



OKLAHOMA INSURANCE DEPARTMENT
STATE OF OKLAHOMA

BULLETIN NO. PC 2006-07

**TO: ALL PROPERTY & CASUALTY INSURERS LICENSED IN THE STATE OF OKLAHOMA
ALL RATING AND ADVISORY ORGANIZATIONS
ALL JOINT UNDERWRITING ASSOCIATIONS
Attention: State Filing Division**

FROM: The Oklahoma Insurance Department

RE: Workers' Compensation Insurance – HB 2905 Affidavit of Exempt Status Under the Workers' Compensation Act and the Exempt Status Fact Sheet

DATE: July 1, 2006

PURPOSE OF THIS BULLETIN

In response to the passage of SB 1X during the Extraordinary Session held in June 2005, the Oklahoma State Legislature enacted Senate Bill 1X. Portions of this bill became effective July 1, 2005. During the 2006 Legislative Session, HB 2905 affirmed the use of the affidavit and fact sheet process.

This Bulletin serves as an aid to insurers on the minor revisions made to the affidavit and fact sheet by HB 2905. Please be advised that this bulletin does not cover all the issues addressed in HB 2905. We recommend that each insurer review Sections 75 through 77 of HB 2905.

AFFIDAVIT OF EXEMPT STATUS UNDER THE WORKERS' COMPENSATION ACT

Senate Bill 1X repealed the sections of Title 40 which created the Certificate of Non-Coverage form. This form was issued by the Oklahoma Department of Labor for those individuals who were not required to be covered under a workers' compensation insurance policy or other plan for the payment of workers' compensation.

Historically the Certificate of Non-Coverage was one of the tools used by businesses, insurers, the Oklahoma Department of Labor, the Oklahoma Workers' Compensation Court, CompSource and others in the evaluation process of the employer-employee relationship.

Although, the Department of Labor has not issued any Certificate of Non-Coverage forms since July 1, 2005, all of those issued prior to that date will be allowed to expire on the original expiration date stated on the form. The complete Oklahoma Attorney General opinion is attached to this bulletin on the OID website.

Senate Bill 1X does not provide for a state issued card to replace the Certificate of Non-Coverage. As a result of the joint effort of Oklahoma legislators, regulators and insurance industry, the first editions of the affidavit and fact sheet were developed. HB 2509 creates the Affidavit of Exempt Status Under the Workers' Compensation Act and the Exempt Status Fact Sheet for any person who is **not** required to be covered under a workers' compensation insurance policy or other plan for the payment of workers' compensation.

This revised affidavit and fact sheet will be another tool that any party can use in the evaluation process of the employer-employee relationship. The Oklahoma Insurance Department encourages insurers to continue to utilize this revised affidavit and fact sheet on the same basis as the Certificate of Non-Coverage.

Pursuant to 36 O.S. 924.5, insurers who become aware of an employer who knowingly and willfully required an employee or subcontractor to execute an affidavit when the employer knew that the employee or subcontractor is required to be covered under a workers' compensation insurance policy or other plan shall report such activity to Robert Noll, Assistant General Counsel at robertnoll@insurance.state.ok.us.

ARE INSURERS REQUIRED TO FILE THE AFFIDAVIT OF EXEMPT STATUS UNDER THE WORKERS' COMPENSATION ACT AND THE EXEMPT STATUS FACT SHEET FOR APPROVAL?

No. Since these documents do not become a part of the workers' compensation policy, neither are required to be submitted to the Department for approval.

DO INSURERS HAVE TO USE THE EXACT FORMAT OF THE ATTACHED AFFIDAVIT OR FACT SHEET?

Although the Department does not mandate the use of the exact forms, uniformity is important. Therefore, the Department would appreciate notification of any changes.

CAN THE ORIGINAL VERSION OF THE AFFIDAVIT AND FACT SHEET BE USED?

Individuals seeking exempt status are expected to utilize the revised affidavit and fact sheet thirty days from the effective date of this bulletin. All exempt status documents currently in effect will be allowed to expire on the original expiration date stated on the specific affidavit.

Questions applicable to this bulletin should be directed to marshafinch@insurance.state.ok.us or kathiestepp@insurance.state.ok.us of the Property and Casualty Division, or Oklahoma Insurance Department, P. O. Box 53408, Oklahoma City, OK 73152-3408.

The Oklahoma Insurance Department encourages readers of this bulletin to periodically check the Department's web site <http://www.oid.state.ok.us/index.asp> for news and updates to Bulletins and other relevant material.

AFFIDAVIT OF EXEMPT STATUS UNDER THE WORKERS' COMPENSATION ACT

State of Oklahoma

County of _____)

I, _____ state under oath as follows:

1. I, _____ (Name of individual) operating as _____ (independent contractor's business name), have agreed to provide services to _____ (Contractor) during calendar year _____.
2. I have read, signed and attached the Exempt Status Fact Sheet and understand that an Independent Contractor is one who engages to perform certain services for another, according to his own manner, method, free from control and direction of his contractor in all matters connected with the performance of the service, except as to the result or product of the work.
3. I understand that based upon the representations in this Affidavit of Exempt Status, I am requesting _____ (Insert contractor's name) to consider my business to be that of an independent contractor; **that I am not an employee under the Workers' Compensation Act** and the policy issued by _____ (Insurance Carrier); and that no premium be charged for the services performed by my business during the policy year.
4. **I am an independent contractor, not an employee of the contractor. I do not want workers' compensation insurance and understand that I am not eligible for Workers' Compensation benefits.**
5. I will obtain workers' compensation and employers' liability insurance for my employees if I have employees, unless they are otherwise exempt from the requirements of the Workers' Compensation Act.
6. I have read, signed and attached the Exempt Status Fact Sheet describing what is an Independent Contractor and the information provided is not the result of force, threats, coercion, compulsion or duress.
7. I understand that the execution of the affidavit shall establish a rebuttable presumption that the executor is not an employee for purposes of the Workers' Compensation Act.
8. I understand that the execution of an affidavit shall not affect the rights or coverage of any employee of the individual executing the affidavit.
9. I understand that knowingly providing false information on an Affidavit of Exempt Status Under the Workers' Compensation Act shall constitute a misdemeanor punishable by a fine not to exceed One Thousand Dollars (\$1,000.00).

Independent Contractor (Executor) Signature

Date _____ Name _____ Title _____

Signature _____ Business Name _____

Notary Public

Signed and sworn to before me on this ____ day of _____, 20__ by _____.

_____ My Commission Expires: _____ My Commission # _____

Notary Public

This form is to be signed and notarized at the start of a job/project for this contractor and is good for the job/project or any similar job/project performed for the contractor for one year from the date of notary.

Note: Employers who knowingly and willfully require an employee or subcontractor to execute an affidavit when the employer knows that the employee or subcontractor is required to be covered under a workers' compensation insurance policy shall be liable for a civil penalty of up to \$1,000.00 per offense. (36 OS §§924.5)

EXEMPT STATUS FACT SHEET

An independent contractor is defined by law as one who engages to perform certain services for another, according to his own manner, method, free from control and direction of his contractor in all matters connected with the performance of the service, except as to the result or product of the work.

Below are statements to help you decide if you are an independent contractor. No one statement is controlling, and your status is based on all the facts in your situation. If a statement describes your situation, then check the box. If at least six of the statements below do not describe your business, you should not sign the attached Affidavit of Exempt Status Under the Workers' Compensation Act.

- 1. The nature of the contract between you and the contractor shows you are independent from the contractor. For example: Is there a written contract where you agree that you are an independent contractor? Are you a corporation or limited liability company? Do you maintain commercial general liability insurance or other business insurance?
- 2. The contractor exercises very little control over your work. For example: By the agreement, can the contractor exercise control on the details of the work or your independence? Do you exercise control over most of the details of the work? Do you create plans or specifications for the job? Do you set your own work hours?
- 3. You are engaged in a distinct occupation or business for others. For example: Do you work for companies or individuals other than the Contractor? Do you work for competitors of the Contractor? Does your business have a logo or uniform?
- 4. Your job is the kind of occupation where the work is usually performed by a specialist without supervision, and not under the direction of the contractor. For example: Is your work supervised by the Contractor?
- 5. Your occupation requires special skills, license, education or training.
- 6. The contractor does not supply the things needed to perform your job such as the tools and the place of work. For example: Do you supply any of the materials or tools for the work? Do you operate a vehicle owned by the contractor? Was the work performed at your business or the contractor's business location or jobsite? Do you wear a uniform supplied by the contractor?
- 7. The length of the job and how long you have worked for the Contractor does not show that you are really an employee. For example: Is this a one-time job, or will you be doing this for the contractor regularly?
- 8. You are paid as a separate contractor, not as an employee. For example: Do you invoice the Contractor for your services? Are you paid by the job? Do you file a federal income tax return for your business? Do you expect to receive an IRS Form 1099 from the Contractor? Does the Contractor pay your expenses?
- 9. Your work is not the regular business of the employer. For example: Is your work customarily done in the Contractor's line of business or as part of the Contractor's daily work? Have you ever been an employee of the Contractor? Do you work with other people hired by the Contractor on the work you perform?
- 10. You do not consider yourself an employee of the contractor. For example: Will the Contractor withhold taxes or monies from your payment? Have you ever been an employee of the Contractor? Have you or your employees ever filed an insurance claim against the Contractor?
- 11. You do not have the right to terminate the relationship without liability. For example: If you quit before the job is finished, is there a penalty?

Based upon these factors, do you believe that you are an independent contractor with exempt status?

(WRITE YES OR NO)

Signature _____
(INDEPENDENT CONTRACTOR/EXECUTOR)

Note: Employers who knowingly and willfully require an employee or subcontractor to execute an affidavit when the employer knows that the employee or subcontractor is required to be covered under a workers' compensation insurance policy shall be liable for a civil penalty of up to \$1,000.00 per offense. (36 OS §§924.5)

**ATTORNEY GENERAL OPINION
05-22**

The Honorable Cliff A. Aldridge
State Senator, District 42
State Capitol Building, Room 533-B
Oklahoma City, Oklahoma 73105

June 29, 2005

The Honorable Patrick Anderson
State Senator, District 19
State Capitol Building, Room 520
Oklahoma City, Oklahoma 73105

Dear Senators Aldridge and Anderson:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

Do Certificates of Non-Coverage issued by the Commissioner of Labor prior to July 1, 2005, remain valid until their date of expiration even though the statute authorizing such cards has been repealed effective July 1, 2005?¹

BACKGROUND

Oklahoma employers are required to carry workers' compensation insurance, or in some circumstances, successfully demonstrate to the Administrator of the Workers' Compensation Court their financial ability to compensate employees who are injured on the job. 85 O.S. 2001, § 61(A). Employers who do not carry insurance are subject to civil and criminal penalties. 85 O.S. 2001, §§

¹ See 2005 Okla. Sess. Laws 1st Ex. Sess. ch. 1, §§ 34, 35.

63.1(A), 63.3(A). Some categories of workers, including independent contractors and sole proprietors, are not considered employees for purposes of the Workers' Compensation Act. 2005 Okla. Sess. Laws 1st Ex. Sess. ch. 1, § 9(9) (amending 85 O.S. Supp.2004, § 3(8)). As a result, employers are not required to carry insurance for those persons, nor are such persons required to carry workers' compensation insurance on themselves.

Senate Bill 1X of the 1st Extraordinary Session of the 50th Legislature repealed 40 O.S. 2001, §§ 415.1 and 415.2 effective July 1, 2005. 2005 Okla. Sess. Laws 1st Ex. Sess. ch. 1, §§ 34, 35. Section 415.1(A) authorizes the Commissioner of Labor to issue a Certificate of Non-Coverage to those persons who work in a capacity other than as an "employee" as that term is defined in the Workers' Compensation Act at Section 3 of Title 85. Application for the certificate requires a non-refundable fee of no more than ten dollars for a one-year certificate and twenty dollars for a two-year certificate. 40 O.S. 2001, § 415.1(A). Issuance of the certificate establishes "a rebuttable presumption that the [holder] is not an employee for purposes of the Workers' Compensation Act." *Id.* § 415.1(B).²

As a result, beginning July 1, 2005, the Commissioner will no longer be authorized to issue Certificates of Non-Coverage. The issue raised in your question is whether the repeal of Section 415.1 of Title 40 renders void those certificates that were issued prior to July 1, 2005 and do not expire until after July 1, 2005.

**A NEW LAW APPLIES PROSPECTIVELY ABSENT EXPRESS
LEGISLATIVE INTENT THAT IT APPLY RETROACTIVELY**

A basic rule of statutory construction is to determine legislative intent and to find that intent in the language of a statute. *City of Durant v. Cicio*, 50 P.3d 218, 221 (Okla. 2002). In addition, it is presumed that statutes are not given retroactive effect unless the Legislature has made its intent to do so clear. "New legislation operates prospectively only 'unless the Legislature clearly expresses a contrary intent. If doubt exists, it must be resolved against a retroactive effect.'" *Crawford v. Guardian Life Ins. Co.*, 954 P.2d 1235, 1238 (Okla. 1998) (quoting *Forest Oil Corp. v. Corp. Comm'n*, 807 P.2d 774, 781 (Okla. 1990)). In repealing 40 O.S. 2001, § 415.1, the Legislature provided no language expressing its intent that the repeal apply retroactively.

² Section 415.2, also repealed by Senate Bill 1X, provides for civil penalties for employers who willfully and knowingly require an employee or subcontractor who is not eligible for a certificate of non-coverage to apply for one.

Evidence that the Legislature did not intend that the repeal apply retroactively can also be found in its failure to repeal a related statute, 85 O.S. 2001, § 11,³ which allows an independent contractor or principal employer to rely in good faith upon the certificates as proof that a subcontractor is exempt from workers' compensation. *Id.* § 11(A)(1), (2).

Therefore, the lack of legislative language applying the repeal of Section 415.1 retroactively, and the retention of 85 O.S. 2001, § 11, evinces legislative intent that certificates issued prior to July 1, 2005, remain valid until their original date of expiration.

AN ACCRUED RIGHT CANNOT BE EXTINGUISHED BY REPEAL OF A STATUTE

Article V, Section 54, of the Oklahoma Constitution provides that the repeal of a statute shall not affect "any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute." *Id.* "A 'vested right' is the power to do certain actions or possess certain things lawfully, and is substantially a property right. It may be created either by common law, by statute or by contract. Once created, it becomes absolute, and is [constitutionally] protected from legislative invasion." *Okla. Water Res. Bd. v. Cent. Okla. Master Conservancy Dist.*, 464 P.2d 748, 755 (Okla. 1968).

Both the holder of a Certificate of Non-Coverage and a principal employer who relies in good faith on the certificate have accrued rights in the certificates. The certificate creates a rebuttable presumption that the holder of the certificate is not an employee. The employer who relies in good faith on the certificate as proof of the holder's status as a non-employee enjoys limited protection from liability. The certificate affects the worker and the employer's exposure to liability. The Oklahoma Supreme Court found that statutory amendments "altering the potential liability of a party by substantially increasing the damages available for a wrong" constituted a substantial alteration to vested rights. *Triple D Excavation v. Edwards*, 70 P.3d 884, 886 (Okla. Ct. App. 2003) (citing *Sudbury v. Deterding*, 19 P.3d 856, 860 (Okla. 2001)). Such amendments could not be applied retroactively. *Sudbury*, 19 P.3d at 860. As a result, the repeal of 40 O.S. 2001, § 415.1 cannot be applied retroactively because to do so would divest employers relying on the certificates, and workers holding the certificates, of accrued rights in violation of Article V, Section 54 of the Oklahoma Constitution.⁴

³ At least one division of the Court of Civil Appeals has held 85 O.S. 2001, § 11(B)(2) unconstitutional to the extent it allows a principal employer to escape liability by relying in good faith on a certificate of non-coverage even though the worker was in fact an employee for purposes of the workers' compensation. *See, e.g., Sloan v. Ringwald*, 940 P.2d 234 (Okla. Ct. App. 1996). This holding does not affect our analysis in this Opinion.

⁴ The holder's substantive right in the certificate is further evidenced by the fact that the certificate, once issued, can only be revoked, suspended or its renewal denied in accordance with the requirements of the Oklahoma Administrative Procedures Act (75 O.S. 2001, §§ 308a – 323) pursuant to OAC 380:60-1-7(l).

It is, therefore, the Official Opinion of the Attorney General that:

Certificates of Non-Coverage issued by the Commissioner of Labor pursuant to 40 O.S. 2001, § 415.1 prior to July 1, 2005, were not voided by the repeal of Section 415.1 in Senate Bill 1X of the 1st Extraordinary Session of the 50th Legislature. *See* 2005 Okla. Sess. Laws 1st Ex. Sess. ch. 1, §§ 34, 35. The certificates remain valid, and any associated accrued rights remain in effect, until the certificates' original date of expiration.

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

GRANT E. MOAK
ASSISTANT ATTORNEY GENERAL