



SUFFOLK ACADEMY OF LAW
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**WORKERS' COMPENSATION COVERAGE
FOR THE SMALL BUSINESS OWNER:
When You Need it and Why**

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WHEN IS WORKERS' COMPENSATION COVERAGE NECESSARY?

- The law requires employers in New York State to have WC coverage for their employees with limited exceptions.
- Employers are required to obtain and keep in effect WC coverage for all employees, even part-time employees and family members that are employed by the company.

COVERED EMPLOYMENT

- Virtually all employers in NYS must have WC coverage for their employees (WCL §2 and 3).
- Employers must post notice of WC coverage in their place(s) of business (WCL § 51).
- Employers must cover the following workers for WC insurance:
 - Workers in all employments conducted for-profit
 - Part-time employees
 - Borrowed and leased employees
 - Family members
 - Volunteers working for a for-profit business
 - Public school teachers, excluding those employed by New York City
 - Public school aides, including New York City
 - Employees of the State of New York, including some volunteer workers
 - Domestic workers employed 40 hours per week or more by the same employer
 - Including full-time sitters or companions and live-in maids
 - Farm workers whose employer paid \$1,200 or more for farm labor in the preceding calendar year
 - Employees of counties and municipalities engaged in work defined by the law as "hazardous"
 - Any other worker determined by the Board to be an employee and not specifically excluded from coverage under the WCL.
 - All corporate officers if the corporation has more than two officers and/or two stockholders (WCL § 54)
 - Officers of one or two person corporations if there are other individuals in employment.
 - These officers may choose to exclude themselves from coverage (WCL § 54)
 - Most workers compensated by a nonprofit organization

* Volunteer Firefighters and Volunteer Ambulance Workers' are covered for death or injuries suffered in the line of duty under the Volunteer Firefighters' Benefit Law and Volunteer Ambulance Workers' Benefit Law.

NOT COVERED

- Individuals who volunteer their services for nonprofit organizations and receive no compensation
 - Compensation includes stipends, room and board, and other “perks” that have monetary value
 - Money used solely to offset expenses incurred while performing activities for the nonprofit is not counted as a stipend
- Clergy and members of religious orders that are performing religious duties
- People engaged in a teaching capacity in or for a nonprofit religious, charitable or educational institution (Section 501(3)(c) under the IRS tax code)
 - To be exempt, the teachers must only be performing teaching duties
- People engaged in a non-manual capacity in or for a nonprofit religious, charitable or educational institution (Section 501(3)(c) under the IRS tax code)
 - Manual labor includes but is not limited to such tasks as filing; carrying materials such as pamphlets, binders or books; cleaning such as dusting or vacuuming; playing musical instruments; moving furniture; shoveling snow; mowing lawns; and construction of any sort
- Persons receiving charitable aid from religious or charitable institution who perform work in return for such aid and who are not under any express contract for hire, and certain persons receiving rehabilitation services in a sheltered workshop (Mental Hygiene Law § 33.09)
- Members of supervised amateur athletic activities operated on a nonprofit basis, provided that such members are not otherwise engaged or employed by any person, firm or corporation participating in such athletic activity.
- People who are covered for specific types of employment under another WC system, such as:
 - Those employed in certain maritime trades
 - Federal government employees
 - Interstate railroad employees
- The spouse and minor children (under 18) of an employer who is a farmer as long as they are not under an express contract
- Certain employees of foreign governments and Native American Nations
- New York City police officers, firefighters and sanitation workers who are covered under the provisions of the New York State General Municipal Law.
- People, including minors, doing yard work or casual chores in and about a one-family, owner-occupied residence or the premises of a nonprofit, noncommercial organization
 - Casual means occasionally, without regularity, without foresight, plan or method
 - Coverage is required if the minor handles power-driven machinery, including a power lawnmower
- Certain real estate salespersons who sign a contract with a broker stating they are independent contractors

- Certain media sales representatives who sign a contract stating they are independent contractors
- Certain insurance agents or brokers who sign a contract stating they are independent contractors
- Sole proprietors, partners, and certain one/two person corporate officers with no other individuals providing services integral to the business
 - Although coverage may be obtained voluntarily.

NONPROFIT ORGANIZATIONS

- Other than the exceptions listed above, individuals working for a nonprofit organization are considered employees under the WCL in the same manner as those working for a for profit business.
- The term “religious, charitable, or education institution” means a corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.

* Employers can request a certificate from the WCB to attest that they are not required to carry WC coverage (Form CE-200).

INDEPENDENT CONTRACTORS

NON-CONSTRUCTION INDUSTRY

- Factors that the Judge will consider to determine whether an individual is an independent contractor, and thus not an employee:
 - Control the time and manner in which the work is to be done; and
 - Obtain a FEIN (Federal Employer Identification Number) from the IRS or have filed business or self-employment income tax returns with the IRS based on work or service performed in the previous calendar year;
 - Maintain a separate business establishment from the hiring business;
 - Perform work that is different than the primary work of the hiring business and perform work for other businesses;
 - Operate under a specific contract, and is responsible for satisfactory performance of work and is subject to profit or loss in performing the specific work under such contract, and be in a position to succeed or fail if the business's expenses exceed income;
 - Obtain a liability insurance policy (and, if appropriate WC and DB insurance policies) under its own legal name and FEIN;
 - Have recurring business liabilities and obligations;

- If it has business cards or advertises, the materials must publicize itself, not another entity;
- Provide all equipment and materials necessary to fulfill the contract; and
- The individual works under his/her own operating permit, contract or authority

CONSTRUCTION INDUSTRY

- New York State Construction Industry Fair Play Act
 - Amended the Labor Law and WCL to establish a presumption of employment in the construction industry.
 - Statute took effect on 10/26/10, and for WC purposes, applies to accidents which occur on or after that date.
 - Provides that any person performing services for a contractor is presumed to be an employee of that contractor, subject to the independent contractor test.
 - Contractor is broadly defined to include any sole proprietor, partnership, firm, corporation, LLC, association or other legal entity permitted to do business within the state who engages in construction work.
- For a person to be an independent contractor, the alleged employer must demonstrate **ALL** three of the following criteria:
 - The person is free from direction and control in performing the job, both under contract and in fact,
 - The person is performing services outside of the usual course of business for the company, and;
 - The person is engaged in an independently established trade, occupation or business that is similar to the service s/he performs.
- The law also contains a 12 part test to determine when a sole proprietor, partnership, corporation or other entity will be considered a “separate business entity” that itself is subject to the law.

OUT OF STATE EMPLOYERS

- An out-of-state employer with an individual or individuals working in NYS is required to have full NYS WC coverage if that employer meets **ANY** of the following criteria:
 - The employer is required to register with the NYS Department of Labor and pay Unemployment Insurance for any period in question.
 - The employer has a permanent physical location in NY or has employees whose primary work location is here.
 - The employer is operating in New York under permit, contract, or license granted by the State of New York, its counties or any municipality as defined under §57 of the WCL.
 - The employer is working as a contractor/general contractor/subcontractor on a construction project in NY.
 - In the previous year, the employer had employees physically in NY for:

- At least 40 hours of every week for a period of longer than 2 consecutive weeks;
or
 - Had employees present in NY for 25 more individual days (e.g. 5 employees working 5 days in NY equals 25 individual employee days).
- When out of state workers send employees into NY for work purposes and a full, statutory NYS WC insurance policy is not required, the employer must have such coverage for WC as required under the laws of its state, and NY must be listed in item 3C on the Information Page of the employer's WC insurance policy.
 - The Board will post on its website a list of carriers that are authorized to by the NYS Insurance Department to write WC and employer's liability coverage in NY.

WHAT TO DO WHEN YOUR CLIENT RECEIVES A PENALTY NOTICE FROM THE WORKERS' COMPENSATION BOARD

(1) MAKE SURE THERE IS ADEQUATE COVERAGE IN PLACE

- Coverage information can be found on the Board's website at www.wcb.ny.gov
- Coverage can be searched using the employer name, FEIN, WCB Employer number or policy number
- The Board will not review penalties for reduction or rescission without proper coverage in place

(2) DETERMINE IF COVERAGE WAS OR IS NECESSARY

- Did the employer have employee(s)?
- Was coverage necessary for the employee(s)?

(3) INVESTIGATE THE PENALTY PERIOD

- How many employees were there?
 - May need to produce corporate tax returns
 - What type of premium would the employer have to pay if coverage was in place?
 - Was there a lapse in coverage?
 - Was it due to change in employer name or FEIN?
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- The WCB monitors coverage status of all subject employers in the State.
 - There are over 800,000
 - The Board ensures that employers maintain required insurance coverage so that their employees can receive timely statutory benefits under the Workers' Compensation Law and Disability Benefits Law.
 - The Board's monitoring also ensures employers in similar industries are subject to similar costs of doing business.

THE BOARD'S DATABASE

- The Board uses a database that gathers information on businesses from a number of sources, including:
 - New York State Department of State (corporations, LLCs, LLPs, and LPs)
 - New York State Department of Labor
 - Insurance carrier records
 - Board investigations
 - Claims information
- Once a database record is established for an employer, coverage information is sent to the Board from insurance carriers and approved self-insurers.

- The Board is notified whenever a WC policy is written, modified or canceled by an insurance carrier.
- The Board has instituted a program that requires insurers and self-insurers to send this information to the Board electronically using the employer's FEIN.
 - If the database shows a cancellation or lapse in coverage, the Board sends out computer-generated noncompliance and penalty notices to employers found in noncompliance
 - In many cases, if the Board does not have coverage information, an inquiry notice is sent to the employer requiring the business to identify how it is complying with the mandatory coverage provisions
 - i.e., was a WC policy secured, or is the business legally exempt from the WC coverage requirement?

FEINs

- The business's FEIN is the Board's primary identification for your business.
- Each business that is a legal entity (sole proprietorship, partnership, corporation, etc.) has its own unique FEIN assigned to it
- Employers must give their FEIN to their insurance carrier when obtaining or modifying WC coverage.
- If an employer has multiple legal entities using employees, the employer must provide the carrier with the legal name, and FEIN for each of these companies.
- It is your carrier's responsibility to electronically notify the Board of that coverage using your firm's FEIN number(s).

THE PENALTY NOTICE

- If no response to the inquiry notice is received, the first penalty notice will be sent. The penalty accrues for the time period in which the employer had no WC coverage and had individuals providing services integral to the business.
- Once the Board assesses a penalty, businesses have 30 days from the date of the notice to seek redetermination review of such penalty explaining why there was a lapse in coverage and asking for the penalty to be reduced.
- Redetermination determinations may result in penalties being rescinded, reduced or upheld.
- If the business has not either paid or requested review of the penalty within three months, the Board sends the penalty to collection agencies.
 - If collection agencies are not successful in collecting the penalty, then the Board is able to issue a judgment against the business for delinquent penalty amounts.

NEGOTIATING PENALTIES WITH THE WORKERS' COMPENSATION BOARD

- Collect all documentation (Ex., payroll records, Certificate of Dissolution from Division of Corporations, final tax document demonstrating a specific out of business date, etc.) and prepare for submission to WCB.
- If coverage was required, request for reduction, not rescission is in order.
- The Board will offer reductions, payment periods – with and without interest
 - Hardship reductions may be considered with tax documentation.

VIOLATIONS OF WCL § 52

- The WCB may require an employer to furnish proof that the employer:
 - Has a valid WC insurance policy;
 - Is self-insured for WC; or
 - Is legally exempt from having to obtain WC coverage, and/or
 - Is keeping proper, accurate business records.
- If the employer fails to provide this information within 10 days following the Board's request, under the Workers' Compensation Law the Board is required to assume that the employer is violating the WCL. (WCL §52 [3])

PERSONAL ACCOUNTABILITY

- The sole proprietor, partners or the president, secretary and treasurer of a corporation are personally liable for a business' failure to secure WC insurance.

LIABILITY FOR CLAIMS INCURRED BY AN UNINSURED EMPLOYER

- Section 26-a says an employer is liable for a penalty of \$2,000 per 10-day period of noncompliance, plus the actual award (including both compensation and medical costs), plus any other penalties the Board assesses for noncompliance.
- In cases involving severely injured employees, the medical costs alone could be in the hundreds of thousands of dollars per injury.

ADDITIONAL LIABILITY FOR UNINSURED EMPLOYERS

- An uninsured employer is responsible for obtaining and paying for any legal representation required to defend a WC claim. An insured employer's WC insurance carrier provides such representation as part of the WC policy's coverage.
- An uninsured employer can be directly sued by an injured employee. (WCL §11)

- In most cases, an employer's WC insurance is the sole recourse for the employer's injured employee.
- An uninsured employer is responsible for all wage and medical benefits awarded to anyone ruled to be their employee. There is no cap on these benefits in New York.

PENALTIES

The law imposes severe penalties upon employers who do not secure workers' compensation insurance, or obtain an approved plan of self-insurance. All penalties assessed for failure to secure coverage are payable to the state treasury, or into the uninsured employer's fund (UEF) (N.Y. Work. Comp. Law § 52(2)).