

SUBCHAPTER G. WORKERS' COMPENSATION INSURANCE
DIVISION 1. SALE OF SUBSTITUTES TO WORKERS' COMPENSATION INSURANCE
28 TAC §5.6302

INTRODUCTION. The Texas Department of Insurance (TDI) proposes to repeal 28 TAC §5.6302, relating to Sale of Substitutes to Workers' Compensation Insurance. Section 5.6302 implements Labor Code §406.052 and Insurance Code §§2301.001, 541.051, and 1701.055. TDI also proposes new 28 TAC §5.6302, relating to required disclosures for plans or coverages that are not workers' compensation insurance, to replace the repealed rule.

The repeal and new section are warranted because stakeholders are concerned that the rule, which was last amended in the early 1990s, is overly broad and applies to insurance coverages that are unlikely to be misinterpreted as workers' compensation coverage. Stakeholders are also concerned that the disclosure statements in the current section are outdated.

EXPLANATION. Repealing §5.6302 is warranted because insurers are currently required to include a disclosure statement in documents that are covered by the language of the rule, even though some of those documents are unlikely to be confused with workers' compensation coverage.

New §5.6302 more accurately identifies the coverages that must include the disclosure statements, which allows insurers to delete unneeded language from some documents.

The new rule requires that the disclosure to employers also be included on policy applications so that employers have early notice that the product is not workers' compensation.

The new rule also revises required disclosures so that they are more easily understood.

Labor Code §406.052 permits an employer that is not required to have workers' compensation insurance coverage and that has elected not to obtain workers' compensation insurance coverage to buy insurance coverage for certain employment-related risks if the insurance is not represented to any person as workers' compensation insurance coverage.

Insurance coverage permitted by Labor Code §406.052 is subject to regulation under Insurance Code §2301.001, which authorizes the Commissioner of Insurance to regulate certain property and casualty insurance forms to ensure that they are not unjust, unfair, inequitable, misleading, or deceptive.

Insurance coverage permitted by Labor Code §406.052 is also regulated by Insurance Code §541.051, which prohibits unfair methods of competition and unfair or deceptive practices in the advertisement or representation of terms, benefits, or advantages of an insurance policy; and §1701.055, which prohibits a life or health insurance policy form containing a provision, title, or heading that is unjust, encourages misrepresentation, or is deceptive.

The current §5.6302 was published in the *Texas Register* at 8 TexReg 3225 and became effective on September 19, 1983. This section requires that an unnecessarily broad range of insurance policies include prescribed language to inform an employer that the policy is not workers' compensation insurance coverage. The rule also prescribes language to be included in certificates of coverage distributed to employees to inform them that they are not covered by a workers' compensation insurance policy.

Proposed new §5.6302 limits the disclosure requirements to insurance products that can reasonably be mistaken for workers' compensation insurance coverage. Insurance products that specifically exclude coverage for occupational injuries, disease, or deaths, for instance, will not be required to include the disclosure. The new rule will:

- clarify that an employee benefit plan cannot be represented as workers' compensation insurance coverage;
- revise for clarity the required protective disclosures for advertisements, marketing, applications, and policies or evidences of coverage; and
- require the disclosure statement to employers to be printed on the first page of an application for coverage.

The proposal gives insurers two years to bring affected documents into compliance with the rule. After the rule's effective date, documents subject to the rule that are filed with TDI because of an insurer's business needs must comply with the rule. By April 1, 2022, all previously approved forms subject to the rule and not updated before that date must be refiled for approval in compliance with the rule.

The current rule remains applicable to existing documents until they are amended and filed with TDI or until April 1, 2022, whichever comes first. Otherwise, insurers are not required to update documents that have already been issued.

TDI received comments at a stakeholder meeting on May 11, 2018, and received comments on an informal draft posted on TDI's website on April 27, 2018. TDI considered those comments when drafting this proposal.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Doug Danzeiser, director, Life and Health Lines Office, Regulatory Policy Division, has determined that for each year of the first five years the proposed new rule is in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering §5.6302, other than that imposed by the statute. This determination was made because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Mr. Danzeiser does not anticipate that the new rule will cause any measurable effect on local employment or the local economy.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years proposed new §5.6302 is in effect, Mr. Danzeiser expects that the enforcement and administration of this proposal will have the public benefit of:

- ensuring that TDI's rules conform to Labor Code §406.052 and Insurance Code Code §§2301.001, 541.051, and 1701.055;
- employers and employees getting disclosures in language that will more clearly tell them that this coverage is not workers' compensation;
- employers more likely understanding that they may be sued by an employee that suffers an occupational injury or disease; and
- employees more likely understanding that they may not be covered by workers' compensation insurance.

Mr. Danzeiser expects that proposed new §5.6302 may result in potential compliance costs for insurers as described below. But TDI has drafted this proposal to maximize public benefits consistent with the authorizing statutes while mitigating insurer costs.

Some insurers will realize a cost savings from the proposed new rule because they will no longer be required to include disclosures on policies or coverages that do not provide benefits to employees for occupational injuries, diseases, or deaths; do not provide employers' liability coverage; and do not indemnify employers without workers' compensation insurance coverage for all or part of the costs of occupational injuries, diseases, or deaths. Nor will they be required to include disclosures in advertisements or marketing materials for these products.

Mr. Danzeiser anticipates that because changes will be phased in over two years, the proposed new rule will impose only minimal costs on insurers required to comply with the rule. Insurers will be able to revise affected documents any time they are refiled with TDI after the rule's effective date, so long as they comply by April 1, 2022.

TDI cannot estimate with specificity the total costs to insurers to comply with the new rule because many of the factors involved are not quantifiable. TDI anticipates that affected insurers will incur some additional labor costs (either employee or independent contractor) to insert the revised disclosure into its documents and materials to comply with the proposed new rule. Insurers may use a variety of personnel to input the revised language as required by this proposal. TDI has identified the possible types of employee positions needed to update an insurer's forms and the median wages costs for these positions.

To calculate potential labor costs, TDI used the 2017 median monthly salaries from the Texas Wages and Employment Projections database developed and maintained by the Labor Market and Career Information Development Department of the Texas Workforce Commission at www.texaswages.com/WDAWages. Information on median wages in other states may be obtained directly from the federal Bureau of Labor Statistics website at www.bls.gov/oes/current/oes_nat.htm. The potential employee positions and their median hourly salaries in Texas are as follows:

- an administrative assistant: \$16.08;
- an advertising manager: \$45.33;
- a computer programmer: \$39.72;
- a compliance officer: \$35.85;
- a marketing specialist: \$33.76; and
- web developers: \$33.01.

TDI anticipates that it will take between one and 20 staff hours to add the revised disclosure into the insurers' applications, policies, and advertising and marketing materials and between one and 50 staff hours to revise electronic systems and web pages. Insurers may calculate the total cost of labor for each category by multiplying the number of estimated hours for each cost component by the median hourly wage for each category of labor.

Insurers may incur costs for printing, copying and mailing their form filings to TDI. Some insurers will incur filing fees. TDI expects approximately 330 accident and health-related filings and 427 property and casualty filings each year from insurers that would be required to comply with the proposed rule. TDI is unable to determine how many of these forms will not have revisions made before the compliance date. Individual major medical health insurance forms are generally refiled each year under the Affordable Care Act; the cost of each filing is \$100. Those forms will need to comply with the new rule when they are filed with TDI, but the cost to refile those forms is a result of the federal law, rather than of this rule. Of the remaining forms that may not have revisions made before the compliance date, accident and health insurers will incur a filing fee of \$100 for a form that is subject to review and approval, or a \$50 filing fee for a form that is exempt from review, as required by Insurance Code §1701.053. There are no filing fees for property and casualty forms. All insurers submitting their forms electronically through the SERFF system will incur \$13.50 per transaction or may buy a block of transactions and pay a lower fee per transaction. An insurer that mails a form filing to TDI will incur mailing costs.

TDI cannot provide specific printing costs since some insurers have in-house printing and others use outside printing companies. For example, some insurers may have their forms printed commercially and in bulk, which usually results in lower per-page costs. Printing costs will also vary depending on the type and weight of paper used, whether the print is black and white or if color is used, and whether the forms will be

provided electronically. TDI estimates that the cost of printing or copying is between \$.08 and \$.12 per page. TDI anticipates that because the rule includes a delayed compliance date, most insurers will be able to use up in-stock forms.

TDI estimates the average price of a standard business-size envelope is between \$.07 and \$.17, and a catalog-size envelope is between \$.31 and \$.40. The United States Postal Service charges \$.55 to mail a one-ounce metered domestic first-class letter. The price of each additional ounce, up to three-and-a-half ounces, is \$.15. The price to mail a domestic first class large envelope is \$1.00 for the first ounce and \$.15 for each additional ounce. Insurers' mailing costs will vary depending on the number of forms they are mailing and on the size of the envelopes they use.

In the April 27, 2018, informal posting of this rule, and the May 11, 2018, informal stakeholder meeting, TDI sought input from industry on their estimated costs to comply with the informal draft. TDI did not get comments that provided specific costs, but one stakeholder stated that considerable resources would be required to make changes to policy forms earlier than January 1, 2020. Another stakeholder stated that the changes will likely require every nonsubscriber industry insurer and service provider, and most employer injury-benefit programs, to incur substantial work hours and other internal and external costs. Another stakeholder asserted that the range of coverages subject to the rule is overly broad and is burdensome for industry to comply with.

Based on the comments received on the informal draft rule, and to help mitigate the costs associated with this proposal, TDI has revised the disclosures' language to allow companies to delay making the required changes until otherwise filing or refiling affected documents or materials, so long as they comply by April 1, 2022.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed new §5.6302 may have an adverse economic effect or a

disproportionate economic impact on small or micro businesses. Rural communities will not be affected by the rule. The cost analysis in this proposal's Public Benefit and Cost Note also applies to these small and micro businesses. TDI estimates that the proposed new rule may affect approximately 53 small or micro businesses.

The proposed new §5.6302 applies more narrowly, which will reduce the burden on regulated persons that do not solicit or sell policies or create advertising or marketing materials for products subject to the rule. Insurance products are excluded if they do not provide benefits to employees for occupational injuries, diseases, or deaths; do not provide employers' liability coverage; and do not indemnify employers without workers' compensation insurance coverage for all or part of the costs of occupational injuries, diseases, or deaths. Some regulated persons will have fewer costs because they will not need to include the disclosures on specifically excluded coverages.

The revised disclosures will strengthen consumer protections meant to ensure that employers do not buy a plan that they believe is workers' compensation insurance coverage or that they believe is an acceptable substitute for workers' compensation insurance coverage.

TDI considered the following alternatives to minimize adverse impact on small and micro businesses while accomplishing the proposal's objectives:

- (1) not proposing repeal and replacement of §5.6302;
- (2) exempting small or micro businesses from the requirement to update the language in the required disclosures;
- (3) not requiring insurers to update documents that have already been issued; and
- (4) not requiring insurers to update documents until they are filed or refiled with TDI, so long as they comply by April 1, 2022.

TDI has determined that the first two alternatives listed above would not accomplish the objectives of §5.6302 and would not be consistent with protecting the

health, safety, and environmental and economic welfare of the state. The proposed rule has incorporated the third and fourth alternatives.

(1) Not proposing repealing and replacing §5.6302. The proposed rule's language more precisely identifies the coverages affected to reduce the burden on regulated persons that do not solicit or sell policies or create advertising or marketing materials for certain products. Products are excluded if they do not provide benefits to employees for occupational injuries, diseases, or deaths; do not provide employers' liability coverage; and do not indemnify employers without workers' compensation insurance coverage for all or part of the costs of occupational injuries, diseases, or deaths.

The revised disclosures strengthen consumer protections by ensuring that Texas employers do not buy and enroll their employees in a plan that they believe is workers' compensation insurance coverage or that they believe is an acceptable substitute for workers' compensation insurance coverage without fully understanding the product they are buying.

The revised disclosures also let consumers know that an employee, or a person entitled to receive a death benefit, may sue an employer if the employee suffers an occupational injury, disease, or death.

The proposed rule applies more clearly to only those coverages that may be misrepresented as workers' compensation insurance. Without the proposed new rule, the existing rule would remain in place and the administrative burden it imposes on regulated persons would continue.

(2) Exempting small or micro businesses from the requirement to update the disclosures' language. TDI considered allowing small or micro businesses to continue using the current disclosures or otherwise exempting them from the requirements of the rule.

TDI rejected this alternative because allowing unequal standards could harm Texas employers and employees if an unscrupulous person represented a substitute policy as workers' compensation insurance coverage or did not tell employers that they were not applying for a workers' compensation insurance policy.

The disclosures will let employers know that the policy they are considering buying is not workers' compensation insurance coverage. The disclosures will tell employers what can happen if they do not have workers' compensation insurance coverage, and will alert employers that they can be sued by an employee who suffers an occupational injury or disease, or by a person entitled to receive a death benefit.

The disclosures will also let employees know that they can ask whether their employer has bought workers' compensation insurance coverage. It lets them know that if their employer has not bought workers' compensation insurance coverage, they may have the right to sue the employer for an injury or illness resulting from a work-related event, or a person entitled to receive a death benefit might have a right to sue the employer if the employee's death. The disclosures will be written in plain language to make them easier to understand. Since the current language does not meet these standards, TDI also rejected the alternative of exempting small or micro businesses.

(3) Not requiring insurers to update documents that have already been issued. The proposed rule excuses insurers from replacing forms already issued. By doing this, TDI has reduced the potential cost impact of printing and mailing new documents. TDI has incorporated this alternative in the proposed rule.

(4) Delaying and phasing in implementation in coordination with the insurer's other document filing needs. The proposed rule allows insurers to incorporate the revised disclosures in filings submitted to TDI on or after January 1, 2020, so long as the affected

documents and materials comply by April 1, 2022. Insurers will be able to incorporate the cost of printing, filing and mailing documents amended to comply with this rule in costs they would already be incurring to amend or resubmit and refile those documents.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal may impose a cost on regulated persons marketing or selling individual or group insurance policies or other evidences of insurance coverage that provide benefits to employees for occupational injuries, disease, or deaths; provide employers' liability coverage; or indemnify employers without workers' compensation insurance coverage for all or part of the costs of occupational injuries, disease, or deaths. TDI has determined that no additional changes to the rule are required under Government Code §2001.0045 because the repeal and replacement of §5.6302 are proposed to reduce the burden imposed by the existing rule on regulated persons.

Regulated persons say the current rule is overly broad and burdensome and requires that protective disclosures be included for insurance product lines that in no way could be sold as a substitute for workers' compensations insurance. Insurers that sell policies no longer subject to the rule should experience cost savings over time.

While the proposed changes to the rule's disclosure language and inclusion of a disclosure in policy applications will impose a cost on regulated entities, the rule's implementation has been phased in to coordinate with other document changes and filings and has been delayed to reduce the cost to comply to a minimal amount.

The proposed rule also excuses insurers from replacing forms already issued.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed new rule is in effect it:

- will not create or eliminate a government program;

- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the agency;
- will result in a small increase in fees paid to the agency;
- will not create a new regulation;
- will reduce existing regulation by narrowing the required disclosure's application to individual or group insurance policies or other evidences of insurance coverage that provide benefits to employees for occupational injuries, disease or deaths; provide employers' liability coverage; or indemnify employers without workers' compensation insurance coverage for all or part of the costs of occupational injuries, disease or deaths;
- will decrease the number of regulated persons subject to the rule. Companies that do not sell regulated coverages will no longer need to comply with the rule's disclosure requirements; and
- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI 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. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. The Commissioner will consider all written comments on the proposal received by TDI no later than 5 p.m., central time, on September 9, 2019. Send your comments to ChiefClerk@tdi.texas.gov; or to the Office of the Chief Clerk, MC113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, TX

78714-9104. To request a hearing on the proposal, submit a request by the end of the comment period, separate from any comments, to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, P.O. Box 78714-9104. The request for hearing must be separate from any comments and received by TDI no later than 5 p.m., central time, on September 9, 2019. If TDI holds a public hearing TDI will consider written and oral comments presented at the hearing.

SUBCHAPTER G.
28 TAC §5.6302

STATUTORY AUTHORITY. The repeal of 28 TAC Chapter 5, Subchapter G, Division 1, §5.6302 is proposed under Insurance Code §§36.001, 2301.007, and 1701.055.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

Insurance Code §2301.007 provides that the Commissioner may disapprove or withdraw approval of a form if the form contains a provision or has a title or heading that is unjust or deceptive, encourages misrepresentation, or violates public policy.

Insurance Code §1701.055 provides that the Commissioner may disapprove or withdraw approval of a form if the form contains a provision, title, or heading that is unjust, encourages misrepresentation or is deceptive.

CROSS-REFERENCE TO STATUTE. The repeal of 28 TAC Chapter 5, Subchapter G, Division 1, §5.6302 implements Insurance Code §2301.007 and §1701.055.

SUBCHAPTER G.
§5.6302. Sale of Substitutes to Workers' Compensation Insurance.

STATUTORY AUTHORITY. TDI proposes new §5.6302 under Insurance Code §§36.001, 541.401, 1701.051, and 2301.006.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement TDI's powers and duties under the Insurance Code and other laws of this state.

Insurance Code §541.401 provides that the Commissioner may adopt rules necessary to accomplish the purposes of Chapter 541, which defines and prohibits unfair methods of competition and unfair or deceptive acts or practices.

Insurance Code §1701.051 requires insurers to file health insurance forms for approval by the Commissioner before use.

Insurance Code §2301.006 requires insurers to file property and casualty insurance forms with the commissioner before use.

CROSS-REFERENCE TO STATUTE. The proposed new Section 5.6302 implements Labor Code §406.052 and Insurance Code §541.401.

TEXT.

§5.6302. Required Disclosures for Plans or Coverages That Are Not Workers' Compensation Insurance.

(a) No misrepresentation of substitutes. A person, agent, or entity may not represent the following coverages as workers' compensation insurance:

- (1) an employee benefit plan;
- (2) an individual or group life insurance policy;
- (3) an individual or group accident or health insurance policy;
- (4) employer's property and casualty insurance policy; or

(5) other individual or group evidence of insurance coverage.

(b) Prohibited misrepresentations. A person, agent, or entity may not represent that the coverages listed in subsection (a) of this section:

(1) are a substitute for workers' compensation insurance coverage;

(2) provide the same benefits for either employees or employers as are provided by workers' compensation insurance; or

(3) limit an employee to a claim for benefits under the plan or policy as the employee's sole remedy against the employer in the event an employee suffers an occupational injury, disease, or fatality.

(c) Disclosure statement required for employers.

(1) The disclosure statement in paragraph (2) of this subsection is required in an individual or group insurance policy or other evidence of coverage that:

(A) provides benefits to an employer's employees for occupational injuries, disease, or deaths;

(B) provides employer's liability coverage; or

(C) indemnifies employers without workers' compensation insurance coverage for all or part of the costs of occupational injuries, diseases, or deaths.

(2) The following statement must be included on the first page of the application and the policy, and on the first page of all materials used in advertising, marketing, and explaining the policy: **"This policy does not provide workers' compensation insurance coverage.** This policy does not protect you from lawsuits by an injured employee or a person who can get their benefits (the employee's dependent or legal beneficiary). You may be sued for damages from a job-related injury, illness, or death."

(3) The statement must:

(A) be in a prominent place;

(B) have its first sentence in bold type;

(C) be in a font that is equivalent in size to 10 points in Times New Roman; and

(D) not be italicized or underlined.

(4) In advertising and marketing materials, the statement must not be minimized or obscured by the rest of the advertisement or materials.

(d) Disclosure statement required for employees.

(1) A group insurance policy described in subsection (c) of this section must include the following statement on the first page of any certificate, evidence of coverage, or other explanatory material issued to employees: "**This policy does not provide workers' compensation insurance.** You should ask your employer if it has workers' compensation insurance. If it does not, you might have the right to sue your employer if you have a job-related injury or illness. And if your death is job related, the person who could get your benefits (your dependent or legal beneficiary) might have the right to sue your employer."

(2) The statement must:

(A) be in a prominent place;

(B) have its first sentence in bold type;

(C) be in a font size not smaller than 10 points in Times New Roman; and

(D) not be italicized or underlined.

(e) Applicability dates.

(1) This section applies to an insurance application, policy, evidence of coverage, contract or explanatory material, or other document subject to this section that is filed or refiled with TDI on or after January 1, 2020.

(2) An insurance policy, evidence of coverage, contract, marketing or explanatory material, or other document is governed by this section as it existed immediately before January 1, 2020, until it is refiled.

(3) Notwithstanding paragraphs (1) and (2) of this subsection, an insurance policy, evidence of coverage, contract, or explanatory material, or other document issued to an employer or employee on or after April 1, 2022, must comply with the requirements of this section.

(4) Advertisements and marketing materials used with an insurance policy regulated under this section are subject to this section at the time the insurance policy must comply with the requirements of this section.

(5) An insurer is not required to update documents that have already been issued.

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

Issued in Austin, Texas, on July 25, 2019.

/s/ James Person
James Person, General Counsel
Texas Department of Insurance