

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Medical Malpractice Liability Insurance Premium Assistance Fund - Premium Subsidy

Adopted Concurrent New Rules: N.J.A.C. 11:27-7

Proposed: December 20, 2004 at 36 N.J.R. 5970

Adopted: May 16, 2005 by Donald Bryan, Acting Commissioner, Department of Banking and Insurance

Filed: May 16, 2005 as R. 2005 d. 186, with substantive and technical changes not requiring additional public notice and comment (see N.J.A.C 1:30-6.3)

Authority: N.J.S.A. 17:1-8.1, 17:1-15e, and 17:30D-28 et seq.

Effective Date: May 16, 2005, Concurrent Adopted New Rules
June 20, 2005, Changes Upon Adoption

Expiration Date: June 6, 2010

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) timely received written comments from the following:

1. New Jersey State Board of Optometrists;
2. MD Advantage Insurance Company of New Jersey;
3. Freedman and Gersten (on behalf of Labor Ready); and
4. The New Jersey Staffing Alliance.

COMMENT: One commenter stated that the reference to the New Jersey State Board of Optometry in the definition of "Board" or "Boards" in N.J.A.C. 11:27-7.2 should read the New Jersey State Board of Optometrists, as that is the correct legal name of the Board.

RESPONSE: The Department has changed the reference upon adoption to reflect the proper legal name of the Board.

COMMENT: One commenter expressed concern with N.J.A.C. 11:27-7.4 regarding data requests. The commenter noted that N.J.A.C. 11:27-7.4(c) provides that the requested information should be provided electronically no later than 30 days after the Department's request for the data or the end of the relevant reporting period, whichever is later. The commenter stated that mailing time should be considered and suggested that the rule provide that the requested information should be provided to the Department no later than 30 days after receipt of the request.

RESPONSE: Upon review, the Department has determined that no change is required. References to due dates for requested or required information by the Department are routinely based on a specified number of days from the date of the request. There would be no way to determine when a particular request was received by an entity. Making the change suggested by the commenter would make the due date for receipt of information too speculative and not consistent among all entities. For example, a request may be misplaced internally within the entity. The Department would have no way to determine the exact date a request was "received" by an entity. Nevertheless, the Department does not intend to impose administrative sanctions for minor delays in providing requested information.

COMMENT: Several commenters expressed concern with the procedures for the assessments established by the Department of Labor and Workforce Development (LWD), and incorporated

in these rules at N.J.A.C. 11:27-7.3(h) and (i). The commenters believed that the rule deprives certain employers subject to the assessment from exercising their statutory right to obtain reimbursement from their employees; and has a disparate and inequitable impact upon these kinds of employers and other similarly situated employers. The commenters stated that staffing firms provide New Jersey companies with resources in assisting them to locate, recruit and place workers on a temporary basis during peak periods and relocations, as well as to meet seasonal needs and their clients' fluctuating work forces. The commenters stated that, as a result of the temporary nature of such employment, these types of employers hire and employ more employees in the course of the year than the majority of non-staffing related companies, which the commenter referred to as traditional employers. Accordingly, the commenters stated that it is less likely that the same employee will remain on the payroll of such a company for an entire year, which leads to a high turnover ratio. The commenters also stated that this effect is not limited to staffing firms, but would apply to any business that has experienced a reduction in the size of its workforce or that goes out of business, since it would not have the ability to recover the \$3.00 surcharge from the same number of available employees as in the base year on which the amount was calculated.

The commenter noted that N.J.S.A. 17:30D-29b(1) provides that the annual surcharge of \$3.00 per employee shall be imposed upon all employers who are subject to the New Jersey Unemployment Compensation Law, N.J.S.A 43:21-1 et seq., to be paid annually, which may, at the option of the employer, be treated as a payroll deduction to each covered employee. The commenters stated that in order to be treated as a payroll deduction, an employee must be on the payroll of the employer. N.J.A.C. 11:27-7.3(i) provides that the surcharge collected by LWD shall be based on the discreet social security numbers reported on Form WR-30 by each

employer subject to N.J.S.A. 17:30D-29 for the immediately preceding calendar year. The commenters stated that by using a past year's census in order to collect funds for the next year, there is a disproportionate impact on employers with fluctuating numbers of employees and high turnover ratios. The commenters stated that the Department, which the commenters asserted promulgated the rule, has exceeded its authority because the rule contravenes the statute's clear mandate that an employer have the right to recover the surcharge by means of a payroll deduction. The commenters suggested that, in order to address their concerns, N.J.A.C. 11:27-7.3(h) be revised to add the following:

“Employers within the temporary help service industry, temporary staffing companies and other employers with high employee turnover or significant reductions in workforce from one year to another, or which would otherwise be prejudiced by an inability to recover the surcharge shall have the right to adjust the payment of the surcharge and deduct the amount payable to the Fund to reflect the amount they can recover from their employees for the calendar year in which the surcharge is imposed.”

The commenters stated that a way to calculate the amount recoverable would be to utilize the total number of W-2 employees based on the WR-30 Forms from the final two quarters of 2004, since this would indicate the total number of employees from whom the reimbursement could be obtained if the employer began deductions at the time of the effective date of the statute, July 1, 2004. Therefore, the commenters stated that if an employer had, for example, 10,000 individual W-2 employees listed on the WR-30 Forms from the last two quarters of 2004, then the total amount due for 2004 would be \$30,000, regardless of whether the employer

actually exercised its right to make the deductions. The commenters stated that this would put staffing firms and other similarly situated employers on an equal footing with traditional employers since both could now exercise their right to recover the subsidy through payroll deductions.

One commenter additionally suggested that New Jersey employers would have the right to apply, within a specified period of time, for an abatement of the assessment already invoiced in mid-2004 based on this approach and either be credited with any overpayment in 2004 against their mid-2005 assessment bill or receive a refund from the State.

RESPONSE: The issue of assessing temporary help agencies and certain retail establishments that have a high rate of employee turnover the \$3.00 medical malpractice assessment was raised last summer by members of the staffing industry. Due to the method used to assess employers, LWD had no way to ameliorate the situation as described in the comments. LWD's assessment has to be based on the number of W-2's reported by the employer for the calendar year due to the fact that this assessment was combined with three other assessments that are also based on employee counts and use that same methodology. Furthermore, the commenters' proposed change in the regulations is not acceptable since the solution suggested is too subjective. However, in response to the concerns expressed by the commenters, N.J.A.C. 11:27-7.3(i) will be amended to include a definition of turnover used by the United States Bureau of Labor Statistics and generally recognized by the temporary help industry and to allow recognition of excess turnover. The amendment is to read as follows:

(i) The surcharge collected by LWD shall be based on the number of discrete social security numbers reported on form WR-30 by each employer subject to N.J.S.A. 17:30D-29 for

the immediately preceding calendar year. Thus, the surcharge for calendar years 2004, 2005 and 2006 shall be based on employment reported for calendar years 2003, 2004, and 2005, respectively. An employer who believes it is not subject to this surcharge, or who believes the surcharge has been calculated incorrectly, may submit a written request for reconsideration thereof to the Director, Division of Accounting, New Jersey Department of Labor and Workforce Development, **PO Box 955, Trenton, New Jersey 08625**, within 30 days of receipt of the surcharge. Such request must stipulate the legal bases upon which the claim of non applicability is based. **For the assessment applicable to fiscal year 2004, an employer who has experienced employee turnover, in accordance with the Job Opening and Labor Turnover Survey definition of turnover as described by the United States Bureau of Labor Statistics, in excess of 150 percent for the period January 1, 2004 through June 30, 2004 may recalculate the assessment using the number of employees reported on form WR-30 for the quarter ending September 30, 2004 plus the number of new employees reported on form WR-30 for the quarter ended December 30, 2004. Any such employer who submits such a recalculation shall provide documentation acceptable to LWD supporting the turnover experienced.** (changes indicated in boldface)

Summary of Agency-Initiated Change:

The Department is making a change to N.J.A.C. 11:27-7.5(f)1 upon adoption. This paragraph currently provides that the Department shall issue a public notice no later than January 31 of each year setting forth those classes of specialties and subspecialties proposed to be eligible for the subsidy. The Department is changing this paragraph upon adoption to read “on

or about” January 31 rather than “no later than.” This change reflects the actual application of the rule. There may be cases where January 31 falls on a weekend or the issuance of the notice may be slightly delayed due to unforeseen circumstances, such as a possible closing of State offices due to inclement weather. The existing timeframes are maintained and interested parties will continue to be permitted to submit written comments on the notice within 30 days from the date the notice is posted on the Department’s website.

Federal Standards Statement

A Federal standards analysis is not required because the adopted new rules are not subject to any Federal requirements or standards.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

[SUBCHAPTERS 1. – 6. (RESERVED)]

11:27-7.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Board” or “Boards” means the New Jersey State Board of Medical Examiners, New Jersey State Board of Chiropractic Examiners, New Jersey State Board of Dentistry, and New Jersey State Board of *[Optometry]* ***Optometrists***.

11:27-7.3 Assessments of employers and certain practitioners

(a)-(h) (No change from proposal.)

(i) The surcharge collected by LWD shall be based on the number of discrete social security numbers reported on form WR-30 by each employer subject to N.J.S.A. 17:30D-29 for the immediately preceding calendar year. Thus, the surcharge for calendar years 2004, 2005 and 2006 shall be based on employment reported for calendar years 2003, 2004, and 2005, respectively. An employer who believes it is not subject to this surcharge or who believes the surcharge has been calculated incorrectly may submit a written request for reconsideration thereof to the Director, Division of Accounting, New Jersey Department of Labor and Workforce Development, ***PO Box 955, Trenton, New Jersey 08625,*** within 30 days of receipt of the surcharge. Such request must stipulate the legal bases upon which the claim of non applicability is based. ***For the assessment applicable to fiscal year 2004, an employer who has experienced employee turnover, in accordance with the Job Opening and Labor Turnover**

Survey definition of turnover as described by the United States Bureau of Labor Statistics, in excess of 150 percent for the period January 1, 2004 through June 30, 2004 may recalculate the assessment using the number of employees reported on form WR-30 for the quarter ending September 30, 2004 plus the number of new employees reported on form WR-30 for the quarter ended December 30, 2004. Any such employer who submits such a recalculation shall provide documentation acceptable to LWD supporting the turnover experienced.*

11:27-7.5 Determination of eligibility

(a)-(e) (No change from proposal.)

(f) The certification of eligible classes and determination of practitioner and health care provider eligibility shall be made annually as set forth below.

1. The Department shall issue a public notice *[no later than]* **on or about*** January 31 of each year setting forth those classes of specialties and subspecialties proposed to be eligible to apply to receive a subsidy from the Fund, the amount available for distribution or projected to be available, and, if applicable, the proposed amounts of the increases in premium and funding obligations referenced, respectively, in (b)1 and 2 above. The public notice shall be disseminated to those interested parties on the Department's distribution list utilized pursuant to N.J.A.C 1:30-5.2(a)6, and shall also be posted on the Department's website: www.njdoji.org. In addition, the public notice shall be published in the New Jersey Register. The public notice shall also provide that interested parties shall have 30 days from the date of posting on the Department's website to provide written comments on the Department's determinations.

2. (No change from proposal.)

(g) (No change from proposal.)

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