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S.P. 404

In Senate, March 24, 2011

An Act To Amend the Laws Governing Security Deposits of Workers' Compensation Self-insurers

Submitted by the Treasurer of State pursuant to Joint Rule 204.
Reference to the Committee on Insurance and Financial Services suggested and ordered
printed.

Joseph G. Carleton Jr.

JOSEPH G. CARLETON, JR.
Secretary of the Senate

Presented by Senator WHITTEMORE of Somerset.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 39-A MRS §403, sub-§3**, as amended by PL 2007, c. 75, §1, is further
3 amended to read:

4 **3. Proof of solvency and financial ability to pay; trust.** The employer may
5 comply with this section by furnishing satisfactory proof to the Superintendent of
6 Insurance of solvency and financial ability to pay the compensation and benefits, and
7 depositing cash, satisfactory securities, irrevocable standby letters of credit issued by a
8 qualified financial institution or a surety bond with the ~~board~~ superintendent, in such sum
9 as the superintendent may determine pursuant to subsection 8, ~~the bond to run to the~~
10 Treasurer of State to be listed as beneficiary of the bond or the irrevocable standby letter
11 of credit and the bond or the irrevocable standby letter of credit to be conditional upon the
12 faithful performance of this Act relating to the payment of compensation and benefits to
13 any injured employee. In case of cash or securities being deposited, or drawn on a surety
14 bond or letter of credit, the cash or securities must be placed in an account at interest by
15 the Treasurer of State, and the accumulation of interest on the cash or securities so
16 deposited must be credited to the account and may not be paid to the employer to the
17 extent that the interest is required to secure the employer's self-insurance obligations,
18 including the amount needed to support any present value discounting in the
19 determination of the amount of the deposit. Any security deposit must be held by the
20 Treasurer of State in trust for the benefit of the self-insurer's employees for the purposes
21 of making payments under this Act. If the superintendent determines that the self-insurer
22 has experienced a deterioration in financial condition that adversely affects the self-
23 insurer's ability to pay obligations under this Act, the security amount may be in excess of
24 the minimum amount required by this Title.

25 A self-insurer may, with the approval of the Superintendent of Insurance, use the
26 following types of security to satisfy the self-insurer's responsibility to post security
27 required by the superintendent: a surety bond; an irrevocable standby letter of credit; cash
28 deposits and acceptable securities; and an actuarially determined fully funded trust. For
29 purposes of this section, "tangible net worth" means equity less assets that have no
30 physical existence and depend on expected future benefits for their ascribed value.
31 Unless disapproved by the superintendent pursuant to paragraph C, subparagraphs (5) and
32 (6), a group self-insurer that maintains a trust actuarially funded to the confidence level
33 required by the superintendent may use an irrevocable standby letter of credit as follows:
34 only in an amount not greater than the difference between the funding to the required
35 confidence level and funding to the confidence level reduced by 10 percentage points;
36 only as long as the trust assets are not used as collateral for the letter of credit; and only
37 as long as the value of trust assets, excluding the value of the letter of credit, is at least
38 equal to the present value, evaluated to the 65% confidence level, of ultimate incurred
39 claims, claims settlement costs and, if determined necessary by the superintendent,
40 administrative costs.

41 A. An individual self-insurer providing an irrevocable standby letter of credit as
42 security shall file with the Superintendent of Insurance a letter of credit, on a form
43 approved by the superintendent, copies of any agreements or other documents
44 establishing the terms and conditions of the employer's reimbursement obligations to

1 the financial institution issuing the letter of credit, together with copies of any
2 required security agreements, mortgages or other agreements or documents granting
3 security for the employer's reimbursement obligations and any other agreements that
4 contain conditions, restrictions or limitations of any kind upon the employer, the
5 superintendent or the Treasurer of State. The form of letter of credit approved by the
6 superintendent must include, but is not limited to, all terms specifically required by
7 this subsection and all terms reasonably required to secure the payment of
8 compensation and benefits to claimants as required under this Act. ~~The~~
9 ~~superintendent, upon receipt of the original irrevocable standby letter of credit, shall~~
10 ~~promptly forward it to the Treasurer of State.~~

11 In order to issue an irrevocable standby letter of credit as security under this
12 paragraph, a financial institution or its parent company must either:

- 13 (1) Maintain a long-term unsecured debt rating of at least A by either Moody's
14 Investors Service, Inc. or Standard and Poor's Corporation;
- 15 (2) Maintain a short-term commercial paper rating within the 3 highest
16 categories established by Moody's Investors Service, Inc. or Standard and Poor's
17 Corporation; or
- 18 (3) Be certified in writing by the Superintendent of Financial Institutions to be
19 well capitalized and well managed in accordance with the criteria set forth in
20 Title 9-B, section 446-A, subsections 1 and 2. The Superintendent of Insurance
21 shall keep the certification confidential, except from the subject financial
22 institution, in accordance with Title 9-B, section 226.

23 The Superintendent of Insurance may adopt rules to establish additional
24 qualifications for financial institutions issuing irrevocable standby letters of credit.
25 Rules adopted pursuant to this paragraph are routine technical rules pursuant to Title
26 5, chapter 375, subchapter 2-A.

27 The irrevocable standby letter of credit must be the individual obligation of the
28 issuing financial institution, may not be subject to any agreement, condition,
29 qualification or defense between the financial institution and the employer and may
30 not in any way be contingent on reimbursement by the employer. If the rating of an
31 issuing financial institution that has issued an irrevocable standby letter of credit
32 pursuant to this section falls below the required standard, the employer shall obtain a
33 new irrevocable standby letter of credit from a qualified financial institution or shall
34 provide other eligible security of equal value approved by the Superintendent of
35 Insurance. The irrevocable standby letter of credit is automatically extended for one
36 year from the date of expiration unless, 90 days prior to any expiration date, the
37 issuing financial institution notifies the Superintendent of Insurance that the financial
38 institution elects not to renew the irrevocable standby letter of credit.

39 An irrevocable standby letter of credit that has been issued by a qualified financial
40 institution and accepted by the Superintendent of Insurance binds the issuing
41 financial institution to pay one or more drafts drawn by the Treasurer of State, as
42 directed by the superintendent, as long as the draft does not exceed the total amount
43 of the irrevocable standby letter of credit. Any draft presented by the Treasurer of
44 State, as directed by the superintendent, must be promptly honored if accompanied by

1 the certification of the superintendent that any obligation under this chapter has not
2 been paid when due or that a proceeding in bankruptcy has been initiated by or with
3 respect to the employer in a court of competent jurisdiction.

4 If the Superintendent of Insurance certifies that the superintendent has been notified
5 by the issuing financial institution that the irrevocable standby letter of credit expires
6 by its terms in 30 days or less and that the irrevocable standby letter of credit was not
7 replaced within 15 days after that notice to the superintendent by other eligible
8 security of equal value approved by the superintendent, then the financial institution
9 must remit within 15 days the full amount of the irrevocable letter of credit to the
10 Treasurer of State without further certification.

11 Any proceeds from a draw on such an irrevocable standby letter of credit by the
12 Treasurer of State, as directed by the Superintendent of Insurance, must be held by
13 the Treasurer of State on behalf of workers' compensation claimants to secure
14 payment of claims until either the superintendent authorizes the Treasurer of State to
15 release those proceeds to the employer upon provision by the employer of
16 replacement security adequate to meet the requirements for security set by the
17 superintendent or the superintendent directs distribution of the proceeds in
18 accordance with this Title.

19 To the extent not inconsistent with state law, the letter of credit is subject to and
20 governed by the International Standby Practices 1998 or successor practices
21 governing standby letters of credit duly adopted by the International Chamber of
22 Commerce. If any legal proceedings are initiated with respect to payment of the
23 letter of credit, those proceedings are subject to the State's courts and law.

24 B. The Superintendent of Insurance shall prescribe the form of the surety bond that
25 may be used to satisfy, in whole or in part, the self-insurer's responsibility under this
26 section to post security. The bond must be continuous, be subject to nonrenewal only
27 upon not less than 60 days' notice to the superintendent, cover payment of all present
28 and future liabilities incurred under this Act while the bond is in force and cover
29 payments that become due while the bond is in force that are attributable to injuries
30 incurred in prior periods and otherwise unsecured by cash, irrevocable standby letters
31 of credit or acceptable securities. A bond must be held until all payments secured by
32 the bond have been made or until the bond has been replaced by other eligible
33 security approved by the superintendent that covers all outstanding liabilities.
34 Payments under the bond are due within 30 days after notice has been given to the
35 surety by the board that the principal has failed to make a payment required under the
36 terms of an award, agreement or governing law. A trust established to satisfy the
37 requirements of this section may not be funded by a surety bond.

38 C. A self-insurer may establish an actuarially determined fully funded trust, funded
39 at a level sufficient to discharge those obligations incurred by the employer pursuant
40 to this Act as they become due and payable from time to time, as long as the
41 Superintendent of Insurance requires that the value of trust assets be at least equal to
42 the present value of ultimate expected incurred claims and claims settlement costs,
43 plus required safety margins and, if determined necessary by the superintendent,
44 administrative costs for the operation of the plan of self-insurance. For the purpose
45 of determining whether an actuarially determined fully funded trust has a surplus of

1 funds in excess of that required by this subsection, the superintendent shall consider,
2 based upon the group's audit for all completed plan years, only the following assets
3 held outside the trust account: cash up to \$10,000; accounts receivable, limited to
4 amounts collected and deposited in the trust account by the date of the surplus
5 distribution; accrued interest on trust account assets that will be collected and
6 deposited in the trust account within 6 months from the date of the surplus
7 determination; tangible assets that will be converted to cash and deposited in the trust
8 account prior to the distribution date of any surplus; and a letter of credit to be used to
9 partially fund the trust to the extent allowed under this section and rules adopted by
10 the superintendent, as supported in the actuarial review. The superintendent shall
11 consider cash held outside the trust account in excess of \$10,000 if the self-insurer
12 provides, to the superintendent's satisfaction, documentation regarding why the
13 money is being held outside the trust account. An actuarially determined fully
14 funded trust must be funded as follows, as determined by the superintendent.

15 (1) For individual and group self-insurers, the amount of security must be
16 determined based upon an actuarial review. The actuarial review must take into
17 consideration the use by a group self-insurer of any irrevocable standby letter of
18 credit. Except as provided in subparagraph (3), initial funding for each plan year
19 must be maintained at the 90% or higher confidence level. Funding after the
20 completion of the initial plan year may be established no lower than the 75%
21 confidence level if the following has occurred:

22 (a) A year considered for reduction is completed;

23 (b) The supporting actuarial review includes an evaluation of the completed
24 year experience with claims evaluated not less than 6 months from the end of
25 the plan year, or in the case of a group self-insurer in existence for at least 36
26 months, not less than 4 months from the end of the plan year; and

27 (c) For individual self-insurers, prior approval from the superintendent is
28 obtained.

29 For the purposes of determining the confidence level, all completed years at the
30 same confidence level may be aggregated. For individual self-insurers, funds
31 may not be released from the trust or transferred between years except as
32 approved by the superintendent. The governing body of a group self-insurer may
33 at any time declare a surplus of funds above the required confidence level, but
34 may only release funds after the completion of any plan year. The superintendent
35 may request information regarding any such declaration. Any distribution of
36 surplus must be based upon an actuarial review of all outstanding obligations for
37 all completed plan years, an audited financial statement of the group for all
38 completed plan years and a surplus distribution worksheet for all completed plan
39 years on a form approved by the superintendent. The group self-insurer must
40 provide the required information within 10 days after the distribution. Any
41 surplus declared or distributed pursuant to this paragraph is subject to adjustment
42 after review by the superintendent within 60 days of the receipt of the required
43 information. Any deficit below the required confidence level, as determined by
44 the superintendent, that results from a distribution under this paragraph must be
45 funded within 45 days from the date of the notice by the superintendent.

1 (2) A group self-insurer may elect to fund at a higher confidence level through
2 the use of cash, marketable securities or reinsurance. If a member of a group
3 self-insurer terminates membership in the group for any reason, that member
4 shall fund the member's proportionate share of the liabilities and obligations of
5 the trust to the 95% confidence level. If for any reason the departing member
6 fails to fund the member's proportionate share of the trust's exposure to the 95%
7 level of confidence, the remaining members of the group shall make the
8 additional contribution no later than the anniversary date of the program as
9 required to fund the departing member's exposure in accordance with this
10 provision.

11 (3) Subject to prior approval by the superintendent in accordance with
12 subparagraph (5), a self-insurer that has successfully maintained an actuarially
13 determined fully funded trust for a period of 5 or more consecutive years may
14 fund all years, including the prospective fund year, at the 75% or higher
15 confidence level in the aggregate and a group self-insurer that has successfully
16 maintained an actuarially determined fully funded trust for a period of 10 or more
17 consecutive years may fund all years, including the prospective fund year, at the
18 65% or higher confidence level in the aggregate.

19 (4) Trust assets must consist of cash or marketable securities of a type and risk
20 character as specified in subsection 9. The trustee shall submit a report to the
21 superintendent not less frequently than quarterly that lists the assets comprising
22 the corpus of the trust, including a statement of their market value and the
23 investment activity during the period covered by the report. The trust must be
24 established and maintained subject to the condition that trust assets may not be
25 transferred or revert in any manner to the employer except to the extent that the
26 superintendent finds that the value of the trust assets exceeds the present value of
27 incurred claims and claims settlement costs with an actuarially indicated margin
28 for future loss development. In all other respects, the trust instrument, including
29 terms for certification, funding, designation of trustee and payout, must be as
30 approved by the superintendent, except that the value of the trust account must be
31 actuarially calculated at least annually by a casualty actuary who is a member of
32 the American Academy of Actuaries and adjusted to the required level of
33 funding.

34 (5) In determining whether a self-insurer that maintains an actuarially
35 determined fully funded trust qualifies for a reduction in the required confidence
36 level pursuant to subparagraph (1) or (3) or is subject to an enhanced confidence
37 level pursuant to subparagraph (6), the superintendent shall consider the financial
38 condition of the self-insurer in relation to the potential workers' compensation
39 liabilities. The factors the superintendent may consider include the self-insurer's
40 liquidity, leverage, tangible net worth, size and net income. For group self-
41 insurers, the superintendent's review must be based on the aggregate financial
42 condition of the group members. At the request of the superintendent, a group
43 self-insurer shall report relevant financial information, on a form prescribed by
44 the superintendent, at such intervals as the superintendent directs. The
45 superintendent may establish additional review criteria or procedures by rule.

1 Rules adopted pursuant to this subparagraph are routine technical rules as defined
2 in Title 5, chapter 375, subchapter 2-A.

3 (6) If the superintendent determines, based on an evaluation of a self-insurer's
4 financial condition pursuant to subparagraph (5), that the confidence level at
5 which the self-insurer has been authorized to fund its trust is not sufficient to
6 provide adequate security for the self-insurer's reasonably anticipated potential
7 workers' compensation liabilities, the superintendent shall make a determination
8 of the appropriate confidence level and order the self-insurer to take prompt
9 action to increase funding to that level within 60 days.

10 D. Notwithstanding any provision of this chapter, authorization to self-insure may
11 not be conditioned on a bond or security deposit that is in excess of \$50,000 for the
12 State, the University of Maine System or any county, city or town with a state-
13 assessed valuation equal to or in excess of \$300,000,000 and either a bond rating
14 equal to or in excess of the 2nd highest standard as set by a national bond rating
15 agency or a net worth equal to or in excess of \$35,000,000. If a county, city or town
16 that is a self-insurer relies upon a bond rating to qualify under this paragraph, it shall
17 value or cause to be valued its unpaid workers' compensation claims pursuant to
18 sound accepted actuarial principles. This value must be incorporated in the annual
19 audit of the county, city or town, together with disclosure of funds appropriated to
20 discharge incurred claims expenses.

21 E. In consideration of a self-insuring entity's application for authorization to operate
22 a plan of self-insurance, the Superintendent of Insurance may require or permit an
23 applicant to employ valid risk transfer by the utilization of primary reinsurance,
24 subject to the provisions of subsection 8. Standards respecting the application of
25 reinsurance must be contained in a rule adopted by the superintendent pursuant to the
26 Maine Administrative Procedure Act. Reinsurance must be defined as insurance
27 covering workers' compensation exposures in excess of risk retained by a self-insurer.

28 F. An employer may be eligible for approved self-insurance status pursuant to this
29 Act if the employer submits a written guarantee of the obligations incurred pursuant
30 to this Act, the guarantee to be issued by a United States or Canadian corporation that
31 is a member of an affiliated group of which the employer is a member, and which
32 corporation is solvent and demonstrates an ability to pay the compensation and
33 benefits, and the guarantee is in a form acceptable to the Superintendent of Insurance.
34 The guarantor shall provide audited annual financial statements and such other
35 information as the superintendent may require, including quarterly financial
36 statements, and the employer shall provide a cash deposit, satisfactory securities,
37 irrevocable standby letters of credit issued by a qualified financial institution or a
38 surety bond as otherwise required by this Act in an amount not less than \$100,000.
39 The guarantor is deemed to have submitted to the jurisdiction of the board and the
40 courts of this State for purposes of enforcing the guarantee. The guarantor, in all
41 respects, is bound by and subject to the orders, findings, decisions or awards rendered
42 against the employer for payment of compensation and any penalties or forfeitures
43 provided under this Act. The superintendent, following hearing, may revoke the self-
44 insured status of the employer if at any time the assets of the guarantor become
45 impaired or encumbered or are otherwise found to be inadequate to support the
46 guarantee.

1 G. A subsidiary employer may be eligible for approved self-insurance status
2 pursuant to this Act if: the subsidiary employer files an application jointly with a
3 qualified parent corporation that has direct ownership of a majority voting interest of
4 the subsidiary employer; the parent corporation and subsidiary employer submit an
5 irrevocable contract of assignment, on a form approved by the Superintendent of
6 Insurance, of the subsidiary employer's obligations incurred pursuant to this Act; the
7 parent corporation is solvent and demonstrates an ability to pay the compensation and
8 benefits of the subsidiary employer; and the subsidiary employer meets all other
9 requirements for application and qualification as a self-insurer under this chapter and
10 under any applicable rules adopted by the superintendent. If the parent corporation is
11 not a United States corporation, the superintendent may, in the superintendent's sole
12 discretion, establish the conditions of any approval of the foreign parent corporation
13 or deny the application of the foreign parent corporation. As part of its application
14 for approval, a foreign parent corporation must provide the following information to
15 the superintendent: evidence that its country of domicile has substantially similar
16 laws with respect to submission to the jurisdiction of the board and the courts of this
17 State for the purposes of payment of workers' compensation claims of the subsidiary
18 employer; audited financial statements, as otherwise required by this Act, prepared in
19 the English language by a certified public accountant licensed in a state in the United
20 States in accordance with generally accepted auditing standards as prescribed by the
21 American Institute of Certified Public Accountants; and security, as otherwise
22 required by the Act, in United States currency. The irrevocable contract of
23 assignment and application must be signed by a duly authorized officer of each
24 corporation and the application must include a board of directors' resolution from
25 each entity as evidence of each officer's authority to enter into the contract. The
26 superintendent may determine the subsidiary employer's eligibility for self-insurance
27 authority and the amount of required security based upon the parent corporation's
28 consolidated financial statement, as long as the employer complies with paragraph H.
29 A subsidiary employer currently authorized to self-insure need not pay the
30 application fee required of a new applicant in order to file an application to qualify
31 under this subsection, but the subsidiary employer and parent corporation must
32 provide all information required under this subsection as if they were a new
33 applicant. Once the subsidiary employer becomes authorized to self-insure under this
34 section, the parent corporation assumes liability for all prior workers' compensation
35 liabilities incurred by the subsidiary employer during the period of self-insurance
36 prior to the date of authorization under this subsection, unless the subsidiary
37 employer files an alternative plan approved by the superintendent. The parent
38 corporation and the subsidiary employer must both be named on the certificate of
39 authorization for self-insurance authority. Upon issuance of a certificate of
40 authorization pursuant to this subsection, the following applies.

41 (1) The parent corporation is deemed to have submitted to the jurisdiction of the
42 board and the courts of the State for the purposes of payment of workers'
43 compensation claims of the subsidiary employer and is deemed to have submitted
44 to the jurisdiction of the superintendent for purposes of implementation of this
45 Act. The parent corporation, in all respects, is bound by and subject to all orders,
46 findings, decisions or awards rendered against the subsidiary employer for

1 payment of compensation and any penalties or forfeitures provided under this
2 Act.

3 (2) A subsidiary employer authorized under this subsection and the parent
4 corporation are considered one employer for the purposes of membership in the
5 Maine Self-Insurance Guarantee Association. In the event of termination,
6 transfer, insolvency, dissolution or bankruptcy of a subsidiary employer
7 qualifying under this subsection, the parent corporation assumes all assessment
8 obligations of the subsidiary employer for its period of self-insurance and is not
9 considered a new member of the association.

10 (3) If the subsidiary employer fails for any reason to pay compensation and
11 benefits as required under this Act, the parent corporation stands in the place of
12 the subsidiary employer and is deemed to be the employer, subject to all
13 requirements and provisions of this Act. For the purposes of payment of benefits
14 and compensation under this Act, an employee of the subsidiary employer is
15 deemed to be concurrently employed by both corporations. Concerning
16 notification of injury to an employee of the subsidiary employer, notice to or
17 knowledge of the occurrence of the injury on the part of the subsidiary employer
18 is deemed notice or knowledge on the part of the parent corporation. The
19 transfer, insolvency, dissolution or bankruptcy of a subsidiary employer
20 qualifying under this subsection does not relieve the parent corporation from
21 payment of compensation for injuries or death sustained by an employee during
22 the time the subsidiary employer was approved for self-insurance authority under
23 this subsection and the parent corporation continues to be deemed an employer
24 until such time as all outstanding workers' compensation claims have been
25 discharged.

26 (4) The transfer, insolvency, dissolution or bankruptcy of a parent corporation
27 causes the termination of the subsidiary employer's authorization to self-insure
28 and a termination plan must be filed pursuant to subsection 14.

29 H. Each individual self-insurer shall submit with its application, and not less
30 frequently than annually thereafter, a financial statement of current origin that has
31 been audited by a certified public accountant. When a self-insurer qualifies on the
32 basis of a financial guarantee or on the basis of an irrevocable contract of assignment,
33 the Superintendent of Insurance may accept an audited financial statement of the
34 guarantor or parent corporation in satisfaction of this requirement and may also
35 require combining statements provided in an array that is reconciled to the
36 consolidated report.

37 **Sec. 2. 39-A MRSA §403, sub-§5, ¶D,** as enacted by PL 1991, c. 885, Pt. A, §8
38 and affected by §§9 to 11, is amended to read:

39 D. If for any reason the status of a group self-insurer under this paragraph is
40 terminated, the securities, the surety bond, the letter of credit or the deposit required
41 by this section continues to be held by the Superintendent of Insurance or Treasurer
42 of State and remains subject to the control of the board until all claims secured by the
43 securities, surety bond, letter of credit or deposit have been discharged. When all
44 such claims have been discharged or after such period as the Superintendent of

1 Insurance determines proper, the superintendent may accept in lieu thereof, and for
2 the additional purpose of securing such further and future contingent liability as may
3 arise from prior injuries to workers and be incurred by reason of any change in the
4 condition of such workers warranting the board making subsequent awards for
5 payment of additional compensation, a policy of insurance furnished by the group
6 self-insurer, its successor or assigns or other entity carrying on or liquidating such
7 self-insurance group. The policy must be in a form approved by the superintendent
8 and issued by any insurance company licensed to issue this class of insurance in the
9 State. It may only be issued for a single complete premium payment in advance by
10 the group self-insurer. It must be given in an amount determined by the
11 superintendent and when issued is noncancellable for any cause during the
12 continuance of the liability secured and so covered.

13 **SUMMARY**

14 This bill specifics that an employer that is a self-insurer of workers' compensation
15 benefits may deposit cash, satisfying securities, irrevocable standby letters of credit
16 issued by qualified financial institutions or a surety bond with the Superintendent of
17 Insurance, rather than the Workers' Compensation Board as in current law, in partial
18 fulfillment of the requirements for self-insurers. It also allows the Superintendent of
19 Insurance to maintain possession of irrevocable standby letters of credit issued by
20 qualified financial institutions and surety bonds.