

COVERAGE AND COMPENSATION FOR SELF-EMPLOYED PERSONS

Effective: June 30, 2002
Amended: August 1, 2006

BACKGROUND

On June 30, 2002, section 33 of the *Workers Compensation Act* (the “Act”), relating to the calculation of average earnings, was amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. As a result, the Panel of Administrators approved amendments to the Board’s policies concerning average earnings.

PURPOSE

This practice directive provides guidance relating to self-employed persons. In particular, this directive addresses these main topics:

- identifying the nature of the self-employed person’s employment; and
- identifying the registration and coverage requirements for each type of employment.

This directive also provides a very general overview of average earnings as they relate to the new legislation and policy provisions. It does not provide detailed guidance with respect to establishing initial and long-term wage rates. Officers should consult Practice Directive #C9-4, *Average Earnings – Initial and Long-Term Average Earnings* and Practice Directive #C9-10, *Workers Deducting Business and/or Equipment Expenses*.

Attached to this directive is a flow chart that provides a general overview of the information contained in this directive.

1.0. LAW AND POLICY

Section 1 of the *Workers Compensation Act* (the “Act”) defines a worker and an employer. Section 2 of the *Act* provides the Board with discretion to provide coverage for independent operators.

Chapter 2 of the *Rehabilitation Services and Claims Manual* Volume II (“the RSCM”) states that the Board considers that a contract to provide labour, in an industry covered by the *Act*, may create one of three types of relationships: **workers; independent firms;** or **labour contractors**. Policy items AP1-1-1 to AP1-1-5 of the *Assessment Policy Manual* (“APM”) provide definitions for these three categories, as well as their respective registration requirements.

Due to the new legislation provisions, the policies in the RSCM relating to average net earnings have been amended. See Practice Directive #32, *Net System of Compensation*.

2.0. WORKERS

2.1 Definition of Worker

The term “worker” is defined in Section 1 of the *Act*. APM Policy item AP1-1-5 states, in part, that workers include individuals who do not employ others and who fall into the following categories:

- individuals paid on an hourly, salaried or commission basis;
- individuals paid on commission or piecework where the work is performed in the employer’s shop, plant or premises;
- individuals paid commission, piecework or profit sharing where they are using equipment supplied by the employer;
- individuals operating under circumstances where the “lease” or “rental” of equipment or “purchase” of material from their employer is merely a device to arrive at a wage or commission amount; and
- labour contractors who elect not to be registered as independent operators.

Persons who are not regularly employed with a designated employer - e.g. only work a few hours per week, may be covered as workers under the *Act*, in certain circumstances. To assist in these determinations, Board officers should contact the Assessment Department for further guidance.

2.2 Coverage for Workers

Workers are automatically covered for compensation by the employer for whom they work.

2.3 Wage Rates for Workers

Initial and long-term wage rates for workers are established in accordance with section 33 of the *Act* and Chapter 9 of the RSCM.

3.0. OWNERS OF INDEPENDENT FIRMS

3.1 Definition of Independent Firms

Independent Firms include incorporated companies, as well as proprietorships and partnerships. APM Policy item AP1-1-3 states, in part, that independent firms include the following:

- (1) Any firm supplying labour and materials on which a profit or loss may result. Items such as nails and drywall tape are not considered materials for this purpose.

- (2) Any firm which has two or more pieces of revenue producing equipment. Hand tools and personal transportation vehicles or vehicles used to move equipment are not considered to be revenue producing equipment.
- (3) Service industry firms that enter into two or more contracts simultaneously.
- (4) Incorporated companies unless there are circumstances indicating that the principals of the corporation are workers rather than independent firms. If such circumstances exist, a full investigation will be made and the applicant's position determined in accordance with the policies in this *Manual*. Two common situations where corporations will not be considered independent firms are where:
 - (i) the corporation is a personal service corporation, (A personal service corporation for this purpose is one where no worker other than a principal active shareholder is employed, and if the firm was not incorporated, the principal active shareholder would clearly be a worker. If, without incorporation, the firm would be a labour contractor, it would not be considered a personal service corporation.); or
 - (ii) the corporation's sole function is to provide an inescapable phase of a firm's operations, it is providing essentially labour only for one firm at a time, and there is a degree of common ownership between the two firms. In such cases, the corporation will be assessed through the operating company at the assessment rate of the operating company. If the corporation is working for more than one firm, or there is not common ownership, the company will be considered a separate employer.
- (5) Society, cooperative, trade union or similar entity.
- (6) Manpower supply firms.

3.2 Registration for Independent Firms

Registration with the Assessment Department is mandatory for all independent firms where the firm is an employer. This requirement applies to both unincorporated firms and firms which contract to a prime employer who may be already registered with the Board. Individual coverage for owners of independent firms is detailed below, under item 3.4 "Unincorporated Independent Firms".

3.3 Definition of Principals of Incorporated Independent Firms

Principals are officers of incorporated companies who also own shares in the corporation. Incorporated companies can be identified by names such as: *Co., Company, Ltd., Limited, Inc. and Incorporated*. Companies are separate legal entities from their principals or shareholders.

3.3.1 Coverage for Principals of Incorporated Independent Firms

APM Policy item AP1-1-4 states, in part that:

“a director, shareholder or other principal of the company who is active in the operation of the company is generally considered to be a worker under the Act.”

As principals are considered workers of their companies, they cannot purchase POP. Principals of corporations must register their companies with the Assessment Department and declare the number of principals/active shareholders and their total earnings. Failure to register will result in the rejection of the claim, unless they can demonstrate that they were not personally responsible for registering the firm – (see *APM Policy item AP1-1-4*). Failure of a firm to register does not, however, bar a claim from other workers of the corporation.

The only exception to mandatory registration for an incorporated company is where the corporation is deemed a “personal service corporation”. This is where no other help is employed and, but for the incorporation, the principal would clearly fall into the worker category. The exception also applies to situations where there is a degree of common ownership between two companies and the sole function of the principal’s firm is to provide the labour-only phase of another firm’s operations. Contact the Assessment Department for further guidance.

3.3.2 Wage Rates for Principals of Incorporated Independent Firms

Principals’ wage rates are established in accordance with RSCM, Policy item #68.90, *Principals – Composition of Earnings*. As the company is a separate entity, principals’ remuneration is generally verified through a T4, *Statement of Remuneration Paid*. Income and expenses declared on the company’s tax return are not transferred to a principal’s individual tax return.

In some cases, both the principal’s personal tax return and the company’s corporate tax return may be required in order to determine the principal’s average earnings.

3.4 Unincorporated Independent Firms – (Proprietorships and Partnerships)

3.4.1 Definition of Proprietors of Independent Firms

Proprietorships are unincorporated business organizations with one owner. Income and expenses of an unincorporated firm are declared on the owner’s individual tax return, as there is no legal distinction between the proprietorship and its owner.

3.4.2 Coverage for Proprietors of Independent Firms

Proprietors of unincorporated independent firms, who wish coverage for compensation, must purchase POP from the Assessment Department. Spouses of proprietors of independent firms are not automatically covered for compensation. Spouses of proprietors of independent firms may apply for “voluntary coverage” provided there is an employment relationship and they are paid by the business. While the spouse does not

have to purchase POP, the proprietor must make a declaration to the Assessment Department at the time when POP is purchased for the proprietor.

3.4.3 Wage Rates for Proprietors of Independent Firms

Section 33.6 provides that average earnings of a person entitled to POP are the earnings for which coverage has been purchased.

Spouses with voluntary coverage and children of proprietors, paid by the firm and who have an employment relationship, are considered to be workers of the firm. Average earnings are therefore set in accordance with Chapter 9 of the RSCM.

3.5 Definition of Partners of Independent Firms

A partnership is similar to a proprietorship except that two or more individuals own the business. For accounting purposes, it is recognized as a business entity separate from the financial dealings of its individual owners. Partners can distribute the business' profits or losses in any way they wish.

3.5.1 Coverage for Partners of Independent Firms

Partners of unincorporated independent firms who wish coverage must also purchase POP. Failure to do so results in the rejection of the claim, but is not a bar to compensation for other workers of the firm.

Spouses and children of a partner, who are paid by and work for the partnership, are covered as workers and do not have to purchase POP or request "voluntary coverage". See APM Policy item AP1-1-4.

3.5.2 Wage Rates for Partners of Independent Firms

The average earnings for a partner of an independent firm are based on the amount of POP purchased.

4.0 LABOUR CONTRACTORS

4.1 Definition of Labour Contractors

As outlined in APM Policy item AP1-1-7, labour contractors include unincorporated individuals or partners:

- have workers and supply labour only to one firm at a time;
- are not defined as workers, do not have workers, or do not supply major materials or major revenue-producing equipment but who contract a service to two or more firms on an ongoing simultaneous basis; or
- may or may not have workers but contract a service including one piece of major revenue-producing equipment to a firm or individual.

4.2 Coverage for Labour Contractors with POP

Labour contractors have the OPTION to either register as an employer or purchase POP. APM Policy item AP1-1-7 provides that where a labour contractor chooses to register his or her business, the business is then treated as an independent firm by the Assessment Department. In these situations, the labour contractor is not covered unless he or she has purchased POP. The same principles concerning coverage and wage rates relating to proprietors of independent firms would then apply. (See APM Policy item AP1-1-4).

4.2.1 Wage Rates for Labour Contractors with POP

The average earnings for a labour contractor with POP are based on the amount of POP purchased.

4.3 Coverage for Labour Contractors without POP

A labour contractor who has not registered and has not purchased POP, as well as any other help employed by the labour contractor (including paid family members), are covered by the prime contractor or firm with whom the labour contractor contracts. See APM Policy item AP1-1-7.

4.3.1 Initial Wage Rates for Labour Contractors without POP

Chapter 9 of the RSCM, Practice Directive #C9-4 and Practice Directive #C9-10, provide guidance in determining average earnings for both the initial and long-term wage rates.

5.0. ADJUDICATIVE PROCEDURES

Where there is an indication that a claimant may be self-employed, the Board officer must:

1. determine what type of employment the self-employed person was working in at the time of the injury;
2. determine whether registration was mandatory for that particular type of employment;
3. determine whether POP was mandatory;
4. if necessary, obtain an opinion from the Assessment Department with respect to registration and POP;
5. determine whether the claimant has coverage under the *Act*;
6. proceed to adjudicate the merits of the claim; and
7. establish an appropriate wage rate in accordance with section 33 and Chapters 9 of RSCM Vol. I and Vol. II.

CLAIMS BUSINESS PROCESS FOR SELF-EMPLOYED PERSONS

