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Executive Chamber
2nd Floor, State Capitol
Albany, NY 12224

Re: Governor's April 28, 2008, Draft Proposal—Guidelines For Out-Of-State Employers

The April 28, 2008, draft of New York workers' compensation guidelines for out-of-state employers is much improved over the previous drafts. There is, at least, some clarity given to *de minimus* contacts in New York. Yet, many other New York operations are not given the clarity that is needed to promote compliance certainty for out-of-state employers. PIA believes this is unacceptable. There is no way to justify placing this kind of burden on employers, particularly, in the present political climate that frowns on barriers to interstate commerce and is now advocating for federal oversight of insurance.

1. Employee protection

Injured workers who are eligible for New York benefits are protected exactly the same, whether the employer's insurance is provided by Part One (3.A.) coverage or Part Three (3.C.) coverage. In fact, Part Three coverage has a provision that states the following:

2. If you begin work in any one of those states after the effective date of this policy and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A. of the Information Page.

If the goal is the protection of workers, there is no legitimate reason for rejecting Part Three (3.C.)—Other States Insurance.

2. Fairness

Out-of-state employers who have Part Three (3.C.) coverage in New York should not have to duplicate this coverage with Part One (3.A.) coverage when there is no impact on the injured worker. To force this expense on these employers is an inexcusable impediment to interstate commerce. This practice can only lead to reciprocal impediments to commerce, which will result in increased costs to New York employers.

3. Certainty

If a law is worth enacting to protect the public, then compliance with that law is just as important as the law itself. Compliance is more likely to occur when the requirements of the law are unequivocal and easily ascertained. Out-of-state employers need some certainty when attempting to comply with the New York Workers' Compensation Law.

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There should be a clearly stated threshold where Part One (3.A.) coverage is required. And, until that threshold has been met, Part Three (3.C.) coverage should be accepted. The NYWCB should be empowered to draw that line according to well-thought criteria, balancing the need to capture premium for significant New York employments with the expectations for ease of interstate commerce.

4. Premium equity

A legitimate reason for requiring Part One (3.A.) coverage is to capture the premium associated with New York employment. To the extent that injured out-of-state employees are filing their claims in New York, there should be an offset of premium. New York employers should not have to subsidize the expenses incurred by out-of-state employers. The question is—where should the line be drawn? To what extent do out-of-state employees choose to file claims in New York in lieu of their home state? All of the bordering states have higher weekly maximum benefits and New York now has a cap on permanent partial injuries. This, combined with the fact that filing a claim outside a worker's home state is inconvenient, tends to make it unlikely that out-of-state employees would file their claims in New York. If the New York Workers' Compensation Board had the flexibility to determine which employments should be subject to Part One (3.A.) coverage, it could monitor the actual claims filed by nonresidents and adjust the 3.A./3.C. threshold accordingly.

5. Residual market

Typically, voluntary insurers are unwilling to add New York under Part One (3.A.) on the out-of-state employer's policy. Residual market insurers (e.g., the assigned risk plan insurers) are never willing to add New York. Moreover, unlike the wording quoted in (1.) above for voluntary market Part Three (3.C.) coverage, assigned risk insurers in many states offer only Limited Other States Insurance. The effect of this endorsement is to exclude coverage when the state in which benefits are claimed requires Part One (3.A.) coverage. Thus, New York's position for such employers can actually void protection for workers that would otherwise be provided. This means the employer must apply to the New York State Insurance Fund for the required insurance. PIANY receives numerous complaints about the difficulty in getting such a policy placed. For one thing, the NYSIF demands a New York location be entered on the application and, as is the case with incidental and intermittent employment, there is no specific location to record. Also, some underwriters at the NYSIF require the employer to include the *entire* multistate payroll as the basis for a deposit premium with the promise to adjust the earned premium upon audit. This can tie up thousands of dollars for minimal work in New York.

6. Producer's vulnerability

Whenever there is uncertainty for the client's obligations, the insurance advisor also is at risk. A producer is placed in the position of telling a client that an expensive New York policy may be required or maybe not, but you better buy it just in case. In many cases, the producer is never informed of the New York exposure until it is too late. The employer generally blames the producer when coverage is inadequate, which leads to litigation against the producer. Many New York producers

insure out-of-state employers and also are vulnerable to these error and omissions exposures. This business friction is completely unnecessary and avoidable where there is compliance certainty.

7. Frictional costs

Another frictional cost involves the insurer's need to report 3.A. policy information to the NYWCB when the employment is incidental. Capturing such incidental employment in the system does not justify the added cost of bookkeeping for the employer and the reporting and auditing expense of the insurer.

Recommendation

PIANY believes that a solution to this problem requires legislation. The NYWCB should be authorized by statute to determine the type of New York employment that requires Part One (3.A.) coverage, which should be unequivocally stated and well publicized. In addition, Part Three (3.C.) coverage should be recognized by statute as satisfying the requirements of the law when the 3.A. threshold has not been crossed.

PIANY suggests the following language for a bill to amend Subdivision 2 of Section 50:

2. By insuring and keeping insured the payment of such compensation with a New York stock corporation, mutual corporation or reciprocal insurer authorized to transact the business of workers' compensation insurance in this state through a policy issued under the law of this state; PROVIDED THAT THE WORKERS' COMPENSATION BOARD IS AUTHORIZED BY REGULATION TO EXEMPT OUT-OF-STATE EMPLOYERS HAVING INTERMITTENT OR INCIDENTAL EMPLOYMENT IN NEW YORK AND ACCEPT "PART THREE—OTHER STATES INSURANCE," OR ITS EQUIVALENT, AS AN ALTERNATIVE.

Should it be deemed more favorable to establish a threshold by statute, rather than leaving it to the discretion of the NYWCB, PIANY suggests language something like the following:

2. By insuring and keeping insured the payment of such compensation with a New York stock corporation, mutual corporation or reciprocal insurer authorized to transact the business of workers' compensation insurance in this state; PROVIDED THAT, IF 1) THE EMPLOYER IS CONDUCTING BUSINESS THAT IS SUBJECT TO THE REQUIREMENTS OF WCL SECTION 57, 2) HAS HIRED AN EMPLOYEE WITHIN NEW YORK, 3) HAS ONGOING OPERATIONS IN NEW YORK, OR 4) HAS A SPECIFIC LOCATION IN NEW YORK, SUCH WORKERS' COMPENSATION INSURANCE MUST BE OBTAINED through a policy issued under the law of this state.

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Another option is to merely exclude nonresidents from coverage under the New York Workers' Compensation Law, as Connecticut has done. PIANY is not necessarily advocating this approach, but it is working in Connecticut. See the following statute:

Section 31-275. Definitions. As used in this chapter, unless the context otherwise provides:

(B) "Employee" shall not be construed to include:

(vi) Any person who is not a resident of this state but is injured in this state during the course of his employment, unless such person (I) works for an employer who has a place of employment or a business facility located in this state at which such person spends at least fifty per cent of his employment time, or (II) works for an employer pursuant to an employment contract to be performed primarily in this state.

Thank you for the opportunity to comment on this draft proposal. Please feel free to contact me to discuss with you any aspect of its subject matter.

Sincerely,

Dan Corbin, CPCU, CIC, LUTC
Director of Research

cc: Senator James Seward, Senate Insurance Committee Chairman
Assemblyman Joseph Morelle, Assembly Insurance Committee Chairman