

## WORKERS' COMPENSATION

# New Rule Tightens Exclusion for Officers, Owners

**A** NEW LAW has made changes to the officer exclusion for workers' compensation in California, but it could cause problems for policies that incept prior to the effective date of Jan. 1.

Starting in 2017, an officer can only be excluded from workers' comp coverage if he or she owns 15% or more of the company's stock. That's changed from the current rules that set no ownership levels for officers and directors that want to claim a workers' comp exclusion, which has created confusion as well as an opportunity for fraud.

However, the law is written in such a way that it also applies to policies that are in effect as of 2017 and not just those incepting on Jan. 1.

In other words, if your policy incepts at another point in the year, and if you have owners or officers who are claiming this exemption, you will need to bring your policy into compliance before the start of the year.

### Current law

To be eligible for a workers' comp exclusion:

- The employee must be an executive

officer of the corporation (president, vice president, secretary, assistant secretary, treasurer, assistant treasurer, for example).

- The employee must own some stock in the corporation.
- The company must be a "closed corporation." That means that all of the company stock must be owned by the executive officers and directors.

### The problem with current law

The election process to opt out of coverage is not very clear under current law. Beyond one limited statutory reference and very little regulatory guidance, insurers and LLCs are left to figure it out for themselves.

The Association of California Insurance Companies, one of the supporters of the bill – AB 2883 – argues that this lack of clarity has led to abuses that have hurt injured workers and driven fraudulent activity.

There have been cases of some companies making a janitor the "vice president of janitorial services" in order to avoid paying for their workers' comp coverage. ❖

## What's new Jan. 1, 2017

AB 2883 requires:

- That an officer or member of the board of directors own at least 15% of the stock of the corporation in order to opt out of workers' compensation coverage.
- That the officer or member of the board of directors sign a waiver stating that the individual is a qualifying officer or member.
- To continue receiving the exemption, you will have to submit a waiver to your insurer by Dec. 31. Your insurer will send you the form.
- If the signed waiver/exclusion form is not received on or before Dec. 31, individuals will be included for coverage effective Jan. 1, 2017 and subject to officer minimum/maximum payrolls.
- The minimum officer payroll for 2017 is \$48,100 and the maximum officer payroll is \$122,200.
- Officer premiums will be determined based on job duties, class code rates and payroll.

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**NEW LAW**

# State-mandated Retirement Program Starts Jan. 1



**A** NEW LAW will take effect on Jan. 1, 2017 that will require California employers with five or more workers to offer their staff a retirement plan or enroll them in a new state-run retirement program.

The law, the first of its kind in the nation, is expected to become a blueprint for other states that are considering creating their own retirement plans.

Employers that already offer their workers a retirement plan, like a 401(k), will not be required to participate, but those that don't will have to enroll their employees in the California Secure Choice Retirement Program (SCRCP). Once enrolled, a minimum of 3% will be deducted from employees' paychecks on a pre-tax basis.

The law does not require employers to match the deduction, nor does it require them to pay their own funds into the plans.

For the first three years of the program, all assets will be invested in U.S. Treasuries, or IRA accounts – the savings program established by the U.S. Department of Treasury that also invests savings in bonds issued by the federal government. ❖

**WHEN DOES IT START?**  
The law prescribes that it take effect Jan. 1, 2017, but a number of media reports have said that the ramping up period for the state may be too short – and that implementation may therefore be delayed.

**BASIC REQUIREMENTS**  
Enabling regulations still have to be written for the new law, however the law spells out some of the major provisions:

- Workers will be able to opt out of the program.
- The minimum amount employees will be required to divert to the retirement plan is 3%, but the board of directors for SCRCP is authorized to set the level between 2 and 5% of salary, depending on the length of time an individual enrollee has participated in the program.
- Over time, deferrals may automatically escalate up to an 8% threshold.
- Workers will have the option to adjust deferral rates, but must abide by the minimums.
- The program will be administered by an investment board, comprised of nine members and headed by the state treasurer, and will include several members appointed by the governor.

**LARGE EMPLOYERS FIRST**  
Mandatory enrollment will be phased based on the size of eligible employers:

- Employers with 100 more workers will have 12 months from the time of the program's launch to enroll them.
- Employers with 50 to 99 workers will have two years from the time of the program's launch to enroll them.
- All other eligible employers with five or more workers will have three years to enroll them.

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## WORKERS' COMP

# How Three Firms Reduced Their Claims Costs

**A**LMOST ALL businesses have some risk of being sued or cited for pollution, even the most benign, such as a property owner.

Pollution exposures for many businesses are obvious – like dry cleaners from the chemicals they use, to printing companies from the ink they use. And any manufacturer would face some type of pollution exposure as well, in addition to warehouse operators and contractors.

Think you're not exposed? Say you own a business property, even an office building for example, you could have pollution exposure such as:

- The existence of lead (paint and pipes) or asbestos.
- Releases of pollutants by tenants from improper or inadequate storage or disposal of lubricant oils, primer or lab waste material.
- Inadequate containment in loading areas that could lead to the release of pollutants.

However, as the risks have grown for pollution liability, most commercial general liability policies now exclude pollution coverage. It's something to be aware of for most any business, particularly as the list of what is considered to be a pollutant has grown dramatically.

### The exclusion

The easiest way to think of a pollution exclusion is that it can apply to a contaminant. Virtually every commercial general liability policy includes a pollution exclusion.

These policies used to cover pollution but as the risk for being sued for pollution has grown, so then has the exclusion.

The standard policy has two pollution liability coverage forms. It also has a special form for underground storage tanks.

The current version of the Insurance Services Office (ISO) commercial general liability form has pollution coverage narrowed down to a few covered occurrences, typically including:

- Certain off-premises exposures
- Certain product-completed operations
- Smoke, fumes, soot, vapors from your heating equipment or from a fire in your building
- Gas or fumes from materials you bring into a work site.

### The broad definition of pollution

Consider these examples:

- A food company in Wisconsin recalled a batch of listeria bacteria-contaminated sandwiches and filed a product recall claim with its insurer. However, the insurer denied coverage based on the policy's pollution exclusion. The court sided with the insurer, concluding that bacteria were an excluded ISO form pollutant.
- A hospital in California was sued after an outbreak of legionnaire's disease was traced back to a drinking fountain in the hospital lobby. The insurer rejected coverage for the lawsuits, citing a fungus and bacteria exclusion in their general liability policies.



### The solution

What are the possible answers when it comes to the pollution insurance question? You can have a specific commercial liability form or a separate pollution liability policy.

Pollution liability insurance is designed to address claims and suits involving pollution losses in which it is alleged that the insured is responsible, as well as property losses related to pollution on owned or occupied property. ❖

## Pollution liability policy coverage

**Premises pollution liability** – Covers first-party claims associated with pollution on the premises of the insured. (Example: It is discovered that instead of clean soil, contaminated soil was used to fill a space formerly occupied by an underground storage tank that leaked. The cost of remediation would be covered.)

It would also cover third-party claims associated with the pollution (like when a person falls sick due to the pollution).

**Contractors pollution liability** – Covers bodily injury, property damage and remediation costs for which a contractor who causes pollution is liable.

**Errors and omissions liability** – Covers losses that result from wrongful acts performed in conducting professional services, such as a soil engineer erroneously rendering an opinion that there is no soil pollution, when in fact, there is.

## RISK MANAGEMENT

# Review, Update Your Business Continuity Plans

**C**ALIFORNIA EMPLOYERS may have to update and expand their workplace first aid kits next year as Cal/OSHA finalizes new regulations governing what they should contain.

The rule-making board for Cal/OSHA has proposed changes that should make it easier to comply as one of the most confusing parts of the regulation is set to be eliminated. A portion of the current rules lays out the requirements for the first aid kit contents, which the employer can deviate from with a note from an employer-authorized licensed physician.

The regulations being formulated now would do away with those requirements and instead require employers to have adequate first aid supplies based on the hazards of their workplace, or face a Cal/OSHA citation.

The new regulations will essentially be performance standards, since the contents of the kit will be determined by the needs of an employer's workforce.

Cal/OSHA wants employers to assess the likely injuries in their workplaces and prepare appropriately with supplies and training.

The standard is in need of revision as knowledge about first aid has evolved over time.

Most small employers are unaware of the consulting provision, but members of Cal/OSHA's rule-making board say that the provision is unnecessary. Often if there is a note, it is merely a photocopy that has been provided by the manufacturer of the first aid kit.

Many of Cal/OSHA's board members recommend using the first aid kit contents as recommended by the American National Standards Institute (ANSI), and that the contents be checked every three months to ensure all of the required supplies are there.

One piece of good news is that the requirements will likely not cost employers a lot of money. If a business already has an ANSI-approved kit, it would most likely suffice unless there are workplace dangers that may require additional materials.

The new rules are expected to take effect in early 2017. ❖

## Likely Kit Requirements

Minutes from the October board meeting indicated that the members are leaning towards a three-pronged requirement:

- That there be a minimum list of materials that are suitable for an office environment and perhaps at least partially include items in the ANSI list.
- That there are other items in the kit based on the hazards that are specific to the workplace.
- Requirements for specific hazards, like companies that have chemicals or other substances keeping the proper antidotes on hand for workers who are exposed. That would require a doctor's certification.

## What is first aid?

First aid is defined by Cal/OSHA as:

- Issuing non-prescription medications at non-prescription strengths;
- Administering tetanus vaccinations;
- Cleaning and covering wounds;
- Using hot/cold therapy;
- Using non-rigid supports and temporary immobilization devices;
- Drilling fingernails and toenails to relieve pressure;
- Administering eye patches, irrigating eyes or swabbing them to remove foreign bodies;
- Removing splinters from areas other than the eye;
- Using finger guards;
- Using massage; and
- Providing fluids for heat stress.

