

ACT 304

H.B. NO. 2549-86

A Bill for an Act Relating to Workers' Compensation.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 386, Hawaii Revised Statutes, is amended by adding a new part VI to read as follows:

“PART VI. SELF-INSURANCE GROUPS

§386-191 Scope. This part shall apply to workers' compensation self-insurance groups. This part shall not apply to public employees or governmental entities. Groups which are issued a certificate of approval by the insurance commissioner shall not be deemed to be insurers or insurance companies and shall not be subject to the provisions of the insurance laws and rules, except as otherwise provided in this part.

§386-192 Definitions. For the purpose of this part:

“Administrator” means an individual, partnership, or corporation engaged by a workers' compensation self-insurance group's board of trustees to carry out the policies established by the group's board of trustees and to provide day-to-day management of the group.

“Insolvent” or “insolvency” means the inability of a workers' compensation self-insurance group to pay its outstanding lawful obligations as they mature in the regular course of business, as may be shown either by an excess of its required reserves and other liabilities over its assets or by its not having sufficient assets to reinsure all of its outstanding liabilities after paying all accrued claims owed by it.

“Net premium” means premium derived from standard premium adjusted by any advance premium discounts.

“Service company” means a person or entity which provides services which are not provided by the administrator. The services which may be provided by a service company include but are not limited to:

- (1) Claims adjustment;
- (2) Safety engineering;
- (3) Compilation of statistics and the preparation of premium, loss, and tax reports;
- (4) Preparation of other required self-insurance reports;

- (5) Development of members' assessments and fees; and
- (6) Administration of a claims fund account.

"Standard premium" means the premium derived from the manual rates adjusted by experience modification factors but before advance premium discounts.

"Workers' compensation self-insurance group" or "group" means a not-for-profit unincorporated association consisting of five or more employers who:

- (1) Are engaged in the same or similar type of business;
- (2) Are members of the same bona fide trade or professional association which has been in existence for not less than five years; and
- (3) Enter into agreements to pool their liabilities for workers' compensation benefits in this State.

§386-193 Authority to act as workers' compensation self-insurance group. No person, association, or other entity shall act as a workers' compensation self-insurance group unless it has been issued a certificate of approval by the insurance commissioner.

§386-194 Qualifications for initial approval and continued authority to act as a workers' compensation self-insurance group. (a) A proposed workers' compensation self-insurance group shall file with the insurance commissioner its application for a certificate of approval accompanied by a nonrefundable filing fee in the amount of \$300. The application shall include the group's name, location of its principal office, date of organization, name and address of each member, and such other information as the insurance commissioner may reasonably require, together with the following:

- (1) Proof of compliance with subsection (b);
- (2) A copy of its articles of association, if any;
- (3) A copy of agreements with the administrator and any service company;
- (4) A copy of the bylaws of the proposed group;
- (5) A copy of the agreement between the group and each member securing the payment of workers' compensation benefits, which shall include provision for payment of special compensation fund assessments as provided for under chapter 386, part IV, subpart C;
- (6) Designation of the initial board of trustees and administrator;
- (7) The address in this State where the books and records of the group will be maintained at all times;
- (8) A pro forma financial statement on a form acceptable to the insurance commissioner showing the financial ability of the group to pay the workers' compensation obligations of its members; and
- (9) Proof of payment to the group by each member of not less than twenty-five per cent of that member's first year estimated annual net premium on a date prescribed by the insurance commissioner. Each payment shall be considered part of the first year premium payment of each member if the proposed group is granted a certificate of approval.

(b) To obtain and maintain its certificate of approval, a workers' compensation self-insurance group shall comply with the following requirements as well as any other requirements established by law or rule:

- (1) A combined net worth of all members of at least \$1,000,000;
- (2) Security in the form and amount prescribed by the insurance commissioner which shall be provided by either a surety bond, security deposit, financial security endorsement, or any combina-

tion thereof. If a surety bond is used to meet the security requirement, it shall be issued by a corporate surety company authorized to transact business in this State. If a security deposit is used to meet the security requirement, securities shall be limited to bonds or other evidences of indebtedness issued, assumed, or guaranteed by the United States or any agency or instrumentality thereof; certificates of deposits in a federally insured bank; shares or savings deposits in a federally insured savings and loan association or credit union; or any bond or security issued by any state and backed by the full faith and credit of that state. Any such securities shall be deposited with the director of finance and assigned to and made negotiable by the director of labor and industrial relations pursuant to a trust document acceptable to the insurance commissioner. Interest accruing on a negotiable security so deposited shall be collected and transmitted to the depositor, provided the depositor is not in default. A financial security endorsement, issued as part of an acceptable excess insurance contract, may be used to meet all or part of the security requirement. The bond, security deposit, or financial security endorsement shall be for the benefit of the State solely to pay claims and associated expenses and payable upon the failure of the group to pay workers' compensation benefits it is legally obligated to pay. The insurance commissioner may establish and adjust from time to time requirements for the amount of security based on differences among groups in their size, types of employment, years in existence, and other relevant factors;

- (3) Specific and aggregate excess insurance in a form, in an amount, and by an insurance company acceptable to the insurance commissioner. The insurance commissioner may establish minimum requirements for the amount of specific and aggregate excess insurance based on differences among groups in their size, types of employment, years in existence, and other relevant factors, and may permit a group to meet this requirement by placing in a designated depository securities of the type referred to under paragraph (2);
- (4) An estimated annual standard premium of at least \$250,000;
- (5) An indemnity agreement jointly and severally binding the group and each member thereof to meet the workers' compensation obligations of each member. The indemnity agreement shall be in a form prescribed by the insurance commissioner and shall include minimum uniform substantive provisions prescribed by the insurance commissioner. Subject to the insurance commissioner's approval, a group may add other provisions needed because of its particular circumstances;
- (6) A fidelity bond for the administrator in a form and amount prescribed by the insurance commissioner; and
- (7) A fidelity bond for the service company in a form and amount prescribed by the insurance commissioner. The insurance commissioner may also require the service company providing claim services to furnish a performance bond in a form and amount prescribed by the insurance commissioner.

(c) A group shall notify the insurance commissioner of any change in the information required to be filed under subsection (a) or in the manner of the group's compliance with subsection (b) no later than thirty days after such change.

(d) The insurance commissioner shall evaluate the information provided by the application required to be filed under subsection (a) to assure that no gaps in funding exist and that funds necessary to pay workers' compensation benefits will be available on a timely basis.

(e) The insurance commissioner shall act upon a completed application for a certificate of approval within sixty days. If, because of the number of applications, the insurance commissioner is unable to act upon an application within this period, the insurance commissioner shall have an additional sixty days to act under this subsection.

(f) The insurance commissioner shall issue to the group a certificate of approval upon finding that the proposed group has met all requirements or the insurance commissioner shall issue an order refusing such certificate setting forth reasons for such refusal upon finding that the proposed group does not meet all requirements.

(g) Each workers' compensation self-insurance group shall be deemed to have appointed the insurance commissioner as its attorney to receive service of legal process issued against it in this State. The appointment shall be irrevocable, shall bind any successor in interest, and shall remain in effect as long as there is in this State any obligation or liability of the group for workers' compensation benefits.

(h) Each group shall establish and maintain a safety and accident prevention program for which the insurance commissioner shall prescribe minimum requirements.

§386-195 Certificate of approval; termination. (a) The certificate of approval issued by the insurance commissioner to a workers' compensation self-insurance group authorizes the group to provide workers' compensation benefits. The certificate of approval shall remain in effect until terminated at the request of the group or revoked by the insurance commissioner pursuant to section 386-211.

(b) The insurance commissioner shall not grant the request of any group to terminate its certificate of approval unless the group has insured or reinsured all incurred workers' compensation obligations with an authorized insurer under an agreement filed with and approved in writing by the insurance commissioner. The obligations shall include both known claims and expenses associated therewith and claims incurred, but not reported, and expenses associated therewith.

(c) Subject to the approval of the insurance commissioner, a group may merge with another group engaged in the same or similar type of business only if the resulting group assumes in full all obligations of the merging groups. The insurance commissioner may hold a hearing on the merger and shall do so if any party, including a member of either group, so requests.

§386-196 Examinations. The insurance commissioner may examine the affairs, transactions, accounts, records, and assets and liabilities of each group as often as the insurance commissioner deems advisable. The expense of examinations shall be assessed against the group in the same manner that insurers are assessed for examinations.

§386-197 Board of trustees; membership, powers, duties, and prohibitions. Each group shall be operated by a board of trustees, which shall consist of not less than five persons whom the members of a group elect for stated terms of office. At least two-thirds of the trustees shall be employees, officers, or directors of members of the group. The group's administrator, service company, or any owner, officer, employee of, or any other person affiliated with, the administra-

tor or service company shall not serve on the board of trustees of the group. All trustees shall be residents of this State or officers of corporations authorized to do business in this State. The board of trustees of each group shall ensure that all claims are paid promptly and take all necessary precautions to safeguard the assets of the group, including all of the following:

- (1) The board of trustees shall:
 - (A) Maintain responsibility for moneys collected or disbursed from the group and segregate all moneys into a claims fund account and an administrative fund account. At least seventy per cent of the net premium shall be placed into a designated depository for the sole purpose of paying claims, allocated claims expenses, reinsurance or excess insurance, and special compensation fund assessments. This account shall be called the claims fund account. The remaining net premium shall be placed in a designated depository for the payment of taxes, general regulatory fees and assessments, and administrative costs. This account shall be called the administrative fund account. The commissioner may approve an administrative fund account of more than thirty per cent and a claims fund account of less than seventy per cent only if the group shows to the insurance commissioner's satisfaction that more than thirty per cent is needed for an effective safety and loss control program or that the group's aggregate excess insurance attaches at less than seventy per cent;
 - (B) Maintain minutes of its meetings and make the minutes available to the insurance commissioner;
 - (C) Retain an independent certified public accountant to prepare the statement of financial condition required by section 386-201(a); and
 - (D) Designate an administrator to carry out the policies established by the board of trustees and to provide day to day management of the group and delineate in the written minutes of its meetings the areas of authority it delegates to the administrator.
- (2) The board of trustees shall not:
 - (A) Extend credit to a member for payment of a premium, except pursuant to payment plans approved by the insurance commissioner; and
 - (B) Borrow moneys from the group or in the name of the group, except in the ordinary course of business, without first advising the insurance commissioner of the nature and purpose of the loan and obtaining prior approval from the insurance commissioner.

§386-198 Group membership; termination, liability. (a) An employer joining a workers' compensation self-insurance group after the group has been issued a certificate of approval shall submit an application for membership to the board of trustees or its administrator and enter into the indemnity agreement required by section 386-194(b). Membership shall take effect no earlier than each member's date of approval. The application for membership and its approval shall be maintained as permanent records of the board of trustees.

(b) Each member of a group shall be subject to cancellation by the group pursuant to the bylaws of the group. In addition, each member may elect to terminate participation in the group. The group shall notify the insurance

commissioner and department of labor and industrial relations of the termination or cancellation of a member within ten days. The group shall maintain coverage of each canceled or terminated member for thirty days after the notice, at the terminating member's expense, unless the group is notified sooner by the department that the canceled or terminated member has procured workers' compensation insurance, has become an approved self-insurer, or has become a member of another group.

(c) The group shall pay all workers' compensation benefits for which each member incurs liability during the member's period of membership. A member who elects to terminate its membership or is canceled by a group remains jointly and severally liable for workers' compensation obligations of the group and its members which were incurred during the canceled or terminated member's period of membership.

(d) A group member is not relieved of its workers' compensation liabilities incurred during its period of membership, except through payment by the group or the member of required workers' compensation benefits.

(e) The insolvency or bankruptcy of a member does not relieve the group or any other member of liability for the payment of any workers' compensation benefits incurred during the insolvent or bankrupt member's period of membership.

§386-199 Service companies. (a) No service company or its employees, officers, or directors shall be an employee, officer, or director of, or have either a direct or indirect financial interest in, an administrator. No administrator or its employees, officers, or directors shall be an employee, officer, or director of, or have either a direct or indirect financial interest in, a service company.

(b) The service contract shall state that unless the insurance commissioner permits otherwise the service company shall handle all claims and other obligations incurred during the contract period to their conclusion.

§386-200 Licensing of agent. Except for a salaried employee of a group, its administrator, or its service company, any person soliciting membership in a workers' compensation self-insurance group shall be licensed as a general agent or subagent as provided under sections 431-361 to 431-407.

§386-201 Financial statements and other reports. (a) Each group shall submit to the insurance commissioner a statement of financial condition audited by an independent certified public accountant on or before the last day of the sixth month following the end of the group's fiscal year. The financial statement shall be on a form prescribed by the insurance commissioner and shall include, but not be limited to, actuarially appropriate reserves for:

- (1) Known claims and expenses associated therewith;
- (2) Claims incurred but not reported and expenses associated therewith;
- (3) Unearned premiums; and
- (4) Bad debts, reserves for which shall be shown as liabilities.

An actuarial opinion regarding reserves for known claims and expenses associated therewith and claims incurred but not reported and expenses associated therewith shall be included in the audited financial statement. The actuarial opinion shall be given by a member of the American Academy of Actuaries or other qualified loss reserve specialist as defined in the annual statement adopted by the National Association of Insurance Commissioners.

(b) No person shall make any untrue statement of a material fact in connection with the solicitation of membership of a group. No person shall omit to state a material fact which makes the statement misleading, in light of the

circumstances under which it is made, in connection with the solicitation of membership of a group.

(c) The insurance commissioner may prescribe the format and frequency of other reports which may include, but shall not be limited to, payroll audit reports, summary loss reports, and quarterly financial statements.

§386-202 Misrepresentation prohibited. No person shall make a material misrepresentation or omission of a material fact in connection with the solicitation of membership of a group.

§386-203 Investments. Funds not needed for current obligations may be invested by the board of trustees in accordance with sections 431-281 to 431-312.

§386-204 Rates and reporting of rates. (a) Every workers' compensation self-insurance group shall adhere to the uniform classification system, uniform experience rating plan, and manual rules filed with the insurance commissioner by an advisory organization designated by the insurance commissioner.

(b) Premium contributions to the group shall be determined by applying the manual rates and rules to the appropriate classification of each member which shall be adjusted by each member's experience credit or debit. Subject to approval by the insurance commissioner, premium contributions may also be reduced by an advance premium discount reflecting the group's expense levels and loss experience.

(c) Notwithstanding subsection (b), a group may apply to the insurance commissioner for permission to make its own rates. The rates shall be based on at least five years of the group's experience.

(d) Each group shall be audited at least annually by an auditor acceptable to the insurance commissioner to verify proper classifications, experience rating, payroll, and rates. A report of the audit shall be filed with the insurance commissioner in a form acceptable to the insurance commissioner. A group or any member thereof may request a hearing on any objections to the classifications. If the insurance commissioner determines that, as a result of an improper classification, a member's premium contribution is insufficient, the insurance commissioner shall order the group to assess that member an amount equal to the deficiency. If the insurance commissioner determines that, as a result of an improper classification, a member's premium is excessive, the insurance commissioner shall order the group to refund to the member the excess collected. The audit shall be at the expense of the group.

§386-205 Refunds. (a) Any moneys for a fund year in excess of the amount necessary to fund all obligations for that fund year may be declared to be refundable by the board of trustees not less than twelve months after the end of the fund year.

(b) Each member shall be given a written description of the refund plan at the time of application for membership. A refund for any fund year shall be paid only to those employers who remain participants in the group for the entire fund year. Payment of a refund based on a previous fund year shall not be contingent on continued membership in the group after that fund year.

§386-206 Premium payment; reserves. (a) Each group shall establish to the satisfaction of the insurance commissioner a premium payment plan which shall include an initial payment by each member of at least twenty-five per cent of that member's annual premium before the start of the group's fund year and payment of the balance of each member's annual premium in monthly or quarterly installments.

(b) Each group shall establish and maintain actuarially appropriate loss reserves, which shall include reserves for known claims and expenses associated therewith and claims incurred but not reported and expenses associated therewith.

(c) Each group shall establish and maintain bad debt reserves based on the historical experience of the group or other groups.

§386-207 Deficits and insolvencies. (a) If the assets of a group are at any time insufficient to enable the group to discharge its legal liabilities and other obligations and to maintain the reserves required of it under this chapter, the group shall forthwith make up the deficiency or levy an assessment upon its members for the amount needed to make up the deficiency.

(b) In the event of a deficiency in any fund year, the deficiency shall be made up immediately, either from:

- (1) Surplus from a fund year other than the current fund year;
- (2) Administrative funds;
- (3) Assessment of the membership, if ordered by the group; or
- (4) An alternate method as the insurance commissioner may approve or direct.

The insurance commissioner shall be notified prior to any transfer of surplus funds from one fund year to another.

(c) If the group fails to assess its members or to otherwise make up the deficit within thirty days, the insurance commissioner shall order it to do so.

(d) If the group fails to make the required assessment of its members within thirty days after the insurance commissioner orders it to do so or if the deficiency is not fully made up within sixty days after the date on which the assessment is made or within a longer period of time as may be specified by the insurance commissioner, the group shall be deemed to be insolvent.

(e) The insurance commissioner shall proceed against an insolvent group in the same manner as the insurance commissioner would proceed against an insolvent domestic insurer in this State as prescribed in sections 431-651 to 431-686. The insurance commissioner shall have the same powers and limitations in the proceedings as are provided under those laws, except as otherwise provided in this chapter.

(f) In the event of the liquidation of a group, the insurance commissioner shall levy an assessment upon its members for an amount as the insurance commissioner determines to be necessary to discharge all liabilities of the group, including the reasonable cost of liquidation.

§386-208 Guaranty mechanism. In the event of a liquidation pursuant to section 386-207, after exhausting the security required pursuant to section 386-194(b)(2), the insurance commissioner shall levy an assessment against all groups to assure prompt payment of benefits. The assessment on each group shall be based on the proportion that the premium of each group bears to the total premium of all groups. The insurance commissioner may exempt a group from assessment upon finding that the payment of the assessment would render the group insolvent. The assessment shall not relieve any member of an insolvent group of its joint and several liability. After any assessment is made, the insurance commissioner shall take action to enforce the joint and several liability provisions of the insolvent group's indemnity agreement and shall recoup:

- (1) All costs incurred by the insurance commissioner in enforcing the joint and several liability;

- (2) Amounts that the insurance commissioner assessed any other groups pursuant to this section; and
- (3) Any obligation included within section 386-207(f).

§386-209 Monetary penalties. After notice and opportunity for a hearing, the insurance commissioner may impose a monetary penalty on any person or group found to be in violation of any provision of this chapter or any rule adopted thereunder. The monetary penalty shall not exceed \$1,000 for each act or violation and shall not exceed \$10,000 in the aggregate. The amount of any monetary penalty shall be paid to the insurance commissioner and transmitted to the director of finance for deposit into the general fund.

§386-210 Cease and desist orders. (a) After notice and opportunity for a hearing, the insurance commissioner may issue an order requiring a person or group to cease and desist from engaging in an act or practice found to be in violation of any provision of this chapter or any rule adopted under this chapter.

(b) Upon a finding, after notice and opportunity for a hearing, that any person or group has violated any cease and desist order, the insurance commissioner may do either or both of the following:

- (1) Impose a monetary penalty of not more than \$10,000 for each and every act or violation of the order, but not to exceed an aggregate monetary penalty of \$100,000; or
- (2) Revoke the group's certificate of approval or any insurance license held by the person.

§386-211 Revocation of certificate of approval. (a) After notice and opportunity for a hearing, the insurance commissioner may revoke a group's certificate of approval if the group:

- (1) Is found to be insolvent;
- (2) Fails to pay any premium tax, regulatory fee or assessment, or special compensation fund assessments imposed upon it; or
- (3) Fails to comply with any provision of this chapter or any rule adopted under this chapter or with any lawful order of the insurance commissioner within the time prescribed.

(b) In addition, the insurance commissioner may revoke a group's certificate of approval if, after notice and opportunity for hearing, the insurance commissioner finds that:

- (1) Any certificate of approval that was issued to the group was obtained by fraud;
- (2) There was a material misrepresentation in the application for the certificate of approval; or
- (3) The group or its administrator has misappropriated, converted, illegally withheld, or refused to pay over upon proper demand any moneys that belong to a member, an employee of a member, or a person otherwise entitled thereto and that have been entrusted to the group or its administrator in its fiduciary capacities.

§386-212 Notice and hearing. The insurance commissioner in the administration of this chapter shall comply with chapters 91 and 92 when applicable.

§386-213 Rules. The insurance commissioner shall adopt rules in accordance with chapter 91 for the purposes of this chapter.

§386-214 Severability. If any provision of this chapter, or the application thereof, to any person or circumstance, is subsequently held to be invalid, the invalidity shall not affect other provisions or applications of this chapter.”

SECTION 2. Section 386-1, Hawaii Revised Statutes, is amended by amending the definition of “employer” to read as follows:

“Employer” means any person having one or more persons in his employment. It includes the legal representative of a deceased employer and the State, any county or political subdivision of the State, and any other public entity within the State.

The insurer of an employer is subject to the employer’s liabilities, shall pay the deductible as provided for under section 386-100, shall collect the amount of the deductible from the employer, and be entitled to rights and remedies under this chapter as far as applicable.

The workers’ compensation self-insurance group of which an employer is a member is subject to that employer’s liabilities and entitled to rights and remedies under this chapter as far as applicable.”

SECTION 3. Section 386-121, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) Employers, except the State, any county or political subdivision of the State, or other public entity within the State, shall secure compensation to their employees in one of the following ways:

- (1) By insuring and keeping insured the payment of compensation with any stock, mutual, reciprocal, or other insurer authorized to transact the business of workers’ compensation insurance in the State;
- (2) By depositing and maintaining with the state director of finance security satisfactory to the director of labor and industrial relations securing the payment by the employer of compensation according to the terms of this chapter;
- (3) Upon furnishing satisfactory proof to the director of his solvency and financial ability to pay the compensation and benefits herein provided, no insurance or security shall be required, and the employer shall make payments directly to his employees, as they may become entitled to receive the same under the terms and conditions of this chapter[.]; or
- (4) By membership in a workers’ compensation self-insurance group with a valid certificate of approval under section 386-194.

Any person who wilfully misrepresents any fact in order to obtain the benefits of paragraph (3) [of this subsection] shall be guilty of a misdemeanor.”

SECTION 4. Section 386-122, Hawaii Revised Statutes, is amended to read as follows:

“§386-122 Notice of insurance. If the insurance so effected is [not] under [paragraph (2) or (3) of] section [386-121(a)] 386-121(a)(1), the employer shall forthwith file with the director of labor and industrial relations in a form prescribed by the director a notice of his insurance together with a copy of the contract or policy of insurance.”

SECTION 5. Section 386-154, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

- “(a) As used in this section:

[1] "Employing unit" means an employer who has not secured compensation to his employees under section 386-121(a)(1)[:]; except that, for employers who are members of a workers' compensation group under part VI, the term means the group.

[2] "Average annual compensation" means the average of annual compensation payments made by an employing unit for a period consisting of two consecutive calendar years immediately preceding the year for which the charge is assessed under this section; provided that if, at the end of a calendar year, an employing unit was subject to this chapter for a period less than twelve consecutive months the total amount of compensation payments made by him during such period shall constitute his average annual compensation.

[3] "Employing unit's compensation ratio" means the percentage ratio derived by dividing an employing unit's average annual compensation at the end of a calendar year by the total average annual compensation paid during the same two calendar years by all employers subject to this chapter.

[4] "Carrier's compensation ratio" means the quotient derived by dividing the total average annual compensation paid during the two most recent calendar years by all insurance carriers on behalf of employers insured and keeping insured under section 386-121(a)(1) by the total average annual compensation paid during the same two calendar years by all employers subject to this chapter.

[5] "Anticipated total assessment" means the amount derived by dividing the total amount of the levy to be paid by insurance carriers in a calendar year as required by section 386-153 by the most recent carrier's compensation ratio."

SECTION 6. There is appropriated out of the general revenues of the State of Hawaii the sum of \$153,000, or so much thereof as may be necessary for fiscal year 1986-1987, to implement the licensure and regulation of workers' compensation self-insurance groups, including the hiring of appropriate personnel, by the insurance commissioner. The sum appropriated shall be expended by the department of commerce and consumer affairs.

SECTION 7. This Act shall not affect rights and duties which matured, penalties which were incurred, and proceedings which were begun prior to its effective date.

SECTION 8. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 9. This Act shall take effect upon its approval.

(Approved May 30, 1986.)