

**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**

**1. INTRODUCTION.** The Texas Department of Insurance, Division of Workers' Compensation (division) adopts 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*. The amended sections are adopted without changes to the proposed text published in the January 26, 2018, issue of the *Texas Register* (43 TexReg 441). No request for a public hearing was submitted to the division.

The public comment period closed on February 26, 2018, and the division received written comments from one commenter. In response to written comments, the division made no changes to the proposed text.

In accordance with Government Code §2001.033, the division's reasoned justification for these rules is set out in this order, which includes the preamble. The following paragraphs set forth a detailed section-by-section description of, and reasoned justification for, all amendments to §§112.101, 112.102, 112.201, and 112.202.

**2. REASONED JUSTIFICATION.** In House Bill (HB) 2112, the 85th Legislature, Regular Session, amended and repealed certain reporting and notification requirements throughout the Labor Code, including Labor Code §406.144, *Election to Provide Coverage; Agreement*, and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 HB 2112 repealed §406.144(c), which required an agreement to be filed with the division, and amended §406.144(d) to require the hiring contractor to send a copy of the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 only 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 only 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 adoption includes substantially similar amendments to §112.101 and §112.102 to achieve 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 their 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 remove these 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 filed automatically with the division. Removal of this reporting requirement is consistent with the Labor Code changes in HB 2112, as well as other TAC changes. 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 adopted amendment is necessary to communicate that the agreement will no longer be filed automatically with the division, per the Labor Code changes in HB 2112, as well as other TAC changes.

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 adopted amendment is necessary to communicate that the agreement will no longer be filed automatically with the division, per the Labor Code changes in HB 2112, as well as other TAC changes.

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 adopted 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 directive that the agreement no longer be filed automatically with the division. 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.

### **3. SUMMARY OF COMMENTS AND AGENCY RESPONSE.**

**Comment:** Commenter recommended that the font size should be increased on DWC Forms 81, 82, 83, and 84; DWC Form-84 should be re-written in plain language; and, DWC Form-84 should be translated to Spanish.

#### **Division Response:**

The division appreciates the comment and notes that the commenter did not make a comment relating to the rule text, but instead relating to the division forms associated with this rule. The division agrees that the DWC Form-84 should be translated to Spanish. However, the division declines to make the other suggested changes to forms at this time.

### **4. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.**

#### **For:**

None.

#### **For, with changes:**

None.

#### **Against:**

None.

#### **Neither for nor against:**

Office of Injured Employee Counsel.

**5. STATUTORY AUTHORITY.** Amended §112.101 and §112.102 are adopted 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 filling date, unless a subsequent hiring agreement expressly states the joint agreement does not apply.

## **6. TEXT.**

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

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

- (1) be in writing;

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

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

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

(5) contain the signatures of both parties;

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

(b) The workers' compensation insurance coverage provided by the general contractor under the agreement shall take effect no sooner than the date on which the agreement was executed and deductions for the premiums shall not be made for coverage provided prior to that date.

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

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

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

(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 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 within 10 days of the date of execution. Filing shall be made in the form and manner prescribed by the division.

(e) The general contractor shall be required to give the subcontractor's employees the notice required under the Texas Labor Code, §406.005 when such an agreement is made.

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

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

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

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

(1) be in writing;

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

(3) contain the signatures of both parties;

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

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

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

(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) be in writing;

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

(3) contain the signatures of both parties;

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

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

(e) The workers' compensation insurance coverage provided by the motor carrier under the agreement shall take effect no sooner than the date on which the agreement was executed and deductions for the premiums shall not be made for coverage provided prior to that date.

(f) The motor carrier shall be required to give the owner operator's employees the notice required under the Texas Workers' Compensation Act, §406.005, when such an agreement is made.

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

(a) This section applies only to building and construction projects as provided by the Texas Labor Code, §406.142.

(b) An independent contractor and a hiring contractor, as defined in the Texas Labor Code, §406.141, may enter into a written agreement:

(1) to allow the hiring contractor to withhold the cost of workers' compensation insurance from the contract price; and

(2) to stipulate that, for the sole purpose of providing workers' compensation insurance, the hiring contractor will be the employer of the independent contractor and the independent contractor's employees.

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

(d) The agreement shall:

(1) be in writing;

(2) indicate whether the hiring contractor will make a deduction for the premiums;

(3) specify that the hiring contractor will be the employer of the independent contractor and the independent contractor's employees for the sole purpose of providing workers' compensation insurance;

(4) specify the location of the job sites subject to the contract and the agreement;

(5) contain the signatures of both parties; and

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

(e) The workers' compensation insurance coverage provided by the hiring contractor under the agreement shall take effect no sooner than the date on which the agreement was executed and deductions for the premiums shall not be made for coverage provided prior to that date.

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

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

and

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

(g) The hiring contractor must 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) A hiring contractor electing to provide workers' compensation insurance coverage through an agreement under subsection (b) of this section shall be deemed to have accepted the rights and responsibilities of an employer imposed under the Act as of the effective date of the workers' compensation insurance coverage.

(i) If an independent contractor makes an agreement under this rule, the employee of the independent contractor may elect to retain his common law rights as provided by the Texas Labor Code, §406.034.

(j) For purposes of the Texas Labor Code, §406.142, 20,000 square feet is measured on the outside perimeter of the structure.

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

(a) An independent subcontractor and a hiring contractor may enter into an agreement which states that the subcontractor is an independent contractor and is not an employee of the hiring contractor.

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

(1) be in writing;

(2) state that the subcontractor meets the qualifications of an independent contractor under the Texas Labor Code, §406.141(2);

(3) state that the subcontractor is an independent contractor and is not an employee of the hiring contractor;

(4) contain the signatures of both parties;

(5) indicate the date the agreement was made; and

(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 rules, expressly stating that this agreement does not apply."

(c) If a person who is covered by an independent contractor agreement signed under this section is found to be an employee of the hiring contractor, the person is covered under the hiring contractor's workers' compensation policy.

(d) The hiring contractor shall maintain the original and 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) If the agreement is made in compliance with subsections (a) through (d) of this section and a separate agreement has not been made in accordance with §112.201 of this title (relating to Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers):

(1) the subcontractor and the subcontractor's employees shall not be entitled to workers' compensation coverage from the hiring contractor; and

(2) the hiring contractor's workers' compensation insurance carrier shall not require premiums to be paid by the hiring contractor for coverage of the independent contractor or the independent contractor's employees, helpers, or subcontractors.

(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.

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

Issued at Austin, Texas, on \_\_\_\_\_, 2018.

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

The commissioner adopts amendments to §§112.101, 112.102, 112.201, and 112.202.

\_\_\_\_\_  
W. Ryan Brannan  
Commissioner of Workers' Compensation

COMMISSIONER'S ORDER NO. \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
**X**  
\_\_\_\_\_

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

COMMISSIONER'S ORDER NO. \_\_\_\_\_