



**THE WORKERS' COMPENSATION
RATING AND INSPECTION BUREAU**

June 22, 2007

CIRCULAR LETTER 2057

**FOLLOW –UP TO CIRCULAR LETTER NO. 2045: PROCEDURES FOR ISSUING
CERTIFICATES OF INSURANCE
FOR SOLE PROPRIETORS AND PARTNERSHIPS**

Circular Letter No. 2045 announced the Division of Insurance's approval of *Procedures for Issuing Certificates of Insurance for Sole Proprietors and Partnerships* ("Procedures"). Effective May 1, 2007, all Certificates of Insurance ("Certificate") for policies issued to a sole proprietor or partnership shall include language that indicates whether or not the sole proprietor or partner(s) is covered by the workers' compensation policy identified on the Certificate. The purpose of the *Procedures* is to enable the recipient of a Certificate to better understand what coverage is provided by the workers' compensation insurance policy identified on the Certificate.

The announcement of these *Procedures* resulted in many questions about the consequences of the new Certificate language during audits of policyholders who hire any sole proprietors or partnerships. In an effort to address these questions, a subcommittee of the Bureau/Producer Advisory Group was appointed to draft proposed audit guidelines to provide consistent treatment of such Certificates at audit. The Bureau will submit those audit guidelines for review and approval by the Division of Insurance and Department of Industrial Accidents. In the meantime, this Circular addresses some of the questions that have been asked.

Collection of Premium

The *Procedures* do not change the existing law regarding a carrier's authority to collect premium from its policyholders. Under Parts One and Five of The Standard Workers' Compensation and Employers Liability Insurance Policy ("Policy"), the insurance company is entitled to collect premium for the employer's officers and employees **and for all other persons engaged in work that could make the insurance company liable under the workers' compensation law**. Similarly, Rule V-A of the *Massachusetts Workers' Compensation and Employers' Liability Insurance Manual* ("Manual"), which is approved by the Commissioner of Insurance, states: "Premium shall be computed on the basis of the total remuneration paid or payable by the insured for services of employees or other individuals who **could** receive workers' compensation benefits pursuant to M.G.L. Chapter 152, as amended, for work-related

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injuries as provided for by the policy” (Emphasis added). Under the provisions of M.G.L. c. 152, section 18, an insurance company may become liable for the payment of workers’ compensation benefits to other persons (i.e. other than employees) hired by its policyholder.¹ Under Rule IX of the Manual a policyholder is required to furnish satisfactory evidence to his insurance company that his sub-contractors or independent contractors have workers’ compensation insurance in force covering the work performed for the insured employer.

Manual Rule IX refers to an insurance company’s collection of premium for uninsured sub-contractors or uninsured independent contractors with employees. An insurance company may also be required to pay benefits to an uninsured sub-contractor or independent contractor with no employees because the Department of Industrial Accidents or a court could find that an alleged independent contractor is actually an employee of the policyholder. In Massachusetts, it is presumed that any person performing services for another is an employee unless the employer can meet the following three part test set forth in M.G.L. c. 149, section 148B.

1. The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
2. The service is performed outside the usual course of business of the employer; and
3. The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

The employer’s failure to demonstrate any one of the above criteria will suffice to establish that the services in question constitute employment.

Coverage Election for Sole Proprietors and Partners

The *Procedures* do not change the existing law regarding coverage requirements for sole proprietors or partners. There is no state law requiring a sole proprietor or partner(s) of a partnership to purchase workers’ compensation insurance to cover themselves.² As indicated above, however, if an “uninsured” sole proprietor or partner

¹ Section 18, in pertinent part, states: *If an insured person enters into a contract , written or oral, with an independent contractor to do such person’s work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured , and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons.....**This section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the insured , nor to any case where the injury occurred elsewhere than on, in or about the premises on which the contractor has undertaken to execute the work for the insured or which are under the control or management of the insured. The word “premises” as used in this section, shall include the public highways if the contract requires or necessitates the use of the public highways.** (emphasis added)*

² *If a sole proprietor or a partner wants to be covered as an employee under a workers’ compensation policy, he/she needs to elect such coverage in accordance with M.G.L. c. 152 sec. 1(4) and the*

is injured while performing work for a policyholder, he could be eligible to receive workers' compensation benefits from the policyholder's insurance company. As a result, the Policy permits an insurance company to collect premium for any person who is hired by its policyholder and engaged in work that could make the insurance company liable under the workers' compensation law.

Certificates for Subcontractors and Independent Contractors Presented at Audit

The following scenarios provide general information about what a policyholder can expect to be asked for at audit.

Scenario One: The policyholder provides the auditor with a valid Certificate issued for a policy covering a sole proprietor or partnership. The Certificate indicates that the sole proprietor or partner(s) has elected to be covered by the workers' compensation policy identified on the Certificate.

Such a Certificate could be accepted at audit as evidence that the sole proprietor or partnership/partners has workers' compensation insurance coverage for themselves and any and all of their employees.

Scenario Two: The policyholder provides the auditor with a valid Certificate issued for a policy covering a sole proprietor or partnership. The Certificate indicates that the sole proprietor or partner(s) has **not** elected to be covered by the worker's compensation policy identified on the certificate.

The policyholder can expect the auditor to ask for satisfactory evidence that such sole proprietor or partnership is an employer.³ If the auditor does not receive satisfactory evidence that the sole proprietor or partnership is an employer, the policyholder can expect to be asked to provide evidence which proves that the sole proprietor or partnership meets the three prong test set forth in G.L. c. 149, section 148B.

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provisions of the Massachusetts Code of Regulations, 452 CMR 8.07. If such coverage is elected by a sole proprietor or partner, then his/her workers' compensation insurance policy should include the Sole Proprietors, Partners, Officers, and Others Coverage Endorsement WC 00 03 10.

³ Evidence to establish whether a sole proprietor or partnership is an employer could include, but not be limited to, such things as: contracts between the policyholder and the sole proprietor or partnership, invoices from a sub contractor to the general contractor, W2 forms, Employer Identification Numbers (EIN), 940 Forms: Employer's Annual Federal Unemployment (FUTA) Tax Return, and/or 941 Forms: Employer's Quarterly Federal Tax Return.