My Accountant Says I Should Have Registered With WSIB TEN Years Ago! Now What Do I Do?

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A surprisingly common event in the practice of workers' compensation law is the frantic, sometimes even panicked email or phone call from a client, potential client, or the lawyer or accountant of such a business. The pattern is generally the same.

"We have been in business for X years. Nobody ever told us before that we had to register for workers' compensation, but now so and so is telling me that we have a big problem because we didn't. If this is compulsory, why doesn't somebody tell you that at the beginning?"

And therein lies the heart of the question. While workers' compensation coverage or, more technically, registration with the Workplace Safety and Insurance Board, is required for **most** Ontario employers, it is certainly not required for all of them, and the means of knowing which category a business falls into are not well known. As a result, as new businesses start up, it is all too frequent an occurrence that the question of registration with the WSIB never arises.

In order to understand registration obligations, it is necessary first to take a small step back and look at the overall structure of WSIB coverage in Ontario. Since the inception of the worker's compensation system 100 years ago, Ontario employers have essentially fallen into one of three categories.

The first and by far the largest of these categories is Schedule 1. These employers include most manufacturing, sales, distribution, service and construction activities, but by no means all of them. All Schedule 1 employers in Ontario are required to register with the WSIB effective on the day that they first employ workers, and to pay premiums based on a percentage of payroll, roughly ranging from 0.2% to 18.3%, based on anticipated injury rates in a given business activity.

Schedule 2 employers, on the other hand, do not pay premiums but are instead directly responsible to reimburse to the WSIB the cost of all claims paid, plus an administrative surcharge in excess of 22%. Employers in this category tend to be larger and more established on the whole, and include municipalities and school boards, railways, shipping companies and airlines. Registration for them is not much of an issue; if someone gets hurt, the WSIB will make sure they get its bill.

The balance of employers in Ontario categorized into neither Schedule is not required to provide Worker's Compensation coverage to their employees. There is no particular pattern by which to identify them; they include such diverse operations as golf courses, photography studios, funeral homes, dental offices and summer camps.

In order to determine the categorization of the business with any level of certainty, the Schedules, which are published as part of a regulation under the *Workplace Safety and Insurance Act*, tend not to be sufficiently specific, and recourse really must be had to the Employer Classification Manual published by the WSIB, and available on its website (www.wsib.on.ca). This manual is rather large, with a single page description of each business activity that the WSIB can conceive of, and a simple line indicating whether it is compulsorily covered under either Schedule, or the phrase, “By application (non-covered),” meaning that registration and coverage are not required, but available as an option.

Certainly, some of the inquiries that begin as pronouncements of doom from an accountant, lawyer or other advisor have rapid and happy endings when a review of that manual produces a clear categorization of the business as one of optional coverage.

But what about the many inquiries that come from employers that are, in fact, classified under Schedule 1? They are potentially liable for retroactive premium assessments plus penalties plus interest against delinquent employers going back five, and in some cases more years, and the WSIB will bring the full weight of its enforcement powers to bear upon such an employer that it discovers on its own. Prosecutions and fines are a distinct possibility. To that end, the Board draws information from its own investigatory activities, information exchanges with the Canada Revenue Agency and other government authorities, anonymous tips, and reports of worker injuries by individuals whose employers are unknown to the Board.

But the reality is that it remains quite possible for an employer to fly under the radar, deliberately or otherwise, for an extended period of time. WSIB has recently revised its policy for dealing with such employers who self-identify and register with the Board PRIOR to being detected through any of the Board's activities described above.

Where an employer steps forward and voluntarily discloses non-compliance, the WSIB will apply its Voluntary Registration policy and waive its rights to levy penalties and interest, or to lay charges. While the employer will be assessed retroactively for premiums, that assessment will be limited to the 12 months prior to the date that it in fact registers.

The lesson here is twofold. First, when the possibility is initially raised that there might be noncompliance, the initial step is always to determine whether registration is mandatory in the first place. If it was not, the problem vanishes. If, however, the employer was required to register, it should move quickly to place itself within the Voluntary Registration policy and the amnesty that it provides, rather than risking detection at the WSIB's initiative and the expensive liabilities that may follow from that.

Contact us if you require assistance navigating the processes of the WSIB.