

To: Workers' Compensation Advisory Council

From: Department of Commerce

Date: January 20, 2023

RE: Legislative proposal for Chapter 79A related to bankruptcy

79A.01, subd. 4

"Insolvent self-insurer" means: (1) a member private self-insurer who has failed to pay compensation as a result of a declaration of bankruptcy or insolvency by a court of competent jurisdiction and whose security deposit has been called by the commissioner pursuant to chapter 176; (2) a member self-insurer who has failed to pay compensation and who has been issued a certificate of default by the commissioner and whose security deposit has been called by the commissioner pursuant to chapter 176; ~~or~~ (3) a member or former member private self-insurer who has failed to pay an assessment required by section 79A.12, subdivision 2, and who has been issued a certificate of default by the commissioner and whose security deposit has been called by the commissioner; ~~or~~ (4) a member private self-insurer whose security deposit has been called by the commissioner pursuant to chapter 176 in accordance with section 79A.04, subdivision 9b(2).

79A.04, subd. 7

The private self-insured employer loses all right, title, and interest in and any right to control all assets or obligations posted or left on deposit as security. In the event ~~that a private self-insurer is the subject of a voluntary or involuntary petition under the United States Bankruptcy Code, title 11, or~~ a court of competent jurisdiction has declared the private self-insurer to be ~~bankrupt or~~ insolvent, or in the event of the issuance of a certificate of default by the commissioner, the commissioner shall liquidate the deposit as provided in this chapter, and transfer it to the self-insurer's security fund for application to the self-insured employer's incurred liability and other current or future obligations of the self-insurers' security fund. In the event that ~~a private self-insurer is the subject of a voluntary or involuntary petition under the United States Bankruptcy Code, title 11, or~~ a court of competent jurisdiction has declared the private self-insurer to be ~~bankrupt or~~ insolvent, or in the event of the issuance of a certificate of default by the commissioner, all right, title, and interest in and any right to control all assets or obligations which have been posted or deposited as security must be transferred to the self-insurers' security fund.

79A.04, subd. 9a Insolvency, ~~bankruptcy~~, or default; utilization of security deposit.

The commissioner of labor and industry shall notify the commissioner and the security fund if the commissioner of labor and industry has knowledge that any private self-insurer has failed to pay workers' compensation benefits as required by chapter 176. The security deposit shall be used to administer and pay the private self-insurers' workers' compensation or assessment obligations or any other current or future obligations of the self-insurers' security fund if any of the following occurs:

(1) the private self-insurer has failed to pay workers' compensation as required by chapter 176 and either:

~~(i) the commissioner determines that a private self-insurer is the subject of a voluntary or involuntary petition under the United States Bankruptcy Code, title 11; or~~

~~(ii) the commissioner determines that a court of competent jurisdiction has declared the private self-insurer to be bankrupt or insolvent; or~~

(2) the commissioner issues a certificate of default against a private self-insurer for failure to pay workers' compensation as required by chapter 176; or

(3) the commissioner issues a certificate of default against a private self-insurer for failure to pay an assessment to the self-insurer's security fund when due.

79A.04, subd. 9b ~~Insolvency, Bankruptcy, or default~~; utilization of security deposit.

(1) A private self-insurer must notify the commissioner prior to, or immediately upon, the filing of a voluntary or involuntary petition under the United States Bankruptcy Code, title 11 and when a court of competent jurisdiction has declared the private self-insurer to be bankrupt.

(2) If a private self-insurer is (a) the subject of a voluntary or involuntary petition under the United States Bankruptcy Code, title 11, or (b) a court of competent jurisdiction has declared the private self-insurer to be bankrupt and the private self-insurer has failed to pay workers' compensation as required by chapter 176, the commissioner must call its security and proceed in accordance with this section.

(3) If, upon notice that a private self-insurer is the subject of a voluntary or involuntary petition under the United States Bankruptcy Code, title 11, or a court of competent jurisdiction has declared the private self-insurer to be bankrupt but the private self-insurer has not failed to timely pay workers' compensation benefits as required by chapter 176, the commissioner may call its security and proceed in accordance with this section if the commissioner determines that the private self-insurer's payment of workers' compensation benefits would be delayed in any way as a result of the bankruptcy petition or declaration or that the private self-insurer would otherwise be unable to fulfill its obligations under chapter 176 or chapter 79A.

(4) In making the determination provided for in paragraph 3 to call a private self-insurer's security and proceed in accordance with this section, the commissioner must consult with the commissioner of labor and industry to determine if the commissioner of labor and industry has knowledge that the private self-insurer has failed to pay workers' compensation benefits as required by chapter 176. The commissioner shall also consider the following:

(a) the self-insurer's most recent actuarial statement, including, but not limited to, estimated future liability and posted security;

(b) the self-insurer's claims history, and claims projections;

(c) the circumstances surrounding the self-insurer's petition to file bankruptcy; and

(d) any other circumstances the commissioner deems relevant.

In making the determination provided for in paragraph 3, the commissioner must also meet and confer with the private self-insurer and the security fund. The initial meet and confer must occur within 30 days of the filing of the petition for Chapter 11 bankruptcy. Failure to participate in the meet and confer process by the self-insurer may result in a default determination to immediately transfer the posted security and claims obligations to the Security Fund. During the meet and confer, the commissioner may ask the self-insurer to provide additional information. Additionally, the security fund may inspect the private self-insurer's most recent actuarial study on file with the commissioner as well as its current security deposit amount required by the commissioner. Data disclosed during the meet and confer will remain confidential. Nothing in this section shall limit the fund's own authority to seek information directly from its members.

79A.04, subd. 10

In the event of ~~bankruptcy~~, insolvency, or certificate of default, the commissioner shall immediately notify by certified mail the commissioner of management and budget, the surety, the issuer of an irrevocable letter of credit, and any custodian of the security required in this chapter. At the time of notification, the commissioner shall also call the security and transfer and assign it to the self-insurers' security fund. The commissioner shall also immediately notify by certified mail the self-insurers' security fund, and order the security fund to assume the insolvent self-insurers' obligations for which it is liable under chapter 176. The security fund shall commence payment of these obligations within 14 days of receipt of this notification and order. Payments shall be made to claimants whose entitlement to benefits can be ascertained by the security fund, with or without proceedings before the Department of Labor and Industry, the Office of Administrative Hearings, the Workers' Compensation Court of Appeals, or the Minnesota Supreme Court. Upon the assumption of obligations by the security fund pursuant to the commissioner's notification and order, the security fund has the right to immediate possession of any posted or deposited security and the custodian, surety, or issuer of any irrevocable letter of credit or the commissioner, if in possession of it, shall turn over the security, proceeds of the surety bond, or letter of credit to the security fund together with the interest that has accrued since the date of the self-insured employer's insolvency. The security fund has the right to the immediate possession of all relevant workers' compensation claim files and data of the self-insurer, and the possessor of the files and data must turn the files and data, or complete copies of them, over to the security fund within five days of the notification provided under this subdivision. If the possessor of the files and data fails to timely turn over the files and data to the security fund, it is liable to the security fund for a penalty of \$500 per day for each day after the five-day period has expired. The security fund is entitled to recover its reasonable attorney fees and costs in any action brought to obtain possession of the workers' compensation claim files and data of the self-insurer, and for any action to recover the penalties provided by this subdivision. The self-insurers' security fund may administer payment of benefits or it may retain a third-party administrator to do so.

79A.04, subd. 16

If, following a private self-insurer's ~~bankruptcy~~, insolvency, or certificate of default, the commissioner calls its security and proceeds in accordance with this section, the commissioner shall revoke the certificate to self-insure of the private self-insurer as soon as practicable but no later than 30 days after its security has been called. No insolvent self-insurer, as defined in section 79A.01, subdivision 4, shall be eligible to receive another grant of authority to self-insure unless either: (1) the insolvent self-insurer's

posted security was sufficient to pay all direct and indirect administrative and professional expenses of the security fund related to the insolvent self-insurer, and all losses, including estimated future liability, allocated loss expense, and unallocated loss expense of the insolvent self-insurer; or (2) the insolvent self-insurer pays the security fund an amount equal to all such losses and expenses the security fund has paid or will be required to pay related to this insolvent self-insurer.

79A.08

It is the intent of the legislature in enacting sections 79A.08 to 79A.10 to provide for the continuation of workers' compensation benefits delayed due to the failure of a private self-insured employer to meet its compensation obligations, whenever the commissioner of commerce issues a certificate of default or there is a declaration of ~~bankruptcy or~~ insolvency by a court of competent jurisdiction. With respect to the continued liability of a surety for claims that arise under a bond after termination of that bond and to a surety's liability for the cost of administration of claims, it is the intent of the legislature to provide that that liability ceases upon lawful termination of that bond. This applies to all surety bonds which are purchased by the self-insured employer after July 1, 1988. The legislature finds and declares that the establishment of the self-insurers' security fund is a necessary component of a complete system of workers' compensation, required by chapter 176, to have adequate provisions for the comfort, health, safety, and general welfare of any and all workers and their dependents to the extent of relieving the consequences of any industrial injury or death, and full provision for securing the payment of compensation.

79A.13

The trustees shall annually contract for an independent certified audit of the financial activities of the fund. An annual report on the financial status of the fund as of June 30 shall be submitted to the commissioner and to each member.

The security fund shall be established on July 1, 1988, or 90 days after July 1, 1988, whichever occurs later. All applications for private self-insurers which are made after July 1, 1988, prior to the establishment of the security fund, shall comply with all requirements of this chapter. Applications for private self-insurers which are made after January 1, 1988, but prior to July 1, 1988, shall, prior to the establishment of the security fund, comply with the requirements of this chapter. The security fund shall be liable for payment of benefits only for members where there has been a declaration of ~~bankruptcy or~~ insolvency by a court of competent jurisdiction after the date on which the security fund is established, or where the commissioner has issued a certificate of default which has occurred after the date on which the security fund is established.

79A.24, subd. 4

(a) All surety bonds, irrevocable letters of credit, and documents showing issuance of any irrevocable letter of credit shall be deposited in accordance with the provisions of section 79A.071.

(b) Upon the commissioner sending a request to renew, request to post, or request to increase a security deposit, a perfected security interest is created in the commercial self-insurance group's and member's assets in favor of the commissioner to the extent of any then unsecured portion of the commercial self-insurance group's incurred liabilities. The perfected security interest is transferred to

any cash or securities thereafter posted by the commercial self-insurance group with the commissioner of management and budget and is released only upon either of the following:

(1) the acceptance by the commissioner of a surety bond or irrevocable letter of credit for the full amount of the incurred liabilities for the payment of compensation; or

(2) the return of cash or securities by the commissioner. The commercial self-insurance group loses all right, title, and interest in and any right to control all assets or obligations posted or left on deposit as security. In the event of a declaration of ~~bankruptcy or~~ insolvency by a court of competent jurisdiction, or in the event of the issuance of a certificate of default by the commissioner, the commissioner shall liquidate the deposit as provided in this chapter, and transfer it to the commercial self-insurance group security fund for application to the commercial self-insurance group's incurred liability.

(c) No securities in physical form on deposit with the commissioner of management and budget or the commissioner or custodial accounts assigned to the state shall be released or exchanged without an order from the commissioner. No security can be exchanged more than once every 90 days.

(d) Any securities deposited with the commissioner of management and budget or with a custodial account assigned to the commissioner of management and budget or letters of credit or surety bonds held by the commissioner may be exchanged or replaced by the depositor with any other acceptable securities or letters of credit or surety bond of like amount so long as the market value of the securities or amount of the surety bonds or letter of credit equals or exceeds the amount of the deposit required. If securities are replaced by surety bond, the commercial self-insurance group must maintain securities on deposit in an amount sufficient to meet all outstanding workers' compensation liability arising during the period covered by the deposit of the replaced securities.

79A.25, subd. 1 Notice of insolvency, ~~bankruptcy~~, or default.

The commissioner of labor and industry shall notify the commissioner and the commercial self-insurance group security fund if the commissioner of labor and industry has knowledge that any commercial self-insurance group has failed to pay workers' compensation benefits as required by chapter 176. If the commissioner determines that a court of competent jurisdiction has declared the commercial self-insurance group to be ~~bankrupt or~~ insolvent and the commercial self-insurance group has failed to pay workers' compensation as required by chapter 176 or if the commissioner issues a certificate of default against a commercial self-insurance group for failure to pay workers' compensation as required by chapter 176, then the security deposit posted by the commercial self-insurance group shall be utilized to administer and pay the commercial self-insurance group's workers' compensation obligation.

79A.25, subd. 2a Mandatory ~~R~~evocation of certificate to self-insure.

(a) The commissioner shall revoke the commercial self-insurance group's certificate to self-insure once notified of the commercial self-insurance group's ~~bankruptcy~~, insolvency, or upon issuance of a certificate of default. The revocation shall be completed as soon as practicable, but no later than 30 days after the commercial self-insurance group's security has been called.

(b) The commissioner shall also revoke a commercial self-insurance group's authority to self-insure on the following grounds:

(1) failure to comply with any lawful order of the commissioner;

- (2) failure to comply with any provision of chapter 176;
- (3) a deterioration of the commercial self-insurance group's financial condition affecting its ability to pay obligations in chapter 176;
- (4) committing an unfair or deceptive act or practice as defined in section 72A.20; or
- (5) failure to abide by the plan of operation of the Workers' Compensation Reinsurance Association.

79A.25, subd. 2b Discretionary revocation of certificate to self-insure.

(1) A commercial self-insurance group must notify the commissioner, prior to or immediately upon a court of competent jurisdiction declaring it to be ~~bankrupt or~~ insolvent. If a commercial self-insurance group has been declared ~~bankrupt or~~ insolvent by a court of competent jurisdiction and the commercial self-insurance group has failed to pay workers' compensation as required by chapter 176, the commissioner must call its security and proceed in accordance with this section.

(2) If a commercial self-insurance group has notified the commissioner that a court of competent jurisdiction has declared it bankrupt but the commercial self-insurance group has not failed to pay workers' compensation benefits as required by chapter 176, the commissioner may call its security and proceed in accordance with this section if the commissioner determines that the commercial self-insurance group's payment of workers' compensation benefits would be delayed in any way as a result of the bankruptcy petition or declaration or that the commercial self-insurance group would otherwise be unable to fulfill its obligations under chapter 176 or chapter 79A.

(3) In making the determination provided for in paragraph 2 to call a commercial self-insurance group's security and proceed in accordance with this section, the commissioner must consult with the commissioner of labor and industry to determine if the commissioner of labor and industry has knowledge that the commercial self-insurance group has failed to pay workers' compensation benefits as required by chapter 176. The commissioner shall also consider the following:

- (a) the commercial self-insurance group's most recent actuarial statement, including, but not limited to, estimated future liability and posted security;
- (b) the commercial self-insurance group's claims history, and claims projections;
- (c) the circumstances surrounding the commercial self-insurance group's petition to file bankruptcy; and
- (d) any other circumstances the commissioner deems relevant.

The commissioner must also meet and confer with the commercial self-insurance group and the group security fund. The initial meet and confer must occur within 30 days of the filing of the petition for Chapter 11 bankruptcy. Failure to participate in the meet and confer process by the commercial self-insurance group will result in a default determination to immediately transfer the posted security and claims obligations to the fund. During the meet and confer, the commission may ask the commercial self-insurance group to provide additional information and the commercial self-insurance group security fund may inspect the commercial self-insurance group's most recent actuarial study on file with the commissioner as well as its current security deposit amount required by the commissioner. Data

disclosed during the meet and confer will remain confidential. Nothing in this section shall limit the fund's own authority to seek information directly from its members.

79A.25, subd. 3

In the event of ~~bankruptcy~~, insolvency, or certificate of default, the commissioner shall immediately notify by certified mail the commissioner of management and budget, the surety, the issuer of an irrevocable letter of credit, and any custodian of the security. At the time of notification, the commissioner shall also call the security and transfer and assign it to the commercial self-insurance group security fund. The commissioner shall also notify by certified mail the commercial self-insurance group's security fund and order the commercial security fund to assume the insolvent commercial self-insurance group's obligations for which it is liable under chapter 176.