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State of Wisconsin

Department of Workforce Development

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DATE: October 17, 1997 INS Letter 377

TO: Worker's Compensation Insurance Carriers

FROM: Gregory Krohm, Administrator
Worker's Compensation Division

SUBJECT: Preparation for administrative rule changes

I urge carriers to prepare for administrative rule changes that will become effective January, 1998. One in particular, administrative rule DWD 80.02, will require that employers report compensable injuries only to their insurance carriers. Employers will no longer be required to file duplicate reports of compensable injuries to this Division, except in cases of fatalities.

This rules streamlines the process for employers, carriers and the Worker's Compensation Division. The rule change should reduce paperwork transactions and allow for more accurate reporting of injuries and associated employment and injury information.

Carriers are advised to alert their customers to this change. Early preparation to implement the changes will help ensure that all compensable injuries are reported timely both by employers to carriers and from carriers to the Department. It will also help ensure workers are fully informed of the status of their claims, reasons why their claims are being investigated, and that the information associated with their claim is reported accurately to facilitate prompt and accurate payments.

The new rules do not change the timeliness requirement that carriers report compensable injuries to the Department within 14 days of the date of injury. The standard in DWD 80.03 that carriers report at least 70% of the claims to the department within the 14 day standard is also retained. Our studies indicate that only about 50% of the claims are reported to the WC Division by carriers in a timely manner. The Division will closely monitor performance with respect to this requirement. We believe that good communication and training will correct these deficiencies and reduce the need for enforcement actions to a minimum.

Please give close attention to these rule changes and take the steps internally and with your customers to assure compliance. We look forward to your help in ensuring complete and accurate information is sent timely to injured workers and the Division.

For your information, enclosed is a copy of the plain language explanation of the statutory changes recommended by the Worker's Compensation Advisory Council to the legislature as part of the "1998/99 Agreed Bill." It is on schedule for implementation on January 1, 1998.

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Worker's Compensation
Statutory Changes Recommended to the Legislature
Target to be effective January 1, 1998

Plain Language Summary

The following recommendations have the unanimous support of the labor and management members of the Council on Worker's Compensation. They will be discussed by a Joint Assembly and Senate Labor Committee Hearing in late October.

1. ***Worker's compensation insurance for AFDC-JOBS and FSET participants.*** The bill clarifies that, for purposes of worker's compensation insurance coverage, the status of participants in the food stamp employment and training (FSET) program is the same as those in the AFDC-JOBS program. Unless the work-site employer agrees to insure them, for worker's compensation purposes only, they are employes of the public agencies administering these programs. The bill also clarifies the state's expenditure authority to purchase an "umbrella" worker's compensation insurance policy (which local agencies pay for on a per-client basis) and that the employe-clients may not sue the work-site employer for work-related injuries covered under a worker's compensation insurance policy. Finally, the AFDC-JOBS sunset date coincides with the end of AFDC in March, 1998.

Comment: These technical changes merely codify current DWD and DOA administration of worker's compensation insurance related to these programs.

2. ***Temporary help agencies***. Under current law, temporary help agencies are liable for worker's compensation benefit payments to employes that they loan or lease to another employer. The bill clarifies that temporary help agencies are also liable for all penalties, and that the temporary help agency may not seek reimbursement for penalty payments from work-site employers.

Comment: The penalty question arose in several recent contested-cases. This clarification should eliminate needless litigation by specifying who is liable for penalties. Representatives of the temporary-help industry testified in support of this proposal.

3. ***Independent contractors.*** For worker's compensation (WC) purposes, an independent contractor is not considered someone's employe if the independent contractor meets all nine statutory conditions for establishing the existence of an independent business. One of the WC conditions relates to federal law. This bill adds language related to federal self-employment income tax returns which is borrowed directly from the definition of an independent contractor under the unemployment insurance (UI) program.

Comment: The change was recommended by accountants dealing with both the UI and WC programs. Because the UI and WC programs have different objectives, it is not possible to have an identical definition of independent contractors on every test. Still, in recent years, both programs have attempted to re-work their statutory definitions so that they are as close as possible. For this particular test, the UI definition is preferable to the current WC definition.

4. ***Work-experience students.*** The bill extends the initial sunset provision on this program for another two years, from January 1, 1998, to January 1, 2000.

Comment: Two years ago, schools were authorized to insure work-study students who received no wages from a work-site employer with whom they had been placed. If schools insured the students for worker's compensation purposes, the work-site employer continued to be immunized from tort liability. The option has rarely been used. While there are no known problems, there is not enough experience to eliminate the sunset provision completely.

5. ***Election by corporate officers to opt out of coverage.*** Currently, 2 officers of corporations with less than 10 stockholders may chose not to be covered under the corporation's worker's compensation insurance policy. This change clarifies that the election to opt out of coverage may occur at any time during the policy period, but once they elect to opt out, they may not reverse that election during the policy period.

Comment: This codifies the current interpretation of the law by the Office of the Commissioner of Insurance, the Wisconsin Compensation Rating Bureau and the Worker's Compensation Division. The ability to allow certain officers of small corporations to opt out at any time during the policy, allows the corporation to reduce its premium costs. However, once they chose to opt out, that choice should be irreversible during the remainder of the policy period to prevent someone from manipulating coverage, particularly with the date of injury for occupational disease claims.

6. ***Increased benefits.*** The maximum payments for temporary total disability (TTD) and permanent partial disability (PPD) were increased by 2.8% in both 1998 and 1999.

Year	***Maximum TTD***	***Maximum PPD***
1997	$509	$174
1998	$523	$179
1999	$538	$184

Comment: These increases are the result of negotiations between the labor and management members of the Council on Worker's Compensation.

7. ***Restore the pre-1985 52-week formula for determining wages.*** The bill restores the pre-1985 formula for determining an employe's worker's compensation wage for purposes of making benefit payments. Using the prior 52 weeks rather than 4 calendar quarters will not change the employe's benefits, but it makes it clearer to employers and insurers how the employe's wage should be calculated.

Comment: Determining an employe's wage for purposes of making worker's compensation benefit payments can be complicated. The 1985 formula change was an effort to simplify part of the wage calculation for employers by using calendar-quarter data which they used for unemployment insurance rather than weekly data. However, the anticipated simplification did not materialize. Under the UI system, wages are not calculated and reported until the close of the calendar period--making the additional calculation of current-quarterly wages necessary. Today's widespread use of business computers makes this a much less significant issue for employers than in the past.

8. ***Copies of respondent's medical reports.*** Insurance carriers or self-insured employers who request that an employe submit to a medical examination shall send the employe a copy of all reports of the examination that are prepared by the medical examiner immediately upon receiving a copy of the report.

Comment: Under current law, the employe receives a copy only upon request and there is no statutory statement that timeliness is important.

9. ***Dentists.*** With one exception, the bill gives dentists the same status under the Worker's Compensation Act as physicians, chiropractors, psychologists and podiatrists. The current evidentiary exception continues: The opinions of dentists are admissible as evidence of the diagnosis and necessity of treatment, but not of the cause or extent of disability.

Comment: Attorneys representing insurance carriers complained that the law authorizes the use of a dentist's testimony as evidence of diagnosis and treatment, but the statutes are silent on the right of an insurance carrier to request that an injured worker submit to an adverse medical examination by a dentist selected by the insurance carrier. In at least one case, the injured worker intended to introduce evidence from his dentist, but refused to attend an adverse dental exam scheduled by the insurance carrier.

10. ***Fee and necessity of treatment disputes.*** The bill clarifies the authority of administrative law judges (ALJs) in the Worker's Compensation Division to determine by stipulation, compromise or an order issued after a hearing whether or not a health-care provider's treatment was necessary or whether the provider's fee was reasonable. If the ALJ determines that the disputed treatment was not necessary or the fee was not reasonable, the health-care provider may not bill the injured worker for any unpaid balance. Also, in any case in which liability is conceded or otherwise resolved (including cases in which hearings have been held), the bill authorizes ALJs and the parties to use the alternative dispute resolution processes outlined in section 102.16 of the Statutes to determine if the provider's treatment was necessary or if the fee was reasonable. Also, where the department issues an order using the alternative dispute resolution processes, the bill specifies that the department can modify the order within 30 days. Finally, the bill extends the sunset provision on the alternative dispute resolution processes for another two years.

Comment: This clarifies issues arising from the Labor and Industry Review Commission's decision in Sommerfeldt v. Ace Hardware Ripon, December 13, 1995.

11. ***Religious sects.*** Under current law, religious sects such as the Amish (who conscientiously object to accepting benefits from any public and private insurance, including federal social security benefits) are authorized to provide an alternative form of worker's compensation benefits, provided that they prove their financial ability to do so. The proof of financial ability has been a letter of credit from a financial institution with dollar amounts varying depending upon the number of employes covered by the sect. The bill retains the requirement that the sects accept liability for providing the alternative benefits, but eliminates the requirement that the sect prove its financial ability to do so.

Comment: Amish representatives who helped to negotiate the current law have persuasively argued that they did not fully understand the nature of the agreement. As implemented, they particularly object that the letter of credit is virtually indistinguishable from the insurance requirements to which they conscientiously objected in the first place. As the Amish explained it, since their sect was founded in 1632, they have an unblemished record of meeting the needs of injured members and their dependents for health care and an adequate standard of living, including members who are "shunned."

12. ***An employe's choice of an out-of-state medical practitioner is limited.*** The bill provides that, unless they agree to do so, an employer or insurance carrier is not liable to pay for out-of-state medical treatment--even when that treatment is the result of a referral from an in-state medical practitioner. This provision expires January 1, 2000.

Comment. This reverses the Wisconsin Supreme Court's decision in UFE v. LIRC, holding that employers and insurers remain liable for out-of-state treatment on referrals to the same extent they would be liable if the treatment had been in-state. The Council on Worker's Compensation will study the subject of out-of-state treatment in more depth during the next two-years before recommending whether to remove or extend the sunset.

13. ***Uninsured Employer Fund (UEF).*** Currently, in addition to the penalties an employer pays for being illegally uninsured, whenever the Department pays benefits to an employe from the UEF, the Department requires the illegally uninsured employer to reimburse the fund for those benefit payments. By law, there is a 30-day deadline for the illegally uninsured employer to pay penalties, but the current statute is silent on the time within which an illegally uninsured employer must reimburse the UEF for benefit payments made by the Department from the UEF to injured employes. The bill establishes the same 30-day deadline for reimbursement payments that currently exists for penalty payments.

Also, under current law, corporate officers and directors of illegally uninsured businesses are personally liable for unsatisfied warrants issued by the Department to collect penalties or reimbursement payments. The bill extends the same personal liability for unsatisfied UEF warrants to members or managers of limited liability companies.

Comment: Members or managers of limited liability companies have a relationship to limited liability companies that is similar to what officers and directors have to corporations.

Prepared by: Richard Smith
Division of Worker's Compensation
September 1997