Washington State Department of Labor & Industries

Preliminary Cost-Benefit Analysis

Self-Insurance Good Faith and Fair Dealing

Chapter 296-15 WAC, Workers' Compensation Self-Insurance Rules and Regulations

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CHAPTER 1: Requirements of the Administrative Procedure Act

The Administrative Procedure Act (APA; Chapter 34.05 RCW) requires that, before adopting a significant legislative rule, the Department of Labor & Industries (L&I) must analyze the probable costs and benefits of the rule, and determine that the benefits are greater than its costs, taking into account both the qualitative and quantitative benefits and costs." RCW 34.05.328(1)(d).

Under certain circumstances, a rule or rule component is exempt from this requirement. These exemption criteria are listed in RCW 34.05.328(5)(b), including:

- Emergency rules adopted under RCW 34.05.350;
- Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party;
- Rules adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule;
- Rules that only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;
- Rules the content of which is explicitly and specifically dictated by statute;
- Rules that set or adjust fees under the authority of RCW 19.02.075 or that set or adjust fees or rates pursuant to legislative standards, including fees set or adjusted under the authority of RCW 19.80.045.

This cost-benefit analysis has been prepared to comply with the APA for the creation of new rule sections and amendments that do not fall under the exemptions described above.

CHAPTER 2: Background of the Industry and the Proposed Rules

2.1 The background of the affected industry

Self-insured employers (SIEs) are a unique subset of employers in Washington State who are certified to manage claims incurred from injuries on their jobsites themselves. In addition, they directly pay benefits and liabilities for those claims instead of owing premiums to the State Fund. In order to become certified as a self-insurer, employers must meet specific and stringent financial, job safety, and other criteria. Due to these requirements, SIEs tend to be among the largest employers in the state.

Once certified, SIEs often contract the management of their claims with licensed companies that specialize in managing workers' compensation claims, called third-party administrators (TPAs). Both SIEs and TPAs must manage workers' compensation claims in accordance with Title 51 RCW.

This rule applies to a subset of SIEs, self-insured municipal employers and self-insured private sector firefighter employers who employ 50 or more firefighters.

2.2 The background of this rulemaking

2.2.1 Substitute House Bill 1521 (SHB 1521)

The Washington State Legislature passed SHB 1521 during the 2023 legislative session and the bill was codified under Chapter 51.14 RCW. SHB 1521 established a duty of good faith and fair dealing for self-insured municipal employers and self-insured private sector firefighter employers who employ 50 or more firefighters. Failure to practice good faith and fair dealing with their injured workers could result in increased penalties, including decertification of their self-insured status. Good faith and fair dealing in this context refers to the administration of workers' compensation benefits. Rules on this subject seek to protect the best interests of impacted workers by ensuring that they are free from coercion or other unfair practices regarding industrial insurance benefits that may be due to them.

Section 3 of SHB 1521 requires L&I to conduct rulemaking to identify additional applications of the duty of good faith and fair dealing and establish criteria for calculating appropriate penalties for violations. Section 4 directs L&I to withdraw the certification of self-insurers who have

violated the duty of good faith and fair dealing three times in a three-year period. Additional rules are needed to clarify processes related to self-insurance penalties, corrective action, and withdrawal of certification. This rulemaking creates no new requirements for management of claims. Rather, it identifies to what degree violations of existing requirements are raised to the level of a violation of good faith and fair dealing.

2.2.2 Rule development process

In order to have rules in place by July 1, 2024—the effective date of L&I's enforcement obligations under SHB 1521—L&I began a comprehensive rulemaking development process with stakeholders in November of 2023. On September 05, 2023, L&I filed the CR-101, preproposal statement of inquiry, as required by the APA.

As part of the rule development process, L&I developed the draft rule language in conjunction with a group of stakeholders, including self-insured employers, the Washington Self-Insurers' Association (WSIA), Association of Washington Cities (AWC), Washington State Association of Justice (WSAJ), and other interested parties. L&I created and circulated multiple pre-draft versions of the rule language to stakeholders who were able to provide input. L&I held meetings to discuss the pre-draft rule language and accepted written feedback. Feedback received on pre-draft rules was considered and incorporated into L&I's proposed rules being filed on February 20, 2024.

2.3 The description of the rule amendments

2.3.1 Determination for significant legislative rules or exemption

As required by the APA, L&I analyzed its proposed rules to determine whether the rules are "significant legislative rules" as defined in RCW 34.05.328(5)(a)(i). This section describes the results of the required analysis.

2.3.1.1 Proposed changes not considered significant legislative rules or are exempt in whole

WAC 296-15-121 Surety for a self-insurance program

Rule Overview: There are no significant legislative portions in proposed amendments to this rule. Proposed amendments are all meant to clarify definitions and procedures related to surety and are exempt under RCW 34.05.328(5)(b)(iv).

WAC 296-15-125 Default by a self-insurer

Rule Overview: There are no significant legislative portions in proposed amendments to this rule. Proposed amendments are all meant to clarify definitions and procedures related to self-insurer default and are exempt under RCW 34.05.328(5)(b)(iv).

2.3.1.2 Proposed changes considered significant legislative rules in whole or in part

WAC 296-15-257 Withdrawal or corrective action pursuant to action instituted by the department

Rule Overview: This proposed new section was created to summarize reasons the director or director's designee may take corrective action or withdraw certification of a self-insured employer. The only new reason added was for the violation of the duty of good faith and fair dealing, which specifies that corrective action may be taken after two violations. This is to give employers the best possible chance to come into compliance and avoid accruing a third violation in three years, which would necessitate decertification. All other reasons listed adopt or incorporate other statutes and rules by reference without material change and are exempt under RCW 34.05.328(5)(b)(iii).

Costs to be estimated: Costs associated with this proposed rule pertain to enforcement only. There are no additional costs to self-insured employers or third party administrators to comply.

WAC 296-15-260 Corrective action or withdrawal of certification

Rule Overview: Most proposed amendments in this section clarify language which describes processes for corrective action or withdrawal of certification and are exempt under RCW 34.05.328(5)(b)(iv). One amendment makes a change for the date after a self-insurer's receipt of order and notice when certification will be withdrawn, changing from not less than 90 days to not less than 30 days. Finally, a provision was added which allows the director to delay withdrawing the certification of a self-insured employer while that employer has an enforceable contract with a licensed third party administrator. This provision of the proposed rule is exempt by adopting or incorporating by reference without material change under RCW 34.05.328(5)(b)(iii).

Costs to be estimated: Costs associated with these proposed amendments would be indirect and solely related to enforcement. Therefore, there are no costs to comply.

WAC 296-15-266 Penalties

Rule Overview: Part of this proposed amendment that is a signification legislative rule is the removal of an asterisk ("*") where notice of a claim was defined. This was removed because the definition of notice of a claim is not consistent with current case law. This change is necessary because definition of notice of a claim could affect when a self-insured employer's duty to take certain actions begins. Additionally, to subsection (1), it is now explicitly stated that L&I may consider assessing penalties by a worker's or beneficiary's request or upon its own motion.

Other proposed amendments to this rule are primarily meant to clarify processes for considering penalty assessments or update terminology to be consistent with L&I standards, such as replacing the word "claimant" for "worker". These proposed amendments are exempt under RCW 34.05.328(5)(b)(iv).

Costs to be estimated: Costs associated with this proposed rule pertain to enforcement only. There are no additional costs to self-insured employers or third party administrators to comply.

WAC 296-15-268 Self-insurance penalty calculations

Rule Overview: This proposed new section outlines criteria L&I will consider when calculating self-insured penalty amounts for penalties assessed per WAC 296-15-266, RCW 51.48.017, RCW 51.48.080, or RCW 51.14.180. This includes penalties incurred for violations of the duty of good faith and fair dealing.

Costs to be estimated: Costs associated with this proposed rule pertain to enforcement only. There are no additional costs to self-insured employers or third party administrators to comply.

WAC 296-15-270 Violation of the duty of good faith and fair dealing

Rule Overview: This proposed new section identifies applications of the duty of good faith and fair dealing. Summarized in (1), "If a self-insured employer (SIE) or third party administrator (TPA) manages the claim in a manner which demonstrates a greater concern for the self-insured employer's interest than the worker's interest, the SIE/TPA will be in violation of its duty to engage in good faith and fair dealing. Additionally, violation of the SIE/TPA duty to engage in good faith and fair dealing includes repeatedly engaging in any of the following actions with such frequency as to indicate a general business practice:". Proceeding subsections reference existing rules and statutes that describe actions that violate Title 51 RCW. No new claims management practices are required by this proposed rule. It only elevates the possible penalties for actions that are engaged in in such a manner deemed a violation of the duty of good faith and fair dealing.

Costs to be estimated: Costs associated with this proposed rule pertain to enforcement only. There are no additional costs to self-insured employers or third party administrators to comply. All actions described as violations of the duty of good faith and fair dealing were already subject to penalties by existing statutes and rules.

WAC 296-15-272 When intentional behavior is deemed a violation of the duty of good faith and fair dealing

Rule Overview: This proposed new section identifies applications of the duty of good faith and fair dealing when specific actions are taken by the self-insured employer or third party administrator with an intention to interfere with the worker's ability to pursue benefits or otherwise engage in egregious behavior that places the employer's interests ahead of the worker's interests under Title 51 RCW. No new claims management practices are required by this proposed rule. It only elevates the possible penalties for actions that are engaged in in such a manner deemed a violation of the duty of good faith and fair dealing.

Costs to be estimated: Costs associated with this proposed rule pertain to enforcement only. There are no additional costs to self-insured employers or third party administrators to comply. All actions described as violations of the duty of good faith and fair dealing were already subject to penalties by existing statutes and rules.

CHAPTER 3: Probable Costs of the Proposed Rule

The estimated costs in this analysis, if any, represent only costs of enforcement of existing statutes and rules when they elevate to the level specified in the proposed rule for the affected parties. If a self-insured employer or third party administrator abides by the underlying rules and laws there will be no costs.

CHAPTER 4: Cost-Benefit Determination

As described above, there are no new costs for compliance with the proposed rules, as the probable costs apply only to penalties assessed to self-insured employers or third party administrators for non-compliance. Workers may benefit from the availability of penalties more likely to deter unfair practices in the management of their claims. Workers and SIEs benefit from having clarity on the requirements related to good faith and fair dealing. In total, the probable benefits of this rule outweigh the probable costs.