

# EMPLOYMENT LAW SUMMARY

## West Virginia Workers' Compensation – Employer Responsibilities



*Because You're Different*

Workers' compensation is a system of no-fault insurance that provides monetary compensation and medical benefits to employees, or their survivors, for work-related injuries, diseases and deaths. Workers' compensation is governed by state law.

The West Virginia Workers' Compensation Act (WCA) establishes employer responsibilities relating to workers' compensation in the state. The West Virginia [Office of the Insurance Commissioner](#) (OIC) administers the workers' compensation system and enforces employer responsibilities under the WCA.

### COVERAGE REQUIREMENT

With limited exceptions, the WCA requires all employers in the state to maintain workers' compensation coverage for their employees. Under the WCA, an "employer" includes any entity that regularly employs **one or more employees** "for the purpose of carrying on any form of industry, service or business" in West Virginia.

An employer may satisfy the WCA's coverage requirement by obtaining either:

- A workers' compensation policy from a private insurance company that is licensed to transact workers' compensation insurance in West Virginia; or
- The OIC's approval to self-insure.

Employers must pay the full cost of providing workers' compensation coverage. The WCA specifically prohibits employers from making their employees contribute to their coverage cost in any manner.

An employer that fails to maintain required coverage loses all the protections that the WCA affords to employers. Specifically, noncompliant employers are subject to negligence lawsuits, meaning that they can be sued by injured employees to recover all damages resulting from a work-related injury.

Noncompliant employers are particularly disadvantaged in these types of lawsuits, because the WCA also precludes them from raising certain defenses to an injured employee's lawsuit.

In addition, an employer that fails to maintain coverage as required may be subject to fines of up to **\$10,000**, and other penalties, under the WCA.

### EXCLUSIONS AND VOLUNTARY COVERAGE ELECTIONS

The WCA specifically excludes certain types of employment from its requirements. This means that an employer does not have to provide workers' compensation coverage for individuals who work in the excluded types of employment. Among those excluded are:

- Domestic servants; •Agricultural employers with five or fewer full-time employees;
- Employees who work out of state (other than on a temporary basis);
- Casual employers (employers may have up to three employees, and each employee's work must be temporary, intermittent and sporadic in nature and cannot last longer than 10 days in any calendar quarter);
- Churches;
- Employers engaged in organized professional sports activities, including employers of trainers and jockeys engaged in thoroughbred horse racing; and
- Employees who are eligible to receive benefits under federal workers' compensation laws.

Nevertheless, an employer may voluntarily elect to provide coverage for any individual who is excluded from the law's coverage requirement. Employers that choose to provide voluntary coverage become subject to all provisions of the WCA in relation to the voluntarily covered individuals.

### **VOLUNTARY COVERAGE EXCLUSIONS**

Although the WCA does not allow any employee to waive his or her rights to coverage and benefits under the WCA, the law does allow certain employers to voluntarily exclude certain individuals from their coverage. Specifically, an employer may voluntarily elect to exclude:

- Any members of a partnership;
- A sole proprietorship owner;
- The elected president, vice president, secretary and treasurer of a corporation;
- Members of an association or corporation's board of directors who do not perform work that is ordinarily performed by an employee (rather than by an officer) for the association or corporation; and
- Up to four managers, officers or members of a limited liability company (LLC).

To make a voluntary exclusion, an employer must send written notice to its insurance carrier or to the OIC. The notice must specify the positions that the employer wishes to exclude and the names and Social Security numbers of the individuals who occupy the affected positions. A voluntary exclusion generally becomes effective as soon as the insurance carrier or OIC receives a valid exclusion notice.

### **INSURANCE POLICIES**

To comply with the WCA, every workers' compensation insurance policy issued in West Virginia must be in writing and contain certain provisions. Among these is the issuing insurance carrier's agreement to assume virtually all responsibility for the insured employer's WCA duties relating to:

- Administering its employees' workers' compensation claims;
- Filing required notices with the OIC; and
- Paying all WCA-required benefits to and for any injured employees.

However, every insured employer has a continuous and ongoing obligation to provide its insurance carrier and the OIC with any information required to carry out the purposes of the WCA. This specifically includes all information that could affect the employer's payroll or premium, as well as any information relating to any employee injury claim.

Insurance carriers must send notice of an employer's coverage to the OIC within 30 days after issuing or renewing any policy. Insurance carriers must also send a termination notice to the OIC and the insured employer at least 10 ten days before terminating an insurance policy.

### **SELF-INSURANCE**

A self-insured employer uses its own assets, rather than an insurance policy, to insure its obligations under the WCA. Self-insured employers must directly pay all WCA benefits to and for any employees who sustain work-related injuries. A self-insured employer is also responsible for performing all claims administration duties under the WCA. However, the law does allow self-insured employers to hire qualified, licensed third-party administrators within the state to perform these tasks.

An employer that wishes to self-insure must first obtain the OIC's approval. To meet the minimum qualifications for self-insurance, an employer must show that it has sufficient financial capability and responsibility to ensure that its employees will receive all required WCA benefits for any work-related injuries or conditions. The application process begins by submitting an application to the OIC. Along with the application, an employer must include:

- Disclosures regarding its management and financial structures;
- Audited financial statements for each of the three fiscal years prior to the application filing;
- A nonrefundable **\$2,500** application fee; and
- Any additional information the OIC may request during (or after) the application process.

Once the OIC issues an approval for self-insurance, the employer is authorized to self-insure for a period of **one year** and must undergo annual, comprehensive reviews by the OIC for any renewals. The OIC may require a self-insured employer to:

- Submit to an unscheduled inspection or audit at any time;
- Deposit a bond or other securities; or
- Obtain an excess insurance policy for catastrophic losses.

In addition, every self-insured employer must:

- Pay assessments and surcharges for various purposes and funds, including an annual assessment of **\$5,000** or more for the Self-Insured Employer Guarantee Pool;
- Keep and maintain comprehensive payroll records for at least 10 years after the time period reflected in each record;
- File quarterly payroll statements with the OIC;
- Ensure that the OIC always has current [contact](#) information for the person who has primary responsibility for administering claims and paying benefits under the WCA; and
- Comply with all other WCA provisions.

## NOTICE POSTING

The WCA requires all employers to post a workers' compensation notice in a conspicuous location within their employees' workplace.

If an employer is insured, its posted [notice](#) must include the name, business address and telephone number of its insurance carrier and of the person whom employees or other may contact with questions about a claim.

If an employer is self-insured, its posted notice must indicate that it administers its own claims and include contact information for the person who is responsible for administering claims. The OIC provides [sample notices](#) that self-insured employers may use to meet this requirement. A self-insured employer must post the notice within **five days** after its self-insurance approval becomes effective.

All employers must ensure that the appropriate notice remains posted at all times.

## INJURY REPORTING

Employers must always keep blank copies of [Form OIC-WC-1](#) ("Employees' and Physicians' Report of Occupational Injury or Disease") available to employees at their worksites. When an employee sustains a work-related injury, he or she must use this form to notify the employer of the injury as soon as possible after it occurs. Injured employees may submit Form IOC-WC-1 to their employers in person or by certified mail. A copy of the form must also be mailed to the OIC.

Employers must complete and submit [Form OIC-WC-2](#) ("Employers' Report of Occupational Injury or Disease") to their insurance carriers within **five days** after receiving notice of an employee's work-related injury. Self-insured employers must submit this form to the OIC within the same time period. Employers that have any reason to question an employee's claim must submit their concerns in writing along with the form. Copies of the employer's reservations against paying a claim and any attachments sent with the form must also be sent to the affected employee.

## INITIAL BENEFIT PAYMENTS AND COMPENSABILITY DETERMINATION

An employer (or its insurance carrier, if applicable) must begin paying any required temporary total disability (TTD) benefits to an employee, and must report the initial payment to the OIC, within **15 working days** after it first receives notice of the employee's injury.

In general, an employee who has reported a work-related injury becomes entitled to receive TTD benefits once he or she has been disabled from work for **three or more days** as a result of the reported injury. The requirement to pay these initial TTD benefits applies even if the employer has clearly indicated on its Form OIC-WC-2 that it disputes the employee's claims. If a self-insured employer fails to pay these (or any other) benefits as required under the WCA, the OIC may pay the benefits out of the Self-Insured Employer Guarantee Pool and then later recover the paid amounts from the employer.

Under certain circumstances, an employer may be able to retroactively dispute an employee's entitlement to any of the initial TTD benefits that he or she received and may possibly even recover those paid amounts from the employee. To keep these possibilities open, an employer must:

- Meet its five-day deadline for filing Form OIC-WC-2; and Indicate clearly on Form OIC-WC-2 that it:
  - Disputes the employee's claims; or
  - Accepts the employee's claims on a conditional basis.

If an employer has met these requirements and the OIC ultimately determines that the employee was not entitled to the initial TTD benefits that he or she received, the employer may recover the paid amounts by offsetting any other benefits payable to the employee.

An employer that does not meet these requirements may still dispute an employee's claims after the Form OIC-WC-2 deadline, but it waives its dispute and retroactive recovery rights. This means that the employer cannot recover any benefits that have already been paid or become payable by the time a late dispute notice is filed.

Finally, an employer that properly disputes or conditionally accepts an employee's claims in a timely Form OIC-WC-2 filing can gain a significant advantage in the overall dispute process if it can also show any of the following:

- That a business shutdown affecting the employee had been scheduled before, and was scheduled to begin within one week after, the employee reported the injury;
- That the employee received notice, within the 60 days prior to his or her injury report, that his or her employment position was to be eliminated;
- That the employee was receiving unemployment benefits at the time he or she submitted the injury report; or
- That the employee had received unemployment benefits within the 60 days prior to submitting the injury report.

## PROHIBITED PRACTICES

After an employee reports a work-related injury, his or her employer is prohibited from all of the following:

- Discriminating in any manner against the employee because of the injury report or because of any other factor relating to the employee's claims under the WCA;
- Canceling, decreasing or failing to pay its share for any medical insurance coverage that it provided for the employee prior to his or her injury (unless a medical coverage change is uniformly applied to all similarly situated participants in the employer's health plan). This prohibition applies only to periods during which the employee is receiving TTD benefits under the WCA (and may not apply at all if an employer's health plan is subject to and compliant with the federal Employee Retirement Income Security Act);
- Terminating the employee at any time during which he or she is receiving or eligible to receive TTD benefits (unless the termination is due to the employee's misconduct); and
- Refusing to honor a request by the employee to be reinstated to his or her pre-injury (or a closely comparable) employment position, if the position is available and the employee is capable of performing the work. If neither the former position nor a comparable one is available, the employer must give the employee a right to preferential recall for any job within the employee's capabilities that becomes available within the one-year period after the employee submits his or her request for reinstatement to the employer. An employee who has a right to preferential recall under the WCA must ensure that the employer always has his or her current mailing address during the one-year period.

## MORE INFORMATION

Contact Heffernan Insurance Brokers or visit the OIC's [website](#) for more information about workers' compensation requirements in West Virginia.

