Rulemaking Hearing Rules
of
The Tennessee Department of Commerce and Insurance
Insurance Division

Chapter 0780-1-81
Administration of Self Insurance Workers' Compensation Programs by Single Employers or Pools

Table of Contents

0780-1-81-.01 Purpose and Scope
0780-1-81-.02 Definitions
0780-1-81-.03 Written Agreement Necessary
0780-1-81-.04 Payment to Third Party Administrator
0780-1-81-.05 Maintenance of Information
0780-1-81-.06 Responsibilities of the Employer or Pool
0780-1-81-.07 Collection of Monies and Payments of Claims
0780-1-81-.08 Disclosure of Charges and Fees
0780-1-81-.09 Certificate of Authority
0780-1-81-.10 Grounds for Denial, Suspension, or Revocation of Certificate of Authority

Rule 0780-1-81-.01 Purpose and Scope.

The purpose of this Chapter is to regulate the person(s) administering workers' compensation benefits for employers that self-insure pursuant to T.C.A. §§ 50-6-405(b) and (c).

Authority: T.C.A. §§ 50-6-405(b), 50-6-405(c) and 50-6-405(h).

Rule 0780-1-81-.02 Definitions.

(1) "Affiliate" or "affiliated" means an entity or person who directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, a specified entity or person.

(2) "Commissioner" means the Commissioner of the Department of Commerce and Insurance.

(3) "Control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct and/or cause the direction of the management and/or policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or non-management services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by the Insurance Holding Company System Act, T.C.A. §§ 56-11-201, *et seq.*, that control does not exist in fact. The Commissioner may determine, after furnishing all persons in interest notice and an opportunity to be heard and making specific findings of fact to support the determination, that control exists in fact, notwithstanding the absence of a presumption to that effect or the filing of a disclaimer in like manner to T.C.A. § 56-11-205(k).

(4) "Employer" means a single employer that is self-insuring their workers' compensation liabilities under T.C.A. § 50-6-405(a) pursuant to T.C.A. §§ 50-6-405(a) and (b).

(5) "GAAP" means United States generally accepted accounting principles consistently applied.

(6) "Insurance producer" means a person who sells, solicits or negotiates a contract of insurance as those terms are defined in this Rule.

(7) "Insurer" means a person undertaking to provide workers' compensation insurance coverage through a company requiring a certificate of authority issued pursuant to T.C.A. § 56-2-205.

(8) "NAIC" means the National Association of Insurance Commissioners.

(9) "Negotiate" means the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance or plan of self-insurance concerning any of the substantive benefits, terms or conditions of the contract, provided that the person engaged in that act either sells insurance or obtains insurance coverage from insurers for the purchaser.

(10) "Person" means an individual or business entity.

(11) "Sell" means to exchange a contract of insurance or plan of self-insurance by any means, for money or its equivalent, on behalf of an insurer, employer, or pool.

(12) "Solicit" means attempting to sell insurance or a plan of self-insurance or asking or urging a person to apply for a particular kind of insurance or plan of self-insurance from a particular insurer, employer, or pool.

(13) "Third party administrator" means a person who directly or indirectly collects charges or premiums from, adjusts or settles claims, or provides loss control or account managing services in connection with workers' compensation insurance coverage offered or provided by a self-insured employer under T.C.A. §§ 50-6-405(a) and (b), or a self-insured pool under T.C.A. § 50-6-405(c), except any of the following:

(a) An insurance producer licensed to sell insurance coverage in this state, whose activities are limited exclusively to the sale of insurance;

(b) A person who adjusts or settles claims in the normal course of that person's practice or employment as an attorney at law and who does not collect charges or premiums in connection with workers' compensation insurance coverage;

(c) A person licensed as a managing general agent in this state, whose activities are limited exclusively to the scope of activities conveyed under such license;

(d) A self-insured employer under T.C.A. §§ 50-6-405(a) and (b), or a self-insured pool under T.C.A. § 50-6-405(c) which have been granted a certificate of authority by the Commissioner, as long as their activities are limited to their own self-insurance programs and do not perform such services for others;

(e) A third party administrator who is affiliated with an insurer, as defined in this Rule, and who only performs the contractual duties (between the third party administrator and the insurer) of a third party administrator for the direct and assumed insurance business of the affiliated insurer. The insurer is responsible for the acts of the third party administrator and is responsible for providing all of the third party administrator's books and records to the Commissioner, upon a request from the Commissioner;

(f) An employee of a licensed third party administrator who performs functions as part of their employment with the licensed third party administrator; and

(g) An administrator, as that term is used in Chapter 0780-1-54, appropriately licensed by the Commissioner that does not perform any of the acts set forth herein except the collection

of premium or charges in connection with the workers' compensation coverage by the pool in which the person acts an administrator.

(14) "Pool" means a self-insurance pool operating pursuant to T.C.A. § 50-6-405(c).

(15) "Workers' compensation benefits and/or insurance coverage" means the benefits intended to pay the liabilities that arise out of the requirements of T.C.A. § 50-6-405(a) for an employer's liability.

Authority: T.C.A. §§ 50-6-405(b), 50-6-405(c), 50-6-405(h), 56-6-101, *et seq.* and 56-6-501, *et seq.*

Rule 0780-1-81-.03 Written Agreement Necessary.

(1) No third party administrator shall act as such without a written agreement between the third party administrator and the employer or pool, and the written agreement shall be retained as part of the official records of the employer or pool and the third party administrator for the duration of the agreement and for five (5) years thereafter. The agreement shall contain all provisions required by this Chapter, except insofar as these requirements do not apply to the functions performed by the third party administrator.

(2) The written agreement shall include a statement of all of the duties that the third party administrator is expected to perform on behalf of the employer or pool.

(3) The employer, pool, or third party administrator may, with written notice, terminate the written agreement for cause as provided in the agreement. The employer or pool shall fulfill any and all lawful obligations with respect to workers' compensation benefits affected by the written agreement, regardless of any dispute between the employer or pool and the third party administrator.

Authority: T.C.A. §§ 50-6-405(b), 50-6-405(c) and 50-6-405(h).

Rule 0780-1-81-.04 Payment to Third Party Administrator.

The payment of claim payments forwarded by the employer or pool to the third party administrator shall not be deemed to have been paid to the employee until the payments are actually received by the employee, unless any different standard has been promulgated under the workers' compensation law by the Department of Labor and Workforce Development.

Authority: T.C.A. §§ 50-6-405(b), 50-6-405(c) and 50-6-405(h).

Rule 0780-1-81-.05 Maintenance of Information.

(1) A third party administrator shall maintain and make available to the employer or pool complete books and records of all transactions performed on behalf of the employer or pool. The books and records shall be maintained in accordance with prudent standards of insurance record keeping and shall be maintained by the third party administrator for a period of not less than five (5) years from the date of their creation, unless the agreement between the employer or pool and the third party administrator is terminated prior to the five (5) years.

(2) The Commissioner shall have access to all books and records maintained by a third party administrator for the purposes of examination, audit, and inspection. Pursuant to the Commissioner's role, applicable common law and statutory protections and privileges, and examination and investigative authority including those conferred under T.C.A. §§ 50-6-405, 56-1-409, and any other provisions of T.C.A. Title 56 or 50 that may be pertinent, any documents, materials, or other information in the possession or control of the Commissioner that are furnished by a third party administrator, insurance producer or an employee or agent thereof acting on behalf of the third party administrator, insurance producer, or obtained by the Commissioner shall be

confidential by law and privileged, shall not be subject to public inspection as provided in T.C.A. § 10-7-503, may be shielded from subpoena or eligible for a protective order under applicable laws and court procedure rules, and may be shielded from discovery or inadmissible as evidence in any private civil action. However, the Commissioner is authorized to use such documents, materials or other information in furtherance of any regulatory or legal action brought as part of the Commissioner's official duties. The costs of such examination, audit, or inspection, including such experts which the Commissioner deems necessary to contract, may be assessed, in the discretion of the Commissioner, to the third party administrator, employer, or pool.

(3) The Commissioner or any person who received documents, materials, or other information while acting under the authority of the Commissioner may resist under any applicable laws and court rules being called to testify in any private civil action concerning any confidential documents, materials, or information referenced in Paragraph (2) of this Rule. By this Rule, the Commissioner does not waive any right he or she may have to determine and assert the scope of confidentiality and privilege relating to particular documents, materials, or other information obtained or maintained under the Commissioner's authority.

(4) In order to assist in the performance of his or her duties, the Commissioner:

(a) May share documents, materials, or other information, including the confidential and privileged documents, materials, or information subject to Paragraph (2) of this Rule, with other state and federal agencies, provided that the recipient agrees in writing to maintain the confidentiality and privileged status of the document, material, or other information;

(b) May receive documents, materials, or information, including otherwise confidential and privileged documents, materials, or information, from the NAIC, its affiliates or subsidiaries and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the documents, materials, or information; and

(c) May enter into agreements governing sharing and use of information consistent with this Paragraph.

(5) To the extent allowed under applicable law, the Commissioner deems that no waiver of any applicable privilege or claim of confidentiality in the documents, materials, or information is intended or shall occur as a result of disclosure to the Commissioner under this Rule or as a result of sharing as authorized in Paragraph (4) of this Rule.

(6) Nothing in this Chapter shall prohibit the Commissioner from releasing documents relating to contested cases or examination reports or orders which are open to public inspection pursuant to T.C.A. § 10-7-503.

(7) The employer or pool shall own the records generated by the third party administrator pertaining to the employer or pool, however, the third party administrator shall retain the right to continuing access to books and records necessary to permit the third party administrator to fulfill all of its contractual obligations to employers or pools. Nothing in this Paragraph shall restrict the ability of a third party administrator and an employer or pool from entering into a contract which would allow the third party administrator to make copies of documents in their possession after the termination of their agreement with the employer or pool.

(8) If the employer or pool and the third party administrator cancel their agreement pursuant to Rule 0780-1-81-.03(3), notwithstanding the provisions of Paragraph (1) of this Rule, the third party administrator may by written agreement with the employer or pool transfer all records to a new third party administrator rather than retain them for five (5) years. In such cases, the new third

party administrator shall acknowledge, in writing, that it is responsible for retaining the records of the prior third party administrator as required in Paragraph (1) of this Rule.

Authority: T.C.A. §§ 50-6-405, 50-6-405(a)(2), 50-6-405(b), 50-6-405(c), 50-6-405(c)(4)(C), 50-6-405(h), 10-7-503(a), 10-7-504, 56-1-204, 56-1-408 through 409, 56-1-411 through 413, 56-6-120, 56-8-104(8), 56-8-107, 56-8-118, 56-44-105.

Rule 0780-1-81-.06 Responsibilities of Employer or Pool.

(1) If an employer or pool utilizes the services of a third party administrator, the employer or pool shall be responsible for determining the benefits, premium rates, and claims payment procedures applicable to the benefits and for securing reinsurance, stop loss insurance or excess coverage, if any. The rules pertaining to these matters shall be provided, in writing by the employer or pool to the third party administrator. The responsibilities of the third party administrator as to any of these matters shall be set forth in the written agreement between the third party administrator and the employer or pool.

(2) Nothing in this Chapter shall relieve an employer or pool of the ultimate responsibility for the competent administration and timely payment of workers' compensation benefits as required by T.C.A. §§ 50-6-205 and 56-8-104 and any rules promulgated thereunder.

Authority: T.C.A. §§ 50-6-405(b), 50-6-405(c), 50-6-405(h), 50-6-205, 56-8-102(3) and 56-8-104.

Rule 0780-1-81-.07 Collection of Monies and Payments of Claims.

(1) All monies collected by a third party administrator on behalf of or for an employer or pool, and the return of monies received from that employer or pool, shall be held by the third party administrator in a fiduciary capacity. The monies shall be immediately remitted to the person entitled to them or shall be deposited promptly in a fiduciary account established and maintained by the third party administrator in a federally or state insured financial institution. The written agreement between the third party administrator and the employer or pool shall provide for the third party administrator to periodically, but no less than quarterly, render an accounting to the employer or pool detailing all transactions performed by the third party administrator pertaining to the business underwritten by the employer or pool.

(2) If monies deposited in a fiduciary account have been collected on behalf of or for one or more employers or pools, the third party administrator shall keep records clearly recording the deposits in and withdrawals from the account on behalf of each employer or pool. The third party administrator shall keep copies of all the records and, upon request of an employer or pool, shall furnish the employer or pool with copies of the records pertaining to the deposits and withdrawals.

(3) All claims paid by the third party administrator from funds collected on behalf of or for an employer or pool shall be paid only on drafts, electronic transfer, or checks of and as authorized by the employer or pool.

(4) All third party administrators shall comply with the prompt pay standards set forth in both T.C.A. Title 50 and Title 56 for the payment of workers' compensation benefits.

Authority: T.C.A. §§ 50-6-405(b), 50-6-405(c), 50-6-405(h), 50-6-205, and 56-8-104.

Rule 0780-1-81-.08 Disclosure of Charges and Fees.

Third party administrators shall disclose to the employer or pool all affiliates of the third party administrator providing services to the employer or pool and any fees in addition to those paid to the third party administrator for such services.

Authority: T.C.A. §§ 50-6-405(b), 50-6-405(c) and 50-6-405(h).

Rule 0780-1-81-.09 Certificate of Authority.

(1) A person shall apply to be a third party administrator upon an application to be specified by the Commissioner and shall receive a certificate of authority or license from the Commissioner, prior to performing any function of a third party administrator in this state. It shall be unlawful for any person to operate in this state as a third party administrator without a certificate of authority or license.

(2) The application shall include or be accompanied by the following information and documents:

(a) All basic organizational documents of the applicant, including any articles of incorporation, articles of association, partnership agreement, trade name certificate, pool agreement, shareholder agreement and other applicable documents and all amendments to such documents;

(b) The bylaws, rules, regulations or similar documents regulating the internal affairs of the applicant;

(c) NAIC Biographical Affidavit for individuals who are responsible for the conduct of affairs of the applicant including: all members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholders or member holding directly or indirectly ten percent (10%) or more of the voting stock, voting securities or voting interest of the applicant; and any other person who exercises control or influence over the affairs of the applicant;

(d) Audited annual financial statements or reports for the two (2) most recent fiscal years that prove that the applicant has a positive net worth. If the applicant has been in existence for less than two (2) fiscal years, the application shall include financial statements or reports, certified by an officer of the applicant and prepared in accordance with GAAP, for any completed fiscal years, and for any month during the current fiscal year for which such financial statements or reports have been completed. The Commissioner reserves the ability to only consider assets that would be admitted by the NAIC's Accounting Practices and Procedures Manual when evaluating an applicant's financial statement. An audited financial/annual report prepared on a consolidated basis shall include a columnar consolidating or combining worksheet that shall be filed with the report and include the following:

1. Amounts shown on the consolidated audited financial report shall be shown on the worksheet;

2. Amounts for each entity shall be stated separately; and

3. Explanations of consolidating and eliminating entries shall be included. The applicant shall also include such other information as the Commissioner may require in order to determine the current financial condition of the applicant.

(e) A statement describing the business plan including information on staffing levels and activities proposed in this state and nationwide. The plan shall provide details setting forth the applicant's capability for providing a sufficient number of experienced and qualified personnel in the areas of claims adjustment, claims processing, record keeping and underwriting recommendations; and

(f) Such other pertinent information as may be required by the Commissioner.

(3) A third party administrator licensed or applying for licensure under this Chapter shall make available for inspection by the Commissioner copies of all contracts with insurers, employers, or pools or other persons utilizing the services of the third party administrator.

(4) A third party administrator licensed or applying for licensure under this Chapter shall make available for inspection by the Commissioner its accounts, records, and files for examination, and make its officers available to give information with respect to its affairs, as often as reasonably required by the Commissioner.

(5) The Commissioner may refuse to issue a certificate of authority or license if the Commissioner determines that the third party administrator, or any individual responsible for the conduct of affairs of the third party administrator is not competent, trustworthy, financially responsible or of good personal and business reputation, or has had an insurance or a third party administrator certificate of authority or license denied or revoked for cause by any jurisdiction, or if the Commissioner determines that any of the grounds set forth in Rule 0780-1-81-.10 exists with respect to the third party administrator.

(6) A certificate of authority or license issued under this Chapter shall remain valid, unless surrendered, suspended or revoked by the Commissioner, for a period of one (1) year.

(7) A third party administrator licensed or applying for licensure under this Chapter shall immediately notify the Commissioner of any material change in its ownership, control, or any other fact or circumstance affecting its qualification for a certificate of authority or license in this State.

(8) All third party administrators shall annually on or before the anniversary date of the granting of its certificate of authority renew its certificate of authority.

(9) A third party administrator that holds a license as a service company at the time of the effective date of this Chapter has until January 1, 2006, to obtain a certificate of authority under this Chapter.

Authority: T.C.A. §§ 50-6-405(b), 50-6-405(c), 50-6-405(h), 56-1-409 and 4-5-320.

Rule 0780-1-81-.10 Grounds for Denial, Suspension, or Revocation of Certificate of Authority.

(1) The certificate of authority or license of a third party administrator may be denied, suspended, or revoked if the Commissioner finds that the third party administrator:

(a) Has violated any lawful rule or order of the Commissioner or any provision of the insurance laws of this state specifically applicable to third party administrators;

(b) Is in an unsound financial or operational condition. The Commissioner, in evaluating the financial or operational condition of a third party administrator, may utilize the criteria contained in Chapter 0780-1-66. The Commissioner may consider such other factors in evaluating the financial or operational condition of a third party administrator deemed to be appropriate;

(c) Is using such methods or practices in the conduct of its business so as to render its further transaction of business in this state hazardous or injurious to insured persons or the public;

(d) Has failed to pay any judgment rendered against it in this state within sixty (60) days after the judgment has become final;

(e) Has refused to be examined or to make available its accounts, records and files for examination, or if any individual responsible for the conduct or affairs of the third party administrator, including members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholder or member holding directly or indirectly ten percent (10%) or more of the voting stock, voting securities or voting interest of the third party administrator; and any other person who exercises control or influence over the affairs of the third party administrator; has refused to give information with respect to its affairs or has refused to perform any other legal obligation as to an examination, when required by the Commissioner;

(f) Has, without just cause, refused to pay proper claims or perform services arising under its contracts or has, without just cause, caused covered employees to accept less than the amount due them or caused covered employees to employ attorneys or bring suit against the third party administrator or employer or pool to secure full payment or settlement of such claims;

(g) At any time fails to meet any qualification for which issuance of the certificate could have been refused had the failure then existed and been known to the Commissioner;

(h) If any of the individuals responsible for the conduct of its affairs, including members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholder or member holding directly or indirectly ten percent (10%) or more of its voting stock, voting securities or voting interest; and any other person who exercises control or influence over its affairs; has been convicted of, or has entered a plea of guilty or *nolo contendere* to, a felony without regard to whether adjudication was withheld;

(i) Is under suspension or revocation in another state; or

(j) Has failed to timely file its annual renewal application pursuant to Rule 0780-1-81-.09.

(2) The Commissioner may, in his or her discretion after making the finding required by T.C.A. § 4-5-320 that public health, safety or welfare imperatively requires emergency action, and without advance notice or hearing, immediately suspend the certificate of authority or license of a third party administrator if the Commissioner finds that one or more of the following circumstances exist:

(a) The third party administrator is insolvent or impaired;

(b) A proceeding for receivership, conservatorship, rehabilitation, or other delinquency proceeding regarding the third party administrator has been commenced in any state; or

(c) The financial condition or business practices of the third party administrator otherwise pose an imminent threat to the public health, safety, or welfare of the residents of this state.

(3) Any action by the Commissioner to suspend or revoke a certificate of authority pursuant to this Chapter shall be governed by the Uniform Administrative Procedures Act, compiled in T.C.A. §§ 4-5-101, *et seq.*

(4) The Commissioner may serve a notice or order in any action arising under this Chapter by registered or certified mail to the third party administrator at the address of record in the files of the Commissioner. Service in the manner set forth herein shall be deemed to constitute service

and reasonable notice to such third party administrator or applicant. The Commissioner may also serve notice of such action to all known employers or pools serviced by the third party administrator.

(5) Nothing in this Rule shall be deemed to create a private cause of action against a third party administrator.

Authority: T.C.A. §§ 50-6-405(b), 50-6-405(c), 50-6-405(h) and 4-5-320.

Legal contact and/or party who will approve final copy for publication:

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Signature of the agency or officers directly responsible for proposing and/or drafting these rules:

Tracey Gentry Harney

John F. Morris
Tracey Gentry Harney
Staff Attorneys

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Department of Commerce and Insurance, on this the 29 day of August, 2005.

Further, I certify that the provisions of T.C.A. § 4-5-222 have been fully complied with, that these rules are properly presented for filing, a notice of rulemaking hearing has been filed in the Department of State on the 29th day of October, 2004, and such notice of rulemaking hearing having been published in the November, 2004 issue of the Tennessee Administrative Register, and such rulemaking hearing having been conducted pursuant thereto on the 17th day of December, 2004.

Paula A. Flowers

Paula A. Flowers
Commissioner
Department of Commerce and Insurance

DENISE M. LEWIS
STATE OF TENNESSEE
NOTARY PUBLIC
WILSON COUNTY, TENN.

My Commission Expires MAR. 22, 2008

Subscribed and sworn to before me this the 29th day of August, 2005.

Denise M Lewis
Notary Public

My commission expires on the 22nd day of March, 2008.

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Paul G. Summers
Paul G. Summers
Attorney General and Reporter

The rulemaking hearing rules set out herein were properly filed in the Department of State on the 12 day of Sept., 2005, and will become effective on the 26 day of Nov., 2005.

Riley C Darnell
Riley C. Darnell
Secretary of State

By: _____

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