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## **Task Force on Group Self-Insurance Issues reports to governor and the New York State Legislature: Group Model Imposes Too Much Risk on Participating Employers**

*What lies ahead for New York's current system permitting groups of employers to self-insure their obligations under workers' compensation?*

Under current New York State Law, employers who wish to self-insure for workers' compensation may either self-insure individually or join together and request approval to operate as a group self-insured trust (GSIT). The members of a GSIT proportionally share in any surplus which may have been generated by the trust (i.e., contributions for a given fiscal year which exceed expenses. Conversely, members are jointly and severally liable for any deficit which may occur when the contributions are inadequate to pay all of the GSIT's obligations for a given period.

Workers' Compensation Law (WCL) includes a provision which requires the Workers' Compensation Board (WCB) to assess all self-insured employers for all expenses incurred by the WCB relative to self-insured business. It has been the WCB's interpretation that this includes the WCB's administrative and regulatory costs and for the costs of any unmet obligations incurred by an insolvent individual or group self-insurer and that these costs are assessed pursuant to Section 50-5 of the WCL (50-5 assessment).

**A good run.** Prior to the 2006/07 fiscal year, there had never been a group default in New York state. The 50-5 assessment was, as a result, only imposed for the administrative costs of running the self-insurance program and the defaults of several individual self-insurers. The total annual industry-wide assessment was below \$10 million.

**Then failures.** In 2006/07, for the first time in the history of the program, several groups were closed due to financial concerns; in 2007/08 those groups, plus several additional groups became insolvent. Due to a growing level of unfunded claims costs related to these insolvent groups, the 50-5 assessment for 2007/08 almost doubled. As additional groups defaulted, and as their projected level of unreserved claims has grown, this assessment has grown even higher.

**Decline in active groups and participating employers.** The group self-insurance program has experienced a precipitous decline in both the number of active groups and participating employers. At its height in 2005, there were 65 active groups representing almost 18,000 employers. At the end of 2009, there were only 30 groups and less than 5,000 employers participating. In addition, the joint and several provisions of the group program that were supposed to be the financial cornerstone of the program have proven to be insufficient. The Board has billed former members of defaulted group trusts almost \$500 million. Many former members of these insolvent groups have refused to pay WCB issued bills and some have challenged assessments through litigation. In fact, of the total deficit billed to the employer members of the insolvent groups, only \$33.8 million has been collected to date and another \$82 million has been pledged. The lack of timely payments by these former members also has caused financial hardship to others in the system via increased assessments.

When forensic audits of insolvent trusts are completed the Task Force projects their unfunded liabilities might approach \$600 million.

**2008 reform legislation.** In order to understand the reasons for these defaults and assess the long-term viability of the group model, legislation signed by Gov. Paterson on June 30, 2008, created a Task Force on Group Self Insurance. The Group Self Insurance Task Force met from April 2009 through March 2010. It has reviewed extensive documents and interviewed various stakeholders.

**Task Force says to terminate the program.** Although there are some benefits to group self insurance, the Task Force has determined that the group model simply imposes too much risk on the employers that participate in it. Therefore, it is the recommendation of the Task Force to

terminate the group self-insurance program effective Dec. 31, 2010. The Task Force further recommends that such legislation be enacted expeditiously to allow all existing groups sufficient time to find alternative coverage.

**GSIT flaws.** The report outlines some of most notable **flaws inherent in the group self-insurance program**, which include:

- the joint and several liabilities that can significantly impact the member employer's business operations and can have a serious impact on the employer's financial position, including their ability to borrow and acquire surety bonds, for years into the future;
- the amount of the assessment liability imposed by 50-5 fluctuates significantly and it is often required to be paid in a short time frame in order to meet the cash-flow needs related to the unfunded liabilities of insolvent groups. Further, the future ability of the WCB to impose such assessments has been called into question by a recent court decision, finding them unconstitutional;
- the significant level of trustee involvement and oversight that is essential to ensure proper administration of the groups (This level of involvement for small business owners is overly burdensome and often not achievable.);
- the conflict of interest that exists between the group administrator and the third-party administrator particularly with regard to establishing accurate reserve estimates. Accurate reserves are the cornerstone of ensuring that a group remains healthy and able to meet its financial obligations. When manipulation of reserves is a product of such conflict of interest, effective regulation of the groups become nearly impossible. Gross understatement of the required reserves by the group's key advisors has been identified as a major reason for the downfall of a majority of failed group trusts.
- it is not cost beneficial, nor is it likely attainable, to provide the level of regulatory oversight needed to ensure that the groups maintain the necessary financial and operational standards to protect the employer members that participate in the group self-insurance program.
- the information provided to and submitted by the independent consultants on behalf of the groups, including claims, actuarial and fiscal data is a key component to ensuring that the group's funding position remains viable (It is difficult to ensure the veracity of the data in a cost beneficial manner.);
- the excessive costs and time associated with pursuing litigation to enforce the joint and several provisions of the WCL further delay collection efforts.

**Proposed legislative fixes.** In addition to terminating the group trust program at the end of 2010, in an attempt to mitigate the impact on all self-insured employers and to allow existing groups to better manage the run off, the Task Force recommends the following other legislative provisions be adopted:

- reaffirm the WCB's authority under Section 26 of the WCL to pursue judgments and provide other collection tools to the WCB in addition to traditional joint and several billings;
- grant the WCB the authority to deem employers who do not honor their joint and several obligations noncompliant with the coverage requirements of the WCL;
- empower the WCB to pursue all available actions such as stop-work orders, debarment from public works and other penalties that are currently imposed on employers who do not have the required workers' compensation coverage;
- reaffirm the WCB's right as successor in interest to all the rights of the insolvent group trust;
- establish the WCB's right to immediate access to the records of the insolvent group trust and its advisor's records related to the trust including work product;

- authorize the WCB to initiate joint and several lawsuits and other third-party recoveries through retention of outside counsel, in addition to suits that may be brought by the Attorney General's Office;
- reform the assessments (excluding the self insurer's assessment) by eliminating the GSITs category when distributing the initial indemnity liability among sectors. This option would result in the assessment liability being re-distributed to the remainder of the industry and the employers that participated in the group program would pay this liability with their new "carrier";
- authorize assumption of workers' compensation liability insurance policies to give GSITs the ability to manage or eliminate their tail of claims. This alternative must be performed in a manner which assures complete compliance with the WCB regulations and law; and
- thus providing maximum protection for the claimant. In addition, the entity offering the assumption of liability policy must make available liaison services for both the employees and the employers in the event there are issues which arise after transition.

In the interim, while the recommendations of the Task Force are being considered by the governor and the Legislature, the Task Force is recommending that the WCB take a number of administrative actions outlined in the report.

PIANY will follow this issue closely and invites your comments at [govaffairs@pia.org](mailto:govaffairs@pia.org).