

No. **3959**

OFFICIAL ORDER
of the
TEXAS COMMISSIONER OF INSURANCE

Date: May 12, 2015

Subject Considered:

**AMENDMENTS TO THE
NATIONAL COUNCIL ON COMPENSATION INSURANCE
BASIC MANUAL, FORMS MANUAL, EXPERIENCE RATING PLAN MANUAL,
AND STATISTICAL PLAN MANUAL
FOR WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE
NCCI FILING ITEM NO. 05-TX-2014 and NCCI FILING ITEM NO. 06-TX-2014**

The commissioner of insurance considers amendments to the National Council on Compensation Insurance *Basic Manual for Workers Compensation and Employers Liability Insurance* (NCCI's *Basic Manual*), the *Forms Manual of Workers Compensation and Employers Liability Insurance* (NCCI's *Forms Manual*), and the *Statistical Plan Manual for Workers Compensation and Employers Liability Insurance* (NCCI's *Stat Plan*) proposed in *Item 05-TX-2014—Revisions to Basic Manual Rules, Forms, and Endorsements for Professional Employer Organizations* (TDI ECase No. 7643).

In addition, the commissioner of insurance considers amendments to the *Experience Rating Plan Manual for Workers Compensation and Employers Liability Insurance* (NCCI's *ER Plan Manual*) proposed in *Item 06-TX-2014—Revisions to Experience Rating Plan Manual for Professional Employer Organizations* (TDI ECase No. 7643).

After considering the filings, the commissioner adopts the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Senate Bill 1286, 83rd Legislature, Regular Session (2013) revised Labor Code Chapter 91 by
 - changing the name of Chapter 91 from “Staff Leasing Services” to “Professional Employer Organizations” and establishing new definitions
 - requiring a professional employer services agreement between a PEO and a client

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- allowing the client to choose to maintain workers' compensation coverage for its covered employees or to cover them under the PEO's policy, and
 - making an individual who is a client's executive employee (as described in Labor Code Section 406.097 and Rule 2-E) a covered employee of the PEO who is treated as an executive employee for premium calculation and classification purposes, unless the PEO and the client expressly agree in the professional employer services agreement that the individual is not a covered employee.
2. NCCI filed *Item 05-TX-2014* on December 10, 2014, to revise the rules, forms, and endorsements for PEOs in Texas. A copy of the full text of the filing and related exhibits has been on file with the TDI chief clerk since then. The filing and exhibits are incorporated by reference into this order.
 3. NCCI filed *Item 06-TX-2014* on December 16, 2014, to revise the experience rating modification rules for PEOs in Texas. A copy of the full text of the filing and related exhibits has been on file with the TDI chief clerk since then. The filing and exhibits are incorporated by reference into this order.
 4. On February 2, 2015, TDI published notice of the filings and notice of a public hearing on the TDI website at www.tdi.texas.gov/rules/2014/nccimanual.html, and distributed notice of the filing to electronic news subscribers.
 5. TDI held a public hearing on the filings at 1:30 p.m., February 20, 2015, at the William P. Hobby, Jr. building in Austin, Texas under Docket No. 2772.
 6. During the public hearing, TDI staff recommended that Rule 3-D-3-b, concerning the treatment of a client's executive employees, be clarified by amending the opening sentence to read:

An individual who is the client's executive employee, as described in Texas Labor Code, Section 406.097 and Rule 2-E, is a covered employee of the PEO and is treated as an executive employee for premium calculation and classification purposes, unless the PEO and the client expressly agree in the professional employer services agreement that the individual is not a covered employee.

7. Additionally, during the public hearing, TDI staff recommended that a Texas exception to NCCI's *Basic Manual* is needed for Rule 1-D-3-f, in addition to amending the title of the rule from "Employee Leasing, Labor Contractors and Temporary Labor Services" to "Professional Employer Organizations," as the filing proposed. The Texas exception for this rule should read:

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(1) The client's covered employees must be classified the same as direct employees of the client performing the same or similar duties; (2) If the client has no direct employees performing the same or similar duties, the covered employees are classified as if they were direct employees of the client.

8. TDI received comments from three commenters during the comment period.
9. A commenter suggested clarifying Rule 3-D-3-b by adding a comma to fully separate an independent clause to clarify the rule.

TDI appreciates the comment, and has reworded the sentence. See FOF 6.

10. A commenter suggested that Rule 3-D-3-b(1) incorrectly limits the circumstances when executive employees of the client are considered covered employees, and suggested that the wording be amended to make the correction.

TDI appreciates the comment, and has amended the wording to state that if the client's executive employees are covered employees, they may be excluded from the PEO's policy in specific situations.

11. A commenter recommended that Rule 3-D-3-b(1)(b) be deleted as it is superfluous.

TDI appreciates the comment, but declines to make the recommended change. Including this section in the rule makes this rule consistent with other rules in NCCI's *Basic Manual* that pertain to executive employees of entities other than PEOs.

12. A commenter recommended deleting the requirement to name a client's executive employee that is being excluded from coverage on the Texas Professional Employer Organization (PEO) Executive Employee Exclusion Endorsement (WC 42 03 14), Exhibit 8 of *Item 05-TX-2014*.

TDI appreciates the comment, but, for the following reasons, declines to make the recommended change.

- It is important for the PEO's carrier to know which of the client's executive employees are excluded from coverage for premium calculation and coverage determination.
- Naming the executive employees that are excluded on the endorsement accomplishes that.

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- Having coverage information for the client's executive employees is helpful to TDI-Division of Workers' Compensation (TDI-DWC) in determining which carrier is responsible for the client's executive employees in the event of a claim.
- Executive employees have coverage options under Labor Code Section 406.097 that other employees do not have.
- Naming the client's executive employees excluded from coverage is consistent with other rules in NCCI's *Basic Manual* that pertain to executive employees of entities other than PEOs.

13. A commenter recommended changing Rule 3-D-3-d(2) to require that the PEO notify its carrier within 10 business days, rather than the proposed three days, of termination of coverage for a client due to an amendment to or termination of a professional employer services agreement with a client, and for the carrier to then notify TDI-DWC of the termination. The commenter indicated that the industry practice is for the PEO to notify its carrier on a weekly basis of all client terminations and for the carrier to then notify TDI-DWC.

TDI appreciates the comment and has changed the number of days' notice from three days to 10 calendar days to be more consistent with industry practice, rather than 10 business days.

14. A commenter was not certain if the endorsements listed in Rule 3-D-3-e are to be used at the discretion of the carrier or if they are mandated in each applicable instance.

TDI appreciates the comment and has amended the language to more clearly state that the carrier must attach the endorsements, when applicable.

15. A commenter indicated that the first time the Texas Professional Employer Organization (PEO) Executive Employee Inclusion Endorsement (WC 42 03 13), Exhibit 7 of *Item 05-TX-2014*, is mentioned is in the chart of endorsements found in Rule 3-D-3-e. The commenter suggested that if this endorsement is required to be used, there should be a rule requiring its use.

TDI appreciates this comment and has amended the language in Rule 3-D-3-e. To be consistent and to clarify the requirements for the endorsements, TDI has made the following changes. None of these changes imposes an additional cost or makes the rule affect additional people.

- TDI amended Rule 3-D-3-a(4) to require that the Texas Covered Employee Exclusion Endorsement for Policy Covering Direct Employees of a Client (WC 42 03 12), Exhibit 6 of *Item 05-TX-2014*, be attached to the client's policy to exclude coverage for the client's covered employees that are covered by the PEO's policy.

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- TDI amended Rule 3-D-3-b(3) to require that the Texas Professional Employer Organization (PEO) Executive Employee Inclusion Endorsement (WC 42 03 13), Exhibit 7 of *Item 05-TX-2014*, be attached to the PEO's policy, naming the executive employees covered.
- TDI amended Rule 3-D-4-a(2) to require that the Texas Professional Employer Organization (PEO) Client Endorsement (WC 42 03 16), Exhibit 10 of *Item 05-TX-2014*, be attached to the client's policy to provide coverage for the covered employees of the client.
- TDI added Rule 3-D-4-a(3) to require that the Texas Advance Notice of Cancellation to the Professional Employer Organization (PEO) (WC 42 03 15), Exhibit 9 of *Item 05-TX-2014*, be attached to the client's policy, to require that the carrier provide advance notice to the PEO of not less than 10 days before cancellation of the client's policy.

16. Two commenters suggested several changes to the Texas Professional Employer Organization (PEO) Endorsement (WC 42 03 11), Exhibit 5 of *Item 05-TX-2014*, to more clearly reflect the coemployment relationship between the PEO and the client for covered employees.

TDI appreciates these comments and has changed the wording in the first, third, and fourth paragraphs of the endorsement as suggested by the commenters to clarify the coemployment relationship between the PEO and the client for covered employees.

17. Two commenters suggested a change to the Texas Covered Employee Exclusion Endorsement for Policy Covering Direct Employees of a Client (WC 42 03 12), Exhibit 6 of *Item 05-TX-2014*, to more clearly reflect the coemployment relationship between the PEO and the client for covered employees. One of the commenters also suggested omitting the last sentence of the endorsement.

TDI appreciates these comments and has changed the wording in the first sentence of the last paragraph of the endorsement as suggested. However, TDI declines to delete the last sentence of the paragraph because that sentence clarifies that the direct employees of the client are covered under the policy. To avoid confusion, TDI has moved the last sentence to a separate paragraph of the endorsement.

18. Two commenters suggested a change to the Texas Professional Employer Organization (PEO) Executive Employee Inclusion Endorsement (WC 42 03 13), Exhibit 7 of *Item 05-TX-2014*, to clarify that the endorsement must be attached to the policy, if applicable, and to more clearly reflect the coemployment relationship between the PEO and the client for covered employees.

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TDI appreciates these comments and has changed Rule 3-D-3-b(3) to require that the endorsement be attached, if applicable. See FOF 15. In addition, TDI has amended the wording of the endorsement as the commenter suggested.

19. A commenter suggested a change in the wording of the Texas Professional Employer Organization (PEO) Executive Employee Exclusion Endorsement (WC 42 03 14) to more clearly reflect the coemployment relationship between the PEO and the client for covered employees. In addition, the commenter suggested a change in the wording of the endorsement to clarify that a carrier may have the option to permit an executive employee with less than 25 percent equity ownership in the client to be excluded from the PEO's policy.

TDI appreciates the comment. TDI has amended the wording of WC 42 03 14 as the commenter suggested. TDI has also amended the language in the last paragraph of the endorsement to clarify when the client's executive employees can be excluded from coverage.

20. A commenter supported the approval of *Item 05-TX-2014* and *Item 06-TX-2014*.

TDI appreciates the commenter's support.

21. A commenter generally supported the proposed changes to the rules in each filing. However, with regard to *Item 06-TX-2014*, the commenter suggested that a change be made to Rule 5-A-2-b(1) and (2) to be consistent with Rule 5-A-2-a, when describing the experience rating modification that applies to a client that terminates a professional employer services agreement with one PEO and immediately enters an agreement with a successor PEO.

TDI appreciates the comment, but declines to make the change. Rule 5-A-2-b(1) and (2) describes the experience rating modification that applies to a client on termination of an agreement with one PEO when the client immediately enters an agreement with a successor PEO. Rule 5-A-2-a describes the experience rating modification that applies to a client in calculating workers' compensation premium when the client first enters into an agreement with a PEO. These are two completely different situations, and different rules apply to each situation. TDI does agree that these rules are not consistent with each other, but the rules are not intended to be consistent.

22. A commenter recommends adding language to Texas Professional Employer Organization (PEO) Endorsement (WC 42 03 11), Exhibit 5 of *Item 05-TX-2014*, and Texas Professional Employer Organization (PEO) Client Endorsement (WC 42 03 16), Exhibit 10 of *Item 05-TX-2014*, to clarify that the policy provides coverage for bodily injury to covered employees.

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TDI appreciates this comment, but declines to make the change. The workers' compensation policy language clearly states that the policy does provide coverage for bodily injury by accident and bodily injury by disease, and that bodily injury includes resulting death. For this reason, the additional language is not necessary in these endorsements.

23. NCCI amended filing *Item 05-TX-2014* to reflect the changes recommended by TDI as a result of the comments received on the filing.

SUMMARY OF CHANGES FOR *ITEM 05-TX-2014* AS AMENDED AND *ITEM 06-TX-2014*

1. *Item 05-TX-2014* changes NCCI's Basic Manual Rule 3-D by
 - amending the title from "Employee Leasing Arrangements" to "Professional Employer Organizations"
 - harmonizing the definitions in the rule with the definitions in SB 1286
 - clarifying how the classification code is determined for the client's covered employees
 - requiring the client and the PEO to specify in the professional employer services agreement whether the parties have elected to obtain coverage for the client's covered employees, and if so, which party will maintain the coverage
 - clarifying the coemployment relationship between the PEO and the client throughout the rules and endorsements
 - if the client maintains coverage for its covered employees (client policy basis):
 - requiring the client's policy to provide coverage for its covered employees and direct employees, if any, under one policy
 - requiring the PEO to maintain separate payroll records and job descriptions of covered employees for each client and to furnish those records to the client's carrier on request, and
 - setting forth the carrier's responsibilities in making the final payroll audits
 - establishing requirements if the policy is canceled or nonrenewed when a PEO's policy maintains coverage for the client's covered employees (PEO policy basis)
 - reiterating that an individual who is the client's executive employee, as described in Labor Code Section 406.097, is a covered employee of the PEO and is treated as an executive employee for premium calculation and classification purposes, unless the PEO and the client

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- expressly agree in the professional employer services agreement that the individual is not a covered employee
- providing that even if the professional employer services agreement states that the client's executive employees are covered employees, they may be excluded from the PEO's policy or the client's policy under specific situations
 - specifying the client's notification requirements when the client enters into a professional employer services agreement during its policy period
 - stating the purpose of each PEO endorsement, and requiring that the appropriate PEO endorsement be attached to the policy, when applicable
 - requiring the PEO's carrier to provide to the client's prospective carrier the PEO's experience rating modification in effect at the time the professional employer services agreement is terminated
 - specifying the notice requirements of the PEO and its carrier if there is an amendment to or termination of a professional employer services agreement with a client, and
 - specifying that claim information must be provided by the PEO to the client on request and identifying the time frame and method of delivery of that information.
2. *Item 05-TX-2014* also withdraws the following forms and endorsement from NCCI's *Forms Manual*:
- Employee Provider (EP-1B and EP-1C) forms, and
 - Texas Employee Provider Client Company Endorsement (WC 42 04 06 D).
3. *Item 05-TX-2014* also establishes the following endorsements in NCCI's *Forms Manual*:
- Texas Professional Employer Organization (PEO) Endorsement (WC 42 03 11), Exhibit 5 of the filing, which must be attached to each policy written on a PEO policy basis. This endorsement provides coverage for covered employees of a client under the PEO's policy.
 - Texas Covered Employee Exclusion Endorsement for Policy Covering Direct Employees of a Client (WC 42 03 12), Exhibit 6 of the filing, which is attached to a client's policy that covers its direct employees, and excludes coverage from the client's policy for covered employees under a professional employer services agreement between the client and a PEO.
 - Texas Professional Employer Organization (PEO) Executive Employee Inclusion Endorsement (WC 42 03 13) Exhibit 7 of the filing, which is attached to a PEO's policy to provide coverage to some or all of the executive employees of the client listed on the endorsement. A separate endorsement is required for each client.
 - Texas Professional Employer Organization (PEO) Executive Employee Exclusion Endorsement (WC 42 03 14), Exhibit 8 of the filing, which is attached to the PEO's policy to exclude coverage

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- for some or all of the client's executive employees. A separate endorsement is required for each client.
- Texas Advance Notice of Cancellation to the Professional Employer Organization (PEO) (WC 42 03 15), Exhibit 9 of the filing, which is attached to the client's policy that is covering direct employees of the client and its covered employees. The endorsement requires the carrier to provide advance notice to the PEO of not less than 10 days before cancellation of the client's policy.
 - Texas Professional Employer Organization (PEO) Client Endorsement (WC 42 03 16), Exhibit 10 of the filing, which is attached to the client's policy to provide coverage for the client's covered employees.
4. *Item 05-TX-2014* also amends Part 3, Item F of NCCI's *Stat Plan* to indicate the unit report must be reported with an E in the Employee Leasing Code field for a PEO policy. In addition, the exposure of covered employees must be reported separately when
- the PEO provides coverage for a client's covered employees, or
 - the client's experience rating modification is applicable under the Texas rules of NCCI's *Basic Manual* and NCCI's *ER Plan Manual*.
5. *Item 05-TX-2014* requires that only unit reports for PEOs are allowed to submit multiple instances of a class code with different exposure and different experience rating modification factors within the same split.
6. *Item 06-TX-2014* amends NCCI's *ER Plan Manual* Rule 5-A by stating which experience rating modification applies
- when a PEO maintains coverage for the covered employees (PEO policy basis)
 - on termination of an agreement between the PEO and a client (PEO policy basis)
 - when the client maintains the coverage for its covered employees and direct employees (client policy basis), and
 - on termination of an agreement between the PEO and a client (client policy basis).

CONCLUSIONS OF LAW

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1. The commissioner has jurisdiction over this matter under Insurance Code Article 5.96 and Sections 2051.201, 2052.002, and 36.001.
2. Commissioner's Order No. 3142, dated March 21, 2014, established a procedure for the commissioner to consider changes to NCCI's manuals: 1) NCCI makes a filing; 2) TDI publishes notice of the filing on the TDI website and distributes notice of the filing to subscribers to TDI's electronic news, with at least a 30-day period for interested persons to submit comments or request a hearing; and 3) the commissioner issues an order approving the filing, approving the filing with changes, or rejecting the filing.
3. TDI gave proper and timely notice in compliance with Commissioner's Order No. 3142.
4. Amending NCCI's *Basic Manual*, NCCI's *Forms Manual*, and NCCI's *Stat Plan* as *Item 05-TX-2014* proposes is reasonable, and is consistent with Texas workers' compensation statutes and rules.
5. Amending NCCI's *ER Plan Manual* as *Item 06-TX-2014* proposes is reasonable, and is consistent with Texas workers' compensation statutes and rules.

The commissioner approves NCCI's amended filing *Item 05-TX-2014—Revisions to Basic Manual, Rules, Forms, and Endorsements for Professional Employer Organizations* with changes, and NCCI's amended filing *Item 06-TX-2014—Revisions to Experience Rating Plan Manual Rules for Professional Employer Organizations*, for policies with effective dates on or after 12:01 a.m., July 1, 2015.



David C. Mattax
Commissioner of Insurance