

September 2019

### **Change in Law: New Workers' Compensation Coverage Requirements**

**Background:** Effective August 1, 2019, Alaska made changes to existing workers' compensation laws that will impact many businesses throughout the State. Corporations and limited liability companies must now provide workers' compensation coverage for each "employee" who owns less than 10% of the business entity. If an executive officer or member owns 10% or more of the business entity, the executive officer or member will not be considered an employee for purposes of workers' compensation laws. Under the old laws, any officer had the option to elect to waive coverage with the approval of the directors, and members were not considered employees. See AS 23.30.240.

An employee is defined as a person who is not an independent contractor and who, under a contract of hire, express or implied, is employed by an employer. See AS 23.30.395(19). This means that if the employee "works" for the business entity and owns less than 10% of the entity, the employee must have workers' compensation coverage by August 1, 2019. Passive investors who are not under a contract of hire and provide no services to the business entity are exempt from the workers' compensation coverage requirement, even if they own less than 10% of the business entity.

The Workers' Compensation Division will recognize executive officer waivers issued before July 31, 2019 through the expiration of the entity's existing insurance policy or until the entity voluntarily cancels the policy.

**What this means to you:** The greatest impact from the new law likely involves parent and subsidiary companies and family businesses. Many clients own at least 10% of a parent company and are involved with the operations of a subsidiary. According to the Division of Workers' Compensation those clients may need workers' compensation coverage if they do not directly own at least 10% of the subsidiary.

Another illustration of the implications of the law involves family businesses. There is no small or family business exception. A client that owns less than 10% of an entity may provide services or run errands for a family owned corporation or limited liability company and may now need workers' compensation coverage to comply with the new law. We are told the Workers' Compensation Division will make determinations such as these on a case-by-case basis.

The penalties for the failure to comply with the new requirements are significant. Civil penalties ranging from \$10 - \$1,000 per uninsured "employee" for each uninsured employee workday are now authorized based upon 15 different "aggravating factors".<sup>1</sup> Violations of these factors will likely result in the Workers' Compensation Division issuing a "stop order" to prohibit the use of employee labor by the entity until the required coverage is obtained.<sup>2</sup> We are also told underwriters will terminate coverage of businesses who fail to comply with the new law.

Workers' compensation premiums can be costly and the potential penalties for the failure to comply with the requirements are significant. This can have a substantial impact upon the planning/organization of business entities in Alaska. Reorganization of the entity may lessen or eliminate the impact of the new law, although the decision to implement any reorganization should be balanced with a variety of considerations.

If you have any concerns regarding the changes to the workers' compensation requirements or think your business entity may benefit from restructuring, please contact our office to discuss.

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<sup>1</sup> "Aggravating factors" includes: (1) failure to obtain workers' compensation insurance within 10 days after notification of a lack of coverage; (2) failure to maintain workers' compensation insurance after previous notification of a lack of coverage; (3) a violation of AS 23.30.075 that exceeds 180 calendar days; (4) previous violations of AS 23.30.075; (5) issuance of a stop order; (6) violation of a stop order; (7) failure to comply with the division's initial discovery demand; (8) failure to pay a penalty previously assessed; (9) failure to provide compensation or benefits payable under the Act to an uninsured injured employee; (10) a history of injuries or deaths while in violation of AS 23.30.075; (11) a history of injuries or deaths while the employer was insured under AS 23.30.075; (12) failure to appear at a hearing; (13) cancellation of a workers' compensation insurance policy; (14) lapses in business practice that would be used by a reasonably diligent business person; (15) receipt of government funding of any form to obtain workers' compensation coverage under AS 23.30.075, and failure to provide that coverage (the maximum penalty of \$1,000 per uninsured employee workday may be assessed under AS 23.30.080(f) for a violation of this factor). See 8 AAC 45.176(d).

Violations of 1 - 3 of these factors result in a \$10 - \$50 penalty per uninsured employee workday, 4 - 6 violations result in a \$51 - \$499 penalty per uninsured employee workday, 7 - 10 violations result in a \$500 - \$999 penalty per uninsured employee workday, and more than 10 violation result in the maximum \$1,000 penalty per uninsured employee workday. See 8 AAC 45.176(a)(3) - (6).

<sup>2</sup> AS 23.30.080(d) provides the Workers' Compensation Board "shall" assess a \$1,000 per day, civil penalty against the employer for violation of a "stop order" until workers' compensation coverage is properly obtained.