

## CHAPTER 16

( HB 207 )

AN ACT relating to insurance.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔SECTION 1. A NEW SECTION OF SUBTITLE 45 OF KRS CHAPTER 304 IS CREATED TO READ AS FOLLOWS:

- (1) (a) 1. *The board of directors of a risk retention group shall have a majority of independent directors.*
  2. *No director shall qualify as independent unless the board of directors affirmatively determines that the director has no material relationship with the risk retention group. Each risk retention group shall disclose these determinations to the commissioner at least annually.*
  3. *No director shall be deemed to have a material relationship with the risk retention group solely because the director is a direct or indirect owner or member of the risk retention group or is an officer, director, or employee of an owner or member of the risk retention group.*
- (b) *If the risk retention group is a reciprocal insurer, then an attorney-in-fact shall be required to adhere to the same standards regarding independence of operation and governance as imposed on the risk retention group's board of directors pursuant to this section. Unless prohibited under state law, service providers of a reciprocal risk retention group shall contract with the risk retention group and not the attorney-in-fact.*
- (c) *No person shall qualify as independent until one (1) year after the end of a material relationship. For material relationships established pursuant to subsection (9)(a) of Section 2 of this Act, no person shall qualify as independent until one (1) year after the compensation or payment of any other item of value from the risk retention group or a consultant or service provider to the risk retention group falls below the threshold established in that subsection.*
- (2) (a) *No contract with a service provider that creates or results in a material relationship shall be entered into by a risk retention group unless the risk retention group has provided written notice to the commissioner of its intention to enter into the contract at least thirty (30) days prior to the execution of the contract and the commissioner has not disapproved the proposed contract within the notice period.*
- (b) *The term of any material service provider contract with a risk retention group shall not exceed five (5) years.*
- (c) *Any material service provider contract, or its renewal, shall require the approval of the majority of a risk retention group's independent directors. At any time, the risk retention group's board of directors has the right to terminate any service provider contract for cause after providing adequate notice as defined in the contract.*
- (d) *For the purposes of this subsection, "service provider" includes:*
  1. *Captive managers;*
  2. *Auditors;*
  3. *Accountants;*
  4. *Actuaries;*
  5. *Investment advisors;*
  6. *Lawyers other than defense counsel retained by the risk retention group to defend claims, unless the amount of fees paid to the defense counsel creates or results in a material relationship;*
  7. *Managing general underwriters; and*
  8. *Other parties responsible for underwriting, determining rates, collecting premiums, adjusting and settling claims, or preparing financial statements;*

- (3) *A risk retention group's board of directors shall adopt a written policy in its plan of operation that requires the board to:*
- (a) *Ensure that all owners of the risk retention group receive evidence of ownership interest;*
  - (b) *Develop a set of corporate governance standards applicable to the risk retention group that satisfies, at a minimum, the requirements of this section;*
  - (c) *Oversee the evaluation of the risk retention group's management including but not limited to the performance of the captive manager, managing general underwriter, or other party or parties responsible for underwriting, determining rates, collecting premiums, adjusting or settling claims, or preparing financial statements;*
  - (d) *Review and approve the amount to be paid for all material service providers; and*
  - (e) *Review and approve, at least annually:*
    - 1. *The goals and objectives relevant to the risk retention group's compensation of officers and service providers;*
    - 2. *The officers' and service providers' performance in light of those goals and objectives; and*
    - 3. *The continued engagement of the officers and material service providers.*
- (4) (a) *A risk retention group shall have an audit committee composed of at least three (3) independent directors. Non-independent directors may participate in the activities of the audit committee if invited by the committee members, but cannot be members of the committee.*
- (b) *The audit committee shall have a written charter that defines the committee's purpose, which, at a minimum, shall include the following:*
- 1. *Assist board oversight of:*
    - a. *The integrity of the financial statements;*
    - b. *Compliance with legal and regulatory requirements; and*
    - c. *The qualification, independence, and performance of the independent auditor and actuary;*
  - 2. *Discuss the annual audited financial statements and the quarterly financial statements with management;*
  - 3. *Discuss the annual audited financial statements and, if advisable, the quarterly financial statements with its independent auditors;*
  - 4. *Discuss policies with respect to risk assessment and risk management;*
  - 5. *Meet separately and periodically, either directly or through a designated representative of the committee, with management and independent auditors;*
  - 6. *Review with the independent auditors any audit problems or difficulties and management's response;*
  - 7. *Set clear hiring policies regarding the hiring of employees or former employees of the independent auditor;*
  - 8. *Require external auditors to rotate the lead or coordinating audit partner having primary responsibility for the risk retention group's audit as well as the audit partner responsible for reviewing that audit so that neither individual performs audit services for more than five (5) consecutive fiscal years; and*
  - 9. *Report regularly to the board of directors.*
- (c) *The commissioner may waive the requirement to establish an audit committee composed of independent directors if the risk retention group demonstrates to the commissioner that:*
- 1. *It is impracticable to do so; and*
  - 2. *The risk retention group's board of directors is otherwise capable of accomplishing the purposes of an audit committee.*

- (5) (a) *The governance standards adopted by the board of directors pursuant to paragraph (3)(b) of this section shall include:*
1. *The process by which the directors are elected by the owners;*
  2. *Director qualification standards;*
  3. *Director responsibilities;*
  4. *Director access to management and, as necessary and appropriate, independent advisors;*
  5. *Director compensation;*
  6. *Director orientation and continuing education;*
  7. *The policies and procedures for management succession;*
  8. *The policies and procedures for annual performance evaluation of the board; and*
  9. *A code of business conduct and ethics for directors, officers, and employees.*
- (b) *The board of directors shall make the governance standards required by this section available through electronic or other means and provide the information to the risk retention group's members upon request.*
- (6) (a) *The code of business conduct and ethics for directors, officers, and employees required by subsection (5) of this section shall address the following topics:*
1. *Conflicts of interest;*
  2. *Matters covered under the corporate opportunities doctrine under the state of domicile;*
  3. *Confidentiality;*
  4. *Fair dealing;*
  5. *Protection and proper use of risk retention group assets;*
  6. *Compliance with all applicable laws, rules, and regulations; and*
  7. *Requiring the reporting of any illegal or unethical behavior which affects the operation of the risk retention group.*
- (b) *Any waivers of the code for directors or executive officers shall be promptly disclosed to the board of directors.*
- (7) *The captive manager, president, or chief executive officer of the risk retention group shall promptly notify the commissioner in writing if he or she becomes aware of any material noncompliance with any of the provisions of this section.*

➔Section 2. KRS 304.45-020 is amended to read as follows:

As used in this subtitle:

- (1) *"Board of directors" or "board" means the governing body of a risk retention group elected by its owners to establish policy, elect or appoint officers and committees, and make other governing decisions.*
- (2) *"Commissioner" means the commissioner of the Kentucky Department of Insurance or the insurance supervisor of another state;*
- (3)~~(2)~~ *"Completed operations liability" means liability arising out of the installation, maintenance, or repair of any product at a site which is not owned or controlled by:*
  - (a) *Any person who performs that work; or*
  - (b) *Any person who hires an independent contractor to perform that work, but shall include liability for activities which are completed or abandoned before the date of the occurrence giving rise to the liability;*
- (4) *"Director" means a natural person designated in the articles of a risk retention group, or designated, elected, or appointed by any other manner, name, or title to act as a director;*

- (5)(3) "Domicile," for the purposes of determining the state in which a purchasing group is domiciled, means:
- (a) For a corporation, the state in which the purchasing group is incorporated; and
  - (b) For an unincorporated entity, the state of its principal place of business;
- (6)(4) "Hazardous financial condition" means a condition in which, based on its present or reasonably anticipated financial condition, a risk retention group, although not yet financially impaired or insolvent, is unlikely to be able:
- (a) To meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or
  - (b) To pay other obligations in the normal course of business;
- (7)(5) "Insurance" means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risks which is determined to be insurance under the laws of this state;
- (8)(6) "Liability":
- (a) Means legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property, or other damage or loss to ~~those~~<sup>such</sup> other persons resulting from or arising out of:
    - 1. Any business (whether profit or nonprofit), trade, product, services (including professional services), premises, or operations; or
    - 2. Any activity of any state or local government, or any agency or political subdivision thereof; but
  - (b) Does not include personal risk liability or an employer's liability with respect to its employees other than legal liability under the Federal Employers' Liability Act (45 U.S.C. secs. 51 et seq.);
- (9) ***"Material relationship" includes but is not limited to:***
- (a) ***The receipt in any one (1) twelve (12) month period by a person, a member of the person's immediate family, or any business with which the person is affiliated of compensation or payment of any other item of value from the risk retention group or a consultant or service provider to the risk retention group that exceeds or equals the greater of the following, as measured at the end of any fiscal quarter falling in the twelve (12) month period:***
    - 1. ***Five percent (5%) of the risk retention group's gross written premium for the twelve (12) month period; or***
    - 2. ***Two percent (2%) of the risk retention group's surplus for the twelve (12) month period;***
  - (b) ***A director or immediate family member of a director who is affiliated with or employed in a professional capacity by a present or former internal or external auditor of the risk retention group; or***
  - (c) ***A director or immediate family member of a director who is employed as an executive officer of another company where any of the risk retention group's present executives serve on that other company's board of directors;***
- (10) ***"Material service provider contract" means a contract between a risk retention group and a service provider where the amount to be paid for the contract exceeds or equals the greater of the following:***
- (a) ***Five percent (5%) of the risk retention group's annual gross written premium; or***
  - (b) ***Two percent (2%) of the risk retention group's surplus;***
- (11)(7) "Personal risk liability" means liability for damages because of injury to any person, damage to property, or other loss or damage arising from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in subsection (6) of this section;
- (12)(8) "Plan of operation or a feasibility study" means an analysis which presents the expected activities and results of a risk retention group, including, at a minimum:

- (a) Information sufficient to verify that its members are engaged in businesses or activities similar or related with respect to the liability to which ~~its~~~~[such]~~ members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations;
  - (b) For each state in which it intends to operate, the coverages, deductibles, coverage limits, rates, and rating classification system for each kind of insurance the group intends to offer;
  - (c) Historical and expected loss experience of the proposed members and national experience of similar exposures to the extent that this experience is reasonably available;
  - (d) Pro forma financial statements and projections;
  - (e) Appropriate opinions by a qualified, independent casualty actuary, including a determination of minimum premium or participation levels required to commence operations and to prevent a hazardous financial condition;
  - (f) Identification of management, underwriting, and claim procedures, marketing methods, managerial oversight methods, and investment policies; and
  - (g) ~~Any~~~~[Such]~~ other matters as may be prescribed by the commissioner for liability insurance companies authorized by the insurance laws of the state in which the risk retention group is chartered;
- ~~(13)~~~~(9)~~ "Product liability" means liability for damages because of any personal injury, death, emotional harm, consequential economic damage, or property damage (including damages resulting from the loss of use of property) arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product, but does not include the liability of any person for those damages if the product involved was in the possession of ~~that~~~~[such]~~ person when the incident giving rise to the claim occurred;
- ~~(14)~~~~(10)~~ "Purchasing group" means any group which:
- (a) Has as one (1) of its purposes the purchase of liability insurance on a group basis;
  - (b) Purchases ~~that~~~~[such]~~ insurance only for its group members and only to cover their similar or related liability exposure, as described in paragraph (c) of this subsection;
  - (c) Is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and
  - (d) Is domiciled in any state;
- ~~(15)~~~~(11)~~ "Risk retention group" means any corporation or other limited liability association:
- (a) Whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members;
  - (b) Which is organized for the primary purpose of conducting the activity described under paragraph (a) of this subsection;
  - (c) Which:
    1. Is chartered and licensed as a liability insurance company and authorized to engage in the business of insurance under the laws of any state; or
    2. Before January 1, 1985, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or the Cayman Islands and, before ~~that~~~~[such]~~ date, had certified to the commissioner of at least one (1) state that it satisfied the capitalization requirements of ~~that~~~~[such]~~ state, except that any ~~[such]~~ group shall be considered to be a risk retention group only if it has engaged in business continuously since ~~that~~~~[such]~~ date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability (as ~~the~~~~[such]~~ terms were defined under the Product Liability Risk Retention Act of 1981 prior to the date of the enactment of the Liability Risk Retention Act of 1986);
  - (d) Which does not exclude any person from membership in the group solely to provide for members of ~~the~~~~[such]~~ group a competitive advantage over ~~that~~~~[such]~~ person;
  - (e) Which:

1. Has as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by ~~the[such]~~ group; or
  2. Has as its sole owner an organization which has as its members only persons who comprise the membership of the risk retention group and as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by ~~the[such]~~ group;
- (f) Whose members are engaged in businesses or activities similar or related with respect to the liability to which ~~the[such]~~ members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and
- (g) Whose activities do not include the provision of insurance other than:
1. Liability insurance for assuming and spreading all or any portion of the liability of its group members; and
  2. Reinsurance with respect to the liability of any other risk retention group or any members of ~~the[such]~~ other group which is engaged in businesses or activities so that ~~the[such]~~ group or member meets the requirement described in paragraph (f) of this subsection from membership in the risk retention group and which provides ~~the[such]~~ reinsurance; and
- (h) The name of which includes the phrase "risk retention group"; and
- ~~(16)(12)~~ "State" means any state of the United States or the District of Columbia.

➔Section 3. KRS 304.45-030 is amended to read as follows:

- (1) A risk retention group shall, pursuant to the provisions of this chapter, be chartered and licensed to write only liability insurance pursuant to this subtitle, and, except as otherwise provided in this subtitle, shall comply with all of the laws, regulations, and requirements applicable to such insurers chartered and licensed in this state and with KRS 304.45-040 to the extent such requirements are not a limitation on laws, regulations, or requirements of this state.
- (2) Notwithstanding any other provision to the contrary, all risk retention groups chartered in this state shall file with the department and the National Association of Insurance Commissioners (NAIC), an annual statement in a form prescribed by the NAIC and completed in accordance with the NAIC instructions and the NAIC accounting practices and procedures manual.
- (3) Before it may offer insurance in any state, each risk retention group shall also submit for approval to the commissioner of this state a plan of operation or a feasibility study and revisions of ~~the[such]~~ plan or study if the group intends to offer any additional kinds of liability insurance. The **risk retention** group shall not offer any additional kinds of liability insurance in this state or any other state until a revision of ~~the[such]~~ plan or study is approved by the commissioner. ***In the event of any other subsequent material change in any item of the plan or study, the risk retention group shall submit an appropriate revision to the commissioner within ten (10) days of the change.***
- (4) (a) At the time of filing its application for charter, the risk retention group shall provide to the commissioner in summary form ***the following information:***
  1. The identity of the initial members of the group;~~;~~
  2. The identity of those individuals who organized the group or who will provide administrative services or otherwise influence or control the activities of the group;~~;~~
  3. The amount and nature of initial capitalization;~~;~~
  4. The coverages to be afforded;~~;~~ and
  5. The states in which the group intends to operate.
- (b) Upon receipt of the information, the commissioner shall forward ~~the[such]~~ information to the National Association of Insurance Commissioners. Providing notification to the National Association of Insurance Commissioners is in addition to and shall not be sufficient to satisfy the requirements of KRS 304.45-040 and all other sections of this subtitle.
- (5) A risk retention group shall, within ten (10) days, notify the commissioner of any changes in the identity of those individuals who provide administrative services or otherwise influence or control the activities of the group, the coverages afforded, and the states in which the group operates.

- (6) A risk retention group chartered and licensed in this state as a product liability risk retention group under the provisions of KRS Chapter 304 in effect prior to July 13, 1990, may continue to act as ~~one[such]~~ without complying with this subtitle as long as it complies with the provisions of KRS Chapter 304 in effect prior to July 13, 1990. The exception provided in this subsection shall cease to apply to any product liability risk retention group which offers any other kind of liability insurance other than product liability or completed operations liability insurance.

➔Section 4. KRS 304.45-040 is amended to read as follows:

Risk retention groups chartered and licensed in states other than this state and seeking to do business as a risk retention group in this state shall observe and abide by the laws of this state as follows:

- (1) Before offering insurance in this state, a risk retention group shall submit to the commissioner:
  - (a) A statement identifying the state or states in which the risk retention group is chartered and licensed as a liability insurance company, date of chartering and licensing, its principal place of business, and ~~any[such]~~ other information, including information on its membership, as the commissioner of this state may require to verify that the risk retention group is qualified under KRS 304.45-020(15)(11);
  - (b) A copy of its plan of ~~operation[operations]~~ or a feasibility study and revisions of ~~the[such]~~ plan or study submitted to its state of domicile, but the provision relating to the submission of a plan of operation or a feasibility study shall not apply as to any kind or classification of liability insurance which was defined in the Product Liability Risk Retention Act of 1981 before October 27, 1986, and was offered before ~~that[such]~~ date by any risk retention group which had been chartered and operating for not less than three (3) years ~~at that time[before such date]~~; and
  - (c) A statement of registration which designates the Secretary of State as its agent for the purpose of receiving service of legal documents or process.
- (2) Any risk retention group doing business in this state shall submit to the commissioner:
  - (a) A copy of the group's financial statement submitted to the state in which the risk retention group is chartered and licensed, which shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by a member of the American Academy of Actuaries or a qualified loss reserve specialist under criteria established by the National Association of Insurance Commissioners;
  - (b) A copy of each financial, market conduct, or other examination of the risk retention group as certified by the commissioner or public official conducting the examination;
  - (c) Upon request by the commissioner, a copy of any audit performed with respect to the risk retention group; and
  - (d) ~~Any[Such]~~ information as may be required to verify its continuing qualification as a risk retention group under KRS 304.45-020(15)(11).
- (3) A risk retention group shall, within ten (10) days, notify the commissioner of any changes in any of the information required in subsections (1) and (2) of this section.
- (4) Any risk retention group shall submit to an examination by the commissioner to determine its financial condition if the commissioner of the jurisdiction in which the group is chartered and licensed has not initiated an examination or does not initiate an examination within sixty (60) days after a request by the commissioner of this state. Any ~~[such]~~ examination shall be coordinated to avoid unjustified repetition and conducted in an expeditious manner and in accordance with the National Association of Insurance Commissioners' examiner handbook. ~~The[Such]~~ examinations shall be conducted in accordance with KRS 304.2-210 to 304.2-300.
- (5) Any application used or any policy issued by a risk retention group shall contain in ten (10) point boldface type the following legend:

#### NOTICE

THIS POLICY IS ISSUED BY YOUR RISK RETENTION GROUP. YOUR RISK RETENTION GROUP MAY NOT BE SUBJECT TO ALL OF THE INSURANCE LAWS AND REGULATIONS OF YOUR STATE. STATE INSURANCE INSOLVENCY GUARANTY FUNDS ARE NOT AVAILABLE FOR YOUR RISK RETENTION GROUP.

- (6) In the solicitation or sale of insurance, a risk retention group shall not:
  - (a) Solicit or sell insurance to any person who is not eligible for membership in ~~the[such]~~ group; and
  - (b) Solicit or sell insurance issued by, or otherwise operate, a risk retention group that is in a hazardous financial condition or is financially impaired.
- (7) No risk retention group shall be allowed to do business in this state if an insurance company is directly or indirectly a member or owner of ~~the[such]~~ risk retention group, except if all members of the risk retention group are insurance companies.
- (8) A risk retention group shall not offer insurance policy coverage prohibited by statute or regulation or declared unlawful by the highest court of this state.
- (9) A risk retention group not chartered in this state and doing business in this state shall comply with a lawful order issued in a voluntary dissolution proceeding or in a delinquency proceeding commenced by a commissioner if there has been a finding of financial impairment after an examination under subsection (4) of this section.
- (10) A risk retention group registered in this state as a product liability risk retention group under the provisions of KRS Chapter 304 in effect prior to July 13, 1990, may continue to act as ~~one[such]~~ without complying with this subtitle as long as it complies with the provisions of KRS Chapter 304 in effect prior to July 13, 1990. The exception provided in this subsection shall cease to apply to any product liability risk retention group which offers kinds of liability insurance other than product liability or completed operations liability insurance.

➔SECTION 5. KRS 304.45-050 IS REPEALED AND REENACTED TO READ AS FOLLOWS:

*A purchasing group and its insurer or insurers shall be subject to all applicable laws of this state, except that a purchasing group and its insurer or insurers shall be exempt from any law regarding liability insurance for the purchasing group that would:*

- (1) *Prohibit the establishment of a purchasing group;*
- (2) *Make it unlawful for an insurer to provide or offer to provide to a purchasing group or its members insurance on a basis that provides advantages based on the purchasing group's loss and expense experience not afforded to other persons with respect to rates, policy forms, coverages, or other matters;*
- (3) *Prohibit a purchasing group or its members from purchasing insurance on a group basis described in subsection (2) of this section;*
- (4) *Prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;*
- (5) *Require that a purchasing group have a minimum number of members, common ownership or affiliation, or certain legal form;*
- (6) *Require that a certain percentage of a purchasing group obtain insurance on a group basis;*
- (7) *Otherwise discriminate against a purchasing group or any of its members; or*
- (8) *Require that any insurance policy issued to a purchasing group or any of its members be countersigned by an insurance agent or broker residing in this state.*

➔Section 6. KRS 304.45-060 is amended to read as follows:

- (1) A purchasing group which intends to do business in this state shall, prior to doing business, furnish notice to the commissioner which shall:
  - (a) Identify the state in which the purchasing group is domiciled;
  - (b) Specify the kinds and classification of liability insurance which the purchasing group intends to purchase;
  - (c) Identify the insurance company or companies from which the purchasing group intends to purchase its insurance and the domicile or domiciles of ~~the[such]~~ insurance company or insurance companies;
  - (d) Specify the method by which and the person or persons, if any, through whom insurance will be offered to its members whose risks are resident or located in this state;

- (e) Identify the principal place of business of the purchasing group; and
  - (f) Provide ~~any[such]~~ other information as may be required by the commissioner to verify that the purchasing group is qualified under KRS 304.45-020(~~14~~)(~~10~~) and is otherwise in compliance with the laws of this state.
- (2) A purchasing group shall, within ten (10) days, notify the commissioner of any changes in any of the items set forth in subsection (1) of this section.
- (3) The purchasing group shall register with and designate the Secretary of State as its agent solely for the purpose of receiving legal documents or process, except that ~~this[such]~~ requirement shall not apply in the case of a purchasing group:
- (a) Which in any state of the United States:
    - 1. Was domiciled before April 1, 1986; and
    - 2. Is domiciled on and after October 27, 1986;
  - (b) Which:
    - 1. Before October 27, 1986, purchased insurance from an insurer licensed in any state; and
    - 2. Since October 27, 1986, purchased its insurance from an insurer licensed in any state;
  - (c) Which was a purchasing group under the requirements of the Product Liability Risk Retention Act of 1981 (P.L. 97-45) before October 27, 1986; and
  - (d) Which does not purchase insurance that was not authorized for purposes of an exemption under that act, as in effect before October 27, 1986.
- (4) Any purchasing group which was doing business in this state prior to July 13, 1990, shall, within thirty (30) days after July 13, 1990, furnish notice to the commissioner pursuant to the provisions of this subtitle and furnish the information required pursuant to this subtitle.

➔Section 7. This Act takes effect on January 1, 2018.

**Signed by Governor March 16, 2017.**