

Opinion No. 79-38

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TO: Manuel A. Garcia, Jr., Superintendent of Insurance

Self-insured employers are not subject to the premium tax imposed under the Workmen's Compensation Act.

QUESTIONS

Are self-insured employers under the Workmen's Compensation Act subject to the premium tax imposed by Section 59-5-1(C) NMSA 1978?

CONCLUSIONS

No.

ANALYSIS

Section 59-5-1(C) NMSA 1978 provides in relevant part that "[e]very insurance company transacting an insurance business in New Mexico" shall be subject to premium taxes as specified therein. In order to be subjected to the premium tax, therefore, the entity in question must be considered to be an "insurance company transacting insurance business."

"Insurance usually involves a contract whereby the insurer, for an adequate consideration, undertakes to indemnify the insured against loss arising from specified perils, or to reimburse him for all or part of an obligation he has incurred." **New Mexico Life Guaranty v. Moore**, 93 N.M. 47, 596 P.2d 260, 263 (1979). "Insurance is an arrangement for transferring and distributing risk." Keeton, **Basic Text on Insurance Law** (1971 ed.) at

2. Although not all transactions having these characteristics may be considered to be insurance, insurance does not exist unless these factors are present. Keeton, **supra**.

OPINION

In qualifying to be a "self-insured", an employer retains the risks involved and elects not to transfer or distribute those risks to others. The employer will not be indemnified for losses incurred under the Workmen's Compensation Act. Indeed, it has been said:

"Merely because an employer . . . is known as a 'self-insurer', does not convert such employer into an 'insurer' as the same is defined and considered in the insurance code. . . . It is analogous to . . . automobile collision coverage or major medical coverage, wherein there is usually a stated deductible amount, the effect of which is, in simplest terms to make the insured 'self-insured' for any loss up to the amount of the deductible. No one has yet to suggest in such instances that the insured, being self-insured up to the amount of the deductible, is an 'insurer' who has merely 'reinsured' the risk above a certain limit. **Zinke-Smith, Inc. v. Florida Insurance Guaranty Association, Inc.**, 304 So. 2d 507, 509 (Fla. App. 1974), **cert. denied**, 315 So. 2d 469 (Fla. 1975)."

It is clear, then, that a self-insured employer under the Workmen's Compensation Act is not an "insurance {93} company transacting insurance business" and therefore, is not subject to the premium tax under Section 59-5-1(C) NMSA 1978.

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