

## Foreign Policy

### You Could Unknowingly Buy a Workers' Comp Claim You Never Expected

By DAVID MATOSKY

If you are not careful, you could unknowingly be taking on your subcontractor's workers' compensation insurance, costing you much more in premiums and affecting your claims experience. In some instances, even with a certificate of insurance, you may still be assuming the exposure of those subcontractors.

Massachusetts law mandates that all businesses in the Commonwealth that have employees carry workers' compensation insurance to cover their employees regardless of their business structure. Workers' compensation insurance pays lost-time (wage) and medical benefits to employees injured during the course of their employment.

Corporations must comply with the law, but in some instances certain officers of the corporation can be exempted from coverage.

While sole proprietors, partners in a partnership, members of a limited liability company (LLC), and partners in a limited liability partnership (LLP) have the choice to elect coverage for themselves, they must nonetheless comply with the law if they have any employees. The law defines an employee as "every person in the service of another under any contract of hire, express or implied, oral or written."

But what happens when an employer does not carry a valid workers' compensation insurance policy?

If the uninsured employer has a relationship with a 'general employer,' then the law requires that the general employer's policy respond as if that worker was an employee of the general employer.

This means that in the case of an injury, the general employer's policy will pay the benefits. It also means that an insurance audit could add the uninsured employee's pay to the premium bases of the general employer's policy. This general employer relationship most commonly exists when a contractor hires independent or subcontractors.

To illustrate this concept, let's go through the following scenario. A property manager carries a valid workers' compensation insurance policy in compliance with the law. In order to get a fresh coat of paint on the walls of his building, the property manager hires Al to paint. Al in turn hires Joe to help him paint. Unfortunately, Joe is hurt while painting. Al never got a workers' compensation policy to provide coverage for Joe. Therefore, Joe will be considered an employee of the property manager, and the property manager's policy will pay benefits to Joe. In addition, the property manager's premium and loss experience will be impacted due to the claim.

In the absence of a workers' compensation policy, the injured employee can seek benefits directly from their employer. This creates a significant financial exposure for

those employers that opt to violate the law, or may simply be ignorant of the law. To illustrate this point, let's say a homeowner hires a neighbor to help him clean the gutters on his house. If the neighbor is injured while cleaning the gutters, the homeowner will be picking up the tab.

The employer-employee relationship between independent contractors, subcontractors, and general contractors can be difficult to understand and is not always easy to distinguish. To educate yourself more on this issue, you should review the advisory issued by the Mass. Attorney General in July 2004, which revises the Independent Contractor Law. The advisory can be found at [www.ago.state.ma.us](http://www.ago.state.ma.us).

Another issue that can be difficult to understand and for which authorities in the Commonwealth have created a working group to resolve relates to sole proprietors and partners. As previously mentioned, while sole proprietors and partners must carry workers' compensation insurance when they have employees, they have the option of electing coverage on themselves. When they do not elect coverage under their policy, they are therefore individually uninsured for workers' compensation.

So what happens when a sole proprietor or partner who did not elect coverage under their policy is injured performing work for me?

One might think that since the sole proprietor or partner had the opportunity to elect coverage on themselves under their policy, but opted not to, that they are on their own if they are injured, and I won't be liable to pay benefits. To further complicate things, they gave me a certificate of insurance as evidence that they carried a valid workers' compensation insurance policy.

Doesn't that take me off the hook? Apparently not, and that is why the working group has been established.

Until such time as the Commonwealth clarifies this significant issue, the best thing your company can do when hiring a sole proprietor or partnership to perform work for you is to know the facts before you hire them. Request a certificate of insurance that specifically indicates whether the sole proprietor or partner has elected coverage or not.

Insurance companies and agents will be required to disclose such information on certificates of insurance as of May 1, 2007, but there is nothing to prevent them from disclosing such information prior to then. Insist on it. Otherwise, you could unknowingly be buying a workers' compensation claim that you never expected.

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