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Public Law
123rd Legislature
First Regular Session

Chapter 75
H.P. 751 - L.D. 991

An Act To Clarify the Security Requirements for Self-insurers

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 39-A MRSA §403, sub-§3, as amended by PL 2005, c. 98, §§1 and 2, is further amended to read:

3. Proof of solvency and financial ability to pay; trust. The employer may comply with this section by furnishing satisfactory proof to the Superintendent of Insurance of solvency and financial ability to pay the compensation and benefits, and depositing cash, satisfactory securities, irrevocable standby letters of credit issued by a qualified financial institution or a surety bond with the board, in such sum as the superintendent may determine pursuant to subsection 8, the bond to run to the Treasurer of State and to be conditional upon the faithful performance of this Act relating to the payment of compensation and benefits to any injured employee. In case of cash or securities being deposited, or drawn on a surety bond or letter of credit, the cash or securities must be placed in an account at interest by the Treasurer of State, and the accumulation of interest on the cash or securities so deposited must be credited to the account and may not be paid to the employer to the extent that the interest is required to secure the employer's self-insurance obligations, including the amount needed to support any present value discounting in the determination of the amount of the deposit. Any security deposit must be held by the Treasurer of State in trust for the benefit of the self-insurer's employees for the purposes of making payments under this Act. If the superintendent determines that the self-insurer has experienced a deterioration in financial condition that adversely affects the self-insurer's ability to pay obligations under this Act, the security amount may be in excess of the minimum amount required by this Title.

A self-insurer may, with the approval of the Superintendent of Insurance, use the following types of security to satisfy the self-insurer's responsibility to post security required by the superintendent: a surety bond; an irrevocable standby letter of credit; cash deposits and acceptable securities; and an actuarially determined fully funded trust. For purposes of this section, "tangible net worth" means equity less assets that have no physical existence and depend on expected future benefits for their ascribed value. Unless disapproved by the superintendent pursuant to paragraph C, subparagraphs (5) and (6), a group self-insurer that maintains a trust actuarially funded to the confidence level required by the superintendent may use an irrevocable standby letter of credit as follows: only in an amount not greater than the difference between the funding to the required confidence level and funding to the confidence level reduced by 10 percentage points; only as long as the trust assets are not used as collateral for the letter of credit; and

only as long as the value of trust assets, excluding the value of the letter of credit, are at least equal to the present value, evaluated to the 65% confidence level, of ultimate incurred claims, claims settlement costs and, if determined necessary by the superintendent, administrative costs.

A. An individual self-insurer providing an irrevocable standby letter of credit as security shall file with the Superintendent of Insurance a letter of credit, on a form approved by the superintendent, copies of any agreements or other documents establishing the terms and conditions of the employer's reimbursement obligations to the financial institution issuing the letter of credit, together with copies of any required security agreements, mortgages or other agreements or documents granting security for the employer's reimbursement obligations and any other agreements that contain conditions, restrictions or limitations of any kind upon the employer, the superintendent or the Treasurer of State. The form of letter of credit approved by the superintendent must include, but is not limited to, all terms specifically required by this subsection and all terms reasonably required to secure the payment of compensation and benefits to claimants as required under this Act. The superintendent, upon receipt of the original irrevocable standby letter of credit, shall promptly forward it to the Treasurer of State.

In order to issue an irrevocable standby letter of credit as security under this paragraph, a financial institution or its parent company must either:

- (1) Maintain a long-term unsecured debt rating of at least A by either Moody's Investors Service, Inc. or Standard and Poor's Corporation;
- (2) Maintain a short-term commercial paper rating within the 3 highest categories established by Moody's Investors Service, Inc. or Standard and Poor's Corporation; or
- (3) Be certified in writing by the Superintendent of Financial Institutions to be well capitalized and well managed in accordance with the criteria set forth in Title 9-B, section 446-A, subsections 1 and 2. The Superintendent of Insurance shall keep the certification confidential, except from the subject financial institution, in accordance with Title 9-B, section 226.

The Superintendent of Insurance may adopt rules to establish additional qualifications for financial institutions issuing irrevocable standby letters of credit. Rules adopted pursuant to this paragraph are routine technical rules pursuant to Title 5, chapter 375, subchapter H-A2-A.

The irrevocable standby letter of credit must be the individual obligation of the issuing financial institution, may not be subject to any agreement, condition, qualification or defense between the financial institution and the employer and may not in any way be contingent on reimbursement by the employer. If the rating of an issuing financial institution that has issued an irrevocable standby letter of credit pursuant to this section falls below the required standard, the employer shall obtain a new irrevocable standby letter of credit from a qualified financial institution or shall provide other eligible security of equal value approved by the Superintendent of Insurance. The irrevocable standby letter

of credit is automatically extended for one year from the date of expiration unless, 90 days prior to any expiration date, the issuing financial institution notifies the Superintendent of Insurance that the financial institution elects not to renew the irrevocable standby letter of credit.

An irrevocable standby letter of credit that has been issued by a qualified financial institution and accepted by the Superintendent of Insurance binds the issuing financial institution to pay one or more drafts drawn by the Treasurer of State, as directed by the superintendent, as long as the draft does not exceed the total amount of the irrevocable standby letter of credit. Any draft presented by the Treasurer of State, as directed by the superintendent, must be promptly honored if accompanied by the certification of the superintendent that any obligation under this chapter has not been paid when due or that a proceeding in bankruptcy has been initiated by or with respect to the employer in a court of competent jurisdiction.

If the Superintendent of Insurance certifies that the superintendent has been notified by the issuing financial institution that the irrevocable standby letter of credit expires by its terms in 30 days or less and that the irrevocable standby letter of credit was not replaced within 15 days after that notice to the superintendent by other eligible security of equal value approved by the superintendent, then the financial institution must remit within 15 days the full amount of the irrevocable letter of credit to the Treasurer of State without further certification.

Any proceeds from a draw on such an irrevocable standby letter of credit by the Treasurer of State, as directed by the Superintendent of Insurance, must be held by the Treasurer of State on behalf of workers' compensation claimants to secure payment of claims until either the superintendent authorizes the Treasurer of State to release those proceeds to the employer upon provision by the employer of replacement security adequate to meet the requirements for security set by the superintendent or the superintendent directs distribution of the proceeds in accordance with this Title.

To the extent not inconsistent with state law, the letter of credit is subject to and governed by the International Standby Practices 1998 or successor practices governing standby letters of credit duly adopted by the International Chamber of Commerce. If any legal proceedings are initiated with respect to payment of the letter of credit, those proceedings are subject to the State's courts and law.

B. The Superintendent of Insurance shall prescribe the form of the surety bond that may be used to satisfy, in whole or in part, the self-insurer's responsibility under this section to post security. The bond must be continuous, be subject to nonrenewal only upon not less than 60 ~~days~~days' notice to the superintendent, cover payment of all present and future liabilities incurred under this Act while the bond is in force and cover payments that become due while the bond is in force that are attributable to injuries incurred in prior periods and otherwise unsecured by cash, irrevocable standby letters of credit or acceptable securities. A bond must be held until all payments secured by the bond have been made or until the bond has been replaced by other eligible security approved by the superintendent that covers all outstanding liabilities. Payments under the bond are due within 30 days after notice has been given to the surety by the board that the principal has failed to make a payment required under the terms of an award, agreement or governing law. A trust established to satisfy the requirements of this section may not be funded by a surety bond.

C. A self-insurer may establish an actuarially determined fully funded trust, funded at a level sufficient to discharge those obligations incurred by the employer pursuant to this Act as they become due and payable from time to time, as long as the Superintendent of Insurance requires that the value of trust assets be at least equal to the present value of ultimate expected incurred claims and claims settlement costs, plus required safety margins and, if determined necessary by the superintendent, administrative costs for the operation of the plan of self-insurance. For the purpose of determining whether an actuarially determined fully funded trust has a surplus of funds in excess of that required by this subsection, the superintendent shall consider, based upon the group's audit for all completed plan years, only the following assets held outside the trust account: cash up to \$10,000; accounts receivable, limited to amounts collected and deposited in the trust account by the date of the surplus distribution; accrued interest on trust account assets that will be collected and deposited in the trust account within 6 months from the date of the surplus determination; tangible assets that will be converted to cash and deposited in the trust account prior to the distribution date of any surplus; and a letter of credit to be used to partially fund the trust to the extent allowed under this section and rules adopted by the superintendent, as supported in the actuarial review. The superintendent shall consider cash held outside the trust account in excess of \$10,000 if the self-insurer provides, to the superintendent's satisfaction, documentation regarding why the money is being held outside the trust account. An actuarially determined fully funded trust must be funded as follows, as determined by the superintendent.

(1) For individual and group self-insurers, the amount of security must be determined based upon an actuarial review. The actuarial review must take into consideration the use by a group self-insurer of any irrevocable standby letter of credit. Except as provided in subparagraph (3), initial funding for each plan year must be maintained at the 90% or higher confidence level. Funding after the completion of the initial plan year may be established no lower than the 75% confidence level if the following has occurred:

(a) A year considered for reduction is completed;

(b) The supporting actuarial review includes an evaluation of the completed year experience with claims evaluated not less than 6 months from the end of the plan year, or in the case of a group self-insurer in existence for at least 36 months, not less than 4 months from the end of the plan year; and

(c) For individual self-insurers, prior approval from the superintendent is obtained.

For the purposes of determining the confidence level, all completed years at the same confidence level may be aggregated. For individual self-insurers, funds may not be released from the trust or transferred between years except as approved by the superintendent. The governing body of a group self-insurer may at any time declare a surplus of funds above the required confidence level, but may only release funds after the completion of any plan year. The superintendent may request information regarding any such declaration. Any distribution of surplus must be based upon an actuarial review of all outstanding obligations for all completed plan years, an audited financial statement of the group for all completed plan years

and a surplus distribution worksheet for all completed plan years on a form approved by the superintendent. The group self-insurer must provide the required information within 10 days after the distribution. Any surplus declared or distributed pursuant to this paragraph is subject to adjustment after review by the superintendent within 60 days of the receipt of the required information. Any deficit below the required confidence level, as determined by the superintendent, that results from a distribution under this paragraph must be funded within 45 days from the date of the notice by the superintendent.

(2) A group self-insurer may elect to fund at a higher confidence level through the use of cash, marketable securities or reinsurance. If a member of a group self-insurer terminates membership in the group for any reason, that member shall fund the member's proportionate share of the liabilities and obligations of the trust to the 95% confidence level. If for any reason the departing member fails to fund the member's proportionate share of the trust's exposure to the 95% level of confidence, the remaining members of the group shall make the additional contribution no later than the anniversary date of the program as required to fund the departing member's exposure in accordance with this provision.

(3) Subject to prior approval by the superintendent in accordance with subparagraph (5), a self-insurer that has successfully maintained an actuarially determined fully funded trust for a period of 5 or more consecutive years may fund all years, including the prospective fund year, at the 75% or higher confidence level in the aggregate and a group self-insurer that has successfully maintained an actuarially determined fully funded trust for a period of 10 or more consecutive years may fund all years, including the prospective fund year, at the 65% or higher confidence level in the aggregate.

(4) Trust assets must consist of cash or marketable securities of a type and risk character as specified in subsection 9. The trustee shall submit a report to the superintendent not less frequently than quarterly that lists the assets comprising the corpus of the trust, including a statement of their market value and the investment activity during the period covered by the report. The trust must be established and maintained subject to the condition that trust assets may not be transferred or revert in any manner to the employer except to the extent that the superintendent finds that the value of the trust assets exceeds the present value of incurred claims and claims settlement costs with an actuarially indicated margin for future loss development. In all other respects, the trust instrument, including terms for certification, funding, designation of trustee and payout, must be as approved by the superintendent, except that the value of the trust account must be actuarially calculated at least annually by a casualty actuary who is a member of the American Academy of Actuaries and adjusted to the required level of funding.

(5) In determining whether a self-insurer that maintains an actuarially determined fully funded trust qualifies for a reduction in the required confidence level pursuant to subparagraph (1) or (3) or is subject to an enhanced confidence level pursuant to subparagraph (6), the superintendent shall consider the financial condition of the self-insurer in relation to the potential workers' compensation liabilities. The factors the superintendent may consider include the self-insurer's liquidity, leverage, tangible net worth, size and net income. For group

self-insurers, the superintendent's review must be based on the aggregate financial condition of the group members. At the request of the superintendent, a group self-insurer shall report relevant financial information, on a form prescribed by the superintendent, at such intervals as the superintendent directs. The superintendent may establish additional review criteria or procedures by rule. Rules adopted pursuant to this subparagraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

(6) If the superintendent determines, based on an evaluation of a self-insurer's financial condition pursuant to subparagraph (5), that the confidence level at which the self-insurer has been authorized to fund its trust is not sufficient to provide adequate security for the self-insurer's reasonably anticipated potential workers' compensation liabilities, the superintendent shall make a determination of the appropriate confidence level and order the self-insurer to take prompt action to increase funding to that level within 60 days.

D. Notwithstanding any provision of this chapter, authorization to self-insure may not be conditioned on a bond or security deposit that is in excess of \$50,000 for the State, the University of Maine System or any county, city or town with a state-assessed valuation equal to or in excess of \$300,000,000 and either a bond rating equal to or in excess of the 2nd highest standard as set by a national bond rating agency or a net worth equal to or in excess of \$35,000,000. If a county, city or town that is a self-insurer relies upon a bond rating to qualify under this paragraph, it shall value or cause to be valued its unpaid workers' compensation claims pursuant to sound accepted actuarial principles. This value must be incorporated in the annual audit of the county, city or town, together with disclosure of funds appropriated to discharge incurred claims expenses.

E. In consideration of a self-insuring entity's application for authorization to operate a plan of self-insurance, the Superintendent of Insurance may require or permit an applicant to employ valid risk transfer by the utilization of primary reinsurance, subject to the provisions of subsection 8. Standards respecting the application of reinsurance must be contained in a rule adopted by the superintendent pursuant to the Maine Administrative Procedure Act. Reinsurance must be defined as insurance covering workers' compensation exposures in excess of risk retained by a self-insurer.

F. An employer may be eligible for approved self-insurance status pursuant to this Act if the employer submits a written guarantee of the obligations incurred pursuant to this Act, the guarantee to be issued by a United States or Canadian corporation that is a member of an affiliated group of which the employer is a member, and which corporation is solvent and demonstrates an ability to pay the compensation and benefits, and the guarantee is in a form acceptable to the Superintendent of Insurance. The guarantor shall provide audited annual financial statements and such other information as the superintendent may require, including quarterly financial statements, and the employer shall provide a cash deposit, satisfactory securities, irrevocable standby letters of credit issued by a qualified financial institution or a surety bond as otherwise required by this Act in an amount not less than \$100,000. The guarantor is deemed to have submitted to the jurisdiction of the board and the courts of this State for purposes of enforcing the guarantee. The guarantor, in all respects, is bound by and subject to the orders, findings, decisions or awards rendered against the employer for payment of compensation and any penalties or forfeitures provided under this Act. The superintendent, following hearing, may revoke the self-insured status of the employer if at any time the assets of the guarantor become impaired or encumbered or are otherwise found to be inadequate to support the guarantee.

G. A subsidiary employer may be eligible for approved self-insurance status pursuant to this Act if: the subsidiary employer files an application jointly with a qualified parent corporation that has direct ownership of a majority voting interest of the subsidiary employer; the parent corporation and subsidiary employer submit an irrevocable contract of assignment, on a form approved by the Superintendent of Insurance, of the subsidiary employer's obligations incurred pursuant to this Act; the parent corporation is solvent and demonstrates an ability to pay the compensation and benefits of the subsidiary employer; and the subsidiary employer meets all other requirements for application and qualification as a self-insurer under this chapter and under any applicable rules adopted by the superintendent. If the parent corporation is not a United States corporation, the superintendent may, in the superintendent's sole discretion, establish the conditions of any approval of the foreign parent corporation or deny the application of the foreign parent corporation. As part of its application for approval, a foreign parent corporation must provide the following information to the superintendent: evidence that its country of domicile has substantially similar laws with respect to submission to the jurisdiction of the board and the courts of this State for the purposes of payment of workers' compensation claims of the subsidiary employer; audited financial statements, as otherwise required by this Act, prepared in the English language by a certified public accountant licensed in a state in the United States in accordance with generally accepted auditing standards as prescribed by the American Institute of Certified Public Accountants; and security, as otherwise required by the Act, in United States currency. The irrevocable contract of assignment and application must be signed by a duly authorized officer of each corporation and the application must include a board of directors' resolution from each entity as evidence of each officer's authority to enter into the contract. The superintendent may determine the subsidiary employer's eligibility for self-insurance authority and the amount of required security based upon the parent corporation's consolidated financial statement, as long as the employer complies with paragraph H. A subsidiary employer currently authorized to self-insure need not pay the application fee required of a new applicant in order to file an application to qualify under this subsection, but the subsidiary employer and parent corporation must provide all information required under this subsection as if they were a new applicant. Once the subsidiary employer becomes authorized to self-insure under this section, the parent corporation assumes liability for all prior workers' compensation liabilities incurred by the subsidiary employer during the period of self-insurance prior to the date of authorization under this subsection, unless the subsidiary employer files an alternative plan approved by the superintendent. The parent corporation and the subsidiary employer must both be named on the certificate of authorization for self-insurance authority. Upon issuance of a certificate of authorization pursuant to this subsection, the following applies.

(1) The parent corporation is deemed to have submitted to the jurisdiction of the board and the courts of the State for the purposes of payment of workers' compensation claims of the subsidiary employer and is deemed to have submitted to the jurisdiction of the superintendent for purposes of implementation of this Act. The parent corporation, in all respects, is bound by and subject to all orders, findings, decisions or awards rendered against the subsidiary employer for payment of compensation and any penalties or forfeitures provided under this Act.

(2) A subsidiary employer authorized under this subsection and the parent corporation are considered one employer for the purposes of membership in the Maine Self-Insurance Guarantee Association. In the event of termination, transfer, insolvency, dissolution or

bankruptcy of a subsidiary employer qualifying under this subsection, the parent corporation assumes all assessment obligations of the subsidiary employer for its period of self-insurance and is not considered a new member of the association.

(3) If the subsidiary employer fails for any reason to pay compensation and benefits as required under this Act, the parent corporation stands in the place of the subsidiary employer and is deemed to be the employer, subject to all requirements and provisions of this Act. For the purposes of payment of benefits and compensation under this Act, an employee of the subsidiary employer is deemed to be concurrently employed by both corporations. Concerning notification of injury to an employee of the subsidiary employer, notice to or knowledge of the occurrence of the injury on the part of the subsidiary employer is deemed notice or knowledge on the part of the parent corporation. The transfer, insolvency, dissolution or bankruptcy of a subsidiary employer qualifying under this subsection does not relieve the parent corporation from payment of compensation for injuries or death sustained by an employee during the time the subsidiary employer was approved for self-insurance authority under this subsection and the parent corporation continues to be deemed an employer until such time as all outstanding workers' compensation claims have been discharged.

(4) The transfer, insolvency, dissolution or bankruptcy of a parent corporation causes the termination of the subsidiary employer's authorization to self-insure and a termination plan must be filed pursuant to subsection 14.

H. Each individual self-insurer shall submit with its application, and not less frequently than annually thereafter, a financial statement of current origin that has been audited by a certified public accountant. When a self-insurer qualifies on the basis of a financial guarantee or on the basis of an irrevocable contract of assignment, the Superintendent of Insurance may accept an audited financial statement of the guarantor or parent corporation in satisfaction of this requirement and may also require combining statements provided in an array that is reconciled to the consolidated report.

Effective September 20, 2007