



February 20, 2007

BUREAU CIRCULAR No. 816

RE: **SENATE BILL 1**

PROVISIONS PERTAINING TO COVERAGE FOR OUT-OF-STATE EMPLOYERS

For some time, Delaware workers compensation rates have generally been higher than those of surrounding jurisdictions. Delaware employers have perceived these differentials as a competitive disadvantage when projects in Delaware can be done on a short-term basis using personnel based in other states.

In apparent response to these concerns, Section 21 of Senate Bill 1 (signed into law on January 17, 2007) requires that certain out-of-state employers must obtain workers compensation coverage for employees working in Delaware via a Delaware policy, a Delaware schedule of rates endorsed onto a policy issued in another state, or by qualifying as a self-insurer in the State of Delaware.

The employers subject to this requirement are any "construction or contracting" businesses and other types of businesses doing "substantial work" in Delaware. "Construction or contracting" and "substantial work" are terms defined within Senate Bill 1.

The language of Senate Bill 1 and other pertinent Delaware laws relevant to this issue is extensive and somewhat complex. For ease of reference, this circular provides two attachment sections. The first such section contains language excerpted from Senate Bill 1 pertinent to out-of-state employers and includes definitions relied upon in that section. The second section contains language from § 2372, § 2373 and § 2374 of the Delaware Workers Compensation Act, with which out-of-state employers affected by Section 21 of Senate bill 1 must comply.

The Bureau is attempting to obtain clarification of a number of points related to the provisions of the law noted or presented in attachments to this circular. Among other things, we do not presently know how the term "primarily engaged" will be interpreted and/or how partial days of employment or work activity will be treated by the Department of Labor in administering this law. Further, we do not know how the Department of Labor will respond to the requirements of §2374 pertaining to proof-of-coverage. Historically and up to the enactment of Senate Bill 1, the Bureau provided the Department of Labor with access to policy coverage information obtained from carriers reporting their new or renewal policies,

cancellations, reinstatements and endorsements. Recently the Bureau began providing public access to this information online through the Department of Labor's website. Whether these procedures will be adopted as a means of compliance with Senate Bill 1 or some alternative and/or additional processes will be established remains to be seen. The Bureau will continue to advise members and other interested parties via circular when additional information becomes available to us.

Any questions concerning this Circular may be directed to Bruce Decker, Senior vice President, at (302) 654-1435, Extension 4411 or bdecker@dcrb.com or me at (302) 654-1435, Extension 4413 or twisecarver@dcrb.com.

Timothy L. Wisecarver
President

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Attachments

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Remember to visit our web site at www.dcrb.com for more information about this and other topics.

Section 21 of Senate Bill 1, signed into law on January 17, 2007, requires in part that "Every employer having a primary place of business in another state shall carry Delaware workers' compensation coverage in full for any employees doing substantial work in the State of Delaware as if they were an employer in Delaware. Every such employer whose employee is injured during the course of employment within the territory of the State of Delaware shall notify such employee of his or her rights under this chapter."

"Substantial work" is defined in Senate Bill 1 as including but not being limited to the following:

- (1) A construction or contracting business for which a Delaware employer would be required to be licensed under Title 30, Chapter 25 of the Delaware Code,
- (2) A business of any sort in which one or more employees is primarily engaged in the business of the employer in the territory of the State of Delaware for more than five consecutive work days at a single time; or
- (3) Working for a business of any sort in which one or more employees is primarily engaged in the business of the employer for more than an aggregate of three weeks in any six-month period. For purposes of this section, a week shall consist of five consecutive work days.

Title 30, Chapter 25 of the Delaware Code defines "contractor" as "...every person engaged in the business of:

a. Furnishing labor or both labor and materials in connection with all or any part of construction, alteration, repairing, dismantling or demolition of buildings, roads, bridges, viaducts, sewers, water and gas mains and every other type of structure as an improvement, alteration or development of real property; a person is a contractor regardless of whether the person is a general contractor or a subcontractor, or whether the person is a resident or a nonresident; in addition "contractor" shall include "construction transportation contractors" which shall include persons engaged in the business of contracting for transporting tangible property of other persons in connection with all or any part of the construction, alteration, repairing, dismantling or demolition of buildings, roads, bridges, viaducts, sewers, water and gas mains and every other type of structure as an improvement, alteration or development of real property but shall not include draypersons as defined in § 2301(a) of this title; or

b. Real estate development.

The insurance requirement imposed by Section 21 of Senate Bill 1 may be satisfied by:

- (1) An actual Delaware workers compensation policy covering the activities of the employer for any employee engaged in the employer's business in the territory of the State of Delaware;
- (2) A written rider on an out-of-state policy of insurance covering the work activities of the employees as fully and completely as an actual Delaware workers compensation policy would; or
- (3) A declaration of self-insurance that would be valid and acceptable if made by a Delaware employer in the territory of the State of Delaware providing such coverage, filings and surety as is required of Delaware employers to be self-insured for claims for Delaware workers compensation.

Employers described in Section 21 of Senate Bill 1 are specifically required to comply with Sections 2372, 2373 and 2374 of the Delaware Workers Compensation Act. Language of those sections including amendments made by Senate Bill 1 is provided below:

§ 2372. Duty of employer to carry compensation liability insurance or to qualify as a self-insurer; deposit of security; premiums for certain summer employees.

(a) Every employer to whom this chapter applies shall insure and keep insured the employer's liability for compensation in some corporation, association or organization approved by the Department and authorized to transact the business of workers' compensation insurance in this State or shall furnish to the Department satisfactory proof of the employer's financial ability to pay directly the compensation, in the amount and manner and when due, as provided in this chapter.

(b) In any case, the Department or Board may require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred. All bonds of insurance carriers or self-insurers deposited to secure their obligations under this chapter shall be deposited with the State Insurance Commissioner.

(c) Every insurer licensed to issue workers' compensation and employers' liability insurance by the Insurance Department pursuant to Title 18, shall offer to write each such policy subject to a deductible applying only to medical reimbursement and death benefits. The insured employer shall be permitted to accept or reject such a deductible at the time the policy is issued or renewed. Any applicable deductible shall be subject to the following provisions:

(1) The deductible shall apply separately to each occurrence during the policy term regardless of the number of employees injured in the occurrence;

(2) The deductible shall be subject to a minimum of \$500 and a maximum of \$5,000, with intermediate deductible increments of \$500;

(3) The premium charged for a deductible form of policy shall be subject to an actuarially **(sic)** sound credit related to the amount of the deductible;

(4) In the event of a claim under a deductible form of policy, the insurer shall administer the claim as though no deductible applied and shall then be entitled to reimbursement from the employer for the amount of said deductible.

(d) Every insurer licensed to issue workers' compensation and employers' liability insurance by the Insurance Department pursuant to Title 18 shall write a policy and base its rates upon the limited term of employment, rather than on an annual basis, for summer employees employed by various civic and nonprofit associations whose wages are funded through grants awarded by the Department of Community Affairs. (Code 1915, § 3193z; 29 Del. Laws, c. 233; 30 Del. Laws, c. 203, § 8; 37 Del. Laws, c. 239, § 3; Code 1935, § 6096; 47 Del. Laws, c. 174; 48 Del. Laws, c. 24; 19 Del. C. 1953, § 2372; 63 Del. Laws, c. 250, § 4; 64 Del. Laws, c. 171, § 1; 70 Del. Laws, c. 172, §§ 3, 4; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 84, § 3; 74 Del. Laws, c. 390, § 1.)

§ 2373. Payment of compensation by self-insurer.

Whenever an employer who is a self-insurer under this chapter enters into an agreement to pay compensation to an injured employee or the employee's dependents in case of the employee's death or whenever an award is made by the Board in favor of such injured employee or the employee's dependents in case of the employee's death, the employer shall pay the full liability under the agreement or award to a savings bank or trust company in accordance with § 2359 of this title. Such fund, together with all interest arising from the investment thereof, shall be held and paid out in accordance with § 2359 of this title. Failure on the part of a self-insured employer to make such payment within 30 days after the making of an agreement or award shall forthwith terminate the right of such employer to carry the employer's own insurance. (Code 1915, § 3193z; 29 Del. Laws, c. 233; 30 Del. Laws, c. 203, § 8; 37 Del. Laws, c. 239, § 3; Code 1935, § 6096; 19 Del. C. 1953, § 2373; 70 Del. Laws, c. 172, § 4; 70 Del. Laws, c. 186, § 1.)

§ 2374. Proof of compliance with insurance requirements; liability on failure of compliance; defenses unavailable; injunction.

(a) Every employer to whom this chapter applies shall file with the Department in form prescribed by it, annually or as often as may be required by the Department, evidence of the employer's compliance with §§ 2372 and 2373 of this title and all other sections relating thereto.

(b) Every insurance carrier shall notify the Department of Labor, on forms specified by the Department, within fourteen (14) days that an employer's policy for workers' compensation coverage has been cancelled, lapsed, or is otherwise terminated, other than for replacement of coverage through a different insurance carrier, with a copy to the employer.

(c) Every employer, upon such notice, or, at the latest, when contacted by the Department of Labor concerning such notice, shall provide proof of insurance within fourteen (14) days or establish by proof satisfactory to the Secretary of the Department of Labor that the employer has:

- (1) been granted self-insured status in accordance with all the laws of the State of Delaware,
- (2) terminated operation;
- (3) terminated or retired any employees and the operators of the business have elected to waive coverage under §2308 of this title;
- (4) sold the business, been voluntarily or involuntarily been liquidated, and/or been enjoined by the courts from doing business; or
- (5) otherwise ceased to exist as an entity that requires workers' compensation coverage in Delaware.

(d) Whoever, being an employer, refuses or neglects to comply with the sections referred to in subsection (a) of this section shall be subject to a civil penalty:

- (1) for employers previously insured until the default, an amount equal to the premium for the insurance not purchased times three (3), based on the last premium rate charged by the carrier providing the coverage before the default for a one year period; or

- (2) for employers without previous history of coverage, an amount equal to the most expensive policy premium actually charged by any insurance carrier doing business in the State at the time of the assessment for appropriate coverage of the uninsured employer's business times three (3) for a one (1) year period.

(e) Whoever, being an employer, refuses or neglects to comply with the sections referred to in subsection (a) of this section on a continuing basis after notice by the Department of Labor shall be subject to a civil penalty:

- (1) as described in subsection (d) on the 15th day after notice to comply with subsection (c); and
- (2) an assessment of \$10 per day for each employee in the employer's service at the time when the insurance became due, but not less than \$250 for each day of such refusal or neglect and until the same ceases.
- (3) The employer shall also be liable to the employer's injured employees during continuance of such neglect or refusal, either for compensation under this chapter or in an action at law for damages. In such action, upon proof that the employer has not complied with this section, it shall not be a defense that the:
 - (a.) Employee was negligent; or
 - (b.) Employee had assumed the risk of the injury; or
 - (c.) Injury was caused by the negligence of a fellow employee.

(f) If any employer is in default under §§2372 and 2373 of this title for a period of thirty (30) days, in addition to the above, the employer may be enjoined by the Court of Chancery of this State from carrying on business while such default continues. The Department of Labor shall file such petitions in such cases seeking an order of the Court.

(g) When an employer is uninsured for any period and obtains insurance subsequently to comply with notice to provide proof of insurance, for each day that the employer is uninsured, regardless of whether or not a claim arises during that period, the employer shall be assessed the penalty in subsection (d) unless the employer can demonstrate to the satisfaction of the Secretary of Labor that the uninsured status was the fault of some other business entity, in which case the assessment shall be levied upon the business entity at fault for the uninsured status. Before an alternative business entity may be charged with the assessment, it shall be given notice and if the liability is contested, a hearing before the Secretary of Labor.

(h) Any assessment or fine collected under this section will be deposited in the Workers' Compensation Fund and disbursed to pay the claims of any employee affected by the employer's failure to comply with the requirements of insurance imposed by this chapter. (Code 1915, § 3193aa; 29 Del. Laws, c. 233; Code 1935, § 6097; 19 Del. C. 1953, § 2374; 70 Del. Laws, c. 95, § 3; 70 Del. Laws, c. 172, § 4, 9; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 84, § 3, 76 Del. Laws, c. 1, § 2.