

# MAINE STATE LEGISLATURE

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# 123rd MAINE LEGISLATURE

## FIRST REGULAR SESSION-2007

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Legislative Document

No. 991

H.P. 751

House of Representatives, March 2, 2007

### An Act To Clarify the Security Requirements for Self-insurers

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Submitted by the Department of Professional and Financial Regulation pursuant to Joint Rule 204.

Reference to the Committee on Insurance and Financial Services suggested and ordered printed.

*Millicent M. MacFarland*  
MILLICENT M. MacFARLAND  
Clerk

Presented by Representative PRIEST of Brunswick.  
Cosponsored by Senator SNOWE-MELLO of Androscoggin and  
Senator: PERRY of Penobscot.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 39-A MRSA §403, sub-§3**, as amended by PL 2005, c. 98, §§1 and 2, is  
3 further amended to read:

4 **3. Proof of solvency and financial ability to pay; trust.** The employer may  
5 comply with this section by furnishing satisfactory proof to the Superintendent of  
6 Insurance of solvency and financial ability to pay the compensation and benefits, and  
7 depositing cash, satisfactory securities, irrevocable standby letters of credit issued by a  
8 qualified financial institution or a surety bond with the board, in such sum as the  
9 superintendent may determine pursuant to subsection 8, the bond to run to the Treasurer  
10 of State and to be conditional upon the faithful performance of this Act relating to the  
11 payment of compensation and benefits to any injured employee. In case of cash or  
12 securities being deposited, or drawn on a surety bond or letter of credit, the cash or  
13 securities must be placed in an account at interest by the Treasurer of State, and the  
14 accumulation of interest on the cash or securities so deposited must be credited to the  
15 account and may not be paid to the employer to the extent that the interest is required to  
16 secure the employer's self-insurance obligations, including the amount needed to support  
17 any present value discounting in the determination of the amount of the deposit. Any  
18 security deposit must be held by the Treasurer of State in trust for the benefit of the self-  
19 insurer's employees for the purposes of making payments under this Act. If the  
20 superintendent determines that the self-insurer has experienced a deterioration in financial  
21 condition that adversely affects the self-insurer's ability to pay obligations under this Act,  
22 the security amount may be in excess of the minimum amount required by this Title.

23 A self-insurer may, with the approval of the Superintendent of Insurance, use the  
24 following types of security to satisfy the self-insurer's responsibility to post security  
25 required by the superintendent: a surety bond; an irrevocable standby letter of credit; cash  
26 deposits and acceptable securities; and an actuarially determined fully funded trust. For  
27 purposes of this section, "tangible net worth" means equity less assets that have no  
28 physical existence and depend on expected future benefits for their ascribed value.  
29 Unless disapproved by the superintendent pursuant to paragraph C, subparagraphs (5) and  
30 (6), a group self-insurer that maintains a trust actuarially funded to the confidence level  
31 required by the superintendent may use an irrevocable standby letter of credit as follows:  
32 only in an amount not greater than the difference between the funding to the required  
33 confidence level and funding to the confidence level reduced by 10 percentage points;  
34 only as long as the trust assets are not used as collateral for the letter of credit; and only  
35 as long as the value of trust assets, excluding the value of the letter of credit, ~~are~~ is at least  
36 equal to the present value, evaluated to the 65% confidence level, of ultimate incurred  
37 claims, claims settlement costs and, if determined necessary by the superintendent,  
38 administrative costs.

39 A. An individual self-insurer providing an irrevocable standby letter of credit as  
40 security shall file with the Superintendent of Insurance a letter of credit, on a form  
41 approved by the superintendent, copies of any agreements or other documents  
42 establishing the terms and conditions of the employer's reimbursement obligations to  
43 the financial institution issuing the letter of credit, together with copies of any  
44 required security agreements, mortgages or other agreements or documents granting

1 security for the employer's reimbursement obligations and any other agreements that  
2 contain conditions, restrictions or limitations of any kind upon the employer, the  
3 superintendent or the Treasurer of State. The form of letter of credit approved by the  
4 superintendent must include, but is not limited to, all terms specifically required by  
5 this subsection and all terms reasonably required to secure the payment of  
6 compensation and benefits to claimants as required under this Act. The  
7 superintendent, upon receipt of the original irrevocable standby letter of credit, shall  
8 promptly forward it to the Treasurer of State.

9 In order to issue an irrevocable standby letter of credit as security under this  
10 paragraph, a financial institution or its parent company must either:

11 (1) Maintain a long-term unsecured debt rating of at least A by either Moody's  
12 Investors Service, Inc. or Standard and Poor's Corporation;

13 (2) Maintain a short-term commercial paper rating within the 3 highest  
14 categories established by Moody's Investors Service, Inc. or Standard and Poor's  
15 Corporation; or

16 (3) Be certified in writing by the Superintendent of Financial Institutions to be  
17 well capitalized and well managed in accordance with the criteria set forth in  
18 Title 9-B, section 446-A, subsections 1 and 2. The Superintendent of Insurance  
19 shall keep the certification confidential, except from the subject financial  
20 institution, in accordance with Title 9-B, section 226.

21 The Superintendent of Insurance may adopt rules to establish additional  
22 qualifications for financial institutions issuing irrevocable standby letters of credit.  
23 Rules adopted pursuant to this paragraph are routine technical rules pursuant to Title  
24 5, chapter 375, subchapter ~~H-A~~ 2-A.

25 The irrevocable standby letter of credit must be the individual obligation of the  
26 issuing financial institution, may not be subject to any agreement, condition,  
27 qualification or defense between the financial institution and the employer and may  
28 not in any way be contingent on reimbursement by the employer. If the rating of an  
29 issuing financial institution that has issued an irrevocable standby letter of credit  
30 pursuant to this section falls below the required standard, the employer shall obtain a  
31 new irrevocable standby letter of credit from a qualified financial institution or shall  
32 provide other eligible security of equal value approved by the Superintendent of  
33 Insurance. The irrevocable standby letter of credit is automatically extended for one  
34 year from the date of expiration unless, 90 days prior to any expiration date, the  
35 issuing financial institution notifies the Superintendent of Insurance that the financial  
36 institution elects not to renew the irrevocable standby letter of credit.

37 An irrevocable standby letter of credit that has been issued by a qualified financial  
38 institution and accepted by the Superintendent of Insurance binds the issuing  
39 financial institution to pay one or more drafts drawn by the Treasurer of State, as  
40 directed by the superintendent, as long as the draft does not exceed the total amount  
41 of the irrevocable standby letter of credit. Any draft presented by the Treasurer of  
42 State, as directed by the superintendent, must be promptly honored if accompanied by  
43 the certification of the superintendent that any obligation under this chapter has not

1       been paid when due or that a proceeding in bankruptcy has been initiated by or with  
2       respect to the employer in a court of competent jurisdiction.

3       If the Superintendent of Insurance certifies that the superintendent has been notified  
4       by the issuing financial institution that the irrevocable standby letter of credit expires  
5       by its terms in 30 days or less and that the irrevocable standby letter of credit was not  
6       replaced within 15 days after that notice to the superintendent by other eligible  
7       security of equal value approved by the superintendent, then the financial institution  
8       must remit within 15 days the full amount of the irrevocable letter of credit to the  
9       Treasurer of State without further certification.

10       Any proceeds from a draw on such an irrevocable standby letter of credit by the  
11       Treasurer of State, as directed by the Superintendent of Insurance, must be held by  
12       the Treasurer of State on behalf of workers' compensation claimants to secure  
13       payment of claims until either the superintendent authorizes the Treasurer of State to  
14       release those proceeds to the employer upon provision by the employer of  
15       replacement security adequate to meet the requirements for security set by the  
16       superintendent or the superintendent directs distribution of the proceeds in  
17       accordance with this Title.

18       To the extent not inconsistent with state law, the letter of credit is subject to and  
19       governed by the International Standby Practices 1998 or successor practices  
20       governing standby letters of credit duly adopted by the International Chamber of  
21       Commerce. If any legal proceedings are initiated with respect to payment of the  
22       letter of credit, those proceedings are subject to the State's courts and law.

23       B. The Superintendent of Insurance shall prescribe the form of the surety bond that  
24       may be used to satisfy, in whole or in part, the self-insurer's responsibility under this  
25       section to post security. The bond must be continuous, be subject to nonrenewal only  
26       upon not less than 60 ~~days~~ days' notice to the superintendent, cover payment of all  
27       present and future liabilities incurred under this Act while the bond is in force and  
28       cover payments that become due while the bond is in force that are attributable to  
29       injuries incurred in prior periods and otherwise unsecured by cash, irrevocable  
30       standby letters of credit or acceptable securities. A bond must be held until all  
31       payments secured by the bond have been made or until the bond has been replaced by  
32       other eligible security approved by the superintendent that covers all outstanding  
33       liabilities. Payments under the bond are due within 30 days after notice has been  
34       given to the surety by the board that the principal has failed to make a payment  
35       required under the terms of an award, agreement or governing law. A trust  
36       established to satisfy the requirements of this section may not be funded by a surety  
37       bond.

38       C. A self-insurer may establish an actuarially determined fully funded trust, funded  
39       at a level sufficient to discharge those obligations incurred by the employer pursuant  
40       to this Act as they become due and payable from time to time, as long as the  
41       Superintendent of Insurance requires that the value of trust assets be at least equal to  
42       the present value of ultimate expected incurred claims and claims settlement costs,  
43       plus required safety margins and, if determined necessary by the superintendent,  
44       administrative costs for the operation of the plan of self-insurance. For the purpose  
45       of determining whether an actuarially determined fully funded trust has a surplus of

1 funds in excess of that required by this subsection, the superintendent shall consider,  
2 based upon the group's audit for all completed plan years, only the following assets  
3 held outside the trust account: cash up to \$10,000; accounts receivable, limited to  
4 amounts collected and deposited in the trust account by the date of the surplus  
5 distribution; accrued interest on trust account assets that will be collected and  
6 deposited in the trust account within 6 months from the date of the surplus  
7 determination; tangible assets that will be converted to cash and deposited in the trust  
8 account prior to the distribution date of any surplus; and a letter of credit to be used to  
9 partially fund the trust to the extent allowed under this section and rules adopted by  
10 the superintendent, as supported in the actuarial review. The superintendent shall  
11 consider cash held outside the trust account in excess of \$10,000 if the self-insurer  
12 provides, to the superintendent's satisfaction, documentation regarding why the  
13 money is being held outside the trust account. An actuarially determined fully  
14 funded trust must be funded as follows, as determined by the superintendent.

15 (1) For individual and group self-insurers, the amount of security must be  
16 determined based upon an actuarial review. The actuarial review must take into  
17 consideration the use by a group self-insurer of any irrevocable standby letter of  
18 credit. Except as provided in subparagraph (3), initial funding for each plan year  
19 must be maintained at the 90% or higher confidence level. Funding after the  
20 completion of the initial plan year may be established no lower than the 75%  
21 confidence level if the following has occurred:

22 (a) A year considered for reduction is completed;

23 (b) The supporting actuarial review includes an evaluation of the  
24 completed year experience with claims evaluated not less than 6  
25 months from the end of the plan year, or in the case of a group self-  
26 insurer in existence for at least 36 months, not less than 4 months from  
27 the end of the plan year; and

28 (c) For individual self-insurers, prior approval from the superintendent  
29 is obtained.

30 For the purposes of determining the confidence level, all completed years  
31 at the same confidence level may be aggregated. For individual self-  
32 insurers, funds may not be released from the trust or transferred between  
33 years except as approved by the superintendent. The governing body of a  
34 group self-insurer may at any time declare a surplus of funds above the  
35 required confidence level, but may only release funds after the completion  
36 of any plan year. The superintendent may request information regarding  
37 any such declaration. Any distribution of surplus must be based upon an  
38 actuarial review of all outstanding obligations for all completed plan years,  
39 an audited financial statement of the group for all completed plan years  
40 and a surplus distribution worksheet for all completed plan years on a form  
41 approved by the superintendent. The group self-insurer must provide the  
42 required information within 10 days after the distribution. Any surplus  
43 declared or distributed pursuant to this paragraph is subject to adjustment

1 after review by the superintendent within 60 days of the receipt of the  
2 required information. Any deficit below the required confidence level, as  
3 determined by the superintendent, that results from a distribution under  
4 this paragraph must be funded within 45 days from the date of the notice  
5 by the superintendent.

6 (2) A group self-insurer may elect to fund at a higher confidence level through  
7 the use of cash, marketable securities or reinsurance. If a member of a group  
8 self-insurer terminates membership in the group for any reason, that member  
9 shall fund the member's proportionate share of the liabilities and obligations of  
10 the trust to the 95% confidence level. If for any reason the departing member  
11 fails to fund the member's proportionate share of the trust's exposure to the 95%  
12 level of confidence, the remaining members of the group shall make the  
13 additional contribution no later than the anniversary date of the program as  
14 required to fund the departing member's exposure in accordance with this  
15 provision.

16 (3) Subject to prior approval by the superintendent in accordance with  
17 subparagraph (5), a self-insurer that has successfully maintained an actuarially  
18 determined fully funded trust for a period of 5 or more consecutive years may  
19 fund all years, including the prospective fund year, at the 75% or higher  
20 confidence level in the aggregate and a group self-insurer that has successfully  
21 maintained an actuarially determined fully funded trust for a period of 10 or more  
22 consecutive years may fund all years, including the prospective fund year, at the  
23 65% or higher confidence level in the aggregate.

24 (4) Trust assets must consist of cash or marketable securities of a type and risk  
25 character as specified in subsection 9. The trustee shall submit a report to the  
26 superintendent not less frequently than quarterly that lists the assets comprising  
27 the corpus of the trust, including a statement of their market value and the  
28 investment activity during the period covered by the report. The trust must be  
29 established and maintained subject to the condition that trust assets may not be  
30 transferred or revert in any manner to the employer except to the extent that the  
31 superintendent finds that the value of the trust assets exceeds the present value of  
32 incurred claims and claims settlement costs with an actuarially indicated margin  
33 for future loss development. In all other respects, the trust instrument, including  
34 terms for certification, funding, designation of trustee and payout, must be as  
35 approved by the superintendent, except that the value of the trust account must be  
36 actuarially calculated at least annually by a casualty actuary who is a member of  
37 the American Academy of Actuaries and adjusted to the required level of  
38 funding.

39 (5) In determining whether a self-insurer that maintains an actuarially  
40 determined fully funded trust qualifies for a reduction in the required confidence  
41 level pursuant to subparagraph (1) or (3) or is subject to an enhanced confidence  
42 level pursuant to subparagraph (6), the superintendent shall consider the financial  
43 condition of the self-insurer in relation to the potential workers' compensation  
44 liabilities. The factors the superintendent may consider include the self-insurer's  
45 liquidity, leverage, tangible net worth, size and net income. For group self-

1 insurers, the superintendent's review must be based on the aggregate financial  
2 condition of the group members. At the request of the superintendent, a group  
3 self-insurer shall report relevant financial information, on a form prescribed by  
4 the superintendent, at such intervals as the superintendent directs. The  
5 superintendent may establish additional review criteria or procedures by rule.  
6 Rules adopted pursuant to this subparagraph are routine technical rules as defined  
7 in Title 5, chapter 375, subchapter 2-A.

8 (6) If the superintendent determines, based on an evaluation of a self-insurer's  
9 financial condition pursuant to subparagraph (5), that the confidence level at  
10 which the self-insurer has been authorized to fund its trust is not sufficient to  
11 provide adequate security for the self-insurer's reasonably anticipated potential  
12 workers' compensation liabilities, the superintendent shall make a determination  
13 of the appropriate confidence level and order the self-insurer to take prompt  
14 action to increase funding to that level within 60 days.

15 D. Notwithstanding any provision of this chapter, authorization to self-insure may  
16 not be conditioned on a bond or security deposit that is in excess of \$50,000 for the  
17 State, the University of Maine System or any county, city or town with a state-  
18 assessed valuation equal to or in excess of \$300,000,000 and either a bond rating  
19 equal to or in excess of the 2nd highest standard as set by a national bond rating  
20 agency or a net worth equal to or in excess of \$35,000,000. If a county, city or town  
21 that is a self-insurer relies upon a bond rating to qualify under this paragraph, it shall  
22 value or cause to be valued its unpaid workers' compensation claims pursuant to  
23 sound accepted actuarial principles. This value must be incorporated in the annual  
24 audit of the county, city or town, together with disclosure of funds appropriated to  
25 discharge incurred claims expenses.

26 E. In consideration of a self-insuring entity's application for authorization to operate  
27 a plan of self-insurance, the Superintendent of Insurance may require or permit an  
28 applicant to employ valid risk transfer by the utilization of primary reinsurance,  
29 subject to the provisions of subsection 8. Standards respecting the application of  
30 reinsurance must be contained in a rule adopted by the superintendent pursuant to the  
31 Maine Administrative Procedure Act. Reinsurance must be defined as insurance  
32 covering workers' compensation exposures in excess of risk retained by a self-insurer.

33 F. An employer may be eligible for approved self-insurance status pursuant to this  
34 Act if the employer submits a written guarantee of the obligations incurred pursuant  
35 to this Act, the guarantee to be issued by a United States or Canadian corporation that  
36 is a member of an affiliated group of which the employer is a member, and which  
37 corporation is solvent and demonstrates an ability to pay the compensation and  
38 benefits, and the guarantee is in a form acceptable to the Superintendent of Insurance.  
39 The guarantor shall provide audited annual financial statements and such other  
40 information as the superintendent may require, including quarterly financial  
41 statements, and the employer shall provide a cash deposit, satisfactory securities,  
42 irrevocable standby letters of credit issued by a qualified financial institution or a  
43 surety bond as otherwise required by this Act in an amount not less than \$100,000.  
44 The guarantor is deemed to have submitted to the jurisdiction of the board and the  
45 courts of this State for purposes of enforcing the guarantee. The guarantor, in all  
46 respects, is bound by and subject to the orders, findings, decisions or awards rendered



1 against the employer for payment of compensation and any penalties or forfeitures  
2 provided under this Act. The superintendent, following hearing, may revoke the self-  
3 insured status of the employer if at any time the assets of the guarantor become  
4 impaired or encumbered or are otherwise found to be inadequate to support the  
5 guarantee.

6 G. A subsidiary employer may be eligible for approved self-insurance status  
7 pursuant to this Act if: the subsidiary employer files an application jointly with a  
8 qualified parent corporation that has direct ownership of a majority voting interest of  
9 the subsidiary employer; the parent corporation and subsidiary employer submit an  
10 irrevocable contract of assignment, on a form approved by the Superintendent of  
11 Insurance, of the subsidiary employer's obligations incurred pursuant to this Act; the  
12 parent corporation is solvent and demonstrates an ability to pay the compensation and  
13 benefits of the subsidiary employer; and the subsidiary employer meets all other  
14 requirements for application and qualification as a self-insurer under this chapter and  
15 under any applicable rules adopted by the superintendent. If the parent corporation is  
16 not a United States corporation, the superintendent may, in the superintendent's sole  
17 discretion, establish the conditions of any approval of the foreign parent corporation  
18 or deny the application of the foreign parent corporation. As part of its application  
19 for approval, a foreign parent corporation must provide the following information to  
20 the superintendent: evidence that its country of domicile has substantially similar  
21 laws with respect to submission to the jurisdiction of the board and the courts of this  
22 State for the purposes of payment of workers' compensation claims of the subsidiary  
23 employer; audited financial statements, as otherwise required by this Act, prepared in  
24 the English language by a certified public accountant licensed in a state in the United  
25 States in accordance with generally accepted auditing standards as prescribed by the  
26 American Institute of Certified Public Accountants; and security, as otherwise  
27 required by the Act, in United States currency. The irrevocable contract of  
28 assignment and application must be signed by a duly authorized officer of each  
29 corporation and the application must include a board of directors' resolution from  
30 each entity as evidence of each officer's authority to enter into the contract. The  
31 superintendent may determine the subsidiary employer's eligibility for self-insurance  
32 authority and the amount of required security based upon the parent corporation's  
33 consolidated financial statement, as long as the employer complies with paragraph H.  
34 A subsidiary employer currently authorized to self-insure need not pay the  
35 application fee required of a new applicant in order to file an application to qualify  
36 under this subsection, but the subsidiary employer and parent corporation must  
37 provide all information required under this subsection as if they were a new  
38 applicant. Once the subsidiary employer becomes authorized to self-insure under this  
39 section, the parent corporation assumes liability for all prior workers' compensation  
40 liabilities incurred by the subsidiary employer during the period of self-insurance  
41 prior to the date of authorization under this subsection, unless the subsidiary  
42 employer files an alternative plan approved by the superintendent. The parent  
43 corporation and the subsidiary employer must both be named on the certificate of  
44 authorization for self-insurance authority. Upon issuance of a certificate of  
45 authorization pursuant to this subsection, the following applies.

46 (1) The parent corporation is deemed to have submitted to the jurisdiction of the  
47 board and the courts of the State for the purposes of payment of workers'

1 compensation claims of the subsidiary employer and is deemed to have submitted  
2 to the jurisdiction of the superintendent for purposes of implementation of this  
3 Act. The parent corporation, in all respects, is bound by and subject to all orders,  
4 findings, decisions or awards rendered against the subsidiary employer for  
5 payment of compensation and any penalties or forfeitures provided under this  
6 Act.

7 (2) A subsidiary employer authorized under this subsection and the parent  
8 corporation are considered one employer for the purposes of membership in the  
9 Maine Self-Insurance Guarantee Association. In the event of termination,  
10 transfer, insolvency, dissolution or bankruptcy of a subsidiary employer  
11 qualifying under this subsection, the parent corporation assumes all assessment  
12 obligations of the subsidiary employer for its period of self-insurance and is not  
13 considered a new member of the association.

14 (3) If the subsidiary employer fails for any reason to pay compensation and  
15 benefits as required under this Act, the parent corporation stands in the place of  
16 the subsidiary employer and is deemed to be the employer, subject to all  
17 requirements and provisions of this Act. For the purposes of payment of benefits  
18 and compensation under this Act, an employee of the subsidiary employer is  
19 deemed to be concurrently employed by both corporations. Concerning  
20 notification of injury to an employee of the subsidiary employer, notice to or  
21 knowledge of the occurrence of the injury on the part of the subsidiary employer  
22 is deemed notice or knowledge on the part of the parent corporation. The  
23 transfer, insolvency, dissolution or bankruptcy of a subsidiary employer  
24 qualifying under this subsection does not relieve the parent corporation from  
25 payment of compensation for injuries or death sustained by an employee during  
26 the time the subsidiary employer was approved for self-insurance authority under  
27 this subsection and the parent corporation continues to be deemed an employer  
28 until such time as all outstanding workers' compensation claims have been  
29 discharged.

30 (4) The transfer, insolvency, dissolution or bankruptcy of a parent corporation  
31 causes the termination of the subsidiary employer's authorization to self-insure  
32 and a termination plan must be filed pursuant to subsection 14.

33 H. Each individual self-insurer shall submit with its application, and not less  
34 frequently than annually thereafter, a financial statement of current origin that has  
35 been audited by a certified public accountant. When a self-insurer qualifies on the  
36 basis of a financial guarantee or on the basis of an irrevocable contract of assignment,  
37 the Superintendent of Insurance may accept an audited financial statement of the  
38 guarantor or parent corporation in satisfaction of this requirement and may also  
39 require combining statements provided in an array that is reconciled to the  
40 consolidated report.

41 **SUMMARY**

42 This bill clarifies that when a surety bond or a letter of credit held as security for a  
43 workers' compensation self-insurance program is drawn, the proceeds must be held and

1    disbursed in a manner similar to a cash deposit. This bill also specifies that all group self-  
2    insurance trusts must have cash funding to no less than the 65% confidence level.