

# Workers' Compensation coverage for Common Interest Developments – A Mandatory Purchase

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Truman and Gail Lawson had an unwieldy 50-foot palm tree in their front yard and they wanted it trimmed. It seemed like an easy task. The Lawsons hired Eliseo Lascano, owner of Anthony's Tree Service, to perform the work. Lascano agreed to charge the Lawsons \$450 and assigned Miguel Fernandez, one of Lascano's employees with more than four years' tree-trimming experience, to the task. Unfortunately, Fernandez fell from the tree while performing the work sustaining serious injuries.

The California Business and Professional Code requires a contractor's license to trim a tree measuring 15 feet or more. (Bus. & Prof. Code, § 7026.1, subd.(c)). Despite apparent misrepresentations to the contrary, neither Lascano, nor his company, Anthony's Tree Service, were licensed. *State Compensation Ins. Fund v. Workers' Comp. Appeals Board* (1985) 40 Cal.3d 5, 12-16 Labor Code, makes an unlicensed contractor who is performing work for which a license is required an employee of the hirer of the unlicensed contractor, for the purpose of workers' compensation. In other words, the Lawson's, by hiring an unlicensed contractor to do the work, had now automatically become the injured worker's employer.

Could the above scenario occur at a common interest development? Absolutely. Despite the constant and well-intentioned warnings of cautious community managers, Boards of CID's often hastily hire vendors to do work and never think of confirming the existence of the vendor's workers' compensation policy.

California law requires ALL employers to maintain workers' compensation insurance - *California Labor Code, Section 3600(a)*. Furthermore, nearly every set of CC&R's require a Board of a common interest development to purchase workers' compensation coverage "to the extent necessary to comply with applicable law."

Nevertheless, many Boards ignorantly argue the coverage is unnecessary thinking that an injured worker will "be covered somehow." Unfortunately nothing could be farther from the truth.

If Miguel Fernandez were injured at a common interest development, could he sue the Association and seek coverage under the Association's general liability coverage? No. All general liability policies covering community associations contain specific exclusionary language which eliminates coverage for "any obligation" of the Association "under a workers compensation (sic) law." (*ISO Language – 1992 – CG 00 01 10 93*)



If the Board is sued by the homeowners for failing to purchase coverage, surely the Board would have coverage under their Directors & Officers Liability policy.

Unfortunately, again the answer is "no." Consistent in every Directors & Officers Liability policy is a specific exclusion for any claim "arising out of, directly or indirectly resulting from or in consequence of, or in any way involving" ... bodily injury or sickness -- whether workplace related or not. In other words, if the Board is sued for a failure to maintain workers' compensation coverage, they will find themselves without any benefit of D&O protection.

A Workers' Compensation policy covering a management company can only protect that single entity. (In order for a second entity to be named on a Workers' Compensation policy, it must own at least 50% of the stock of the second entity). As a result, the Workers' Compensation policy covering a management agent cannot be modified or endorsed to extend to a homeowners association client. If the injured individual is deemed to be the employee of the Association, we couldn't rely on the management company's workers' compensation coverage to protect the community association client.

Since there is actually no "cap" to the benefits paid out on a workers compensation policy, failing to maintain coverage could potentially cost the Association hundreds of thousands of dollars. But the disruption could impact more than just the Association's pocketbook - a claim could result in preventing homeowners from selling, transferring or refinancing their home. When an employee is injured while working for an Association who has failed to maintain workers compensation required by law -- and the Association fails to pay or post a bond to pay the compensation due the employee -- the employee's compensation is paid from California's Uninsured Employers Fund. The State will then place a lien on the Association for the same amount paid as compensation to the injured worker. No units within the development could be sold or refinanced until the lien is satisfied.

Case law surrounding the issue of employment has consistently held that the most important element in establishing an employer/employee relationship is one of "control." Despite holding him/herself out as an independent contractor, if the Association controls the details of the work performed and the injured worker has no other workers' compensation coverage, it is a virtual certainty that the Workers' Compensation Appeals board (WCAB) will find that a worker is an employee of the Association and not an independent contractor.

California Labor Code Section 3202 requires that workers' compensation law be "liberally construed by the courts with the purpose of extending their benefits..." and this consistently happens with questions of employment. If an "independent contractor" does not otherwise have workers' compensation insurance, the courts, believing they have an obligation to award benefits, may liberally construe the law to find that the common interest development was the employer.

The question is, "How can the association or manager prevent itself from being considered an employer?" Hiring only licensed contractors who maintain their own workers' compensation coverage is the single best defense against being roped into an unwanted workers' compensation claim.

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**About the Author:** Tim Cline, CIRMS, is President of Timothy Cline Insurance Agency, Inc. of Santa Monica. Tim is a past President of the Greater Los Angeles Chapter of Community Associations Institute, a former Chair of the CAI National Insurance and Risk Manager Professionals Networking Committee and currently on the Board of Directors of the Los Angeles Chapter of the Insurance Brokers and Agents Association of the West.

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