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BULLETIN

TO: All Property and Casualty Carriers, Self-Insured Workers' Compensation Pools,
and Insurance Producers

FR: Paula A. Flowers, Commissioner
Department of Commerce and Insurance

Paula A. Flowers

RE: Responsibility of Insurance Companies and Employers in Determining the
Existence of an Independent Contractor Relationship

DT: June 1, 2005

The purpose of this Bulletin is to communicate the Department's position regarding the responsibility of insurance companies and employers to determine whether an individual is an employee or an independent contractor for purposes of obtaining and maintaining workers' compensation coverage for that individual. Be advised that it is this Department's position that when an employer documents that an individual is an independent contractor, rather than an employee, in accordance with Tenn. Code Ann. § 50-6-102(11), the insurance carrier must either document the basis for any disagreement with an individual's classification based upon the seven (7) factors contained in Tenn. Code Ann. § 50-6-102(11) or accept the employer's classification.

Tenn. Code Ann. § 50-6-102(11) states as follows:

In a work relationship, in order to determine whether an individual is an "employee" or whether an individual is a "subcontractor" or an "independent contractor", the following factors shall be considered:

- (A) The right to control the conduct of the work;
- (B) The right of termination;
- (C) The method of payment;
- (D) The freedom to select and hire helpers;
- (E) The furnishing of tools and equipment;
- (F) Self-scheduling of working hours; and
- (G) The freedom to offer services to other entities.

The law contemplates that every employer must have performed the analysis required by Tenn. Code Ann. § 50-6-102(11), and that the employer has determined whether an individual is an employee or independent contractor at the time of application for insurance coverage and underwriting of the workers' compensation policy. Every insurer should communicate to its producers what documentation will satisfy the insurer that an individual is an independent contractor and not subject to the Workers' Compensation Law in accordance with the seven (7) factors outlined in Tenn. Code Ann. § 50-6-102(11). In the event that an insurance company disputes an employer's classification of an individual as independent contractor, the insurance company must dispute the classification only in accordance with Tenn. Code Ann. § 50-6-102(11), and document the basis for such dispute.

It has come to the Department's attention that some companies may have disregarded the factors set forth above at the time of audit and attempted to recover premium for risk exposure that did not truly exist. Be advised that it is the Department's position that it is an unfair and deceptive act and a violation of Tenn. Code Ann. § 56-8-103 for an insurer to disregard Tenn. Code Ann. § 50-6-102(11) and treat individuals as employees without the supporting analysis for each individual. In order for the underwriting process to work most effectively, insurers should communicate with their policyholders throughout the life of the policy in order that any changes in the determinative factors can be noted prior to the audit.

The Department of Labor and Workforce Development previously accepted an I-18 Form, "Election of Non-Coverage by a Sub-Contractor", which certified that an individual was an independent contractor and not subject to the Workers' Compensation Law. The I-18 form was never intended to replace the analysis required by Tenn. Code Ann. § 50-6-102(11) which delineates the factors that determine whether an individual is an employee or independent contractor. The Department of Labor and Workforce Development's discontinuation of use of the I-18 Form does not discontinue the requirement for analysis to be performed by the employer pursuant to Tenn. Code Ann. § 50-6-102(11). Furthermore, insurance companies should not rely upon the procurement of a minimum premium policy issued by either an insurance company or the Tennessee Workers' Compensation Insurance Plan to evidence the lack of an employer-employee relationship. In sum, no form or policy should be used instead of conducting the analysis contemplated by Tenn. Code Ann. § 50-6-102(11).

Disputes as to whether an individual is an employee or an independent contractor that arise after a work-related injury has occurred will continue to be determined on a case-by-case basis by the Department of Labor and Workforce Development as part of their benefit review process. Disputes that arise as to whether an individual is an employee or an independent contractor for purposes of computing premium will be considered by this Department pursuant to Tenn. Code Ann. § 56-5-309 and/or the Tennessee Workers' Compensation Insurance Plan.

Should you have any questions concerning this Bulletin, please contact the Insurance Division at 615-741-0472. The Department of Labor and Workforce Development can be contacted at (800) 332-COMP (2667).