

**JOHN CUNNINGHAM'S LLC NEWSLETTER  
FOR TAX AND LEGAL PROFESSIONALS**

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**RECENT AMENDMENT TO NEW HAMPSHIRE  
WORKERS' COMPENSATION LAW IMPOSES MAJOR  
NEW BURDEN ON NEW HAMPSHIRE  
BUILDING TRADES**

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EXECUTIVE SUMMARY. A recent amendment to New Hampshire workers' compensation law eliminates the ability of New Hampshire corporations and LLCs to exclude key officers and members from workers' compensation coverage. However, it is relatively easy for these companies to convert to New Hampshire limited liability partnerships. This conversion will protect them from the negative financial impact of the amendment.

DISCUSSION. As many readers will know, Section 281-A:18-a of the New Hampshire workers' compensation statute has provided for many years that any corporation or limited liability company is entitled to exclude up to three executive officers or members from the compulsory coverage requirements of the statute. The exclusion provided by Section 281-A:18-a has been of major importance to hundreds of New Hampshire companies engaged in businesses and trades potentially subject to heavy workers' compensation premiums. For some of these companies, the exclusion has meant the difference between business success and business failure.

However, under a major amendment that became effective on September 14, 2007, Section 281-A:18-a has been altered to provide that the above exclusion

shall not apply to any individual, regardless of status or title within a corporation or limited liability company, *who is actively engaged in on-site work on any construction site within the state of New Hampshire.*

(Emphasis added)

The precise scope of the above amendment is extremely unclear. For example:

- Is a corporate officer or LLC member who engages only in *supervisory* work "actively engaged in on-site work" within the meaning of the amendment?
- What if such an officer or member engages in only a few minutes of physical labor at a construction site during a relevant year? Does this minimal work nevertheless destroy the Section 281-A:18-a exclusion for his or her corporation or LLC?

- Does the amendment apply if the work being done at the site in question is not the construction of a new highway or office building, but rather, a minor project involving residential renovation?

Not only is the amendment to Section 281-A:18-a highly ambiguous; there is a serious question whether it is constitutional, since, among other considerations, it singles out one group of arguably hazardous trades—namely, the building trades—but spares many other trades, such as logging, that are clearly far more hazardous.

Indeed, there is even an indication that the amendment may arise from staff error and may seriously misrepresent the Legislature's intent. This is because HB 471-FN-A, the bill from which the amendment derived, provided for elimination of the above exclusion only for corporations and LLCs doing work at New Hampshire *state* construction sites. By its terms, amended Section 281-A:18-a applies to *all* New Hampshire construction sites.

In my view, there are four main alternatives available to corporations and LLCs to avoid the potentially lethal impact of the amendment. I suspect the first three of these alternatives will be unattractive to some of these entities; but for many of them, the fourth may be highly practical.

- Litigation. First, as I've indicated, the amendment is open to serious legal challenge in the New Hampshire courts. However, the costs and risks of litigation to overturn the amendment will be prohibitive for most affected companies.
- Lobbying. Second, affected companies, either directly or through trade associations, may contact members of the Legislature to seek repeal of the amendment. However, while I think that ultimately, this approach is likely to succeed, it is unlikely to achieve success for at least a year or two.
- Conversion to sole proprietorship or general partnership form. Third, while New Hampshire workers' comp rules *do* apply to corporations and LLCs, these rules do *not* apply to individuals conducting their businesses as sole proprietorships or to individuals who are partners of general partnerships. Thus, the shareholders of corporations and the members of LLCs may be tempted to consider dissolving these entities and conducting their businesses as sole proprietorships or general partnerships.

However, as most readers will know, under New Hampshire law, sole proprietorships and general partnerships do not provide their owners with liability shields. In relatively hazardous businesses such as the building trades, business owners should think long and hard before forgoing these shields; if they forgo them and their businesses thereafter become subject to serious claims, these owners may lose not only their businesses but also their homes and all of their other personal assets.

- Conversion to LLP. Fourth, corporations and LLCs adversely affected by the amendment should consider converting to LLPs. LLPs are general partnerships that file registrations as LLPs with the New Hampshire Secretary of State. This registration provides a general partnership with a liability shield that is not as comprehensive as that of LLCs and corporations, since it protects the partners

only from claims of negligence and similar claims. The LLP does *not* protect partners from, for example, from claims under contract law, bankruptcy law, environmental law or sexual harassment law. However, the main legal concern of most New Hampshire business owners engaged in the building trades is negligence. As a practical matter, the LLP liability shield is all that many of these business owners will ever need.

It is true that in order for an entity to register as an LLP, it must first qualify as a general partnership—which means that it must have at least two owners. However, I suspect that most owners of single-shareholder corporations and single-member LLCs who decide to avoid the effect of the above workers' comp amendment by converting to LLPs will have little difficulty persuading a spouse or close friend to serve as an “accommodation” second owner.

Furthermore, under New Hampshire law, it is relatively easy for corporations and LLCs to convert to or merge into general partnerships—which may then file LLP registrations with the Secretary of State.

To sum up: The September 14, 2007 amendment to RSA 281-A:18-a will impose heavy new workers' comp premium obligations, potentially amounting to thousands or even tens of thousands of dollars, on many New Hampshire corporations and LLCs engaged in the building trades. However, these companies can lawfully avoid these burdens by converting to New Hampshire LLPs.

*If you have comments on this column or wish to contact me for any other reason, please send me an e-mail at [lawjmc@comcast.net](mailto:lawjmc@comcast.net) or give me a call at (603) 228-0125. If you'd like to visit my website, the link is [www.llcformations.com](http://www.llcformations.com).*

JOHN CUNNINGHAM