

TITLE 11 LABOR AND WORKERS' COMPENSATION
CHAPTER 4 WORKERS' COMPENSATION
PART 13 CONTROLLED INSURANCE PLANS

11.4.13.1 ISSUING AGENCY: New Mexico Workers' Compensation Administration (WCA).
[11.4.13.1 NMAC - N, 11/15/04]

11.4.13.2 SCOPE: These rules cover all parties regulated pursuant to NMSA 1978, Section 52-1-4.2 and all parties seeking to establish a "controlled insurance plan" or a "wrap-up " insurance plan, as defined below, for the purpose of insuring workers' compensation liability.
[11.4.13.2 NMAC - N, 11/15/04]

11.4.13.3 STATUTORY AUTHORITY: The director is authorized by NMSA 1978, Section 52-5-4 to adopt reasonable rules and regulations to implement the legislative purposes of the Workers' Compensation Act (Act). The director is empowered to seek administrative penalties pursuant to NMSA 1978, Section 52-1-61. Regulatory authority over controlled insurance plans is set forth at NMSA 1978, Section 52-1-4.2.
[11.4.13.3 NMAC - N, 11/15/04]

11.4.13.4 DURATION: Permanent.
[11.4.13.4 NMAC - N, 11/15/04]

11.4.13.5 EFFECTIVE DATE: November 15, 2004 unless a later date is cited at the end of a section.
[11.4.13.5 NMAC - N, 11/15/04]

11.4.13.6 OBJECTIVE: This part sets forth the requirements and processes for application and regulation of controlled insurance plans, enumerates prohibited acts and sets forth enforcement procedures.
[11.4.13.6 NMAC - N, 11/15/04]

11.4.13.7 DEFINITIONS:

- A. "Unit statistical data" means the detailed exposure, premium, and loss (claim) information at the classification code level. Data providers submit unit statistical data to the designated rate service organization for use in ratemaking and experience rating.
- B. "Single construction site" means the defined contiguous geographical area in which all accidents that occurred during the duration of the controlled insurance plan shall be covered by the controlled insurance plan.
- C. "Noncontiguous construction site" means an area, or areas, in which construction is taking place that is not described on the official application, or amended application, as being within the controlled insurance plan by both a narrative description and a map designation which shows the construction site outlined by a single, non intersecting, boundary line.
- D. "Controlled insurance plan," "OCIP," "CCIP," "wrap-up," "owner controlled insurance plan," and "contractor controlled insurance plan" individually and collectively mean the controlled insurance plan subject to regulation under this rule.
- E. "Same project" means a construction project on a single construction site defined and funded at the time of the application required by these rules.
- F. "Director" means the director of the workers' compensation administration or his designee.
- G. "WCA" or "agency" means the workers' compensation administration of the state of New Mexico.
- H. "Applicant" means the person or entity that sought approval of a controlled insurance plan, any person designated by the applicant as their agent for interaction with the WCA and any substituted applicant approved as a substitute in writing by the director.
- I. "Equipment and furnishings" means any item that is shown in, or specified on, construction documents for the single construction site.

[11.4.13.7 NMAC - N, 11/15/04]

11.4.13.8 APPLICATIONS:

- A. Any party proposing a controlled insurance plan pursuant to NMSA 1978, Section 52-1-4.2, shall submit an application for approval to the director on a form provided for that purpose not less than 30 days prior to the commencement of bidding procedures for the primary contractor.

(1) A provisional or contingent application for approval shall be allowed, provided that neither final approval nor permission to break ground may be given to any provisional or contingent application.

(2) Approvals of provisional or contingent applications are advisory only and no approval that is not designated as a final approval and that does not bear the signature of the director shall be deemed final.

(3) Every application for approval of a controlled insurance plan shall contain a detailed financial statement demonstrating that the aggregate construction cost, as statutorily defined, has been satisfied, and further showing that the sources of funding for the project conform with the definition of the term, "same project" contained in these rules. The financial statement shall be supported by an affidavit executed by the signatory to the application attesting to the accuracy and completeness of the financial statement.

B. No controlled insurance plan construction project shall break ground until final written approval of the controlled insurance plan, subject to amendment, is provided by the director. The director is authorized to seek injunctive relief to prohibit construction at a site until final approval of an application for a controlled insurance plan is given or the construction project is operated under a non-controlled insurance plan otherwise complying with the Act, in addition to any other relief sought.

C. Failure to provide and maintain current information on the application form on file with the director, and to update any change information within ten calendar days of the change shall constitute a violation of these rules. The applicant shall have a continuing duty to maintain the currency and correctness of the application on file with the director.

D. Amendments to an application to conform with any modifications to the job, modifications to the safety plan or modifications to the designated single construction site and all other information required by this rule or the application for approval of a controlled insurance plan are required prior to the commencement of work pursuant to the amended provisions.

(1) The insurance policy for a controlled insurance plan must be conformed to any revisions in the application prior to commencement of work pursuant to the revisions.

(2) All contractors and subcontractors shall be notified in writing upon any request for amendment or revision to the application, and shall be separately notified of the approved amendments or revisions prior to the commencement of work pursuant to any approved amendments or revisions.

E. The director or his designee shall be available to applicants for controlled insurance plans to provide counseling in aid of the development of acceptable applications, but in no event shall such assistance be construed as the director's approval of the application or as a promise that the director will approve an application.

F. The director or his designee shall attempt to complete the application review process within 30 days of submission of the final application, and shall inform the applicants in writing of the reasons for, and expected duration of, any delay beyond the 30 day period.

G. The applicants shall specify the names of at least two individuals authorized to accept notices and service of process applicable to the controlled insurance plan. For each named individual, both street and mailing addresses shall be specified, and the applicant shall notify the WCA of any changes in the authorized representatives for receipt of notices and process or the applicable addresses for such representatives within three business days of any such change.

H. The applicant shall specify the name of at least one person, who may also be designated to perform other functions under this part, who is knowledgeable concerning the handling of workers' compensation claims under the Act. The director shall approve the designated claims management professional after submission of credentials and resume, prior to the commencement of the work. The designated claims management professional shall be available within 24 hours of any accident at the single construction site and shall consult with the injured worker's employer within 72 hours of any accident at the single construction site, concerning the handling of the claim and return to work issues.

[11.4.13.8 NMAC - N, 11/15/04]

11.4.13.9 CONTROLLED INSURANCE PLAN CONSIDERATION UNDER THE EXTRA-HAZARDOUS EMPLOYER PROVISIONS OF THE WORKERS' COMPENSATION ACT.

The controlled insurance plan shall be considered a single employer for purposes of WCA regulations concerning extra-hazardous employers, promulgated pursuant to NMSA 1978, Section 52-5-1.3 (B). The North American industrial classification system (NAICS) code applicable to the general contractor shall be the industry code utilized for comparison of the controlled insurance plan loss record to its industry standard. The controlled insurance plan project shall be examined every 90 days, while construction is ongoing, for purposes of determining extra-hazardous employer status.

[11.4.13.9 NMAC - N, 11/15/04]

11.4.13.10 SAFETY PLANS

A. Criteria for approval. The following requirements must be met for initial approval of a safety plan and for final approval of an application for a controlled insurance plan. Failure to maintain continuous compliance with each of these requirements shall be considered a violation of these rules and the director shall be authorized to seek injunctive action to prohibit construction work until such failure is corrected.

(1) New Mexico OSHA compliance;

(2) Appointment of a site safety manager acceptable to the director;

(a) The site safety manager shall have a minimum of three-year's experience in programs covered by 29 CFR part 1910 or 29 CFR part 1926, as applicable.

(b) An applicant shall submit a resume and credentials of the proposed site safety manager not less than 14 days before commencement of work on the project. The director, or his designee, shall review the resume credentials within 14 days. Work on the project shall not commence until the director or his designee has approved a site safety manager.

(c) An applicant shall submit a resume and credentials for any proposed substitute or standby site safety manager prior to any construction activities at the single construction site overseen by the substitute or standby site safety manager.

(d) In no event shall the applicant allow work at the single construction site to proceed for more than 8 continuous hours without the approved site safety manager, or approved substitute or backup site safety manager being physically present at the single construction site.

(e) All approved safety plans must provide that the approved site safety manager, or approved standby or substitute site safety manager shall have plenary authority to close down the construction project in whole or in part, in the event that hazards to health or safety of workers present an imminent danger to worker health or safety. The approved site safety manager, backup site safety manager or substitute site safety manager has a duty to close down the construction project, in whole or in part, upon discovery of an imminent danger to worker health or safety that cannot be immediately rectified.

(3) A plan for coordination of site safety programs among all contractors and subcontractors by the site safety manager, including access for contractor and subcontractor safety personnel.

(a) The plan shall provide for review of the controlled insurance plan safety plan and drug and alcohol testing provisions by safety personnel employed by, or contracted to, individual contractors and subcontractors.

(b) The plan shall provide that any safety provisions, and drug and alcohol testing programs required by the contractor or subcontractor that are more stringent in the safety provisions or drug and alcohol testing programs required by the approved safety plan shall be enforceable against the employees and working conditions of the contractor or subcontractor and shall not be superseded by the approved controlled insurance plan safety plan or the approved controlled insurance plan drug and alcohol screening program.

(4) Third party safety consultant

(a) The applicant shall engage the services of an independently contracted safety consultant ("third party safety consultant") to provide independent inspections and oversight on safety issues to assist the site safety manager and the WCA.

(i) The third party safety consultant shall conduct work environment evaluation inspections of the single construction site at least twice per month during construction activities.

(ii) The third party safety consultant shall notify the site safety manager immediately of any hazardous condition disclosed by the third party safety consultant's inspection

(iii) The third party safety consultant shall not be terminated in response to making a good-faith finding that a safety hazard exists or in response to reporting such safety violations as provided by these rules.

(b) The third party safety consultant shall have credentials at least equal to those required of the site safety manager.

(c) The third party safety consultant shall not be the backup site safety manager.

(d) The credentials of the third party safety consultant shall be presented to, and approved in writing by, the WCA prior to the commencement of construction

(e) In the event that the third party safety consultant is replaced during construction activities, the credentials of the replacement third party safety consultant shall be presented to the WCA within no more than five working days of the earlier of the termination of the contract or the cessation of work by the prior third party safety consultant.

(f) The third party safety consultant shall prepare written reports at least every 30 days from the date of commencement of construction detailing any safety issues or hazards discovered during the inspections that occurred during the prior month. Said reports shall be provided to the WCA, all contractors and all sub-contractors.

(g) The third party safety consultant shall also generate a written report in the event that he or she discovers any condition or hazards that constitute an imminent danger to worker health or safety that the independent safety consultant believes would justify closure of the construction site in whole or in part by the site safety manager. Said report shall be provided to the WCA, all contractors and all subcontractors within 2 days of the discovery of the condition or hazard.

(5) Drug and alcohol screening, complying with provisions of NMSA 1978, Section 52-1-12.1. Compliance with the drug and alcohol screening plan shall be the responsibility of the applicant provided that the applicant shall implement any more stringent plan incorporated pursuant to Subparagraph (a) of Paragraph (3) of Subsection A of 11.4.13.10 NMAC.

(6) Continuous coverage of the construction site shall be provided by an on-site registered nurse, who shall have demonstrated experience in the treatment of workers' compensation claimants, during all working hours.

(a) Credentials and resume for the registered nurse must be presented to the WCA and approved prior to the beginning of construction.

(b) Credentials for any registered nurse serving in a backup capacity or as a substitute for the original approved registered nurse must be presented to the WCA and approved prior to the first instance of coverage by that nurse.

(c) Should the retention of a registered nurse constitute a hardship on the applicant because of location or any other circumstance, the applicant may petition the director for a waiver of this requirement pursuant to section 11 of 11.4.13 NMAC and the substitution of a certified, full-time, emergency medical technician (EMT). The applicant must demonstrate compliance.

(7) Emergency medical services plan

(a) The plan must include a provision requiring prominent display at the work site giving notice to workers of emergency facilities to be used in the event of an accident, including a map directing workers to the appropriate emergency facilities.

(b) The plan must include a provision requiring prominent display at the work site of notices concerning any contracted physicians or medical facilities.

(c) The plan must contain a provision for providing notice of initial choice of health care providers to workers, in compliance with WCA regulations.

(d) The plan must contain evidence of planning and contractual preparation for emergency medical evacuation by air, when medically appropriate.

(8) Evidence of a plan for facilitating return to work of injured employees.

(a) The plan must provide for appropriate communication to workers to ensure to the extent possible they are fully apprised concerning return to work policies.

(b) The plan must provide for the direct involvement of the employer of the injured worker in return to work planning and implementation commencing as soon as possible after the injury to the worker.

(c) The plan must provide for continued communication concerning return to work between the insurer, the worker and employer for all injuries persisting beyond the completion of the project.

(9) The site safety manager must certify to the owner of the property upon which the controlled insurance plan project is being built, all contractors and subcontractors and to the independent safety consultant, and to the WCA, that each worker on the single construction site has been specifically safety trained for each job function that they perform, within 10 days of the commencement, or change, of the workers job duties on the single construction site. The certification shall be on a form approved by the director.

(10) The plan must provide for communications provided to the applicant regarding substance abuse testing, medical treatment and medical conditions, or injury reports to be promptly and specifically communicated to the workers employer within four calendar days of the communication to the applicant. The applicant is solely responsible for this requirement. The applicant shall specify, to the WCA and to each contractor and subcontractor, before the commencement of work at the single construction site, the names of at least two persons working full time at the single construction site who are authorized to assist the applicant in fulfilling this responsibility.

B. Failure to obtain approval for a safety plan or to maintain compliance with an approved safety plan is a serious violation of these rules and the director is authorized to seek injunctive relief to prevent commencement or continuation of construction until such situation is remedied in addition to any other relief sought.

[11.4.13.10 NMAC - N, 11/15/04; A, 12/29/06]

11.4.13.11 WAIVERS. A waiver of any non-statutory requirement in this Part may be sought by the applicant. No waiver of any requirement of this part shall be effective unless documented in writing, signed by the director. No waiver shall be granted under circumstances where the waiver has the effect of increasing the risk of injury or accident to any worker on the project, or increasing the impact or effect of any accidental injury or occupational disease upon any worker on the project. The director may consult with in-house or independent safety experts in making a determination under this section, but his determination shall not be overturned unless it is arbitrary, capricious, abusive of discretion or otherwise not in compliance with law.

[11.4.13.11 NMAC - N, 11/15/04]

11.4.13.12 BID NOTICES TO CONTRACTORS AND SUBCONTRACTORS

A. All bid notices to contractors and subcontractors shall include specification of the single construction site proposed, and shall include a copy of the proposed controlled insurance safety plan.

B. The bid procedure utilized by the applicant must include a mechanism for contractors and subcontractors to have questions concerning the controlled insurance plan answered before the bid is due.

[11.4.13.12 NMAC - N, 11/15/04]

11.4.13.13 DISPUTES CONCERNING APPROVAL OF THE APPLICATION FOR APPROVAL OF A CONTROLLED INSURANCE PLAN AND FOR THE REQUIRED SAFETY PLAN

A. All application materials, and safety plan materials shall be submitted to the director at least 30 days before the planned commencement of construction.

B. Amendments to the application or safety plan, and any waivers of requirements, that are negotiated between the WCA and the applicant shall only be effective if reduced to writing and signed by both parties.

C. In the event that an impasse develops in negotiations or disputes arising from the application process, the safety plan or request for waivers of requirements, the director shall designate an informal dispute resolution coordinator to attempt to bring the parties together to help them reach a mutually agreeable solution.

D. In the event the informal dispute resolution fails to resolve the dispute, either the applicant or the WCA can request a formal hearing before the director.

E. The director, or his hearing officer, shall hear the positions of both sides and render an initial ruling within 15 days of the hearing. Motions practice and discovery procedures shall not be allowed. The rules of evidence are relaxed to the extent possible, consistent with the need to maintain order in the hearing and reach a fair decision.

F. Appeal from the ruling the director or his hearing officer after a formal hearing shall be by writ of certiorari to the district court, pursuant to SCRA 01-075.

[11.4.13.13 NMAC - N, 11/15/04]

11.4.13.14 PROHIBITED ACTS. The following acts are prohibited:

A. The establishment of the controlled insurance plan for projects that do not have an aggregate construction value in excess of \$150 million, including equipment and furnishings, expended within a five-year period as provided in NMSA 1978, Section 52-1-4.2 (A) and Section 11.4.7.9 of these rules.

B. The establishment of a rolling wrap-up plan or establishment of a construction project insured under a rolling wrap-up plan.

C. Establishment of a controlled insurance plan on a site other than the single construction site, or establishment of the controlled insurance plan on a noncontiguous construction site.

D. Failure to include appropriate notice of the controlled insurance plan in request for bids or request for proposals to construction contractors and subcontractors, and failure to include an accurate description of the single construction site or failure to include a copy of the proposed controlled insurance safety plan with the request for bids or request for proposals.

E. Failure to include copies of specifications for the controlled insurance plan with request for bids or request for proposals to construction contractors and subcontractors and failure to provide a mechanism for contractors and subcontractors to have their questions concerning the controlled insurance plan answered before the bid or proposal is due.

F. Failure to timely file the contract for a controlled insurance plan and evidence of compliance with NMSA 1978, Section 52-1-4.2 (A-E) with the WCA and the superintendent insurance at least 30 days before the date on which the applicant is to begin receiving bids or proposals on the project.

G. Failure to request and obtain written approval from the WCA of the application for approval and the site safety plan for the controlled insurance project, prior to the commencement of work on the project.

H. Failure to distribute project performance based refunded premiums or dividends to each participating contractor or subcontractor on a proportional basis, if such refunded premiums or dividends are provided for in the contract.

I. Failure to establish a method for timely reporting of job related injuries to employees of the contractor and subcontractors to their specific employer, the controlled insurance plan insurer and the WCA.

J. Failure to maintain and report unit statistical data to the insurance company writing the workers' compensation insurance policies for the contractors and subcontractors participating in the controlled insurance plan project within the time frame required by the insurance company.

K. Failure by contractors and subcontractors participating in the controlled insurance plan project to allow access to payroll records for payroll auditing purposes.

L. Failure to provide contractors and subcontractors with actual specific payroll audit data following the end of the annual policy period.

M. Failure to provide information to contractors and subcontractors concerning injuries to their workers in a form and format designed to quickly and accurately inform the contractors and subcontractors concerning the nature and extent of injuries and the circumstances in which the injury occurred.

N. Failure to cover the injury to an employee of any contractor or subcontractor that occurs within the physical confines of the single construction site.

O. Failure to update and keep current the application, safety plan, narrative description of the single construction site and visual diagram of the single construction site.

P. Failure to take steps to conform the controlled insurance plan policy to the single construction site definition before work is done, or knowingly allowing work to be commenced in any area intended to be covered by the controlled insurance plan, without ensuring that the controlled insurance plan policy is written to conform its geographic scope of coverage to the single construction site.

Q. Failure to comply with any provision of these rules, or to knowingly allow any contractor, subcontractor or employee or independent contractor of the general contractor to violate any provision of these rules.
[11.4.13.14 NMAC - N, 11/15/04]

11.4.13.15 ENFORCEMENT

A. In the event of violation of any of these rules, or in the event of the occurrence of any prohibited acts specified in these rules, the WCA may seek any or all of the following penalties singly or in combination, against the applicant, any individual responsible for the performance or non-performance of any duty or prohibited act and, with respect to injunctive relief, against the continuation of the controlled insurance project:

(1) A fine of up to \$1000 for each violation pursuant to NMSA 1978, Section 52-1-61.

(2) A fine of up to \$1000 for each day of the continuing violation, after notice is served upon the designated representative of the applicant that the director has made a finding of probable cause that a continuing violation of these rules has occurred.

(3) Injunctive relief for the cessation of construction activities at the single construction site for the noncontiguous construction site until full compliance with these rules is achieved, as specifically authorized in these rules.

B. The procedures to be utilized in enforcement proceedings pursuant to this section as set forth in 11 NMAC 4.5.

[11.4.13.15 NMAC - N, 11/15/04]

HISTORY OF 11.4.13 NMAC: [Reserved]