

October 11, 2106

To: Workers' Compensation Advisory Council

From: Jim Leach

Re: Employers who are subject to workers' compensation, but who are neither insured nor self-insured

South Dakota law does not require any employer to carry workers' compensation insurance. Instead, it provides that an employee injured working for a non-insured employer has the right to sue in tort, or sue for medical expenses and double workers' compensation indemnity benefits. SDCL 62-3-11.

I have handled a number of workers' compensation cases against uninsured employers over the past 30 years. All these cases are similar in that they tend to involve:

- undercapitalized employers in heavy industries who turn their backs on their injured employees and make no attempt to pay the workers' compensation benefits they owe;
- serious injuries, because these are caused by heavy work;

- employers who will fight a workers' compensation claim every step of the way, not being bound by the obligation of good faith that insurance companies owe to an injured employee;
- judgments that are generally uncollectible, either because the employer has vanished, is judgment-proof, or files bankruptcy; and
- great hardship for the injured employee, who receives no benefits during disability, and typically has no medical coverage (few blue-collar workers carry their own health insurance, and even if they do, under the Affordable Care Act ("Obamacare"), they are likely to have a very high deductible), and who therefore may not be able to get the medical treatment they need.

Every employer whose employees are subject to workers' compensation should be required to obtain and maintain workers' compensation insurance. The vast majority of employers carry workers' compensation insurance. The ones who don't tend to be fly-by-night operators. South Dakota law should not create a special loophole for them. And fly-by-night employers have an unfair advantage

over employers who buy workers' compensation insurance, because they eliminate a cost that insured employers pay.

Laws requiring that people carry insurance are commonplace. Just a few examples are:

- Automobile drivers must carry liability insurance in case they injure someone;
- To obtain a home mortgage, the mortgagor must have homeowners' insurance to protect the lender-mortgagee from risk of loss of the collateral (the home);
- To practice law in South Dakota, a lawyer must have malpractice insurance, or prominently display the lack of it on the lawyer's letterhead;
- To operate a carnival in South Dakota, the operator must have liability insurance (Rapid City Journal, September 18, 2016, p. 1);
- In Sioux Falls, licensed tree trimmers are required to carry \$1 million in liability insurance. License requirements are also commonplace. Sioux Falls requires city licenses for door-to-door peddlers, backflow

prevention technicians, day cares, grocers, pest controllers, and tattoo artists (Sioux Falls Argus Leader, April 16, 2016).

I am **not** seeking to change the law to require that employers who are not subject to workers' compensation claims now be subject to them. The South Dakota Department of Labor states:

“Coverage

“The South Dakota Worker’s Compensation Law covers all employers with only limited exceptions.

“Exceptions:

“Domestic servants (unless working for an employer more than 20 hours in any calendar week and for more than six weeks in any 13-week period)

“Farm or agricultural labor

“One whose employment is not in the usual course of trade, business, occupation or profession of the employer (independent contractors, including real estate agents and owner-operators of trucks certified as independent contractors by the Department of Labor and Regulation; see ‘Coverage for Independent Contractors’ below for more information)

“Certain elected officials of the state or any subdivision of government

“Workfare participants.”

Whether these exceptions are good or bad is not at issue. I do not propose to change them.

I went back and forth on whether or not to suggest specific language that would require all employers who are subject to workers’ compensation to buy workers’ compensation insurance. On the one hand, any proposal is subject to criticism for its wording. On the other hand, making no proposal may leave you without a clear idea of what I suggest. On balance, I decided to include a proposal. I am **not** tied to this language, or any particular language. Here is my suggestion:

“The South Dakota Department of Revenue shall not issue any sales tax license to any employer whose employees are covered by the South Dakota Workers’ Compensation Law until the employer shows proof of workers’ compensation insurance, or self-insurance approved by the Department of Labor. Thereafter, a lapse in coverage of the employer’s workers’ compensation insurance, or self-insurance approved by the Department of Labor, shall automatically terminate the employer’s sales tax license for so long as the lapse continues.”

This proposal has the advantage of tying proof of workers’ compensation insurance to an existing system (the issuance of sales tax licenses). Employers take

sales tax license seriously because failure to obtain one is a crime. Because of this, I suspect the rate of compliance with the sales tax license requirement is high.

There certainly may be other, better ideas for how to require that an employer whose employees are covered by workers' compensation obtain and maintain workers' compensation insurance or self-insurance. I welcome any other suggestions that would accomplish this goal.