended §112.202(d) to delete "file a legible copy of the agreement with the Commission in the form and manner prescribed by the Commission." This amendment is necessary to reflect statutory changes in HB 2112, which became effective for agreements signed on or after June 9th, 2017, and the division's intent that the agreement no longer be automatically filed with the division. Removing the requirement also alleviates system participant reporting requirements. The division amended §112.202(f) to delete "[A]ll hiring contracts executed by the parties during the year after an agreement under subsection (a) of this section is filed are subject to that agreement, unless such contract expressly states that the agreement does not apply." The statement "[A]n agreement signed under subsection (a) applies to each hiring agreement executed by the parties until the first anniversary of the date the agreement was filed with the hiring contractor's workers' compensation insurance

carrier, unless a subsequent agreement is executed expressly stating that the agreement does not apply” was added. The amended subsection specifies that the agreement’s end date is based on when the agreement is filed with the workers’ compensation insurance carrier. The specification is necessary to reflect the change in filing requirements in the Labor Code and §112.202, namely that the agreement is no longer automatically filed with the division. Thus, the agreement applies from the date it is executed through the first anniversary of the date it is filed with the workers’ compensation insurance carrier. The division notes that 28 TAC §102.4(h), *General Rules for Non-Commission Communications*, establishes the date a written communication is deemed to have been sent on as the date received, if sent by fax, personal delivery, or electronic transmission, or the date postmarked if sent via the United States Postal Service. If the postmark date is unavailable, then the date sent is the later of the signature date or the date it was received minus five days. Thus, for the purposes of establishing the date an agreement is filed with the workers’ compensation insurance carrier, unless the great weight of evidence indicates otherwise, the agreement is deemed filed according to §102.4(h). Amended §112.202(f) also more closely mirrors the statutory language in §406.145(e), which states a joint agreement “applies to each hiring agreement between the hiring contractor and the independent contractor until the first anniversary of its filing date ...” Consistency in language between the statute, rule, and form helps system participants understand the applicability of joint agreements and avoids confusion.

FISCAL NOTE. Dan Paschal, Deputy Commissioner of TDI-DWC Affairs & Strategic Planning, has determined that for each year of the first five years the amended sections are in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposed amended sections. Any economic costs to those state and local governments that provide workers' compensation coverage are discussed below.

PUBLIC BENEFITS. Mr. Paschal has also determined that for each of the first five years amended §§112.101, 112.102, 112.201, and 112.202 are in effect, there will be a number of public benefits. The public benefits anticipated as a result of the proposed sections include: (i) alleviating system participant reporting requirements to the division for multiple Chapter 112 agreements; (ii) increasing administrative efficiency by eliminating the need for processing and storage of the agreements; and (iii) reducing costs to system participants for printing, and sometimes mailing, a copy for the division.

ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL. Mr. Paschal anticipates that, for each of the first five years amended §§112.101, 112.102, 112.201, and 112.202 are in effect, there will be no costs to persons required to comply with the amended sections. Instead, the amendments result in a cost savings to system participants by removing existing reporting requirements.

Government Code §2001.0045 requires a state agency to offset any costs associated with a proposed rule by: (1) repealing a rule imposing a total cost that is equal to or greater than that of the proposed rule; or (2) amending a rule to decrease the total cost imposed by an amount that is equal to or greater than the cost of the proposed rule. As described above, the division has determined that the proposed amendments will not impose a cost on system participants. The amendments instead provide a cost savings by removing existing requirements for parties to send a copy of certain Chapter 112 agreements to the division, which are found in the DWC Form-081, DWC Form-082, and DWC Form-083. The division is not able to estimate the exact number of hard copies submitted for each specific form. However, in Fiscal Year 2016 the division received approximately 24,000 hard copies of the DWC Form-081 – DWC Form-084. By removing the requirement that a copy of the DWC Form-081, DWC Form-082, and DWC Form-083 be automatically provided to the division, the division estimates a total cost savings to system participants of approximately \$2,400 (the total number of hard copies received multiplied by a printing cost of \$.10 per page) for each of the first five years. An additional cost savings may also apply for system participants who previously mailed their copy of the agreement, which would equal \$0.49 for each agreement mailed to the division.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.

Government Code §2006.002(c) provides that if a proposed rule may have an adverse economic effect on small businesses, micro-businesses, or rural communities, state

agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines “small business” as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. Government Code §2006.001(1) defines “micro business” similarly to “small business” but specifies that such a business may not have more than 20 employees. Government Code §2006.001(1-a) defines a “rural community” as a municipality with a population of less than 25,000.

In accordance with Government Code §2006.002(c), the division has determined that the proposed amendments will not have an adverse economic effect on small businesses, micro-businesses, or rural communities. Instead, amended §§112.101, 112.102, 112.201, and 112.202 result in a cost savings to system participants, including small or micro businesses, by removing existing reporting requirements.

GOVERNMENT GROWTH IMPACT STATEMENT. Government Code §2001.0221 requires that a state agency prepare a government growth impact statement that reasonably describes the effects a proposed rule may have during the first five years it is in effect. The division has determined that the proposed amendments to §§112.101, 112.102, 112.201, and 112.202 will not create or eliminate a government program, and

will not require an increase or decrease in fees paid to the division. Implementation of the proposed amendments will not require the creation or elimination of employee positions, and will not require an increase or decrease in future legislative appropriations to the division.

The proposed amendments do not create a new regulation, expand an existing regulation, or repeal an existing regulation. However, the amendments will limit existing regulations by removing the reporting requirement that a copy of certain Chapter 112 agreements be provided to the division. The number of individuals subject to the rules' applicability is neither increased nor decreased by the proposed amendments, and the proposed amendments have no impact on the state's economy.

TAKINGS IMPACT ASSESSMENT. The division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on February 26, 2018. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to Rulecomments@tdi.texas.gov or by mail to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of

Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If a hearing is held, the division will consider written comments and public testimony presented at the hearing.

STATUTORY AUTHORITY. Amended §§112.101, 112.102, 112.201, and 112.202 are proposed under the authority of Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking*; Labor Code §402.061, *Adoption of Rules*; Labor Code §406.122, *Status As Employee*; Labor Code §406.123, *Election to Provide Coverage; Administrative Violation*; Labor Code §406.144, *Election to Provide Coverage, Agreement*; and Labor Code §406.145, *Joint Agreement*.

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

Labor Code §402.061 authorizes the commissioner to adopt rules as necessary for the implementation and enforcement of the Act.

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

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

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

Labor Code §406.145 permits a hiring contractor and an independent subcontractor to enter into a joint agreement declaring the subcontractor an independent contractor and not an employee of the hiring contractor for workers' compensation purposes. The joint agreement applies to each hiring agreement between the parties until the first anniversary of its filing date, unless a subsequent hiring agreement expressly states the joint agreement does not apply.

TEXT.

Subchapter B. Application to General Contractor/Subcontractor and Motor Carrier/Owner Operator.

§112.101. Agreement Regarding Workers' Compensation Insurance Coverage between General Contractors and Subcontractors.

(a) (No change.)

(1) (No change.)

(2) (No change.)

(3) (No change.)

(4) (No change.)

(5) (No change.)

(6) (No change.)

(b) (No change.)

(c) (No change.)

(1) (No change.)

(2) (No change.)

(d) The general contractor shall maintain the original and file a legible copy of the agreement with the general contractor's workers' compensation insurance carrier [~~and the Commission~~] within 10 days of the date of execution. An agreement is not considered filed if it is illegible or incomplete. If a general contractor and subcontractor enter into a written agreement in which the subcontractor assumes the responsibilities of an employer, as provided in the Texas Labor Code, §406.122(b) the general contractor shall provide a copy of the agreement to its carrier within 10 days of execution. After January 1, 1993, a general contractor who is a certified self-insurer shall file a copy of the agreement with the division [~~Division of Self-Insurance Regulation~~] within 10 days of the date of execution. Filing shall be made in the form and manner prescribed by the division. [~~Commission.~~]

(e) (No change.)

(f) (No change.)

§112.102. Agreements between Motor Carriers and Owner Operators.

(a) (No change.)

(b) (No change.)

(1) (No change.)

(2) (No change.)

(3) (No change.)

(4) (No change.)

(5) (No change.)

(c) (No change.)

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

(1) (No change.)

(2) (No change.)

(3) (No change.)

(4) (No change.)

(5) be filed with ~~[the commission in Austin and]~~ the insurance carrier of the motor carrier within 10 days of execution.

(e) (No change.)

(f) (No change.)

Subchapter C. Application to Certain Building and Construction Workers.

§112.201. Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers.

(a) (No change.)

(b) (No change.)

(1) (No change.)

(2) (No change.)

(c) An agreement made under subsection (b) of this section shall be filed in the form and manner prescribed by the division. [~~commission.~~]

(d) (No change.)

(1) (No change.)

(2) (No change.)

(3) (No change.)

(4) (No change.)

(5) (No change.)

(6) (No change.)

(e) (No change.)

(f) (No change.)

(1) (No change.)

(2) (No change.)

(g) [~~The hiring contractor shall file a legible copy of the agreement with the commission, in the form and manner prescribed by the Commission.~~] The hiring contractor must [~~also~~] maintain the original and file a legible copy of the agreement with

the hiring contractor's workers' compensation insurance carrier within 10 days of the date of execution. An agreement is not considered filed if it is illegible or incomplete.

(h) (No change.)

(i) (No change.)

(j) (No change.)

§112.202. Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers.

(a) (No change.)

(b) The agreement shall be filed in the form and manner prescribed by the division [~~Commission~~] and shall:

(1) (No change.)

(2) (No change.)

(3) (No change.)

(4) (No change.)

(5) (No change.)

(6) state that: "Once this agreement is signed, the subcontractor and the subcontractor's employees shall not be entitled to workers' compensation coverage from the hiring contractor unless a subsequent written agreement is executed, and filed according to division [~~Commission~~] rules, expressly stating that this agreement does not apply."

(c) (No change.)

(d) The hiring contractor shall maintain the original and ~~[file a legible copy of the agreement with the Commission in the form and manner prescribed by the Commission. The hiring contractor must also]~~ file a legible copy of the agreement with the hiring contractor's workers' compensation insurance carrier, if any, within 10 days of the date of execution. An agreement is not considered filed if it is illegible or incomplete.

(e) (No change.)

(1) (No change.)

(2) (No change.)

(f) An agreement signed under subsection (a) applies to each hiring agreement executed by the parties until the first anniversary of the date the agreement was filed with the hiring contractor's workers' compensation insurance carrier, unless a subsequent agreement is executed expressly stating that the agreement does not apply. ~~[All hiring contracts executed by the parties during the year after an agreement under subsection (a) of this section is filed are subject to that agreement, unless such contract expressly states that the agreement does not apply.]~~

CERTIFICATION.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued at Austin, Texas, on January 10, 2018.

X

Nicholas Canaday III
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Texas Department of Insurance,
Division of Workers' Compensation