2024 Delaware insurance law changes: what directors and officers need to know

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The Delaware Legislature has remained quite busy throughout 2024, making many noteworthy changes to the state's insurance laws pertaining to financial institutions, liability insurance death benefits, and health care laws that will impact businesses, employers, insurance companies, regulatory agencies, and those generally conducting business and working in Delaware.

Senate Bill 249 amends Chapter 69 of Title 18, providing the Insurance Commissioner with additional flexibility to approve the types of financial institutions that are authorized to hold required capital and surplus of captive insurance companies.

This article presents a broad overview of those changes as summarized by the State of Delaware Department of Insurance in its "Universally Applicable Bulletin No. 9," (https://bit.ly/3Z6BwKt) and how they may impact the insurance industry in Delaware. Some of the changes are pending the Governor's signature, but many have already been signed into law.

One notable change impacts captive insurers. Generally, captive insurance companies are owned by the entities that they insure and are usually formed by businesses that wish to better manage the cost and administration of their insurance coverage. Delaware has a strong and innovative captive program that allows for the issuance of conditional licenses issued the same day as the captive application is submitted to the State.

Title 69 defines "captive insurers" as insurance companies owned by another organization whose exclusive purpose is to insure risks of the parent organization and affiliated companies or, in the case of groups and associations, insurance organizations owned by the insureds whose exclusive purpose is to insure risks to member organizations and/or group members and their affiliates. Delaware was previously recognized as the world's fifth largest and the third largest U.S. captive domicile.

The benefits of captive insurance are largely self-explanatory and best understood as providing more control over costs and program administration than traditional insurance companies because captive owners are their insureds. One can easily see the inherent insured-owner incentive to keep claims and costs low.

With respect to Delaware licensed captive insurers as defined under Title 69, Senate Bill 249 amends Chapter 69 of Title 18, providing the Insurance Commissioner with additional flexibility to approve the types of financial institutions that are authorized to hold required capital and surplus of captive insurance companies.

Previously in 2022 Delaware's Governor John Carney signed Senate Bill 203 to amend Section 145(g) of the Delaware General Corporation Law allowing Delaware corporations to purchase insurance for its directors, officers, employees and agents — commonly referred to as D&O insurance — using captive insurers. The 2022 change allowed the provision of D&O coverage where the corporation would typically not have the ability under the DGCL to provide the covered director, officer, employee or agent with indemnification.

In what appears to be an ongoing direct response to the overturn of Roe v. Wade, *several changes will be made in Delaware regarding laws impacting the insurance coverage for termination of pregnancy when the Governor signs House Substitute 2 for House Bill 110.*

The current changes will allow captives to hold assets in financial institutions other than banks, and these assets can also be held outside of Delaware in many circumstances. The bill authorizes the commissioner to impose additional conditions on captive insurers related to such capital and surplus, to ensure the solvency and efficient operations of those captives. The law passed the House and Senate with only one vote against it in the Senate.

The change to Title 69 complements the 2022 change to the DGCL by formally making Delaware a more welcoming venue for captives thereby ensuring Delaware corporations continue to have captive insurers as an option when looking to provide peace of mind through D&O coverage to corporate directors and officers, which may ultimately help keep Delaware corporations competitive in attracting and retaining talented directors and officers.

Directors and Officers of hospitals, healthcare organizations, and clinics, organizations that write liability insurance for first responder agencies, and any organization that is subject to liability policies in Delaware will likely be impacted by the following changes to the Insurance Code.

Delaware's Insurance Code has been amended to increase death benefits for the beneficiaries of "Covered Persons" who are killed in the line of duty. "Covered Persons" are now eligible for $375,000 payable in annual installments, with the maximum amount paid in any single calendar year being $50,000, a notable increase from the prior maximum of $200,000. Under Chapter 66 of Title 18, "Covered Persons" includes police officers, firefighters, auxiliary and volunteer ambulance and rescue company members, National Guard members in some circumstances, agents of certain state units, paramedics and others similarly situated. Senate Bill 202 amends Chapter 66 of Title 18, impacting claims submitted on and after July 1, 2023.

Three additional noteworthy areas of the law were changed in Delaware that impact pregnancy termination laws, coverage for doula services and fertility treatment providers.

To that end, and in what appears to be an ongoing direct response to the overturn of *Roe v. Wade*, several changes will be made in Delaware regarding laws impacting the insurance coverage for termination of pregnancy when the Governor signs House Substitute 2 for House Bill 110. Abortion remains legal in Delaware and in 2022 after *Roe v. Wade* was overturned Governor Carney signed House Bill 455 improving and increasing access and protection to abortion services.

Specifically, the bill will: (1) amend Title 18 by adding a definition of "religious employer" and requiring both individual and group health care carriers to cover services related to the termination of pregnancy with identical cost-sharing prohibitions. Cost sharing typically refers to coinsurance or deductibles. Employers qualifying as "religious employers" may obtain an exclusion from the carrier (defined as any entity providing health insurance under section 505(3) of Title 18) if doing so violates their bona fide religious beliefs; and (2) amend Title 29, which will now require coverage for services related to the termination of pregnancy under the state employee health plan.

Turning to doula services, pursuant to amendments to Chapters 33 and 35 of Title 18 (by way of House Bill 362), doula services will now be covered under insurance, pursuant to § 3370G and § 3553A, respectively. Doula services is defined as "*support and assistance during labor and childbirth, prenatal and postpartum support and education, breastfeeding assistance and lactation support, parenting education, and support for a birthing person following loss of pregnancy*."

The doula must also be certified by the Delaware Certification Board, and coverage will include at least three prenatal visits, each up to 90 minutes, three postpartum visits, each up to 90 minutes, attendance through labor and birth, and additional postpartum visits as recommended by a Title 24 licensed clinician.

With respect to fertility providers, as of Sept. 24, 2024, such providers will be protected by the same legal protections afforded providers of contraceptive and abortion services, along with their patients, and regardless of where the care or residency is located (in versus out of state), including whether the care is provided via telehealth under House Bill 374. House Bill 374 also prevents insurance companies from taking any adverse action against health care professionals who provide fertility treatment and services.

Delaware is a small but active venue where legislative changes impacting entities that transact business in the venue occur regularly. As these legislative changes begin to take effect and start having real-life implications and impact on the Delaware insurance community, insurers should not be surprised to see an uptick in litigation as the new laws are navigated. Directors and Officers of these organizations should continue to monitor changes to the insurance laws that will impact or influence their decision-making.

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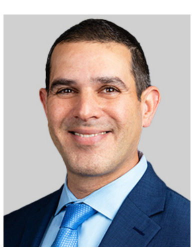
About the authors



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