WEST VIRGINIA CODE CHAPTER 23 ARTICLE 2C

WV Legislature

§23-2C-1. Findings and purpose.

(a) The Legislature finds that:

(1) There is a long-term actuarial funding crisis in the state-run monopolistic workers' compensation system;

(2) Similar short-term and long-term crises have been ongoing during the past two decades;

(3) During the current crisis, employers in West Virginia find it increasingly difficult to afford the rates charged by the Workers' Compensation Commission for workers' compensation coverage and that paying said rates adversely impacts employers' ability to compete in a global economic environment;

(4) The cost of obtaining workers' compensation coverage from the state system may result in many employers leaving the state;

(5) Employers' access to competitive workers' compensation rates and the resulting economic development benefit is of utmost importance to the citizens of West Virginia;

(6) A mechanism is needed to provide an enduring solution to this recurring workers' compensation crisis;

(7) An employers' mutual insurance company or a similar entity has proven to be a successful mechanism in other states for helping employers secure insurance and for stabilizing the insurance market;

(8) There is a substantial public interest in creating a method to provide a stable workers' compensation insurance market in this state;

(9) The state-run workers' compensation program is a substantial actual and potential liability to the state;

(10) There is substantial public benefit in transferring certain actual and potential future liability of the state to the private sector and creating a stable self-sufficient entity which will be a potential source of workers' compensation coverage for employers in this state;

(11) A stable, financially viable insurer in the private sector will aid in providing a continuing source of insurance funds to compensate injured workers; and

(12) Because the public will greatly benefit from the formation of an employers' mutual insurance company, state efforts to encourage and support the formation of such an entity, including providing funding for the entity's initial capital, is in the clear public interest.

(b) The purpose of this article is to create a mechanism for the formation of an employers' mutual insurance company that will provide:

WV Legislature

(1) A means for employers to obtain workers' compensation insurance that is reasonably available and affordable; and

(2) Compensation to employees of mutual policyholders who suffer work place injuries as defined in this chapter.

(c) The employers' mutual insurance company contemplated and created as the successor to the former Workers' Compensation Commission in this article began operation on January 1, 2006. The state opened to a private, competitive market for workers' compensation insurance on July 1, 2008. This section remains in this code for historical purposes.

WV Legislature

§23-2C-2. Definitions.

(a) "Insurance Commissioner" means the Insurance Commissioner of West Virginia as provided in §33-2-1 of this code.

(b) "Policy default" means a policyholder that has failed to comply with the terms of its workers' compensation insurance policy and is consequently without workers' compensation insurance coverage.

(c) "Workers' compensation insurance" means insurance which provides all compensation and benefits required by this chapter.

(d) "Insurer" includes:

(1) A self-insured employer; and

(2) A private carrier.

(e) "Industrial Council" means the advisory group established in §23-2C-5 of this code.

(f) "Old Fund" means a fund held by the State Treasurer's office consisting of those funds transferred to it from the defunct Workers' Compensation Fund or other sources and those funds due and owing the defunct Workers' Compensation Fund as of June 30, 2005, that are thereafter collected. The Old Fund and assets in the fund remain property of the state after the transition to a private market.

(g) "Old Fund liabilities" mean all claims payment obligations (indemnity and medical expenses), related liabilities and appropriate administrative expenses necessary for the administration of all claims, actual and incurred but not reported, for any claim with a date of injury or last exposure on or before June 30, 2005: *Provided*, That Old Fund liabilities include all claims payments for any claim, regardless of date of injury or last exposure, through December 31, 2005: *Provided, however*, That Old Fund liabilities include all claims with dates of injuries or last exposure prior to July 1, 2004, for bankrupt self-insured employers that had defaulted on their claims obligations which were recognized by the former Workers' Compensation Commission in its actuarially determined liability number as of June 30, 2005.

(h) "Private carrier" means any insurer or the legal representative of an insurer authorized by the Insurance Commissioner to provide workers' compensation insurance pursuant to this chapter. The term does not include a self-insured employer or private employers.

(i) "Uninsured Employer Fund" means a fund held by the State Treasurer's office consisting of those funds transferred to it from the defunct Workers' Compensation Fund and any other source. Disbursements from the Uninsured Employer Fund shall be upon requisitions signed by the Insurance Commissioner, and as otherwise set forth in an exempt legislative rule promulgated by the Industrial Council.

WV Legislature

(j) "Self-Insured Employer Guaranty Risk Pool" is a fund held by the State Treasurer's office consisting of those funds transferred to it from the guaranty pool created pursuant to 85 CSR 19 (2007) and any future funds collected through continued administration of that exempt legislative rule as administered by the Insurance Commissioner. Disbursements shall be made from the Self-Insured Employer Guaranty Risk Pool upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in 85 CSR 19 (2007).

(k) "Self-Insured Employer Security Risk Pool" is a fund held by the State Treasurer consisting of those funds paid into it through the Insurance Commissioner's administration of 85 CSR 19 (2007). Disbursement from the fund shall be made from the Self-Insured Employer Security Risk Pool upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in 85 CSR 19: *Provided*, That the liabilities are limited to those self-insured employers who default on their claims obligations after the termination of the former Workers' Compensation Commission.

(l) "Voluntary market" means the workers' compensation insurance market in which insurers voluntarily offer coverage to applicants who meet the insurers' underwriting standards or guidelines.

WV Legislature

§23-2C-3. Private carriers not subject to certain premium taxes, surcharges, and credits; regulatory surcharge imposed on private carriers and self-insured employers.

Private carriers including the company, are not subject to payment of insurance premium taxes, surcharges, and credits contained in §33-3-1 et seq. of this code on premiums received for workers' compensation insurance coverage under this chapter. In lieu thereof, the workers' compensation insurance market is subject to the following:

(1)(A) With respect to fiscal years beginning on and after July 1, 2008, each private carrier shall collect a surcharge in the amount of five and five-tenths percent of the premium collected plus the total of all premium discounts based on deductible provisions that were applied: *Provided*, That prior to June 30, 2013, and every five years thereafter, the Insurance Commissioner shall review the percentage surcharge and determine a new percentage as he or she deems necessary; and

(B) The amounts required to be collected under §23-2C-3(a)(1)(A) of this code shall be remitted to the Insurance Commissioner on or before the twenty-fifth day of the month succeeding the end of the quarter in which they are collected, except for the fourth quarter for which the surcharge shall be remitted on or before March 1 of the succeeding year.

(2) Each fiscal year, the Insurance Commissioner shall calculate a percentage surcharge to be remitted on a quarterly basis by self-insured employers and said percentage shall be calculated by dividing the previous year's self-insured payroll in the state into the portion of the Insurance Commissioner's budget amount attributable to regulation of the self-insured employer market. This resulting percentage shall be applied to each self-insured employer's payroll and the resulting amount shall be remitted as a regulatory surcharge by each self-insured employer. The Industrial Council may promulgate a rule for implementation of this section. All private carriers and self-insured employers shall furnish the Insurance Commissioner with all required information and cooperate in all respects necessary for the Insurance Commissioner to perform the duties set forth in this section and in other provisions of this chapter and Chapter 33 of this code. The surcharge shall be calculated so as to only defray the costs associated with the administration of this chapter and the funds raised shall not be used for any other purpose.

WV Legislature

§23-2C-3a. Employers' mutual insurance company - additional provisions enacted in November 2005.

[Repealed.]

WV Legislature

§23-2C-4. Governance and organization.

[Repealed.]

WV Legislature

§23-2C-5. Creation of the industrial council; duties.

(a) There is hereby created within the Office of the Insurance Commissioner an industrial council.

(b) On or before July 1, 2005, the Governor, with the advice and consent of the Senate, shall appoint five voting members to the industrial council who meet the requirements and qualifications prescribed in this subsection. Two members of the West Virginia Senate and two members of the West Virginia House of Delegates shall serve as advisory nonvoting members of the board. The Governor shall appoint the legislative members to the board. No more than three of the legislative members may be of the same political party. The Insurance Commissioner shall serve as an advisory nonvoting member of the board.

(1) (A) Five members shall be appointed by the Governor with the advice and consent of the Senate for terms that begin upon appointment after the effective date of this legislation and expire as follows:

(i) One member shall be appointed for a term ending June 30, 2007;

(ii) Two members shall be appointed for a term ending June 30, 2008; and

(iii) Two members shall be appointed for a term ending June 30, 2009.

(B) Except for appointments to fill vacancies, each subsequent appointment shall be for a term ending June 30 of the fourth year following the year the preceding term expired. In the event a vacancy occurs, it shall be filled by appointment for the unexpired term. A member whose term has expired shall continue in office until a successor has been duly appointed and qualified. No member of the council may be removed from office by the Governor except for official misconduct, incompetency, neglect of duty, or gross immorality.

(C) No appointed member may be a candidate for or hold elected office. Members may be reappointed for no more than two full terms.

(2) Each of the appointed voting members of the council shall be appointed based upon his or her demonstrated knowledge and experience to effectively accomplish the purposes of this chapter. They shall meet the minimum qualifications as follows:

(A) Each shall hold a baccalaureate degree from an accredited college or university: *Provided*, That no more than one of the appointed voting members may serve without a baccalaureate degree from an accredited college or university if the member has a minimum of 15 years' experience in his or her field of expertise as required in this subdivision;

(B) Each shall have a minimum of 10 years' experience in his or her field of expertise. The Governor shall consider the following guidelines when determining whether potential candidates meet the qualifications of this subsection: Expertise in insurance claims management; expertise in insurance underwriting; expertise in the financial management of

WV Legislature

pensions or insurance plans; expertise as a trustee of pension or trust funds of more than 200 beneficiaries or $300 million; expertise in workers' compensation management; expertise in loss prevention and rehabilitation; expertise in occupational medicine demonstrated by licensure as a medical doctor in West Virginia and experience, board certification, or university affiliation; or expertise in similar areas of endeavor;

(C) At least one shall be a certified public accountant with financial management or pension or insurance audit expertise; at least one shall be an attorney with financial management experience; one shall be an academician holding an advanced degree from an accredited college or university in business, finance, insurance, or economics; and one shall represent organized labor;

(D) The council shall appoint one member to serve as chairperson. The chairperson shall serve for a one-year term and may serve more than one consecutive term. The council shall hold meetings at the request of the chairperson or at the request of at least three of the members of the council, but no less frequently than once every three months. The chairperson shall determine the date and time of each meeting. Three members of the council constitute a quorum for the conduct of the business of the council. No vacancy in the membership of the council shall impair the right of a quorum to exercise all the rights and perform all the duties of the council. No action shall be taken by the council except upon the affirmative vote of three members of the council.

(3)(A) Each voting appointed member of the council shall receive compensation of not more than $350 per day for each day during which he or she is required to and does attend a meeting of the board.

(B) Each voting appointed member of the council is entitled to be reimbursed for actual and necessary expenses incurred for each day or portion thereof engaged in the discharge of official duties in a manner consistent with guidelines of the Travel Management Office of the Department of Administration.

(C) Each member of the council shall be provided appropriate liability insurance, including, but not limited to, errors and omissions coverage, without additional premium, by the state Board of Risk and Insurance Management established pursuant to §29-12-1 *et seq*. of this code.

(c) The industrial council shall:

(1) In consultation with the Insurance Commissioner, establish operating guidelines and policies designed to ensure the effective administration of the workers' compensation insurance market in West Virginia.

(2) Review and approve, reject or modify rules that are proposed by the Insurance Commissioner for operation and regulation of the workers' compensation insurance market before the rules are filed with the Secretary of State. The rules adopted by the industrial

WV Legislature

council are not subject to §29A-3-9 through §29A-3-16 of this code. The industrial council shall follow the remaining provisions of said chapter for giving notice to the public of its actions and for holding hearings and receiving public comments on the rules.

(3) In accordance with the laws and rules of West Virginia, establish and monitor performance standards and measurements to ensure the timeliness and accuracy of activities performed under chapter 23 of this code and applicable rules.

(4) Submit for approval by the Legislature, as an isolated and clearly discernable component of the Insurance Commissioner's budget, a budget for the sufficient administrative resources and funding requirements necessary for their duties under this article.

(5) Perform all record and information gathering functions necessary to carry out its duties under this code.

(6) Perform all other duties as specifically provided in this chapter for the industrial council and those duties incidental thereto.

(7) Establish a method of indexing claims of injured workers that will make information concerning the injured workers of one insurer available to other insurers.

(A) Every insurer shall provide information, as required by the industrial council, for establishing and maintaining the claims index.

(B) If an employee files a claim with an insurer, the insurer is entitled to receive from the administrator a list of the prior claims of the employee. If the insurer desires to inspect the files related to the prior claims, he or she must obtain the written consent of the employee or the Insurance Commissioner or his or her designee. The use of the information contained in the files is limited to the administration of the claim.

WV Legislature

§23-2C-6. Continuation of old fund, uninsured employer fund, self-insured employer guaranty risk pool, and self-insured employer security risk pool.

There is hereby continued in the State Treasury a "Workers' Compensation Old Fund", "Workers' Compensation Uninsured Employers' Fund", "Self-insured Employer Guaranty Risk Pool", and "Self-insured Employer Security Risk Pool". The Insurance Commissioner shall have full authority to administer the Old Fund, the Uninsured Employers' Fund, the Self-Insured Employer Guaranty Risk Pool, and the Self-Insured Employer Security Risk Pool.

WV Legislature

§23-2C-7. Custody, investment and disbursement of funds.

The State Treasurer shall be the custodian of the Old Fund, the Uninsured Employer Fund, the Self-Insured Employer Guaranty Risk Pool, and the Self-Insured Employer Security Risk Pool, and moneys payable to each of these funds shall be deposited in the State Treasury to the credit of the funds. Each fund shall be a separate and distinct fund upon the books and records of the Auditor and Treasurer. Disbursements from these funds shall be made upon requisitions signed by the Insurance Commissioner. The Old Fund, the Uninsured Employer Fund, the Self-Insured Employer Guaranty Risk Pool, and the Self-Insured Employer Security Risk Pool are participant plans as defined in §12-6-2 of this code and are subject to the provisions of §12-6-9a of this code. The funds may be invested by the Investment Management Board in accordance with §12-6-1 *et seq*. of this code.

WV Legislature

§23-2C-8. Workers' Compensation Uninsured Employer Fund.

(a) The Workers' Compensation Uninsured Employer Fund shall be governed by the following:

(1) All money and securities in the fund must be held by the State Treasurer as custodian thereof to be used solely as provided in this article.

(2) The State Treasurer may disburse money from the fund only upon written requisition of the Insurance Commissioner.

(3) *Assessments*. — The Insurance Commissioner shall assess each private carrier and may assess self-insured employers an amount to be deposited in the fund. The assessment may be collected by each private carrier from its policyholders in the form of a policy surcharge. To establish the amount of the assessment, the Insurance Commissioner shall determine the amount of money necessary to maintain an appropriate balance in the fund for each fiscal year and shall allocate a portion of that amount to be payable by each of the groups subject to the assessment. After allocating the amounts payable by each group, the Insurance Commissioner shall apply an assessment rate to:

(A) Private carriers that reflects the relative hazard of the employments covered by the private carriers, results in an equitable distribution of costs among the private carriers and is based upon expected annual premiums to be received;

(B) Self-insured employers, if assessed, that results in an equitable distribution of costs among the self-insured employers and is based upon expected annual expenditures for claims; and

(C) Any other groups assessed that results in an equitable distribution of costs among them and is based upon expected annual expenditures for claims or premium to be received.

(4) The Industrial Council may adopt rules for the establishment and administration of the assessment methodologies, rates, payments, and any penalties that it determines are necessary to carry out the provisions of this section.

(b) *Payments from the fund*. —

(1) Except as otherwise provided in this subsection, an injured employee of any employer required to be covered under this chapter who has failed to obtain coverage may receive compensation from the Uninsured Employer Fund if such employee meets all jurisdictional and entitlement provisions of this chapter, files a claim with the Insurance Commissioner and makes an irrevocable assignment to the Insurance Commissioner of a right to be subrogated to the rights of the injured employee.

(2) Employees who are injured while employed by a self-insured employer are ineligible for benefits from the Workers' Compensation Uninsured Employer Fund.

WV Legislature

(c) *Initial determination upon receipt of a claim. —*

If a claim is filed against the Uninsured Employer Fund, the Insurance Commissioner or his or her third-party administrator shall: (1) Accept the claim into the fund if it is determined that the employer was required to maintain workers' compensation coverage with respect to the injured worker but failed to do so; (2) reject the claim if it is determined that the employer maintained such coverage or was not required to do so; or (3) in a claim involving the availability of benefits pursuant to §23-2-1d of this code, either reject or conditionally accept the claim. An aggrieved party may file a protest with the Office of Judges, or Board of Review upon the termination of the Office of Judges, to any decision by the Insurance Commissioner or the third-party administrator to accept or reject a claim into the fund, as well as to any claims decisions made with respect to any claim accepted into the fund and such protests shall be determined in the same manner as disputed claims are determined pursuant to the provisions of §23-5-1 et seq. of this code: *Provided*, That in any proceeding involving the decision to accept or refuse to accept a claim into the fund, the employer has the burden of proving that it either provided mandatory workers' compensation insurance coverage or that it was not required to do so.

(d) *Employer liability. —*

(1) Any employer who has failed to provide mandatory coverage required by the provisions of this chapter is liable for all payments made and to be made on its behalf, including any benefits, administrative costs and attorney's fees paid from the fund or incurred by the Insurance Commissioner, plus interest calculated in accordance with the provisions of §23-2-13 of this code.

(2) The Insurance Commissioner:

(A) May bring a civil action in a court of competent jurisdiction to recover from the employer the amounts set forth in §23-2C-8(d)(1) of this code. In any such action, the Insurance Commissioner may also recover the present value of the estimated future payments to be made on the employer's behalf and administrative costs and attorney's fees attributable to such claim: *Provided*, That the failure of the Insurance Commissioner to include a claim for future payments shall not preclude one or more subsequent actions for such amounts;

(B) May enter into a contract with any person, including the third-party administrator of the Uninsured Employer Fund, to assist in the collection of any liability of an uninsured employer; and

(C) In lieu of a civil action, may enter into an agreement or settlement regarding the collection of any liability of an uninsured employer.

(3) In addition to any other liabilities provided in this section, the Insurance Commissioner may impose an administrative penalty of not more than $10,000 against an employer if the employer fails to provide mandatory coverage required by this chapter. All penalties and

WV Legislature

other moneys collected pursuant to this section shall be deposited into the Uninsured Employer Fund.

WV Legislature

§23-2C-9.

Repealed.

Acts, 2008 Reg. Sess., Ch. 120.

WV Legislature

§23-2C-10. West Virginia adverse risk assignment.

(a) The Insurance Commissioner shall provide for the development and administration of an assigned risk plan to provide workers' compensation insurance coverage to employers who are unable to procure coverage in the voluntary market.

(b) To qualify for coverage under the plan, an employer must have been categorically declined coverage by at least two insurers that are not affiliated with each other. The employer has the burden of establishing that at least two unaffiliated insurers are unwilling to provide coverage at any premium level that is reasonably related to the risk presented by the employer. The assigned risk plan may also provide for other reasonable qualifications and for the termination of coverage under the plan for specified reasons.

(c) Any employer that satisfies the requirements of subsection (b) of this section and other qualifications established in the plan shall be provided coverage at a premium level to be determined or approved by the Insurance Commissioner, which premiums shall be actuarially sound, consistent with classification and rate-making methodologies found in the insurance industry, and calculated to enable the plan to be self-sustaining and, to the greatest extent possible, able to operate without subsidies from employers and insurers in the voluntary market. Rates may not be excessive, inadequate or unfairly discriminatory.

(d) The Insurance Commissioner may designate any third party, including any private carrier or rating organization with substantial experience in developing and administering similar programs in other states, to develop and administer the assigned risk plan for a period of three years, and thereafter, shall contract with any qualified party, including the then current administrator, to continue the administration of the assigned risk plan: Provided, That the Insurance Commissioner must approve the plan prior to the plan becoming operative. The plan established pursuant to this section shall require that all private carriers participate as a condition of their authority to transact business in this state.

(e) In the event the plan incurs a deficit in one or more policy years, the Insurance Commissioner may assess all private carriers providing workers' compensation insurance in voluntary market funds as are necessary to cover the deficits. The assessments shall result in an equitable distribution of costs among private carriers based upon premiums received by the private carriers in the private market. Assessments made upon the policies of each private carrier pursuant to this section may be collected by each carrier in the form of a surcharge.

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§23-2C-11. Transfer of assets from new fund to the mutual insurance company established as a successor to the commission; transfer of commission employees.

[Repealed.]

WV Legislature

§23-2C-12. Certain personnel provisions governing Workers' Compensation Commission employees and employees laid off by the employers' mutual insurance company during its initial year of operation.

A person who was employed by the former Workers' Compensation Commission upon its termination or was laid off by the employers' mutual insurance company created in this article on or before June 30, 2008, is entitled to be placed on an appropriate reemployment list maintained by the Department of Personnel and to be allowed a preference on that list. The Department of Personnel shall maintain such an employee on the reemployment list indefinitely, or until the employee has declined three offers of employment at a paygrade substantially similar to that of his or her position upon termination of the former Workers' Compensation Commission, or until he or she is reemployed by the executive branch of state government, whichever occurs earlier.

WV Legislature

§23-2C-13. Certain retraining benefits to those employees laid-off by the mutual during its first year of operation.

[Repealed.]

WV Legislature

§23-2C-14. Certain benefits provided to commission employees.

[Repealed.]

WV Legislature

§23-2C-15. Mandatory coverage; changing of coverage.

(a) An employer may elect to purchase workers' compensation insurance from another a private carrier licensed and otherwise authorized to transact workers' compensation insurance in this state or (3) self-insure its obligations if it satisfies all requirements of this code to so self-insure and is permitted to do so. Private carriers are permitted to sell workers' compensation insurance through licensed agents in the state. To the extent that a private carrier markets workers' compensation insurance through a licensed agent, it is subject to all applicable provisions of Chapter 33 of this code.

(b) Every employer shall continuously post a notice upon its premises in a conspicuous place identifying its workers' compensation insurer. The notice must include the name, business address, and telephone number of the insurer and of the person to contact with questions about a claim.

(c) Any rule promulgated by the Industrial Council empowering agencies of this state to revoke or refuse to grant, issue, or renew any contract, license, permit, certificate, or other authority to conduct a trade, profession, or business to or with any employer whose account is in default with regard to any liability under this chapter shall be fully enforceable by the Insurance Commissioner against the employer.

(d) Private carriers may cancel a policy upon the issuance of 30 days' written advance notice to the policyholder and may refuse to renew a policy upon the issuance of 60 days' written advance notice to the policyholder: *Provided*, That cancellation of the policy by the carrier for failure of consideration to be paid by the policyholder or for refusal to comply with a premium audit is effective after 10 days' advance written notice of cancellation to the policyholder.

(e) Every private carrier shall notify the Insurance Commissioner as follows: (1) Of the issuance or renewal of insurance coverage, within 30 days of: (A) The effective date of coverage; or (B) the private carrier's receipt of notice of the employer's operations in this state, whichever is later; (2) of a termination of coverage by the private carrier due to refusal to renew or cancellation, at least 10 days prior to the effective date of the termination; and (3) of a termination of coverage by an employer, within 10 days of the private carrier's receipt of the employer's request for such termination; the notifications shall be on forms developed or in a manner prescribed by the Insurance Commissioner.

(f) For the purposes of §23-2C-15(d) and (e) of this code, the transfer of a policyholder between insurance companies within the same group is not considered a cancellation or refusal to renew a workers' compensation insurance policy.

WV Legislature

§23-2C-16. Administration of Old Fund, Uninsured Employer Fund, Self-Insured Employer Guaranty Risk Pool, Self-Insured Employer Security Risk Pool, and Private Carrier Guaranty Fund.

(a) The Insurance Commissioner shall review claims determined to be payable from the Old Fund, Uninsured Employer Fund, Self-Insured Employer Guaranty Risk Pool, Self-Insured Employer Security Risk Pool, and Private Carrier Guaranty Fund and may contest the determination pursuant to the provisions of §23-5-1 *et seq*. of this code. The Insurance Commissioner may retain a third-party administrator for said funds. The administrative duties may include, receipt of all claims, processing said claims, providing for the payment of said claims through the State Treasurer's office or other applicable state agency, and ensuring, through the selection and assignment of counsel, that claims decisions are properly defended.

(b) The Insurance Commissioner may conduct or cause to be conducted an annual audit to be performed on said funds.

(c) The Insurance Commissioner may contract or employ counsel to perform legal services related solely to the collection of moneys due the Old Fund, including the collection of moneys due the Old Fund and enforcement of repayment agreements entered into for the collection of moneys due on or before June 30, 2005, in any administrative proceeding and in any state or federal court.

(d) During the fiscal years beginning July 1, 2019, July 1, 2020, July 1, 2021, July 1, 2022, and July 1, 2023, the Insurance Commissioner may, in his or her discretion, transfer special revenue moneys contained in the Insurance Commission Fund to the Old Fund in any fiscal year in which the Insurance Commissioner has determined, and an independent Auditor has attested thereto, that a deficit balance existed in the Old Fund for the prior fiscal year.

WV Legislature

§23-2C-17. Administration of a competitive system.

(a) Every policy of insurance issued by a private carrier:

(1) Shall be in writing;

(2) Shall contain the insuring agreements and exclusions; and

(3) If it contains a provision inconsistent with this chapter, it shall be deemed to be reformed to conform with this chapter.

(b) The Industrial Council shall promulgate a rule which prescribes the requirements of a basic policy to be used by private carriers.

(c) A private carrier or self-insured employer may enter into a contract to have its plan of insurance administered by a third-party administrator if the administrator is licensed with the Insurance Commissioner in accordance with article forty-six, chapter thirty-three of this code. Notwithstanding any other provision of this code to the contrary, any third-party administrator who, directly or indirectly, underwrites or collects charges or premiums from, or adjusts or settles claims on residents of this state, in connection with workers' compensation coverage offered or provided by a private carrier or self-insured employer, is subject to the provisions of article forty-six, chapter thirty-three of this code to the same extent as those persons included in the definition set forth in subsection (a), section two of said article. The Insurance Commissioner shall propose rules, as provided in section five, article two-c of this chapter, to regulate the use of third-party administrators by private carriers and self-insured employers, including rules setting forth mandatory provisions for agreements between third-party administrators and self-insured employers or private carriers.

(d) A self-insured employer or a private carrier may:

(1) Enter into a contract or contracts with one or more organizations for managed care to provide comprehensive medical and health care services to employees for injuries and diseases that are compensable pursuant to this chapter. The managed care plan must be approved pursuant to the provisions of section three, article four of this chapter.

(2) Require employees to obtain medical and health care services for their industrial injuries from those organizations and persons with whom the self-insured employer or private carrier has contracted or as the self-insured employer or private carrier otherwise prescribes.

(3) Except for emergency care, require employees to obtain the approval of the self-insured employer or private carrier before obtaining medical and health care services for their industrial injuries from a provider of health care who has not been previously approved by the self-insured employer or private carrier.

(e) A private carrier or self-insured employer may inquire about and request medical records

WV Legislature

of an injured employee that concern a preexisting medical condition that is reasonably related to the industrial injury of that injured employee.

(f) An injured employee must sign all medical releases necessary for his or her self-insured employer or his or her employer's private carrier to obtain information and records about a preexisting medical condition that is reasonably related to the industrial injury of the employee and that will assist the insurer to determine the nature and amount of workers' compensation to which the employee is entitled.

WV Legislature

§23-2C-18. Ratemaking; Insurance Commissioner.

(a)(1) Rates for workers' compensation insurance are subject to the provisions of this section, §23-2C-18a of this code, and §33-20-1 *et seq*. of this code.

(2) In the event of any conflict, the provisions of this article shall have paramount effect, but the provisions in this chapter and Chapter 33 of this code shall be construed as complementary and harmonious unless so clearly in conflict that they cannot reasonably be reconciled.

(b) An insurer shall file its rates by filing a multiplier or multipliers to be applied to prospective loss costs that have been filed by the designated advisory organization on behalf of the insurer in accordance with §23-2C-18a of this code and may also file carrier specific rating plans.

(c) Rates must not be excessive, inadequate, or unfairly discriminatory, nor may an insurer charge any rate which if continued will have or tend to have the effect of destroying competition or creating a monopoly.

(d) The Insurance Commissioner may disapprove rates if there is not a reasonable degree of price competition at the consumer level with respect to the class of business to which they apply. In determining whether a reasonable degree of price competition exists, the Insurance Commissioner shall consider all relevant tests, including:

(1) The number of insurers actively engaged in the class of business and their shares of the market;

(2) The existence of differentials in rates in that class of business;

(3) Whether long-run profitability for private carriers generally of the class of business is unreasonably high in relation to its risk;

(4) Consumers' knowledge in regard to the market in question; and

(5) Whether price competition is a result of the market or is artificial. If competition does not exist, rates are excessive if they are likely to produce a long-run profit that is unreasonably high in relation to the risk of the class of business, or if expenses are unreasonably high in relation to the services rendered.

(e) Rates are inadequate if they are clearly insufficient, together with the income from investments attributable to them, to sustain projected losses and expenses in the class of business to which they apply.

(f) One rate is unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses. Rates are not unfairly discriminatory because different premiums result for policyholders with similar exposure to

WV Legislature

loss but different expense factors, or similar expense factors but different exposure to loss, so long as the rates reflect the differences with reasonable accuracy. Rates are not unfairly discriminatory if they are averaged broadly among persons insured under a group, franchise, or blanket policy.

WV Legislature

§23-2C-18a. Designation of rating organization.

(a) For the purposes of this section:

(1) "Classification system" or "classification" means the plan, system or arrangement for grouping risks with similar characteristics or a specified class of risk by recognizing differences in exposure to hazards.

(2) "Experience rating" means a statistical procedure utilizing past risk experience to produce a prospective premium credit, debit or unity modification.

(3) "Prospective loss costs" means historical aggregate losses and loss adjustment expenses projected through development to their ultimate value and through trending to a future point in time. Prospective loss costs do not include provisions for profit or expenses other than loss adjustment expenses.

(4) "Statistical plan" means the plan, system or arrangement used in collecting data for ratemaking or other purposes.

(b) The Insurance Commissioner shall designate one rating organization to:

(1) Assist the commissioner in gathering, compiling and reporting relevant statistical information on an aggregate basis;

(2) Develop and administer, subject to approval by the commissioner, the uniform statistical plan, uniform classification plan and uniform experience rating plan;

(3) Develop and file manual rules, subject to the approval of the commissioner, that are reasonably related to the recording and reporting of data pursuant to the uniform statistical plan, uniform experience rating plan and the uniform classification plan; and

(4) File with the commissioner for approval all prospective loss costs, provisions for special assessments, all supplementary rating information and any changes, amendments or modification of the forgoing proposed in this state.

(c) Each workers' compensation insurer shall:

(1) Record and report its workers' compensation experience to the designated rating organization as set forth in the uniform statistical plan approved by the commissioner; and

(2) Adhere to the uniform classification plan and uniform experience rating plan developed by the designated rating organization and approved by the commissioner.

(d) The commissioner may promulgate exempt legislative rules to implement the provisions of this section, including a rule providing for the equitable sharing and recovery of the expense of the designated rating organization in performing the functions set forth in

WV Legislature

subsection (b) of this section.

WV Legislature

§23-2C-19. Premium payment; employer default; special provisions as to employer default collection.

(a) Each employer who is required to purchase and maintain workers' compensation insurance or who elects to purchase workers' compensation insurance shall pay a premium to a private carrier. Each carrier shall notify its policyholders of the mandated premium payment methodology and under what circumstances a policyholder will be found to be in policy default.

(b) An employer who is required to purchase and maintain workers' compensation insurance but fails to do so or otherwise enters policy default shall be deprived of the benefits and protection afforded by this chapter, including §23-2-6 of this code, and the employer is liable as provided in §23-2-8 of this code: The policy defaulted employer's liability under these sections is retroactive to the day the policy default occurs: The private carrier shall notify the policy defaulted employer of the method by which the employer may be reinstated with the private carrier.

(c) In addition to any other liabilities provided in this section, the Insurance Commissioner may impose an administrative fine of not more than $10,000 against an employer if the employer fails to provide mandatory coverage required by this chapter.

(d) Every agency shall, upon notification of employer default by the Insurance Commissioner, immediately begin the process to revoke or terminate any contract, license, permit, certificate, or other authority to conduct a trade, profession, or business in this state and shall refuse to issue, grant, or renew any such contract, license, permit, certificate, or authority.

(1) The term "employer default" means having an outstanding balance or liability to the Old Fund or to the Uninsured Employers' Fund or being in policy default, as defined in §23-2C-2 of this code, or failure to maintain mandatory workers' compensation coverage. An employer is not in default if it has entered into a repayment agreement with the Insurance Commissioner and remains in compliance with the obligations under the repayment agreement.

(2) The term "agency" includes any unit of state government such as officers, agencies, divisions, departments, boards, commissions, authorities, or public corporations.

(e) Any amounts owed by an employer to the state as a result of an employer default is a personal liability of the employer, its officers, owners, partners, and directors and is immediately due and owing and shall, in addition, be a lien enforceable against all the property of the employer, its officers, owners, partners, and directors: *Provided*, That the lien shall not be enforceable as against a purchaser, including a lien creditor, of real estate or personal property for a valuable consideration without notice, unless docketed as provided in §38-10C-1 of this code: *Provided, however*, That the lien may be enforced as other judgment liens are enforced through the provisions of chapter 38 of this code and the

WV Legislature

same is considered by the circuit court to be a judgment lien for this purpose.

(f) The Insurance Commissioner shall propose rules for adoption by the industrial council to effectuate the purposes of this section including the conditions under which agencies shall comply with the provisions of §23-2C-19(d) of this code and specifying how notice of default shall be given by the Insurance Commissioner.

WV Legislature

§23-2C-20. Claims administration issues.

(a) Private carriers and self-insured employers shall at all times be bound and shall comply fully with all of the provisions of this chapter. Furthermore, all of the provisions contained in §23-4-1 *et seq*. of this code pertaining to disability and death benefits are binding on and shall be strictly adhered to by the successor to the commission, private carriers, and the self-insured employer in their administration of claims presented by employees of the self-insured employer private carriers and self-insured employers.

(b) The Occupational Pneumoconiosis Board shall be administered by the Insurance Commissioner. Private carriers and self-insured employers shall have all authority and responsibility in the administration and processing of occupational pneumoconiosis claims.

(c) Upon termination of the former Workers' Compensation Commission, claims allocation responsibilities transferred to the Insurance Commissioner.

(d) The Insurance Commissioner's third-party administrator for the Old Fund has administrative and adjudicatory authority in administering old law liability and deciding old law claims.

WV Legislature

§23-2C-21. Limitation of liability of insurer or third-party administrator; administrative fines are exclusive remedies.

(a) No civil action may be brought or maintained by an employee against a private carrier or a third-party administrator, or any employee or agent of a private carrier or third-party administrator, who violates any provision of this chapter or Chapter 33 of this code.

(b) Any administrative fines or remedies provided in this chapter or Chapter 33 of this code or rules promulgated by the Insurance Commissioner are the exclusive civil remedies for any violation of this chapter committed by a private carrier or a third-party administrator or any agent or employee of a private carrier or a third-party administrator.

(c) Upon a determination by the Office of Judges, or by the Board of Review upon the termination of the Offices Judges, that a denial of compensability, a denial of an award of temporary total disability, or a denial of an authorization for medical benefits was unreasonable, reasonable attorney's fees and the costs actually incurred in the process of obtaining a reversal of the denial shall be awarded to the claimant and paid by the private carrier or self-insured employer which issued the unreasonable denial. A denial is unreasonable if, after submission by or on behalf of the claimant, of evidence of the compensability of the claim, the entitlement to temporary total disability benefits or medical benefits, the private carrier or self-insured employer is unable to demonstrate that it had evidence or a legal basis supported by legal authority at the time of the denial which is relevant and probative and supports the denial of the award or authorization. Payment of attorney's fees and costs awarded under this subsection will be made to the claimant at the conclusion of litigation, including all appeals, of the claimant's protest of the denial.

WV Legislature

§23-2C-22. Rules.

Except as otherwise provided in this chapter, all rules applicable to the former Workers' Compensation Commission are hereby adopted and made effective as to the operation of the Workers' Compensation insurance market to the extent that they are not in conflict with the current law. Authority to enforce the existing rules and the regulatory functions of the commission as set forth in chapter twenty-three of the code shall transfer from the commission to the Insurance Commissioner effective upon termination of the commission.

WV Legislature

§23-2C-23. Transfer of assets and contracts.

[Repealed.]

WV Legislature

§23-2C-24. Surplus note or other loan arrangement for new fund.

[Repealed.]

WV Legislature