

Prepared by SFM's in-house legal firm, Lynn Scharfenberg & Associates

Employers are required to provide workers' compensation coverage

Wisconsin state law allows for some limited exceptions to the requirement

General rules

All Wisconsin employers, with very limited exceptions, are required either to purchase worker's compensation insurance or to obtain approval of the Department of Workforce Development to self-insure.

Under the Act, the term "employer" means:

- The state and any governmental or quasi-governmental subdivision or corporation under the state, including each county, city, town, village, school district, sewer district and drainage district.
- Every person or entity who employs three or more full-time or part-time employees, whether in one or more trades, businesses, professions or occupations.
- Every person who usually employs fewer than 3 employees, if the person has paid wages of \$500 or more in any calendar quarter for services performed in Wisconsin. (Such employer must have insurance by the 10th day of the first month of the next calendar quarter.)
- Farmers who employ 6 or more workers on the same day for any 20 days during the calendar year. (They must get insurance by the 10th day after the 20th day of employment).

There are some very limited but notable exceptions to these rules.

Small businesses

Sole proprietors, partners and members of limited liability companies are not considered to be employees under Wisconsin's worker's compensation law. Accordingly:

- Sole proprietors that have no employees are not required to carry worker's compensation insurance.
- Partnerships that have partners only and no employees are not required to carry worker's com-

pensation insurance.

- Limited liability companies that have members only and no employees are not required to carry worker's compensation insurance.

On the other hand, the employees of sole proprietorships, partnerships, limited liability companies and corporations are covered by the Worker's Compensation Act, and any of these entities that have employees must obtain insurance. All worker's compensation policies automatically *exclude* the sole proprietor, partners and limited liability company members unless such policies are specifically endorsed to include them. If sole proprietors, partners and members of limited liability companies wish to add themselves to a policy, they must notify their agent and pay additional premiums for the coverage.

The rules are somewhat different for corporations. If a closely-held corporation has no more than two corporate officers *and no other employees*, a workers compensation policy is not required if both officers elect not to be subject to the Worker's Compensation Act. A closely-held corporation is defined as a corporation with not more than 10 stockholders. To elect not to be subject to the Worker's Compensation Act, the corporation must complete a Corporate Officer Option Notice and file it with the Worker's Compensation Division (WCD).

A corporation with more than two corporate officers *or with any other employees* must maintain worker's compensation insurance or meet the requirements for self-insurance. All worker's compensation policies issued to corporations cover corporate officers; however, a closely-held corporation may exclude up to two corporate officers from coverage pursuant to an endorsement on the policy that includes the name(s) of the officer(s). Close corporations interested in exclud-

ing 1 or 2 officers from coverage should contact their agent regarding this endorsement.

Nannies, caretakers and other household workers

The Wisconsin Worker's Compensation Act does not require coverage for domestic servants or for any person whose employment is not in the course of a trade, business, profession or occupation of the employer. Although the term "domestic servant" is not defined in the Act, the WCD has consistently ruled that persons hired in a private home to perform general household services, such as babysitting, cooking, cleaning, laundering, gardening, yard and maintenance work and other duties commonly associated with the meaning of domestic servant, are not covered employees under the Act.

The WCD has also ruled that persons hired in a private home to provide primary care to an individual, such as assistance walking, bathing, supervising the use of medications, and administering exercise therapy, are home-care providers and not domestic servants, even though they might also assist with the preparation and clean-up of the recipient's meals and perform other duties that are commonly associated with domestic servants. Nonetheless, the Labor & Industry Review Commission has held that a person performing personal care services to an individual does not provide services as part of the trade, business, occupation or profession of the recipient (i.e., the patient/homeowner/client) and therefore is not a covered employee of the recipient. In some cases home-care workers are hired and paid by county or private social services agencies. In such cases, the worker would be a covered employee of the county or social services agency.

Independent Contractors

Wisconsin's worker's compensation law excludes independent contractors from coverage. However, employers should never assume that someone who represents himself as an independent contractor is not

an employee for purposes of worker's compensation coverage. Under Wisconsin law, a person is required to meet a nine-part test before he or she is considered an independent contractor rather than an employee. Every one of the following nine conditions must be met:

1. Maintain a separate business.
2. Obtain a Federal Employer Identification number from the Internal Revenue Service or have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year. A social security number cannot be substituted for a FEIN and does not meet the legal burden of this provision.
3. Operate under specific contracts.
4. Be responsible for operating expenses under the contracts.
5. Be responsible for satisfactory performance of the work under the contracts
6. Be paid per contract, per job, by commission or by competitive bid.
7. Be subject to profit or loss in performing the work under the contracts.
8. Have recurring business liabilities and obligations.
9. Be in a position to succeed or fail if business expense exceeds income.

Penalties for failing to insure

An enhanced enforcement mechanism went into effect in 1990 for dealing with employers who unlawfully fail to insure. Penalties can include fines, business closure and imprisonment. In the case of a corporation that fails to insure, its officers and directors are personally liable for some penalties. The fine for failure to carry worker's compensation insurance when required is twice the amount of premium not paid during the uninsured time period or \$750, whichever is greater. Under certain circumstances, an employer who has a lapse in coverage can also be subject to a penalty of \$100 for each day it is uninsured up to 7 days.