

## **FRAUD ENFORCEMENT AND NEW CRIMINAL & CIVIL PENALTIES TARGET UNINSURED EMPLOYERS**

Traditionally when the term “fraud” is used in insurance, most people think immediately of a claimant trying to “put one over” on the system. As a consequence, insurance carriers and the Workers’ Compensation Board have taken steps over the past decade to attempt to catch and prosecute parties who commit such fraud. However, the cost of Employer Fraud to the system, and to those honest employers under it, is much larger. Over the past several years, the Workers’ Compensation Board has stepped up compliance against uninsured employers, with larger fines and an aggressive data-matching campaign with other State agencies. The 2007 reforms take this compliance to a new level, increasing fines, penalties, imposing stop-work orders, suspension and debarment. Though our readers are not the target of this legislation, you may deal with subcontractors, independent contractors, and others who face its provisions.

First and foremost is compliance with the law that requires all employers to secure compensation coverage for their employees, though a policy issued under the law of New York. In its most aggressive move, the New York Workers’ Compensation Board has announced that effective September 9, all out-of-state employers (i.e. those with offices not in New York) who have employees working in New York State will be required to carry a “full, statutory workers’ compensation insurance policy”. This is defined as a compensation insurance policy issued by a carrier, listing New York in item 3A on the employers’ workers’ compensation information page. A call to the Workers’ Compensation Board by our office resulted in an elaboration that, for example, a New Jersey employer, who sends its New Jersey employees into New York on a temporary assignment, but who maintains a New Jersey workers’ compensation policy that DOES NOT include “all states” coverage, or specifically coverage in New York under New York Law for those possible New York employees, would be in violation of this law, subjecting it to fines. Further, it is not clear whether, if a New York employer subcontracted this New Jersey employer to perform work for it, that the certificate of insurance issued and the declaration page issued for that New Jersey employer would be sufficient for the New York employer to avoid being charged under his coverage for these “uninsured out-of-state employees”. We can easily see a situation where New York contractors, using out-of-state labor for a job, could see charges for uninsured subcontractors. We believe there will need to be significant clarification of this compliance issue, and there may be litigation that results from it.

Further changes to the law, and increased criminal and civil penalty provisions include, the following:

- Failure to secure coverage for five or fewer employees is a misdemeanor with fines ranging between \$1,000 and \$5,000. Failure to secure coverage for more than five employees is a Class E felony, with fines ranging between \$5,000 and \$50,000. Conviction of a second or subsequent violation of this provision within a five-year period is a Class D felony, with fines ranging between \$10,000 and \$50,000. These fines are in addition to any other penalties and fines; for instance, the previous penalty for non-compliance, \$250 for a ten-day period, is now increased to \$1,000 for a ten-day period.
- As under prior law, Corporate Officers may be considered personally liable for failure to secure such coverage; however, the new law creates an affirmative defense to this personal liability for officers who take reasonable steps to insure that their corporation secured workers’ compensation.
- Included in the definition of failure to secure workers’ compensation is now a provision including the intentional misrepresentation or concealment of payroll or information relevant to premium calculation, which includes any deliberate or intentional misrepresentation of codes or misclassification of payroll intentionally to a lower-rated code as a means to avoidance of premium. A violation of this provision is deemed to be the equivalent of non-compliance for failure to secure coverage. Employers are required to keep adequate records to determine the employers payroll for any period in question, as well as being required to maintain adequate records to properly classify employee payroll. Failure to maintain such documentation can involve penalties including an imputation of employee payroll based on the State Average Weekly Wage, multiplied by 150%.
- Whenever the Chair of the Workers’ Compensation Board determines that an employer who is required to secure compensation coverage, has failed to do so, or has failed to pay penalties assessed against it, such failure may be deemed by the Chair to be an “immediate serious danger to public health, safety, or welfare” sufficient for the Chair to issue a “stop-work order” on that employer, requiring immediate cessation of all business operations immediately. This stop-work order may be issued on a single work-site of an employer, or on all employer locations, and the order shall remain in effect until lifted by the Chair, upon determination that the employer is in compliance with the coverage requirements of the law, or that assessed penalties have been paid. The employer may appeal the stop-work order, and the Chair may make a redetermination based on an agreement to pay, or other compliance. However, a failure by the employer to meet the terms and conditions of such a settlement shall result in the reinstatement of the stop-work order, and reinstatement in full of all penalties. A stop-work order issued shall apply against all substantially owned subsidiaries of the employer.
- Any person subject to final assessment of fines or penalties, or to a stop-work order, or who has been convicted of certain misdemeanor compliance provisions of the law, as well as any substantially-owned affiliated entity, shall be ineligible to submit a bid on or be awarded any public work contract with the State, any municipal corporation or public body for a period of one year

from the final conviction. Those convicted of felony provisions are debarred from such work for a period of five years from such conviction.

- The law creates a greater coordination and communication among the Workers' Compensation Board, Department of Labor, Department of Taxation and Finance, Department of Motor Vehicles, and the Department of Insurance, in the gathering of information to identify or investigate possible fraud.
- With respect to claims prosecuted by claimants or their attorneys, which claims are deemed to be without reasonable grounds, the law provides for assessment of costs against these parties, as well as legal fees against attorneys or licensed representatives who institute or maintain such actions without reasonable grounds.
- Finally, the law extends civil immunity to any person who, in good faith, shares information related to suspected fraudulent insurance transactions with a state agency, including its employees/agents, investigating fraud or misconduct related to the Workers' Compensation Law.