



**STATE OF NEW YORK
INSURANCE DEPARTMENT
160 WEST BROADWAY
NEW YORK, NEW YORK 10013**

Circular Letter No. 13 (1994)
August 5, 1994

**TO: All Property/Casualty Insurance Companies Authorized to Write General Liability or Workers
Compensation Insurance in This State**
RE: Excess Workers' Compensation -- Insurance Policies for Self-insured Employers

Employers wishing to act as self-insurers in providing workers' compensation benefits to their employees must comply with the applicable requirements of the New York Workers' Compensation Law and the Workers' Compensation Board (WCB) Regulations in order to obtain the Board's approval.

Among the conditions for qualifying for approval to act as a self-insurer, Section 316.2 of the WCB Regulations requires the employer to provide security against catastrophic loss arising out of one accident. The most common accepted form of such security is a certification of the issuance of an excess insurance policy by an authorized insurance carrier.

Excess insurance policies are designed to indemnify the self-insured employer for statutory workers' compensation benefits paid to an employee that exceed a specified amount (up to a specified limit). There is no provision that the excess policy will "drop down," i.e., pay an injured employee directly for amounts within the self-insured retained limit in the event the employer fails to make such payments on its own. Nor is there a provision that an employee may make a direct claim against the insurance carrier for any amounts covered in the excess insurance policy in the event of the employer's insolvency or termination of operations.

Although the Regulation refers to such insurance policy as an "excess reinsurance contract," the policy is not reinsurance in the true sense of the term. Reinsurance is a contractual arrangement under which a "ceding" insurer buys insurance from an "assuming" insurer to cover losses incurred by the ceding insurer under insurance contracts the ceding insurer issued to its insureds. Since a reinsurance agreement is a contract between two insurers, and an employer which is self-insured is not an insurer as defined in the New York Insurance Law, the employer cannot enter into a reinsurance contract.

Pursuant to Insurance Law § 1113(a)(30), this Department finds that the coverage provided by such excess policies is substantially similar to "personal injury liability insurance," which is authorized by § 1113(a)(13), and provides for ". . . insurance against legal liability of the insured. . . arising out of the death or injury of any person. . ." Although the definition in paragraph (a)(13) expressly excludes workers' compensation insurance, this coverage is not considered to be workers' compensation insurance since, as described above, no statutory workers' compensation benefits are paid directly to an injured employee under the excess policy.

Policies written to provide excess workers' compensation coverage must comply with the applicable provisions of Sections 3420 and 3426 of the Insurance Law. In addition, certain provisions are required by the Workers' Compensation Board to be incorporated in the excess policy. Among such requirements are:

- o Notification to the Chair of the Workers' Compensation Board by

registered mail, at least 30 days prior to the effective date of cancellation.

o A provision that the policy shall remain in effect continuously until cancelled.

o A provision setting forth the obligations of the insurer and the rights of the Workers' Compensation Board in the event the self-insurer becomes insolvent or bankrupt, or otherwise fails to meet its obligations under the Workers' Compensation Law. The prescribed text of this provision may be obtained from the Insurance Department or the Workers' Compensation Board.

Policy forms and rates are subject to the filing requirements set forth in Article 23 of the Insurance Law and Insurance Department Regulation No. 129, as applicable to commercial liability insurance.

The rating methodology for these policies must be in a format that would permit a user of the insurer's rate manual to determine precisely the premium due, given the variables applicable to a particular risk.

Questions and requests for further information regarding this subject may be directed to:

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Very truly yours,

SALVATORE R. CURIALE
SUPERINTENDENT OF INSURANCE