

TITLE 11 LABOR AND WORKERS' COMPENSATION
CHAPTER 4 WORKERS' COMPENSATION
PART 8 INDIVIDUAL SELF-INSURANCE

11.4.8.1 ISSUING AGENCY: Workers' Compensation Administration.
[11.4.8.1 NMAC - Rp, 11.4.8.1 NMAC, 10/1/15]

11.4.8.2 SCOPE: This rule applies to all corporations, companies or other entities applying for self-insurance, those who are or were certified for self-insurance, and to their agents and representatives.
[11.4.8.2 NMAC - Rp, 11.4.8.1 NMAC, 10/1/15]

11.4.8.3 STATUTORY AUTHORITY: Chapter 52 NMSA 1978.
[11.4.8.3 NMAC - Rp, 11.4.8.3 NMAC, 10/1/15]

11.4.8.4 DURATION: Permanent.
[11.4.8.4 NMAC - Rp, 11.4.8.4 NMAC, 10/1/15]

11.4.8.5 EFFECTIVE DATE: October 1, 2015, unless a later date is cited at the end of a section.
[11.4.8.5 NMAC - Rp, 11.4.8.5 NMAC, 10/1/15]

11.4.8.6 OBJECTIVE: The purpose of these rules is establish the minimum qualification criteria for a private company or qualifying public entity to apply to the director for permission to self-insure their workers' compensation risk and to establish the criteria to maintain such self-insured status after it is granted by the director.
[11.4.8.6 NMAC - Rp, 11.4.8.6 NMAC, 10/1/15]

11.4.8.7 DEFINITIONS:

A. "Approved excess insurer" means an insurer domiciled within the United States of America or an alien insurer listed in the national association of insurance commissioner's (NAIC) quarterly listing of alien insurers with a rating of "A" or better by A.M. Best or similar rating organization approved by the director.

B. "Approved security" means a letter of credit or surety bond issued by an approved financial institution or surety respectively and used for the payment of claims and related expenses in the event of default by the employer and for reimbursement to the guarantee fund for any benefits paid by the fund on behalf of the employer.

C. "Approved surety" means a financial institution with at least one location in New Mexico or a New Mexico admitted carrier, that is not in the control of the self-insured, and that has a rating of "A" or better from A.M. Best, a rating of "good" or better by Bauer Financial, or similar ratings from organizations approved by the director.

D. "Completed application" means an application for certificate of self-insurance that demonstrates all the eligibility criteria and that attaches all required documentation, as set forth in these rules.

E. "Director" means the director of the workers' compensation administration.

F. "Financially solvent" means an employer's current and continuing ability to pay, as they become due, all existing and future obligations, including workers' compensation benefits to which it is or becomes obligated under the Act.

G. "Guarantee fund" means the fund created by Section 52-8-7(A) NMSA 1978 to provide benefits to workers and the families of workers of private individual self-insurers who become insolvent or otherwise unable to meet their financial obligations.

H. "Guarantee board" means the board of directors of the self-insurers' guarantee fund commission.

I. "Parent" means ownership of a subsidiary entity of greater than 50 percent.

J. "Reserves" means the value of claims without regard to expected excess insurance or other recoveries.

K. "Risk management program" means an entity's claims administration personnel, policies and procedures, safety program and personnel, and adequate excess insurance.

L. "Tangible net worth" means net worth less intangible assets.

[11.4.8.7 NMAC - Rp, 11.4.8.7 NMAC, 10/1/15]

11.4.8.8 INDIVIDUAL SELF-INSURANCE:

A. An employer seeking to be certified as a self-insurer under the Act shall make application on a form prescribed by the director.

B. The director shall notify the chairman of the guarantee board of the identity of any applicant for self-insurance within 15 days of the receipt of the application. The guarantee board shall respond in writing to the director within 30 days of receipt of the notification or be deemed to have expressed no objection to the applicant's membership in the commission. The administration's self-insurance audit staff shall take any written objections into account when making its final recommendation to the director.

C. The director may decline to approve an application for self-insurance if not satisfied that the employer will be able to meet all its obligations under the Act and these rules.

D. Eligibility: Applicants for self-insurance must demonstrate the following base eligibility criteria, each of which must be continuously maintained during the period of self-insurance to maintain eligibility:

(1) a current tangible net worth of at least two million, five hundred thousand dollars (\$2,500,000);

(2) the employer has been in business for a period of not less than three years. This requirement may be waived by the director under circumstances where the form of business organization has changed within the three year period but the management and function of the business entity has substantially stayed the same;

(3) a strong trend of financial health and financial solvency;

(4) an acceptable risk management program;

(5) workers' compensation specific excess insurance from an approved excess insurer with retention of two hundred fifty thousand dollars (\$250,000) or less per occurrence and statutory upper limits; an acceptable policy of excess insurance shall provide coverage for all provisions of the Act, contain no exclusion of such coverage, and include a current New Mexico amendatory endorsement;

(6) an approved security issued in favor of the New Mexico self-insurers' guarantee fund;

(7) a bona fide employment relationship exists between the employer and the employees which it proposes to self-insure; employees who receive wages from or are under the control of any other entity with respect to the day to day supervision and assignment of the work may not come under an individual self-insurance program; employee leasing companies are prohibited from receiving a certificate of self-insurance;

(8) if the employer is a subsidiary, a parental guarantee from the subsidiary's upper-most parent in a form acceptable to the director; a parent company may self-insure its subsidiaries under one certificate in the name of the parent provided the parent meets all eligibility criteria and provides parental guarantees for the subsidiaries and guarantees by each subsidiary for the other(s); and

(9) any other reasonable criteria deemed necessary by the director to guarantee payment of workers' compensation claims to injured workers.

E. Application: The employer's application for certificate of self-insurance shall be accompanied by documentation sufficient to demonstrate eligibility, including the following:

(1) a one hundred fifty dollar (\$150) non-refundable filing fee made out to the workers' compensation administration;

(2) proof of valid workers' compensation insurance in force for the three years preceding the date of application and continuing in force up to the approved date of self-insurance;

(3) employer's audited financial statements for the most recent fiscal year, presented in accordance with generally accepted accounting principles (GAAP), and financial statements for the preceding two years;

(4) if the employer is a corporation, proof of a resolution adopted by employer's board of directors authorizing and directing the corporation to undertake to self-insure its risks and to comply with the provisions of the Act and the rules of the director; a similar official ratification is required from the governing body of any governmental entity;

(5) a detailed accounting of the employer's workers' compensation loss history for the last three years, and experience modifiers for the same period, which shall include all claims covered under a claims "buy-back" program and deductible programs;

(6) an explanation of the safety program, a copy of the safety manual, and resumes of all personnel responsible for the New Mexico safety program;

(7) proof of a proposed policy for workers' compensation excess insurance that complies with the eligibility requirements set forth in this rule, including the declaration page of such policy and all endorsements providing or limiting coverage in New Mexico.

- (8) a letter of intent from an approved surety to issue an approved security in an amount and form to be specified by the director, but not less than two hundred thousand dollars (\$200,000); and
- (9) proof of compliance with Section 52-1-6.2 NMSA 1978 for the most recent year.

F. Certification.

(1) The director shall act upon a completed application for a certificate of self-insurance within 90 days.

(2) Upon approval, the director shall issue a certificate acknowledging the employer's status as a self-insured under the act; the certificate shall be effective continuously until terminated at the request of the self-insured or revoked by the director.

(3) Upon a merger or other combination by two self-insured employers, the employers may continue to be self-insured under one certificate provided that the administration is given adequate disclosure, and guarantees and subject to the approval of the director.

(4) The director may issue a provisional certificate, good for not more than one year, to a self-insurer if the director is convinced that any defects are minor in nature and can be corrected within the one year period.

G. Continuing eligibility requirements: Following certification by the director, a self-insured employer shall:

(1) notify the director prior to liquidation, sale, or transfer of ownership and prior to any material change in the employer's financial condition or in New Mexico operations;

(2) obtain the director's approval prior to making any material change in any excess insurance policy or approved security;

(3) notify the director prior to any change in the provider or scope of risk management program;

(4) have at least one claims representative licensed and located within New Mexico to pay workers' compensation claims of claimants residing or located in New Mexico, and to ensure that all adjusters and third party administrators are licensed in New Mexico, regardless of their physical location, and to promptly pay all claims from accounts in financial institutions located within New Mexico;

(5) be subject to sanctions for any act or omission by its agents;

(6) provide proof of coverage for excess insurance policies within 30 days of effective date or renewal and to provide the complete policy within 60 days of effective date or renewal; unauthorized changes appearing in any policy will require immediate remediation by way of reinstatement of approved terms or other measures deemed appropriate by the director; and

(7) comply with all conditions required as stated in the employer's self-insurance certificate.

H. Financial responsibility and payment of claims:

(1) The employer shall pay claims for which it becomes obligated in accordance with the act and these rules.

(2) The payment of claims shall continue without regard to the self-insurance status of the employer and without regard to any amount of security posted, whether or not the security is called. An approved security shall be maintained until all claims have expired, subject to determination of the director.

(3) The employer shall maintain a level of reserves at the full undiscounted value of each claim, including indemnity and medical only claims, sufficient to pay all claims and associated expenses.

(4) The employer shall promptly pay guarantee fund assessments, provide documentation supporting assessment calculations, and maintain in good standing membership in the guarantee fund.

(5) The employer shall report loss runs, regardless of type or cost, to the administration in the format prescribed by the director on a semi-annual basis not later than January 31 and July 31 of each year.

(6) Failure to maintain minimum financial criteria and an approved risk management program may result in increased security requirements, termination of self-insurance status, or any other measure deemed necessary by the director for the protection of benefits of injured workers and the guarantee fund.

(7) Upon voluntary or involuntary termination of employer's self-insurance status, the employer shall:

(a) provide any information requested by the director for the purpose of establishing claims liability and financial condition;

(b) comply with any requirement by the director to increase security;

(c) make claims files available to the director for the performance of any audit, examination or review, or for administration of claims in the event of a default;

(d) notify the administration of any changes in address/location, pertinent personnel, claims administration services, location of claims files and related claims personnel, and financial condition; and

(e) promptly notify the director of the employer's current ownership, organizational structure and the employer's ability to pay workers' compensation obligations;

(8) All government entities must have a pre-funded system. All past, present, and future liabilities existing at any time shall be fully accounted for by liquid assets or other assets agreeable to the director. No government entity shall be required to post security.

(9) A self-insurer shall maintain compliance with the requirements of Workers' Compensation Act, WCA rules and the conditions set forth in its certificate of self-insurance.

I. Audits and examinations:

(1) An applicant or self-insured employer is subject to initial or periodic examination or audit by the administration to determine initial or continued eligibility for self-insurance. The applicant or self-insured agrees to bear the costs of any reviews or evaluations and to provide a reasonably private space to conduct the audit and all records required for such audits and examinations.

(2) Audits or examinations under these rules may include, but are not limited to:

(a) audits or reviews of the applicant's or self-insured's records regarding any representation made on its financial statement or application for self-insurance;

(b) audits or reviews of the applicant's or self-insured's records pertaining to its loss history, claims administration, reserves and claimant files;

(c) audits or reviews of safety programs;

(d) interviewing or taking the testimony of the applicant or self-insured, or any of its agents or employees, regarding any matter pertaining to the obligations of the applicant or self-insured under the act or the director's rules; and

(e) audits or examinations the director deems necessary to ensure a self-insured's continued compliance with these rules.

(3) An applicant or self-insured employer shall cooperate fully with administration representatives in any examination or audit and to attempt in good faith to resolve any issues raised in those examinations or audits.

(4) A self-insured employer shall provide its annual audited financial statements to the administration within 90 days of the end of each fiscal year.

J. Denials, revocation and probationary certificates:

(1) The denial, revocation, or probation of a certificate of self-insurance shall be made by an order signed by the director. Every such order shall state its effective date and shall concisely state what is ordered, the grounds on which the order is based, and the provisions of the act or rules pursuant to which the action is taken.

(2) The director shall deny an application for self-insurance if the employer has failed to demonstrate to the director's satisfaction that the employer meets all requirements of the Act and these rules or has failed to demonstrate its ability to meet all its obligations under the act.

(3) A certificate of self-insurance may be revoked or placed on probationary status if the director, with good cause, ceases to be satisfied that the employer is able to meet all its obligations under the act and these rules. The occurrence of any of the following events shall constitute good cause to revoke or place on probationary status a certificate of self-insurance:

(a) failure of the employer to comply with any provisions or requirements of the act, these rules, or any lawful order or communication of the director;

(b) failure of the approved surety to remain financially solvent, or any other impairment of any aspect of the employer's financial responsibility requirements;

(c) failure to comply with any other statutes, laws, rules, or regulations of the state of New Mexico;

(d) failure to cooperate with the administration to mitigate adverse consequences for injured workers caused by the employer filing for protection under the federal bankruptcy laws; or

(e) failure to maintain membership in the New Mexico self-insurers' guarantee fund commission in good standing.

(4) An employer that has been decertified or placed on probation must still comply with the financial responsibilities set forth in these rules and the following additional requirements:

(a) The security amount set after decertification shall account for both known claims and associated expenses, as well as claims incurred but not reported (IBNR) and associated expenses.

(b) If the employer is subject to Section 52-1-6 NMSA 1978, proof of coverage must be provided.

(c) No adjustments to the security will be allowed for three years from the date of the decertification. If after three years, the director has determined that adequate time has passed to reasonably determine the expected long-term liabilities and that there is no risk to benefits of injured workers or the guarantee fund, reduction in security may be approved. At that time, the director may, in his discretion, reduce or return some or all of the security.

(5) Probationary certifications:

(a) A probationary certificate means the temporary revocation of the self-insured's existing self-insurance certificate.

(b) Failure to comply with the Act or these rules may result in the issuance of a probationary certificate of individual self-insurance.

(c) During a probationary period, the employer must comply with all terms specified as conditions of probation within the probationary certificate or in any other lawful order of the director.

(d) The duration of the probationary period shall be within the director's discretion, but shall not extend for a period greater than one year.

(e) The probationary certificate may be withdrawn and the original certificate of self-insurance reinstated, if the self-insured comes into full compliance with the Act, these rules, and all probationary conditions. The reinstatement of the original certificate is subject to the sole discretion of the director.

(f) If the self-insured fails to come into compliance with the Act and the rules by the end of the probationary period, the self-insured's status as a self-insured will be revoked.

K. Recertification:

(1) Any employer formerly certified as a self-insurer who ceases to be certified may not apply for recertification until three years after revocation.

(2) An employer who seeks to reinstate its certificate of self-insurance shall reapply to the director on the form prescribed pursuant to these rules. A non-refundable filing fee of one hundred fifty dollars (\$150) must accompany the application for recertification.

(3) If there is a change of ownership whereby the controlling interest of a self-insured changes, the new ownership shall submit a new application to the director for a certificate of self-insurance. A non-refundable filing fee of one hundred fifty dollars (\$150) must accompany the new application.

L. Hearings: Any person aggrieved by a decision of the director under these rules may request in writing a hearing before the director. The request shall briefly state the respects in which the party is aggrieved, the relief sought, and the grounds relied upon as the basis of relief.

M. Penalty: In addition to any other sanctions provided herein, failure to comply with any of the provisions of the Act or these rules renders the applicant or self-insured employer subject to penalties as provided in Section 52-1-61 NMSA 1978.

N. Waiver: Any requirement contained in these rules may be waived by specific written authorization of the director. Any interested person may request such a variance or waiver in writing. [11.4.8.8 NMAC - Rp, 11.4.8.8 NMAC, 10/1/15; A, 9/30/16]

11.4.8.9 SELF-INSURERS' GUARANTEE FUND:

A. Commission membership is composed of all self-insurers as defined in Section 52-8-3(J) NMSA 1978, as a condition of their authority to individually self-insure in the state of New Mexico.

B. Withdrawal of membership:

(1) A member shall be automatically withdrawn from the commission upon the termination of its self-insurance certificate and payment of all assessments due to the date of such termination.

(2) Notwithstanding the termination of membership of a self-insured for whatever reason, that self-insured shall remain liable to the commission for any assessments imposed and based upon insolvencies occurring while the terminated self-insured was a member of the commission.

C. Board of directors:

(1) A board of directors shall be appointed pursuant to Section 52-8-5 NMSA 1978. Every member of the board of directors shall currently be a representative of a commission member in good standing. The board may adopt by-laws governing the functioning of the commission including the filling of vacancies on the board, removal of board members and conflicts of interest. The board of directors shall elect a chairperson, who shall also be president of the corporation, and a vice-chairman, who shall also be vice president of the corporation. The director shall be the secretary/treasurer of the corporation.

(2) The commission shall maintain such financial records as are necessary to properly reflect assessments, receipts and disbursements (including paid claims) of all funds of the commission. Such records shall also reflect the financial condition of the commission at all times. The commission shall make available its financial records to the administration when so requested.

(3) The commission shall make all necessary records available to an independent auditor to facilitate audits of the commission.

(4) All board members, and such other personnel as may be employed by the board, shall be bonded in an amount determined by the board to be adequate to protect the interests of the commission.

(5) The board may open one or more insured accounts in any number of state or federally chartered financial institutions located in the state of New Mexico, in order to conduct commission business. Reasonable delegation of deposit and withdrawal authority in such accounts may be made, consistent with prudent fiscal policy, but, except as is expressly provided herein, the withdrawal of commission funds shall require the signatures of any two members of the board.

D. Powers and duties of the commission:

(1) The commission, through its board of directors, shall have the power to:

- (a) sue and be sued and appear and defend in all actions and proceedings in its corporate name to the same extent as a natural person;
- (b) adopt and use a common corporate seal and alter the same; provided, however, that such seal shall always contain the words “not for profit corporation”;
- (c) elect or appoint such officers and agents as its officers shall require and allow them reasonable compensation;
- (d) make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, other obligations and secure any of its obligations by mortgage and pledge of any or all of its property, franchises or income;
- (e) purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use or otherwise deal in and with real and personal property, or any interest therein, wherever situated;
- (f) have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized;
- (g) purchase reinsurance or excess insurance as is determined by the board of directors to be necessary to effectuate the purposes and intent of Section 52-8-6(A) NMSA 1978;
- (h) review all applicants for membership in the commission and make recommendations to the director concerning the appropriateness of inclusion in, or termination from, membership in the commission with respect to any applicant or member;
- (i) provide for imposition of assessments upon members to insure the financial stability of the fund as provided in Section 52-8-6(A) NMSA 1978; and
- (j) request, upon a majority vote of the board, that the administration determine the condition of any member of the commission which the board in good faith believes may no longer be qualified to be a member of the commission; within 30 days of receipt of such request or for good cause shown, the administration shall make such determination and shall advise the board of its findings; each request for a determination shall be kept on file by the administration and it shall not be open to public inspection pursuant to Section 52-5-21 NMSA 1978.

(2) The commission through its board of directors shall have the following duties:

(a) The commission shall incorporate as a not-for-profit corporation under the laws of New Mexico and shall maintain its corporate status in good standing.

(b) The commission shall be deemed to stand in the place of an insolvent employer to the extent of its obligations on covered claims and, to such extent, shall have all rights, duties and obligations of the insolvent employer as if the employer had not become insolvent.

(c) As to any insolvency proceeding, the commission shall periodically file with the receiver or liquidator of the insolvent member statements of the covered claims paid by the commission and estimates of anticipated claims on the commission. Such filing shall preserve the rights of the commission against the assets of the insolvent member.

(d) To maintain an insolvency fund to meet the obligations of insolvent members, pursuant to Section 52-8-7 NMSA 1978.

(e) At the conclusion of any member insolvency in which the commission was obligated to pay covered claims, prepare a report on the history and cause of such insolvency, based on information available to the commission and submit such report to the administration.

(f) Not later than May 31st each year, submit a financial report for the preceding calendar year in a form approved by the director.

E. Procedure for handling claims:

(1) The commission shall accept for processing all claims against insolvent members which are made by the injured party or their representative.

(2) The commission shall be obligated to pay benefits to injured workers to the same extent as the insolvent member and shall be added as a party in any complaint for benefits or complaints for reduction or termination of benefits filed with respect to the insolvent employer.

(3) The commission may employ persons to process covered claims, giving them reasonable authority to process claims. Any processing of claims in excess of that authority shall be subject to prior approval by the board, or a claims committee established by the board for that purpose.

(4) The commission shall use every reasonable means to expedite the handling of covered claims submitted by the injured worker or representative, and may adopt a protocol for the handling of those claims.

F. Assessments: Determination and payment of assessment:

(1) Each member shall be given not less than 30 days' notice of the date that an assessment is due and payable.

(2) The assessment notice shall advise the member to remit the assessment payable to the commission. Upon receipt of the assessments, the commission shall deposit said funds in the commission's accounts and shall use them for the purposes stated in the Self-Insurers' Guarantee Fund Act.

(3) The commission shall immediately notify the director if a member fails to pay an assessment when due. The director may penalize the member or revoke its authority to self-insure pursuant to Section 52-1-61 NMSA 1978, and these rules.

(4) The board shall enforce its right to collect any assessment remaining unpaid 60 days after it shall have become due by appropriate action at law or in equity against the non-paying member.

(5) For purposes of calculating assessments, the self-insured may deduct any subrogation recovery in such amounts as are recovered in the same assessment year as they are paid.

(6) If two or more self-insureds combine certificates, the fund balance for the combined entity shall be combined.

(7) Assessments paid by a parent on behalf of a subsidiary which has its own certificate shall be allocated to the subsidiary.

[11.4.8.9 NMAC - Rp, 11.4.8.9 NMAC, 10/1/15; A, 9/30/16]

HISTORY OF 11.4.8 NMAC:

Pre-NMAC History: [RESERVED]

History of Repealed Material:

11 NMAC 4.8.9.5, Establishment of Fund - Repealed effective 10/1/98.

11 NMAC 4.8.9.7.1.A - Repealed effective 10/1/98.

11.4.8 NMAC Individual Self-Insurance, filed 1/3/05 - Repealed effective 10/1/15.