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International Association of Industrial Accident Boards and Commissions Model Agreement Between Jurisdictions to Govern Coordination of Claims and Coverage July 29, 2005

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Background and Uses

The purpose of this model is provide a useful overview of the experience of states in negotiating and administering reciprocal agreements to coordinate employer insurance requirements and claims in cases where “temporary” employment occurs in one of the states that are parties to a reciprocal agreement. The model presented here distills the structure and language commonly found in existing agreements.

Reciprocal agreements to coordinate interstate insurance requirements and claims handling are practiced by at least 10 states, dating back as early as 1968 (Washington). The benefits of such agreements are:

- For employers, they reduce requirements to purchase insurance coverage in multiple or numerous jurisdictions when an employer sends employees to work for short periods outside the state of hire and normal employment
- For workers, they eliminate any possible questions with regard to the employee’s right to obtain workers’ compensation benefits from the state of hire and normal employment, usually the home state of the worker with medical providers close to home.
- For state WC agencies, they ease the enforcement investigations and sanctions required to maintain the scope of workers' compensation coverage desired.
- For insurers/payers they reduce ambiguity in claims handling by insurance adjusters and minimize the need to deal with duplicate claims and offsets.
- For all parties, they reduce the costs of litigation for benefits when the applicable coverage by two states is ambiguous.

By way of background, it should be understood that most states do allow claims that occur in the course of temporary employment outside of the “home” state of operations to be processed under the laws of the home state where the worker regularly works. However, employers are often

exposed to the need to purchase multiple policies (especially when state-specific assigned risk plans are involved), which may result in them paying twice for the same workers' payroll. Disputes and litigation are most likely to arise when the claim is serious (major permanent injury or death) and the indemnity benefits are greatly different between states.

In addition to the requirements of law from each jurisdiction, agreements should be approached with a clear understanding of the consequences to employers and injured workers. Among the issues to consider are:

- If benefit levels are greatly different between the states, the state with the lower benefit level is constraining access to higher benefits for its workers that may be injured outside the state
- If one state has a much lower workers' compensation insurance rate (especially for mobile employment like construction trades), employers in the low rate state may have a competitive advantage in winning bids as compared to employers in the other party to the agreement (hence the common use of construction exceptions, given below).

[Note that the term "state" used below should be construed to include province, territory, or any sub-national jurisdiction having authority to govern workers' compensation.]

Model Reciprocal Agreement

The State of ____ "A" ____, acting by and through the Department of _____ and the State of ____ "B" ____, acting by and through its Department of _____, desiring to resolve jurisdictional issues that arise when workers from one state temporarily work in another, enter into the following agreement (the "Agreement"):

[Note: the signing authority in most of the existing laws is an agency head. As an exception, North Dakota agreements are signed by the Governor as well as agency representatives.]

Who Is Affected By This Agreement

This Agreement affects the rights of workers and the responsibilities of their employers when a contract of employment arises in "A" to work in "A" and the worker is temporarily working in B, or when the contract of employment arises in "B" to work in "B" and the worker is temporarily working in A. To be covered by this Agreement: 1) an employer must be considered an employer under both A's and B's workers' compensation laws, 2) an employer must have a workers' compensation insurance policy unless they are a licensed [insert the term that is appropriate under state law] self insurer, and 3) workers must be considered workers under both A's and B's workers' compensation laws. In the event that the employer or worker is not covered in one of the states that are signatories to this agreement, the existence of this agreement does not affect or alter the rights a worker may have against the employer under the laws of either state.

Note: If the employer is illegally uninsured, the employee may have the right of choice of venue to file the claim against an uninsured employer fund, assuming such funds exist in both states. You may want to make this explicit.

Basic Rule

When a worker employed in “A” and subject to “A” workers’ compensation law is temporarily working in “B”, or when a worker employed in “B” and subject to “B” workers’ compensation law is temporarily working in “A”:

1. Employers must secure the payment of workers' compensation benefits under the workers' compensation law of the worker’s state of usual employment, and pay premiums or be self-insured in that state for the work performed while in the other state; and
2. Workers' compensation benefits for injuries and occupational diseases arising out of the temporary employment in the other state shall be payable under the workers' compensation law of the worker’s state of usual employment, and that state's law provides the exclusive remedy available to the injured worker.

This agreement covers only employees whose place of usual employment is in one of the jurisdictions party to this agreement. In determining the place of usual employment, the jurisdiction in which the employee has spent the majority of paid work days over the past 12 months shall be the dominant factor in locating the nexus of employment. If there is no single jurisdiction with the majority of paid work days, the jurisdiction of hire will determine the place of usual employment for purposes of this agreement.

Note: If there is ambiguity about the nexus of employment, e.g., worker usually works in State B, but was hired in State C and occasionally reports for work in C, then this agreement may not apply even if the employment in A is temporary within the meaning of this agreement.

Drafting Note: States may wish to consider including language that would extend the definition of temporary employment to apply to emergency situations.

[Option 1 for determining Temporary employment]

In determining whether a worker is temporarily working in another state, “A” and “B” agree to consider:

1. The extent to which the worker's work within the state is of a temporary duration;
2. The intent of the employer in regard to the worker's employment status;
3. The understanding of the worker in regard to the employment status with the employer;
4. The permanent location of the employer and its permanent facilities;

5. The extent to which the employer's work in the state is of a temporary duration, established by a beginning date and expected ending date of the employer's work;
6. The circumstances and directives surrounding the worker's work assignment;
7. The state laws and regulations to which the employer is otherwise subject;
8. The residence of the worker;
9. The provisions of any contract, written policy manual or other written agreement concerning the terms and conditions of employment; and
10. Other information relevant to the determination.

[Drafting Note – Option 2 for determining “Temporary”. The above open-ended criteria may lead to burdensome litigation and delays in determination and notice of extraterritorial coverage requirements. Thus, more objective triggers may be desirable.]

The employee's presence in the state of the temporary work assignment for purposes of conducting employment activities does not exceed any of the following periods:

- (1) [] days in any 30-day period; or
- (2) [] days in any 360-day period.

[Additional optional conditions on application of this agreement]

- A. The employee was not hired to work specifically in the state of temporary work assignment;
- B. The employer does not have a permanent place of business in the state of the temporary work assignment, and;
- C. This Agreement does not apply to employees of an employer working in the State of the temporary work assignment [options: in construction, on public service contracts, or whatever other areas the law prescribes].

Within 30 days of the effective date of a law change, the parties agree to notify the other state in writing or via email of any changes to their statutory or decisional law that may affect this Agreement.

Exclusion From The Basic Rule

This Agreement does not apply to any “A” worker of a “B” employer while working in the State of “A” nor to any “B” worker of a “A” employer while working in the State of “B.” It is understood that an employer from either “B” or “A” may have work in the other state where they

may have both “B” and “A” workers not on temporary assignment. This circumstance would require the employer to obtain coverage in both states to cover the subject workers of their respective states.

Certificates Of Coverage

Upon request, a duly authorized official of the workers’ compensation board or similar agency in each state will issue certificates of extraterritorial coverage to the other when appropriate. It shall certify that an employer is insured in that other state for which extraterritorial coverage for the employer's subject workers while working within the state of temporary assignment on a temporary basis is being provided, as defined above. When issued, the certificate is prima facie evidence that the employer carries such compensation insurance.

Effective Date

This Agreement shall take effect immediately upon execution by both parties and public notification in compliance with the laws of “A” and “B”. This agreement will remain in effect unless terminated, modified, amended or replaced in writing between the parties.

Termination

Either party may terminate the Agreement, without cause, by giving at least 60 days written notice to the other party to this agreement.

Notice

This Agreement creates no rights or remedies, causes of action, or claims on behalf of any third person or entity against “A” or “B”, and is executed expressly and solely for the purpose of coordinating issues of workers’ compensation coverage between the states

Drafting option: It would be useful to offer a specific dispute resolution process. In Canada, the Boards submit interjurisdictional disputes to a third Board for arbitration. In the US, it may be difficult to enlist a third-party state to arbitrate a dispute under this agreement. An alternative dispute resolution process might be to submit the claim dispute to the review body that normally receives appeals to hearings regarding disputed workers' compensation claims. It seems logical to submit the dispute to the jurisdiction in which the extraterritorial claim is being made, i.e., the jurisdiction of temporary employment.