# **02 DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION**

**031 BUREAU OF INSURANCE**

**Chapter 450: WORKERS’ COMPENSATION INSURANCE – EXPERIENCE RATING**

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**Section 1. Authority and Purpose**

This Rule is adopted by the Superintendent pursuant to 24‑A M.R.S.A. §§ 212, 2303, 2382, and 2382‑D, to provide employers with adequate information regarding their experience modification factors and an opportunity to correct errors, to exclude aggravations of prior work-related injuries from the subsequent employer’s experience modification as required by Maine law, and to establish uniform requirements respecting the applicability of experience modification factors to employers that have had a change in ownership, management, control, or operation.

**Section 2. Scope**

This Rule is applicable to all intrastate experience modification factors calculated for Maine employers and to the portion of interstate experience modification factors covering exposure in this State. However, the Superintendent may authorize the members of a group self-insurer to adopt rating or assessment mechanisms that modify the application of this Rule to the group’s internal operations for the purpose of equitably allocating claim and expense costs, if the Superintendent finds that the rating or assessment mechanism is not contrary to applicable statutory requirements and does not frustrate the purposes of this Rule.

**Section 3. Effective Date of Experience Modification Factor**

A. *Experience modification increase; policy effective date.* An insurer shall not implement an increase in the experience modification factor after the effective date of the policy unless the policy (including any applicable endorsements) clearly specifies the terms under which the employer’s experience rating may be subject to change.

B. *Limitation.* An insurer shall not implement an increase in the experience modification factor more than 90 days after the policy effective date. An insurer or advisory organization may appeal to the Superintendent for an extension of the 90-day limitation period if there are unusual circumstances which legitimately delay the availability of the experience modification factor. This Subsection does not apply to the periodic recalculation of the policyholder’s experience modification factor, in accordance with the terms of the approved experience rating plan, if the policyholder has been notified in writing at or before the time the policy is issued or renewed that the effective date of the experience modification factor is different from the effective date of the policy.

C. *Modification resulting in premium reduction.* Any change in the experience modification factor that results in a premium reduction shall not be subject to the restrictions in Subsections A and B above, and shall apply retroactively to the entire policy period to the extent affected by the erroneous experience modification factor.

D. *Lack of employer cooperation.* The restrictions in Subsections A and B above shall not apply if the designated advisory organization is unable to calculate the modification factor for an employer solely because the employer has failed to cooperate in an audit affecting the modification calculation or solely due to the fault of the employer or an agent of the employer.

E. *Changes in rating basis.* This Section does not apply to changes in experience modification factors resulting from a change in the governing classification of a business or from a change in ownership or other transaction subject to Section 7.

**Section 4. Information Available to Employers**

A. *Information available.* At the written request of an employer, the insurer or designated advisory organization shall provide within 30 days after receipt of the request a copy of the experience rating calculation, including a listing of the claims used in determining the experience modification factor. Claims with paid or incurred values below the designated advisory organization’s *de minimis* threshold may be listed in the aggregate. The threshold may not exceed $2000 without the prior approval of the Superintendent.

B. *Failure to comply; prohibition.* If the insurer or designated advisory organization fails to provide the requested calculation within 30 days after receipt of the request, then the insurer is prohibited from applying an experience modification factor greater than 1.00 for the period between the termination of the 30‑day response period and the date the requested information is received by the employer.

**Section 5. Revision of Loss Reports Used in the Experience Rating Calculation**

The experience rating plan filed by the designated advisory organization shall provide for the submission of corrected incurred loss reports for the purpose of recalculating the employer’s experience modification factor. If the correction results in a decrease, it shall apply retroactively to the current policy from its date of inception and to all affected policies in force at any time during the two–year period preceding the current policy’s effective date, or such longer period as may be specified in the plan. Valid reasons for filing a corrected loss report must include, at a minimum:

A. *Erroneous information.* If the original loss report did not accurately report the insurer’s paid loss and reserve, or if the employer can demonstrate that the information used by the insurer in paying a loss or estimating an incurred loss was incorrect and that the insurer knew or should have known at the time of the payment date or required valuation date that the information was incorrect.

B. *Third-party recovery.* If the insurer receives a payment in satisfaction or compromise of a claim against a third party arising out of the same occurrence as a claim against the employer, the amount of the recovery, net of reasonable equitably apportioned litigation costs, shall be deducted from the incurred loss to the extent that the anticipated recovery was not previously recognized in calculating the incurred loss. For revisions made under this Subsection, the minimum required period of retroactivity for corrections shall be extended from two years to four years preceding the current policy’s effective date.

C*. Change in governing classification.* When an employer’s operations are reclassified and the reclassification is not based on a change in operations, the employer’s experience modification factor shall be recalculated, effective the same day as the reclassification becomes effective, on the basis of expected loss figures for the experience period that are consistent with the new classification.

**Section 6. Aggravation of Prior Work-Related Injuries**

A. *Definitions.* For purposes of this Section:

(1) *“Subsequent injury”* means an injury giving rise to a claim for which benefits have been paid pursuant to 39-A M.R.S.A. §212 or §213 and which has been identified as potentially aggravating or combining with a prior lost-time work-related injury within the meaning of this Rule.

(2) *“Prior lost-time work-related injury”* means an injury to a claimant for which benefits have been paid before the date of the subsequent injury pursuant to 39 A M.R.S.A. §212 or §213, with the exception of any injury that was subsequently determined by the Workers’ Compensation Board not to be compensable.

(3) *“Aggravates or combines with a prior lost-time work-related injury to produce incapacity”:* A subsequent injury, as defined in Paragraph 1 above, aggravates or combines with a prior lost-time work-related injury, as defined in Paragraph 2 above, to produce incapacity, when the insurer or self-insurer covering the prior injury has reimbursed the insurer or self-insurer covering the subsequent injury for compensation benefits paid pursuant to 39-A M.R.S.A. §212 or §213, unless the subsequent injury claim was subsequently determined by the Workers’ Compensation Board not to be apportionable to the prior carrier. For purposes of this Paragraph, reimbursement includes internal fund transfers or accounting recognition if the same carrier is on the risk for both injuries.

B. *Reporting of subsequent injuries.* When reporting incurred losses to the designated advisory organization, an insurer shall separately identify all claims attributable to lost-time work-related injuries that aggravate or combine with any prior lost-time work-related injury to produce incapacity.

C. *Exclusion from incurred loss experience.* The designated advisory organization shall exclude all claims reported under this Section from an employer’s loss experience when calculating the employer’s experience modification factor, and shall make appropriate corresponding adjustments to aggregate loss experience when determining employers’ expected losses for experience rating purposes. The designated advisory organization shall develop and implement an appropriate coding mechanism. This Section does not restrict the use of such information for ratemaking purposes.

D. *Apportionment after reporting date.* If a claim is included in an employer’s incurred loss experience, but a payment or decree made after the loss report was filed establishes that the injury aggravates or combines with a prior lost-time work-related injury, then the exclusion of the claim from the employer’s incurred loss experience shall be retroactive only if the employer is entitled to a correction of the relevant loss report pursuant to Section 5.

E. *Merit rating plan.* If the employer is not subject to experience rating, claims reported under this Section shall be excluded from the employer’s loss experience in determining the number of claims within the rating period and in determining the employer’s loss ratio for purposes of the merit rating plan established pursuant to 24-A M.R.S.A. §2382‑D(3).

**Section 7. Changes in Ownership**

Incurred experience shall be used in future experience modification factors for a business throughout the experience rating period, regardless of any change in ownership, control, management, or operations, unless there has been both a substantial change in operations and a *bona fide* change in majority ownership of the business, in which case experience incurred before the change shall be disregarded.

A. *Substantial change in operations.* For the purposes of this Section, “substantial change in operations” shall mean a change in operation of the employer sufficient to cause a change in the governing risk classification assignment and a change in the process and hazard of the operations. If an entity is subject to multiple classifications as a result of its operation of separate and distinct businesses, the determination whether there has been a substantial change of operations shall be made separately for each business if the experience is separable, and shall otherwise depend on whether discontinued operations represent a majority of the incurred losses during the rating period applicable at the time of the change.

B.Bona fide *change in majority ownership.* For the purposes of this Section, “*bona fide* change in majority ownership” shall mean that either the former owners of the business or its predecessor entity now collectively own or control less than 50% of the business, or the new owners of the business previously collectively owned or controlled less than one-third of the business or its predecessor entity. Ownership or control shall be considered whether exercised directly or through related parties, security interests, options to repurchase, or any arrangement designed to retain *de facto* control or otherwise avoid the application of this Rule.

C. *Acquisition of physical assets.* If an entity acquires most or all of the physical assets of a business by sale or lease from another entity and the seller then

(1) Becomes entirely inactive with no employees, or

(2) Retains a few employees for the purpose of closing out its affairs prior to dissolution as a legal entity, or

(3) Retains a few clerical employees for the purpose of carrying on operations in connection with investment of its financial assets,

the acquiring entity shall be considered the purchaser of the business for purposes of this Section.

D. *Partial sale.* If an entity disposes of a part of its assets or operations but otherwise continues to operate its business, the experience rating plan established by the designated advisory organization may establish criteria for determining whether the corresponding experience shall be transferred to the acquiring entity, retained by the selling entity, or attributed concurrently to both entities.

E. *Restructuring.* If, as a result of a realignment of operations among affiliated entities, or in connection with an acquisition, sale, or other transaction involving multiple entities, there is a substantial change in operations at the legal entity level but substantial continuity of operations in the aggregate, the experience shall follow the physical operations rather than the legal entity.

F. *Temporary Changes of Control.* The experience incurred on all operations of a risk shall continue to be used in determining the experience modification of an entity subject to trusteeship, receivership, a bondholders’ protective committee, or similar temporary change of control, whether voluntary or at the direction of the courts, unless there is also a substantial change of operations and the new controlling parties did not have a prior controlling interest in the business.

G. *Mergers, consolidations, exchanges of stock.* If two or more entities are merged or consolidated, their incurred experience shall be used for experience rating the surviving entity, unless the merger or consolidation is also accompanied by a substantial change of operations of one or more of the merged entities, in which event the experience of the discontinued operations shall be disregarded in future ratings. Exchanges of stock and other transactions that create a new group of affiliated employers which are combinable for experience rating purposes, or consolidate two or more groups which were previously rated separately, shall be treated in the same manner as mergers.

H. *Disaggregation of combined entities.* If two or more entities have been combined for experience rating purposes but are no longer combinable as the result of a *bona fide* change in majority ownership of one or more of them, the experience of each entity before the sale or disposition shall continue to be used in rating the appropriate successor entity to the extent that the experience of the predecessor entities can be separated. If the experience cannot be separated, the transaction shall be treated in the same manner as a partial sale of a single business.

I. *Substance of transaction.* If the designated advisory organization determines that there is substantial continuity of operations between a predecessor and successor business, and that literal application of the provisions of this Section to the form of the transaction would result in misallocating or inappropriately disregarding the experience of the predecessor business, the designated advisory organization may apply the experience of the predecessor entity in rating the successor entity upon written notice to the policyholder, the insurer, and the Superintendent.

J. *Effective date.* A change in experience rating pursuant to a transaction subject to this Section shall be effective as of the effective date of the transaction, unless the plan filed by the designated advisory organization specifies a later effective date.

K. *Waiver.* The Superintendent shall have the discretion to approve an experience rating plan that modifies the provisions of this Section if the Superintendent determines that the plan filed by the designated advisory organization is consistent with the purposes of this Section and appropriately reflects the likelihood of future losses.

**Section 8. Right to Hearing**

Any employer that believes it has been aggrieved by the application of the experience rating procedure may seek review by the Superintendent pursuant to 24-A M.R.S.A. §2320.

**Section 9. Interstate Rating**

Risks which have not had a change in ownership, management, control, or operation or for which the application of this rule is consistent with the designated advisory organization’s rating of interstate risks, shall continue to be rated on an interstate basis. Any risk not subject to interstate experience rating as a result of the application of this rule shall be experience rated on its Maine experience.

**Section 10. Transition**

A. *Effective date of amendments.* The 2007 amendments to this Rule shall be effective on March 26, 2007, and, except as provided in Subsections B and C, shall apply to all policies issued, renewed, or subject to revised experience modification factors on or after the effective date.

B. *Transition period.* Between the effective date of the 2007 amendments and January 1, 2008, a rate, rule, or form filing submitted by insurers and advisory organizations is not in violation of any applicable provision of this Rule if the filing instead complies with the comparable provision of the prior version of the Rule. A policy issued or renewed before January 1, 2008 or an experience modification factor promulgated before January 1, 2008 is in compliance with this Rule to the extent that it complies with a filing properly approved pursuant to this Subsection or pursuant to the prior version of this Rule.

C. *Subsequent injury claims.* Section 6 shall apply to the reporting of all subsequent-injury claims whose first report under the unit statistical plan is due on or after January 1, 2009. The designated advisory organization shall include a brief description of the change in the experience modification calculation with all experience rating worksheets with effective dates between January 1 and December 31, 2009, explaining that claims for which reports are due on or after January 1, 2009 shall be excluded when they are attributable to lost time work-related injuries that aggravate or combine with prior lost-time work-related injuries to produce incapacity. Before July 1, 2008, the designated advisory organization shall file revised experience rating plan rules and reporting instructions with the Superintendent for the implementation of Section 6. The Superintendent may postpone the effective date of Section 6 upon a finding that the necessary framework for fair and effective implementation will not be in place in time, or that there is significant risk that insurers will not be equitably compensated.

STATUTORY AUTHORITY: 24-A M.R.S.A. §§ 212, 2301, 2303, and 2364.

EFFECTIVE DATE:

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