

WCIRB Bulletin

Bulletin No. 2017-26

November 14, 2017

1221 Broadway, Suite 900 • Oakland, CA 94612 • 415.777.0777 • Fax 415.778.7007 • www.wcirb.com • wcirb@wcirb.com

California Department of Insurance Notice Regarding Senate Bill No. 189 (Corrected)

The California Department of Insurance (CDI) has requested that the WCIRB post to its website and notify its members regarding the issuance of the attached notice which summarizes the changes in the law resulting from Senate Bill No. 189 (SB 189). The notice provides responses to several frequently asked questions (FAQs) and includes sample waiver forms. The notice supersedes the CDI's letter to the WCIRB dated March 16, 2017 to the extent that the letter is inconsistent with the provisions of SB 189.

If you have any questions concerning the CDI's notice, please contact the CDI at workcompquestions@insurance.ca.gov. The CDI's notice is available on the WCIRB's website on the [Executive Officers and Partners](#) page in the Learning Center.

WCIRBCalifornia®
Objective.Trusted.Integral.

DEPARTMENT OF INSURANCE

Legal Division, Government Law Bureau

45 Fremont Street, 21st Floor
San Francisco, CA 94105



Patricia Hein
Attorney IV
TEL: 415-538-4430
FAX: 415-904-5490
E-Mail: Patricia.Hein@insurance.ca.gov
www.insurance.ca.gov

November 13, 2017

Brenda J. Keys
Senior Vice President and Chief Legal Officer
WCIRB California
1221 Broadway, Suite 900
Oakland, CA 94612

SUBJECT: Implementation of SB 189

Dear Ms. Keys:

SB 189, which is effective beginning on January 1, 2018, makes certain changes to the definition of employee, and exclusions from the definition of employee, as set forth in Labor Code sections 3351 and 3352. In order to provide guidance to the workers' compensation insurer community, we developed the attached document that provides notice to insurers, answers to frequently asked questions, and two sample waiver forms. We direct the WCIRB to provide these documents to its member insurers and post this document on its website.

Thank you.

Cordially,

Patricia Hein

Patricia Hein
Attorney IV

Attachment

NOTICE TO ALL INSURERS ADMITTED TO WRITE OR WRITING WORKERS' COMPENSATION COVERAGES IN CALIFORNIA REGARDING CHANGES IN DEFINITIONS OF EMPLOYEE AND EXCLUSIONS TO THE DEFINITION OF EMPLOYEE (OFFICERS, MEMBERS OF BOARDS OF DIRECTORS, PARTNERS, MANAGING MEMBERS, REVOCABLE TRUSTS, OWNERS OF A PROFESSIONAL SERVICE CORPORATION, SOLE SHAREHOLDERS)

EFFECTIVE JANUARY 1, 2018 AND JULY 1, 2018 AS A RESULT OF THE ENACTMENT OF SB 189

THIS NOTICE SUPERSEDES THE DEPARTMENT'S LETTER TO THE WORKERS' COMPENSATION INSURANCE RATING BUREAU OF CALIFORNIA (WCIRB) DATED MARCH 16, 2017 TO THE EXTENT THAT THE LETTER IS INCONSISTENT WITH THE PROVISIONS OF SB 189.

Current law defines an employee, for purposes of the laws governing workers' compensation, to include, among other persons:

- Officers and members of boards of directors of quasi-public or private corporations while rendering actual service for the corporations for pay, and
- All working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company.

Current law excludes from the definition of employee:

- An officer or member of the board of directors of a quasi-public or private corporation who owns at least 15% of the issued and outstanding stock and executes a written waiver of his or her rights under the laws governing workers' compensation stating under penalty of perjury that he or she is a qualifying officer or director, and
- An individual who is a general partner of a partnership or a managing member of a limited liability company who executes a written waiver of his or her rights under the laws governing workers' compensation stating under the penalty of perjury that he or she is a qualifying general partner or managing member.

Effective January 1, 2018

Effective January 1, 2018, SB 189 (Bradford) makes the following changes to the waiver provisions of Labor Code section 3352 that pertain to an officer or member of the board of directors who owns at least 15% of the issued and outstanding stock of the corporation, or an

individual who is a general partner of a partnership or a managing member of a limited liability company, adding:

- A written waiver of workers' compensation coverage that is executed pursuant to Labor Code Section 3352(a)(16) and (17), including, but not limited to, a written waiver that was executed prior to January 1, 2017, and accepted by the insurer on or before December 31, 2017, may be deemed to be accepted by the insurer as of January 1, 2017, and remains in effect until there is a written withdrawal by:
 - the officer or member of the board of directors of a corporation,
 - the general partner of a partnership, or
 - the managing member of a limited liability company.

The Department expects insurers, agents and brokers to notify policyholders of the provisions of SB 189 and, in particular, expects all licensees with affected policies to notify all policyholders that have executed waivers to exclude coverage including, but not limited to, waivers that were executed prior to January 1, 2017 and accepted by the insurer on or before December 31, 2017, whether: 1) the insurer will accept the waiver, and 2) whether the waiver will be deemed accepted as of January 1, 2017.

Effective July 1, 2018

Trusts

Effective July 1, 2018, a person holding the power to revoke a trust with respect to shares of a private corporation held in trust, or general partnership or limited liability company interests held in trust, is defined as an "employee" within the meaning of Labor Code section 3351. To the extent such person is deemed an "employee" pursuant to the provisions defining as employees officers and members of boards of directors of quasi-public or private corporations, or working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company, he or she may also elect to be excluded from coverage if the person otherwise meets the criteria for exclusion from coverage described in section 3352.

Officers and Members of Boards of Directors

Effective July 1, 2018, an officer or member of the board of directors that meets the definition of employee in Labor Code section 3351(c) may elect to waive coverage if either (1) he or she owns at least 10% of the issued and outstanding stock, or (2) he or she owns at least 1% of the issued and outstanding stock of the corporation if his or her parent, grandparent, sibling, spouse, or child owns at least 10 percent of the issued and outstanding stock and is covered by a health insurance policy or health care service plan. The officer or member shall execute a written

waiver under penalty of perjury that he or she is a qualifying officer or director. The waiver shall be effective upon the date of receipt and acceptance by the corporation's insurer. The insurer, with the consent of the individual executing the waiver, may elect to backdate the acceptance of the waiver up to 15 days prior to the date of receipt of the waiver. The waiver shall remain in effect until the officer or member of the board of directors provides the insurer with a written withdrawal of the waiver.

Sole Shareholders of a Private Corporation

Effective July 1, 2018, an officer or director of a private corporation who is the sole shareholder of the private corporation is excluded from the definition of "employee" but may elect to be subject to liability for workers' compensation pursuant to Labor Code section 4151(a).

General Partners or Managing Members of a Limited Liability Corporation

Effective July 1, 2018, if an individual who is a general partner of a partnership or a managing member of a limited liability company executes a written waiver of coverage and states under penalty of perjury that the person is a qualifying general partner or managing member, the waiver shall be effective upon the date of receipt and acceptance by the partnership's or limited liability company's insurer. The insurer, with the consent of the individual executing the waiver, may elect to backdate the acceptance of the waiver up to 15 days prior to the date of receipt of the waiver. The waiver shall remain in effect until the individual provides the insurer with a written withdrawal of the waiver.

Professional Corporations

Effective July 1, 2018, an owner of a professional corporation, as defined in Section 13401 of the Corporations Code, who is a practitioner rendering professional services for which the professional corporation is organized, may waive coverage by executing a document, in writing and under penalty of perjury, waiving his or her workers' compensation rights and stating that he or she is covered by a health care service plan or a health insurance policy. The insurer, with the consent of the owner executing the waiver, may elect to backdate the acceptance of the waiver up to 15 days prior to the date of receipt of the waiver. The owner must provide a copy of the waiver to all other owners of the corporation and the corporation must keep a copy of the waiver on file. The waiver shall remain in effect until the owner provides the insurer with a written withdrawal of the waiver.

Sole Shareholders of a Private Professional Corporation

Effective July 1, 2018, an owner of a private professional corporation who is the sole shareholder of the private professional corporation is excluded from the definition of "employee" but may elect to be subject to liability for workers' compensation pursuant to Labor Code section 4151(a).

Cooperative Corporations

Effective July 1, 2018, an officer or member of the board of directors of a cooperative corporation organized pursuant to the Cooperative Corporation Law as set forth in the Corporations Code may waive coverage by executing a document, in writing and under penalty of perjury, waiving his or her workers' compensation rights and stating that he or she is covered by a health care service plan or health insurance policy, and a disability insurance policy that is comparable in scope and coverage to a workers' compensation policy. The Insurance Commissioner shall determine whether a disability policy is comparable in scope and coverage to a workers' compensation policy.

The officer or member of the board of directors shall provide a copy of the waiver to all other officers or members of the cooperative corporation and the cooperative corporation shall keep a copy of the waiver on file. The insurer, with the consent of the individual executing the waiver, may elect to backdate the acceptance of the waiver up to 15 days prior to the date of receipt of the waiver. The waiver shall remain in effect until the officer or member provides the insurer with a written withdrawal of the waiver.

Miscellaneous

SB 189 also made changes to Labor Code sections 3364, 3706.5, and 4156 that are unrelated to the definition of employee and accompanying provisions regarding the waiver of workers' compensation coverage.

Questions

If you have any questions concerning this notice, please contact the California Department of Insurance by e-mail at: workcompquestions@insurance.ca.gov.

FREQUENTLY ASKED QUESTIONS (FAQs)

The California Department of Insurance (CDI) is precluded from providing legal advice or interpreting law outside of a regulatory process. This FAQ section does not constitute legal advice and cannot be relied upon as such. Please consult your attorney for advice regarding your specific situation.

Q: How are limited liability partnerships, limited partnerships, non-profits, and other business structures affected by SB 189?

A. Individuals can review the definition of “employee” under California law as set forth in California Labor Code section 3351, and exclusions to the definition of “employee” under California Labor Code section 3352, to determine whether they must be covered for workers’ compensation insurance and whether they are eligible to waive workers’ compensation coverage.

Q. Do the provisions that are effective as of July 1, 2018 apply to policies that are already in force?

A. No. Labor Code section 3352(b)(2) states: “a policy or contract that is entered into or renewed in compliance with this section is subject to this section as it read on the date that the policy or contract was entered into or renewed.” Thus, the new provisions apply to all policies incepting or renewing on or after July 1, 2018.

Q. I am an employee of business entity that does not currently carry workers’ compensation insurance, but SB 189 indicates that I am an “employee” for workers’ compensation insurance purposes, and that I may waive coverage. To whom can I send my waiver?

A. The provisions under Labor Code section 3552 require waivers to be received and accepted by an insurer. You may wish to consult with your liability insurer to determine whether it will accept your waiver form.

Q. I am an officer/director of a quasi-public or private corporation but I own less than the minimum required percentage of issued and outstanding stock as an individual to qualify for a waiver. But I share joint ownership with another individual and our combined ownership meets the ownership requirement for a waiver. May we waive insurance coverage?

A. Both Labor Code section 3352(a)(16)(A) (pre-July 1, 2018) and 3352(a)(16)(A)(i) (post-July 1, 2018) refer to an officer or member of the board of directors in the singular. Therefore, in accordance with the plain reading of the statute, each person waiving coverage must meet the ownership requirement.

Q. What does the phrase, “rendering actual service for the corporations for pay,” as used in Labor Code section 3351(c) (pre-July 1, 2018) and 3351(c) (post-July 1, 2018) mean?

A. SB 189 does not provide a definition for this phrase and it is subject to interpretation by a workers’ compensation judge should a case proceed to the Workers’ Compensation Appeals Board.

Q. What does the term “wages” mean as used in Labor Code section 3351(f) (pre-July 1, 2018) and 3351(f) (post-July 1, 2018)?

A. SB 189 does not provide a definition for this phrase and it is subject to interpretation by a workers’ compensation judge should a case proceed to the Workers’ Compensation Appeals Board.

Q. I sent my insurer my signed waiver but they continued to charge me premium, which I paid. I sent a second waiver, which the insurer has accepted, but they have not reimbursed me for the premium that I have already paid. Who can help me?

A. You may wish to contact our consumer complaint hotline at 1-800-927-4357. You may also visit our page at <https://www.insurance.ca.gov/01-consumers/101-help/>.

Q. Whom should I contact if I have questions about this Notice or the sample waiver form?

A. You can contact us by sending an email to workcompquestions@insurance.ca.gov. Please be aware that we cannot provide legal advice concerning how this law will impact any particular individual or any particular circumstance, such as advice regarding whether a person meets the definition of “employee,” or whether someone who is an employee is eligible to waive workers’ compensation coverage, under the California Labor Code.

SAMPLE WAIVER FORM (Effective July 1, 2018)

Insured Name:

Insurer:

Policy No.:

**CORPORATE OFFICERS/DIRECTORS - WAIVER OF WORKERS' COMPENSATION
COVERAGE**

Pursuant to California Labor Code section 3352(a)(16)(A)(i), I hereby certify that I am an officer or director as described in Labor Code section 3351, subdivision (c) of the above-named insured, and that I either (1) own at least ten percent (10%) of the issued and outstanding stock of the above-named insured corporation, or (2) own at least one percent (1%) of the issued and outstanding stock of the corporation if my parent, grandparent, sibling, spouse, or child owns at least ten percent (10%) of the issued and outstanding stock of the corporation and am covered by a health insurance policy or a health service plan. As a qualifying officer or director, I elect to be excluded from the corporation's workers' compensation insurance policy with the above-referenced insurer. I understand and agree that this written waiver will be effective upon the date of receipt and acceptance by the corporation's insurer, that the insurer may elect to backdate the acceptance of the waiver up to 15 days prior to the date of receipt of the waiver, and that it shall remain in effect until I provide the insurer with a written withdrawal of this waiver. I understand and agree that by signing this waiver, I will not be entitled to coverage under the insured's workers' compensation policy with the above-referenced insurer if an employment-related injury occurs.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: _____

OFFICER/DIRECTOR SIGNATURE

PRINT OFFICER'S/DIRECTOR'S FULL NAME/TITLE

ACCEPTED:

[Insurance Company]

DATE

NOTE TO EMPLOYER: The exclusion will be endorsed to the policy upon our receipt and acceptance of a signed and properly completed form. The person electing exclusion must sign this form. Company representatives may not sign on behalf of the individual. One exclusion per form. Submit additional forms if needed.

Submit forms to: xxx

SAMPLE WAIVER FORM (effective July 1, 2018)

Insured Name:

Insurer:

Policy No.:

**GENERAL PARTNERS AND LLC MANAGING MEMBERS - WAIVER OF
WORKERS' COMPENSATION COVERAGE**

Pursuant to California Labor Code section 3352(a)(17)(A), I hereby certify that I am a general partner (if the insured is a partnership) or a managing member (if the insured is a limited liability company) of the above-named insured. As a qualifying general partner or managing member, I elect to be excluded from the insured's workers' compensation insurance policy with the above-referenced insurer. I understand and agree that this written waiver will be effective upon the date of receipt and acceptance by the partnership's or limited liability company's insurer, that the insurer may elect to backdate the acceptance of the waiver up to 15 days prior to the date of receipt of the waiver, and that it shall remain in effect until I provide the insurer with a written withdrawal of this waiver. I understand and agree that by signing this waiver, I will not be entitled to coverage under the insured's workers' compensation insurance policy with the above-referenced insurer if an employment-related injury occurs.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: _____

GENERAL PARTNER'S/MANAGING
MEMBER'S SIGNATURE

PRINT FULL NAME/TITLE

ACCEPTED:

[Insurance Company]

DATE

NOTE TO EMPLOYER: The exclusion will be endorsed to the policy upon our receipt and acceptance of a signed and properly completed form. The person electing exclusion must sign this form. Company representatives may not sign on behalf of the individual. One exclusion per form. Submit additional forms if needed.

Submit forms to: xxx