WEST virginia Legislature

2022 regular session

Introduced

House Bill 4296

By Delegate Westfall

[Introduced January 20, 2022; referred to the Committee on the Judiciary]

A BILL to repeal §23-1-1c, §23-1-1d, §23-1-1e, §23-1-1g, §23-1-3, §23-1-4a, §23-1-6, §23-1-7, and §23-1-20 of the Code of West Virginia, 1931, as amended; to repeal §23-2-1b, §23-2-4, §23-2-5c, §23-2-5d, §23-2-14, §23-2-15, and §23-2-16 of said code; to repeal §23-2B-1, §23-2B-2, and §23-2B-3 of said code; to repeal §23-2C-3a, §23-2C-4, §23-2C-11, §23-2C-13, §23-2C-14, §23-2C-23, and §23-2C-24 of said code; to repeal §23-2D-1, §23-2D-2, §23-2D-3, §23-2D-4, §23-2D-5, §23-2D-5a, §23-2D-6, §23-2D-7, §23-2D-8, §23-2D-9, and §23-2D-10 of said code; to repeal §23-3-1, §23-3-1a, §23-3-2, §23-3-3, §23-3-4, §23-3-5, and §23-3-6 of said code; to repeal §23-4A-2, §23-4A-3, §23-4A-4, §23-4A-5, §23-4A-6, §23-4A-8, and §23-4A-9 of said code; to repeal §23-4B-6, §23-4B-8, §23-4B-8a, and §23-4B-8b of said code; to repeal §23-4C-1, §23-4C-2, §23-4C-3, §23-4C-4, §23-4C-5, and §23-4C-6 of said code; to amend and reenact §23-1-1, §23-1-1b, §23-1-1f, §23-1-2, §23-1-4, §23-1-5, §23-1-8, §23-1-9, §23-1-10, §23-1-11, §23-1-12, §23-1-13, §23-1-14, §23-1-15, §23-1-18, and §23-1-19 of said code; to amend said code by adding thereto a new section, designated §23-1-21; to amend and reenact §23-2-1, §23-2-1c, §23-2-1d, §23-2-2, §23-2-3, §23-2-5, §23-2-5a, §23-2-6, §23-2-7, §23-2-8, §23-2-9, §23-2-11, §23-2-13, and §23-2-17 of said code; to amend and reenact §23-2A-1 of said code; to amend and reenact §23-2C-1, §23-2C-2, §23-2C-3, §23-2C-6, §23-2C-7, §23-2C-8, §23-2C-12, §23-2C-15, §23-2C-16, §23-2C-18, §23-2C-19, §23-2C-20, and §23-2C-21 of said code; to amend and reenact §23-4A-1 of said code; and to amend and reenact §23-4B-2, §23-4B-4, §23-4B-5, §23-4B-7, and §23-4B-9 of said code, all relating to modernizing and updating workers’ compensation statutes; removing or revising provisions made obsolete by legislation and regulatory revisions in 2005 and 2006; standardizing  references to public offices or agencies; updating statutory citations; and making spelling and grammatical changes throughout.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1. GENERAL ADMINISTRATIVE PROVISIONS.

§23-1-1. ~~Workers’ Compensation Commission created;~~ Regulation of the workers’ compensation system by the Insurance Commissioner; findings.

(a) ~~The Legislature finds that a deficit exists in the Workers’ Compensation Fund of such critical proportions that it constitutes an imminent threat to the immediate and long-term solvency of the fund and constitutes a substantial deterrent to the economic development of this state. The Legislature further finds that addressing the workers’ compensation crisis requires the efforts of all persons and entities involved and resolution of the crisis is in the best interest of the public. Modification to the rate system, alteration of the benefit structure, improvement of current management practices and changes in perception must be merged into a unified effort to make the workers’ compensation system viable and solvent through the mutualization of the system and the opening of the market to private workers’ compensation insurance carriers. It~~ As recognized by the Supreme Court of Appeals of West Virginia in Wampler Foods, Inc. v. Workers’ Compensation Division, 216 W.Va. 129, 602 S.E.2d 805 (2004), and in recognition that a deficit of such critical proportions existed in the workers’ compensation fund that it constituted an immediate and long term threat to the solvency of the fund, as well as a substantial deterrent to the economic development of this state, and further that lawmakers are uniquely charged with the responsibility for passing laws designed to cure such serious concerns and that substantial deference is accorded to legislative actions aimed at doing so, it was and remains the intent of the Legislature that the amendments to this chapter enacted in the year 2003 be applied from the date upon which the enactment was made effective by the Legislature. ~~The Legislature finds that an emergency exists as a result of the combined effect of this deficit, other state budgetary deficits and liabilities and other grave social and economic circumstances currently confronting the state and that unless the changes provided by the enactment of the amendments to this chapter, as well as other legislation designed to address the problem are made effective immediately, the fiscal stability of this state will suffer irreparable harm. Accordingly, the Legislature finds that the need of the citizens of this state for the protection of the State Treasury and the solvency of the Workers’ Compensation Funds requires the limitations on any expectations that may have arisen from prior enactments of this chapter~~

(b) It is the further intent of the Legislature that this chapter be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the Legislature that workers’ compensation cases shall be decided on their merits and that a rule of “liberal construction” based on any “remedial” basis of workers’ compensation legislation shall not affect the weighing of evidence in resolving such cases. The workers’ compensation system in this state is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees’ rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter and employers’ rights to raise common law defenses, such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. Accordingly, the Legislature hereby declares that any remedial component of the workers’ compensation laws is not to cause the workers’ compensation laws to receive liberal construction that alters in any way the proper weighing of evidence as required by §23-4-1g of this code.

~~(c) The “Workers’ Compensation Division of the Bureau of Employment Programs” is, on or after October 1, 2003, reestablished, reconstituted and continued as the Workers’ Compensation Commission, an agency of the state. The purpose of the commission is to ensure the fair, efficient and financially stable administration of the workers’ compensation system of the State of West Virginia. The powers and duties heretofore imposed upon the Workers’ Compensation Division and the Commissioner of the Bureau of Employment Programs as they relate to workers’ compensation are hereby transferred to and imposed upon the Workers’ Compensation Commission and its executive director in the manner prescribed by this chapter.~~

~~(d) It is the intent of the Legislature that the transfer of the administration of the workers’ compensation system of this state from the Workers’ Compensation Division under the Commissioner of the Bureau of Employment Programs to the Workers’ Compensation Commission under its executive director and the workers’ compensation board of managers is to become effective October 1, 2003. Any provisions of the enactment of Enrolled Senate Bill No. 2013 in the year 2003 relating to the transfer of the administration of the workers’ compensation system of this state that conflict with the intent of the Legislature as described in this subsection shall, to that extent, become operative on October 1, 2003, and until that date, prior enactments of this code in effect on the effective date of Enrolled Senate Bill No. 2013 relating to the administration of the workers’ compensation system of this state, whether amended and reenacted or repealed by the passage of Enrolled Senate Bill No. 2013, have full force and effect. All provisions of the enactment of Enrolled Senate Bill No. 2013 in the year 2003 relating to matters other than the transfer of the administration of the workers’ compensation system of this state shall become operative on the effective date of that enactment, unless otherwise specifically provided in that enactment~~

~~(e)~~ (c) It is the intent of the Legislature, expressed through its enactment of legislation, to transfer the regulation of the workers’ compensation system to the Insurance Commissioner. By proclamation of the Governor, as authorized by §23-2C-1 *et seq.* of this code, the Workers’ Compensation Commission was terminated on December 31, 2005. To further the transition from the state-operated workers’ compensation system to a system of private insurance, the duties and responsibilities of the Workers’ Compensation Commission and the board of managers, including, but not limited to, ratemaking and adjudication of claims now reside with the Insurance Commissioner.

§23-1-1b. ~~Executive Director; qualifications; oath; seal; removal; powers~~ Powers and duties of Insurance Commissioner.

~~(a) The Executive Director shall be hired by the board of managers for a term not to exceed five years and may be retained based on overall performance for additional terms:~~ *~~Provided~~*~~, That the Executive Director of the Division of Workers’ Compensation on the date of the enactment of this section in the year 2003 shall serve as the initial Executive Director of the Commission and shall receive the same salary and benefits as received as the Executive Director of the Division of Workers’ Compensation through and until the board of managers establishes his or her salary and benefits as the Executive Director of the Commission. The position of Executive Director shall be full-time employment. Except for the initial Executive Director, candidates for the position of Executive Director shall have a minimum of a bachelor of arts or science degree from an accredited four-year college or university in one or more of the following disciplines: Finance; economics; insurance administration; law; public administration; accounting; or business administration. Candidates for the position of Executive Director will be considered based on their demonstrated education, knowledge and a minimum of ten years’ experience in the areas of workers’ compensation, insurance company management, administrative and management experience with an organization comparable in size to the Workers’ Compensation Commission or any relevant experience which demonstrates an ability to effectively accomplish the purposes of this chapter.~~

~~(b) The Executive Director shall not be a candidate for or hold any other public office or trust, nor shall he or she be a member of a political committee. If he or she becomes a candidate for a public office or becomes a member of a political committee, his or her office as Executive Director shall be immediately vacated.~~

~~(c) The Executive Director, before entering upon the duties of his or her office, shall take and subscribe to the oath prescribed by section five, article IV of the state Constitution. The oath shall be filed with the Secretary of State.~~

~~(d) The Executive Director shall have an official seal for the authentication of orders and proceedings, upon which seal shall be engraved the words “West Virginia Workers’ Compensation Commission” and any other design prescribed by the board of managers. The courts in this state shall take judicial notice of the seal of the Commission and in all cases copies of orders, proceedings or records in the office of the West Virginia Workers’ Compensation Commission are equal to the original in evidence.~~

~~(e) The Executive Director shall not be a member of the board of managers.~~

~~(f) The Executive Director shall serve until the expiration of his or her term, resignation or until removed by a two-thirds vote of the full board of managers. The board of managers and the Executive Director may, by agreement, terminate the term of employment at any time~~

~~(g)~~ The ~~Executive Director~~ Insurance Commissioner shall have ~~overall management responsibility and administrative control and supervision within the Workers’ Compensation Commission and has~~ the power and duty to:

(1) Establish ~~with the approval of the board of managers the overall administrative policy of the Commission for the purposes of this chapter~~ operating guidelines and policies designed to ensure the effective regulation of the workers’ compensation insurance market in West Virginia and effectuate the provisions of this chapter;

(2) Employ, direct, and supervise all employees required in the connection with the performance of the duties assigned to the ~~Commission~~ Insurance Commissioner by this chapter; ~~and fix the compensation of the employees in accordance with the provisions of article six, chapter twenty-nine of this code:~~ *~~Provided~~*~~, That the Executive Director shall identify which members of the staff of the Workers’ Compensation Commission shall be exempted from the salary schedules or pay plan adopted by the state personnel board and further identify such staff members by job classification or designation, together with the salary or salary ranges for each such job classification or designation and shall file this information with the Director of the Division of Personnel no later than December 31, 2003, and thereafter as changes are made or at least annually:~~ *~~Provided, however~~*~~, That, effective July 1, 2006, if the Commission has not been terminated or otherwise discontinued, all employees of the Commission shall be exempt and otherwise not under the jurisdiction of the provisions of the statutes, rules and regulations of the classified service set forth in article six, chapter twenty-nine of this code and article six-a of said chapter and are afforded no protections, rights or access to procedures set forth in said provision. All commission employees shall be employees at will unless his or her employment status is altered by an express, written employment contract executed on behalf of the Commission and the employee. The Commission and its employees shall be exempt and otherwise not under the jurisdiction of the state personnel board, the department of personnel, or any other successor agency, and their statutes, rules and regulations~~

(3) Reorganize the work of the ~~Commission~~ Insurance Commissioner, its divisions, sections, and offices to the extent necessary to achieve the most efficient performance of its functions. ~~All persons employed by the workers’ compensation division in positions that were formerly supervised and directed by the Commissioner of the Bureau of Employment Programs under chapter twenty-one-a of this code are hereby assigned and transferred in their respective classifications to the Workers’ Compensation Commission effective October 1, 2003. Further, the Executive Director may select persons that are employed by the Bureau of Employment Programs on the effective date of the enactment of this section in the year 2003 to be assigned and transferred to the Workers’ Compensation Commission in their respective classifications, such assignment and transfer to take effect no later than December 31, 2003. Employees in the classified service who have gained permanent status as of the effective date of this article will not be subject to further qualifying examination in their respective classifications by reason of any transfer required by the provisions of this subdivision. Due to the emergency currently existing at the Commission and the urgent need to develop fast, efficient claims processing, management and administration, the Executive Director is hereby granted authority to reorganize internal functions and operations and to delegate, assign, transfer, combine, establish, eliminate and consolidate responsibilities and duties to and among the positions transferred under the authority of this subdivision. The Division of Personnel shall cooperate fully by assisting in all personnel activities necessary to expedite all changes for the Commission. The Executive Director is hereby granted authority to reorganize internal functions and operations and to delegate, assign, transfer, combine, establish, eliminate and consolidate responsibilities and duties to and among the positions transferred under the authority of this subdivision. The Division of Personnel shall cooperate fully by assisting in all personnel activities necessary to expedite all changes for the Commission and shall otherwise continue to provide all necessary administrative support to the Commission in connection with the Commission’s personnel needs until the company established in article two-c of this chapter becomes operational. Nothing contained in this subdivision shall be construed to either abridge the rights of employees within the classified service of the state to the procedures and protections set forth in article six, chapter twenty-nine of this code or to preclude the reclassification or reallocation of positions in accordance with procedures set forth in said article;~~

~~(4) Exempt no more than 25 of any of the newly created positions from the classified service of the state, the employees of which positions shall serve at the will and pleasure of the Executive Director. The Executive Director shall report all exemptions made under this subdivision to the Director of the Division of Personnel no later than January 1, 2004, and thereafter as the Executive Director determines to be necessary;~~

~~(5) With the advice and approval of the board of managers, propose operating guidelines and policies to standardize administration, expedite commission business and promote the efficiency of the services provided by the Commission;~~

~~(6) Prepare and submit to the board of managers information the board requires for classifications of occupations or industries; the basis for premium rates, taxes, surcharges and assessment for administrative charges, for assessments related to loss experience, for assessments of prospective risk exposure, for assessments of deficit management and deficit reduction costs incurred, for other deficit management and deficit reduction assessments, for rules and systems of rating, rate revisions and merit rating for employers covered by this chapter; and information regarding the extent, degree and amount of subsidization between the classifications. The Executive Director shall obtain, prepare and submit any other information the board of managers requires for the prompt and efficient discharge of its duties~~

~~(7)~~ (4) Keep accurate and complete accounts and records necessary to the collection, administration, and distribution of the workers’ compensation funds created in §23-2C-6 of this code;

~~(8) Sign and execute in the name of the state, by “The Workers’ Compensation Commission”, any contract or agreement;~~

~~(9) Make recommendations and an annual report to the Governor concerning the condition, operation and functioning of the Commission;~~

~~(10)~~ (5) Invoke any legal or special remedy for the enforcement of orders or the provisions of this chapter;

~~(11) Prepare and submit for approval to the board of managers a budget for each fiscal year, including estimates of the costs and necessary expenditures of the Commission in the discharge of all duties imposed by this chapter as well as the costs of furnishing office space to the officers and employees of the Commission~~

~~(12)~~ (6) Ensure that all employees of the ~~Commission~~ Insurance Commissioner follow the orders, operating guidelines, and policies of the ~~Commission~~ agency as they relate to the ~~Commission’s~~ agency’s overall policymaking, management, and adjudicatory duties under this chapter;

~~(13)~~ (7) Delegate all powers and duties vested in the ~~Executive Director~~ Insurance Commissioner to his or her appointees and employees: ~~but~~ *Provided*, That the ~~Executive Director~~ Insurance Commissioner is responsible for their acts;

~~(14) Provide at commission expense a program of continuing professional, technical and specialized instruction for the personnel of the Commission. The Executive Director shall consult with and report at least annually to the Legislative Oversight Commission on Workforce Investment for Economic Development to obtain the most appropriate training using all available resources~~

~~(15)~~ (8)(A) Contract or employ counsel to perform all legal services for the ~~Commission~~ Insurance Commissioner including, but not limited to, representing the ~~Executive Director, board of managers and commission~~ Insurance Commissioner in any administrative proceeding and in any state or federal court. Additionally, the ~~Commission~~ Insurance Commissioner may, but shall not be required to, call upon the Attorney General for legal assistance and representation as provided by law. The Attorney General shall not approve or exercise authority over in-house counsel or contract counsel hired pursuant to this section;

(B) In addition to the authority granted by this section to the ~~Executive Director~~ Insurance Commissioner and notwithstanding any provision to the contrary elsewhere in this code, use any attorney regularly employed by the ~~Commission~~ Insurance Commissioner or the Office of the Attorney General to represent the ~~Commission, the Executive Director or the board of managers~~ Insurance Commissioner in any matter arising from the performance of ~~its~~ his or her duties or the execution of ~~its~~ his or her powers under this chapter. ~~In addition, the Executive Director, with the approval of the board of managers, may retain counsel for any purpose in the administration of this chapter relating to the collection of any amounts due from employers to the Commission:~~ *~~Provided~~*~~, That the allocation of resources for the purpose of any collections shall be pursuant to the plan developed by the board of managers. The board of managers shall solicit proposals from counsel who are interested in representing the Commission under the terms of this subdivision. Thereafter, the board of managers shall select any attorneys it determines necessary to pursue the collection objectives of this subdivision:~~

~~(i) Payment to retained counsel may either be hourly or by other fixed fee, or as determined by the court or administrative law judge as provided in this section. A contingency fee payable from the amount recovered by judgment or settlement for the Commission is only permitted, to the extent not prohibited by federal law, when the assets of a defendant or respondent are depleted so that a full recovery plus attorneys’ fees is not possible;~~

~~(ii) In the event that any collections action, other than a collections action against a claimant, initiated either by retained counsel or other counsel on behalf of the Commission results in a judgment or settlement in favor of the Commission, the court or, if there was no judicial component to the action, the administrative law judge, shall determine the amount of attorneys’ fees that shall be paid by the defendants or respondents to the retained or other counsel representing the Commission. If the court is to determine the amount of attorneys’ fees, it shall include in its determination the amount of fee that should be paid for the representation of the Commission in pursuing the administrative component, if any, of the action. The amount so paid shall be fixed by the court or the administrative law judge in an amount no less than twenty percent of its recovery. Any additional amount of attorneys’ fees shall be determined by use of the following factors:~~

~~(I) The counsel’s normal hourly rate or, if the counsel is an employee of the Commission or is an employee of the Office of the Attorney General, an hourly rate the court or the administrative law judge determines to be customary based upon the attorney’s experience and skill level;~~

~~(II) The number of hours actually expended on the action;~~

~~(III) The complexity of the issues involved in the action;~~

~~(IV) The degree of risk involved in the case with regard to the probability of success or failure;~~

~~(V) The overhead costs incurred by counsel with regard to the use of paralegals and other office staff, experts and investigators; and~~

~~(VI) The public purpose served or public objective achieved by the attorney in obtaining the judgment or settlement on behalf of the Commission;~~

~~(iii) Notwithstanding the provisions of paragraph (B) of this subdivision, if the Commission and the defendants or respondents to any administrative or judicial action settle the action, the parties may negotiate a separate settlement of attorneys’ fees to be paid by the defendants or respondents above and beyond the amount recovered by the Commission. In the event that a settlement of attorneys’ fees is made, it must be submitted to the court or administrative law judge for approval;~~

~~(iv) Any attorney regularly employed by the Commission or by the Office of the Attorney General may not receive any remuneration for his or her services other than the attorney’s regular salary. Any attorneys’ fees awarded for an employed attorney are payable to the Commission~~

~~(16)~~ (9) Propose rules for ~~promulgation by the board of managers~~ approval by the Industrial Council created in §23-2C-5 of this code, under which agencies of this state shall revoke or refuse to grant, issue, or renew any contract, license, permit, certificate, or other authority to conduct a trade, profession, or business to or with any employing unit ~~whose account~~ who is in default ~~on the Default List~~ as set forth in §23-2C-19(d)(1) of this code or listed in the Employer Violator System with the ~~Commission with regard to the administration of this chapter~~ Insurance Commissioner. The term “agency” includes any unit of state government such as officers, agencies, divisions, departments, boards, commissions, authorities, or public corporations. An employing unit is not in default if it has entered into a repayment agreement with the ~~Commission~~ Insurance Commissioner and remains in compliance with its obligations under the repayment agreements;

(A) The rules shall provide that, before granting, issuing, or renewing any contract, license, permit, certificate, or other authority to conduct a trade, profession, or business to or with any employing unit, the designated agencies shall review a list or lists provided by the ~~Commission~~ Insurance Commissioner of employers that are in default. If the employing unit’s name is not on the list, the agency, unless it has actual knowledge that the employing unit is in default ~~with the Commission~~, may grant, issue, or renew the contract, license, permit, certificate, or other authority to conduct a trade, profession, or business. The list may be provided to the agency in the form of a computerized database or databases that the agency can access. Any objections to the refusal to issue or renew shall be reviewed under the appropriate provisions of this chapter. The prohibition against granting, issuing, or renewing any contract, license, permit, certificate, or other authority under this subdivision shall remain in full force and effect as promulgated under §21A-2-6 of this code until the rules required by this ~~subsection~~ subdivision are promulgated and in effect;

(B) The rules shall also provide a procedure allowing any agency or interested person, after being covered under the rules for at least one year, to petition the ~~Commission~~ Insurance Commissioner to be exempt from the provisions of the rules;

~~(17)~~ (10) Deposit to the credit of the appropriate special revenue account or fund, notwithstanding any other provision of this code and to the extent allowed by federal law, all amounts of delinquent payments or overpayments, interest, and penalties thereon and attorneys’ fees and costs collected under the provisions of this chapter. The amounts collected shall not be treated by the Auditor or Treasurer as part of the general revenue of the state;

~~(18) Recommend for approval of the board of managers rules for the administration of claims management by self-insured employers and third-party administrators including regulation and sanctions for the rejection of claims and for maintaining claim records and ensuring access to all claim records by interested claimants, claimant representatives, the Commission and the Office of Judges;~~

~~(19) Recommend for approval of the board of managers, rules to eliminate the ability of an employer to avoid an experience modification factor by virtue of a reorganization of a business;~~

~~(20) Submit for approval of the board of managers rules setting forth procedures for auditing and investigating employers, including employer premium audits and including auditing and investigating programs of self-insured employers and third-party administrators, employees, health care providers and medical and vocational rehabilitation service providers~~

~~(21)~~ (11) Regularly audit or examine and monitor programs established by self-insured employers or third-party administrators under this chapter to ensure compliance with the ~~Commission’s~~ Insurance Commissioner’s rules and the law;

~~(22)~~ (12) ~~Facilitate the transfer of the fraud investigation and prosecution unit, along with the assets necessary to support the functions being performed, to the Insurance Commissioner. This transfer shall be completed by July 1, 2005. This unit~~ Oversee the Insurance Fraud Unit that has the responsibility and authority for investigating and controlling insurance fraud and workers’ compensation fraud ~~of the Workers’ Compensation System of~~ in the State of West Virginia ~~and shall perform such other duties as may be assigned to it by the Insurance Commissioner~~ as set forth in §33-41-1 *et seq.* of this code. The fraud unit shall be under the supervision of an inspector general, who shall be appointed by the Insurance Commissioner. Nothing in this section shall preclude ~~the Commission or, when applicable, the company created in article two-c of this chapter and other~~ private carriers from independently investigating and controlling abuse. ~~and exercising the powers granted to the Commission to address and eliminate abuse under this chapter. The Executive Director may select persons that are assigned to the fraud and abuse unit on the effective date of the enactment of this section to be assigned and remain employees of the Workers’ Compensation Commission. The Commission shall determine its fiscal year 2006 budget for the fraud investigation and prosecution unit and shall make advanced quarterly payments to the Insurance Commissioner during fiscal year 2006 for the actual operational expenses incurred as a direct result of this transfer:~~ *~~Provided~~*~~, That the payments and expenses shall be reconciled prior to the final fiscal year transfer and any unexpended amount shall be deducted from the final quarter’s payment. This reimbursement methodology shall repeat for fiscal year 2007. Any amounts transferred under this section to the Insurance Commissioner shall be appropriated by the Legislature. The Commission’s inspector general shall serve as the initial inspector general for the Insurance Commissioner~~

(A) The inspector general shall, with the consent and advice of the ~~Executive Director~~ Insurance Commissioner, employ all personnel as necessary for the institution, development and finalization of procedures and investigations which serve to ensure that only necessary and proper workers’ compensation benefits and expenses are paid to or on behalf of injured employees. ~~and to insure employers subscribe to and pay the proper premium to the West Virginia Workers’ Compensation Commission~~ Qualification, compensation, and personnel practice relating to the employees of the fraud and abuse unit, including that of the position of inspector general, shall be governed by the provisions of the statutes and rules of the classified service pursuant to §29-6-1, *et seq.* of this code. The inspector general shall supervise all personnel; ~~which collectively shall be referred to in this chapter as the fraud and abuse unit~~

(B) The fraud ~~and abuse~~ unit shall have the following powers and duties:

~~(i) The~~ ~~fraud and abuse unit shall propose for promulgation by the board of managers rules for determining the existence of fraud and abuse as it relates to the Workers’ Compensation System in West Virginia;~~

~~(ii) The fraud and abuse unit will be responsible for the initiation, development, review and proposal for promulgation by the board of managers of rules regarding the existence of fraud and abuse as it relates to the Workers’ Compensation System in West Virginia~~

~~(iii)~~ (i) The fraud ~~and abuse~~ unit will take action to identify and prevent and discourage any and all fraud and abuse;

~~(iv)~~ (ii) The fraud ~~and abuse~~ unit, in cases of criminal fraud, has the authority to review and prosecute those cases for violations of ~~§61-3-24e, §61-3-24f, §61-3-24g, and §61-3-24h of this code~~ §23-1-1 et seq., §33-1-1 et seq., §61-3-1 et seq., and §61-4-5 of this code, as well as any other criminal statutes that may be applicable. In addition, the fraud ~~and abuse~~ unit not only has the authority to prosecute and refer cases involving criminal fraud to appropriate state authorities for prosecution, but it also has the authority, and is encouraged, to cooperate with the appropriate federal authorities for review and possible prosecution, by eitherstate or federal agencies, of cases involving criminal fraud concerning the Workers’ Compensation System in West Virginia; and

~~(v) The fraud and abuse unit, in cases which do not meet the definition of criminal fraud, but would meet a reasonable person’s definition of an abuse of the Workers’ Compensation System, shall take the appropriate action to discourage and prevent such abuse. Furthermore, the fraud investigation and abuse unit shall assist the Commission to develop evidence of fraud or abuse which can be used pursuant to the provisions of this chapter to suspend, and where appropriate, terminate, a claimant’s benefits. In addition, evidence developed pursuant to these provisions can be used in hearings before the office of judges on protests to commission decisions terminating, or not terminating, temporary total disability benefits; and~~

~~(vi)~~ (iii) The fraud ~~and abuse~~ unit is expressly authorized to initiate investigations and participate in the development of, and if necessary, the prosecution of any health care provider, including a provider of rehabilitation services and in-home caretaker, alleged to have violated the provisions of §23-4-3c of this code;

(C) Specific personnel, designated by the inspector general, shall be permitted to operate vehicles owned or leased for the state displaying Class A registration plates;

(D) Notwithstanding any provision of this code to the contrary, specific personnel designated by the inspector general may carry handguns in the course of their official duties after meeting specialized qualifications established by the Governor’s Committee on Crime, Delinquency and Correction, which qualifications shall include the successful completion of handgun training provided to law-enforcement officers by the West Virginia State Police:*Provided*, That nothing in this subsection shall be construed to include the personnel so designated by the inspector general to carry handguns within the meaning of the term law-enforcement official as defined in §30-29-1 of this code;

(E) The fraud ~~and abuse~~ unit is not subject to any requirement of §6-9a-1 *et seq.* of this code and the investigations conducted by the fraud ~~and abuse~~ unit and the materials placed in the files of the unit as a result of any such investigation are exempt from public disclosure under the provisions of chapter 29B of this code;

(F) In the event that a final judicial decision adjudges that the statewide prosecutorial powers vested by this subdivision in the fraud ~~and abuse~~ unit may only be exercised by a public official other than an employee of the fraud ~~and abuse~~ unit, then to that extent the provisions of this subdivision vesting statewide prosecutorial power shall thenceforth be of no force and effect, the remaining provisions of this subdivision shall continue in full force and effect, and prosecutions hereunder may only be exercised by the prosecuting attorneys of this state and their assistants or special assistant prosecuting attorneys appointed as provided by law;

~~(23)~~ (13) Enter into interagency agreements to assist in exchanging information and fulfilling the default provisions of this chapter;

~~(24) Notwithstanding any provision of this code to the contrary, the Executive Director, under emergency authorization:~~

~~(A) May expend up to $50,000 for purchases of and may contract for goods and services without securing competitive bids. This emergency spending authority expires on July 1, 2005; and~~

~~(B) May expend such sums as the Executive Director determines are necessary for professional services, contracts for the purchase of an automated claims administration system and associated computer hardware and software in the administration of claims for benefits made under provisions of this chapter and contracts for technical services and related services necessary to develop, implement and maintain the system and associated computer hardware and software. The provisions of article three, chapter five-a of this code relating to the Purchasing Division of the Department of Administration shall not apply to these contracts. The Director shall award the contract or contracts on a competitive basis. This emergency spending authority expires on December 31, 2006~~

~~(25)~~ (14) Establish an employer violator system to identify individuals and employers who are in default, ~~or are delinquent on any premium, assessment, surcharge, tax or penalty owed to the Commission~~ as defined by §23-2C-19(d)(1) of this code. The employer violator system shall prohibit violators who own, control or have a 10 percent or more ownership interest, or other ownership interest as may be defined by the ~~Commission~~ Insurance Commissioner, in any company from obtaining or maintaining any license, certificate or permit issued by the state until the violator has paid all moneys owed to the ~~Commission~~ Insurance Commissioner or has entered into and remains in compliance with a repayment agreement;

~~(26) Propose the designation of health care providers to make decisions for the Commission regarding appropriateness of medical services;~~

~~(27) Study the correlation between premium tax merit rating for employers and the safety performance of employers. This study shall be completed prior to July 1, 2004, and the results thereof provided to the board of managers~~

~~(28)~~ (15) ~~Upon termination of the Commission, accomplish the transfer to the Insurance Commissioner established in article two-c of this chapter, the Insurance Commissioner, and any other applicable state agency or department, of the~~ Perform all other functions necessary for the regulation of the workers’ compensation insurance industry, including, but not limited to: ~~the following commission functions Rate making~~ ratemaking, self-insurance, office of judges, and board of review; ~~The Executive Director may select persons that are assigned to these functions on the effective date of the enactment of this section to be assigned and become employees of the company as established in article two-c of this chapter. The Executive Director may, in consultation with the Insurance Commissioner, select persons that are assigned to the Insurance Commissioner. The Commission shall determine its fiscal year 2006 budget for each of these functions, reduce the budget amount attributable to self-insured employers for these functions and shall make advanced quarterly payments to the Insurance Commissioner during fiscal year 2006 for the actual operational expenses incurred as a direct result of this transfer. The amount shall include the funds necessary to operate the industrial council and the Insurance Commissioner shall be administratively responsible for the industrial council’s budget:~~ *~~Provided~~*~~, That the payments and expenses shall be reconciled prior to the final fiscal year transfer and any unexpended amount shall be deducted from the final quarter’s payment. This reimbursement methodology shall repeat for fiscal year 2007. Any amounts transferred under this section to the Insurance Commissioner shall be appropriated by the Legislature. For the final calendar quarter of 2005 and the first and second calendar quarters of the year 2006, all self-insured employers shall remit to the Insurance Commissioner on a quarterly basis the administrative component of their fiscal year 2006 rate. For the fiscal year beginning July 1, 2006, self-insured employers shall remit an administrative charge to the Insurance Commissioner in an amount determined by the Commissioner. All self-insured employer advance deposits shall transfer from the Commission to the Insurance Commissioner upon termination of the Commission~~ and

~~(29)~~ (16) Perform all duties set forth in §23-2C-1 *et seq.* of this code.

§23-1-1c. Payment withholding; interception; penalty.

[Repealed.]

§23-1-1d. Rules of former division of workers’ compensation.

[Repealed.]

§23-1-1e. Transfer of assets and contracts; ability to acquire, own, lease and otherwise **manage property.**

[Repealed.]

§23-1-1f. Authority of Insurance Commission to exempt employees from classified service; exemption from purchasing rules.

Notwithstanding any other provision of this code, ~~upon termination of the commission~~ the Insurance Commissioner may:

(1) Exempt no more than 20 positions of the offices of the Insurance Commissioner from the classified service of the state, the employees of which positions shall serve at the will and pleasure of the commissioner: *Provided,* That such exempt positions shall be in addition to those positions in classified-exempt service under the classification plan adopted by the Division of Personnel; ~~The Insurance Commissioner shall report all exemptions made under this section to the Director of the Division of Personnel no later than July 1, 2007, and thereafter as the commissioner determines to be necessary~~ and

(2) Expend such sums for professional services as he or she determines are necessary to perform ~~those~~ duties ~~transferred to the Insurance Commissioner upon the termination of the commission~~ under this chapter. The provisions of §5A-3-1 *et seq.* of this code relating to the Purchasing Division of the Department of Administration shall not apply to these contracts, and the Insurance Commissioner shall award the contract or contracts on a competitive basis.

§23-1-1g. Legislative intent to create a quasi-public entity.

[Repealed.]

§23-1-2. Oversight of the workers’ compensation commission.

~~(a) In addition to any other oversight of the commission exercised by the Legislature, the commission~~ The Insurance Commissioner shall report at least quarterly to the Joint Committee on Government and Finance regarding the funds created in §23-2C-1 *et seq.* of this code. This analysis shall include the current balances in the fund and revenue generated and expended in relationship to the liabilities and assets of the funds and estimates of any debt reduction relative to the fund over the next reporting period. ~~and the joint commission on economic development. The commission shall collect data and report on claims and injuries and on the costs and outcomes of injuries by standard codes for medical treatment, vocation rehabilitation services, return-to-work services, other benefits payable to or on behalf of employees, efforts to eliminate fraud and abuse and the impact of judicial and quasijudicial rulings on the administration of the workers’ compensation system and the solvency of the fund. The workers’ compensation commission shall provide to the Joint Committee on Government and Finance and the joint commission on economic development an action plan for improving the workers’ compensation system. This plan shall include detail on any administrative changes undertaken by the commission, a report on the anticipated outcome of the changes, a cost-benefit analysis of the changes and time frames for commencement and completion of these changes. Subsequent reports to the Joint Committee on Government and Finance and the joint commission on economic development shall report on the progress of these changes. The administrative changes shall include, but are not limited to, claims processing, reorganization, staff development and training, return-to-work programs, workplace alternatives for injured workers, safety programs and medical and vocational services.~~

~~(b) The commission shall also report on the current status of the workers’ compensation fund and the coal-workers’ pneumoconiosis fund. This analysis shall include the current balances in the fund and revenue generated and expended in relationship to the liabilities and assets of the funds and estimates of any debt reduction relative to the fund over the next reporting period.~~

~~(c) The commission shall further report on the impact on the workers’ compensation system of the amendments to subdivision (2), subsection (n), section six, article four of this chapter enacted during the year 2003, including, but not limited to, an analysis of any litigation resulting from the amendments and the availability of health care to injured workers resulting from the amendments.~~

~~(d) The commission shall further report on methodologies used to establish all types of assessments and rates.~~

~~(e) The commission shall further report on legislative action that may be required to further improve the operation of the commission.~~

~~(f) The commission shall further report on efforts to eliminate fraud and abuse including a statistical breakdown of investigations being conducted and their outcomes. The commission shall report to the Joint Committee on Government and Finance on a monthly basis until July 1, 2004, on fraud and abuse and quarterly thereafter~~

§23-1-3. Payment of salaries and expenses generally; manner; limitation.

[Repealed.]

§23-1-4. ~~Office hours;~~ Records; confidentiality; exceptions.

~~(a) The offices of the workers’ compensation commission shall be open for the transaction of business between the hours of 8:30 a.m. and 5:00 p.m. of each and every day, excepting Saturdays, Sundays, and legal holidays, and be open upon any additional days and at any additional times elected by the commission. The executive director is the chief executive officer of the workers’ compensation commission.~~

~~(b)~~ Except as expressly provided for in this subsection, information obtained regarding employers and claimants pursuant to this chapter for the purposes of its administration is not subject to the provisions of chapter 29B of this code unless the provisions are hereafter specifically made applicable, in whole or in part. The information that is reasonably necessary may be released in formal orders or opinions of any tribunal or court which is presented with an issue arising under this chapter as well as in the presentations of the parties before the tribunal or court. Similarly, claimants or other interested parties to an issue arising under this chapter may, upon request, obtain information from the ~~commission’s~~ Insurance Commissioner’s records to the extent necessary for the proper presentation or defense of a claim or other matter. Information may be released pursuant to the provisions of chapter 29B of this code only if all identifying information has first been eliminated from the records. Nothing in this subsection shall prevent the release of information to another agency of the state or of the federal government for the legitimate purposes of those agencies*: Provided,* That the agency shall guarantee the confidentiality of the information provided to the fullest extent possible in keeping with its own statutory and regulatory mandates. Nothing in this section shall prevent the ~~commission~~ Insurance Commissioner from complying with any subpoena duces tecum: *Provided, however,* That the issuing tribunal or court shall take such actions as proper to maintain the confidentiality of the information.

The ~~commission~~ Insurance Commissioner may release, pursuant to a proper request under the provisions of chapter 29B of this code, the following information:

~~(1) The base premium tax rate for a specific employer~~

~~(2~~) (1) Whether or not a specific employer has obtained coverage under the provisions of this chapter;

~~(3)~~ (2) Whether or not a specific employer is in good standing or is delinquent or in default according to the ~~commission’s~~ Insurance Commissioner’s records and the time periods thereof; and

~~(4)~~ (3) If a specific employer is delinquent or in default, what the payments due the ~~commission~~ Insurance Commissioner are and what the components of that payment are, including the time periods affected.

§23-1-4a. Bond for executive director and associate director.

[Repealed.]

§23-1-5. Office of ~~executive director~~ Insurance Commissioner; hearings.

The ~~executive director~~ Insurance Commissioner shall keep and maintain his or her office at the seat of government and shall provide a suitable room or rooms, necessary office furniture, supplies, books, periodicals, maps, and other equipment. After due notice, showing the time and place, the ~~executive director~~ Insurance Commissioner may hold hearings anywhere within the state, or elsewhere by agreement of claimant and employer, with the approval of the ~~executive director~~ Insurance Commissioner.

§23-1-6. Employment of associate director and other assistants; compensation and travel expenses.

[Repealed.]

§23-1-7. Associate director to act during executive director’s absence or inability to act and in case of vacancy; bond of associate director.

[Repealed.]

§23-1-8. Authority of ~~executive director~~ Insurance Commissioner and employees as to oaths and evidence.

The ~~executive director, associate director~~ Insurance Commissioner and other employees appointed by the ~~executive director~~ Insurance Commissioner may, for the purpose contemplated by this chapter, administer oaths, certify official acts, take depositions, issue subpoenas, and compel the attendance of witnesses and the production of pertinent books, accounts, papers, records, documents, and testimony.

§23-1-9. Compelling compliance with order or subpoena.

In case of failure or refusal of any person to comply with the order of the ~~executive director~~ Insurance Commissioner, or subpoena issued by him or her, ~~the associate director~~ or duly appointed employee, or on the refusal of a witness to testify to any matter regarding which he or she may be lawfully interrogated, or refusal to permit an inspection as aforesaid, the circuit judge of the county in which the person resides, on application of the ~~executive director, associate director~~ Insurance Commissioner or any duly appointed employee, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of a subpoena issued from the court on a refusal to testify in the court.

§23-1-10. Fee of officer serving subpoena; fees and mileage of witnesses.

Each officer who serves subpoenas on behalf of the ~~commission~~ Insurance Commissioner shall receive the same fee as a sheriff and each witness who appears in obedience to a subpoena before the ~~executive director, associate director~~ Insurance Commissioner or duly appointed employee shall receive for his or her attendance the fees and mileage provided for witnesses in civil cases in the circuit court ~~which shall be audited and paid out of the workers’ compensation fund in the same manner as other expenses are audited and paid~~ if the witness was subpoenaed without the request of either claimant or employer at the instance of the ~~executive director, associate director~~ Insurance Commissioner or duly appointed employee. The witness fees and mileage of any witness subpoenaed by, or at the instance of, either claimant or employer shall be paid by the party who subpoenas the witness.

§23-1-11. Depositions; investigations.

(a) In an investigation into any matter arising under ~~articles one through five, inclusive, of~~ this chapter, the ~~commission~~ Insurance Commissioner may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in the circuit court, but the depositions shall be upon reasonable notice to claimant and employer or other affected persons or their respective attorneys. ~~The commission shall designate the person to represent it for the taking of the deposition~~

(b) The ~~commission~~ Insurance Commissioner also has discretion to accept and consider depositions taken within or without the state by either the claimant or employer or other affected person, provided due and reasonable notice of the taking of the depositions was given to the other parties or their attorneys, if any: *Provided,* That the ~~commission~~ Insurance Commissioner, upon due notice to the parties, has authority to refuse or permit the taking of depositions or to reject the depositions after they are taken, if they were taken at a place or under circumstances which imposed an undue burden or hardship upon the other parties. The ~~commission’s~~ Insurance Commissioner’s discretion to accept, refuse to approve or reject the depositions is binding in the absence of abuse of the discretion.

~~(c) The powers and duties set forth in the section shall be transferred from the Workers’ Compensation Commission to the Insurance Commissioner upon termination of the commission~~

§23-1-12. Copies of proceedings as evidence.

A transcribed copy of the evidence and proceedings, or any specific part thereof, on any investigation or hearing, taken by a stenographer appointed by the ~~executive director~~ Insurance Commissioner and certified and sworn to by the stenographer to be a true and correct transcript of the testimony in the investigation or hearing, or of a particular witness, or of a specific part thereof, or to be a correct transcript of the proceedings had on the investigation or hearing purporting to be taken and subscribed, may be received in evidence by the ~~executive director~~ Insurance Commissioner with the same effect as if the stenographer were present and testified to the facts certified. A copy of the transcript shall be furnished on demand to any party upon payment of the fee prescribed in the rules and policies of the ~~commission~~ Insurance Commissioner. The fee shall not exceed that prescribed for transcripts in the circuit court.

§23-1-13. Rules of procedure and evidence; persons authorized to appear in proceedings; withholding of psychiatric and psychological reports and providing summaries thereof.

(a) The ~~Workers’ Compensation Commission~~ Insurance Commissioner shall adopt reasonable and proper rules of procedure, regulate and provide for the kind and character of notices, and the service of the notices, in cases of accident and injury to employees, the nature and extent of the proofs and evidence, the method of taking and furnishing of evidence to establish the rights to benefits or compensation from the fund hereinafter provided for, or directly from employers as hereinafter provided, as the case may require, and the method of making investigations, physical examinations and inspections and prescribe the time within which adjudications and awards shall be made.

(b) At hearings and other proceedings before the ~~commission~~ Insurance Commissioner or before the duly authorized representative of the ~~commission~~ Insurance Commissioner, an employer who is a natural person may appear, and a claimant may appear, only as follows:

(1) By an attorney duly licensed and admitted to the practice of law in this state;

(2) By a nonresident attorney duly licensed and admitted to practice before a court of record of general jurisdiction in another state or country or in the District of Columbia who has complied with the provisions of rule 8.0 - admission pro hac vice, West Virginia Supreme Court Rules for admission to the practice of law, as amended;

(3) By a representative from a labor organization who has been recognized by the ~~commission~~ Insurance Commissioner as being qualified to represent a claimant or who is an individual otherwise found to be qualified by the ~~commission~~ Insurance Commissioner to act as a representative. The representative shall participate in the presentation of facts, figures, and factual conclusions as distinguished from the presentation of legal conclusions in respect to the facts and figures; or

(4) Pro se.

(c) At hearings and other proceedings before the ~~commission~~ Insurance Commissioner or before the duly authorized representative of the ~~commission~~ Insurance Commissioner, an employer who is not a natural person may appear only as follows:

(1) By an attorney duly licensed and admitted to the practice of law in this state;

(2) By a nonresident attorney duly licensed and admitted to practice before a court of record of general jurisdiction in another state or country or in the District of Columbia who has complied with the provisions of rule 8.0 - admission pro hac vice, West Virginia Supreme Court Rules for admission to the practice of law, as amended;

(3) By a member of the board of directors of a corporation or by an officer of the corporation for purposes of representing the interest of the corporation in the presentation of facts, figures, and factual conclusions as distinguished from the presentation of legal conclusions in respect to the facts and figures; or

(4) By a representative from an employer service company who has been recognized by the ~~commission~~ Insurance Commissioner as being qualified to represent an employer or who is an individual otherwise found to be qualified by the ~~commission~~ Insurance Commissioner to act as a representative. The representative shall participate in the presentation of facts, figures, and factual conclusions as distinguished from the presentation of legal conclusions in respect to the facts and figures.

(d) The ~~commission~~ Insurance Commissioner or ~~its~~ his or her representative may require an individual appearing on behalf of a natural person or corporation to produce satisfactory evidence that he or she is properly qualified and authorized to appear pursuant to this section.

(e) The provisions of §23-1-13(b), (c), and (d) of this code shall not be construed as being applicable to proceedings before the office of judges or board of review pursuant to the provisions of §23-5-1 *et seq.* of this code.

(f) At the direction of a treating or evaluating psychiatrist or clinical doctoral-level psychologist, a psychiatric or psychological report concerning a claimant who is receiving treatment or is being evaluated for psychiatric or psychological problems may be withheld from the claimant. In that event, a summary of the report shall be compiled by the reporting psychiatrist or clinical doctoral-level psychologist. The summary shall be provided to the claimant upon his or her request. Any representative or attorney of the claimant must agree to provide the claimant with only the summary before the full report is provided to the representative or attorney for his or her use in preparing the claimant’s case. The report shall only be withheld from the claimant in those instances where the treating or evaluating psychiatrist or clinical doctoral-level psychologist certifies that exposure to the contents of the full report is likely to cause serious harm to the claimant or is likely to cause the claimant to pose a serious threat of harm to a third party.

(g) In any matter arising under §23-1-1 *et seq.*, §23-2-1 *et seq.*, §23-2A-1 *et seq.*, §23-2C-1 *et seq.*, §23-4-1 *et seq.*, §23-4A-1, §23-4B-1 *et seq.*, and §23-5-1 *et seq.* of this code in which the ~~commission~~ Insurance Commissioner is required to give notice to a party, if a party is represented by an attorney or other representative, then notice to the attorney or other representative is sufficient notice to the party represented.

~~(h) The powers and duties set forth in the section shall be transferred from the Workers’ Compensation Commission to the Insurance Commissioner upon termination of the commission~~

§23-1-14. Forms.

The ~~commission~~ Insurance Commissioner shall prepare and furnish free of cost forms (and provide in his or her rules for their distribution so that they may be readily available) of applications for benefits for compensation, ~~from the Workers’ Compensation Fund, or directly from employers, as the case may be~~ notices to employers, proofs of injury or death, of medical attendance, of employment and wage earnings, and any other forms considered proper and advisable. It is the duty of employers to constantly keep on hand a sufficient supply of the forms. ~~The powers and duties set forth in the section shall be transferred from the Workers’ Compensation Commission to the Insurance Commissioner as of the termination of the commission~~

§23-1-15. Procedure before ~~commission~~ Insurance Commissioner.

The ~~commission, and the~~ Insurance Commissioner ~~effective upon termination of the commission, are~~ is not bound by the usual common-law or statutory rules of evidence, but shall adopt formal rules of practice and procedure as herein provided, and may make investigations in a manner that in his or her judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of this chapter.

§23-1-18. ~~Commission~~ Insurance Commissioner employees not subject to subpoena for workers’ compensation hearings.

No employee of the ~~workers’ compensation commission~~ Insurance Commissioner shall be compelled to testify as to the basis, findings, or reasons for any decision or order rendered by the employee under this chapter in any hearing conducted pursuant to §23-5-1 *et seq.* of this code.

§23-1-19. Civil remedies.

(a) Any person, firm, corporation, or other entity which willfully, by means of false statement or representation, or by concealment of any material fact, or by other fraudulent scheme, device, or artifice on behalf of himself or herself, itself, or others, obtains or attempts to obtain benefits, payments, allowances, or reduced premium costs or other charges, including Workers’ Compensation coverage, ~~under the programs of the Workers’ Compensation Commission, the company,~~ from the Insurance Commissioner, a private carrier, or self-insured employer, to which he, she, or it is not entitled, or in a greater amount than that to which he, she, or it is entitled, shall be liable to the ~~Workers’ Compensation Commission, the company,~~ Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, in an amount equal to three times the amount of such benefits, payments, or allowances to which he, she, or it is not entitled and shall be liable for the payment of reasonable attorney fees and all other fees and costs of litigation.

(b) No criminal action or indictment need be brought against any person, firm, corporation, or other entity as a condition for establishing civil liability hereunder.

(c) A civil action under this section may be prosecuted and maintained on behalf of the ~~Workers’ Compensation Commission, the~~ Insurance Commissioner, ~~the company~~ a private carrier, or self-insured employer by any attorney in contract with or employed by the ~~Workers’ Compensation Commission, the~~ Insurance Commissioner, ~~the company,~~ a private carrier, or self-insured employer to provide such representation.

(d) Venue for a civil action under this section shall be either in the county in which the defendant resides or in Kanawha County as selected by the ~~commission or~~ Insurance Commissioner. ~~Upon creation of the company pursuant to article two-c of this chapter, venue~~ Venue for a civil action under this section for ~~the company~~ private carriers and self-insured employers shall be either in the county in which the defendant resides or the county in which the injured worker was employed, as selected by the ~~company, the~~ private carrier or self-insured employer.

(e) The remedies and penalties provided in this section are in addition to those remedies and penalties provided elsewhere by law.

§23-1-20. Employment preference for employees in workers’ compensation litigation unit.

[Repealed.]

§23-1-21. Authorization to require the electronic invoices and transfers.

(a) The Insurance Commissioner shall establish a program to require the acceptance of disbursements by electronic transfer from the funds created in §23-2C-1 *et seq.* of this code to employers, vendors, claimants, and all others lawfully entitled to receive such disbursements.

(b) The Insurance Commissioner may establish a program to require payments of deposits and other funds into the funds created in §23-2C-1 *et seq.* of this code by electronic transfer of funds.

(c) The Insurance Commissioner may establish a program whereby invoices and other charges against the funds created in §23-2C-1 *et seq.* of this code may be submitted to the Insurance Commissioner by electronic means.

(d) Any program authorized by this section must be implemented through a rule promulgated by the Workers’ Compensation Industrial Council.

ARTICLE 2. EMPLOYERS AND EMPLOYEES SUBJECT TO CHAPTER; EXTRATERRITORIAL COVERAGE.

§23-2-1. Employers subject to chapter; elections not to provide certain coverages; notices; filing of business registration certificates.

(a) The State of West Virginia and all governmental agencies or departments created by it, including county boards of education, political subdivisions of the state, any volunteer fire department or company, and other emergency service organizations as defined by §15-5-1 *et seq.* of this code, and all persons, firms, associations, and corporations regularly employing another person or persons for the purpose of carrying on any form of industry, service, or business in this state, are employers within the meaning of this chapter ~~and are required to subscribe to and pay premium taxes into the Workers’ Compensation Fund for the protection of their employees~~ and are subject to all requirements of this chapter and all rules prescribed by the ~~Workers’ Compensation Commission with reference to rate, classification, and premium payment~~*~~: Provided,~~* ~~That rates will be adjusted by the commission to reflect the demand on the compensation fund by the covered employer~~ Industrial Council pursuant to §23-2C-5 of this code.

(b) The following employers are not required to ~~subscribe to the fund~~ procure workers’ compensation insurance, but may elect to do so:

(1) Employers of employees in domestic services;

(2) Employers of five or fewer full-time employees in agricultural service;

(3) Employers of employees while the employees are employed without the state except in cases of temporary employment without the state;

(4) Casual employers. An employer is a casual employer when the number of his or her employees does not exceed three and the period of employment is temporary, intermittent, and sporadic in nature and does not exceed 10 calendar days in any calendar quarter;

(5) Churches;

(6) Employers engaged in organized professional sports activities, including employers of trainers and jockeys engaged in thoroughbred horse racing;

(7) Any volunteer rescue squad or volunteer police auxiliary unit organized under the auspices of a county commission, municipality, or other government entity or political subdivision; volunteer organizations created or sponsored by government entities or political subdivisions; or area or regional emergency medical services boards of directors in furtherance of the purposes of the Emergency Medical Services Act of §16-4C-1 *et seq.* of this code: *Provided,* That if any of the employers described in this subdivision have paid employees, to the extent of those paid employees, the employer shall ~~subscribe to and pay premium taxes into the Workers’ Compensation Fund~~ procure workers’ compensation insurance based upon the gross wages of the paid employees, but with regard to the volunteers, the coverage remains optional;

(8) Taxicab drivers of taxicab companies operating under §24A-2-1 *et seq.* of this code, who provide taxicab service pursuant to a written or electronic agreement that identifies the taxicab driver as an independent contractor consistent with the ~~United States Internal Revenue code requirements for persons acting as independent contractors~~ West Virginia Employment Law Worker Classification Act as set forth in §21-5I-1 *et seq.* of this code: *Provided*, That any such taxicab driver identified as an independent contractor shall not be eligible for workers’ compensation benefits under this chapter as an employee of the taxicab company.

(9) Any employer whose employees are eligible to receive benefits under the federal Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §901 *et seq*., but only for those employees eligible for those benefits.

(c) Notwithstanding any other provision of this chapter to the contrary, whenever there are churches in a circuit which employ one individual clergyman and the payments to the clergyman from the churches constitute his or her full salary, such circuit or group of churches may elect to be considered a single employer ~~for the purpose of premium payment into the Workers’ Compensation Fund~~.

~~(d) Employers who are not required to subscribe to the Workers’ Compensation Fund may voluntarily choose to subscribe to and pay premiums into the fund for the protection of their employees and in that case are subject to all requirements of this chapter and all rules and regulations prescribed by the commission with reference to rates, classifications and premium payments and shall afford to them the protection of this chapter, including section six of this article, but the failure of the employers to choose to subscribe to and to pay premiums into the fund shall not impose any liability upon them other than any liability that would exist notwithstanding the provisions of this chapter.~~

~~(e) Any foreign corporation employer whose employment in this state is to be for a definite or limited period which could not be considered “regularly employing” within the meaning of this section may choose to pay into the Workers’ Compensation Fund the premiums provided for in this section, and at the time of making application to the Workers’ Compensation Commission, the employer shall furnish a statement under oath showing the probable length of time the employment will continue in this state, the character of the work, an estimate of the monthly payroll and any other information which may be required by the commission. At the time of making application the employer shall deposit with the commission to the credit of the Workers’ Compensation Fund the amount required by section five of this article. That amount shall be returned to the employer if the employer’s application is rejected by the commission. Upon notice to the employer of the acceptance of his or her application by the commission, he or she is an employer within the meaning of this chapter and subject to all of its provisions.~~

~~(f) Any foreign corporation employer choosing to comply with the provisions of this chapter and to receive the benefits under this chapter shall, at the time of making application to the commission in addition to other requirements of this chapter, furnish the commission with a certificate from the Secretary of State, where the certificate is necessary, showing that it has complied with all the requirements necessary to enable it legally to do business in this state and no application of a foreign corporation employer shall be accepted by the commission until the certificate is filed~~

~~(g)~~ (d) The following employers may elect not to provide coverage to certain of their employees under the provisions of this chapter:

(1) Any political subdivision of the state including county commissions and municipalities, boards of education, or emergency services organizations organized under the auspices of a county commission may elect not to provide coverage to any elected official. The election not to provide coverage does not apply to individuals in appointed positions or to any other employees of the political subdivision;

(2) If an employer is a partnership, sole proprietorship, association, or corporation, the employer may elect not to include as an “employee” within this chapter any member of the partnership, the owner of the sole proprietorship, or any corporate officer or member of the board of directors of the association or corporation. The officers of a corporation or an association shall consist of a president, a vice president, a secretary, and a treasurer, each of whom is elected by the board of directors at the time and in the manner prescribed by the bylaws. Other officers and assistant officers that are considered necessary may be elected or appointed by the board of directors or chosen in any other manner prescribed by the bylaws and, if elected, appointed, or chosen, the employer may elect not to include the officer or assistant officer as an “employee” within the meaning of this chapter: *Provided,* That except for those persons who are members of the board of directors or who are the corporation’s or association’s president, vice president, secretary, and treasurer and who may be excluded by reason of their positions from ~~the~~ workers’ compensation benefits ~~of~~ required by this chapter even though their duties, responsibilities, activities, or actions may have a dual capacity of work which is ordinarily performed by an officer and also of work which is ordinarily performed by a worker, an administrator, or an employee who is not an officer, no other officer or assistant officer who is elected or appointed shall be excluded by election from coverage or be denied ~~the~~ benefits ~~of this chapter~~ merely because he or she is an officer or assistant officer if, as a matter of fact:

(A) He or she is engaged in a dual capacity of having the duties and responsibilities for work ordinarily performed by an officer and also having duties and work ordinarily performed by a worker, administrator, or employee who is not an officer;

(B) He or she is engaged ordinarily in performing the duties of a worker, an administrator, or an employee who is not an officer and receives pay for performing the duties in the capacity of an employee; or

(C) He or she is engaged in an employment palpably separate and distinct from his or her official duties as an officer of the association or corporation;

(3) If an employer is a limited liability company, the employer may elect not to include as an “employee” within this chapter a total of no more than four persons, each of whom are acting in the capacity of manager, officer, or member of the company.

~~(h) In the event of election under subsection (g) of this section, the employer shall serve upon the commission written notice naming the positions not to be covered and shall not include the “employee’s” remuneration for premium purposes in all future payroll reports, and the partner, proprietor or corporate or executive officer is not considered an employee within the meaning of this chapter after the notice has been served. Notwithstanding the provisions of subsection (g), section five of this article, if an employer is delinquent or in default or has not subscribed to the Fund even though it is obligated to do so under the provisions of this article, any partner, proprietor or corporate or executive officer shall not be covered and shall not receive the benefits of this chapter~~

~~(i)~~ (e) “Regularly employing” or “regular employment” means employment by an employer which is not a casual employer under this section.

~~(j) Upon the termination of the commission, the criteria governing which employer shall or may subscribe to the Workers’ Compensation Commission shall also govern which employers shall or may purchase Workers’ Compensation insurance under article two-c of this chapter~~

§23-2-1b. Special provisions as to premiums.

[Repealed.]

§23-2-1c. Extraterritorial coverage; approval and change of agreements.

(a) Whenever ~~with respect to an employee of an employer who is a subscriber in good standing to the workers’ compensation fund or an employer who has elected to pay compensation directly, as provided in section nine of this article~~ there is a possibility of conflict with respect to the application of workers’ compensation laws because the contract of employment is entered into and all or some portion of the work is performed or is to be performed in a state or states other than this state, the employer and the employee may agree to be bound by the laws of this state or by the laws of any other state in which all or some portion of the work of the employee is to be performed: *Provided*, ~~That the executive director may review and accept or reject the agreement. The review shall be conducted in keeping with the executive director’s fiduciary obligations to the workers’ compensation fund which may include, among other things, the nexus of the employer and the employee to the state:~~ *~~Provided, however~~* That nothing in this section shall be construed as to require an agreement in those instances where §23-2-1(b)(3) or §23-2-1a(a)(1) of this code are applicable. ~~All agreements shall be in writing and filed with the executive director within ten days after execution of the agreement but shall not become effective until approved by the executive director and shall, thereafter, remain in effect until terminated or modified by agreement of the parties similarly filed or by order of the executive director~~ If the parties agree to be bound by the laws of this state, an employee injured within the terms and provisions of this chapter is entitled to benefits under this chapter regardless of the situs of the injury or exposure to occupational pneumoconiosis or other occupational disease, and the rights of the employee and his or her dependents under the laws of this state shall be the exclusive remedy against the employer on account of injury, disease, or death in the course of and as a result of the employment.

(b) If the parties agree to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and his or her dependents under the laws of that state shall be the exclusive remedy against the employer on account of injury, disease, or death in the course of and as a result of the employment without regard to the situs of the injury or exposure to occupational pneumoconiosis or other occupational disease.

(c) If the employee is a resident of a state other than this state and is subject to the terms and provisions of the workers’ compensation law or similar laws of a state other than this state, the employee and his or her dependents are not entitled to the benefits payable under this chapter on account of injury, disease, or death in the course of and as a result of employment temporarily within this state, and the rights of the employee and his or her dependents under the laws of the other state shall be the exclusive remedy against the employer on account of any injury, disease or death.

(d) If any employee or his or her dependents are awarded workers’ compensation benefits or recover damages from the employer under the laws of another state for an injury received in the course of and resulting from the employment, the amount awarded or recovered, whether paid or to be paid in future installments, shall be credited against the amount of any benefits payable under this chapter for the same injury.

§23-2-1d. Prime contractors and subcontractors liability.

~~(a) For the exclusive purposes of this section, the term “employer” as defined in section one of this article includes any primary contractor who regularly subcontracts with other employers for the performance of any work arising from or as a result of the primary contractor’s own contract:~~ *~~Provided,~~* ~~That a subcontractor does not include one providing goods rather than services. For purposes of this subsection, extraction of natural resources is a provision of services. In the event that a subcontracting employer defaults on its obligations to make payments to the commission, then the primary contractor is liable for the payments. However, nothing contained in this section shall extend or except to a primary contractor or subcontractors the provisions of section six, six-a or eight of this article. This section is applicable only with regard to subcontractors with whom the primary contractor has a contract for any work or services for a period longer than sixty days:~~ *~~Provided, however,~~* ~~That this section is also applicable to contracts for consecutive periods of work that total more than sixty days. It is not applicable to the primary contractor with regard to sub-subcontractors. However, a subcontractor for the purposes of a contract with the primary contractor can itself become a primary contractor with regard to other employers with whom it subcontracts. It is the intent of the Legislature that no contractor, whether a primary contractor, subcontractor, or sub-subcontractor, escape or avoid liability for any workers’ compensation premium, assessment or tax. The executive director shall propose for promulgation a rule to effect this purpose on or before December 31, 2003.~~

~~(b) A primary contractor may avoid initial liability under subsection (a) of this section if it obtains from the executive director, prior to the initial performance of any work by the subcontractor’s employees, a certificate that the subcontractor is in good standing with the Workers’ Compensation Fund.~~

~~(1) Failure to obtain the certificate of good standing prior to the initial performance of any work by the subcontractor results in the primary contractor being equally liable with the subcontractor for all delinquent and defaulted premium taxes, premium deposits, interest and other penalties arising during the life of the contract or due to work performed in furtherance of the contract:~~ *~~Provided,~~* ~~That the commission is entitled to collect only once for the amount of premiums, premium deposits and interest due to the default, but the commission may impose other penalties on the primary contractor or on the subcontractor, or both.~~

~~(2) In order to continue avoiding liability under this section, the primary contractor shall request that the commission inform the primary contractor of any subsequent default by the subcontractor. In the event that the subcontractor does default, the commission shall notify the primary contractor of the default by placing a notice in the certified United States mail, postage prepaid, and addressed to the primary contractor at the address furnished to the commission by the primary contractor. The mailing is good and sufficient notice to the primary contractor of the subcontractor’s default. However, the primary contractor is not liable under this section until the first day of the calendar quarter following the calendar quarter in which the notice is given and then the liability is only for that following calendar quarter and thereafter and only if the subcontract has not been terminated~~*~~: Provided,~~* ~~That the commission is entitled to collect only once for the amount of premiums, premium deposits and interest due to the default, but the commission may impose other penalties on the primary contractor or on the subcontractor, or both.~~

~~(c) In any situation where a subcontractor defaults with regard to its payment obligations under this chapter or fails to provide a certificate of good standing as provided in this section, the default or failure is good and sufficient cause for a primary contractor to hold the subcontractor responsible and to seek reimbursement or indemnification for any amounts paid on behalf of the subcontractor to avoid or cure a workers’ compensation default, plus related costs, including reasonable attorneys’ fees, and to terminate its subcontract with the subcontractor notwithstanding any provision to the contrary in the contract.~~

~~(d) The provisions of this section are applicable only to those contracts entered into or extended on or after January 1, 1994.~~

~~(e) The commission may take any action authorized by section five-a of this article in furtherance of its efforts to collect amounts due from the primary contractor under this section.~~

~~(f) Effective upon termination of the commission, subsections (a) through (e), inclusive, of this section shall be applicable only to unpaid premiums due the commission or the Old Fund as provided in article two-c of this chapter~~

~~(g)~~ (a) The Legislature finds that every prime contractor should be responsible to ensure that any subcontractor with which it directly contracts is either self-insured or maintains workers’ compensation coverage throughout the periods during which the services of a subcontractor are used and, further, if the subcontractor is neither self-insured nor covered, then the prime contractor rather than the Uninsured Employer Fund should be responsible for the payment of statutory benefits. It is also the intent of the Legislature that this section not be used as the basis for expanding the liability of a prime contractor beyond the limited purpose of providing coverage in the limited circumstances and in the manner expressly addressed by this section: *Provided,* That receipt by the prime contractor of a certificate of coverage from a subcontractor shall be deemed to relieve the prime contractor of responsibility regarding the subcontractor’s workers’ compensation coverage.

~~(h)~~ (b) ~~On after the effective date of the reenactment of this section in 2009, if~~ If an employee of a subcontractor suffers an injury or disease and, on the date of injury or last exposure, his or her employer did not have workers’ compensation coverage or was not an approved self-insured employer, and the prime contractor did not obtain certification of coverage from the subcontractor, then that employee may file a claim against the prime contractor for which the subcontractor performed services on the date of injury or last exposure, and such claim shall be administered in the same manner as claims filed by injured employees of the prime contractor: *Provided,* That a subcontractor that subcontracts with another subcontractor shall, with respect to such subcontract, ~~is~~ be the prime contractor for the purposes of this section: *Provided, however,* That the provisions of this subsection do not relieve a subcontractor from any requirements of this chapter, including the duty to maintain coverage on its employees. The subcontractor shall provide proof of continuing coverage to the prime contractor by providing a certificate showing current as well as renewal or replacement coverage during the term of the contract between the prime contractor and the subcontractor. The subcontractor shall provide notice to the prime contractor within two business days of cancellation of expiration of coverage.

~~(i)~~ (c) Notwithstanding that an injured employee of a subcontractor is eligible for workers’ compensation benefits pursuant to this section from the prime contractor’s carrier or the self-insured prime contractor, whichever is applicable, a subcontractor who has failed to maintain workers’ compensation coverage on its employees:

(1) May not claim the exemption from liability provided by §23-2-6 and §23-2-6a of this code;

(2) May be held liable to an injured employee pursuant to the provisions of §23-2-8 of this code; and

(3) Is the designated employer for the purposes of any “deliberate intention” action brought by the injured worker pursuant to the provisions of §23-4-2 of this code.

~~(j)~~ (d) If a claim of an injured employee of a subcontractor is accepted or conditionally accepted into the Uninsured Employer Fund, both the prime contractor and subcontractor are jointly and severally liable for any payments made by the fund, and the Insurance Commissioner may seek recovery of the payments, plus administrative costs and attorneys’ fees, from the prime contractor, the subcontractor, or both: *Provided,* That a prime contractor who is held liable pursuant to this subsection for the payment of benefits to an injured employee of a subcontractor may recover the amount of such payments from the subcontractor, plus reasonable attorneys’ fee and costs: *Provided, however,* That if a prime contractor has performed due diligence in all matters requiring ~~an verifying~~ the verification of a subcontractor’s maintenance of workers’ compensation insurance coverage, ~~than~~ then the prime contractor is not liable for any claim made hereunder against the subcontractor.

§23-2-2. ~~Commission~~ Insurance Commissioner to be furnished information by employers, State Tax Commissioner, and ~~division of unemployment compensation~~ WorkForce West Virginia; secrecy of information; examination of employers, etc.; violation a misdemeanor.

(a) Every employer shall furnish the ~~executive director~~ Insurance Commissioner, upon request, all information required by him or her to carry out the purposes of this chapter. Every employer shall have a continuous and ongoing duty to maintain current information about its activities, risks, and rates ~~on the books of the commission~~ regarding workers’ compensation coverage. The ~~Executive Director~~ Insurance Commissioner ~~or any person employed by the commission for that purpose~~ may examine under oath any employer or officer, agent, or employee of any employer.

(b) Notwithstanding the provisions of any other statute to the contrary, specifically, but not exclusively, §11-10-5, §11-10-5b, and §21A-10-11 of this code, the ~~Executive Director of the Workers’ Compensation Commission~~ Insurance Commissioner may receive the following information:

(1) Upon written request to the State Tax Commissioner: The names, addresses, places of business, and other identifying information of all businesses receiving a business franchise registration certificate and the dates thereof; and the names and social security numbers or other tax identification numbers of the businesses and of the businesses’ workers and employees, if otherwise collected, and the quarterly or other applicable reporting period and annual gross wages or other compensation paid to the workers and employees of businesses reported pursuant to the requirement of withholding of tax on income.

(2) Upon written application to ~~the Division of Unemployment Compensation~~ WorkForce West Virginia: In addition to the information that may be released to the ~~Workers’ Compensation Commission~~ Insurance Commissioner for the purposes of this chapter under the provisions of chapter 21A of this code, the names, addresses, and other identifying information of all employing units filing reports and information pursuant to §21A-10-11 of this code as well as information contained in those reports regarding the number and names, addresses, and social security numbers of employees employed and the gross quarterly or other applicable reporting period wages paid by each employing unit to each identified employee.

(c) All information acquired by the ~~Workers’ Compensation Commission~~ Insurance Commissioner pursuant to §23-2-2(b) of this code shall be used only for ~~auditing premium payments, assisting in a wage determination, assisting in the determination of employment status, and registering businesses under the single point of registration program as set forth in article twelve, chapter eleven of this code~~ the performance of the functions necessary for the regulation of the workers’ compensation insurance industry and other duties as set forth in this chapter. ~~The Workers’ Compensation Commission Insurance Commissioner, upon receiving the business franchise registration certificate information made available pursuant to subsection (b) of this section, shall contact all businesses receiving a business franchise registration certificate and provide all necessary forms to register the business under the provisions of this article. Any officer or employee of this state who uses the information obtained under this section in any manner other than the one stated in this section or elsewhere authorized in this code, or who divulges or makes known in any manner any of the information obtained under this section, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one thousand dollars or incarcerated in the county or regional jail for not more than one year, or both together with cost of prosecution~~

(d) Reasonable costs of compilation and production of any information made available pursuant to §23-2-2(b) of this code shall be charged to the ~~Workers’ Compensation Commission~~ Insurance Commissioner.

(e) Information acquired by the ~~commission~~ Insurance Commissioner pursuant to §23-2-2(b) of this code is not subject to disclosure under the provisions of chapter 29B of this code.

~~(f) The right to request, gather and maintain information set forth in this section shall transfer to the Insurance Commissioner and the industrial council upon termination of the commission~~

§23-2-3. Report forms and other forms for use of employers.

The ~~commission, and effective upon termination of the commission, the~~ Insurance Commissioner shall prepare and furnish report forms for the use of employers subject to this chapter. Every employer receiving from the ~~commission~~ Insurance Commissioner any form or forms with direction for completion and returning to the ~~commission~~ Insurance Commissioner shall return the form, within the period fixed by the ~~commission~~ Insurance Commissioner, completed as to answer fully and correctly all pertinent questions in the form, and if unable to do so, shall give good and sufficient reasons for the failure. ~~Every employer subject to the provisions of this chapter shall make application to the commission on the forms prescribed by the commission for that purpose; and any employer who terminates his or her business or for any other reason is no longer subject to this chapter shall immediately notify the commission on forms to be furnished by the commission for that purpose~~

§23-2-4. Classification of industries; rate of premiums; authority to adopt various systems; accounts.

[Repealed.]

§23-2-5. ~~Application; payment of premium taxes; gross wages; payroll report; deposits; delinquency; default; reinstatement; payment of benefits; notice~~Notice to employees. ~~criminal provisions; penalties.~~

~~(a) For the purpose of creating a Workers’ Compensation Fund, each employer who is required to subscribe to the fund or who elects to subscribe to the fund shall pay premium taxes calculated as a percentage of the employer’s gross wages payroll as defined by the commission at the rate determined by the commission and then in effect plus any additional premium taxes developed from rates, surcharges or assessments as determined by the commission. At the time each employer subscribes to the fund, the application required by the commission shall be filed and a premium deposit equal to the first quarter’s estimated premium tax payment shall be remitted. The minimum quarterly or other reporting period premium to be paid by any employer is $25.~~

~~(1) Thereafter, the premium taxes shall be paid quarterly or at other payment intervals established by the commission on or before the last day of the month following the end of the quarter or designated payment interval and shall be the prescribed percentage of the entire gross wages of all employees, from which net payroll is calculated and paid, during the preceding quarter or other designated payment interval. The commission may require employers, in accordance with the provisions of rules proposed by the executive director and promulgated by the board of managers, to report gross wages and pay premium taxes monthly or at other intervals.~~

~~(2) Every subscribing employer shall make a gross wages payroll report to the commission for the preceding reporting period. The report shall be on the form or forms prescribed by the commission and shall contain all information required by the commission.~~

~~(3) After subscribing to the fund, each employer shall remit with each premium tax payment an amount calculated to be sufficient to maintain a premium deposit equal to the premium payment for the previous reporting period. The commission may reduce the amount of the premium deposit required from seasonal employers for those reporting periods during which employment is significantly reduced. If the employer pays premium tax on a basis other than quarterly, the commission may require the deposit to be based upon some other time period. The premium deposit shall be credited to the employer’s account on the books of the commission and used to pay premium taxes and any other sums due the fund when an employer becomes delinquent or in default as provided in this article.~~

~~(4) All premium taxes and premium deposits required by this article to be paid shall be paid by the employers to the commission, which shall maintain a record of all sums so received. Any sum mailed to the commission is considered to be received on the date the envelope transmitting it is postmarked by the United States Postal Service. All sums received by the commission shall be deposited in the State Treasury to the credit of the Workers’ Compensation Commission in the manner now prescribed by law.~~

~~(5) The commission shall encourage employer efforts to create and maintain safe workplaces, to encourage loss prevention programs and to encourage employer-provided wellness programs, through the normal operation of the experience rating formula, seminars and other public presentations, the development of model safety programs and other initiatives as may be determined by the executive director and the board of managers.~~

~~(b) Failure of an employer to timely pay premium taxes as provided in subsection (a) of this section, to timely file a payroll report or to maintain an adequate premium deposit shall cause the employer’s account to become delinquent. No employer will be declared delinquent or be assessed any penalty for the delinquency if the commission determines that the delinquency has been caused by delays in the administration of the fund. The commission shall, in writing, within sixty days of the end of each reporting period notify all delinquent employers of their failure to timely pay premium taxes, to timely file a payroll report or to maintain an adequate premium deposit. Each employer who fails to timely file any payroll report or timely pay the premium tax due with the report, or both, for any reporting period commencing on and after July 1, 1995, shall pay a late reporting or payment penalty of the greater of $50 or a sum obtained by multiplying the premium tax due with the report by the penalty rate applicable to that reporting period. The penalty rate to be used in a Workers’ Compensation Commission’s fiscal year is calculated annually on the first day of each fiscal year. The penalty rate used to calculate the penalty for each reporting period in a fiscal year is the quotient, rounded to the nearest higher whole number percentage rate, obtained by dividing the sum of the prime rate plus four percent by four. The prime rate is the rate published in the~~ *~~Wall Street Journal~~* ~~on the last business day of the commission’s prior fiscal year reflecting the base rate on corporate loans posted by at least seventy-five percent of the nation’s thirty largest banks. The late penalty shall be paid with the most recent reporting period’s report and payment and is due when that reporting period’s report and payment are filed. If the late penalty is not paid when due, it may be charged to and collected by the commission from the employer’s premium deposit account or otherwise as provided by law. The notification shall demand the filing of the delinquent payroll report and payment of delinquent premium taxes, the penalty for late reporting or payment of premium taxes or premium deposit, the interest penalty and an amount sufficient to maintain the premium deposit before the end of the third month following the end of the preceding reporting period. Interest shall accrue and be charged on the delinquent premium payment and premium deposit pursuant to section thirteen of this article.~~

~~(c) Whenever the commission notifies an employer of the delinquent status of its account, the notification shall explain the legal consequence of subsequent default by an employer required to subscribe to the fund and the legal consequences of termination of an electing employer’s account.~~

~~(d) Failure by the employer, who is required to subscribe to the fund and who fails to resolve the delinquency within the prescribed period, shall place the account in default and shall deprive the default employer of the benefits and protection afforded by this chapter, including section six of this article, and the employer is liable as provided in section eight of this article. The default employer’s liability under these sections is retroactive to midnight of the last day of the month following the end of the reporting period for which the delinquency occurs. The commission shall notify the default employer of the method by which the employer may be reinstated with the fund. The commission shall also notify the employees of the employer by written notice as hereinafter provided in this section.~~

~~(e) Failure by any employer, who voluntarily elects to subscribe, to resolve the delinquency within the prescribed period shall place the account in default and shall automatically terminate the election of the employer to pay into the Workers’ Compensation Fund and shall deprive the employer and the employees of the default elective employer of the benefits and protection afforded by this chapter, including section six of this article, and the employer is liable as provided in section eight of this article. The default employer’s liability under that section is retroactive to midnight of the last day of the month following the end of the payment period for which the delinquency occurs. Employees who were the subject of the default employer’s voluntary election to provide them the benefits afforded by this chapter shall have the protection terminated at the time of their employer’s default.~~

~~(f) (1) Except as provided in subdivision (3) of this subsection, any employer who is required to subscribe to the fund and who is in default on the effective date of this section or who subsequently defaults, and any employer who has elected to subscribe to the fund and who defaults and whose account is terminated prior to the effective date of this section or whose account is subsequently terminated, shall be restored immediately to the benefits and protection of this chapter only upon the filing of all delinquent payroll and other reports required by the commission and payment into the fund of all unpaid premiums, an adequate premium deposit, accrued interest and the penalty for late reporting and payment. Interest is calculated as provided by section thirteen of this article.~~

~~The commission shall not have the authority to waive either premium or accrued interest:~~ *~~Provided,~~* ~~That until termination of the commission, the commissioner shall have the authority to waive either premium or accrued interest if the waiver is part of the full and final resolution of administrative or civil litigation. The provisions of section seventeen of this article apply to any action or decision of the commission under this section.~~

~~(2) The commission may restore a defaulted or terminated employer through a reinstatement agreement. The reinstatement agreement shall require the payment in full of all premium taxes, premium deposits, the penalty for late reporting and payment, past accrued interest and future interest calculated pursuant to the provisions of section thirteen of this article. Notwithstanding the filing of a reinstatement application or the entering into of a reinstatement agreement, the commission is authorized to file a lien against the employer as provided by section five-a of this article. In addition, entry into a reinstatement agreement is discretionary with the commission. Its discretion shall be exercised in keeping with the fiduciary obligations owed to the Workers’ Compensation Fund. If the commission declines to enter into a reinstatement agreement and if the employer does not comply with the provisions of subdivision (1) of this subsection, the commission may proceed with any of the collection efforts provided by section five-a of this article or as otherwise provided by this code. Applications for reinstatement shall: (A) Be made upon forms prescribed by the commission; (B) include a report of the gross wages payroll of the employer which had not been reported to the commission during the entire period of delinquency and default. The gross wages information shall be certified by the employer or its authorized agent; and (C) include a payment of a portion of the liability equal to one half of one percent of the gross payroll during the period of delinquency and default or equal to another portion of the liability determined by rule but not to exceed the amount of the entire liability due and owing for the period of delinquency and default. An employer who applies for reinstatement is entitled to the benefits and protection of this chapter on the day a properly completed and acceptable application which is accompanied by the application payment is received by the commission:~~ *~~Provided,~~* ~~That if the commission reinstates an employer subject to the terms of a reinstatement agreement, the subsequent failure of the employer to make scheduled payments or to pay accrued or future interest in accordance with the reinstatement agreement or to timely file current reports and to pay current premiums within the month following the end of the period for which the report and payment are due, or to otherwise maintain its account in good standing or, if the reinstatement agreement does not require earlier restoration of the premium deposit, to restore the premium deposit to the required amount by the end of the repayment period shall cause the reinstatement application and the reinstatement agreement to be null, void and of no effect, and the employer is denied the benefits and protection of this chapter effective from the date that the employer’s account originally became delinquent.~~

~~(3) Any employer who fails to maintain its account in good standing with regard to subsequent premium taxes and premium deposits after filing an application for reinstatement and prior to the final resolution of an application for reinstatement by entering into a reinstatement agreement or by payment of the liability in full as provided in subdivision (1) of this subsection shall cause the reinstatement application to be null, void and of no effect and the employer shall be denied the benefits and protection of this chapter effective from the date that the employer’s account originally became delinquent.~~

~~(4) Following any failure of an employer to comply with the provisions of a reinstatement agreement, the commission may make and continue with any of the collection efforts provided by this chapter or elsewhere in this code even if the employer files another reinstatement application.~~

~~(g) With the exception noted in subsection (h), section one of this article, no employee of an employer required by this chapter to subscribe to the Workers’ Compensation Fund shall be denied benefits provided by this chapter because the employer failed to subscribe or because the employer’s account is either delinquent or in default.~~

~~(h) (1) The provisions of this section shall not deprive any individual of any cause of action which has accrued as a result of an injury or death which occurred during any period of delinquency not resolved in accordance with the provisions of this article, or subsequent failure to comply with the terms of the repayment agreement.~~

~~(2) Upon withdrawal from the fund or termination of election of any employer, the employer shall be refunded the balance due the employer of its deposit, after deducting all amounts owed by the employer to the Workers’ Compensation Fund and other agencies of this state, and the commission shall notify the employees of the employer of the termination in the manner as the commission may consider best and sufficient.~~

~~(3)~~ Upon discovery that an employer is not maintaining West Virginia workers’ compensation insurance, the Insurance Commissioner shall issue a written notice to the employees of that employer. Notice to employees provided in this section shall be given by posting written notice that the employer is defaulted under the compensation law of West Virginia and ~~in the case of employers required by this chapter to subscribe and pay premiums to the fund~~ that the defaulted employer is liable to its employees for injury or death, both in Workers’ Compensation benefits and in damages at common law or by statute. ~~and in the case of employers not required by this chapter to subscribe and pay premiums to the fund, but voluntarily electing to do so as provided in this article, that neither the employer nor the employees are protected by the law as to any injury or death sustained after the date specified in the notice.~~ The notice shall be in the form prescribed by the ~~commission~~ Insurance Commissioner and shall be posted in a conspicuous place at the chief works of the employer, as it appears in records of the ~~commission~~ Insurance Commissioner. If the chief works of the employer cannot be found or identified, the notices shall be posted at the front door of the courthouse of the county in which the chief works are located, according to the c~~ommission’s~~ Insurance Commissioner’s records. Any person who shall, prior to the reinstatement of the employer, as provided in this section, or prior to sixty days after the posting of the notice, whichever shall first occur, remove, deface, or render illegible the notice, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined $1,000. The notice shall state this provision upon its face. The ~~commission~~ Insurance Commissioner may require any sheriff, deputy sheriff, constable, or other official of the State of West Virginia, authorized to serve civil process, to post the notice and to make return thereof of the fact of the posting to the ~~commission~~ Insurance Commissioner. Any failure of the officer to post any notice within 10 days after he or she has received the notice from the ~~commission~~ Insurance Commissioner, without just cause or excuse, constitutes a willful failure or refusal to perform a duty required of him or her by law within the meaning of §61-5-28 of this code. Any person actually injured by reason of the failure has an action against the official, and upon any official bond he or she may have given, for the damages as the person may actually have incurred, but not to exceed, in the case of any surety upon the bond, the amount of the penalty of the bond. Any official posting the notice as required in this ~~subdivision~~ section is entitled to the same fee as is now or may hereafter be provided for the service of process in suits instituted in courts of record in the State of West Virginia. The fee shall be paid by the ~~commission~~ Insurance Commissioner out of any funds at ~~its~~ his or her disposal. ~~but shall be charged by the commission against the account of the employer to whose delinquency the notice relates~~

§23-2-5a. Collection of premiums from defaulting employers; interest and penalties; civil remedies; creation and enforcement of lien against employer and purchaser; duty of Secretary of State to register liens; distraint powers; insolvency proceedings; Secretary of State to withhold certificates of dissolution; injunctive relief; bond; attorney fees and costs.

(a) The ~~Workers’ Compensation Commission~~ Insurance Commissioner in the name of the state may commence a civil action against an employer who, after due notice, defaults in any payment required by this chapter. If judgment is against the employer, the employer shall pay the costs of the action. A civil action under this section shall be given preference on the calendar of the court over all other civil actions. Upon prevailing in a civil action, the ~~commission~~ Insurance Commissioner is entitled to recover its attorneys’ fees and costs of action from the employer.

(b) In addition to the provisions of §23-2-5a(a) of this code, any payment, interest and penalty due and unpaid under this chapter is a personal obligation of the employer immediately due and owing to the ~~commission~~ Insurance Commissioner and shall, in addition, be a lien enforceable against all the property of the employer: *Provided,* That the lien shall not be enforceable as against a purchaser (including a lien creditor) of real estate or personal property for a valuable consideration without notice, unless docketed as provided in §38-10C-1 of this code: *Provided, however,* That the lien may be enforced as other judgment liens are enforced through the provisions of said chapter and the same is considered deemed by the circuit court to be a judgment lien for this purpose.

(c) In addition to all other civil remedies prescribed, the ~~commission~~ Insurance Commissioner may in the name of the state, after giving appropriate notice as required by due process, distrain upon any personal property, including intangible property, of any employer delinquent for any payment, interest, and penalty thereon. If the ~~commission~~ Insurance Commissioner has good reason to believe that the property or a substantial portion of the property is about to be removed from the county in which it is situated, upon giving appropriate notice, either before or after the seizure, as is proper in the circumstances, the ~~commission~~ Insurance Commissioner may likewise distrain in the name of the state before the delinquency occurs. For that purpose, the ~~commission~~ Insurance Commissioner may require the services of a sheriff of any county in the state in levying the distress in the county in which the sheriff is an officer and in which the personal property is situated. A sheriff collecting any payment, interest, and penalty thereon is entitled to the compensation as provided by law for his or her services in the levy and enforcement of executions. Upon prevailing in any distraint action, the ~~commission~~ Insurance Commissioner is entitled to recover its attorneys’ fees and costs of action from the employer.

(d) In case a business subject to the payments, interest, and penalties thereon imposed under this chapter is operated in connection with a receivership or insolvency proceeding in any state court in this state, the court under whose direction the business is operated shall, by the entry of a proper order or decree in the cause, make provisions, so far as the assets in administration will permit, for the regular payment of the payments, interest, and penalties as they become due.

(e) The Secretary of State of this state shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this state or organized under the laws of any other state and admitted to do business in this state, until notified by the ~~commission~~ Insurance Commissioner that all payments, interest, and penalties thereon against the corporation which is an employer under this chapter have been paid or that provision satisfactory to the ~~commission~~ Insurance Commissioner has been made for payment.

(f) In any case when an employer ~~required to subscribe to the fund defaults in payments of premium, premium deposits, penalty or interest thereon, for as many as two reporting periods, which reporting periods need not be consecutive, and remains in default after due notice,~~ is in default to the Old Fund or has a liability to the Uninsured Employer Fund or is in default on a policy or otherwise fails to maintain mandatory workers’ compensation coverage, the ~~commission~~ Insurance Commissioner may bring action in the circuit court of Kanawha County to enjoin the employer from continuing to ~~carry on~~ operate the employer’s business ~~in which the liability was incurred~~ as provided for in §33-2-22 of this code: *Provided,* That the ~~commission~~ Insurance Commissioner may, in his or her sole discretion and as an alternative to this action, require the delinquent employer to file a bond in the form prescribed by the ~~commission~~ Insurance Commissioner with satisfactory surety in an amount not less than ~~fifty~~ 150 percent ~~more than~~ of the total payments, interest, and penalties due.

§23-2-5c. Statute of limitations; effective date for new payments; previous payments due not affected.

[Repealed.]

§23-2-5d. Uncollectible receivables; write-offs.

[Repealed.]

§23-2-6. Exemption of contributing employers from liability.

Any employer subject to this chapter who ~~subscribes and pays into the workers’ compensation fund the premiums provided by this chapter~~ procures and continuously maintains workers’ compensation insurance as required by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which the employer is not in default ~~in the payment of the premiums or direct payments~~ and has complied fully with all other provisions of this chapter. Continuation in the service of the employer shall be considered a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employee or his or her parents would otherwise have: *Provided,* That in case of employers not required by this chapter to ~~subscribe and pay premiums into the workers’ compensation fund~~ procure and maintain workers’ compensation insurance, the injured employee has remained in the employer’s service with notice that his or her employer has elected to ~~pay into the workers’ compensation fund the premiums provided by this chapter~~ procure and maintain workers’ compensation insurance, or has elected to make direct payments as aforesaid.

§23-2-7. Benefits of chapter may not be waived by contract or regulation.

No employer or employee shall exempt himself or herself from the burden or waive the benefits of this chapter by any contract, agreement, rule, or regulation, and any such contract, agreement, rule, or regulation shall be pro tanto void.

§23-2-8. Liability of employer ~~electing not to pay or defaulting in payment of premiums~~ for failing to procure or maintain workers’ compensation insurance; certain common-law defenses prohibited; exceptions.

All employers ~~required by this chapter to subscribe to and pay premiums into the workers’ compensation fund, except the State of West Virginia, the governmental agencies or departments created by it, and municipalities and political subdivisions of the state, and who do not subscribe to and pay premiums into the workers’ compensation fund as required by this chapter and have not elected to pay individually and directly or from benefit funds compensation and expenses to injured employees or fatally injured employees’ dependents under the provisions of section nine of this article, or having so subscribed or elected, shall be in default in the payment of same, or not having otherwise fully complied with the provisions of section five or section nine of this article~~ who fail to procure and continuously maintain workers’ compensation insurance as required by this chapter or who fail to obtain permission to self-insure their workers’ compensation risk as permitted by §23-2-9 of this code shall be liable to their employees (within the meaning of this article) for all damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect, or default of the employer or any of the employer’s officers, agents, or employees while acting within the scope of their employment and in the course of their employment and also to the personal representatives of such employees where death results from such personal injuries, and in any action by any such employee or personal representative thereof, such defendant shall not avail himself or herself of the following common-law defenses: The defense of the fellow-servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself or herself of any defense that the negligence in question was that of someone whose duties are prescribed by statute: *Provided*, That such provision depriving a defendant employer of certain common-law defenses under the circumstances therein set forth shall not apply to an action brought against a county court, Board of Education, municipality, or other political subdivision of the state, or against any employer not required to cover his or her employees under the provisions of this chapter.

§23-2-9. Election of employer or employers’ group to be self-insured and to provide own system of compensation; exceptions; self administration; rules; penalties; regulation of self-insurers.

(a) Notwithstanding any provisions of this chapter to the contrary, the following types of employers or employers’ groups may apply for permission to self-insure their workers’ compensation risk.

(1) The types of employers are:

(A) Any employer who is of sufficient capability and financial responsibility to ensure the payment to injured employees and the dependents of fatally injured employees of benefits provided in this chapter at least equal in value to the compensation provided for in this chapter;

(B) Any employer or group of employers as provided in §23-2-9(a)(1)(A) of this code of such capability and financial responsibility that maintains its own benefit fund or system of compensation to which its employees are not required or permitted to contribute and whose benefits are at least equal in value to those provided in this chapter; or

(C) Any employer who is signatory to a collective bargaining agreement that allows for participation in a group workers’ compensation insurance program may join with any other employer or employers that are signatory to a collective bargaining agreement or agreements that allow for participation in a group workers’ compensation program and jointly apply to the Insurance Commissioner to collectively self-insure their obligations under this chapter. The employers must collectively meet the conditions set forth in §23-2-9(a)(1)(A) and (B) of this code. There shall be joint and several liability for all employers who choose to jointly self-insure under the provisions of this article.

(2) In order to be approved for self-insurance status, the employer shall:

(A) Submit all information requested by the Insurance Commissioner;

(B) Provide security or bond, in an amount and form determined by the Insurance Commissioner, which shall balance the employer’s financial condition based upon an analysis of its audited financial statements and the full accrued value of current liability for future claim payments based upon generally accepted actuarial and accounting principles of the employer’s existing and expected liability;

(C) Meet the financial responsibility requirements set forth in rules promulgated by the ~~board of managers or~~ industrial council;

(D) Obtain and maintain a policy of excess insurance if required to do so by the Insurance Commissioner; and

(E) Have an effective health and safety program at its workplaces.

(3) Upon a finding that the employer has met all of the requirements of this section and any rules promulgated thereunder, the employer may be permitted self-insurance status. An annual review of each self-insurer’s continuing ability to meet its obligations and the requirements of this section shall be made by the Insurance Commissioner. At the time of such review, the Insurance Commissioner may require that the self-insured employer post a bond or security or obtain and maintain an excess insurance policy. This review shall also include a recalculation of the amount of any security, bond, or policy of excess insurance previously required to be posted or obtained under any provision of this chapter or any rules promulgated thereunder. Failure to provide the required amount or form of security or bond or to obtain or maintain the required excess insurance policy may cause the employer’s self-insurance status to be terminated by the Insurance Commissioner.

(4) Whenever a self-insured employer furnishes security or bond, including replacement and amended bonds and other securities, as surety to ensure the employer’s or guarantor’s payment of all obligations under this chapter for which the security or bond was furnished, the security or bond shall be in the most current form or forms approved and authorized by the ~~commission or~~ Insurance Commissioner for use by the employer or its guarantors, surety companies, banks, financial institutions, or others in its behalf for that purpose.

(b)(1) Notwithstanding any provision in this chapter to the contrary, self-insured employers shall, effective July 1, 2004, administer their own claims. The Insurance Commissioner shall, pursuant to rules promulgated by the ~~board of managers or~~ industrial council, regulate the administration of claims by employers granted permission to self-insure their obligations under this chapter. A self-insured employer shall comply with rules promulgated by the ~~board of managers or~~ industrial council governing the self-administration of its claims.

(2) An employer or employers’ group that self-insures its risk and self-administers its claims shall exercise all authority and responsibility granted to the Insurance Commissioner or private carriers in this chapter and provide notices of action taken to effect the purposes of this chapter to provide benefits to persons who have suffered injuries or diseases covered by this chapter. An employer or employers’ group granted permission to self-insure and self-administer its obligations under this chapter shall at all times be bound and shall comply fully with all of the provisions of this chapter. Furthermore, all of the provisions contained in §23-4-1 *et seq.* of this code pertaining to disability and death benefits are binding on and shall be strictly adhered to by the self-insured employer in its administration of claims presented by employees of the self-insured employer. Violations of the provisions of this chapter and such rules relating to this chapter as may be approved by the ~~board of managers or~~ industrial council may constitute sufficient grounds for the termination of the authority for any employer to self-insure its obligations under this chapter.

(c) Each self-insured employer shall, on or before the last day of the first month of each quarter or other assigned reporting period, file with the Insurance Commissioner a certified statement of the total gross wages and earnings of all of the employer’s employees subject to this chapter for the preceding quarter or other assigned reporting period.

(d)(1) If a self-insured employer defaults in the payment of any portion of surcharges or assessments required under this chapter or rules promulgated thereunder, or in any payment required to be made as benefits provided by this chapter to the employer’s injured employees or ~~dependants~~ dependents of fatally injured employees, the Insurance Commissioner shall, in an appropriate case, determine the full accrued value based upon generally accepted actuarial and accounting principles of the employer’s liability, including the costs of all awarded claims and of all incurred but not reported claims. The amount determined may, in an appropriate case, be assessed against the employer. The Insurance Commissioner may demand and collect the present value of the defaulted liability. Interest shall accrue upon the demanded amount as provided in §23-2-13 of this code until the liability is fully paid. Payment of all amounts then due to the Insurance Commissioner and to the employer’s employees is a sufficient basis for reinstating the employer to good standing with the Insurance Commissioner and removing the employer from default status.

(2) The assessments and surcharges required to be paid by self-insured employers pursuant to the provisions of this chapter and the rules promulgated thereunder are special revenue taxes under and according to the provisions of state workers’ compensation law and are considered to be tax claims, as priority claims or administrative expense claims according to those provisions under the law provided in the United States bankruptcy code, Title 11 of the United States Code. In addition, as the same was previously intended by the prior provisions of this section, this amendment and reenactment is for the purpose of clarification of the taxing authority of the Insurance Commissioner.

~~(e) The commission may create, implement, establish and administer a perpetual self-insurance security risk pool of funds, sureties, securities, insurance provided by private insurance carriers or other states’ programs, and other property, of both real and personal properties, to secure the payment of obligations of self-insured employers. If a pool is created, the board of managers shall adopt rules for the organizational plan, participation, contributions and other payments which may be required of self-insured employers under this section. The board of managers may adopt a rule authorizing the commission to assess each self-insured employer in proportion according to each employer’s portion of the unsecured obligation and liability or to assess according to some other method provided by rule which shall properly create and fund the risk pool to serve the needs of employees, employers and the Workers’ Compensation Fund by providing adequate security. The board of managers establishing a security risk pool may authorize the executive director to use any assessments, premium taxes and revenues and appropriations as may be made available to the commission. Effective upon termination of the commission, all statutory and regulatory authority provided to the commission and board of managers over pools created pursuant to this section, as such pools are defined in section two, article two-c of this chapter, shall transfer to the Insurance Commissioner.~~

~~(f)~~ (e) Any self-insured employer which has had a period of inactivity due to the nonemployment of employees which results in its reporting of no wages on reports to the Insurance Commissioner for a period of four or more consecutive quarters may have its status inactivated and shall apply for reactivation to status as a self-insured employer prior to its reemployment of employees. Despite the inactivation, the self-insured employer shall continue to make payments on all awards for which it is responsible. Upon application for reactivation of its status as an operating self-insured employer, the employer shall document that it meets the eligibility requirements needed to maintain self-insured employer status under this section and any rules adopted to implement it. If the employer is unable to requalify and obtain approval for reactivation, the employer shall, effective with the date of employment of any employee, purchase workers’ compensation insurance as provided in §23-2C-1 *et seq.* of this code, but shall continue to be a self-insurer as to the prior period of active status and to furnish security or bond and meet its prior self-insurance obligations.

~~(g)~~ (f) ~~In any case under the provisions of this section that requires the payment of compensation or benefits by an employer in periodical payments and the nature of the case makes it possible to compute the present value of all future payments, the commission may, in its discretion, at any time compute and permit to be paid into the Workers’ Compensation Fund an amount equal to the present value of all unpaid future payments on the award or awards for which liability exists in trust. Thereafter, the employer shall be discharged from any further portion of premium tax liability upon the award or awards and payment of the award or awards shall be assumed by the commission. Upon termination of the commission, the process herein described will no longer be permitted.~~ Self-insured employers may ~~thereafter~~ withdraw from self-insured status and purchase workers’ compensation insurance as provided in §23-2C-1 *et seq.* of this code, but said self-insured employers shall remain liable for their self-insured employer claims liabilities for each claim with a date of injury or last exposure prior to the effective date of insurance coverage.

~~(h)~~ (g) Any employer subject to this chapter, who elects to carry the employer’s own risk by being a self-insured employer and who has complied with the requirements of this section and of any applicable rules, shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after the election’s approval and during the period that the employer is allowed to carry the employer’s own risk.

~~(i)~~ (h) An employer may not hire any person or group to self-administer claims under this chapter as a third-party administrator unless the person or group has been determined to be qualified to be a third-party administrator by the Insurance Commissioner pursuant to rules adopted by the ~~board of managers or~~ industrial council. Any person or group whose status as a third-party administrator has been revoked, suspended, or terminated by the Insurance Commissioner shall immediately cease administration of claims and shall not administer claims unless subsequently authorized by the Insurance Commissioner.

~~(j) All regulatory, oversight and document-gathering authority provided to the commission under this section shall transfer to the Insurance Commissioner and the industrial council upon termination of the commission.~~

§23-2-11. Partial invalidity of chapter.

~~If any employer is adjudicated to be outside the lawful scope of this chapter, the chapter shall not apply to him or her or his or her employee; or if any employee is adjudicated to be outside the lawful scope of this chapter, because of remoteness of his or her work from the hazard of his or her employer’s work, the adjudication shall not impair the validity of this chapter in other respects and in every case an accounting in accordance with the justice of the case shall be had of moneys received. If the provisions of this chapter for the creation of the workers’ compensation fund, or the provisions of this chapter making the compensation to the employee provided in it exclusive of any other remedy on the part of the employee, is held invalid, the entire chapter shall be invalidated and an accounting according to the justice of the case shall be had of money received. In other respects an adjudication of invalidity of any part of this chapter shall not affect the validity of the chapter as a whole or any part of this chapter.~~ If any provision of this chapter or the application of such provision to any circumstance is held to be unconstitutional or otherwise invalid, the remainder of this chapter or the application of the provisions to other circumstances shall not be affected thereby. The Legislature hereby declares that it would have passed the remainder of this chapter if it had known that such provision, or its application to any circumstances, would be declared unconstitutional or otherwise invalid.

§23-2-13. Interest~~on past-due payments; reinstatement agreements~~**.**

~~Effective July 1, 1999, payments unpaid on the date on which due and payable shall immediately begin bearing interest as specified in this section. The interest rate per annum for each fiscal year shall be calculated as the greater of the commission’s current discount rate or the prime rate plus four percent, each rounded to the nearest whole percent. The discount rate shall be determined by the board of managers on an annual basis. The prime rate shall be the rate published in the~~ *~~Wall Street Journal~~* ~~on the last business day of the commission’s prior fiscal year reflecting the base rate on corporate loans posted by at least seventy-five percent of the nation’s thirty largest banks. This same rate of interest shall be applicable to all reinstatement agreements entered into by the commission pursuant to section five of this article on and after the effective date of this section:~~ *~~Provided,~~* ~~That if an employer enters into a subsequent reinstatement agreement within seven years of the date of the first agreement, the interest rate shall be eighteen percent per annum. Interest shall be compounded quarterly until payment plus accrued interest is received by the commission:~~ *~~Provided, however,~~* ~~That on and after the date of execution of a reinstatement agreement, for determining future interest on any past-due premium, premium deposit, and past compounded interest thereon, any reinstatement agreement entered into by the commission shall provide for a simple rate of interest, determined in accordance with the provisions of this section which is not subject to change during the life of the reinstatement agreement for the future interest. Interest collected pursuant to this section shall be paid into the workers’ compensation fund:~~ *~~Provided further,~~* ~~That in no event shall the rate of interest charged a political subdivision of the state or a volunteer fire department pursuant to this section exceed ten percent per annum.~~ The interest due on payments pursuant to §23-2-9(d)(1) and §23-2C-8(d)(1) of this code shall be the prime rate plus four percent rounded to the nearest whole percent.  The prime rate shall be the rate published in the *Wall Street Journal* on the last business day of the prior fiscal year reflecting the base rate on corporate loans posted by at least 75 percent of the nation’s 30 largest banks: *Provided*, That in no event shall the rate of interest charged to a political subdivision of the state or a volunteer fire department exceed 10 percent per annum.

§23-2-14. Sale or transfer of business; attachment of lien for premium, etc.; payments due; criminal penalties for failure to pay; creation and avoidance or elimination of lien; enforcement of lien; successor liability.

[Repealed.]

§23-2-15. Liabilities of successor employer; waiver of payment by commission; assignment of predecessor employer’s premium rate to successor.

[Repealed.]

§23-2-16. Acceptance or assignment of premium rate.

[Repealed.]

§23-2-17. Employer right to hearing; content of petition; appeal.

Notwithstanding any provision in this chapter to the contrary and notwithstanding any provision in §29A-5-5 of this code to the contrary, in any situation where an employer objects to a decision or action of the ~~executive director made under the provisions of this article~~ Insurance Commissioner, the employer is entitled to file a ~~petition demanding a~~ written demand for hearing upon the decision or action in accordance with §33-2-13 of this code. The ~~petition~~ written demand must be filed within 30 days of the employer’s receipt of notice of the disputed ~~executive director’s~~ Insurance Commissioner’s decision or action or, in the absence of such receipt, within 60 days of the date of the ~~executive director’s making the disputed~~ decision ~~or taking the disputed action~~, the time limitations being hereby declared to be a condition of the right to litigate the decision or action and therefore jurisdictional.

The employer’s ~~petition~~ written demand shall clearly identify the decision or action disputed and the bases upon which the employer disputes the decision or action. Upon receipt of a ~~petition~~ written demand, the ~~executive director~~ Insurance Commissioner shall schedule a hearing which shall be conducted in accordance with the provisions of §29A-5-1 *et seq.* and §33-2-13 of this code. An appeal from a final decision of the ~~executive director~~ Insurance Commissioner shall be taken in accord with the provisions of ~~articles five and six of said chapter W.Va. Code:~~ *~~Provided~~*~~, That all appeals shall be taken to the circuit court of Kanawha County~~ §33-2-13 of this code.

ARTICLE 2A. SUBROGATION.

§23-2A-1. Subrogation; limitations.

(a) Where a compensable injury or death is caused, in whole or in part, by the act or omission of a third party, the injured worker or, if he or she is deceased or physically or mentally incompetent, his or her dependents or personal representative are entitled to compensation under the provisions of this chapter, and shall not by having received compensation be precluded from making claim against the third party.

(b) Notwithstanding the provisions of §23-2A-1(a) of this code, if an injured worker, his or her dependents, or his or her personal representative makes a claim against the third party and recovers any sum for the claim:

(1) With respect to any claim arising from a right of action that arose or accrued, in whole or in part, on or after January 1, 2006, the private carrier or self-insured employer, whichever is applicable, shall be allowed statutory subrogation with regard to indemnity and medical benefits paid as of the date of the recovery.

(2) With respect to any claim arising from a right of action that arose or accrued, in whole or in part, prior to January 1, 2006, the Insurance Commissioner ~~and the successor to the commission~~ shall be allowed statutory subrogation with regard to only medical payments paid as of the date of the recovery*: Provided,* That with respect to any recovery arising out of a cause of action that arose or accrued prior to July 1, 2003, any money received by the ~~commissioner~~ Insurance Commissioner or self-insured employer as subrogation to medical benefits expended on behalf of the injured or deceased worker shall not exceed 50 percent of the amount received from the third party as a result of the claim made by the injured worker, his or her dependents or personal representative, after payment of attorneys’ fee and costs, if such exist.

(3) Notwithstanding the provisions of §23-2A-1(b)(1) and (2) of this code, the Insurance Commissioner, acting as administrator of the Uninsured Employer Fund, shall be allowed statutory subrogation with regard to indemnity and medical benefits paid and to be paid from such fund regardless of the date on which the cause of action arose.

(c) For claims that arose or accrued, in whole or in part, prior to the effective date of the reenactment of this section in 2009, and all claims thereafter, the party entitled to subrogation shall permit the deduction from the amount received reasonable attorneys’ fees and reasonable costs and may negotiate the amount to accept as subrogation.

(d) In the event that an injured worker, his or her dependents or personal representative makes a claim against a third party, there shall be, and there is hereby created, a statutory subrogation lien upon the moneys received which shall exist in favor of the Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable.

(e) It is the duty of the injured worker, his or her dependents, his or her personal representative, or his or her attorney to give reasonable notice to the Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, after a claim is filed against the third party and prior to the disbursement of any third-party recovery. The statutory subrogation described in this section does not apply to uninsured and underinsured motorist coverage or any other insurance coverage purchased by the injured worker or on behalf of the injured worker. If the injured worker obtains a recovery from a third party and the injured worker, personal representative, or the injured worker’s attorney fails to protect the statutory right of subrogation created herein, the injured worker, personal representative, and the injured worker’s attorney shall lose the right to retain attorney fees and costs out of the subrogation amount. In addition, such failure creates a cause of action for the Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, against the injured worker, personal representative, and the injured worker’s attorney for the amount of the full subrogation amount and the reasonable fees and costs associated with any such cause of action.

ARTICLE 2B. OCCUPATIONAL SAFETY AND HEALTH PROGRAMS.

§23-2B-1. Occupational safety and health activities; voluntary compliance; consultative services.

[Repealed].

§23-2B-2. Mandatory programs; safety committees; requirements; rules; exceptions.

[Repealed].

§23-2B-3. Premium rate credits; qualified loss management program; loss management firms; penalties; rules.

[Repealed].

ARTICLE 2c.~~EMPLOYERS’ MUTUAL INSURANCE COMPANY~~transition to a private market.

§23-2C-1. Findings and purpose.

(a) The Legislature finds that:

(1) There is a long-term actuarial funding crisis in the state-run monopolistic workers’ compensation system;

(2) Similar short-term and long-term crises have been ongoing during the past two decades;

(3) During the current crisis, employers in West Virginia find it increasingly difficult to afford the rates charged by the Workers’ Compensation Commission for workers’ compensation coverage and that paying said rates adversely impacts employers’ ability to compete in a global economic environment;

(4) The cost of obtaining workers’ compensation coverage from the state system may result in many employers leaving the state;

(5) Employers’ access to competitive workers’ compensation rates and the resulting economic development benefit is of utmost importance to the citizens of West Virginia;

(6) A mechanism is needed to provide an enduring solution to this recurring workers’ compensation crisis;

(7) An employers’ mutual insurance company or a similar entity has proven to be a successful mechanism in other states for helping employers secure insurance and for stabilizing the insurance market;

(8) There is a substantial public interest in creating a method to provide a stable workers’ compensation insurance market in this state;

(9) The state-run workers’ compensation program is a substantial actual and potential liability to the state;

(10) There is substantial public benefit in transferring certain actual and potential future liability of the state to the private sector and creating a stable self-sufficient entity which will be a potential source of workers’ compensation coverage for employers in this state;

(11) A stable, financially viable insurer in the private sector will aid in providing a continuing source of insurance funds to compensate injured workers; and

(12) Because the public will greatly benefit from the formation of an employers’ mutual insurance company, state efforts to encourage and support the formation of such an entity, including providing funding for the entity’s initial capital, is in the clear public interest.

(b) The purpose of this article is to create a mechanism for the formation of an employers’ mutual insurance company that will provide:

(1) A means for employers to obtain workers’ compensation insurance that is reasonably available and affordable; and

(2) Compensation to employees of mutual policyholders who suffer work place injuries as defined in this chapter.

(c) ~~The further purpose of this article is to transfer New Fund assets relating to the workers’ compensation insurance business to the company, including a reasonable level of policyholder surplus, and for the company to assume the New Fund liabilities related to the transferred assets. It is the intent of this article to provide for the initial capitalization of the company to comply with and to meet the requirements of section 351 and related sections of the Internal Revenue Code.~~  The employers’ mutual insurance company contemplated and created as the successor to the former Workers’ Compensation Commission in this article began operation on January 1, 2006. The state opened to a private, competitive market for workers’ compensation insurance on July 1, 2008. This section remains in this code for historical purposes.

§23-2C-2. Definitions.

~~(a) “Executive director” means the Executive Director of the West Virginia Workers’ Compensation Commission as provided in section one-b, article one of this chapter.~~

~~(b) “Commission” means the West Virginia Workers’ Compensation Commission as provided by section one, article one of this chapter.~~

~~(c)~~ (a) “Insurance Commissioner” means the Insurance Commissioner of West Virginia as provided in §33-2-1 of this code.

~~(d) “Company” or “successor to the commission” means the employers’ mutual insurance company created pursuant to the terms of this article.~~

~~(e)~~ (b) “Policy default” means a policyholder that has failed to comply with the terms of its workers’ compensation insurance policy and is consequently without workers’ compensation insurance coverage.

~~(f)~~ (c) “Workers’ compensation insurance” means insurance which provides all compensation and benefits required by this chapter.

~~(g)~~ (d) “Insurer” includes:

(1) A self-insured employer; and

(2) A private carrier.

~~(h)~~ (e) “Industrial Council” means the advisory group established in §23-2C-5 of this code.

~~(i) “Mutualization Transition Fund” is a fund over which the State Treasurer is custodian. Moneys transferred or otherwise payable to the Mutualization Transition Fund shall be deposited in the State Treasury to the credit of the Mutualization Transition Fund. Disbursements shall be made from the Mutualization Transition Fund upon requisitions signed by the executive director, and, upon termination of the commission, the Insurance Commissioner, and shall be reasonably related to the legal, operational, consultative and human resource-related expenses associated with the establishment of the company and the transferring of personnel from the commission to the company.~~

~~(j) “New Fund” means a fund owned and operated by the commission and, upon termination of the commission, the successor organization of the West Virginia Workers’ Compensation Commission and consists of those funds transferred to it from the Workers’ Compensation Fund and any other applicable funds. New Fund includes all moneys due and payable to the Workers’ Compensation Fund for the quarters ending September 30, 2005, and December 31, 2005, which have not been collected by the Workers’ Compensation Fund as of December 31, 2005.~~

~~(k) “New Fund liabilities” means all claims payment obligations (indemnity and medical expenses) for all claims, actual and incurred but not reported, for any claim with a date of injury or last exposure on or after July 1, 2005:~~ *~~Provided,~~* ~~That New Fund liabilities begin with claims payments becoming due and owing on said claims on or after January 1, 2006.~~

~~(~~*~~l~~*~~)~~ (f) “Old Fund” means a fund held by the State Treasurer’s office consisting of those funds transferred to it from the defunct Workers’ Compensation Fund or other sources and those funds due and owing the defunct Workers’ Compensation Fund as of June 30, 2005, that are thereafter collected. The Old Fund and assets in the fund remain property of the state ~~and do not novate or otherwise transfer to the company~~ after the transition to a private market.

~~(m)~~ (g) “Old Fund liabilities” mean all claims payment obligations (indemnity and medical expenses), related liabilities and appropriate administrative expenses necessary for the administration of all claims, actual and incurred but not reported, for any claim with a date of injury or last exposure on or before June 30, 2005: *Provided,* That Old Fund liabilities include all claims payments for any claim, regardless of date of injury or last exposure, through December 31, 2005: *Provided, however,* That Old Fund liabilities include all claims with dates of injuries or last exposure prior to July 1, 2004, for bankrupt self-insured employers that had defaulted on their claims obligations which ~~have been~~ were recognized by the ~~commission~~ former Workers’ Compensation Commission in its actuarially determined liability number as of June 30, 2005.

~~(n)~~ (h) “Private carrier” means any insurer or the legal representative of an insurer authorized by the Insurance Commissioner to provide workers’ compensation insurance pursuant to this chapter. The term does not include a self-insured employer or private employers ~~but does include any successor to the commission~~.

~~(o)~~ (i) “Uninsured Employer Fund” means a fund held by the State Treasurer’s office consisting of those funds transferred to it from the defunct Workers’ Compensation Fund and any other source. Disbursements from the Uninsured Employer Fund shall be upon requisitions signed by the Insurance Commissioner, and as otherwise set forth in an exempt legislative rule promulgated by the ~~Workers’ Compensation Board of Managers~~ Industrial Council.

~~(p)~~ (j) “Self-Insured Employer Guaranty Risk Pool” is a fund held by the State Treasurer’s office consisting of those funds transferred to it from the guaranty pool created pursuant to 85 CSR 19 (2007) and any future funds collected through continued administration of that exempt legislative rule as administered by the Insurance Commissioner. Disbursements shall be made from the Self-Insured Employer Guaranty Risk Pool upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in 85 CSR 19 (2007).

~~(q)~~ (k) “Self-Insured Employer Security Risk Pool” is a fund held by the State Treasurer consisting of those funds paid into it through the Insurance Commissioner’s administration of 85 CSR 19 (2007). Disbursement from the fund shall be made from the Self-Insured Employer Security Risk Pool upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in 85 CSR 19: *Provided,* That the liabilities are limited to those self-insured employers who default on their claims obligations after the termination of the ~~commission~~ former Workers’ Compensation Commission.

~~(r) “Private Carrier Guaranty Fund” is a fund held by the State Treasurer’s office consisting of funds deposited pursuant to this article. Disbursements shall be made from the Private Carrier Guaranty Fund upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in this article. The Private Carrier Guaranty Fund terminates on June 30, 2008, and any moneys remaining in the fund on the date of its termination shall be transferred to the Old Fund.~~

~~(s) “Assigned Risk Fund” is a fund held by the State Treasurer’s office consisting of funds deposited pursuant to this article. Disbursements shall be made from the Assigned Risk Fund upon requisitions signed by the Insurance Commissioner. The obligations of the fund are as provided in this article. The Assigned Risk Fund terminates on June 30, 2008, and any moneys remaining in the fund on the date of its termination shall be transferred to the Old Fund.~~

~~(t) “Comprehensive financial plan” means the plan compiled by the director for acceptance by the Insurance Commissioner identifying and forecasting cash flows, funding sources, debt terms and structures and scheduled amortization and permanent resolution of all Old Fund liabilities. The comprehensive financial plan shall provide for the retirement of the revenue bonds authorized by article two-d of this chapter and all realized and potential claims against the Old Fund shall be fully reserved. The comprehensive financial plan may include any other information the Insurance Commissioner may require as a basis for managing the post-transition fiscal soundness of the Old Fund.~~

~~(u)~~ (l) “Voluntary market” means the workers’ compensation insurance market in which insurers voluntarily offer coverage to applicants who meet the insurers’ underwriting standards or guidelines.

§23-2C-3.~~Creation of employers’ mutual insurance company as successor organization of the West Virginia Workers’ Compensation Commission~~Private carriers not subject to certain premium taxes, surcharges, and credits; regulatory surcharge imposed on private carriers and self-insured employers**.**

~~(a) (1) On or before July 1, 2005, the executive director may take such actions as are necessary to establish an employers’ mutual insurance company as a domestic, private, nonstock corporation to:~~

~~(A) Insure employers against liability for injuries and occupational diseases for which their employees may be entitled to receive compensation pursuant to this chapter and federal Longshore and Harbor Workers’ Compensation Act, 33 U. S. C. §901,~~ *~~et seq~~*~~.;~~

~~(B) Provide employer’s liability insurance incidental to, and provided in connection with, the insurance specified in paragraph (A) of this subdivision, including coal workers’ pneumoconiosis coverage and employer excess liability coverage as provided in this chapter; and~~

~~(C) Transact other kinds of property and casualty insurance for which the company is otherwise qualified under the provisions of this code.~~

~~(2) The company may not sell, assign or transfer substantial assets or ownership of the company.~~

~~(b) If the executive director establishes a domestic mutual insurance company pursuant to subsection (a) of this section:~~

~~(1) As soon as practical, the company established pursuant to the provisions of this article shall, through a vote of a majority of its provisional board, file its corporate charter and bylaws with the Insurance Commissioner and apply for a license with the Insurance Commissioner to transact insurance in this state. Notwithstanding any other provision of this code, the Insurance Commissioner shall act on the documents within fifteen days of the filing by the company.~~

~~(2) In recognition of the workers’ compensation insurance liability insurance crisis in this state at the time of enactment of this article and the critical need to expedite the initial operation of the company, the Legislature authorizes the Insurance Commissioner to review the documentation submitted by the company and to determine the initial capital and surplus requirements of the company, notwithstanding the provisions of section five-b, article three, chapter thirty-three of this code. The company shall furnish the Insurance Commissioner with all information and cooperate in all respects necessary for the Insurance Commissioner to perform the duties set forth in this section and in other provisions of this chapter and chapter thirty-three of this code. The Insurance Commissioner shall monitor the economic viability of the company during its initial operation on not less than a monthly basis, until the commissioner, in his or her discretion, determines that monthly reporting is not necessary. In all other respects the company shall comply with the applicable provisions of chapter thirty-three of this code.~~

~~(3) Subject to the provisions of subdivision (4) of this subsection, the Insurance Commissioner may waive other requirements imposed on mutual insurance companies by the provisions of chapter thirty-three of this code the Insurance Commissioner determines are necessary to enable the company to begin insuring employers in this state at the earliest possible date.~~

~~(4) Within forty months of the date of the issuance of its license to transact insurance, the company shall comply with the capital and surplus requirements set forth in subsection (a), section five-b, article three, chapter thirty-three of this code in effect on the effective date of this enactment, unless the deadline is extended by the Insurance Commissioner.~~

~~(c) For the duration of its existence, the company is not a department, unit, agency or instrumentality of the state for any purpose. All debts, claims, obligations and liabilities of the company, whenever incurred, are the debts, claims, obligations and liabilities of the company only and not of the state or of any department, unit, agency, instrumentality, officer or employee of the state.~~

~~(d) The moneys of the company are not part of the General Revenue Fund of the state. The debts, claims, obligations and liabilities of the company are not a debt of the state or a pledge of the credit of the state.~~

~~(e) The company is not subject to provisions of article nine-a, chapter six of this code; the provisions of article two, chapter six-c of this code; the provisions of chapter twenty-nine-b of this code; the provisions of article three, chapter five-a of this code; the provisions of article six, chapter twenty-nine of this code; or the provisions of chapter twelve of this code.~~

~~(f) (a) If the commission has been terminated, effective upon the termination, private~~ Private carriers including the company, are not subject to payment of insurance premium taxes, surcharges, and credits contained in §33-3-1 *et seq.* of this code on premiums received for workers’ compensation insurance coverage under this chapter. In lieu thereof, the workers’ compensation insurance market is subject to the following:

~~(1)(A) Each fiscal year, the Insurance Commissioner shall calculate a percentage surcharge to be collected by each private carrier from its policyholders. The surcharge percentage shall be calculated by dividing the previous fiscal year’s total premiums collected plus deductible payments by all employers into the portion of the Insurance Commissioner’s budget amount attributable to regulation of the private carrier market. This resulting percentage shall be applied to each policyholder’s premium payment and deductible payments as a surcharge and remitted to the Insurance Commissioner. Said surcharge shall be remitted within 90 days of receipt of premium payments;~~

~~(B)~~ (1)(A) With respect to fiscal years beginning on and after July 1, 2008, ~~in lieu of the surcharge set forth in the preceding paragraph,~~ each private carrier shall collect a surcharge in the amount of five and five-tenths percent of the premium collected plus the total of all premium discounts based on deductible provisions that were applied: *Provided*, That prior to June 30, 2013, and every five years thereafter, the ~~commissioner~~ Insurance Commissioner shall review the percentage surcharge and determine a new percentage as he or she deems necessary; and

~~(C)~~ (B) The amounts required to be collected under ~~paragraph (B) of this subdivision~~ §23-2C-3(a)(1)(A) of this code shall be remitted to the Insurance Commissioner on or before the twenty-fifth day of the month succeeding the end of the quarter in which they are collected, except for the fourth quarter for which the surcharge shall be remitted on or before March 1 of the succeeding year.

(2) Each fiscal year, the Insurance Commissioner shall calculate a percentage surcharge to be remitted on a quarterly basis by self-insured employers and said percentage shall be calculated by dividing the previous year’s self-insured payroll in the state into the portion of the Insurance Commissioner’s budget amount attributable to regulation of the self-insured employer market. This resulting percentage shall be applied to each self-insured employer’s payroll and the resulting amount shall be remitted as a regulatory surcharge by each self-insured employer. The Industrial Council may promulgate a rule for implementation of this section. ~~The company, all other~~ All private carriers and ~~all~~ self-insured employers shall furnish the Insurance Commissioner with all required information and cooperate in all respects necessary for the Insurance Commissioner to perform the duties set forth in this section and in other provisions of this chapter and chapter 33 of this code. The surcharge shall be calculated so as to only defray the costs associated with the administration of this chapter and the funds raised shall not be used for any other purpose ~~except as set forth in subdivision (4) of this subsection~~.

~~(3) (A) Each private carrier shall collect a premiums surcharge from its policyholders as annually determined, by May 1 of each year, by the Insurance Commissioner to produce $45 million annually, of each policyholder’s periodic premium amount for workers’ compensation insurance:~~ *~~Provided~~*~~, That the surcharge rate on policies issued or renewed on or after July 1, 2008, shall be nine percent of the premium collected plus the total of all premium discounts based on deductible provisions that were applied.~~

~~(B) By May 1 each year, the self-insured employer community shall be assessed a cumulative total of $9 million. The methodology for the assessment shall be fair and equitable and determined by exempt legislative rule issued by the Industrial Council. The amount collected pursuant to this subdivision shall be remitted to the Insurance Commissioner for deposit in the Workers’ Compensation Debt Reduction Fund created in section five, article two-d of this chapter:~~ *~~Provided~~*~~, That, notwithstanding any provision of this subdivision or any other provision of this code to the contrary, if the budget shortfall, as determined by the state Budget Office as of December 1, 2015, is greater than $100 million, then the Governor may, by Executive Order, redirect deposits of the amount collected pursuant to this subdivision, for any period commencing after February 29, 2016, and ending before July 1, 2016, to the General Revenue Fund, instead of to the fund otherwise mandated in this subdivision, in article two-d, chapter twenty-three of this code or in any other provision of this code:~~ *~~Provided, however~~*~~, That, notwithstanding any provision of this subdivision or any other provision of this code to the contrary, the Governor may, by Executive Order, redirect one-half of the deposits of the amount collected pursuant to this subdivision, for any period commencing after June 30, 2016, and ending before July 1, 2017, to the General Revenue Fund, instead of to the funds otherwise mandated in this subdivision, in article two-d, chapter twenty-three of this code or in any other provision of this code, until certification of the Governor to the Legislature that an independent actuary has determined that the unfunded liability of the Old Fund, as defined in chapter twenty-three of this code, has been paid or provided for in its entirety:~~ *~~Provided further~~*~~, That, notwithstanding any provision of this subdivision or any other provision of this code to the contrary, the Governor may, by Executive Order, redirect seventy-five percent of the deposits of the amount collected pursuant to this subdivision, for any period commencing after June 30, 2017, and ending before July 1, 2018, to the General Revenue Fund, instead of to the funds otherwise mandated in this subdivision, in article two-d, chapter twenty-three of this code or in any other provision of this code, until certification of the Governor to the Legislature that an independent actuary has determined that the unfunded liability of the Old Fund, as defined in chapter twenty-three of this code, has been paid or provided for in its entirety: And provided further, That, notwithstanding any provision of this subdivision or any other provision of this code to the contrary, seventy-five percent of the deposits of the amount collected pursuant to this subdivision, for any period commencing after June 30, 2018, and ending before January 1, 2019, shall be deposited into the General Revenue Fund instead of to the funds otherwise mandated in this subdivision, in article two-d, chapter twenty-three of this code or in any other provision of this code, until certification of the Governor to the Legislature that an independent actuary has determined that the unfunded liability of the Old Fund, as defined in chapter twenty-three of this code, has been paid or provided for in its entirety.~~

~~(4) On or before July 1, 2009, the Insurance Commissioner shall make a one-time lump sum transfer of $40 million generated from the surcharges assessed pursuant to paragraph (B), subdivision (1) of this subsection and subdivision (2) of this subsection to the Bureau of Employment Programs’ Commissioner for deposit with the Secretary of the Treasury of the United States as a credit of this state in the Unemployment Trust Fund Account maintained pursuant to section four, article eight, chapter twenty-one-a of this code.~~

~~(g) The new premiums surcharge imposed by paragraphs (A) and (B), subdivision (3), subsection (f) of this section sunset and are not collectible with respect to workers’ compensation insurance premiums paid when the policy is renewed on or after the first day of the month following the month in which the Governor certifies to the Legislature that the revenue bonds issued pursuant to article two-d of this chapter have been retired and that the unfunded liability of the Old Fund has been paid or has been provided for in its entirety, whichever occurs last.~~

~~(h) Notwithstanding any other provisions of this section to the contrary, after December 31, 2018, no surcharges may be assessed under subdivision (3), subsection (f) of this section or subsection (g) of this section. Except as otherwise provided in this subsection, the provisions of subdivision (3), subsection (f) of this section and subsection (g) of this section are terminated and shall be of no force or effect beginning on and after January 1, 2019:~~ *~~Provided~~*~~, That liability for surcharges assessed under subdivision (3), subsection (f) of this section for periods prior to January 1, 2019, shall continue until paid.~~

§23-2C-3a. Employers’ mutual insurance company - additional provisions enacted in November 2005.

[Repealed.]

§23-2C-4. Governance and organization.

[Repealed.]

§23-2C-6.~~Creation~~Continuationof **~~new fund,~~** old fund**,** ~~mutualization transition fund,~~uninsured employer fund, self-insured employer guaranty risk pool, and self-insured employer security risk pool ~~private carrier guaranty fund, and assigned risk fund~~.

~~(a) Effective upon the date upon which this enactment is made effective by the Legislature,~~ ~~there~~ There is hereby ~~created~~ continued in the State Treasury a “Workers’ Compensation Old Fund”, ~~“Workers’ Compensation New Fund”, “Mutualization Transition Fund”,~~ “Workers’ Compensation Uninsured Employers’ Fund”, “Self-insured Employer Guaranty Risk Pool”, and “Self-insured Employer Security Risk Pool”. ~~“Private Carrier Guaranty Fund”, and an “Assigned Risk Fund”.~~ The ~~Executive Director of the Workers’ Compensation Commission~~ Insurance Commissioner shall have full authority to administer the Old Fund, ~~the new fund, the mutualization transition fund,~~ the Uninsured Employers’ Fund, the Self-Insured Employer Guaranty Risk Pool, and the Self-Insured Employer Security Risk Pool. ~~and the private carrier guaranty fund~~. ~~until termination of the commission. As soon as practicable upon the establishment of the mutualization transition fund, the executive director shall cause $35 million to be transferred from the Workers’ Compensation Fund into the mutualization transition fund. All unencumbered funds remaining in the mutualization transition fund as of termination of the commission shall be transferred into the private carrier guaranty fund or, if the proclamation set forth in this article has not been issued, back to the Workers’ Compensation Fund. Expenditures from the funds established by this section shall be upon appropriation of the Legislature except that during the fiscal year ending June 30, 2005, expenditures from the mutualization transition fund up to amounts expended for the purposes of this article are authorized rather than pursuant to an appropriation by the Legislature.~~

~~(b) If the proclamation set forth in this article is issued, then upon termination of the commission, the funds contained in the Workers’ Compensation Fund shall be disbursed as follows: (1) A minimum of $300 million into the Workers’ Compensation Old Fund, the exact amount of which shall be set forth in the Governor’s proclamation provided in this article; (2) $5 million into the uninsured employers’ fund; and (3) the remainder into the new fund. Additionally, the funds contained in the guaranty pool provided in 85 CSR §19 (2004) shall be transferred into the self-insured employer guaranty risk pool created in this article.~~

§23-2C-7. Custody, investment and disbursement of funds.

~~(a)~~ The State Treasurer shall be the custodian of the ~~workers’ compensation~~ Old Fund, ~~workers’ compensation~~ the Uninsured Employer Fund, the Self-Insured Employer Guaranty Risk Pool, and the Self-Insured Employer Security Risk Pool, ~~the Private Carrier Guaranty Fund, and the Assigned Risk Fund~~ and moneys payable to each of these funds shall be deposited in the State Treasury to the credit of the funds. Each fund shall be a separate and distinct fund upon the books and records of the Auditor and Treasurer. Disbursements from these funds shall be made upon requisitions signed by the ~~executive director and, effective upon termination of the commission, the~~ Insurance Commissioner. The ~~workers’ compensation~~ Old Fund, the ~~workers’ compensation~~ Uninsured Employer Fund, the Self-Insured Employer Guaranty Risk Pool, and the Self-Insured Employer Security Risk Pool ~~the Private Carrier Guaranty Fund, and the Assigned Risk Fund~~ are participant plans as defined in §12-6-2 of this code and are subject to the provisions of §12-6-9a of this code. The funds may be invested by the Investment Management Board in accordance with §12-6-1 *et seq.* of this code.

~~(b) If the Governor issues the proclamation set forth in this article, then, effective upon termination of the commission, all remaining assets and funds contained in the Workers’ Compensation Fund which are payable to the New Fund shall be so disbursed and paid to the company by communication of the executive director to the State Treasurer or other appropriate state official prior to the termination of the commission.~~

§23-2C-8. Workers’ Compensation Uninsured Employer Fund.

(a) The Workers’ Compensation Uninsured Employer Fund shall be governed by the following:

(1) All money and securities in the fund must be held by the State Treasurer as custodian thereof to be used solely as provided in this article.

(2) The State Treasurer may disburse money from the fund only upon written requisition of the Insurance Commissioner.

(3) *Assessments*. — The Insurance Commissioner shall assess each private carrier and may assess self-insured employers an amount to be deposited in the fund. The assessment may be collected by each private carrier from its policyholders in the form of a policy surcharge. To establish the amount of the assessment, the Insurance Commissioner shall determine the amount of money necessary to maintain an appropriate balance in the fund for each fiscal year and shall allocate a portion of that amount to be payable by each of the groups subject to the assessment. After allocating the amounts payable by each group, the Insurance Commissioner shall apply an assessment rate to:

(A) Private carriers that reflects the relative hazard of the employments covered by the private carriers, results in an equitable distribution of costs among the private carriers and is based upon expected annual premiums to be received;

(B) Self-insured employers, if assessed, that results in an equitable distribution of costs among the self-insured employers and is based upon expected annual expenditures for claims; and

(C) Any other groups assessed that results in an equitable distribution of costs among them and is based upon expected annual expenditures for claims or premium to be received.

(4) The Industrial Council may adopt rules for the establishment and administration of the assessment methodologies, rates, payments, and any penalties that it determines are necessary to carry out the provisions of this section.

(b) *Payments from the fund. —*

(1) Except as otherwise provided in this subsection, an injured employee of any employer required to be covered under this chapter who has failed to obtain coverage may receive compensation from the Uninsured Employer Fund if such employee meets all jurisdictional and entitlement provisions of this chapter, files a claim with the Insurance Commissioner and makes an irrevocable assignment to the Insurance Commissioner of a right to be subrogated to the rights of the injured employee.

(2) Employees who are injured while employed by a self-insured employer are ineligible for benefits from the Workers’ Compensation Uninsured Employer Fund.

(c) *Initial determination upon receipt of a claim. —*

If a claim is filed against the Uninsured Employer Fund, the Insurance Commissioner or his or her third-party administrator shall: (1) Accept the claim into the fund if it is determined that the employer was required to maintain workers’ compensation coverage with respect to the injured worker but failed to do so; (2) reject the claim if it is determined that the employer maintained such coverage or was not required to do so; or (3) in a claim involving the availability of benefits pursuant to §23-2-1d of this code, either reject or conditionally accept the claim. An aggrieved party may file a protest with the Office of Judges, or Board of Review upon the termination of the Office of Judges, to any decision by the Insurance Commissioner or the third-party administrator to accept or reject a claim into the fund, as well as to any claims decisions made with respect to any claim accepted into the fund and such protests shall be determined in the same manner as disputed claims are determined pursuant to the provisions of §23-5-1 *et seq.* of this code: *Provided,* That in any proceeding ~~before the Office of Judges~~ involving the decision to accept or refuse to accept a claim into the fund, the employer has the burden of proving that it either provided mandatory workers’ compensation insurance coverage or that it was not required to do so.

(d) *Employer liability. —*

(1) Any employer who has failed to provide mandatory coverage required by the provisions of this chapter is liable for all payments made and to be made on its behalf, including any benefits, administrative costs and attorney’s fees paid from the fund or incurred by the Insurance Commissioner, plus interest calculated in accordance with the provisions of §23-2-13 of this code.

(2) The Insurance Commissioner:

(A) May bring a civil action in a court of competent jurisdiction to recover from the employer the amounts set forth in §23-2C-8(d)(1) of this code. In any such action, the Insurance Commissioner may also recover the present value of the estimated future payments to be made on the employer’s behalf and administrative costs and attorney’s fees attributable to such claim: *Provided,* That the failure of the Insurance Commissioner to include a claim for future payments shall not preclude one or more subsequent actions for such amounts;

(B) May enter into a contract with any person, including the third-party administrator of the Uninsured Employer Fund, to assist in the collection of any liability of an uninsured employer; and

(C) In lieu of a civil action, may enter into an agreement or settlement regarding the collection of any liability of an uninsured employer.

(3) In addition to any other liabilities provided in this section, the Insurance Commissioner may impose an administrative penalty of not more than $10,000 against an employer if the employer fails to provide mandatory coverage required by this chapter. All penalties and other moneys collected pursuant to this section shall be deposited into the ~~Workers’ Compensation~~ Uninsured Employer Fund.

§23-2C-11. Transfer of assets from new fund to the mutual insurance company established as a successor to the commission; transfer of commission employees.

[Repealed.]

§23-2C-12. Certain personnel provisions governing Workers’ Compensation Commission employees and employees laid off by the employers’ mutual insurance company during its initial year of operation.

~~(a) If a mutual insurance company is established pursuant to this article, a~~ A person who was employed by the former Workers’ Compensation Commission upon its termination or was laid off by the employers’ mutual insurance company created in this article on or before June 30, 2008, is entitled to be placed on an appropriate reemployment list maintained by the Department of Personnel and to be allowed a preference on that list. The Department of Personnel shall maintain such an employee on the reemployment list indefinitely, or until the employee has declined three offers of employment at a paygrade substantially similar to that of his or her position upon termination of the former Workers’ Compensation Commission, or until he or she is reemployed by the executive branch of state government, whichever occurs earlier.

~~(1) Is employed on January 1, 2005, by the commission;~~

~~(2) Was employed by the commission upon its termination; and~~

~~(3) Is laid off by the company on or before June 30, 2008, is entitled to be placed on an appropriate reemployment list maintained by the Department of Personnel and to be allowed a preference on that list. The Department of Personnel shall maintain such an employee on the reemployment list indefinitely, or until the employee has declined three offers of employment at a paygrade substantially similar to that of his or her position upon termination of the commission, or until he or she is reemployed by the executive branch of state government, whichever occurs earlier.~~

~~(b) The executive director may select former bureau of employment program employees who are, upon the termination of the commission, employees of the office of information services and communication and who enter into an employment contract with the company before December 1, 2005, to become employees of the company and said employees shall be afforded the benefits of this section~~.

§23-2C-13. Certain retraining benefits to those employees laid-off by the mutual during its first year of operation.

[Repealed.]

§23-2C-14. Certain benefits provided to commission employees.

[Repealed.]

§23-2C-15. Mandatory coverage; changing of coverage.

~~(a) Effective upon termination of the commission, all subscriber policies with the commission shall novate to the company and all employers shall purchase workers’ compensation insurance from the company unless permitted to self-insure their obligations. The company shall assume responsibility for all new fund obligations of the subscriber policies which novate to the company or which are issued thereafter. Each subscriber whose policy novates to the company shall also have its advanced deposit credited to its account with the company. Each employer purchasing workers’ compensation insurance from the company has the right to designate a representative or agent to act on its behalf in any and all matters relevant to coverage and claims administered by the company.~~

~~(b)~~ (a) ~~Effective July 1, 2008, an~~ An employer may elect to ~~(1) continue to purchase workers’ compensation insurance from the company; (2)~~ purchase workers’ compensation insurance from another a private carrier licensed and otherwise authorized to transact workers’ compensation insurance in this state or (3) self-insure its obligations if it satisfies all requirements of this code to so self-insure and is permitted to do so. ~~Provided, That all state and local governmental bodies, including, but not limited to, all counties and municipalities and their subdivisions, and including all boards, colleges, universities, and schools, shall continue to purchase workers’ compensation insurance from the company through June 30, 2010:~~ *~~Provided, however~~*~~, That the company may not cancel or refuse to renew a policy of a state or local governmental body prior to July 1, 2011, except for failure of consideration to be paid by the policyholder or for refusal to comply with a premium audit. The company and other private~~ Private carriers are permitted to sell workers’ compensation insurance through licensed agents in the state. To the extent that a private carrier markets workers’ compensation insurance through a licensed agent, it is subject to all applicable provisions of chapter 33 of this code.

~~(c)~~ (b) Every employer shall continuously post a notice upon its premises in a conspicuous place identifying its workers’ compensation insurer. The notice must include the name, business address, and telephone number of the insurer and of the person to contact with questions about a claim. ~~The employer shall at all times maintain the notice provided for the information of his or her employees. Release of employer policy information and status by the Industrial Council and the Insurance Commissioner shall be governed by section four, article one of this chapter.~~

~~(d)~~ (c) Any rule promulgated by the Industrial Council empowering agencies of this state to revoke or refuse to grant, issue, or renew any contract, license, permit, certificate, or other authority to conduct a trade, profession, or business to or with any employer whose account is in default with regard to any liability under this chapter shall be fully enforceable by the Insurance Commissioner against the employer.

~~(e)~~ (d) ~~Effective January 1, 2009, the company may decline to offer coverage to any applicant.~~ Private carriers ~~and effective January 1, 2009, the company~~ may cancel a policy upon the issuance of 30 days’ written advance notice to the policyholder and may refuse to renew a policy upon the issuance of 60 days’ written advance notice to the policyholder: *Provided,* That cancellation of the policy by the carrier for failure of consideration to be paid by the policyholder or for refusal to comply with a premium audit is effective after 10 days’ advance written notice of cancellation to the policyholder.

~~(f)~~ (e) Every private carrier shall notify the Insurance Commissioner as follows: (1) Of the issuance or renewal of insurance coverage, within 30 days of: (A) The effective date of coverage; or (B) the private carrier’s receipt of notice of the employer’s operations in this state, whichever is later; (2) of a termination of coverage by the private carrier due to refusal to renew or cancellation, at least 10 days prior to the effective date of the termination; and (3) of a termination of coverage by an employer, within 10 days of the private carrier’s receipt of the employer’s request for such termination; the notifications shall be on forms developed or in a manner prescribed by the Insurance Commissioner.

~~(g)~~ (f) For the purposes of ~~subsections (e) and (f) of this section~~ §23-2C-15(d) and (e) of this code, the transfer of a policyholder between insurance companies within the same group is not considered a cancellation or refusal to renew a workers’ compensation insurance policy.

§23-2C-16. Administration of Old Fund, Uninsured Employer Fund, Self-Insured Employer Guaranty Risk Pool, Self-Insured Employer Security Risk Pool, and Private Carrier Guaranty Fund.

~~(a) Notwithstanding any provision of this code to the contrary, the company shall be the initial third-party administrator of~~ ~~the Old Fund, Uninsured Employer Fund, Self-Insured Employer Guaranty Risk Pool, Self-Insured Employer Security Risk Pool, and Private Carrier Guaranty Fund from the termination of the commission and thereafter for a term of at least six months but not more than three years pursuant to an agreement to be entered into between the Insurance Commissioner and the company prior to the termination of the commission. The company shall be paid a reasonable fee for services provided. The company’s administrative duties may include, but not be limited to, receipt of all claims, processing said claims, providing for the payment of said claims through the State Treasurer’s office or other applicable state agency, and ensuring, through the selection and assignment of counsel, that claims decisions are properly defended. The administration of said funds thereafter shall be subject to the procedures set forth §5A-3-1~~ *~~et seq.~~* ~~of this code.~~

~~(b)~~ (a) The Insurance Commissioner shall review claims determined to be payable from ~~said funds~~ the Old Fund, Uninsured Employer Fund, Self-Insured Employer Guaranty Risk Pool, Self-Insured Employer Security Risk Pool, and Private Carrier Guaranty Fund and may contest the determination pursuant to the provisions of §23-5-1 *et seq.* of this code. The Insurance Commissioner may retain a third-party administrator for said funds. The administrative duties may include, receipt of all claims, processing said claims, providing for the payment of said claims through the State Treasurer’s office or other applicable state agency, and ensuring, through the selection and assignment of counsel, that claims decisions are properly defended.

~~(c)~~ (b) The Insurance Commissioner may conduct or cause to be conducted an annual audit to be performed on said funds.

~~(d)~~ (c) The Insurance Commissioner may contract or employ counsel to perform legal services related solely to the collection of moneys due the Old Fund, including the collection of moneys due the Old Fund and enforcement of repayment agreements entered into for the collection of moneys due on or before June 30, 2005, in any administrative proceeding and in any state or federal court.

~~(e)~~ (d) During the fiscal years beginning July 1, 2019, July 1, 2020, July 1, 2021, July 1, 2022, and July 1, 2023, the Insurance Commissioner may, in his or her discretion, transfer special revenue moneys contained in the Insurance Commission Fund to the Old Fund in any fiscal year in which the Insurance Commissioner has determined, and an independent Auditor has attested thereto, that a deficit balance existed in the Old Fund for the prior fiscal year.

§23-2C-18. Ratemaking; Insurance Commissioner.

(a)(1) ~~The rate-making provisions and premium provisions contained in article two of this chapter shall not be applicable to the company or other private carriers.~~ Rates for workers’ compensation insurance are subject to the provisions of this section, §23-2C-18a of this code, and §33-20-1 *et seq.* of this code.

(2) In the event of any conflict, the provisions of this article shall have paramount effect, but the provisions in this chapter and chapter 33 of this code shall be construed as complementary and harmonious unless so clearly in conflict that they cannot reasonably be reconciled.

(b) An insurer shall file its rates by filing a multiplier or multipliers to be applied to prospective loss costs that have been filed by the designated advisory organization on behalf of the insurer in accordance with §23-2C-18a of this code and may also file carrier specific rating plans.

(c) Rates must not be excessive, inadequate, or unfairly discriminatory, nor may an insurer charge any rate which if continued will have or tend to have the effect of destroying competition or creating a monopoly.

(d) The Insurance Commissioner may disapprove rates if there is not a reasonable degree of price competition at the consumer level with respect to the class of business to which they apply. In determining whether a reasonable degree of price competition exists, the Insurance Commissioner shall consider all relevant tests, including:

(1) The number of insurers actively engaged in the class of business and their shares of the market;

(2) The existence of differentials in rates in that class of business;

(3) Whether long-run profitability for private carriers generally of the class of business is unreasonably high in relation to its risk;

(4) Consumers’ knowledge in regard to the market in question; and

(5) Whether price competition is a result of the market or is artificial. If competition does not exist, rates are excessive if they are likely to produce a long-run profit that is unreasonably high in relation to the risk of the class of business, or if expenses are unreasonably high in relation to the services rendered.

(e) Rates are inadequate if they are clearly insufficient, together with the income from investments attributable to them, to sustain projected losses and expenses in the class of business to which they apply.

(f) One rate is unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses. Rates are not unfairly discriminatory because different premiums result for policyholders with similar exposure to loss but different expense factors, or similar expense factors but different exposure to loss, so long as the rates reflect the differences with reasonable accuracy. Rates are not unfairly discriminatory if they are averaged broadly among persons insured under a group, franchise, or blanket policy.

§23-2C-19. Premium payment; employer default; special provisions as to employer default collection.

(a) Each employer who is required to purchase and maintain workers’ compensation insurance or who elects to purchase workers’ compensation insurance shall pay a premium to a private carrier. Each carrier shall notify its policyholders of the mandated premium payment methodology and under what circumstances a policyholder will be found to be in policy default.

(b) An employer who is required to purchase and maintain workers’ compensation insurance but fails to do so or otherwise enters policy default shall be deprived of the benefits and protection afforded by this chapter, including §23-2-6 of this code, and the employer is liable as provided in §23-2-8 of this code: The policy defaulted employer’s liability under these sections is retroactive to the day the policy default occurs: The private carrier shall notify the policy defaulted employer of the method by which the employer may be reinstated with the private carrier.

(c) In addition to any other liabilities provided in this section, the Insurance Commissioner may impose an administrative fine of not more than $10,000 against an employer if the employer fails to provide mandatory coverage required by this chapter.

~~(d) The company and the Insurance Commissioner shall be provided extraordinary powers to collect any premium amounts payable to the workers’ compensation fund or the new fund and due from July 1, 2005, through June 30, 2008: Those powers shall include: (1) Withholding of coverage effective January 1, 2006: Employers without coverage shall immediately be deprived of the benefits and protection afforded by this chapter, including section six, article two of this chapter and the employer is liable as provided in section eight of said article; (2) the right to maintain a civil action against all officers and directors of the employer individually for collection of the premium owed; and (3) the right to immediately report the employers to the state Tax Department and other state agencies to secure suspension of any and all licenses, certificates, permits, registrations and other similar approval documents necessary for the employer to conduct business in this state.~~

~~(e)~~ (d) Every agency shall, upon notification of employer default by the Insurance Commissioner, immediately begin the process to revoke or terminate any contract, license, permit, certificate, or other authority to conduct a trade, profession, or business in this state and shall refuse to issue, grant, or renew any such contract, license, permit, certificate, or authority.

(1) The term “employer default” means having an outstanding balance or liability to the Old Fund or to the Uninsured Employers’ Fund or being in policy default, as defined in §23-2C-2 of this code, or failure to maintain mandatory workers’ compensation coverage. An employer is not in default if it has entered into a repayment agreement with the Insurance Commissioner and remains in compliance with the obligations under the repayment agreement.

(2) The term “agency” includes any unit of state government such as officers, agencies, divisions, departments, boards, commissions, authorities, or public corporations.

~~(f)~~ (e) Any amounts owed by an employer to the state as a result of an employer default is a personal liability of the employer, its officers, owners, partners, and directors and is immediately due and owing and shall, in addition, be a lien enforceable against all the property of the employer, its officers, owners, partners, and directors: *Provided,* That the lien shall not be enforceable as against a purchaser, including a lien creditor, of real estate or personal property for a valuable consideration without notice, unless docketed as provided in §38-10C-1 of this code: *Provided, however,* That the lien may be enforced as other judgment liens are enforced through the provisions of chapter 38 of this code and the same is considered by the circuit court to be a judgment lien for this purpose.

~~(g)~~ (f) The Insurance Commissioner shall propose rules for adoption by the industrial council to effectuate the purposes of this section including the conditions under which agencies shall comply with the provisions of ~~subsection (e) of this section~~ §23-2C-19(d) of this code and specifying how notice of default shall be given by the ~~commissioner~~ Insurance Commissioner.

§23-2C-20. Claims administration issues.

~~(a) A self-insured employer shall continue to comply with rules promulgated by the board of managers governing the self-administration of its claims and the successor to the commission shall also comply with the rules promulgated by the board of managers governing the self-administration of claims.~~

~~(b)~~ (a) ~~The successor to the commission, any other private carrier and any employer that self-insures its risk and self-administers its claims shall exercise all authority and responsibility granted to the commission in this chapter and provide notices of action taken to effect the purposes of this chapter to provide benefits to persons who have suffered injuries or diseases covered by this chapter. The successor to the commission private~~ Private carriers and self-insured employers shall at all times be bound and shall comply fully with all of the provisions of this chapter. Furthermore, all of the provisions contained in §23-4-1 *et seq.* of this code pertaining to disability and death benefits are binding on and shall be strictly adhered to by the successor to the commission, private carriers, and the self-insured employer in their administration of claims presented by employees of the self-insured employer private carriers and self-insured employers.

~~(c)~~ (b) ~~Upon termination of the commission, the~~  The Occupational Pneumoconiosis Board shall be ~~transferred to the Insurance Commissioner and shall be~~ administered by the Insurance Commissioner. ~~The company and other private carriers shall have all authority and responsibility granted to the self-insured employers in the administration and processing of occupational pneumoconiosis claims.~~ Private carriers and self-insured employers shall have all authority and responsibility in the administration and processing of occupational pneumoconiosis claims.

~~(d)~~ (c) ~~Upon termination of the commission, all claims allocation responsibilities shall transfer from the commission to the Insurance Commissioner.~~ Upon termination of the former Workers’ Compensation Commission, claims allocation responsibilities transferred to the Insurance Commissioner.

~~(e)~~ (d) ~~Upon termination of the commission, the third-party administrator of the Old Fund shall have all administrative and adjudicatory authority vested in the commission in administering old law liabilities and otherwise processing and deciding old law claims.~~ The Insurance Commissioner’s third-party administrator for the Old Fund has administrative and adjudicatory authority in administering old law liability and deciding old law claims.

§23-2C-21. Limitation of liability of insurer or third-party administrator; administrative fines are exclusive remedies.

(a) No civil action may be brought or maintained by an employee against a private carrier or a third-party administrator, or any employee or agent of a private carrier or third-party administrator, who violates any provision of this chapter or chapter 33 of this code.

(b) Any administrative fines or remedies provided in this chapter or chapter 33 of this code or rules promulgated by the ~~Workers’ Compensation Commission or the~~ Insurance Commissioner are the exclusive civil remedies for any violation of this chapter committed by a private carrier or a third-party administrator or any agent or employee of a private carrier or a third-party administrator.

(c) Upon a determination by the Office of Judges, or by the Board of Review upon the termination of the Offices Judges, that a denial of compensability, a denial of an award of temporary total disability, or a denial of an authorization for medical benefits was unreasonable, reasonable attorney’s fees and the costs actually incurred in the process of obtaining a reversal of the denial shall be awarded to the claimant and paid by the private carrier or self-insured employer which issued the unreasonable denial. A denial is unreasonable if, after submission by or on behalf of the claimant, of evidence of the compensability of the claim, the entitlement to temporary total disability benefits or medical benefits, the private carrier or self-insured employer is unable to demonstrate that it had evidence or a legal basis supported by legal authority at the time of the denial which is relevant and probative and supports the denial of the award or authorization. Payment of attorney’s fees and costs awarded under this subsection will be made to the claimant at the conclusion of litigation, including all appeals, of the claimant’s protest of the denial.

§23-2C-23. Transfer of assets and contracts.

[Repealed.]

§23-2C-24. Surplus note or other loan arrangement for new fund.

[Repealed.]

ARTICLE 2D. WORKERS’ COMPENSATION DEBT REDUCTION BONDS.

§23-2D-1. Short title.

[Repealed.]

§23-2D-2. Legislative findings; legislative intent.

[Repealed.]

§23-2D-3. Definitions.

[Repealed.]

§23-2D-4. Workers’ Compensation debt reduction revenue bonds; amount; when may issue.

[Repealed.]

§23-2D-5. Special account created; use of moneys in the Fund.

[Repealed.]

§23-2D-5a. Excess regular coal severance taxes.

[Repealed.]

§23-2D-6. Creation of Debt Service Fund; disbursements to pay debt service on Workers’ Compensation debt reduction revenue bonds.

[Repealed.]

§23-2D-7. Covenants of state.

[Repealed.]

§23-2D-8. Workers’ compensation debt reduction revenue bonds lawful investments.

[Repealed.]

§23-2D-9. Refunding bonds.

[Repealed.]

§23-2D-10. Approval and payment of all necessary expenses.

[Repealed.]

ARTICLE 3. WORKERS’ COMPENSATION FUND.

§23-3-1. Compensation Fund; catastrophe and catastrophe payment defined; compensation by employers.

[Repealed.]

§23-3-1a. Transfer of silicosis fund to workers’ compensation fund; claims under former article six.

[Repealed.]

§23-3-2. Custody, investment and disbursement of funds.

[Repealed.]

§23-3-3. Investment of surplus funds required.

[Repealed.]

§23-3-4. Deposits and disbursements considered abandoned property; disposition of property.

[Repealed.]

§23-3-5. Authorization to require the electronic invoices and transfers.

[Repealed.]

§23-3-6. Emergency fiscal measures.

[Repealed.]

ARTICLE 4A. DISABLED WORKERS’ RELIEF FUND.

§23-4A-1. Disabled Workers’ Relief Fund ~~created~~.

~~(a) For the relief of persons who are receiving benefits pursuant to a permanent total disability award in amounts less than thirty-three and one-third percent of the average weekly wage for the State of West Virginia per month, and for the relief of widows who are receiving benefits on account of the death of an employee in amounts less than thirty-three and one-third percent of the average weekly wage in the State of West Virginia per month, and for the relief of children of employees deceased before 1967, who are under the age of twenty-three and who are full-time students, and for the relief of other persons who are receiving dependents’ benefits on account of the death of an employee in amounts less than the specific monetary amounts set forth in section ten, article four of this chapter and in effect as of July 1, 1973, there is continued a separate fund, heretofore known as the “Disabled Workmen’s Relief Fund”, and which shall hereafter be known as the “Disabled Workers’ Relief Fund”, which shall consist of any sums that are, from time to time, made available to carry out the objects and purposes of this article. The fund shall be in the custody of the State Treasurer and disbursements from the fund shall be made upon requisition signed by the executive director to those persons entitled to participate in the fund and in such amounts to each participant that are provided in section three of this article.~~

~~(b) Effective upon termination of the commission, the “Disabled Workers’ Relief Fund” shall be administered by the successor to the commission and the administrative duties assigned to the executive director shall be transferred to the chief executive officer of the successor to the commission.~~

Persons who are receiving benefits from the Disabled Workers’ Relief Fund at the time the amendments made to this article by the Legislature during the 2022 regular session become effective shall continue to receive said benefits as awarded.

§23-4A-2. To whom benefits paid.

[Repealed.]

§23-4A-3. Computation of benefits.

[Repealed.]

§23-4A-4. Mode of payment.

[Repealed.]

§23-4A-5. Employers providing own system of compensation.

[Repealed.]

§23-4A-6. Powers of commission over disabled workers’ relief fund.

[Repealed.]

§23-4A-8. Disabled workers’ relief fund; how funded.

[Repealed.]

§23-4A-9. Transfer of authority to the Insurance Commissioner.

[Repealed.]

Article 4b. coal-workers’ pneumoconiosis fund.

§23-4B-2. Coal-Workers’ Pneumoconiosis Fund established.

For the relief of persons who are entitled to receive benefits by virtue of Title IV of the federal Coal Mine Health and Safety Act of 1969, as amended, for claims incurred under said Act, including all claims where the date of last exposure is on or before December 31, 2005, without regard to the date the claim is filed, there is continued a fund to be known as the Coal-Workers’ Pneumoconiosis Fund ~~which fund shall be separate from the Workers’ Compensation Fund~~. The Coal-Workers’ Pneumoconiosis Fund shall consist of premiums and other funds paid to the fund by employers, subject to the provisions of Title IV of the federal Coal Mine Health and Safety Act of 1969, as amended, who shall elect to subscribe to the fund to ensure the payment of benefits required by the Act for claims incurred under said Act, including all claims where the date of last exposure is on or before December 31, 2005, without regard to the date the claim is filed.

The State Treasurer shall be the custodian of the Coal-Workers’ Pneumoconiosis Fund and all premiums, deposits, or other moneys paid to the fund shall be deposited in the State Treasury to the credit of the Coal-Workers’ Pneumoconiosis Fund. Disbursements from the fund shall be made upon requisition signed by the ~~Executive Director of the Workers’ Compensation Commission to those persons entitled to participate in the fund:~~ *~~Provided,~~* ~~That effective upon the termination of the Workers’ Compensation Commission, disbursement from the Coal-Workers’ Pneumoconiosis Fund shall be made upon requisitions signed by the~~ Insurance Commissioner. ~~The Insurance Commissioner shall collect any unpaid premium and deposit the same in said fund.~~ The West Virginia Investment Management Board may invest any surplus, reserve, or other moneys belonging to the Coal-Workers’ Pneumoconiosis Fund in accordance with §12-6-1 *et seq.* of this code.

§23-4B-4. Who may subscribe.

Only those employers who are subject to the provisions of Title IV of the federal Coal Mine Health and Safety Act of 1969, as amended, may elect to subscribe to the Coal-Workers’ Pneumoconiosis Fund to insure the liability imposed upon such employers under the provisions of Title IV of the Act. Coverage by the Coal-Workers’ Pneumoconiosis Fund will be provided only for claims incurred under the Act, including all claims where the date of last exposure is on or before December 31, 2005, without regard to the date the claim is filed. Pursuant to §23-4B-9 of this code, the Coal-Workers’ Pneumoconiosis Fund was closed to new subscribers after December 31, 2005, upon the termination of the former Workers’ Compensation Commission. Only those persons entitled to benefits under §23-4B-3 of this code and who were employed by employers who elected to subscribe to the Coal-Workers’ Pneumoconiosis Fund prior to its closure may apply for benefits.

§23-4B-5. Payment of benefits.

Upon receipt of an order of compensation issued pursuant to a claim for benefits filed under the provisions of Title IV of the federal Coal Mine Health and Safety Act of 1969, as amended, for claims incurred under said Act, including all claims where the date of last exposure is on or before December 31, 2005, without regard to the date the claim is filed, the ~~executive director~~ Insurance Commissioner shall disburse the Coal-Workers’ Pneumoconiosis Fund in the amounts and to the persons as directed by the order. ~~Provided, That effective upon the termination of the Workers’ Compensation Commission, disbursement from the Coal-workers’ Pneumoconiosis Fund shall be made upon requisitions signed by the Insurance Commissioner.~~

**§23-4B-6. Coal-workers’ pneumoconiosis fund; how funded.**

[Repealed.]

§23-4B-7. Administration.

~~(a) The Coal-Workers’ Pneumoconiosis Fund shall be administered by the Executive Director of the Workers’ Compensation Commission, who shall employ any employees necessary to discharge his or her duties and responsibilities under this article. All payments of salaries and expenses of the employees and all expenses peculiar to the administration of this article shall be made by the State Treasurer from the Coal-Workers’ Pneumoconiosis Fund upon requisitions signed by the executive director.~~

~~(b) Notwithstanding any provision of this code to the contrary, effective from the termination of the Workers’ Compensation Commission, the~~ The Coal-Workers’ Pneumoconiosis Fund shall be administered by the Insurance Commissioner, who shall employ any employees and contract with any parties necessary to discharge his or her duties and responsibilities under this article. All payments of salaries and expenses of the employees and all expenses peculiar to the administration of this article shall be made by the State Treasurer from the Coal-Workers’ Pneumoconiosis Fund upon requisitions signed by the Insurance Commissioner. *Provided,* That the employers’ mutual insurance company established pursuant to article two-c of this chapter shall be the administrator of the Coal-Workers’ Pneumoconiosis Fund for a term not to exceed three years following the termination of the Workers’ Compensation Commission pursuant to an agreement to be entered into between the Insurance Commissioner and the Company prior to the termination of the Workers’ Compensation Commission. The Company’s administrative duties may include, but not be limited to, receipt of all claims, processing said claims, providing for the payment of said claims through the State Treasurer’s office and ensuring, through the selection and assignment of counsel, that claims decisions are properly defended. Any contract entered into by the Insurance Commissioner for the administration of the Coal-Workers’ Pneumoconiosis Fund thereafter shall be subject to the procedures set forth in article three, chapter five-a of this code.

§23-4B-8. Separable from workers’ compensation fund.

[Repealed.]

§23-4B-8a. Legislative findings; transfers to the state; maximum transfer authorization; purpose for which moneys transferred may be disbursed and expended; maximum amount of transfer authorization; terms and conditions for repayment; premiums to be set without regard to transfers; creation of special account in State Treasury.

[Repealed.]

§23-4B-8b. Transfer of funds to workers’ compensation fund.

[Repealed.]

§23-4B-9. Closure of Coal-Workers’ Pneumoconiosis Fund ~~and coverage provided by the successor of the commission~~.

Upon the termination of the ~~commission~~ former Workers’ Compensation Commission, the Coal-Workers’ Pneumoconiosis Fund shall close ~~and the company shall offer insurance to provide for the benefits required by this article until at least December 31, 2008~~ to new subscribers. All claims payment obligations, including indemnity benefits, medical benefits, administrative, and all other expenses necessary for the administration and defense of claims, where the date of last exposure is on or before December 31, 2005, without regard to the date the claim is filed, shall be an obligation of the Coal-Workers’ Pneumonoconiosis Fund. ~~created in this article and not of the company.~~

ARTICLE 4C. EMPLOYERS’ EXCESS LIABILITY FUND.

§23-4C-1. Purpose.

[Repealed.]

§23-4C-2. Employers’ excess liability fund established.

[Repealed.]

§23-4C-3. Payment of excess damages from fund.

[Repealed.]

§23-4C-4. Employers’ excess liability fund; how funded.

[Repealed.]

§23-4C-5. Administration.

[Repealed.]

§23-4C-6. Novation to the successor of the commission.

[Repealed.]

NOTE: The purpose of this bill is to revise outdated provisions within Chapter 23 of the West Virginia Code, which pertains to workers’ compensation. Much of the language in Chapter 23 is antiquated and predates the 2005/2006 regulatory transition from a state-operated monopolistic system for workers’ compensation to a competitive, private market system. The bill also repeals certain sections and articles within Chapter 23 that are obsolete.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.