

DEPARTMENT OF INSURANCE
OFFICE OF THE COMMISSIONER

Statutory Authority: 18 Delaware Code, Sections 311 and 2533 (18 **Del.C.** §§311 & 2533)
18 **DE Admin. Code** 802

FINAL

REGULATORY IMPLEMENTING ORDER

802 Delaware Workplace Safety Regulation

I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

In the December 1, 2019 edition of the *Register of Regulations* at 23 **DE Reg.** 434, the Commissioner of the Delaware Department of Insurance (Commissioner) published a notice of intent to amend Regulation 802 to:

- Add a provision that specifically emphasizes the availability of discounts that may be available to those employers who otherwise qualify for the Workplace Safety program and who implement a drug-free workplace program at their worksites;
- Rescind subsection 7.3 of the existing regulation concerning inspections by the Department of Labor, since the Department of Labor does not conduct such inspections; and
- Edit the remainder of the regulation for grammar and formatting.

The Department solicited written comments from the public for thirty (30) days as mandated by the Administrative Procedures Act at 29 **Del.C.** §10118(a). The Delaware Code authority for the regulation is 18 **Del.C.** §§311 and 2533.

As discussed in the introductory paragraphs of the proposal, the Delaware Department of Insurance (the Department) has been implementing its Workplace Safety Program since 1989. Through this program, the Department, in coordination with the Delaware Compensation Rating Bureau, offers Delaware employers an opportunity to lower workers' compensation insurance premiums by participating in the Delaware Workplace Safety Program. Businesses may earn discounts of up to 19 percent by providing and maintaining a safe place to work. More information about the program may be found on the Department's website at <https://insurance.delaware.gov/services/workplacesafetydiscount/>.

The Department received one comment, which is on file with the Department, in which the commenter opined that adding "for both supervisors and employees" in the last bulleted point at subsection 7.1 is not practical from an implementation standpoint because most restaurateurs do not have drug-free workplace training for both supervisors and employees, but rather, that supervisors are employees who generally are trained upon hire. The commenter suggested that the regulation be amended on adoption to make training apply only to employees.

The Department did not hold a public hearing on the proposal.

II. FINDINGS OF FACTS

1. The proposed amendments to Regulation 802 Delaware Workplace Safety Regulation augment the Department's Workplace Safety Program because they emphasize the availability of discounts that may be available to those employers who would otherwise qualify for the Workplace Safety Program and who implement a drug-free workplace program at their worksites.

2. On adoption, the Department has determined to amend the bulleted point at subsection 7.1 that describes the employer's training program as suggested by the commenter. The Department did not intend the regulation as amended to require separate training for supervisors and employees, as that provision appears to have been interpreted by the commenter. The Administrative Procedures Act at 29 **Del.C.** §10118(c) allows non-substantive changes to a proposal as a result of public comments on adoption. Given that the first paragraph of this subsection as proposed indicates that the bulleted points following the first paragraph are to be incorporated into an employer's program only "as applicable," and that the Department did not intend for employers to be required to include separate training for both supervisors and employees, the Department has determined that this requested edit is non-substantive in nature and may be made upon adoption. Therefore, the Department has determined to amend the bulleted point at subsection 7.1 to clarify the training requirements.

3. On adoption, the Department is also making a non-substantive, grammatical correction to Section 6.0 of the regulation to correct a technical error, as is expressly permitted under the Administrative Procedures Act at 29 **Del.C.** §10113(b)4.

4. The Department met the public notice requirements of the Administrative Procedures Act.

5. The Commissioner finds that it is appropriate to adopt the proposed amendments to 18 **DE Admin. Code** 802 as proposed in the December 1, 2019 *Register of Regulations* with further amendments in accordance with this Final Order, for the reasons set forth in this Final Order and in the proposal.

III. DECISION TO ADOPT THE NEW REGULATION

For the foregoing reasons, the Commissioner concludes that it is appropriate to adopt the proposed amendments to 18 DE Admin. Code 802, as discussed in the above Findings of Fact for the reasons set forth above and in the proposal.

IV. EFFECTIVE DATE OF ORDER

The actions referred to hereinabove were taken by the Commissioner pursuant to 18 Del.C. §§311 and 2533 on the date indicated below. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*. The effective date of the Regulation shall be as stated in the text of the Regulation.

IT IS SO ORDERED.

The 15th day of January, 2020.

Trinidad Navarro
Commissioner
Delaware Department of Insurance

800 ~~Workmen's~~ Workers' Compensation

802 Delaware Workplace Safety Regulation

1.0 Authority

This regulation is adopted and promulgated by the Insurance Commissioner pursuant to 18 Del.C. §311, ~~§2533~~ ~~§§311 and 2533~~ and promulgated under 29 Del.C. Ch.101.

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2.0 Purpose

[2.1] The purpose of this regulation is to:

~~[2.1 2.1.1]~~ Enhance the health and safety of workers in the State of ~~Delaware~~. Delaware;

~~[2.2 2.1.2]~~ Provide lower insurance premiums for qualifying employers who currently pay \$3,161 or more of annual Delaware Workers' Compensation ~~premiums~~. premiums; and

~~[2.3 2.1.3]~~ Establish both testing and inspection procedures to determine an employer's qualification for a premium credit under the Workplace Safety Program.

3.0 Scope

3.1 All employers who comply with the criteria set forth in this regulation are An employer is eligible for participation in the Workplace Safety Program if the employer complies with the criteria set forth in this regulation.

3.2 Only employers whose employees work at Delaware work sites will be are eligible for this program to participate in the workplace Safety Program; and

3.3 In the case of an employer who purchases a multi-state workers compensation insurance policy, and safety credit earned by participation in the Workplace Safety Program applies to only that portion of the premium that covers Delaware premiums in multi-state policies workers.

4.0 Eligibility and Premium Credit

4.1 An employer is eligible for the Workplace Safety Program if insurance premium credit if:

4.1.1 its The employer's annual workers compensation insurance premium is \$3,161 or more. Workplace Safety credit eligibility is more, based on the most current unit statistical card filing. The Delaware Compensation Rating Bureau will test each is charged with determining whether an employer meets this requirement by taking the most current unit statistical card payroll times current rates times current experience modification to determine the employer's premium ~~size~~. size; and

4.1.2 The employer submits a Workplace Safety Program Questionnaire to the Department of Insurance in which it provides details of the employer's Workplace Safety Program, including but not limited to:

- Details concerning the employer's health and safety program, including the effectiveness of that program;
- Details concerning the employer's employee training program, including data on its adequacy and effectiveness;
- Details concerning the employer's efforts to identify and eliminate potential hazardous conditions; and

- : Workplace injury data for the three years immediately preceding the date on which the employer submits the Workplace Safety Program Questionnaire to the Department.

5.0 Notice of Employer Eligibility

Employers meeting the ~~premium requirement~~ eligibility requirements set forth in Section 4.0 of this regulation will be notified by the Delaware Department of Insurance seven months in advance of their policy renewal date. This notification will ~~[include(s)]~~ include instructions for qualifying for a safe workplace credit.

6.0 Eligibility Period

The Department will notify the employer of eligibility, and ~~he~~ **[will]** inform the employer that ~~he~~ the employer must elect at least five (5) months in advance of the date of policy renewal to participate in the Workplace Safety Program. Failure to notify the Department within this time period of an intent to renew participation may preclude the employer's participation in the Workplace Safety Program for the ~~next~~ next upcoming year. Election to participate shall commence by contacting the Delaware Department of Insurance.

7.0 Inspections and Cost

7.1 ~~There are three options for Workplace Safety Inspections to be conducted. To obtain the Workplace Safety Program premium discount, all inspection procedures and inspection reports must be in compliance with the requirements and standards set forth by this regulation. In the event of multiple applications, only the first application received will be accepted.~~ All inspections must include a thorough review of the following items, which are to be maintained by the employer and made available for the inspector to review:

- Any workplace injuries that have occurred within the three years prior to the application.
- The outcome of those injuries, including specific details of the injuries.
- Confirmation of Modification Duty Availability Reports for all injuries, as applicable.
- Any findings or fines relating to workplace safety resulting from the injuries.
- A list of possible assignments for injured workers.
- Any safety measures taken by the employer as a result of the injuries.
- : Any drug-free workplace program being implemented by an employer that includes but is not limited to the following components, as applicable:
 - : A written policy regarding the use of drugs in the workplace that includes, at a minimum:
 - : A statement of purpose concerning the protection of the employer's employees and guests;
 - : A general statement concerning what conduct is prohibited;
 - : A statement concerning the employer's intent to comply with applicable federal and Delaware statutes and regulations;
 - : A description of the employer's drug testing policy, if any, including but not limited to pre-employment testing, reasonable suspicion testing, and post-incident testing;
 - : A list of workplace-prohibited substances, which may include but is not limited to amphetamines, cannabinoids, cocaine, opiates, phencyclidine (PCP), and chemical derivatives;
 - : Whether marijuana is a prohibited substance in the workplace;
 - : A statement concerning the employer's policy that accounts for the use of prescription medications, including the employee's duty to notify any testing laboratory of such substances;
 - : A statement concerning the employer's policy on employee consumption of alcohol on premises, including the types of employer functions at which alcohol consumption is permitted and whether an employee is permitted to use alcohol on premise outside of the employees normal working hours;
 - : A listing of all employee drug testing procedures (if testing will occur), including but not limited to whether the employer uses an independent laboratory, whether testing includes (or is limited to) urine testing, the employee's right to refuse testing and the consequences for so doing, whether an employee will be compensated for time spent testing, whether the employer pays for the cost of the test;
 - : A statement concerning the consequences that arise when an employee tests positive for drugs, both during a pre-employment drug screening and for current employees, including whether the job applicant or current employee has a right to explain the positive drug test;
 - : A statement of confidentiality of information; and
 - : A method for ensuring and documenting that an applicant for employment and all current employees receive details of the employer's Drug-Free Program;

- A copy of the employer's Drug-Free Workplace Poster, certified by the government agency or vendor of the employer's choice;
- A description of the employer's Employee Assistance Program ("EAP") or proof of resources available to employees such as drug and alcohol counseling services, and a list of treatment centers; and
- A description of the employer's training program for both supervisors and employees that requires that the training must be completed within 30 days of start date as part of new employee orientation, and that describes how the employer documents that **[employers and supervisors employees]** have completed this training.

NOTE: A recommendation by the inspector based on the above information as to whether or not the employer should receive the workplace safety credit must also be included.

7.2 To obtain the Workplace Safety Program premium credit, all inspection procedures and inspection reports must comply with the requirements and standards set forth in this regulation. In the event of multiple applications, only the first application received will be accepted. Subsections 7.2.1 and 7.2.2 of this regulation set forth the two options according to which a Workplace Safety inspection may be conducted.

~~7.1.4~~7.2.1 All inspections made that are conducted by a representative from an independent safety expert company under contract to the Insurance Department will follow this procedure. shall be conducted as follows:

7.2.1.1 The Insurance Department will notify the inspector of the employer's request. The inspector, in turn, will then contact the employer to set up the first of two inspections. A second unannounced inspection shall be made no later than the expiration date of the policy to which any workplace safety credit based on the inspection will apply to confirm the initial certifications of safety in the workplace. The Department of Insurance will notify the Bureau when an employer successfully completes each scheduled and/or nonscheduled inspection. Failure to pass a scheduled inspection will result in a denial of an employer's eligibility to participate in the Workplace Safety Program. However, the employer, after failing an inspection can request another inspection, after successful completion of which will make them eligible for participation in the Workplace Safety Program.

~~7.1~~7.2.1.2The cost of each inspection will be borne by the employer. The minimum charge for safety inspection is \$150 per location. Each work location must successfully pass both inspections before an employer is entitled to a premium credit under the program. Inspection fees for large and/or complex employers may be established by the Department of Insurance.

~~7.2~~7.2.2 Insurers issuing workers compensation insurance in Delaware may submit their own workplace safety inspection procedures for review by the Insurance Department. The Insurance Department shall permit the insurer's inspection to satisfy the inspection requirements of ~~paragraph 7.1.4~~ subsection 7.2.1 of this regulation if the inspection procedures are at least as rigorous as those employed by the Insurance Department and its independent safety experts. An insurer's safety inspection procedures must be re-certified on a bi-annual basis to maintain status as an acceptable substitute.

~~7.3~~ If the annual workers compensation insurance premium is between \$3,161 and \$10,000 for an eligible employer, the employer may opt to undergo an inspection conducted by a qualified inspector from the Delaware Department of Labor at a cost determined by the Department of Labor but not to exceed the maximum fee as per the inspection charges maintained by the Insurance Department.

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8.0 Renewals and Eligibility

8.1 An employer must annually apply for the Workplace Safety Program ~~each year~~.

8.2 For each year after the initial qualification, the inspection requirement for the Workplace Safety Program insurance premium credit will consist of one unannounced inspection. The Department will maintain a list of inspection charges for inspections conducted pursuant to ~~paragraph 7.1~~ subsection 7.2.1 of this regulation, which will be sent to interested parties upon request.

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9.0 Premium Size Ranges and Corresponding Credits

9.1 The Workplace Safety credits insurance premium credit will be ~~granted~~ calculated according to the following formula:

$$20\% \times [1.0000 - C]$$

where "C" is the credibility of the qualified employer in the uniform Experience Rating Plan for the policy period expiring immediately prior to the application of the Safety credit. If the qualified employer was not experience-rated in the policy period expiring immediately prior to the application of the Safety credit, "C" will be set at 0.050 Safety credit packages will be rounded to the nearest whole percent.

9.2 If the inspector confirms that an employer maintains a drug-free workplace program that meets the criteria set forth in subsection 7.1 of this regulation, the carrier may offer an additional discount in accordance with rate filings submitted to and approved by the Department.

10.0 Effect upon Mutual Rates and Schedule Rating Credits

- 10.1 Workers' Compensation manual rates shall be adjusted because of implementation of this program. A Delaware Workplace Safety Program Factor shall be included in loss costs and residual market rates. This factor may offset credits given to qualified employers, so that the Workplace Safety Program will neither increase nor decrease premiums for eligible employers in the aggregate.
- 10.2 Schedule rating plan credits given to policyholders for "competitive" reasons cannot be withdrawn. Schedule credits given for safety reasons may be reduced to offset the Workplace Safety Program premium credit.
- 10.3 A Merit Rating Plan shall be implemented which will provide incentives for employers paying less than \$3,161 of annual Delaware Workers' Compensation premiums to maintain safe workplaces.

11.0 Effective Date

This Regulation ~~shall become~~ became effective on November 11, 2013. The 2019 amendments to this regulation shall become effective [40 days after being published as a final regulation February 11, 2020].

17 DE Reg. 533 (11/01/13)

23 DE Reg. 676 (02/01/20) (Final)