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I. CRITERIA FOR IDENTIFYING HAZARDOUS EMPLOYERS

A. The Health and Safety Division (HSD) of the Arkansas Workers' Compensation Commission (the Commission) pursuant to Ark. Code Ann. Section 11-9-409(c) shall identify hazardous employers based on criteria established by the Commission in this rule. Each employer identified, continued, or monitored shall have the right to verify employment, illness, and injury data used by the HSD, obtain a review of the findings of the HSD by the Chief Executive Officer (C.E.O.) Of the Commission, and request a hearing before the Full Commission to contest the findings of the C.E.O.

A request for review by the C.E.O. or hearing before the Full Commission shall be in writing, setting out the grounds therefore, and shall be filed within fifteen (15) days of the action from which the request is made. The C.E.O. or the Full Commission, as applicable, shall decide the issues within fifteen (15) days of receipt of the request for review or hearing.

DEFINITIONS:

- 1. Number of Employees** - Number of employees reported to the Arkansas Department of Workforce Services. Volunteers, elected officials, and board members of public entities shall not be counted.
- 2. Incident** - A work-related illness or injury for which compensation is paid, as set out in Ark. Code Ann. Section 11-9-501. For an illness or injury to be compensable, the affected employee must miss eight (8) or more calendar days of work. Each illness or injury which results in permanent partial disability without lost time, shall also be deemed an incident for purposes of this rule. Illness or injuries to volunteers, elected officials, or board members of public entities shall not be counted.
- 3. Number of Incidents** - The total number of incidents reported per employer during a calendar year. The number of incidents will be tabulated on a site-specific basis unless reported by the employer in a different manner.
- 4. Expected Incidence Rate** - The benchmark illness and injury rate for each North American Industrial Classification System (NAICS) code. The Expected Incident Rate is obtained from data compiled from national statistics as reported to the Occupational

Safety and Health Administration (OSHA) and published by the Bureau of Labor Statistics (BLS). Lost work day cases are defined by OSHA/BLS as those illness and injury cases which result in one or more days away from work. Lost work day cases do not include cases where the employee works in restricted or light duty. If data is not available from the BLS publication, other suitable sources are used to determine the Expected Incident Rate.

5. Employer Incidence Rate - Derived for each employer according to the following formula:

$$(\text{Number of Incidents}/\text{Number of Employees}) \times 100 = \text{Employer Incidence Rate}$$

Site-specific computations will be made only if data is reported to the Commission by individual location.

6. Hazard Index - Derived annually and based on the preceding year's incidence rates for each employer according to the following formula:

$$\text{Employer Incidence Rate}/\text{Expected Incidence Rate} = \text{Hazard Index}$$

Site-specific computations will be made only if data is reported to the Commission by individual location.

7. Hazardous Employer - Any employer whose Hazard Index is 1.0 or greater may be identified as a Hazardous Employer. A Hazard Index of 1.0 or greater indicates an Employer Incidence Rate which substantially exceeds the Expected Incidence Rate since Employer Incidence Rates are based on cases which result in eight (8) or more days away from work while Expected Incidence Rates are based on cases which result in one or more days away from work.

B. The following criteria shall be used to evaluate employers and identify Hazardous Employers:

1. Employer Incident Rates and Hazard Indexes will be calculated annually, based on the preceding year's incidence rates.
2. When possible, employers with multiple locations in the state shall be evaluated by individual sites or locations and a Hazard Index will be determined for each individual site or location. Site-specific evaluation is possible only if data is reported to the Commission by individual site location.
3. No employer who has only one incident in any single calendar year will be identified as a Hazardous Employer. However, if two or more incidents occur in any single calendar year, all incidents occurring during that year will be used to calculate the Employer Incident Rate and Hazard Index.
4. A Hazard Index of 1.0 or greater indicates an employer whose illness and injury frequencies during the period evaluated substantially exceeded those that may reasonably be expected in that employer's business or industry, since Employer Incidence Rates are based only on those cases which result in eight (8) or more days

away from work while Expected Incidence Rates are based on cases which result in one or more days away from work.

5. Employers identified as Hazardous Employers will be ranked in descending order (from highest to lowest) based on their Hazard Index, with priority attention given to the higher Hazard Indexes.

C. Employers with a Hazard Index of less than 0.9 will not receive official notification from the HSD of their status. They may request this information by contacting the HSD by telephone, letter or fax.

D. Employers with a Hazard Index of 0.9 to 0.99 will receive a courtesy letter from the HSD notifying them of their status. This letter will be sent to the employer only. The letter may contain the following information:

1. Notification that the employer is close to the 1.0 Hazard Index for Hazardous Employer designation.
2. Programs available from the Arkansas Workers' Compensation Commission and Arkansas Department of Labor, at no cost to the employer, designed to assist employers to improve their overall health and safety programs, prevent illness and injuries, and decrease their incident rate.

E. All employers with a Hazard Index of 1.0 or higher will be issued a Warning Notice. Such notice shall be in writing and sent to the specific site the employer's central/corporate headquarters, and the insurance carrier. The notice may include the following information:

1. Notification that the employer meets the criteria to be identified as a Hazardous Employer and may be placed in the Hazardous Employer Program during the twelve (12) months following the notification.
2. Data (including number of employees, number of incidents and Expected Incident Rate) used to determine the Hazard Index.
3. Programs available from the Arkansas Workers' Compensation Commission and Arkansas Department of Labor, at no cost to the employer, designed to assist employers improve their overall safety programs, prevent illness and injuries, and decrease their incident rate.

II. NOTICE TO HAZARDOUS EMPLOYERS

A. Upon a determination by the HSD that an employer should be classified as hazardous, the HSD shall notify the employer and the employer's workers' compensation insurance carrier. The notice shall be sent to:

1. The employer by certified mail at the employer's principal place of business; and
2. The loss control department or equivalent of the employer's workers' compensation insurance carrier or third party administrator of record in the Commission's files.

B. The notice shall be in writing and shall inform the employer of the following provisions:

1. State that the employer has been identified as a Hazardous Employer;
2. State the facts on which the identification of the Hazardous Employer is based;
3. Outline the steps the employer is required to take as an identified Hazardous Employer;
4. Inform the employer of the penalties for failure to take steps required under the Hazardous Employer Program.

III. HEALTH AND SAFETY CONSULTATION

A. An employer who receives notification under Subsection II.A. of this Rule must obtain a health and safety consultation within thirty (30) days by an Approved Professional Safety Source (APSS) approved by the HSD for that purpose. The APSS may be from the Arkansas Department of Labor, from the employer's insurance carrier, an employee of the employer, or a private consultant.

B. Upon request, the HSD shall provide a list of available Approved Professional Safety Sources.

C. The APSS shall conduct a hazard survey at each appropriate job site and prepare a hazard survey report. The report shall be in writing in a format prescribed by the Commission and shall include a description of any potentially hazardous conditions or practices identified, along with recommendations for controlling the identified potentially hazardous conditions or practices and projected dates of correction.

D. The hazard survey report(s) and any attachments shall be filed by the APSS with the Clerk of the Commission.

E. If the initial consultation and report cannot be completed in the time allowed under this section, the employer may apply in writing to the HSD for a waiver of the time requirements. In no case shall the initial consultation exceed 60 days following the date of notification.

IV. FORMULATION OF HEALTH AND SAFETY PLAN

A. Employers who receive notification under Subsection II.A. will develop a health and safety plan within 30 days of the date of the APSS' initial report with the assistance of the same or other Approved Professional Safety Source as referred to in Section III. This plan must be consistent with accepted industry practices. The Health and Safety plan shall include, but need not be limited to, the following:

1. Management component - Including a written safety policy statement and assignment, by position or title, of health and safety responsibilities and authority;

2. Analysis component - Including identified operational, health and safety hazards;
3. Program record keeping system component;
4. Safety and health education and training component;
5. Safety and health audit/inspection component - Including identification, by title or position, of a qualified person(s) to conduct the audits/inspections;
6. Incident investigation component - Including procedures to identify factors contributing to near-misses and accidents and institute corrective measures; and,
7. Periodic review and revision of the health and safety program and operational procedures component - to determine effectiveness of abatement measures.

B. An implementation time line, not to exceed 6 months after the formulation of the plan, shall be developed and included with the plan.

C. If the employer disagrees with any or all of the plan, the employer shall sign the plan and attach a statement containing the specific reasons for disagreement with the plan and proposed alternative solutions to the health and safety issues cited. The HSD will review the areas of disagreement and notify the employer and the APSS of the decision on each area of disagreement.

D. The employer's signature is understood to exclude those areas of the plan for which there is a stated disagreement, pending a final determination by the HSD.

E. The employer will begin implementation of any or all parts of the plan that are not subject to the employer's disagreement. The time lines specified in the plan shall remain in effect for those parts of the plan the employer is directed to implement. During the review of the plan by the HSD, the HSD may direct the employer and the APSS to implement a procedure in lieu of the part of the plan that is in disagreement.

F. The employer shall be responsible for filing the health and safety plan with the HSD within 30 days of the date of the consultant's initial report.

G. Reference material for the development of a health and safety plan may be obtained from the HSD.

V. FOLLOW-UP INSPECTION BY THE HSD

A. Six months after the formulation of the employer's health and safety plan, or earlier when requested by the employer with the concurrence of the APSS, the HSD shall conduct a follow-up inspection to ensure compliance with, and the effectiveness of, the health and safety plan at the employer's premises.

B. The inspection shall be conducted and completed during normal work hours.

C. The employer shall allow the HSD access to the employer's premises, including

remote job sites, and employees during normal work hours to conduct the follow-up inspection.

D. At the time of the inspection, the HSD may consider as evidence of compliance, information which includes, but is not limited to, visual verification, written policies and procedures, attendance rosters for training programs, employee interviews, and purchase orders or receipts for equipment or services necessary to support the accident prevention plan.

VI. REPORT OF FOLLOW-UP INSPECTION

A. The employer, the APSS, and the employer's workers' compensation insurance carrier, shall be provided copies of the report of the follow-up inspection by the HSD.

B. The report shall be in writing and shall specify whether the employer has, or has not, implemented the health and safety plan or other acceptable corrective measures approved by the HSD.

C. If the employer is found not to have implemented the health and safety plan, the report shall also contain:

1. A notification that the employer's Hazardous Employer status is being continued;
2. A list of the specific areas of the health and safety plan which have not been implemented;
3. A list of the specific actions required of the employer to correct the identified deficiencies.

VII. REMOVAL FROM HAZARDOUS EMPLOYER STATUS

An employer shall be removed from Hazardous Employer status if, upon inspection the HSD determines that the employer has complied with the terms of the health and safety plan.

VIII. CONTINUATION OF HAZARDOUS EMPLOYER STATUS

A. An employer shall remain on Hazardous Employer status if the employer is found under Section V. of this Rule (Follow-Up Inspection by the HSD) to have failed or refused to implement a health and safety plan or other suitable hazard abatement measures as approved by the HSD.

B. If an employer is not certified for removal from Hazardous Employer status after the follow-up inspection, the employer shall take the actions specified in the follow-up inspection report, or other suitable hazard abatement measures as approved by the HSD, as a condition for removal from Hazardous Employer status.

C. An employer shall file a progress report with the HSD every 60 days until the employer has been removed from Hazardous Employer status. The report shall include:

1. For Subsection A. of this section only, the list of areas of the health and safety plan and/or hazard survey report which were identified as not being fully

implemented or abated at the time of the follow-up inspection;

2. Additional areas identified in the follow-up inspection report; and

3. The steps which are being taken to address them.

D. After the required corrective actions have been taken, the employer shall notify the HSD and request a re-inspection. The request for re-inspection shall be made no later than six months after the date of the follow-up inspection.

IX. PENALTIES

The Commission may assess a civil penalty against an employer who, at any time in the process, fails or refuses to implement the recommended health and safety plan or other suitable hazard abatement procedures, in an amount up to one thousand dollars (\$1,000.00) per day of violation, payable to the Death and permanent Total Disability Trust Fund. Further, the Commission may petition the appropriate Chancery Court for an order enjoining the employer from engaging in further employment until such time as the employer implements the health and safety plan or abatement measure described above and/or makes payment of all civil penalties. Ark. Code Ann. Section 11-9-409(c).

X. JUDICIAL PROCEEDINGS

The identification as a Hazardous Employer under this rule is not admissible in any judicial proceeding unless the Commission has determined that the employer is not in compliance with Rule 32 and that determination has not been reversed or superseded at the time of the event giving rise to the judicial proceeding.

XI. RULE REVIEW

The Arkansas Workers' Compensation Commission encourages all interested parties to participate in promulgating changes to the Rules governing the Hazardous Employer program. Those who desire input into said changes should submit them in writing to the HSD. After analysis, the Commission may incorporate such changes to the Rule, following public comment, pursuant to Ark. Code Ann. Section 11-9-205.

(Revised October 5, 2007, effective January 1, 2008.)