

New Workers' Compensation Legislation

This year, the Vermont legislature passed "workers' compensation reform" legislation, Act 208 (S.345). Governor Douglas signed the bill into law on June 11, 2008. The Act amended several sections of existing law and directed that several issues be studied. This package of legislation permits employers to pay for first-aid only injuries without reporting to the insurer (reports still must be filed with the Department of Labor), requires that low-deductible insurance policies be offered to employers that request them, changes the number of weeks used to calculate an injured worker's average weekly wage to 26 weeks, delays the implementation of COLA for TTD benefits, permits the award of attorney fees even in the absence of a formal hearing, and requires insurers to evaluate the medical status of any injured worker receiving TTD for 104 weeks. The Act made changes to the criminal fraud statutes and requires insurers to file fraud-prevention reports with the Department of Labor, on request. It also requires studies designed to evaluate different aspects of the workers' compensation system and report findings and recommendations to the legislature. The Department of Labor is directed to investigate and propose rules and legislation relating to improving workplace safety and to returning injured employees to work more quickly. The legislature has also directed the forest products industries and the Secretary of Agriculture to work with the Department of Labor and the Department of Banking, Insurance, Securities, and Health Care Administration to develop programs and practices to reduce the cost of workers' compensation insurance in the agriculture and forest product markets.

Creation of an Employee Classification and Fraud Enforcement Task Force

The most significant of the study groups created by the legislature is a ten-member Workers' Compensation Employee Classification, Coding, and Fraud Enforcement Task Force created to "investigate and analyze

misclassification and miscoding of employees and occurrences of fraud in the workers' compensation program ... " and to offer recommendations on ways to improve detection and prosecution of fraud, ways to improve outreach and education to the business community on properly distinguishing between independent contractors and employees and proper risk coding of employees, and ways to "improve the effectiveness and enforcement of the current fraud statutes ... " The committee's primary focus is the misclassification of employees as independent contractors by employers. The legislature has found this to be an area of particular concern and has directed the task force to examine it closely and report the details of their findings. The legislators on the task force are particularly interested in increased enforcement and are focusing on how all state programs affected by the issue can cooperatively and effectively ensure compliance with Vermont's workers' compensation, unemployment insurance, wage/hour, and income tax laws. The task force is to issue a progress report on February 15, 2009, and a final report on November 15, 2009, which indicates that this task force will spend approximately eighteen months investigating and reporting on this issue. Additionally, the task force is to provide the legislature with their recommendations for "creating a fraud unit with proposals for staffing, reporting, structure, and funding."

Criminal Prosecution of Workers' Compensation Fraud

In addition to creating the task force, the legislature has amended the criminal statute for insurance fraud to include prosecutions for workers' compensation fraud, which until now were prosecuted under a dedicated statute. One of the effects of this change is to expose attorneys, adjusters, and claimants to criminal prosecution for intentionally making fraudulent claims for benefits or making fraudulent statements or omissions regarding insurers and insurance policies as set forth in 13

V.S.A. §2031(b)(1 & 2). Intentional misclassification or miscoding is also identified as "fraud." If the amount of the "benefit" involved in the fraud exceeds \$900, the person charged may be convicted of a felony punishable by up to five years in jail, a \$10,000 fine, and a mandatory notification to any professional regulation authority.

Commissioner May Require Carrier to File Anti-Fraud Plan

The legislature has also given the commissioner of the Department of Labor the authority to require an insurance carrier to file an anti-fraud plan annually upon request. The commissioner may require information on fraud investigations, referrals, or prosecutions involving claims, misclassification of independent contractors, and miscoding of employees. This information will remain confidential unless either the attorney general or the commissioner commences an administrative or criminal proceeding.

AMA Guides, Fifth Ed., to Be Used for Permanency Evaluations

The legislature has also made several substantive changes to the law. The legislature has now specified that all permanency evaluations must be conducted using the Fifth Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*.¹ Before the Department of Labor can allow evaluations to be conducted under a newer edition of the *Guides* or any other rating instrument, the commissioner must formally adopt a rule to that effect. This process will ensure that any proposal by the commissioner to adopt a newer version of the *Guides* will be subject to the scrutiny of publication and public comment.

First-Aid-Only Injuries

The legislature has created a new class of claims entitled "first-aid-only injuries." These are injuries that result in medical bills of less than \$750 and involve not

more than one day of lost time from work for medical treatment and recovery. On these claims, the employer still must file a Form 1. If the claim is contested, the Form 1 must be mailed to the Department and the insurer within five days of notice. Otherwise, the medical bill must be paid within thirty days of the date of injury. In the event that the injury requires more than \$750 in medical care or involves more than one day of absence, the claim must be submitted to the insurance carrier for adjustment.

Deductible Policies Mandated

This new class of "first-aid-only injuries" is designed to work together with a new insurance product that all carriers writing workers' compensation insurance in Vermont are now required to offer. All such carriers are now required to offer workers' compensation insurance at a rate that contains a deductible provision of at least \$500. Under this policy, the employer is bound to reimburse the carrier for "at least the first \$500.00 of benefits, medical or indemnity, due to an injured employee." The claims are to be adjusted as normal with the employer reimbursing the insurance carrier for the amount of the deductible.

Commissioner May Require Mediation

The legislature has also instructed the commissioner to require mediation in workers' compensation cases that the commissioner deems appropriate. This provision will take effect after the commissioner has consulted with interested parties. The legislature has specified that the cost of this mediation is to be shared equally between the parties, unless they agree otherwise, with the claimant's share considered a recoverable cost, should the claimant prevail after hearing.

Commissioner May Issue Abbreviated Findings and Conclusions of Law

After July 1, 2008, the hearing officer will have discretion about whether or not to require the parties to submit proposed findings of fact and conclusions of law. Additionally, the hearing officer has discretion to issue "abbreviated findings of fact or conclusions of law, or both, where appropriate."

Average Weekly Wages Now Average Twenty-Six Weeks

When calculating average weekly wages, the twenty-six weeks preceding the injury are used unless there has been an increase in the wage rate; then, only the higher-rate wages are used in the average. The indemnity payments will be adjusted every July 1st, following payment of at least twenty-six weeks of benefits. This means that if an injured worker is injured on May 1, the worker's indemnity payment will not adjust until July 1st of the following year or fourteen months after injury.

Two-Year Review of TTD Claim

Employers will now be required to review claims where TTD benefits have been paid for more than 104 weeks. Within 30 days after 104 weeks of TTD payments, the employer is required to file with the Department a medical report from a physician addressing (1) the medical status of the injured worker, (2) the expected duration of the disability, and (3) when, or if, the worker is expected to return to work. Additionally, if the examining physician determines that the worker has reached medical end, then the employer is directed to file a Form 27 discontinuance.

Vocational Rehabilitation Changes

The legislature made two changes in the area of vocational rehabilitation. First, claimants will now be allowed to change voc rehab providers only one time absent a showing of good cause. Second, any voc rehab plan presented to the employer will be deemed valid if the employer had an opportunity to be involved in the development of the plan and does not make any changes or objections within twenty-one days after submission. Additionally, the legislature directed the commissioner to examine current practices in the area of vocational rehabilitation to ensure that qualifying claimants understand their rights to voc rehab training and receive rehabilitation designed to return them to work in suitable employment. The commissioner is instructed to develop performance standards to measure the success of rehabilitation plans. The commissioner is directed to report back to the legislature outlining any deficiencies that are discovered along with any rules to be adopted to correct them.

Award of Attorneys Fees with No Formal Hearing

The legislature created a provision where a claimant's attorney may now seek an award of reasonable attorneys fees if a claimant retains the services of an attorney in response to an "actual or effective denial of their claim," a hearing has been requested, and the case resolves prior to hearing "as a result of the attorney's efforts" with payments being made to the claimant. The legislature gave no guidance on what level of efforts are required by the claimant's attorney in order to entitle them to an award of attorney's fees. Additionally, any request for attorney's fees following a formal hearing where the claimant prevails must be made within thirty days following the decision on the hearing.

Union Representative May Assist Claimant

Finally, the legislature directed the Department of Labor to adopt a rule that will allow a representative of a collective-bargaining unit to "provide informal assistance to a workers' compensation claimant in regard to any claim for workers' compensation benefits in all aspects except at a formal hearing."

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¹ GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (Gunnar B.J. Andersson & Linda Cocchiarella eds., 5th ed. 2000).

