

By Mr. Mariano of Quincy, petition of Ronald Mariano relative to insurance compliance self-audit privilege. Insurance.

The Commonwealth of Massachusetts

In the Year Two Thousand and One.

AN ACT RELATIVE TO INSURANCE COMPLIANCE SELF-AUDIT PRIVILEGE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 175 of the General Laws is hereby amended by
2 inserting after section 4C the following new section:—

3 Section 4D. (1) The following words, as used in this section,
4 unless the context otherwise requires, shall have the following
5 meanings:

6 “Communication or communications” mean all oral and written
7 communications and information relating to an insurance compli-
8 ance self-audit and includes an insurance self-audit document.

9 “Hearing officer” means an individual appointed by an agency
10 to conduct a hearing in an agency proceeding. Such an individual
11 includes the commissioner and may be a staff employee of the
12 agency.

13 “Insurance compliance self-audit”, a voluntary internal evalua-
14 tion, review, assessment, or audit not otherwise expressly required
15 by law of an insurer or an activity regulated under the state insur-
16 ance laws and regulations promulgated thereunder, or other laws
17 of this or other states or federal law applicable to an insurer, or of
18 management systems related to the insurer or activity, that is
19 designed to identify and prevent noncompliance and to improve
20 compliance with such statutes, rules, or orders. An insurance com-
21 pliance self-audit may be conducted by the insurer, its employees,
22 or by independent contractors.

23 “Insurance compliance self-audit document”, any document pre-
24 pared as a result of or in connection with and not prior to an insur-
25 ance compliance self-audit. An insurance compliance self-audit

26 document includes a written response to the findings of an insur-
27 ance compliance self-audit. An insurance compliance self-audit
28 document does not include, documents existing prior to the incep-
29 tion of an insurance compliance self-audit, nor shall the collection
30 of such documents in the course of an insurance compliance self-
31 audit subject any such document to the privilege set forth in
32 section 2 and 3 of this act. An insurance compliance document
33 includes a written response to the findings of an insurance compli-
34 ance self-audit, findings, opinions, conclusions, drafts, memo-
35 randa, computer-generated or electronically recorded information
36 and phone records, provided this supporting information is col-
37 lected or developed for the primary purpose and in the course of an
38 insurance compliance self-audit. An insurance compliance self-
39 audit document also includes any of the following:

40 (a) A report prepared by an auditor, who may be an employee
41 of the insurer or an independent contractor, which may include the
42 scope of the audit, the information gained in the audit, and conclu-
43 sions and recommendations, with exhibits and appendices;

44 (b) Memoranda and documents analyzing portions or all of the
45 report and discussing potential implementation issues;

46 (c) An implementation plan that addresses correcting past non-
47 compliance, improving current compliance, and preventing future
48 noncompliance; or

49 (d) Analytic data generated in the course of conducting the
50 insurance compliance self-audit.

51 (2) An insurance compliance self-audit is privileged and no
52 communication relating to an insurance compliance self-audit
53 shall be discoverable or admissible as evidence in any civil,
54 administrative or similar case or proceeding, except as otherwise
55 expressly provided herein. The privilege created in this paragraph
56 is a matter of the substantive law of this state.

57 (3) If the privilege set forth in subsection (2) applies, no insurer
58 or person may be examined in any civil, administrative or similar
59 case or proceeding as to any insurance compliance self-audit or
60 any communication pertaining thereto.

61 (4)(A) The provisions set forth in subsections (2) and (3) herein
62 shall not apply:

63 (i) To the extent that the insurer that conducted or caused to be
64 conducted the insurance compliance self-audit expressly waives
65 the privilege by so stating its intent in writing; or

66 (ii) To the extent that, in a civil, administrative or similar case or
67 proceeding, the court or hearing officer determines that the insur-
68 ance compliance self audit privilege is asserted for a fraudulent
69 purpose, provided that the court or hearing officer shall review the
70 communication in camera before making such a determination.

71 (B) In ordering disclosure under this subsection, the court or
72 hearing officer shall only compel the disclosure of communica-
73 tions that are relevant to the issues in dispute in the underlying
74 proceeding. A party unsuccessfully opposing disclosure may
75 apply for an appropriate order protecting the communication from
76 further disclosure. There shall be an immediate right of appeal of
77 any order under this subsection.

78 (C) An insurer asserting the insurance compliance self-audit
79 privilege in response to a request for disclosure under this section
80 shall provide at the time of filing of any objection to the disclo-
81 sure all of the following information:

82 (i) The date of the communication;

83 (ii) The identity of the person conducting the audit;

84 (iii) The general nature of the activities covered by the insur-
85 ance compliance self-audit; and

86 (iv) An identification of the communications for which the
87 privilege is being asserted.

88 (D) A party seeking disclosure under subsection (A)(ii) has the
89 burden of proving that the privilege is asserted for a fraudulent
90 purpose.

91 (E) The parties may at any time stipulate to entry of an order
92 directing that specific communications pertaining to an insurance
93 compliance self-audit are or are not subject to the privilege cre-
94 ated herein.

95 (5) The privilege set forth in subsections (2) and (3) herein
96 shall not impair the authority of the commissioner or the commis-
97 sioner's designees to conduct examinations pursuant to
98 Chapter 175 of the General Laws, and the commissioner shall
99 have full authority thereunder to require disclosure of communica-
100 tions and to examine persons in connection therewith, notwith-
101 standing that any communication is subject to the privilege set
102 forth in subsections (2) and (3) herein. However:

103 (A) All such communications shall be treated as confidential;

104 (B) Disclosure of any communication to the commissioner shall
105 not constitute a waiver of the privilege. In the event that any com-
106 munication is disclosed to a third person, that communication
107 shall be entitled to the privilege;

108 (C) Any provision of law or rule permitting the commissioner
109 to make information, records and reports public, as well as provi-
110 sions permitting the commissioner to exchange information and
111 data with the National Association of Insurance Commissioners
112 shall not apply to any communication pertaining to an insurance
113 compliance self-audit disclosed to the commissioner herein. Any
114 communication so disclosed to the commissioner shall remain the
115 property of the insurer. To the extent that the commissioner has
116 the authority to compel the disclosure of any communication per-
117 taining to an insurance compliance self-audit under other provi-
118 sions of applicable law, any communication so disclosed to the
119 commissioner may not be disclosed to any other person and must
120 be accorded the same confidentiality and other protections as oth-
121 erwise provided herein;

122 (D) The commissioner may not impose any type of administra-
123 tive fine, penalty, or other sanction based solely upon any commu-
124 nication disclosed. Prior to imposing any type of administrative
125 fine, penalty, or other sanction, the commissioner shall consider
126 any reasonable corrective measures undertaken by the insurer. The
127 imposition of any administrative sanction shall be subject to
128 applicable hearing procedures provided by chapter 30A of the
129 General Laws;

130 (E) Any communication disclosed to the commissioner under
131 this section remains subject to all applicable privileges existing
132 under statute, common law or rule, such as work product doctrine,
133 attorney-client privilege, or the subsequent remedial measures
134 exclusion. Any communication disclosed to the commissioner
135 under this section is not subject to any disclosure under any other
136 section of the general laws;

137 (F) Disclosure of a communication to an agency, whether vol-
138 untary or pursuant to law, does not constitute a waiver of the priv-
139 ilege with respect to any other person. To the extent any provision
140 of law shall permit the commissioner to disclose to another
141 agency any communication obtained herein, such disclosure shall
142 not be made without first verifying that the recipient agency

143 agrees and has the legal authority to protect the communication
144 consistent with the act, and in the case of a criminal law enforce-
145 ment agency, shall not be made in the absence of a duly issued
146 subpoena.

147 (6)(A) The privilege created herein shall not extend to any of
148 the following:

149 (i) Documents, data, reports, or other information required to be
150 collected, developed, maintained, or reported to an agency pur-
151 suant to state or federal law or order. However, any disclosure
152 under subsections (4) and (5) herein shall not in and of itself make
153 this exception applicable;

154 (ii) Information obtained by observation, investigation or moni-
155 toring by any agency; or

156 (iii) Any communication obtained by examination or investiga-
157 tion authorized by the commissioner, or designee, when such com-
158 munication is obtained independently from the insurance
159 compliance self-audit and even though such communication dupli-
160 cates information, in whole or in part, contained within the insur-
161 ance compliance self-audit.

162 (7) Nothing herein shall limit, waive, or abrogate the scope or
163 nature of any privilege existing under statute, rule or common law
164 including but not limited to, the work product doctrine, the
165 attorney-client privilege, or the subsequent remedial measures
166 exclusion.

167 (8) The commissioner shall maintain the confidentiality of
168 information protected herein, subject to the specific exceptions set
169 forth in subsection (6) herein.

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