



WRAITH, SCARLETT & RANDOLPH
INSURANCE SERVICES, INC

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Workers' Compensation

The Dangers of Self-Insured Groups

RECENT NEWS of a self-insured group in California being seized should serve as a warning about the inherent risks of these groups. The 260 mostly small and mid-sized employers that were in this group now face the specter of being liable for a reserves shortfall of up to \$60 million. Even members that once were in the group but had dropped out may also be liable.

The Contractors Access Program of California (CAP), a self-insured program for construction firms, started having cash-flow problems in 2009 as a number of its members left and secured coverage in the private market.

At its peak, CAP had 266 members, but its membership had shrunk to 189 by February 2009 and 137 in November 2009, according to a report by the trade publication *Workers' Comp Executive*. With more companies dropping out of the group, CAP requested that the regulator of self-insurance plans, the Office of Self Insurance Plans (OSIP), revoke its certificate on the grounds that it did not have enough assets to cover all of its losses at the time of the request.

How self-insured groups work

Self-insured groups basically pool the risks of a number of like employers (companies in the same industry) who put up collateral to pay for workers' comp claims costs among the members. Members of self-insured groups are jointly and severally liable for each other's claims and for the claims of the group as whole. The idea is that instead of paying premiums to an insurance company, members will be able to control their claims costs better and in the long run reduce their overall workers' comp expenses.

But self-insured groups must pay their claims like a carrier and someone has to adjust those claims. Often the claims adjusting operations are contracted out to a third-party administrator. The group also needs a knowledgeable administrator that is proficient at estimating claims costs and reserving for claims properly. Any mistakes in this area can result in OSIP ordering the group to increase its

reserves, which means that all group members must pony up additional funds.

There are currently 25 self-insured groups for various industries. Four other groups have had their licenses revoked over the past few years.

Fallout for the group

Worse for the former members of the CAP group is the large tab they are going to be on the hook for, estimated at \$12 million to \$60 million, according to the news report.

Some members told the *Workers' Comp Executive* that they're going to feel the pain based on what little information they've received from the group managers. "It's going to hurt us really bad if it's going to be this big," says one small construction company.

As for the company's joint and several liability, the company owner said he did not know, but "it's a lot." The contractor has obtained other workers' comp insurance through its broker. ■

WE HAVE A NEW ADDRESS!



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CRAPSHOOT:

You are liable for the ultimate cost of not only your own workplace injuries but those of other members in a self-insured group. In other words, you've become an insurance company.

Workplace Safety

Avoid Running Afoul of Wage and Hour Laws

WITH EXPECTED increases in both litigation and federal enforcement of wage and hour laws, employers should make sure they comply with both federal and state laws.

While there are exceptions for individual industries in terms of what they should do, all employers should periodically conduct self-audits addressing the federal and state wage and hour issues that are applicable to their workplace.

The goal of an audit should be:

- to ensure that exempt classifications are properly applied to each employee;
- to ensure exempt employees are paid on a “salary basis,” and that absence and leave policies comply with Fair Labor Standards Act (FLSA) and state law requirements regarding authorized and unauthorized deductions;
- to ensure that all forms of pay required to be included

in overtime calculations are, in fact, included;

- to ensure non-exempt employees are paid for all hours worked;
- to ensure that your payroll records are complete and accurate and are retained for the proper amount of time; and
- to ensure that, to the extent state law requirements exceed those of the FLSA, such stricter requirements become the standard.

Any issues you identify in a periodic audit should be addressed immediately. At the same time, employment policies and actions should be implemented to create an environment in which compliance becomes part of your operational mindset.

The compliance strategies below address some of the more common potential errors in the wage and hour context. ■

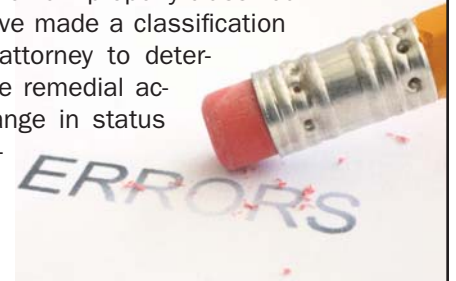
Meal and Break Laws

- Implement written policies regarding meal and break times of non-exempt employees and require approval for additional hours worked.
- Implement measures to ensure that breaks are uninterrupted and employees taking such breaks are completely relieved from duty.
- Tell supervisors not to assign tasks to non-exempt employees or allow them to perform work during their breaks.



Misclassification Errors

- At the time of hiring, inform employees if they are exempt or non-exempt, review job descriptions and spell out payment terms for straight time and overtime.
- Periodically review duties exempt employees perform to ensure they remain properly classified.
- If you find you’ve made a classification error, consult your attorney to determine the appropriate remedial action, such as a change in status from exempt to non-exempt and making payments to such employee.



Overtime/Off-clock Errors

- Adopt clear written policies on schedules and hours of work and require approval for overtime work.
- Require employees to report all time worked.
- Train employees and managers on timekeeping policies and discipline for violations of policy.
- Do not pressure employees to meet deadlines or perform assignments that can only be met by working overtime.
- Regularly review time records. If you find that you failed to pay overtime, pay it at once, even if the work was not authorized.



Record-keeping Mistakes

- Implement and disseminate a timekeeping policy. The policy may, for example, require all employees to complete weekly time sheets, noting all breaks.
- Require non-exempt employees to review and sign their time cards every week and initial any changes made to them. This is your evidence if sued for an off-the-clock violation.
- Retain time and payroll records for all employees. This will help you quickly correct any mistakes you uncover and helps work with an employee who says they were short-changed on their paycheck. Accurate records are the best defense in a wage and hour complaint.



The Taxman Cometh

IRS Employment Audits Get Underway

THE IRS has officially started its Employment Tax National Research Project, which will audit some 6,000 employers of all sizes over the next three years. The aim of the project is to gauge through comprehensive examinations of companies' books how well small, mid-sized and large employers properly pay their employment taxes during the tax years of 2008 through 2010.

The examinations focus on large and small issues (including some items that appear immaterial), and are followed by a thorough review of the results. The IRS announced its plans in November last year and is conducting exams across many industrial sectors.

The project is being launched because the IRS believes a large cross-section of employers are not properly paying their employment taxes.

The two goals of the project are:

- To secure statistically valid information for computing the Employment Tax Gap; and
- To determine compliance so the IRS can focus on the most non-compliant employment tax areas.

The results of the study could also give the IRS ammunition to target certain industries with high non-compliance rates.

The audits will cover four types of employment taxes: Social Security tax; Medicare tax; Federal Unemployment Insurance Tax (FUTA); and personal income tax withholding.

Half of Social Security and Medicare taxes (also known as FICA taxes) are paid by the employer and the other half by the employee. FUTA is paid entirely by the employer. Personal income tax is paid entirely by the employee, but the employer has an obligation to withhold and remit such tax to the IRS.

The IRS is also expected to focus on four areas: worker classification; fringe benefits; reimbursed expenses; and compensation of owner employees. For instance, the IRS will be looking for misclassified workers (workers listed as independent contractors but who are actually employees) and taxable fringe benefits that are treated as nontaxable benefits.

In addition to the Employment Tax project, the IRS is looking more generally at:

- Penalties for failure to deposit employment taxes; and
- Employment tax issues with respect to foreign workers.

Accountants recommend a number of steps to prepare for a possible National Research Project audit (if you use an outside accountant, you should coordinate with them):

- Conduct an internal audit. Make an analysis of your company's obligations and liabilities (both real and potential).
- Make an honest and critical review of all relevant documents. If you have any tax-related documents with ambiguities, it would be a good idea to get them sorted out. An IRS auditor will most often make decisions on any ambiguities (say, employee classification) against the employer.
- If audited, meet with the auditor at your accountant's office. Otherwise IRS auditors may try to speak with your employees, many of who will not be in a position or prepared to answer



GAME PLAN: If an IRS agent wants to meet, coordinate with your accountants to hold the meeting at their office.

the questions. Moreover, they could give incorrect information.

- Keep separate files for each independent contractor. Maintain organized files for each contractor you use. The file should include invoices, contracts, business cards, business licenses, advertisements, website information and more. These are all good pieces of evidence to show that the person is indeed an outside contractor with his or her own business. This is also a good exercise for assessing whether someone can truly be categorized as an independent contractor.

- Review legal definitions for employees. This is particularly important for delineating hourly and exempt workers (the latter of whose wages are not subject to employment taxes). For example, Internal Revenue Code outlines what type of employees qualify as exempt employees, such as "direct sellers." Under the tax law, a worker may qualify as a "direct seller" under Internal Revenue Code section 3508, and thus qualify as a statutorily exempt employee (meaning the worker's wages are not subject to employment taxes) for federal employment tax purposes. Thus, it is important to know the kind of worker at issue and whether there are statutory tests separate from the common law test.

- Make an evaluation of your fringe benefits for employees. Health insurance, tuition reimbursement, employee discounts, employer-provided lodging and meals, moving expenses and transportation benefits fall in this area.

- Review how fringe benefits are taxed. It is very important to know which benefits are taxable and which are not. Be particularly aware of small or de minimis benefits, such as gift cards given to employees for getting a project done or an end-of-year holiday gift. Cash and cash equivalents such as gift certificates or gift cards are always treated as wages.

- A review of your reimbursed expenses. Make sure all reimbursed expenses to your staff are for legitimate business purposes and that your employees properly account for these expenses with receipts. Expenses that are reimbursed for non-business outlays should be treated as wages and taxed accordingly. ■

Health Insurance

Regulations for Adult Children Coverage Issued

THE FEDERAL government in May issued “interim” final regulations that will implement the new legal requirement to allow parents to include their adult children up to the age of 26 on their health insurance plans.

The regulations are being implemented as part of the landmark Patient Protection and Affordable Care Act and the accompanying Health Care and Education Reconciliation Act. The regulations apply to any plans that start on September 23 or later. That means the new rules will apply to any calendar-year plans that renew on January 1, 2011.

The new regulations require that employer-sponsored health plans include provisions for including an employee’s adult children up to the age of 26.

This does not mean that the employer has to pay for that additional coverage, but that the employee has the option to include their adult offspring even if it means paying for the entire premium out of their own pocket.

This article parses out the most salient points of the regs.

Who is a dependant? – The regulations do not provide a definition, but require health plans to define the dependant in terms of the relationship between the child and the employee, and limit the definition to an employee’s adult child who not yet 26.

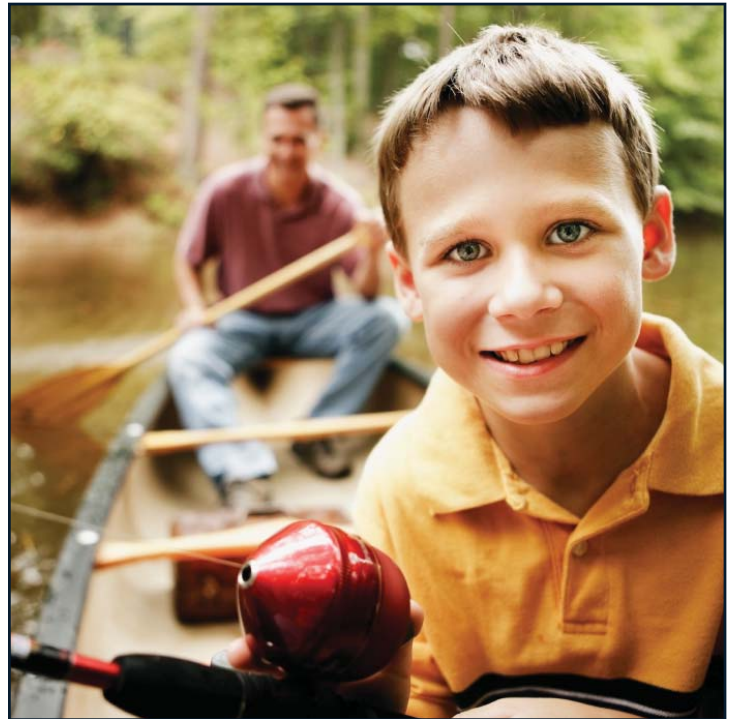
Equal treatment – The regulations require group health plans to offer health care dependants the same plan or health insurance coverage, regardless of age. This means that a plan can neither impose a premium surcharge for children older than 18, nor limit coverage options for them.

Transitioning adult children out of plans – The new regulations provide for assistance in transitioning adult children from a health care plan and extending assistance to those who are denied coverage. Transition relief is now offered to any health care dependant whose coverage ended or was denied, and who will be eligible for coverage on the first day of the first plan year beginning on or after September 23, 2010.

Enrollment – Employers must offer employees a 30-day window to enroll newly eligible health care dependants in employer-provided health coverage. They must provide employees with notice of this enrollment opportunity before the first day of the plan year and the notice must be prominent.

Option to start coverage early – Although employers may permit staff to enroll their newly eligible dependants on or after March 30, 2010, coverage for these newly eligible adult children must be effective no later than the first day of the first plan year beginning on or after September 23, 2010.

Grandfathered group health plans – Until January 1, 2014, grandfathered group health plans (those already in effect before the Health Care Reform Act was enacted) may exclude an adult child who has not attained the age of 26 if the child is eligible to



DAD'S GOT YOUR BACK: Days like this may be memories, but parents can still protect their adult children by keeping them on their group health plan until they are 26.

enroll in an eligible employer-sponsored health plan other than the group health plan of a parent.

In other words, if you are in a plan that’s been in existence prior to March 2010 and your adult child under the age of 26 has health coverage through their own job, your plan is not required to extend coverage. ■

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