

AN ACT

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

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Official Code*

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To recognize an insurance compliance self-evaluative privilege to protect the confidentiality of communications relating to voluntary internal compliance audits.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Insurance Compliance Self-Evaluation Privilege Act of 2002".

New Chapter
8A,
Title 31

New
§ 31-851

Sec. 2. Definitions.

For the purposes of this act, the term:

- (1) "Commissioner" means the Commissioner of Insurance and Securities Regulation.
- (2) "Company" means all insurance companies or carriers that are licensed in the District and subject to the regulatory authority of the Commissioner.
- (3) "District" means the District of Columbia.
- (4) "Insurance compliance audit" means a voluntary internal evaluation, review, assessment, or audit by a company not otherwise expressly required by law. An insurance compliance audit may be conducted by the company, its employees, or by independent contractors.
- (5)(A) "Insurance compliance self-evaluative audit document" means a document prepared as a result of or in connection with, and not prior to, an insurance compliance audit. An insurance compliance self-evaluation audit document may include:
 - (i) A written response to the findings of an insurance compliance audit;
 - (ii) Field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, exhibits, computer-generated or electronically recorded information, maps, charts, graphs, and surveys; provided, that this supporting information is collected or developed for the primary purpose of, and in connection with, an insurance compliance audit;
 - (iii) An insurance compliance audit report prepared by an auditor

who may be an employee of the company or an independent contractor, which report may include the scope of the audit, information produced by the audit, and conclusions and recommendations, with exhibits and appendices;

(iv) Memoranda and documents analyzing portions or all of the insurance compliance audit report and discussing potential implementation issues;

(v) An implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance; or

(vi) Analytic data generated in the course of conducting the insurance compliance audit.

(B) "Insurance compliance self-evaluative audit document" shall not include documents, communications, data, reports, or other information created as a result of a claim involving personal injury or workers' compensation made against an insurance policy.

(6) "Privilege" means the insurance compliance self-evaluative privilege created by section 4(a).

New
§ 31-852

Sec. 3. Scope.

Nothing in this act shall limit, waive, or abrogate the scope or nature of any statutory or common law privilege, including work product, the attorney-client privilege, or the subsequent remedial measures exclusion.

Sec. 4. Privilege.

New
§ 31-853

(a)(1) An insurance compliance self-evaluative audit document shall be privileged information and shall not be admissible as evidence in any legal action in a civil, criminal, or administrative proceeding, except as provided in subsections (b), (c), (d), and (e) of this section and sections 5 and 6.

(2) The privilege shall not extend to:

(A) Documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or otherwise made available to a regulatory agency under a District or federal law, rule, or order;

(B) Information obtained by observation or monitoring by any regulatory agency; or

(C) Information obtained from a source independent of the insurance compliance audit.

(b) If, in connection with examinations conducted under the insurance laws, a company voluntarily submits an insurance compliance self-evaluative audit document to the Commissioner, as delegate of the Mayor, as a confidential document, the provisions of section 4(f) of the Law on Examinations Act of 1993, effective October 21, 1993 (D.C. Law 10-49; D.C. Official Code § 31-1403(f)), shall not apply to the insurance compliance self-evaluative audit document so voluntarily submitted.

(c) To the extent that the Commissioner has the authority to compel the disclosure of an insurance compliance self-evaluative audit document under other provisions of applicable law, the document furnished to the Commissioner shall not be provided to any other persons or entities and shall be accorded the same confidentiality and other protections as provided above for voluntarily submitted documents. Any use of an insurance compliance self-evaluative audit document furnished as a result of a request by the Commissioner under a claim of authority to compel disclosure shall be limited to determining whether or not any disclosed defects in an insurer's policies and procedures or inappropriate treatment of customers has been remedied or that an appropriate plan for their remedy is in place.

(d) The privilege shall not apply to the extent that it is expressly waived by the company that prepared, or caused to be prepared, the insurance compliance self-evaluative audit document.

New
§ 31-854

Sec. 5. Civil or administrative proceedings.

A court may, after an in camera review, require disclosure of material for which the privilege is asserted if the court determines:

- (1) The privilege is asserted for fraudulent purposes;
- (2) The material is not subject to the privilege; or
- (3) Even if subject to the privilege, the material shows evidence of noncompliance with District or federal statutes, rules, or orders and the company failed to take reasonable corrective action or eliminate the noncompliance within a reasonable time.

New
§ 31-855

Sec. 6. Criminal proceedings.

A court may, after an in camera review, require disclosure of material for which the privilege is asserted, if the court determines:

- (1) The privilege is asserted for a fraudulent purpose;
 - (2) The material is not subject to the privilege;
 - (3) Even if subject to the privilege, the material shows evidence of noncompliance with District or federal statutes, rules, or orders and the company failed to undertake reasonable corrective action or eliminate the noncompliance within a reasonable time;
- or

(4) The material contains evidence relevant to the commission of a criminal offense under District law, and:

- (A) The Commissioner, Corporation Counsel, or U.S. Attorney has a compelling need for the information;
- (B) The information is not otherwise available; and
- (C) The Commissioner, Corporation Counsel, or U.S. Attorney is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay.

Sec. 7. Requests for disclosure.

New
§ 31-856

(a) The Commissioner, Corporation Counsel, or U.S. Attorney may request, in writing by certified mail, disclosure of an insurance compliance self-evaluative audit document within 30 days after the service of the request. The company that prepared the document or caused the document to be prepared may file with the appropriate court a petition requesting an in camera hearing to determine whether the insurance compliance self-evaluative audit document or portions of the document are privileged or subject to disclosure. Failure by the company to file a petition waives the privilege for that particular document. A company asserting the insurance compliance self-evaluative privilege in response to a request for disclosure under this subsection shall include in its request the information set forth in subsection (d) of this section.

(b) Upon the filing of a petition under this section, the court shall issue an order scheduling, within 45 days after the filing of the petition, an in camera hearing to determine whether the insurance compliance self-evaluative audit document or portions of the document are privileged or subject to disclosure.

(c) The court, after an in camera review, may require disclosure of material for which the privilege is asserted in accordance with section 5 or section 6. The court shall compel only the disclosure of those portions of an insurance compliance self-evaluative audit document relevant to issues in dispute in the underlying proceeding. A compelled disclosure shall not be considered to be a public document or be deemed to be a waiver of the privilege for any other civil, criminal, or administrative proceeding. A company unsuccessfully opposing disclosure may apply to the court for an order protecting the document from further disclosure.

(d) A company asserting the privilege in response to a request for disclosure under this section shall provide to the Commissioner, Corporation Counsel, or U.S. Attorney, as the case may be, at the time of filing any objection to the disclosure that:

(A) The date and time that the insurance compliance self-evaluative audit document was prepared;

(B) The identity of the entity conducting the audit;

(C) The general nature of the activities covered by the insurance compliance audit; and

(D) An identification of the portions of the insurance compliance self evaluative audit document for which the privilege is being asserted.

Sec. 8. Burden of proof.

New
§ 31-857

(a) A company asserting the privilege shall have the burden of demonstrating the applicability of the privilege. If a company has established the applicability of the privilege, a party seeking disclosure under section 5 shall have the burden of proving that the privilege is asserted for a fraudulent purpose or that the company failed to undertake reasonable corrective action or eliminate the noncompliance within a reasonable time. The Commissioner, Corporation Counsel, or U. S. Attorney seeking disclosure under section 6 shall have the burden of proof.

(b) The parties may at any time agree to entry of an order directing that specific information contained in an insurance compliance self-evaluative audit document be disclosed.

Sec. 9. Applicability.

The privilege shall apply to all litigation or administrative proceedings pending on the effective date of this act or filed subsequent to the effective date of this act.

New
§ 31-858

Sec. 10. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(3)).

Sec. 11. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia