

This rule was filed as 13 NMAC 17.5.

TITLE 13 INSURANCE
CHAPTER 17 WORKERS' COMPENSATION INSURANCE
PART 5 CLASSIFICATION AND RATING FOR EMPLOYERS AND LEASING CONTRACTORS

13.17.5.1 ISSUING AGENCY: New Mexico State Corporation Commission [Public Regulation Commission], Department of Insurance, Post Office Box 1269, Santa Fe, NM 87504-1269.
[7/1/97; Recompiled 11/30/01]

13.17.5.2 SCOPE: This rule applies to workers' compensation and employer's liability insurance as defined in Section 59A-7-6A(3) NMSA 1978.
[9/6/91; Recompiled 11/30/01]

13.17.5.3 STATUTORY AUTHORITY: Sections 59A-2-9, 59A-3-6, 59A-17-5, 59A-18-29, 59A-33-9.1, and 59A-33-10 and 59A-2-9.1 NMSA 1978.
[9/6/91; Recompiled 11/30/01]

13.17.5.4 DURATION: Permanent.
[7/1/97; Recompiled 11/30/01]

13.17.5.5 EFFECTIVE DATE: September 6, 1991, unless a later date is cited at the end of a section or paragraph. Repromulgated in NMAC format effective July 1, 1997.
[9/6/91, 7/1/97; Recompiled 11/30/01]
[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

13.17.5.6 OBJECTIVE: The purpose of this rule is to carry out the requirements of Laws 1990 (2nd Special Session), Chapter 2 relating to proper workers' compensation classification and rating, including defining temporary and leased employees, providing for proper classification and rating, providing for the prevention of experience modifier reductions through employee leasing arrangements and imposing penalties for the use of subterfuge to evade the proper application of workers' compensation classification and rating.
[9/6/91; Recompiled 11/30/01]

13.17.5.7 DEFINITIONS:

A. **"Assigned risk pool or pool"** means the workers' compensation insurance assigned risk facility established by Chapter 59A, Article 33 NMSA 1978.

B. **"Client"** means an employer which obtains workers through an employee leasing arrangement.

C. **"Employee leasing arrangement"** means any arrangement whereby an employer contracts with a leasing contractor to provide all or some of the employer's workers; provided, that the term does not include the provision of temporary workers.

D. **"Employer"** means any person or entity, including a leasing contractor and a client, as defined in, or having the right to control workers within the meaning of case precedents applicable to, the Workers' Compensation Act (Chapter 52, Article 1 NMSA 1978) or the New Mexico Occupational Disease Disablement Law (Chapter 52, Article 3 NMSA 1978).

E. **"Leased worker"** means a worker provided to a client through an employee leasing arrangement; provided that, if a worker has been previously employed by the client prior to working for a leasing contractor, it shall be presumed that the worker is a leased worker, not a temporary worker; and further provided that, if a worker works and should be classified in any construction class, or in any oil and gas well-service or drilling class, the worker shall be presumed to be a leased worker.

F. **"Leasing contractor"** means any person or entity which provides all or any part of a client's New Mexico workers through an employee leasing arrangement.

G. **"Premium subject to dispute"** means premium for a workers' compensation policy as to which the insured has provided a written notice of dispute to the insurer or servicing carrier, and has filed a written request for pending administrative review or has initiated pending litigation. To qualify as premium subject to dispute, the

insured must have identified and detailed specific areas of dispute, have provided a reasonable estimate of the premium believed to be correct, and have paid the amount of such undisputed premium in full.

H. **“Rating based upon experience”** includes any workers’ compensation premium rating plan which provides for premium adjustments based upon an insured’s loss experience under a workers’ compensation insurance policy, including but not limited to any approved experience rating plan and the assigned risk adjustment program (ARAP).

I. **“Subterfuge”** means any artifice, trick, device, misrepresentation or concealment, whether committed knowingly or negligently, including but not limited to:

(1) providing false or misleading information to an insurer, its agent, a rating bureau or the assigned risk pool;

(2) failing or refusing to make full disclosure to an insurer, its agent, a rating bureau or the pool of an employer’s, client’s or leasing contractor’s true ownership, change of ownership, or current or previous employee leasing arrangements;

(3) failing or refusing to make full disclosure of any employer’s, client’s or leasing contractor’s operations, location, payrolls, worker’s compensation loss experience, experience modifiers, worker classifications or other necessary rating information;

(4) failing or refusing to disclose the existence of more than one policy covering an employer’s, client’s or leasing contractor’s workers; or

(5) failing or refusing to disclose the identity of all former insurers and self-insurance plans providing workers compensation coverage to an employer’s, client’s or leasing contractor’s workers, including but not limited to workers provided to any client through an employee leasing arrangement.

J. **“Temporary worker”** means a worker hired and employed by an employer to support or supplement another’s work force in special work situations such as employee absences, temporary skill shortages, seasonal workloads and special temporary assignments such as temporary work for the production of a motion picture; and

K. **“Worker”** includes **“worker”** or **“workman”** as defined pursuant to the Workers’ Compensation Act and employee as defined pursuant to the New Mexico Occupational Disease Disablement Law. [9/6/91; Recompiled 11/30/01]

13.17.5.8 SUBTERFUGE; GENERAL PROHIBITION; PENALTY:

A. The use of subterfuge or any other action to evade the proper application of workers’ compensation insurance classifications, ratings based upon experience or other premium rating procedures is prohibited.

B. In addition to any other penalty provided by law or this rule, any person whom the Superintendent finds, after hearing, to have committed subterfuge shall be subject to the penalties provided in 59A-1-18 NMSA 1978. Each act of subterfuge, whether like or unlike other acts, shall constitute a separate violation. [9/6/91, 7/1/97; Recompiled 11/30/01]

13.17.5.9 COVERAGE OF TEMPORARY WORKERS: In the voluntary market and in the assigned risk pool, coverage for temporary workers shall be through a standard workers’ compensation policy issued to that employer which has the right to control hiring, salary, assignment and payment of the temporary workers. [9/6/91; Recompiled 11/30/01]

13.17.5.10 COVERAGE OF LEASED WORKERS IN THE VOLUNTARY MARKET:

A. In the voluntary insurance market, a leasing contractor shall obtain or cause to be obtained workers’ compensation coverage for leased workers either through individual policies issued to each client or, with the voluntary market insurer’s knowledge and consent, through a standard workers’ compensation policy issued to the leasing contractor as co-employer of and covering all such leased workers. The leasing contractor’s voluntary market insurer may take all reasonable steps to ascertain exposure under any such policy and to collect the appropriate premium, including the following:

(1) requiring a complete description of the leasing company’s and its predecessors-in-interest’s clients and operations, past and present;

(2) conducting periodic audits and requiring periodic reports of payroll, classifications, ratings based upon experience and jurisdictions with exposure. In addition, the insurer may require the leasing contractor to submit its IRS Form 941 or its equivalent to the insurer on a quarterly basis;

- (3) conducting audits of client operations; and
- (4) taking or requiring the leasing contractor to take other reasonable measures appropriate to determining payroll, worker classifications, loss experience, ratings based upon experience and premium.

B. Every voluntary market insurer which provides workers' compensation coverage to a leasing contractor as co-employer of leased workers shall maintain a written record of information in sufficient detail that each individual client's payroll, classifications, losses and ratings based upon experience can be determined. Upon request made at any time before or after the expiration of the leasing contractors' policy, the insurer shall furnish such detail to the client, any rating agency, a subsequent insurer or the assigned risk pool.

C. If a client changes from one leasing contractor to another or terminates its leasing arrangement, the leasing contractors' voluntary market insurers or their rating organizations shall re-determine rating factors for the leasing contractors using the best data available, including but not limited to the client's ratings based upon experience developed pursuant to 13 NMAC 17.5.13 [now 13.17.5.13 NMAC]. This section shall not be construed to require re-determination of a leasing contractor's rating based upon experience more often than annually; provided, that a re-determination may be made more often, upon a client change, in the insurers' discretion. [9/6/91, 7/1/97; Recompiled 11/30/01]

13.17.5.11 COVERAGE OF LEASED WORKERS IN THE ASSIGNED RISK POOL:

A. In the assigned risk pool, a leasing contractor shall obtain or cause to be obtained workers' compensation coverage for leased workers through individual policies issued to and in the name of each client for whom the leased workers work.

B. The assigned risk pool shall cooperate in facilitating the joint administration of workers' compensation policies covering all workers leased by a single leasing contractor. Such cooperation may include assignment of all client policies to a single servicing carrier, a common effective date for all client policies if the leasing contractor so requests, and joint auditing. [9/6/91; Recompiled 11/30/01]

13.17.5.12 PROVISIONS APPLICABLE TO VOLUNTARY MARKET AND ASSIGNED RISK POOL:

A. An insurer or the assigned risk pool may require the following information from an employer, client or leasing contractor making application for coverage:

(1) a list by jurisdiction of every name under which an employer, client or leasing contractor has operated at any time during the preceding five years, including but not limited to business names of all predecessors-in-interest, together with the names of all insurers and policy numbers of policies issued to the employer, client or leasing contractor under each such name, and a copy of the leasing contractor's most recently filed internal revenue service form 941 or equivalent;

(2) a list of every person and entity which has owned a five percent or greater interest in the employer, client or leasing contractor or any of their predecessors-in-interest at any time during the five-year period immediately preceding the application;

(3) for each person and entity identified in the preceding paragraph, a list of all other businesses in which each such person and entity has owned a five percent or greater interest at any time during the five-year period immediately preceding the application;

(4) a list by jurisdiction of every current client of a leasing contractor, together with every name under which each client has operated at any time during the five-year period immediately preceding the application, and a copy of the most recently filed internal revenue service form 941 or equivalent for each client;

(5) a sworn affidavit, signed by the chief executive officer of each client and a responsible officer of its leasing contractor, stating the names of each insurer and policy number of each workers' compensation insurance policy issued to the client under each name under which the client has operated at any time during the five-year period immediately preceding the application;

(6) a list by name of all workers, giving the social security number, classification code and wage of each; and

(7) a sworn affidavit, signed by the chief executive office of each client and a responsible officer of its leasing contractor, stating that all non-leased workers are covered by workers' compensation coverage. In addition, the affidavit may be required to state the name of all insurers, the policy numbers, the policy periods, the number of workers and the aggregate payroll applicable to each classification code of the non-leased workers. This affidavit may be required as often as an insurer or the pool deems reasonably necessary.

B. Leasing contractors may assist in securing and maintaining coverage for clients in the voluntary market or the pool; provided, that this section does not authorize leasing contractors to act as insurance agents and shall not be construed to exempt them from insurance agent or other applicable licensing requirements.

C. Leasing contractors and clients shall provide information in sufficient detail to satisfy the requirements of this rule. Monthly reporting may be required.

D. If an employer provides both leased workers and temporary workers to another, the leased workers shall be covered as specified herein for leased workers of a leasing contractor and the temporary workers shall be covered as specified for temporary workers.
[9/6/91; Recompiled 11/30/01]

13.17.5.13 TERMINATION OF EMPLOYEE LEASING ARRANGEMENT; RATING OF CLIENT:

When any employee leasing arrangement terminates, all prior experience of the client's own direct workers and its previously leased workers shall be used in rating the client. Every rating organization and insurer shall make a reasonable effort, including a special audit if necessary, to obtain and verify the information necessary to calculate a rating based upon experience, where premium is sufficient to make such rating applicable.

[9/6/91; Recompiled 11/30/01]

13.17.5.14 REVIEW:

A. Any rating determination made pursuant to this rule may be appealed as provided under Section 59A-17-30B NMSA 1978.

B. Any other determination or decision made pursuant to this rule may be reviewed through seeking a hearing pursuant to Section 59A-4-15 NMSA 1978.

C. If the application for review concerns an assigned risk pool policy, the assigned risk pool shall continue to provide coverage, if requested, during the period of any review proceeding, through a final decision by the superintendent. Premiums, other than premiums subject to dispute, shall be timely paid in full in order to continue coverage during review. The superintendent may require the amount of all premiums subject to dispute to be deposited in an interest-bearing trust account to be distributed after all decisions are final.

[9/6/91; Recompiled 11/30/01]

13.17.5.15 GENERAL PENALTY:

A. In addition to any other penalty provided by law or rule, violation of any provision of this rule by an employer, client or leasing contractor is grounds for cancellation or non-renewal of workers' compensation insurance. Notice of such cancellation or non-renewal, stating the reason, shall be provided the insured at least 30 days in advance of the effective date of the cancellation.

B. In addition to any other penalty provided by law or this rule, violation of the provisions of this rule is subject to other penalties for violation of the Insurance Code (Chapter 59A NMSA 1978).

C. In addition to any other penalty imposed for violation of this rule, the person or entity violating the rule may be required to pay any unpaid premium found to be due plus interest at the rate of 15% a year from the date such premium should have been paid.

D. An insured covered through the assigned risk pool may avoid cancellation or non-renewal pursuant to 13 NMAC 17.5.15.1 [now Subsection A of 13.17.5.15 NMAC] by taking such corrective action as the pool may specify in a timely manner. The pool may grant an insured a reasonable grace period, not to exceed 30 days, if the insured pays to the pool sufficient deposit premiums to cover ultimate premiums, as estimated by the pool.

[9/6/91; Recompiled 11/30/01]

13.17.5.16 TRANSITION PROVISION: All leasing contractors and all employers providing temporary workers covered through the assigned risk pool on the effective date of this rule shall submit a new application for coverage to the pool on or before September 30, 1991, in order to establish eligibility for pool coverage in accordance with this rule. The application shall contain and be accompanied by all the information and documentation specified in 13 NMAC 17.5.12, paragraphs 17.5.12.1.1 through 17.5.12.1.7 [now Paragraphs (1) through (7) of Subsection A of 13.17.5.12 NMAC]. Effective October 30, 1991, the pool shall recreate and reissue coverage to all such persons or entities to the extent they qualify for pool coverage under this rule, and shall cancel all others to the extent they do not qualify under this rule, giving 30 days' notice of cancellation. Within 10 days of

the date of the notice of cancellation, every such person and entity shall deliver written notice of cancellation to every client and shall seek replacement coverage in accordance with this rule.
[9/6/91; Recompiled 11/30/01]

HISTORY OF 13.17.5 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center as:

SCC 91-1-IN, Worker's Compensation Classification and Rating for Employers and Leasing Contractors (Regulation 17, Rule 2), filed 8/5/91.

History of Repealed Material: [RESERVED]