

# EMPLOYMENT LAW SUMMARY

## New York: Workers' Compensation - Employer Responsibilities



*Because You're Different*

Workers' compensation is a system of no-fault insurance that provides medical benefits and compensation for lost wages and permanent physical impairments to employees who sustain work-related injuries. New York's Workers' Compensation Law (WCL) defines employer responsibilities under the state's workers' compensation program. The New York Workers' Compensation Board (WCB), part of the New York Department of Labor (NYDOL), monitors employer compliance with WCL requirements throughout the state.

### COVERAGE REQUIREMENTS

Employers in New York must secure workers' compensation coverage for their employees. Employers can meet this requirement through either:

- A policy from a private insurance company licensed to do business in the state;
- A policy from the State Insurance Fund; or
- Self-insurance (if they can prove they have sufficient financial stability to pay all benefits workers are entitled to receive under the WCL).

Employers are prohibited from requiring or encouraging any worker to fund any portion of their workers' compensation coverage premiums. Similarly, employers may not request or encourage their employees to waive their right to compensation. However, waivers may be permissible under certain circumstances, such as where employers and workers settle on a lump sum award instead of continued benefits. The WCB will review these agreements to determine whether they are:

- Conscionable,
- In the best interest of the worker; and
- Made without coercion, duress or undue influence.

The WCB will void agreements reached as a result of an intentional misrepresentation of material facts. The WCB will also void agreements if a party requests disapproval of the agreement within 10 days of when the agreement was filed with the WCB for review.

### SELF-INSURANCE

A self-insured employer uses its own assets, rather than an insurance policy provided by an insurance carrier, to cover its obligations under the WCL. To receive WCB approval to self-insure, an employer must:

- File an application using Form SI-1;
- Make a deposit of \$1,358,000 or more;
- Hire a third-party claims administrator or show that it has qualified personnel to handle benefit claims internally; and
- Provide copies of the following reports and documents to the WCB:
  - Financial statements for the three years immediately prior to the application;

- A current payroll report, broken down by classification codes, determined by the New York Compensation Insurance Rating Board (NYCIRB);
- A payroll history for the previous five years, broken down by classification codes;
- The most recent carrier premium audit and current experience modification;
- The employer's safety program;
- A copy of the employer's incurred loss history for the five years immediately prior to the application; and
- A copy of the employer's articles of incorporation (or similar documents).

A self-insured employer's deposit amount is reassessed annually, and employers may be required to contribute additional funds to maintain adequate funding. The WCB can revoke an employer's self-insurance permit if the employer fails or ceases to comply with any of the requirements mentioned above.

### **GROUP SELF-INSURANCE**

Multiple employers may create self-insurance groups by combining their assets to insure against their individual liabilities. The WCB allows employers to self-insure as a group if the group has sufficient financial stability to meet all of its obligations under the WCL. If a self-insured group becomes insolvent, each member in the group remains individually liable for any unpaid obligations the group incurred during the time the employer was part of the self-insured group. To receive authorization to self-insure, a group of employers must:

- Perform related activities within a given industry;
- Have been in business for a period of time acceptable to the WCB;
- Have and maintain an aggregate net worth of at least \$1 million;
- Have and maintain a combined annual payroll of at least \$500,000 (raw rate must first be multiplied by current NYCIRB rates);
- Furnish information about the self-insured group administrator's trustees, officers, directors and general managers;
- Submit evidence of the group administrator's experience in handling benefit claims;
- Make a deposit (the amount is determined after the application is reviewed);
- Indicate the projected rate of contribution and assessments each member of the group will pay during the first year of the group's operation and how these figures were calculated; and
- Provide copies of the following documents:
  - The self-insured group's bylaws;
  - A description of the group's safety program; and
  - A certified actuarial feasibility study for the group.

Once a self-insured group has been created, the group must keep the WCB informed of any employer that is added to or removed from the group.

### **SELF-INSURANCE ANNUAL RENEWALS**

Each year, self-insured employers (or groups of employers) must submit reports to assist the WCB in an evaluation of their ability to self-insure. These reports include the employer's or group's:

- Most recent certified, independently audited financial statement;
- Payroll report, filed by classification code;
- Statement of outstanding death and disability claims; and
- Statement of compensation and medical losses incurred.

In addition, self-insured groups must submit:

- A financial summary report;
- Certified, independently audited financial statements;
- A certified, independent actuarial report; and
- A payroll report, filed by classification code, for each group member and in the aggregate.

### **MANDATORY WORKPLACE SAFETY AND LOSS PREVENTION PROGRAM (WSLPP)**

Under the WCL, certain employers must participate in the New York Workplace Safety and Loss Prevention Program (WSLPP), which was established to help reduce workplace injuries and the cost of workers' compensation coverage in the state. The NYDOL monitors employer compliance with this requirement and may impose 5 percent premium increases for workers' compensation insurance for each year that an employer fails to comply. An employer is subject to this requirement if its most recent:

- Annual payroll was over \$800,000; and
- Workers' compensation experience modification rating was more than 1.20.

The NYCIRB reviews employer payrolls and experience ratings and sends notices to all employers that meet the criteria for mandatory participation. An employer that receives an NYCIRB notice must schedule a consultation and worksite evaluation with a certified specialist within 30 days. Within 10 days after making the consultation arrangements, the employer must provide a written notice, to both its insurance carrier and the NYDOL that includes:

- The date on which the consultation and evaluation is scheduled to begin;
- The deadline for completion of the consultation and evaluation (which is 75 days after the employer received the NYCIRB's notice);
- The name, address and certification number of the specialist who is scheduled to perform the consultation and evaluation; and
- Copies of the employer's workers' compensation injury reports (Forms C-2 and C-2F) from the previous four years.

During a worksite evaluation, the specialist will review the employer's safety program and make any necessary recommendations to ensure that it meets all WSLPP requirements. A compliant safety program must be in writing, and, at a minimum, it must:

- Describe the employer's policies and practices that recognize and protect employees from occupational safety hazards;
- Establish a clear goal for the program and the mechanisms to be used in meeting the goal;
- Provide for visible top management leadership in implementing the program and ensure that all workers at the site are provided equally high-quality safety protection;
- Provide for and encourage employee involvement in the structure and operation of the program;
- Assign and communicate responsibilities for all aspects of the program to managers, supervisors and employees;
- Provide a system to hold managers and supervisors accountable for their responsibilities under the program;
- Provide training that enables managers and supervisors to recognize potential hazards, maintain safety protection in the work area and reinforce employees' training on the nature of potential hazards and required protective measures;
- Provide a reliable system for employees to notify managers of conditions that appear hazardous or not in compliance with the terms of the program without fear of reprisal and provide a mechanism to ensure timely and appropriate responses;
- Provide a mechanism to investigate accidents so that the root cause(s) and means for preventing a recurrence are identified;
- Provide a means to review injury and illness trends over time so that patterns with common causes can be identified and eliminated;
- Establish a mechanism for the employer to conduct ongoing, periodic in-house safety inspections so that new or previously missed hazards or failures in controls are identified;
- Address the impact of emergency situations and develop written plans and procedures for employee safety in these situations;
- Establish procedures for transmitting and enforcing safe work practices in the workplace through training, positive reinforcement and correction of unsafe performance.

After a worksite evaluation, the employer will receive a completed consultation report from the specialist and must send a copy of it to both its insurance carrier and the NYDOL within 30 days. If the consultant's report includes any recommendations for remedial action, the employer must also submit a written statement that describes how and when it will complete the recommended actions. All remedial actions must be completed within six months after the employer receives the consultant's report. Within 60 days after the end of the six-month period for completing remedial actions, the employer's insurance carrier will conduct its own inspection of the worksite to ensure that all remedial actions are complete. Within 45 days after completing that inspection, the insurance carrier must send a written report to both the employer and the NY DOL.

## **VOLUNTARY PROGRAMS**

Employers that are not subject to the mandatory WSLPP may qualify for credits to their workers' compensation insurance premiums (or reductions in their required security deposits for self-insured employers) if they voluntarily participate in the New York Workplace Safety and Loss Prevention Incentive Program (Safety Incentive Program). To be eligible for participation, an employer must:

- Pay at least \$5,000 in annual workers' compensation premiums; and
- Have a workers' compensation experience modification rating of less than 1.30.

Participation requirements also include the establishment of one or more of the following, each of which must include specific elements that depend on the type of program:

- A written safety program;
- A written drug and alcohol prevention program; or
- A written return-to-work program.

In addition, employers that wish to participate in the Safety Incentive Program must have a certified specialist evaluate its program(s). Once the employer receives a written evaluation report from its specialist, it must send a copy of it to the WCB and attach a completed application that includes:

- The name and address of the employer and its insurer;
- The employer's tax identification number;
- The beginning date for the program;
- The name, address and certification number of the specialist that completed the program evaluation;
- The names of any employee representatives who are or will be involved in the program, along with a description of their involvement; and
- Evidence that the employer meets eligibility requirements, including evidence that it is not subject to the compulsory WSLPP.

If the NYDOL approves an employer for participation in the Safety Incentive Program, it will send the employer a certificate of approval. As long as the employer meets all of its ongoing program obligations, the approval may remain in effect for up to three years. Before the NYDOL may apply any premium credits (or security deposit reductions), however, the employer must send a copy of the certificate to its insurance carrier. Once that is complete, the NYDOL will apply a premium credit (or security deposit reduction) of up to 4 percent at the beginning of the employer's next insurance policy renewal period (or the beginning of the next calendar year for self-insured employers).

## **NOTICE POSTING REQUIREMENTS**

Employers must display, in a conspicuous place, a notice stating that they have a workers' compensation insurance policy that complies with state law. As of Jan. 1, 2020, the notice must be posted in both English and Spanish. Failing to display this notice may subject an employer to fines of up to \$500 per violation and may be considered evidence that the employer does not have insurance. An employer that covers its WCL liability through a commercial insurance policy must obtain this notice (Form C-105) from its insurance carrier. Self-insured employers may obtain a copy of the notice from the WCB or the group self-insurance administrator. The notice must, among other things, instruct employees on how to:

- Notify the employer of a work-related injury;
- Secure immediate medical care;
- File medical reports with the WCB and with the employer's insurance carrier;
- File a Form C-3 with the WCB within two years from the date of injury; and
- Choose where to receive treatment.

An employer that participates in the voluntary Safety Incentive Program must also post its certificate of approval from the NYDOL in a prominent place at the worksite for as long as the approval is in effect.

## **INJURY REPORTING REQUIREMENTS**

Employers must record any injury or illness sustained by an employee in the course of employment. These injury records, along with records of all wages, employment classifications and other information, must be available for inspection by the WCB at all times. Employers must also report all work-related injuries and illnesses to the WCB, using Form C-2F, within 10 days after becoming aware of an injury or within 14 days after discovering an occupational disease, if the condition results in:

- The loss of at least one workday beyond the day of the accident;

- Medical treatment beyond first aid; or
- More than one first-aid treatment.

Employers have an additional obligation to notify an injured employee and his or her dependents of their rights under the WCL, by providing them with a claim information packet, within 14 days of filing the injury report.

## **MORE INFORMATION**

Visit the WCB website or contact Heffernan Insurance Brokers for more information on workers' compensation laws in New York.

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