

**Proposed Construction Industry Workers' Compensation Coverage Act**

*To be considered by the NCOIL Workers' Compensation Insurance Committee on November 19, 2009.  
 Sponsored for discussion by Rep. Charles Curtiss (TN) and Sen. Ralph Hudgens (GA)*

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**Section 1. Summary**

This Act mandates workers' compensation coverage in the construction industry, with certain exemptions; establishes auditing procedures; specifies liability; provides penalties for insurance fraud; and addresses enforcement powers.

**Section 2. Definitions**

- A. "Employee" means any entity as defined by *[Insert Applicable Reference to State Definition]*.
- B. "Employer" means any entity as defined by *[Insert Applicable Reference to State Definition]*.
- C. "Partner" means any person as defined by *[Insert Applicable Reference to State Definition]*.
- D. "Principal Contractor" and "subcontractor" mean any entity as defined under *[Insert Applicable State Agency]*.
- E. "Sole proprietor" means any entity as defined under *[Insert Applicable Reference to State Definition]*.

**Section 3. Coverage Requirements**

- A. Every person engaged in the construction industry, including principal contractors, intermediate contractors and subcontractors shall be required to carry workers' compensation insurance, regardless of the number of employees, unless exempted as indicated in subsections (C) and (D).

*Drafting Note: States may want to consider the cost impact of this subsection on sole proprietors and self-employed small contractors. Options to consider include exemptions for individuals with high-quality health insurance plans, the use of deductibles to bring down insurance costs, and monthly premium payment plans.*

- B. For purposes of this Section, "a person engaged in the construction industry" means any person or

entity assigned to the Contracting Group as those classifications are designated by the rate service organization designated by the *[Insert State Department of Insurance]*.

*Drafting Note: For the purposes of this Act, the [Insert State Department of Insurance] could use standard industrial classification codes and the definitions thereof developed by the National Council on Compensation Insurance (NCCI) and the U.S. Department of Labor Bureau of Labor Statistics (BLS) North American Industry Classification System (NAICs) codes to meet the criteria of the term "construction industry" as set forth in this Act.*

- C. A sole proprietor or partner engaged in the construction industry shall not be required to carry workers' compensation on themselves if they are doing work directly for the owner of the property pursuant to Section 3(D), but shall be required to carry workers' compensation insurance on any subcontractor, employee or worker not otherwise covered by a policy of workers' compensation; however, if a sole proprietor or partner is working as an intermediate contractor or subcontractor then workers' compensation insurance shall be required on themselves.
- D. The provisions of this Section shall not apply to individuals performing work on their own property. As used in this subsection (D), an individual is a natural person.

*Drafting Note: States may want to look to state definitions of employer, employee, and existing treatment of homeowners on residential projects to avoid duplicating and conflicting language.*

#### **Section 4. Liability**

- A. Every principal contractor shall be responsible to ensure that any subcontractor with which it directly contracts is either self-insured or maintains workers' compensation coverage throughout the periods during which the services of a subcontractor are used and, further, if the subcontractor is neither self-insured nor covered, then the principal contractor rather than the *[Insert State Uninsured Employer Fund]*, if applicable, should be responsible for the payment of statutory benefits.
- B. If an employee of a subcontractor suffers an injury or disease and, on the date of injury or last exposure, his or her employer did not have workers' compensation coverage or was not an approved self-insured employer, and the principal contractor did not obtain certification of coverage from the subcontractor, then that employee may file a claim against the principal contractor for which the subcontractor performed services on the date of injury or last exposure, and such claim shall be administered in the same manner as claims filed by injured employees of the principal contractor, provided that an intermediate subcontractor that subcontracts with another subcontractor shall, with respect to such subcontract, become the principal contractor for the purposes of this section.
- C.
  - 1. The contractor and subcontractor shall provide proof of continuing coverage to the principal contractor throughout the term of the contract between the contractor and subcontractor by providing a certificate showing current as well as renewal or replacement coverage during the term of the contract between the principal contractor and the subcontractor.
  - 2. A subcontractor who allows coverage to lapse because of non-payment during a contract but fails to notify a contractor under Subsection (C) becomes liable to the injured employee and subject to all recovery of payments, plus administrative costs and attorneys' fees.
- D.
  - 1. If a claim of an injured employee of a subcontractor is accepted or conditionally accepted into the *[Insert State Uninsured Employer Fund]*, if applicable, both the principal contractor and subcontractor are jointly and severally liable for any payments made by the *[Insert State Uninsured Employer Fund]*, and the *[Insert State Insurance Commissioner]* may seek recovery of the payments, plus administrative costs and attorneys' fees, from the principal contractor, the subcontractor, or both.

2. A principal contractor who is held liable pursuant to this subsection for the payment of benefits to an injured employee of a subcontractor may recover the amount of such payments from the subcontractor, plus reasonable attorneys' fee and costs.

### **Section 5. Employer/Contractor Disclosure Requirements**

- A. Employers shall make available to their workers' compensation insurance carrier all records necessary for the payroll verification audit and permit the auditor to make a physical inspection of the employer's operation.
- B. A principal contractor may require a subcontractor to provide evidence of workers' compensation insurance.
- C. An insurance carrier may require each employer to submit a copy of the quarterly earning report at the end of each quarter to the insurance carrier and submit self-audits supported by the quarterly earnings reports and the rules adopted by the state agency providing unemployment tax collection services. The reports must include an attestation by an officer or principal of the employer attesting to the accuracy of the information contained in the report.
- D. A principal contractor may require a subcontractor to be able to produce on demand at their principal place of business information required by Section 5(B).

### **Section 6. Payroll Audit Procedures**

- A. In no event shall employers in the construction class, generating more than the amount of premium required to be experience rated, be audited less than annually. A minimum of ten percent of employers in the construction class that do not generate more than the amount of premium required to be experience rated will be inspected annually and audited, if necessary. The annual audits required for construction classes shall consist of physical onsite audits.
- B. Payroll verification audit rules must include, but need not be limited to, the use of state and federal reports of employee income, payroll and other accounting records, certificates of insurance maintained by subcontractors, and duties of employees.
- C. Upon conclusion of an employer audit, the insurance carrier shall report to the *[Insert State Workers' Compensation Department or Appropriate Agency]* any unresolved employee or independent contractor misclassification, any uncovered or unreported employees, and any other violation of this Act.

### **Section 7. Penalties**

- A. For the purposes of this section, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of Section 3. However, if at any time an employer materially understates or conceals payroll, materially misrepresents or conceals employee duties so as to avoid proper classification for premium calculations, or materially misrepresents or conceals information pertinent to the computation and application of an experience rating modification factor, such employer shall be deemed to have failed to secure payment of workers' compensation and shall be subject to the sanctions set forth in this section.
- B. In addition to any other penalty prescribed by this section, the department shall assess against any employer who has failed to secure the payment of compensation as required by Section 3 a penalty equal to 2 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this section within the preceding 3-year period or \$750, whichever is greater.
- C. 1. Any person that knowingly submits an initial application, renewal application, or certificate of

insurance as proof of coverage, that is false, forged, misleading, or incomplete information for the purpose of avoiding or reducing the amount of premiums for workers' compensation coverage is subject to a civil penalty, per violation, not less than *[Insert Applicable Amount]*.

2. In determining intent, the *[Insert Appropriate State Agency]* shall consider whether a person or organization in a similar size and type of business could reasonably be expected to understand that information being submitted was false or likely to mislead. In assessing the amount of the civil penalty, the *[Insert Appropriate State Agency]* shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following:
  - a. the nature and seriousness of the misconduct;
  - b. the number of violations;
  - c. the persistence of the misconduct;
  - d. the length of time over which the misconduct occurred;
  - e. the willfulness of the defendant's misconduct; and
  - f. the defendant's assets, liabilities, and net worth.
3. The *[Insert Appropriate State Agency]* may also require, as civil penalty, that the entity repay any compensation received through such violation, with interest at the rate of *[Insert Applicable Percentage]*.

*Drafting Note: States can insert references to existing criminal penalties in their workers' compensation or insurance fraud codes.*

- D. 1. Whenever the *[Insert State Workers' Compensation Department or Appropriate Agency]* determines that an employer who is required to secure the payment to his or her employees of the compensation provided for by this Act has failed to secure the payment of workers' compensation required by this Act or to produce the required business records under Section 5 within five (5) business days after receipt of the written request of the *[Insert State Workers' Compensation Department or Appropriate State Agency]*, such failure shall be deemed an immediate serious danger to public health, safety, or welfare sufficient to justify service by the *[Insert State Workers' Compensation Department or Appropriate State Agency]* of a stop-work order on the employer, requiring the cessation of all business operations. If the *[Insert State Workers' Compensation Department or Appropriate State Agency]* makes such a determination, the *[Insert State Workers' Compensation Department or Appropriate State Agency]* shall issue a stop-work order within 72 hours.
2. In addition to serving a stop-work order at a particular worksite which shall be effective immediately, the department shall immediately proceed with service upon the employer which shall be effective upon all employer worksites in the state for which the employer is not in compliance; provided that, if the employer cannot be found and served under due diligence the department may execute service by publishing the stop work order for one week in a news publication having general circulation in the *[names of cities]* metropolitan areas.
3. A stop-work order may be served with regard to an employer's worksite by posting a copy of the stop-work order in a conspicuous location at the worksite. The order shall remain in effect until

the *[Insert State Workers' Compensation Department or Appropriate State Agency]* issues an order releasing the stop-work order upon a finding that the employer has come into compliance with the coverage requirements of this Act and has paid any penalty assessed under this section.

4. The *[Insert State Workers' Compensation Department or Appropriate State Agency]* may issue an order of conditional release from a stop-work order to an employer upon a finding that the employer has complied with coverage requirements of this section and has agreed to remit periodic payments of the penalty pursuant to a payment agreement schedule with the *[Insert State Workers' Compensation Department or Appropriate State Agency]*. If an order of conditional release is issued, failure by the employer to meet any term or condition of such penalty payment agreement shall result in the immediate reinstatement of the stop-work order and the entire unpaid balance of the penalty shall become immediately due.
  5. The *[Insert State Workers' Compensation Department or Appropriate State Agency]* may require an employer who is found to have failed to comply with the coverage requirements of Section 3 to file with the *[Insert State Workers' Compensation Department or Appropriate State Agency]*, as a condition of release from a stop-work order, periodic reports for a probationary period that shall not exceed 2 years that demonstrate the employer's continued compliance with this section. The *[Insert State Workers' Compensation Department or Appropriate State Agency]* shall by rule specify the reports required and the time for filing under this subsection.
- E. Stop-work orders and penalty assessment orders issued under this section against a corporation, partnership, or sole proprietorship shall be in effect against any successor corporation or business entity, including spouses, that has one or more of the same principals or officers as the corporation or partnership against which the stop-work order was issued and are engaged in the same or equivalent trade or activity.
- F. It shall be unlawful for any person to knowingly violate a stop-work order issued by the *[Insert State Workers' Compensation Department or Appropriate State Agency]* and it is punishable as a felony of the third degree.
- G. The *[Insert State Workers' Compensation Department or Appropriate State Agency]* shall assess a penalty of not less than \$1,000 per day against an employer for each day that the employer conducts business operations that are in violation of a stop-work order.
- H. Any agency action by the department under this section, if contested, must be contested as provided in *[Insert State Chapter Relating to Judicial or Administrative Review]*.

### **Section 8. Enforcement**

The *[Insert State Workers' Compensation Department or Appropriate State Agency]* shall have the authority to enforce the requirements of this Act.

*Drafting Note: States may wish to consider the following enforcement provisions:*

- A. *The [Insert State Workers' Compensation Department or Appropriate State Agency] shall enforce workers' compensation coverage requirements, including the requirement that the employer secure the payment of workers' compensation, and the requirement that the employer provide the carrier with information to accurately determine payroll and correctly assign classification codes. In addition to any other powers under [Insert State Statute], the [Insert State Workers' Compensation Department or Appropriate State Agency] shall have the power to:*
  1. *Conduct investigations for the purpose of ensuring employer compliance.*

2. *Enter and inspect any place of business at any reasonable time for the purpose of investigating employer compliance.*
3. *Examine and copy business records.*
4. *Administer oaths and affirmations.*
5. *Certify to official acts.*
6. *Issue and serve subpoenas for attendance of witnesses or production of business records, books, papers, correspondence, memoranda, and other records.*
7. *Issue stop-work orders, penalty assessment orders, and any other orders necessary for the administration of this section.*
8. *Enforce the terms of a stop-work order.*
9. *Levy and pursue actions to recover penalties.*
10. *Seek injunctions and other appropriate relief.*

*B. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall designate representatives who may serve subpoenas and other process of the [Insert State Workers' Compensation Department or Appropriate State Agency] issued under this Act.*

*C. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall specify by rule the business records that employers must maintain and produce to comply with this Act.*

*D. Any law enforcement agency in the state may, at the request of the [Insert State Workers' Compensation Department or Appropriate State Agency], render any assistance necessary to carry out the provisions of this section, including, but not limited to, preventing any employee or other person from remaining at a place of employment or job site after a stop-work order or injunction has taken effect.*

*E. The [Insert State Workers' Compensation Department or Appropriate State Agency] shall adopt rules to administer this section.*

*Drafting Note: States could use part or all of penalties in Section 7 to offset enforcement and other expenses incurred by the implementation of this Act.*

### **Section 9. Severability**

If any section, paragraph, sentence, clause, phrase, or any part of this Act passed is declared invalid, the remaining sections, paragraphs, sentences, clauses, phrases, or parts thereof shall be in no manner affected and shall remain in full force and effect.

### **Section 10. Effective Date**

This Act shall take effect immediately.

*Drafting Note: States would benefit by comparing data from different state agencies, e.g. Unemployment and Workers' Comp Departments, to help identify problem employers.*