

**STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY**

In the Matter of the Proposed Rules
Governing the Fraud Unit,
Minnesota Rules, Parts 5228.0100 to 5228.0140

STATEMENT OF NEED
AND REASONABLENESS

I. INTRODUCTION

This Statement of Need and Reasonableness (SONAR) discusses proposed new rules governing the Labor and Industry Fraud Investigation Unit. The Minnesota legislature enacted 1992 Minnesota Laws, Chapter 510, Article III, section 30 (to be codified at Minnesota Statutes, section 176.87). See Appendix A. This new statute mandates that the Department of Labor and Industry establish a workers' compensation fraud unit in order to investigate fraudulent and other illegal practices of health care providers, employers, insurers, attorneys, employees, and others related to workers' compensation. The department is to determine whether or not there is illegal activity, and the Commissioner of Labor and Industry, by and through his designated agent must refer the matter to the Attorney General or other appropriate prosecuting authority.

The legislature also added the following fraud provision in Laws of Minn. 1992, Chapter 510, Article II, section 6 (to be codified at Minnesota Statutes, section 176.178):

"Any person who (with intent to defraud) receives workers' compensation benefits to which the person is not entitled by knowingly misrepresenting, misstating, or failing to disclose any (material fact) is guilty of theft and shall be sentenced pursuant to section 609.52, subdivision 3."

Laws of Minn. 1992, Article I, Section 11 added a further provision, amending Minnesota Statutes, section 176.179 allowing for recovery of overpayments. The pertinent amending language follows:

". . . Where the commissioner or compensation judge determines that the mistaken compensation was not received in good faith, the commissioner or compensation judge may order reimbursement of the compensation. For purposes of this section, a payment is not received in good faith if it is obtained through fraud, or if the employee knew that the compensation was paid under mistake of fact or law, and the employee had not refunded the mistaken compensation . . ."

Pursuant to rulemaking authority of Minnesota Statutes, sections 175.17, 175.171, and 176.83, the commissioner may adopt rules necessary to implement and carry out the intent and purposes of Minnesota Statutes, Chapter 176.

The proposed rules establish procedures for the fair and orderly administration of the fraud unit and investigation of alleged fraudulent or other illegal practices and activities and clarify terms at newly enacted Minnesota Statutes, section 176.178 and amending section 176.179.

Specifically, the proposed rules define terms, establish the criteria used for identification of suspected fraud or payments not received in good faith, delineate and enumerate the investigative powers of the fraud unit, lay out the framework for determination of whether or not fraud or other illegal activity has occurred, and establish a standard for referral to the appropriate prosecuting authority or Attorney General.

II. STATEMENT OF COMMISSIONER'S STATUTORY AUTHORITY

Newly enacted Minnesota Statutes, section 176.87 empowers the commissioner to establish a workers' compensation fraud unit to investigate fraudulent and other illegal practices of health care providers, employers, insurers, attorneys, employees, and others related to workers' compensation. Pursuant to agency rulemaking authority at Minnesota Statutes, sections 175.17, 175.171 and 176.83, the commissioner is empowered to promulgate rules designed to implement and coordinate the activities of the fraud unit.

III. SMALL BUSINESS CONSIDERATIONS, COST TO LOCAL PUBLIC BODIES, IMPACT ON AGRICULTURAL LAND, AND EFFECT ON SPANISH SPEAKING PEOPLE

A. **Small Business Considerations.** Minnesota Statutes, section 14.155 (1990) requires state agencies proposing rules that affect small businesses to consider the following methods for reducing the impact of the rules on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small businesses;
- (b) the establishment of less stringent schedule or deadlines for compliance or reporting requirements for small businesses;
- (c) the consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) the establishment of performance standards for small business to replace design or operational standards required in the rule; and
- (e) the exemption of small businesses from any or all requirements of the rule.

Minnesota Statutes, section 14.115, subdivision 3 (1990) requires agencies to incorporate into proposed rules any of the methods listed in subdivision 2 "that it finds to be feasible, unless doing so would be contrary to the statutory objectives that are the basis for the proposed rulemaking."

The requirements of Minnesota Statutes, section 14.115 do not constrain this proposed rule because it does not place any direct regulatory burden on small businesses. The rules are intended to describe and define the functions of the Minnesota Department of Labor and Industry Fraud Unit and to further clarify fraudulent activities. It is anticipated that small business would benefit from the promulgation of these rules by the reduction of fraudulent activities that help drive the insurance rates.

The commissioner has considered the impact of the proposed rules on small businesses in terms of the factors identified in Minnesota Statutes, section 14.115, subdivision 2 (a) through (e) (1990). The commissioner has concluded that further exemption, simplification, or less stringent standards for small business pursuant to Minnesota Statutes, section 14.115, subdivision 2 (a) through (e) would be counterproductive and unnecessary to accommodate small business needs in the context of fraud unit rules.

B. Cost of Local Public Bodies Minnesota Statutes, section 14.11, subd. 1 (1990). The commissioner reasonably anticipates these rules will not increase total expenditures to implement the rules within either of the two years following adoption. The rules are addressed to the referral and investigation functions of the fraud investigative unit of the Minnesota Department of Labor and Industry. Although referrals to local prosecutors are contemplated, it is not anticipated that any local cost increase would be necessary to implement the rule.

C. Agricultural Land. These rules pertain to fraud unit activities in the context of workers' compensation and other matters under the jurisdiction of the Commissioner of Labor and Industry. Its adoption would not therefore have a direct and substantial impact on agricultural land and it is not subject to the requirements of Minnesota Statutes, section 14.11, subdivision 2.

D. These rules do not have their primary effect on Spanish speaking people and are not, therefore, subject to the provisions of Minnesota Statutes, section 3.223, subdivision 4 (1990).

IV. STATEMENT OF NEED

Minnesota Statutes, Chapter 14 (1990) requires the commissioner to make an affirmative presentation of facts establishing the need for and the reasonableness of the rules as proposed. In general terms, this means that the commissioner must set forth reasons for the proposal which are not arbitrary and capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists that requires administrative attention, and reasonableness means that the solution proposed by the commissioner is appropriate. The need for the proposed rules is discussed below.

The proposed rules are needed to identify conduct and circumstances within the workers' compensation system by various parties, including but not limited to, employees, employers, insurers, attorneys, health care providers and others which would be the focus of investigative activity by the department. The statute provides only an outline for the fraud unit's activities, general standards and context. For fairness, efficiency, notice and public and private accountability, details of the procedures, guidelines, definitions, and rules of conduct of the fraud unit and standards must be set out by this rule.

V. STATEMENT OF REASONABLENESS

Minnesota Statutes, Chapter 14 (1990) requires the commissioner to make an affirmative presentation of facts establishing the reasonableness of the proposed rules. Reasonableness means that there is a rational basis for the commissioner's proposed action. The reasonableness

of the proposed rules is discussed below.

Part 5228.0100 DEFINITIONS.

Definitional provisions were added to provide clarity, consistency, and context for interpretation of key terms in the rules. In general, as indicated above, the fraud unit will investigate health care providers, employers, insurers, attorneys, employees and others in the workers' compensation system. Therefore reference to these operative terms as defined in Minnesota Statutes, Chapter 176 was used whenever possible.

"Attorney", subpart 2, is one who represents another for a fee and who is licensed to practice law in Minnesota. Because the fraud statutes deal with matters subject to the commissioner's jurisdiction that context was indicated for purposes of this rule. It was necessary to define the term because attorneys are among those specifically indicated in newly enacted Minnesota Statutes, section 176.87 whose illegal practices would be subject to investigations.

"Commissioner", as defined in subpart 3 is the Commissioner of the Department of Labor and Industry. The term is intended to include any other employee in that department who has been delegated responsibility and/or authority to specifically administer the fraud investigation unit or perform actual functions within that unit.

Subpart 4 "Compensation or workers' compensation benefits" refers to the definition contained in Minnesota Statutes, section 176.011, subdivision 8 to define what the fraud unit means by compensation or workers' compensation benefits. They are meant to include any and all workers' compensation benefits including such benefits as medical or rehabilitation benefits. It is necessary to clarify "benefits" because the new fraud statute at Minnesota Statutes, section 176.178 refers to persons who receive "compensation benefits".

"Employee" and "employer", subparts 5 and 6, are also taken from Minnesota Statutes, section 176.011. Thus, employees and employers under the fraud rules are the same as employees and employers under the Workers' Compensation Act itself. This establishes a clear context for the terms used in the rule, which is consistent with Chapter 176.

Subpart 7, "Fraud unit", was clarified to indicate that the fraud unit is the investigative unit of the Minnesota Department of Labor and Industry established by the 1992 statute.

"Health care provider" as defined in subpart 8 was defined by reference to Minnesota Statutes, section 176.011, subdivision 24 to refer to all parties or entities which may be subject to the jurisdiction of the department. It includes the new managed care organizations ("MCO's") certified by the commissioner which are created by the 1992 legislature at Chapter 510 to make it clear that MCO's are also health care providers which will be subject to the investigative jurisdiction of the fraud unit.

"Illegal activity", subpart 9, is defined to clarify and enumerate the various acts, omissions, or material misrepresentations which can be considered a violation of Minnesota Statutes, section 176.87 and the related statutes 176.178 and 609.52. It is important to define this term because Minnesota Statutes, section 176.87, indicates that this is the kind of activity

which triggers referral to the prosecuting authorities or Attorney General. Investigators would need specific guidelines concerning the nature of activities which would require referral. Therefore, the activity was specifically defined to include, but not be limited to, certain specific situations which are indicated in newly enacted 176.178 such as making false statements, reports, or billings concerning "material facts" to receive workers' compensation benefits.

"Insurer", subpart 10, is defined by reference to Minnesota Statutes, section 79.01, subdivision 2, and the workers' compensation law, Minnesota Statutes, Chapter 176, because the 1992 fraud unit legislation specifically mentions these insurers and self-insured employers relating to workers' compensation and indicates that their illegal practices are among those to be investigated.

Subpart 11, "Material fact", is defined to clarify to enumerate possible ways that fraudulent and illegal activity as defined by the department might be performed. Newly enacted Minnesota Statutes, section 176.178 refers to misstatement or omissions of material facts, but makes no further specific reference to typical facts and circumstances which would likely be material. In general, consistent with fraud case law definitions material facts are defined as those which, if known, would influence a decision. In the concept of the new fraud law the decision would be to pay workers' compensation benefits. See Lowe v. U.S., 389 F2d 108, certiorari denied, 88 S.Ct. 2072, 392 U.S. 912, 20 L.Ed.2d. 1371. Following this general definitional principle a list of facts which, if known, would be likely to influence or induce payment of compensation benefits under Minnesota Statutes, Chapter 176 was developed. Among these facts are employment status, symptoms, functional capacity, present or past medical condition, treatment by providers, attorney services for fees, payment of benefits, and facts on notices and reports required to be filed with the commissioner. These enumerated factual contexts, while not exhaustive, provide a focus and specificity for common representations and omissions which would cause persons and entities to receive workers' compensation benefits that investigators and others could rely on for guidance in fraud investigations.

Subpart 12 defines "Person" to include individuals and specified entities to clarify application of the term in the investigative process. Newly enacted Minnesota Statutes, section 176.178 and 176.87 apply to "any person" and "health care providers, employees, employers, insurers, attorneys and others" respectively. This definitional provision seeks to integrate these application concepts within the scope of apparent legislative intent of both statutes.

Subpart 13. "Probable cause" was added as a term because it is used in these rules as a legal standard for referral by means of a request for action, consistent with standards generally applied in the criminal law and for pursuing a civil action without malicious prosecution. In the civil context "probable cause" has been defined by case law as consisting of "such facts and circumstances as will warrant a cautious, reasonable, and prudent person in the honest belief that his action and the means taken in prosecution of it are just, legal, and proper." See First National Bank of Omaha v. Marquette National Bank of Minneapolis, 482 F. Supp. 514 (D. Minn. 1979) aff'd, 636 F2d 195 (8th Cir., 1980), cert. denied, 450 U.S. 1042, 101 S.Ct. 1761, 68 L.Ed.2d 240 (1981). In both civil and criminal contexts the courts determine case by case the sufficiency of facts to warrant reasonableness for action according to a general standard of probable cause.

Subpart 14. "Prosecuting authority" was defined to clarify the term as it is used in newly enacted Minnesota Statutes, section 176.87, and to specify that referrals may be made by the fraud unit to county attorneys or other appropriate law enforcement authorities which have jurisdiction and authority to prosecute criminal, civil, or administrative violations.

Subpart 15. "Rehabilitation provider" was defined in the workers' compensation context (Minn. Rules, part 5200.0100, subp. 8) because these providers are reasonably intended to be included in the scope of fraud unit investigations as "others related to workers' compensation" under Minnesota Statutes, section 176.87. Like health care providers, rehabilitation providers receive payments for their services and make representations to the commissioner and others that impact the payment or non-payment of benefits.

Subpart 16. "Request for action" is defined as the term which formally indicates that standards for referral to the attorney general or prosecuting authority are present based on probable cause that illegal activity is present. Having a clear and specific term for formal referral will assist case management and help notify all parties in the investigative process as to the status of the case.

Part 5228.0110 IDENTIFICATION OF SUSPECTED FRAUD OR PAYMENTS NOT RECEIVED IN GOOD FAITH.

Rule 5228.0100 is intended to specify a context for the responsibilities of the fraud unit by relating scope and powers for the unit to workers' compensation illegal practices in accord with Minnesota Statutes, section 176.87 and the 1992 fraud (Minnesota Statutes, section 176.178) and recovery of overpayment legislation (amendments to Minnesota Statutes, section 176.179) in Laws of Minnesota, Chapter 510. Overpayments identified in the course of investigations may, at the appropriate time, be referred to the payor, usually an insurer or self-insured employer, to commence proceedings under Minnesota Statutes, section 176.179. This provision was added to clarify that the fraud unit would not necessarily function as a collecting agent for payors, but could, when appropriate, identify evidence to refer for commencement of Minnesota Statutes, section 176.179 proceedings.

Part 5228.0120 INVESTIGATIVE POWERS.

Rule 5228.0120 is designed to clarify and enumerate the investigative power and scope of authority that investigators in the department fraud unit shall have. It is intended that fraud unit investigators are allowed to require the disclosure of personal and/or privileged confidential information from insurers without written authorization consistent with Minnesota Statutes, section 72A.502, which states at subdivision 2:

"Personal or privileged information may be disclosed without a written authorization to another person if the information is limited to that which is reasonably necessary to detect or prevent criminal activity, fraud, material misrepresentation, or material nondisclosure in connection with an insurance transaction, and that person agrees not to disclose the information further without the individual written authorization unless the further disclosure is otherwise permitted by this section if made by an insurer, insurance agent, or insurance-

support organization.”

The commissioner has broad enforcement and investigative powers regarding any laws within the commissioner’s jurisdiction. See Minnesota Statutes, section 175.20. In addition there are numerous specified investigative and enforcement powers throughout the range of statutes administered by the commissioner such as Minnesota Statutes, Chapters 176 (workers’ compensation), 177 (minimum wage), 178 (apprenticeships), 181 (employment, wages, hours, etc.), 181A (child labor), 182 (OSHA), 183 (elevators and boilers), 184 (employment agencies) and others. The rule clarifies that the fraud unit will operate within the scope of the commissioner’s statutory investigative authority.

Subpart 3 specifies persons and conduct consistent with the express application of the 1992 fraud and fraud unit statutes: (See the definition of “person” above.) This provision is necessary to reinforce the scope of application throughout the rule.

Part 5228.0130 DETERMINATIONS BY THE FRAUD UNIT.

Subpart 1 is designed to delineate the exact scope of authority of the fraud unit and determinations which the fraud unit will and can make pursuant to legislative authority granted to them. This provision affords further guidance to investigators and notice the public about what actions will be taken at various stages of the investigative process. Again it is specified that the unit will review the evidence to determine whether there is probable cause to proceed with a request for action by the Attorney General or other prosecuting authority or other referrals should be made.

Subpart 2 describes the types of post investigative action that the fraud unit may take ranging from a determination that no further action is necessary to a variety of specific referrals to agencies and prosecuting authorities which have specific jurisdictional authority. Among those are the prosecuting authority (see definition above), the commissioner, the Attorney General, the Minnesota Department of Commerce (insurers and self-insurers), boards and authorities which license and regulate providers and attorneys, and the EEOC (ADA violations). All of these designated referrals have statutory authority and jurisdiction over persons and subject matter which might arise from evidence gathered in the course and scope of the investigative work of the fraud unit. Subpart 2(B) provides the option of referring evidence to payors who would appropriately seek an order of the commissioner or compensation judge for recovery of overpayments obtained not in good faith pursuant to Minnesota Statutes, section 176.179. This was added to clarify that the investigative role of the fraud unit does not necessarily extend to collecting overpayments, but that evidence could be referred to appropriate payor parties to commence proceedings as a dispositional alternative. Subpart 2 clarifies and specifies in order to guide investigators and provide notice to the public concerning the range of referral options that could ensue from the investigative process.

Witnesses

Leo Eide: Assistant Commissioner, Workers’ Compensation Division, and departmental staff, including, but not limited to Deborah Cordes, Special Compensation Fund Director and Fraud Unit Director.