

**From:** Coombs, Robin  
**Sent:** Friday, September 18, 2009 1:59 PM  
**To:** gkroh@iaiaabc.org; Card, Bob H.  
**Cc:** Wasson, D. J.  
**Subject:** Comments re Revised Model for 2 PM CDT, 3 PM NCOIL Employee Misclassification Subcommittee Conference Call  
**Importance:** High

*In my opinion this draft is much more straight forward and easier to understand than the initial.*

*I do have concerns with Section 4 C and D. It seems that D. makes the uninsured sub responsible if his coverage ends because of non payment. However, he should be responsible if he is uninsured for any reason—whether because he never got coverage at all, presented a fraudulent certificate of insurance, got canceled mid term for nonpayment, was nonrenewed, opted not to renew, etc etc. I think the principal contractor should still be on the hook to pay the claim but the principal should be able to recover personally from the uninsured sub, just as the Uninsured Employer's Fund is always entitled to recover from an uninsured employer should they have to pay a claim per the next section E. . I think this is the intent of the persons who were on the call, but it is not entirely clear in the writing. Kentucky's statute also gives the injured employee the option to bring a civil claim against his employer if the employer fails to carry WC, but the injured employee cannot do both. See KRS 342.700.*

*I have concerns about Section 5 D. The principal has a contractual relationship with his carrier. However, the subs of the principal have no such contractual relationship. Therefore, why should they be required by law to give up their privacy to their own records to an insurance carrier who represents an interest that could well be adverse to their own? Granted it would make some audits easier to resolve, if the insurer could compel the sub but that is best left to the principal in my opinion.*

*Section 7 Comment to AIA's prior comment. Issues regarding whether or not an entity is a subcontractor or an independent contractor, while they are labeled misclassification in this document, are not issues of the wrong class code being assigned. Therefore, they cannot be solved by reference to the advisory org's manual, in the same manner as a class correction from 1234 to 9876 would be.*

*Section 8C, in a state with competitive rating, what insurer's manual rates are to be used to determine this penalty? Who is going to do the rating exercise?  
I do not understand the reasoning behind IAABC's comment #(3) re waiving penalty if the uninsured employer was the victim of fraud or negligence by an insurance agent. Why not keep the penalty against the uninsured employer? They should be able to seek redress from the agent. Creating this exception may generate unfounded nuisance actions against agents on the front end of this step rather than the back end.*

*Re 8D, see 8C. Premium is to be paid to the insurer, not to the state. Therefore, why should the state be responsible for estimating payroll and or premium? Suggest taking a look at principle set out in KRS 342.140(1)(f) which is actually addressing computation of an employees average weekly wage for benefit determination but the same idea could apply in this case "If at the time of injury the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees." So the insurer would have to make a good faith*

*estimate of the missing payroll, have evidence to back up said estimate, and would be subject to challenge by the insured.*

*Re 8# Good idea to have specific large penalty for fraudulent certificates.*

*Re 8F, see comment about 5D above. If there is an issue between the insurer and its insured, something like this might be OK. However, if the insured does not have the records requested, and their sub is no help, the insurer should not be able to impose excessive amounts. Re PCI's comment, the state should not become a collection agency for insurers.*

*Robin Coomb*

*Assistant Director, Property & Casualty Division  
Kentucky Department of Insurance  
PO Box 517  
Frankfort, KY 40602-0517  
502 564 3630 x 4294  
800 595 6053 x 4294  
fax 502 564 2728*

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