



October 21, 1992

BULLETIN #532

BULLETIN TO ALL MEMBERS:

RE: "ERISA" PLANS BEING SOLD AS A SUBSTITUTE FOR WORKERS' COMPENSATION

We have recently had several inquiries concerning the use of nonadmitted companies for the exportation of workers' compensation insurance. This issue is addressed in the California Department of Insurance Bulletin 92-5, dated October 8, 1992; we have enclosed a copy for your review.

Referring to paragraph 2, you will notice that California Labor Code Section 3700 requires "that every employer in California either buy workers' compensation insurance from a licensed insurance company, or obtain a certificate of self-insurance from the California Department of Industrial Relations."

Questions should be addressed to Mr. Larry C. White, Staff Counsel for the California Department of Insurance as stated in Department of Insurance Bulletin 92-5.

James S. Pugh
Assistant Manager

JSP/imb

Enclosure

STATE OF CALIFORNIA
Department of Insurance
45 Fremont Street
San Francisco, California 94105

Bulletin No. 92-5

To: ALL ADMITTED INSURERS, ALL LICENSED INSURANCE ADMINISTRATORS, ALL LICENSED AGENTS AND BROKERS AND OTHER INTERESTED PERSONS.

Subject: "ERISA" Plans Being Sold as a Substitute for Workers Compensation

California employers are being approached by persons or organizations offering low cost employee benefit plans that purport to legally circumvent California laws requiring all employers to have workers' compensation coverage. The promoters of these plans assert that the federal Employee Retirement

Income Security Act (ERISA) preempts state law requirements.

ERISA plans are not a substitute for workers' compensation. California Labor Code Section 3700 requires that every employer in California either buy workers' compensation insurance from a licensed insurance company, or obtain a certificate of self insurance from the California Department of Industrial Relations. Employee leasing companies, like all other employers, must comply with this requirement.

Federal law (Title 29 United States Code Section 1003 (b) (3) specifically exempts from ERISA jurisdiction any "plan" that is maintained solely for the purpose of complying with workers compensation laws.

Insurers, agents, and brokers who market ERISA plans may face disciplinary action if they make any stated or implied representation that the plan meets California workers' compensation requirements.

An employer who acquires one of these so-called ERISA plans as a substitute for state mandated workers' compensation coverage could suffer serious losses. The consequences of being illegally uninsured include but are not limited to the following:

- Injured workers may sue such employers in civil court. Awards in these suits can include an amount for "pain and suffering" and/or punitive damages.
- An injured employee bringing such a suit may attach his or her employer's property immediately after filing a lawsuit in order to secure payment of a possible judgement.
- In such a lawsuit, there is a legal presumption that the worker's injury is the result of the employer's negligence.
- Employers may be sued by the Department of Industrial Relations. If they are corporations, DIR may proceed against substantial shareholder or parents. DIR may foreclose on the employer's real property, including in some cases, the employer's home.
- Employers who willfully fail to secure workers' compensation are guilty of a misdemeanor.

Inquiries regarding requirements for permissible self-insurance for workers' compensation should be addressed to the California Department of Industrial Relations. Employers may purchase workers' compensation insurance from one of the several hundred licensed workers' compensation insurance companies or from the State Compensation Insurance Fund. A list of such carriers may be obtained from the Workers' Compensation Insurance Rating Bureau California, Spear Street Tower, Suite 500, One Market Plaza, San Francisco 94105, (415) 777-0777.

Any questions regarding this Bulletin should be addressed to:

Larry C. White, Staff Counsel
California Department of Insurance
45 Fremont Street

San Francisco, California 94105

Telephone: 415/904-5725

Fax: 415/904-5729

Sincerely,

JOHN GARAMENDI

Insurance Commissioner