

TITLE 28. INSURANCE

**PART 2. TEXAS DEPARTMENT OF INSURANCE,
DIVISION OF WORKERS' COMPENSATION**

CHAPTER 166: ACCIDENT PREVENTION SERVICES

REPEAL: §§166.2, 166.4, and 166.6-166.9

ADOPTION

1. INTRODUCTION.

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts the repeal of §§166.2, 166.4, and 166.6 - 166.9, concerning Accident Prevention Services (APS or services). The repeal is necessary for clarity and consistency with new §166.2 and amended §§166.1, 166.3, and 166.5, concerning APS, which are published concurrently in this issue of the *Texas Register*. The repeal of §§166.2, 166.4, 166.6, and 166.7 is adopted due to reorganization, re-codification, and updates to APS requirements contained in Chapter 166. The repeal of §166.8 and §166.9 is due to the repeal of Labor Code §411.062 by House Bill 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005 (HB 7).

2. REASONED JUSTIFICATION.

The Division published three informal drafts of the repealed sections on the Division's website on June 8, 2012, August 17, 2012, and November 1, 2012, and received several informal comments. The repeals were proposed in the *Texas Register* (37 TexReg 9756) on December 14, 2012. A public hearing for the proposal was held on January 4, 2013. The public comment period closed on January 15, 2013. The Division received one public comment. The Division made no changes to the repeal as a result of the comment. Changes made to new §166.2 and amended §§166.1, 166.3, and 166.5, which are published concurrently in this issue of the *Texas Register*, are discussed more fully in the preamble to those sections.

In accordance with Government Code §2001.033(a)(1), the Division's reasoned justification for these repeals is set out in this order, which includes the preamble. The preamble contains a summary of the factual basis of the repealed rules, a summary of comments received from interested parties, the names of entities who commented and whether they were in support of or in opposition to the adoption of the repeals, and the reasons why the Division agrees or disagrees with the comments and recommendations.

Chapter 411 of the Labor Code, relating to Workers' Health and Safety, sets forth the requirements for APS in Subchapter E, §411.061 - 411.068. These statutes require an insurance company, as a prerequisite for writing workers' compensation insurance in Texas, to maintain or provide accident prevention facilities that are adequate to provide accident prevention services required by the nature of its policyholders' operations. An insurance company is also required to use APS in a reasonable manner to prevent injury to employees of its policyholders. These statutes provide an insurance company with flexibility as to the method in which it may provide qualified accident prevention personnel and services. To provide the personnel and services, an insurance company may employ qualified personnel, retain qualified independent contractors, contract with the policyholder to provide the personnel and services, or use a combination of these methods. These statutes also require an insurance company to submit to the Division at least once a year detailed information on the type of accident prevention facilities offered to its policyholders. Finally, these statutes give the Division the authority to conduct inspections to determine the adequacy of the required APS for each insurance company writing workers' compensation insurance in Texas.

Chapter 166 contains the Division's rules that implement the statutory requirements relating to APS provided by an insurance company. This chapter includes rules specifying what services an insurance company must at a minimum provide to its policyholders, rules setting out the due date

and content requirements for the statutorily required annual report, and rules detailing the procedures that apply to a Division inspection of an insurance company's APS. The repeal, together with the newly adopted rule and amendments to Chapter 166 also published in this issue of the *Texas Register*, are chiefly designed to remove administratively burdensome requirements that do not further the provision of quality APS to policyholders, and to give an insurance company more flexibility to efficiently and effectively use loss control resources.

This repeal becomes effective October 1, 2013, when the amended and new Chapter 166 rules become effective.

3. HOW THE SECTIONS WILL FUNCTION.

Repealed §166.2.

Section 166.2, concerning Initial Writing and Resumption of Writing of Workers' Compensation Insurance, requires an insurance company prior to writing its initial workers' compensation insurance policy in Texas or with Texas exposure to file with the Division a plan describing the APS that the insurance company will provide. This rule requires the Division to evaluate the plan's compliance with the requirements listed in §166.4(c) and resolve any discrepancies with the insurance company. An insurance company may request a hearing at the State Office of Administrative Hearings if the insurance company disagrees with the Division's evaluation of the plan. This rule requires the Division to issue a letter of approval to the insurance company upon completion of the evaluation and successful resolution of any disputes.

This rule is repealed because the review process in this rule is replaced by provisions in new §166.2 and amended §166.3 and §166.5. Those rules are discussed in more detail in the preamble for the adoption of new and amended sections and generally require an insurance company that

writes its first workers' compensation insurance policy after the effective date of those rules to file with the Division an initial annual report on its APS not later than the effective date of its first workers' compensation insurance policy. Those rules allow the Division to determine adequacy of the insurance company's APS through review of the initial reports of annual information and inspections as specified in amendments to §166.5.

Repealed §166.4.

Section 166.4 requires an insurance company writing workers' compensation insurance in Texas to maintain or provide accident prevention facilities and services. This rule also prescribes the service requirements an insurance company's APS program must at a minimum meet. The repeal of this rule is necessary due to new §166.2, also published in this issue of the *Texas Register*, which amends service requirements applicable to accident prevention programs.

The amendments to service requirements include retaining certain existing requirements in repealed §166.4, modifying other existing service requirements in this rule, and eliminating other service requirements. These amendments are more fully described in the preamble for new §166.2 published in this issue of the *Texas Register*.

Repealed §166.6 and §166.7.

Section 166.6 and §166.7 govern the exchange of information for the inspection of an insurance company's APS and the inspection of APS, respectively. The repeal of these sections is necessary in light of amendments that relocate these rules in §166.5, which also governs inspections of APS. The Division is also amending these relocated rules. The relocation and accompanying amendments are more fully described in the preamble for amendments to §166.5 published in this issue of the *Texas Register*.

Repealed §166.8 and §166.9.

Section 166.8 and §166.9 govern the qualification of field safety representatives and approval of occupational health and safety education programs, respectively. The repeal of these rules is necessary due to the repeal of Labor Code §411.062 by HB 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005.

Repealed Labor Code §411.062 required the Texas Workers' Compensation Commission, the Division's predecessor agency, to by rule establish qualifications for field safety representatives, which include education and experience requirements for those representatives. These rules implemented this repealed statute and are no longer necessary with its repeal by HB 7.

4. SUMMARY OF COMMENT AND AGENCY RESPONSE.

Repealed §166.7(b)(4) Comment: A commenter requests an explanation of repealed §166.7(b)(4) and confirmation that the referenced appeals process and other aspects of Chapter 415 of the Texas Workers' Compensation Act continue to apply to an insurance company providing accident prevention services.

Agency Response: The Division clarifies that an insurance company providing APS is entitled to the hearing procedures of Labor Code Chapter 415, relating to Administrative Violations, if the Division pursues enforcement action based on an inspection report or for any other reason.

Additionally, under the new framework in §166.5(f)(2), the inspection report will indicate whether the Division has issued a final determination of adequacy, a final determination of inadequacy, or an initial determination of inadequacy with regard to an insurance company's APS. The option for an initial determination of inadequacy affords an insurance company a meaningful opportunity to cure defects in its services before the Division assigns a final determination of inadequacy and possibly takes enforcement action as a result. However, the specific procedure of §166.7(b)(4) has been repealed.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: None

For, with changes: American Insurance Association

Against: None

Neither for or Against: None

6. STATUTORY AUTHORITY.

The repeal is adopted under Labor Code §§411.061, 411.063 – 411.068, 402.00116, 402.00111, 402.061, 402.00128, and 415.021. Section 411.061 requires an insurance company to maintain or provide accident prevention facilities. Sections 411.063 – 411.068 require an insurance company to provide qualified accident prevention personnel; authorize inspections of an insurance company to determine the adequacy of services provided; require an insurance company to submit information to the division; require an insurance company to provide notice of services to a policyholder; require an insurance company to use the services in a reasonable manner to prevent injury to employees of its policyholders; and provide for an administrative penalty for violation of the requirements. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce the Labor Code, Title 5, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code, Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Workers' Compensation Act. Section 402.00128 vests general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by the Labor Code, Title 5. Section 415.021 provides for assessment of administrative penalties if a person violates, fails to comply with, or refuses to comply with a rule or the Texas Workers' Compensation Act.

7. TEXT

§166.2 Initial Writing and Resumption of Writing of Workers' Compensation Insurance

§166.4 Required Accident Prevention Services and Notification of Return-to-Work Coordination Services

§166.6 Exchange of Information for the Inspection

§166.7 Inspection of Accident Prevention Services: Conducting and Reporting

§166.8 Qualification of Field Safety Representatives

§166.9 Approval of Occupational Health and Safety Education Programs

8. CERTIFICATION.

This agency hereby certifies that the repeal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued at Austin, Texas, on _____, 2013.

X

Dirk Johnson
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that 28 TAC §166.2, concerning Initial Writing and Resumption of Writing of Workers' Compensation Insurance; §166.4, concerning Required Accident Prevention Services and Notification of Return-to-Work Coordination Services; §166.6, concerning Exchange of Information for the Inspection; §166.7, concerning Inspection of Accident Prevention Services: Conducting and Reporting; §166.8, concerning Qualification of Field Safety Representatives; and §166.9, concerning Approval of Occupational Health and Safety Education Programs, are repealed.

AND IT IS SO ORDERED.

X

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

X

Dirk Johnson
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation