New York State
Workers' Compensation Board

Employers' Handbook

A Guide to the Workers' Compensation and the Disability Benefits Systems for the New York State Business Owner

June, 2011

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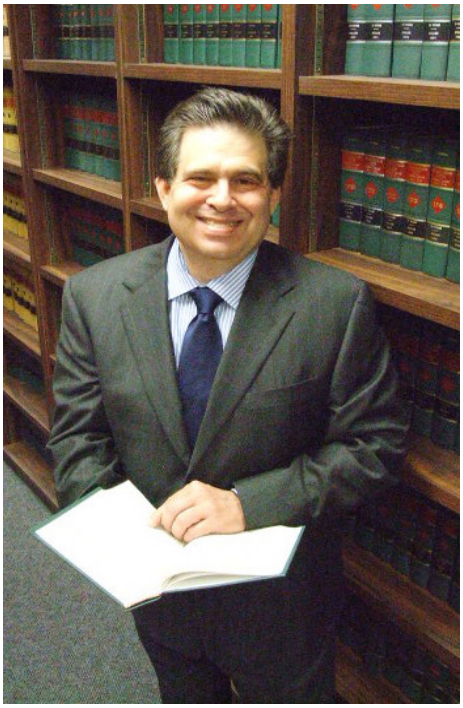
Introduction

This book is intended to provide New York employers with general information regarding their rights and responsibilities under the state's workers' compensation program. It includes information outside the purview of the Workers' Compensation Board in an effort to inform employers about these areas. This booklet does not represent legal advice and is not a complete description of the law.

Message from Chair Robert E. Beloten



The New York Workers' Compensation Law was enacted in 1914 to protect both injured workers and their employers. Under this landmark legislation, workers who suffered injuries or illnesses on the job received timely medical treatment and wage replacement assistance, while employers were protected from being sued by those injured workers.

This legislation is as important today as when it was enacted almost a century ago. The Workers' Compensation Board is committed to providing fair and efficient services for employers who finance the system, and injured workers who rely upon it for compensation and prompt medical care in the event of a workplace injury.

The laws of New York are clear. With few exceptions, if you have employees, you are required to provide workers' compensation insurance to protect injured workers.

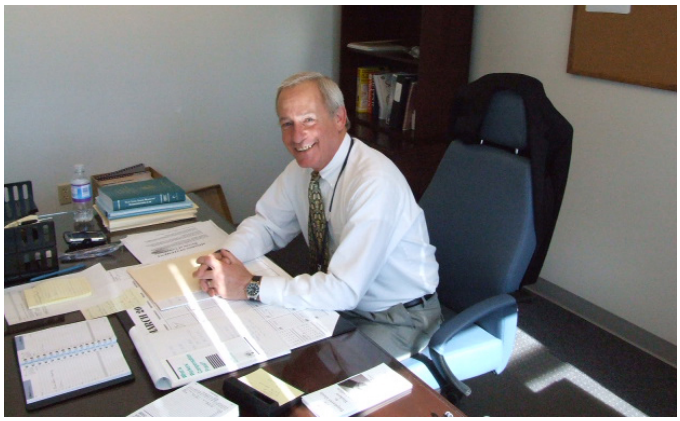
Whether you choose a private carrier, the State Insurance Fund, or self-insurance, workers must be covered. While the Board penalizes employers who do not have insurance, our ultimate goal is to ensure that all businesses and workers are protected.

From experience, the workers' compensation system can be confusing. This manual provides the detailed information an employer needs when considering his or her responsibilities under the workers' compensation law. It was produced by Board staff, including the Office of the Advocate for Business, and is a step-by-step manuscript for both new employers and businesses that have succeeded for generations.

I invite you to review this important text to determine your responsibilities under the law. If after reviewing this material you still have additional questions, you can contact the Office of the Advocate for Business at 1-800-628-3331. We are here to help you better understand and use this vital system.

Message from Advocate for Business Neil Gilberg

The Advocate for Business is the primary liaison between New York's business community and the Workers' Compensation Board. The office was created by legislation to give employers one place to call to get answers to their workers' compensation questions.



The Advocate for Business:

- Assists individual businesses with coverage questions, understanding their experience modification and classifications, and in complying with the workers' compensation law;
- Educates business owners and government personnel on how the workers' compensation system works and the role that each participant plays in the system; and
- Hears the concerns of business associations and employer groups to regarding workers' compensation, and reports those concerns to the chair of the Workers' Compensation Board and offer possible solutions to address the issues.

As the "business ambassador," the advocate for business works closely with the governor's staff, members of the Legislature, the State Insurance Fund, and the New York Compensation Insurance Rating Board to assist their constituents with various workers' compensation-related problems.

The advocate for business handles a wide variety of inquiries and requests for assistance from businesses of all sizes and industry types. However, a large number of inquiries come from small business owners seeking assistance in handling issues they have been unable to resolve through their own means.

If you as a member of the business community have attempted to resolve a workers' compensation issue without success, please call me at 1-800-628-3331. It will be a pleasure to see if the Office of the Advocate for Business can assist you.

Chapter One

How the Workers' Compensation System Began

The Triangle Shirtwaist Factory Fire

The Workers' Compensation system in New York State was born out of a great tragedy – the worst factory fire in the history of New York City. On March 25, 1911, on the top three floors of a ten-story building, a fire broke out at the Triangle Shirtwaist Factory. The fire spread quickly among the reams of fabric, and 146 workers died in less than 15 minutes.

In order to keep the workers, mostly Jewish women immigrants between the ages of 13 and 23, at the sewing machines, the owners had locked the exit doors.

At the time of the Triangle Shirtwaist tragedy, the only way an injured worker could recover damages sustained in a work-related accident was by suing the employer. It was the responsibility of the worker to prove that the employer was negligent. This standard of proof often led to lengthy court proceedings, and made it difficult for workers to obtain compensation and medical care quickly. At the same time, this system left employers open to costly lawsuits.

Workers' Compensation - The Historic Agreement

By the early 1900's, most industrialized countries in Europe had regulatory systems and insurance programs that brought into place a "no-fault" exchange of protections between employers and workers. This new concept was first established in Germany in 1856, and adopted soon after in England and most of Western Europe. New York was the first state to establish a workers' compensation system, and by 1920 most states had workers' compensation laws.

Created in 1914 as the result of an historic agreement between employers and workers, the New York State Workers' Compensation Law ensures that in exchange for guaranteed medical coverage and compensation for lost earnings, employees would not sue their employers in the event of an on-the-job injury. This no-fault system is designed to eliminate the uncertainty of litigation associated with the courts. This reduces the employer's exposure to costly lawsuits and provides benefits to injured workers.

The principles of workers' compensation laws are similar throughout the United States, but each state has unique laws with different benefits.

Currently in New York State, virtually all employers must provide workers' compensation coverage to their employees. This requirement protects both injured workers and their employers.

Chapter Two

The Players in the System

To understand the workers' compensation system, an employer or employee must first understand all the players that are responsible for the process.

Workers' Compensation Board

The first major player, the Workers' Compensation Board (Board), was established to administer the New York State Workers' Compensation Law (WCL). It is responsible for the adjudication of claims and ensuring that employers provide the required coverage to their employees. The mission statement of the agency reads,

The mission of the Workers' Compensation Board is to equitably and fairly administer the provisions of the New York State Workers' Compensation Law, including Workers' Compensation Benefits, Disability Benefits, Volunteer Firefighters' Benefits, Volunteer Ambulance Workers' Benefits & Volunteer Civil Defense Workers' Benefits Law on behalf of our customers, New York's injured workers and their employers.

The Board administers the programs and laws of New York State in a fair and equitable fashion. The Board receives and processes claims and initially seeks to facilitate expedient agreements between injured workers and employers. When a consensus cannot be reached through administrative measures, it becomes necessary for the Board to conduct hearings before a Workers' Compensation Law Judge (Judge). Evidence and testimony are gathered and analyzed prior to the rendering of a decision by the Judge. While the decisions by Judges are binding, parties may seek administrative review of the Judge's decision to the Administrative Review Division. In such a case, a panel of three Board Commissioners will rule on the validity of the Judge's decision. Failing a unanimous decision by the panel, a mandatory full Board review by all thirteen Commissioners may be requested within 30 days of the filing date of the Board panel's decision. In addition, when the decision of the panel is unanimous, a party may seek discretionary full Board review. When a party files a discretionary full Board application, the Board has the option to grant or deny full Board review. The decision of the full Board may be further appealed to the State Appellate Division, Third Department (WCL §23).

The WCL requires that almost all employers in New York State maintain workers' compensation insurance coverage for their employees (WCL §3). Workers' Compensation Law also gives the Board statutory authority to ensure that employers obtain and maintain the required workers' compensation insurance (WCL §50). New York has a comprehensive system for ensuring that employers obtain and maintain the required workers' compensation insurance. The system includes a database to identify employers and their insurance coverage, investigators, educational outreach, an automated penalty process, an appeal process, outside collection agencies, and the issuance of judgments. In addition to these internal functions, the WCL provides for an external enforcement tool. A business must provide proof of workers' compensation compliance prior to receiving a permit, license or contract from a municipality or State agency (WCL §57).

The WCL, as amended by Chapter 6 of the Laws of 2007, allows for stop work orders to be issued when an employer has no coverage or fails to pay workers' compensation penalties (WCL §141-a). In addition, that 2007 Workers' Compensation Reform Legislation subjects employers to penalty (WCL §131) when they fail to keep proper or sufficient records regarding compensation and classification of workers. Further, civil penalties and criminal fines may be issued if an employer intentionally understates or conceals payroll, misclassifies employee duties, or hides any other information to falsely reduce the amount of premium that should be paid (WCL §52(1)(d)).

New York State Insurance Department

The second major player, the New York State Insurance Department, is directly responsible for authorizing insurance carriers to write New York State workers' compensation insurance policies. The Insurance Department is also responsible for administering the underwriting rules for workers' compensation insurance in New York State. As part of this responsibility, the Insurance Department reviews the recommended revisions to workers' compensation rates for approval or disapproval each year. The Insurance Department has authorized another major player in the New York State workers' compensation system, the New York Compensation Insurance Rating Board (CIRB) to initially develop the revised workers' compensation insurance rates and to actually oversee the underwriting rules for workers' compensation insurance policies.

New York Compensation Insurance Rating Board

The New York Compensation Insurance Rating Board (CIRB) is a nonprofit, unincorporated association of insurance carriers, including the State Insurance Fund. In conjunction with the WCL, the Insurance Law provides for the Superintendent of Insurance to designate a statistical organization to collect the loss, premium and payroll data from each carrier, summarize this information and develop an adequate rate structure.

Since the enactment of the law, CIRB has been licensed as the official organization to collect data and develop workers' compensation rates. CIRB analyzes that data and recommends annual reductions or increases in premium rates to the Insurance Department.

In 2008, New York State moved to a loss cost system for workers' compensation rates. In a loss cost system, CIRB will continue to collect and aggregate industry data, but rather than file a manual rate with the New York State Insurance Department for approval, it will only submit the loss costs, which is that portion of the rate that does not include general expenses such as overhead, taxes, or profit. Rates, subject to New York State Insurance Department's approval, will then be determined using carrier-specific "Loss Cost Multipliers" that are filed by each carrier and reflect each carrier's individual underwriting skill and expense structure. This lost cost approach is currently used by a majority of states. It is anticipated that this rate-setting process will increase price competition among insurers.

CIRB also develops experience modification factors for employers with premiums in excess of $5,000; and establishes the rules and procedures, and classifications governing the underwriting of workers' compensation insurance and employer liability insurance.

For more information, please contact the New York Compensation Insurance Rating Board (CIRB) at 212-697-3535 or at www.nycirb.org .

Insurance Carriers

Insurers are the fourth major player in the workers' compensation system and are comprised of private insurance carriers, the State Insurance Fund, self-insured employers and employers that are participating in group self-insurance.

Private Insurance Carriers

Private insurance carriers collect premiums from employers to pay for the claims and related medical expenses of employees who are injured on the job. Over 200 private insurance carriers are currently authorized by the Insurance Department to provide workers' compensation insurance to employers.

State Insurance Fund

The New York State Insurance Fund (SIF) is a not-for-profit agency of the State of New York that was established pursuant to the WCL in 1914 to provide a guaranteed source of workers' compensation insurance coverage at the lowest possible cost to employers within New York State (WCL §76 - 100). Despite its State agency status, SIF is a self-supporting insurance carrier that competes with private insurers. Just like any insurance carrier, SIF collects premiums from employers to pay for the claims and related medical expenses of employees who are injured on the job. The premiums are required by law to be fixed at the lowest possible rates. SIF must provide insurance to any employer seeking coverage, regardless of the employer's type of business, safety record or size. However, if an employer owes SIF money from a previous bill or account, SIF may deny coverage.

SIF is a totally separate and distinct entity from the New York State Workers' Compensation Board.

Self-Insurers

An employer qualifies as a self-insurer by furnishing to the Chair of the Board satisfactory proof of its financial ability to pay compensation. Employers who wish to self-insure may do so in one of three ways: (1) by becoming an individual self-insurer or (2) by becoming a member of a self-insured group or (3) by being a local government entity that has not obtained a workers' compensation insurance policy. **Private employers who wish to self-insure for either workers' compensation or disability benefits must apply to and be approved by the Board's Office of Self-Insurance.**

Individual Self-Insurance

Individual self-insurance is primarily used by **larger employers** who can meet the significant financial standards to self-insure in their own right. Every private individual self-insurer must post with the Board a security deposit which is based upon their outstanding indemnity and medical obligations. These deposits can take the form of a surety bond, letter of credit, cash and/or certain types of securities. The amounts posted are updated every year. In the event that the employer defaults on its obligations the deposit will be used by the

Board to ensure claimants receive the benefits to which they are entitled. (WCL §50 [3]). In addition, all members of the individual and group self insurance programs are subject to an assessment made pursuant to WCL §50 (5). This assessment is used to make claims payments to injured workers when a group or individual self insurer has defaulted and is unable to make such payments.

Group Self-Insurance

Joining a group is an alternative that allows smaller employers who may not meet the criteria for individual self-insurance to enjoy the privilege of self-insurance. Group self-insurers consist of employers performing related activities in a given industry that contractually agree to assume the workers' compensation liabilities of each associated member. Each group is controlled by a board of trustees, at least two-thirds of which must be representatives of employer members. In addition, most trustees will hire a group administrator and a licensed third party administrator to handle many of the day to day functions of running the group. Groups must maintain a trust fund dedicated to the payment of the workers' compensation obligations of the employer members. (WCL §50 [3-a.]) Members of a group self-insured trust must also file an application for participation in the group as well as an indemnity agreement acknowledging their joint and several liability to the trust and the other trust members. Joint and several liability means that each member is liable not only for those benefits, losses and assessments associated with its own employees but also for those of the other members. In addition, all members of the individual and group self insurance programs are subject to an assessment made pursuant to WCL §50 (5). This assessment is used to make claims payments to injured workers when a group or individual self insurer has defaulted and is unable to make such payments.

Local Government Self-Insurance

A county, city, village, town, school district, fire district or other political subdivision of the State is automatically considered self-insured unless it purchases a workers' compensation insurance policy. Nevertheless, it is required to file with the Board a notice of election to self-insure along with a resolution from its governing body, which states that they have elected to provide workers' compensation benefits through self-insurance. Political subdivisions that elect to self-insure for workers' compensation are exempt from posting security deposit or maintaining dedicated trust funds. The basis for this exemption is that political subdivisions have the ability to utilize their taxing authority to guarantee the payment of their claims. (WCL §50 [4-a.])

New York State Department of Labor

Under the 2007 Reform Legislation, the Department of Labor was assigned a number of responsibilities including developing the State's average weekly wage for purposes of computing maximum weekly workers' compensation benefits for accidents that occur after July 1, 2010. The Commissioner of Labor will also determine hardship safety net benefits for claimants that are over 80% disabled but have exhausted their benefit timeframe under the 2007 Reform Legislation for receiving Permanent Partial Disability payments.

Chapter Three

Who is Covered by the Workers' Compensation Law?

Virtually all employers in New York State must provide workers' compensation coverage for their employees (WCL §2 and 3). Employers must post notice of coverage in their place(s) of business (WCL §51). Employers must cover the following workers for workers' compensation insurance:

1. Workers in all employments conducted for-profit. Part-time employees, borrowed employees, leased employees, family members and volunteers working for a for-profit business must also be covered under the Workers' Compensation Law (WCL §3 Groups 1-14-a);
2. Employees of counties and municipalities engaged in work defined by the law as "hazardous" (WCL §3 Groups 15, 15-a and 17);
3. Public school teachers, excluding those employed by New York City, and public school aides, including New York City (WCL §3 Groups 20, 20-a and 22);
4. Employees of the State of New York, including some volunteer workers (WCL §3 Group 16);
5. Domestic workers employed forty or more hours per week by the same employer, including full-time sitters or companions, and live-in maids (WCL §3 Group 12) (see Domestic Workers)
6. Farm workers whose employer paid $1,200 or more for farm labor in the preceding calendar year (WCL §3 Group 14-b) (see Farms)
7. Any other worker determined by the Board to be an employee and not specifically excluded from coverage under the WCL (WCL §3 Groups 1-14-a and 18);
8. All corporate officers if the corporation has more than two officers and/or two stockholders (WCL §54 [6]) (see Corporate Officer Coverage Requirements);
9. Officers of one-or-two person corporations if there are other individuals in employment. These officers may choose to exclude themselves from coverage (WCL §54 [6]) (see Corporate Officer Coverage Requirements); and
10. Most workers compensated by a nonprofit organization (WCL §3 Group 18) (see Nonprofit Organizations).

Volunteer Firefighters and Volunteer Ambulance Workers are provided benefits for death or injuries suffered in the line of duty under the Volunteer Firefighters' Benefit Law and Volunteer Ambulance Workers' Benefit Law.

Who is Not Covered by the Workers' Compensation Law?

1. Individuals who volunteer their services for nonprofit organizations and receive no compensation. Please note that compensation includes stipends, room and board, and other "perks" that have monetary value (WCL §3 Group 18). Money used solely to offset expenses incurred while performing activities for the nonprofit is not counted as a stipend (WCL §2 [9]);
2. Clergy and members of religious orders that are performing religious duties (WCL §3 Group 18);
3. Members of supervised amateur athletic activities operated on a nonprofit basis, provided that such members are not otherwise engaged or employed by any person, firm, or corporation participating in such athletic activity (WCL §3 Group 18);
4. People engaged in a teaching capacity in or for a nonprofit religious, charitable or educational institution (Section 501(c)(3) under the IRS tax code). (WCL §3 Group 18) To be exempt, the teachers must only be performing teaching duties;
5. People engaged in a non-manual capacity in or for a nonprofit religious, charitable or educational institution (Section 501(c)(3) under the IRS tax code (WCL §3 Group 18). Manual labor includes but is not limited to such tasks as filing; carrying materials such as pamphlets, binders, or books; cleaning such as dusting or vacuuming; playing musical instruments; moving furniture; shoveling snow; mowing lawns; and construction of any sort;
6. Persons receiving charitable aid from a religious or charitable institution who perform work in return for such aid and who are not under any express contract of hire (WCL §3 Group 18), and certain persons receiving rehabilitation services in a sheltered workshop (Mental Hygiene Law §33.09);
7. People who are covered for specific types of employment under another workers' compensation system such as those employed in certain maritime trades, interstate railroad employees, federal government employees and others covered under federal workers' compensation laws;
8. The spouse and minor children (under 18 years old) of an employer who is a farmer as long as they are not under an express contract of hire (WCL §2 [4]);
9. Certain employees of foreign governments and Native American Nations (see Foreign Government Employees and Native American Enterprises);
10. New York City police officers, firefighters, and sanitation workers who are covered under provisions of the New York State General Municipal Law. Uniformed police officers and firefighters in other municipalities may also be excluded;
11. People, including minors, doing yard work or casual chores in and about a one-family, owner-occupied residence or the premises of a nonprofit, noncommercial organization (WCL §2 [4]). Casual means occasionally, without regularity, without foresight, plan or method. Coverage is required if the minor handles power-driven machinery, including a power lawnmower;

12. Certain real estate salespersons who sign a contract with a broker stating that they are independent contractors (WCL §2 [4]) (see Real Estate Brokers);
13. Certain media sales representatives who sign a contract stating that they are independent contractors (WCL §2 [4]) (see Media Sales Representatives);
14. Certain insurance agents or brokers who sign a contract stating that they are independent contractors (WCL §2 [4]) (see Insurance Agents); and
15. Sole proprietors, partners, and certain one/two person corporate officers with no other individuals providing services integral to the business (although coverage may be obtained voluntarily) (WCL §2 [4]). See Sole Proprietorships , Partnerships , and Corporate Officer Coverage Requirements . Also see Who Is An Employee Under the Workers' Compensation Law for exceptions.

Who Is An Employee Under the Workers' Compensation Law?

Employees in For-profit Businesses

Under the Workers' Compensation Law, most individuals providing services to a for-profit business will be deemed an employee of that business and therefore must be covered by the employer for workers' compensation insurance. This applies unless those services are specifically excluded as employment under the WCL.

For workers' compensation insurance purposes, the term *employee* generally includes day labor, leased employees, borrowed employees, part-time employees, unpaid volunteers (including family members) and most subcontractors (see specific exclusions listed below under Identifying An Independent Contractor).

Many factors are used to decide whether an individual is an employee under the Workers' Compensation Law. If a business meets any of the criteria listed below, and the individual hired does not meet the criteria listed under independent contractors, or the services rendered are not specifically exempted as employment under the WCL, then that business must obtain a workers' compensation insurance policy.

The factors that are considered to determine whether an individual is an employee within the meaning of the WCL and thus must be provided with workers' compensation insurance coverage by the employer include:

Right to Control- The degree of direction and control a person or organization exercises over someone they contract with to perform a task is always a central issue in determining an employer-employee relationship. A person or organization controlling the manner in which the work is to be performed indicates that the task is being performed by an employee. If the person doing the labor controls the time and manner in which the work is to be done this may indicate that the task is being done by an independent contractor. If an individual is truly independent, the individual generally works under his/her own operating permit, contract or authority.

Character of Work Is the Same as Employer- Work being done that is consistent with the primary work performed by the hiring business indicates that the labor is being done by an

employee. Work done by a person that is different than the primary work of the hiring business may indicate the task is being performed by an independent contractor. (For example, someone installing shingles for a roofer is generally considered the employee of that roofer. Conversely, a plumber hired on a one time basis to fix a broken pipe for a retail store owner is generally considered an independent contractor,)

Method of Payment- Employees tend to be paid wages on an hourly, daily. weekly, or monthly basis. Naturally, employment is indicated if the hiring business withholds taxes and/or provides other employee benefits (Unemployment Insurance, health insurance, pensions, FICA, etc.) Whether the labor is paid using a W2 or 1099 Form for tax purposes does not matter in determining an employer/employee relationship for workers' compensation purposes. A business paying cash to an individual for services usually indicates that the individual is an employee. Payment made for performance of the task as a whole may indicate the task is being done by an independent contractor.

Furnishing Equipment/Materials- A business providing the equipment and/or materials used by people in performing the work tends to indicate an employer-employee relationship.

Right to Hire/Fire- A business retaining the authority to hire and fire the individuals performing the work indicates an employee is performing the work. An independent contractor retains a degree of control over the time when the work is to be accomplished and is not subject to be discharged by the hiring entity because of the method he chooses to use in performing the work. Naturally, an independent contractor's services may be terminated if the services rendered do not meet contractual requirements,)

All factors may be considered and no one factor alone determines whether a person will be considered an employee under the WCL.

Note: A workers' compensation law judge determines whether a person is considered an employee at a hearing following a work related accident or illness.

Employees in Nonprofit Organizations

Other than the exceptions listed under Nonprofit Organizations , individuals working for a nonprofit organization are considered employees under the WCL in the same manner as those working for a for profit business.

Identifying an Independent Contractor

2010 Construction Industry Fair Play Act

Overview

On August 27, 2010, the New York State Construction Industry Fair Play Act was signed into law (Chapter 418). This new law amended the Labor Law and the Workers' Compensation Law to establish a presumption of employment in the construction industry. The new statute took effect on October 26, 2010, and for workers' compensation purposes, applies to accidents which occur on or after that date.

The heart of the new law is Labor Law § 861-C which provides that any person performing services for a contractor is presumed to be an employee of that contractor. Contractor is broadly defined to include any sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity permitted to do business within the state who engages in construction work. Labor Law § 861-C is incorporated by specific reference into Workers' Compensation Law § 2(4). Therefore, any worker performing services for a contractor who is injured on or after October 26, 2010, will be presumed the employee of that contractor for workers' compensation purposes, subject to the independent contractor test contained in the statute.

Application

Under the Fair Play Act, any person working in construction is presumed to be the employee of the person or business for whom he or she is working.

a. For a person to be an independent contractor, the alleged employer must demonstrate ALL three of the following criteria:

    1. The person is free from control and direction in performing the job, both under contract and in fact,
    2. The person is performing services outside of the usual course of business for the company, and;
    3. The person is engaged in an independently established trade, occupation or business that is similar to the service s/he performs.

b. The law also contains a 12-part test to determine when a sole proprietor, partnership, corporation or other entity will be considered a "separate business entity" from the contractor. If an entity meets ALL of the 12 statutory criteria, it will not be considered an employee of the contractor. Instead, it will be a separate business entity that is itself subject to the new law regarding its own employees. A separate business entity must:

    1. be performing the service free from the direction or control over the means and manner of providing the service subject only to the right of the contractor to specify the desired result;
    2. not be subject to cancellation when its work with the contractor ends;
    3. have a substantial investment of capital in the entity beyond ordinary tools and equipment and a personal vehicle;
    4. own the capital goods and gain the profits and bear the losses of the entity;
    5. make its services available to the general public or business community on a regular basis;
    6. include the services provided on a federal income tax schedule as an independent business;
    7. perform the services under the entity's name;
    8. obtain and pay for any required license or permit in the entity's name;
    9. furnish the tools and equipment necessary to provide the service;

10. hire its own employees without contractor approval, pay the employees without reimbursement from the contractor and report the employees' income to the Internal Revenue Service;
11. have the right to perform similar services for others on whatever basis and whenever it chooses; and
12. the contractor does not represent the entity or the employees of the entity as its own employees to its customers.

Penalties

An employer that willfully violates the Fair Play Act by failing to properly classify its employees will be subject to civil penalties of up to a $2,500 fine per misclassified employee for a first violation and up to $5,000 per misclassified employee for a second violation within a five-year period.

Employers also may be subject to criminal prosecution (a misdemeanor) for violations of the act with a penalty of up to 30 days in jail, up to a $25,000 fine and debarment from bidding on or being awarded any Public Works contracts for up to one year for a first offense. Subsequent misdemeanor offenses would be punishable by up to 60 days in jail, up to a $50,000 fine and debarment from bidding on or being awarded any Public Works contracts for up to five years.

The term "willfully violates" means a contractor knew or should have known that his or her conduct violated the law. Workers' Compensation Law Judges will impose the civil penalties contained in the new law based on the evidence presented at the hearing.

Workers' Compensation Law Judges and the Bureau of Compliance may impose the penalties contained in the Fair Play Act. Penalties under the act are in addition to all existing civil and criminal penalties for misclassification, failure to provide required coverage or other violations of the Workers' Compensation Law, Labor Law or Tax & Finance Law.

Identifying Independent Contractors in Non Construction Industries

The following are factors that a workers' compensation law judge will consider to determine whether an individual is an independent contractor, and thus not an employee:

1. Control the time and manner in which the work is to be done;
2. Obtain a Federal Employer Identification Number from the Federal Internal Revenue Service (IRS) or have filed business or self-employment income tax returns with the IRS based on work or service performed the previous calendar year;
3. Maintain a separate business establishment from the hiring business;
4. Perform work that is different than the primary work of the hiring business and perform work for other businesses;
5. Operate under a **specific** contract, and is responsible for satisfactory performance of work and is subject to profit or loss in performing the specific work under such contract, and be in a position to succeed or fail if the business's expenses exceed income.

6. Obtain a liability insurance policy (and if appropriate, workers' compensation and disability benefits insurance policies) under its own legal business name and federal employer identification number;
7. Have recurring business liabilities and obligations;
8. If it has business cards or advertises, the materials must publicize itself, not another entity;
9. Provide all equipment and materials necessary to fulfill the contract; and
10. The individual works under his/her own operating permit, contract or authority.

Special Note for the Trucking Industry: To be considered an independent contractor, drivers must also be transporting goods under their own bill of lading and under their own Department of Transportation Number.

When Coverage Can or Cannot be Required: A business cannot require employees working for that business to obtain their own workers' compensation insurance policy or contribute towards a workers' compensation insurance policy (WCL §31, 32 and 32-a). Independent contractors may be required to maintain their own workers' compensation insurance policy if they intend to work for other businesses. For proper risk management and to ensure that its insurance premiums are as low as possible, a business that hires independent contractors should require those independent contractors to provide proof of their own workers' compensation insurance policies prior to commencing work (See C-105.2 , U-26.3 , GSI-105.2 and SI-12).

Therefore, a business may require an independent business that has its own employees to obtain a workers' compensation insurance policy if the independent business is working as a subcontractor. (An independent business usually has characteristics such as media advertising, commercial telephone listing, business cards, business stationary or forms, its own Federal Employer Identification Number (FEIN), working under its own permits or operating authority, business insurance (liability & WC), and/or maintaining a separate establishment. The independent business has a significant investment in facilities and means of performing work.)

For example, if Business A contracts with Business B to perform services and Business B is an independent business with its own employees, Business A can require Business B to have its own workers' compensation insurance policy and obtain a certificate of insurance for this policy. This will help ensure that Business A's workers' compensation premiums are as low as possible and shield business A from liability under the Workers' Compensation Law.

Examples Where Workers' Compensation Insurance Coverage is Generally Required

Whether a worker is covered under the WCL is always a factual determination by the Board. The following examples are intended to be illustrative and not determinative. In each case the determination of whether a worker is covered will turn on the particular facts of a case at the time of injury.

Example 1. Doctors and nurses staffing an Emergency Room at a hospital are generally considered employees of that hospital under the Workers' Compensation Law since their services are an integral part of the operations of the hospital and the method and manner of their work is generally controlled by the hospital.

Example 2. A bookkeeper that works one day per week on-site at the business location of a general contractor is generally an employee of that general contractor, even if that bookkeeper works for other employers on other days.

Example 3. Persons hired to paint buildings by a painting company are likely to be deemed employees since their services are an integral part of the operations of the painting company and the work of the individual painters is the same as that of the painting company. (Fair Play Act)

Example 4. Persons hired by a roofing company to install shingles are likely to be deemed employees since their services are an integral part of the operations of the roofing company and the work of the individual roofer is the same as that of the roofing company. (Fair Play Act)

Example 5. People hired as computer programmers for a computer software company are likely to be deemed employees since their services are an integral part of the operations of the computer software company and computer programming is the same type of work as the computer software company.

Example 6. A barber rents space from a barbershop owner on a monthly basis. The space includes the chair, sink and other amenities. The store is in a mall and as part of the contract with the mall; the storeowner must keep the barbershop open from 10 AM through 10 PM seven days per week. The barbershop owner requires the barber to work on specific days and times. This barber is generally considered an employee under the Workers' Compensation Law since the owner of the barbershop controls the hours that the barber is required to work.

Example 7. The owner of a large apartment building contracts with a management company to provide a superintendent for the apartment building. The superintendent can be considered the employee of either or both the apartment building owner and/or the management company because each entity controls the superintendent's activities. Accordingly, the apartment building owner needs to obtain a workers' compensation insurance policy since the superintendent's work is integral to the operations of the apartment building. Further, it would be practical for the owner of the apartment building to require the management company to have a workers' compensation insurance policy and obtain a certificate of insurance for this policy. This will help ensure that the owner of the apartment building's premiums are as low as possible and shield the owner from workers' compensation liability.

Example 8. The owner of ABC Trucking Inc, a trucking company, hires drivers to drive its trucks. The trucks are all registered with the Department of Transportation under the name of ABC Trucking Inc. The drivers are generally considered employees of ABC Trucking Inc under the Workers' Compensation Law.

Example 9. ABC Taxi Company Inc. has medallions for 10 taxis. Cab drivers pay a fixed fee to lease the taxis on a daily basis. The taxi drivers are generally considered employees of ABC Taxi Company Inc under the Workers' Compensation Law. Any dispatcher, taxi owner or medallion broker who does not personally drive the taxi 40 or more hours per week must have a workers' compensation insurance policy to cover the drivers of the taxi. In addition, for the lessee to be considered an independent contractor, the owner-operator may not control, direct, supervise, or have the power to hire or fire such lessee (WCL §2 [4]). (see Taxi Cabs)

Example 10. ABC Home Delivery Food Company Inc has "owner operators" purchase its refrigerated trucks, company uniforms and all frozen foods that these "owner operators" will then sell and deliver to customers. These "owner operators" have assigned regions and can only sell within their regions. Further, these "owner operators" have signed a contract indicating that they cannot sell products from competitors of ABC Home Delivery Food Company. These "owner operators" are generally considered employees of ABC Home Delivery Food Company Inc under the Workers' Compensation Law because ABC maintains control over the method and manner of these services.

Example 11. ABC Nursing Home Inc pays no employees, but instead, borrows all of its employees from XYZ Hospital Inc. XYZ Hospital Inc pays for all the salaries and benefits for all of the employees who work for XYZ Hospital Inc. and also for those who work for ABC Nursing Home Inc. In this example, both XYZ Hospital Inc and ABC Nursing Home Inc must have a workers' compensation policy under their respective legal name and FEIN since both corporations are using people to provide their services. If there is common majority ownership between these two corporations, there can be one policy that lists both legal entities as insureds. Each legal entity would be able to obtain Certificates of Insurance listing their respective legal name and FEIN.

Example 12. A trucker drives a truck owned by ABC Trucking Company Inc. The bill of lading lists ABC Trucking Company Inc and the truck has Department of Transportation Numbers printed on it that belong to ABC Trucking Company Inc. The driver is generally considered an employee of ABC Trucking Company Inc.

Examples Where Workers' Compensation Insurance Coverage is Generally Not Required Because the Worker is Not an Employee Under the Law

Whether a worker is covered under the WCL is always a factual determination by the Board. The following examples are intended to be illustrative and not determinative. In each case the determination of whether a worker is covered will turn on the particular facts of a case at the time of injury.

Example 1. An accountant owns her own business and has her own office. She is hired to do an annual tax return for a restaurant. This accountant is likely to be deemed not an employee under the Workers' Compensation Law. A professional that does not work on site for a business and has complete control as to when and how to accomplish the work and obtains work from many clients is generally not an employee under the Workers' Compensation Law.

Example 2. A clothing retail storeowner has a broken pipe in the retail store, looked in the yellow pages of the phone book, and called a plumber to fix the pipe. The plumber comes whenever his time permits, in a company truck with the plumbing company's logo on it and brings his own materials and equipment. The plumber is generally not an employee of the clothing retail store under the Workers' Compensation Law. It may be practical for the clothing retail storeowner to obtain a certificate of workers' compensation insurance from the plumber. This will help ensure that clothing retail storeowner premiums are as low as possible.

Example 3. A beautician rents space from a beauty shop owner on a monthly basis. The space includes the chair, sink and other amenities. The beautician sets her own appointments, has her own license, brings her own cutting tools and orders her own supplies. She comes and goes as she pleases. This beautician is generally not an employee under the Workers' Compensation Law.

Example 4. A person who buys merchandise at a wholesale rate and sells that merchandise in addition to competitors merchandise at retail price at any location and at any time of his/her choosing is generally not an employee under the Workers' Compensation Law.

Example 5. A truck driver that owns his own truck, has his own Department of Transportation numbers printed on the truck, hauls for various businesses and operates under his own bill of lading is generally not an employee under the Workers' Compensation Law.

Additional New York State Workers' Compensation Coverage Situations

Athletic Leagues/Teams/Businesses

For-profit athletic leagues/teams/businesses

For-profit athletic leagues/teams/businesses are required to carry a New York State workers' compensation insurance policy if they have any individuals working in New York State. This includes individuals playing any games, recruiting, scouting or any other activity for the athletic leagues/teams/businesses. This also includes any individuals that are "volunteering" their services.

Nonprofit athletic leagues/teams/businesses

Athletes. Athletes involved in supervised amateur athletic activities operated on a nonprofit basis are not required to be covered by NYS workers' compensation insurance, provided that such athletes are not otherwise engaged or employed by any person, firm, or corporation participating in such athletic activity (WCL §3 Group 18). This includes Division 1 athletes that play for nonprofit colleges and universities even though they are receiving scholarships, room and board.

Coaches and Other Staff. Nonprofit youth leagues/teams that are **NOT** classified as religious, charitable or educational (Section 501(c)(3) under the IRS tax code) and are compensating coaches, trainers, referees, concession stand staff or any other individuals are required to carry a New York State workers' compensation insurance policy to cover the compensated coaches, trainers, referees, concession stand staff or other individuals working for the league.

Nonprofit youth leagues/teams that **ARE** classified as religious, charitable or educational (Section 501(c)(3) under the IRS tax code) and are compensating trainers, referees, concession stand staff are required to carry a New York State workers' compensation insurance policy. Note: (Workers' compensation insurance is NOT required IF only coaches are compensated by religious, charitable or educational nonprofit youth leagues/teams, since coaches are considered teachers and, as such, are not required to be covered by NY workers' compensation insurance. However such 501(c)(3) nonprofits are encouraged to obtain a voluntary workers' compensation insurance policy to protect both the employer and the coaches.

Black Car Operators

A black car operator, as defined in Article 6-F of the executive law ("The Black Car Law"), is an "employee" of the New York Black Car Operators' Injury Compensation Fund, Inc. WCL §2 [3 & 4] (NYBCOICF). NYBCOICF began providing coverage on January 20, 2000, and currently provides workers' compensation insurance coverage through the State Insurance Fund for the drivers affiliated with its members.

Limousine companies must become members of the NYBCOICF if they meet the criteria outlined in the statute. The members of NYBCOICF are large limousine companies (central dispatch facilities) that own less than 50% of their vehicles and receive 90% of their fares as

non-cash. Once a limousine company meets these requirements it MUST become a member of the Fund.

Black Car and limousine companies operating outside of New York State are also required to become members of the NYBCOICF if they do work in New York State and meet the criteria outlined in the statute.

The Fund derives its income to provide workers' compensation insurance, from a 2% surcharge, which is billed and collected by member companies from their clients and then remitted to the fund. The statute permits the fund to either increase or decrease the percentage by notifying and filing a request with the Department of State.

NYBCOICF does not cover Medallion Taxicabs or Community Car Service vehicles. Generally, the NYBCOICF only covers Black Car and Limousine drivers of NYBCOICF members. If a driver's dispatch facility is not a member of NYBCOICF, the driver cannot be covered by NYBCOICF no matter what vehicle he/she drives.

A list of NYBCOICF members is available at
http://newyorkblackcarfund.org/index.cfm?pgid=members

To report a claim by phone, call 1-888-4MY-CLAIM (469-2524). Prospective members can call the Administrator of the Black Car Fund at (716) 843-4545.

Borrowed Employees

A business may not "borrow" employees from another business without each business having New York State workers' compensation and disability benefits insurance coverage in its own legal name. The only exception is when a business obtains all of its employees from a Temporary Service Agency (TSA). When a TSA has a full New York State workers' compensation insurance policy and directly pays individuals, provides their direction and control, maintains the ability to hire and fire them and satisfies other factors as defined by case law in determining an employer/employee relationship, the TSA is generally considered the primary employer under the Workers' Compensation Law. (A Temporary Service Agency is a business that is classified as a temporary service agency under the business's North American Industrial Classification System (NAICS) code.)

Further, any business that is not a temporary service agency cannot lend its employees to another business without each business having a workers' compensation insurance policy in its own legal name. Accordingly, even "parent" corporations that lend employees to "subsidiary" corporations that the "parent" corporation fully owns must have a workers' compensation policy that lists all the legal entities using employees and must be able to provide proof of workers; compensation coverage for each of the legal entities using employees under their specific Federal Employer Identification Number (FEIN).

Corporate Officer Coverage Requirements

For-profit Corporate Officers with Employees: Coverage Requirements for Penalty Purposes

Any executive officer of a corporation who owns all the shares of stock and holds all the offices of the corporation and has employees is automatically included in the corporation's workers' compensation insurance policy (see Employees). This officer may choose to

exclude him/herself by filing an exclusion form with his/her insurance carrier at the time the policy is written or renewed. This document, Form C-105.51 , is available on the Board's website.

Any two executive officers of a corporation who each own at least one share of stock and between them own all the shares of stock and hold all the offices of the corporation and have employees are automatically included in the corporation's workers' compensation insurance policy (see Employees). One or both of the officers may choose to exclude themselves by filing an exclusion form with their insurance carrier at the time the policy is written or renewed. This document, Form C-105.51 , is available on the Board's website.

Please note that no corporate officers may be excluded if the corporation has more than two corporate officers or more than two shareholders, or where the two corporate officers do not own all the shares of stock (each owning at least one share.) WCL §2 [4], WCL §54 [6]

For-profit Corporate Officers with No Employees – Coverage Requirements for Penalty Purposes

Any executive officer of a corporation who owns all the shares of stock and holds all the offices of the corporation and has no other persons in his/her employ is automatically excluded from the WCL (See Employees). This officer may choose to include him/herself by obtaining a workers' compensation insurance policy.

Any two executive officers of a corporation who each own at least one share of stock and between them own all the shares of stock and hold all the offices of the corporation and have no other persons in their employ are automatically excluded from the WCL (See Employees). One or both of the officers may choose to be included by obtaining a workers' compensation insurance policy.

Please note that no corporate officers may be excluded if the corporation has more than two corporate officers or more than two shareholders, or where the one or two corporate officers do not own all the shares of stock (each owning at least one share.) WCL §54 [6]

For-profit Corporate Officers – Coverage Requirements for Subcontractors

General contractors routinely require that subcontractors provide proof of their own workers' compensation coverage in order to co-work on the job. This results in many one or two person owned corporations who are not otherwise legally required to include the corporate officer(s) in a workers' compensation policy, being required to purchase and/or include themselves in a workers' compensation insurance policy in order to work for a particular general contractor (See Identifying An Independent Contractor).

Nonprofit Executive Officer Coverage Requirements

A not-for-profit entity that is not compensating ANY individuals (including executive officers) for their services is not required to obtain a workers' compensation insurance policy. Please note that compensation includes stipends, room and board, and other "perks" that have monetary value. Money used solely to offset expenses incurred while performing activities for the nonprofit are not counted as stipends.

If a nonprofit has a workers' compensation insurance policy, the uncompensated executive officers of that not-for-profit corporation or unincorporated association are exempt, as long as that nonprofit corporation or association has elected to exclude those individuals from coverage. (Form C-105.52)

Compensated executive officers of a not-for-profit corporation or unincorporated association are exempt, as long as, the organization is classified as religious, charitable or educational (Section 501(c)(3) under the IRS tax code) and the executive officers perform no manual labor.

Manual labor includes but is not limited to such tasks as filing; carrying materials such as pamphlets, binders, or books; cleaning such as dusting or vacuuming; playing musical instruments; moving furniture; shoveling snow; mowing lawns; and construction of any sort.

All compensated executive officers of a not-for-profit corporation or unincorporated association that is not classified as religious, charitable or educational (Section 501(c)(3) under the IRS tax code) must be covered by a workers' compensation insurance policy. WCL §54 [6a.]

Domestic Workers Hired by Individuals

Domestic workers include chauffeurs, nannies, home health aides, au pairs, nurses, baby-sitters, maids, cooks, housekeepers, laundry workers, butlers, companions, and gardeners working in a private household.

Domestic workers employed forty or more hours per week by the same employer (including full-time sitters or companions, and live-in maids) are required to be covered by a New York State workers' compensation insurance policy. WCL §3 Group 12

Workers' compensation insurance is NOT required IF the only people who work for the household are domestic workers in a private household who individually work less than 40 hours per week for that household. Time spent at the residence including sleeping and eating and any additional time spent off premises running errands and performing other duties for the employer count towards the total hours worked per week. Also included in the calculation of hours worked per week are all hours where the employer requires the domestic worker's presence. For example, if the employer goes away for two full days and requires the domestic's presence, this counts as 48 hours worked.

While not required, a person who employs household help for less than 40 hours per week is encouraged to obtain a voluntary workers' compensation insurance policy to protect both the employer and the employee.

Please note that a homeowner's insurance policy's workers' compensation insurance rider does not cover any domestic employees for workers' compensation benefits. Insurance Law §3420(j)

Domestic Workers Provided by Agencies or Government Programs

Domestic workers arranged for and paid directly by domestic staffing or temporary service agencies are considered employees of those domestic staffing or temporary service agencies and not the residence that they are working in. Accordingly, as employees of a for-profit business, these "domestic workers" must be covered immediately by the staffing or temporary service agencies. (There is no forty hour per week minimum before coverage is required).

Also, for purposes of workers' compensation coverage requirements, domestic workers arranged for and paid directly by the state, a municipal corporation or other political

subdivision of the state which provides housekeeping, or nursing services to an injured employee or recipient of social services assistance or which arranges for such services by authorizing the hiring of an employee for such purposes is the employee of that government agency, if that domestic worker is employed forty or more hours per week by the same employer. WCL §58

Family Members

Family members providing paid or unpaid services to a for-profit business are counted as employees for workers' compensation coverage purposes (regular owner/officer exclusions apply). Please note that coverage is not required for the spouses and minor children of farmers. (See Farms) WCL §2 [4]

Farms

Workers' compensation insurance is not required for farms that have less than $1,200 of payroll in the preceding calendar year. Coverage must be obtained effective April 1st of the year immediately following the year where the farm had $1,200 of payroll.

The spouse and minor children (under 18 years old) of a farmer are NOT counted as employees under the WCL as long as they are NOT under an express contract of hire.

If a farm labor contractor recruits or supplies farm laborers for work on a farm, such farm laborers are generally deemed employees of the farmer. WCL §2 [4] WCL §3 Group 14-b.

Foreign Government Employees

Foreign Governments are not required to provide New York State workers' compensation coverage for the individuals working in America for those foreign governments as long as they are performing strictly governmental work for the foreign government and are not engaged in any commercial activity for that foreign government. (i.e. Clerks that are working for the Consulate General of Japan. These individuals are United States citizens that are performing strictly governmental work for Japan and are not engaged in any commercial activity for Japan. Based upon these understandings, the Consulate General of Japan does not require a New York State workers' compensation policy.) Please note that any individuals from a foreign government that are working on a commercial venture in New York State must be covered by a New York State workers' compensation insurance policy. (Workers' Compensation Board Subject No 370 issued May 12, 1994)

A domestic worker that is hired and paid directly by a foreign government employee (not the foreign government) is the employee of the individual and not the foreign government and subject to the New York State Workers' Compensation Law regarding domestic employees.

Homeowners Workers' Compensation Insurance Rider

Section 3420 (j) of the New York State Insurance Law states:

Notwithstanding any other provision of this chapter or any other law to the contrary, every policy providing comprehensive personal liability insurance on a one, two, three or four family owner-occupied dwelling, issued or renewed in this state on and after the effective date of this subsection shall provide for coverage against liability for the payment of any obligation, which the policyholder may incur pursuant to the provisions of the workers' compensation law, to an employee arising out of and in the course of employment of less than forty hours per week, in and about such residences of the policyholder in this state. Such coverage shall provide for the benefits in the standard workers' compensation policy issued in this state. No one who purchases a policy providing comprehensive personal liability insurance shall be deemed to have elected to cover under the workers' compensation law any employee who is not required, under the provisions of such law, to be covered.

The term "policyholder" as used in this subsection shall be limited to an individual or individuals as defined by the terms of the policy, but shall not include corporate or other business entities or an individual who has or individuals who have in effect a workers' compensation policy which covers employees working in and about his or their residence.

Every insurer who is licensed by the superintendent to issue homeowners or other policies providing comprehensive personal liability insurance in this state shall also be deemed to be licensed to transact workers' compensation insurance for the purpose of covering those persons specified in this subsection.

Please note that the workers' compensation insurance rider of a homeowner's insurance policy does not cover any domestic employees for workers' compensation benefits nor does it cover people working for home-based businesses.

Further, if a homeowner has live-in or full time domestics, or wishes to voluntarily cover domestics working less than 40 hours per week, the homeowner MUST purchase a separate, standard workers' compensation insurance policy to cover those individuals.

Contractors that are deemed employees under the WCL and working a total of less than 40 hours a week in or around a one, two, three or four family owner occupied residence would be covered by the workers' compensation insurance rider. This is total hours for the employment — for example four individuals working 10 hours per week is equal to 40 hours. Any such employment that equals or exceeds 40 hours per week is not covered by the homeowner's insurance rider.

Please note that contractors performing minor repairs or painting in or around a one family owner occupied residence are not employees under the WCL.

Construction of a new home is never covered by the homeowner's workers' compensation insurance rider. A new home has not yet received a certificate of occupancy (CO), therefore it is not owner occupied and is not covered by the rider.

Independent Contractors and Subcontractors

A business cannot require employees working for that business to obtain their own workers' compensation insurance policy or contribute towards a workers' compensation insurance policy (see Employees).

However, a business may require an independent business that has its own employees to obtain a workers' compensation insurance policy if the independent business is working as a subcontractor. (An independent business usually has characteristics such as media advertising, commercial telephone listing, business cards, business stationary or forms, its own Federal Employer Identification Number (FEIN), working under its own permits or operating authority, business insurance (liability & WC), and/or maintaining a separate establishment. The independent business has a significant investment in facilities and means of performing work.)

For example, if Business A contracts with Business B to perform services and Business B is an independent business with its own employees, Business A can require Business B to have its own workers' compensation insurance policy and obtain a certificate of insurance for this policy. This will help ensure that Business A's workers' compensation premiums are as low as possible.

If an individual is truly independent, the individual works under his/her own operating permit, contract or authority. In many instances, individuals alleged to be subcontractors have been determined by the Board, acting in its adjudicatory capacity, to be employees when such individuals have been injured and have filed claims against the general contractor. As a result, insurance carriers often assess general contractors premiums for coverage of all "subcontractors" on the job site, unless the subcontractors furnish proof that they have their own workers' compensation insurance policy. Accordingly, general contractors routinely require that subcontractors provide proof of their own workers' compensation coverage in order to co-work on the job. This results in many sole proprietors, partnerships, and one or two person owned corporations with no employees who are not otherwise legally required to acquire a workers' compensation policy, being required to purchase a policy (and include themselves in that policy) in order to work for a particular general contractor. (see Identifying An Independent Contractor)

Insurance Agents -- Certain Licensed Insurance Agents Are Independent Contractors

Licensed Insurance Agents or Brokers are independent contractors IF the Licensed Insurance Agent or Broker meets ALL of the following requirements:

1. Has income based upon sales and not on the number of hours worked;
2. Is not a life insurance agent receiving a training allowance subsidy;
3. Has entered into a written contract that outlines the services that they are to perform -- this contract may be terminated by either party at any time upon notice given to the other party;
4. Can work any hours they choose;

5. Incur their own expenses including automobile, travel and entertainment (office facilities and supplies may be provided by real estate firm); and
6. Shall NOT be treated as an employee for State and Federal tax purposes (other than FICA that is required for full time life insurance agents).

For a complete description of the written contract requirements, refer to WCL §2 [4].

Jockey Fund

A jockey, apprentice jockey, or exercise person performing services for an owner or trainer in connection with the training or racing of a thoroughbred horse at a facility of a racing association or corporation subject to article two or four of the racing, pari-mutuel wagering and breeding law and subject to the jurisdiction of the New York State Racing and Wagering Board, is regarded as the "employee" of The New York Jockey Injury Compensation Fund, Inc. Such individual is also considered the employee of all owners and trainers who are licensed or required to be licensed under article two or four of the racing, pari-mutuel wagering and breeding law at the time of any occurrence for which workers' compensation benefits are payable for such jockey, apprentice jockey or exercise person. WCL §2 [3 & 4]

Leased Employees: Professional Employer Organization

Workers' Compensation Coverage Requirements for Clients of Leasing Firms

Leased employees are the employees of the company that is paying to lease them and that company must have a workers' compensation policy in its name. Article 31 section 922 of the Labor Law defines the relationship between the PEO and the client employer. The employer generally recruits and hires its employees and contracts with the leasing firm to handle the payroll, taxes and benefit packages for its employees. Leasing firms (PEOs) must be licensed by the New York State Department of Labor.

Currently, clients of PEOs may be covered by either of the following methods:

- Each client of a leasing firm may procure its own workers' compensation insurance policy to cover its leased employees (as well as any non-leased employees), or
- The leasing firm can procure a **separate** workers' compensation insurance policy to cover the leased employees of each of its client firms. Such a policy would identify the insured as: ABC Leasing Company Inc. L/C/F XYX Machine Shop Inc. This policy only covers the leased employees of the client firm. If the client firm hires any non-leased employees (and/or wishes to protect itself from the claims of uninsured subcontractors working for it), the client firm must purchase a separate workers' compensation policy to provide coverage to individuals not specifically listed on their contract with the PEO. Please contact the Compensation Insurance Rating Board (CIRB) at 212-697-3535 or at www.nycirb.org for more information regarding workers' compensation coverage requirements for clients of leasing firms (PEOs).

Workers' Compensation Coverage Requirements for the Leasing Firm

Regarding coverage requirements for the leasing firm itself, individuals performing the administrative services of the PEO are counted as employees of the PEO. However, leased employees used by the clients of the PEO are NOT counted as employees of the PEO.

Using the above employee definitions for PEOs, regular instate and out-of-state coverage requirements for legal entities apply.

LLCs & LLPs

Under Section 54 [8] of the Workers' Compensation Law, members of a Limited Liability Company (LLC) or a Limited Liability Partnership (LLP) are treated the same as partners of a business that is a partnership under the laws of New York State.

If the LLC or LLP has employees, the members of the LLC or LLP, themselves, are automatically excluded from that coverage. The members may elect to have themselves included in that coverage by filing a proper form, the C-105.32 with the insurance carrier. That coverage election form may be obtained from the insurance carrier.

Workers' compensation coverage is not required for members of a LLC or LLP that does not have employees. (See Employees) However, if a LLC or LLP that has no employees obtains a workers' compensation policy, the members of the LLC or LLP are automatically **included** in that policy. The members of a LLC or LLP may elect to have themselves excluded in that coverage by filing a proper form with the insurance carrier. That coverage election form may be obtained from the insurance carrier.

Workers' compensation insurance coverage is required for LLCs or LLPs that consist solely of members that are other business legal entities. Workers' compensation insurance coverage is also required for LLCs or LLPs that consist of a combination of an individual(s) and another business legal entity(ies).

Media Sales Representatives

Media sales representatives are independent contractors **if** the representative:

- Is a contractor engaged in the sale or renewal of magazine advertising space;
- Has income based upon sales/services and not on the number of hours worked;
- Is incorporated and shall be solely liable for payment of workers' compensation premiums;
- Has entered into a written contract (not entered into under duress) that outlines the services that Media Sales Representative will perform. This contract must include the following statements:

  The media sales representative:

  - Shall not be treated as an employee for State and Federal tax purposes;
  - Can work any hours they choose subject to restrictions in the New York State Business Law;
  - Can work at any site other than on the premises of the person for whom the services are performed;

- Incurs his/her own expenses other than those outlined in the written contract; and
- Is able to terminate the contract with two weeks notice given to the person for whom the services are performed.

For a complete description of the written contract requirements, refer to WCL §2 [4].

Models

Professional model means a person who, in the course of his or her trade, occupation or profession, performs modeling services. *Modeling services* means the appearance by a professional model in photographic sessions or the engagement of such model in live, filmed or taped modeling performances for compensation.

"Employee" shall include, for purposes of the Workers' Compensation Law, a professional model, who: (a) performs modeling services for; or (b) consents in writing to the transfer of his or her exclusive legal right to the use of his or her name, portrait, picture or image, for advertising purposes or for the purposes of trade, directly to a retail store, a manufacturer, an advertising agency, a photographer, a publishing company or any other such person or entity, which dictates such professional model's assignments, hours of work or performance locations and which compensates such professional model in return for a waiver of such professional model's privacy rights listed above, **unless such services are performed according to a written contract stating that such professional model is the employee of another employer.** WCL §2 [4]

Native American Enterprises

Workers' compensation insurance coverage is not required for Native American enterprises owned by the Native American tribe itself, such as casinos. However, Native Americans and non-Native Americans working at the enterprise may be covered voluntarily.

Workers' compensation insurance coverage is not required for enterprises not owned by the tribe, but instead owned by an individual, partnership, corporation etc., whose employees are working solely on a Native American reservation. However, Native Americans and non-Native Americans working at the enterprise may be covered voluntarily.

Any enterprise not owned by the Native American tribe itself that is working in New York State outside a Native American reservation must abide by the regular New York State coverage requirements for workers' compensation insurance.

New York Employers with Employees Working Outside New York State

Generally, a New York State workers' compensation policy covers all of a firm's employees who are located within New York State. That policy also covers employees that have incidental travel and temporary work assignments outside of New York State for New York workers' compensation insurance benefits if those employees are injured outside of New York State. In some cases an employee whose work site is located outside the state but whose employer's

office is located in New York State may be entitled to collect workers' compensation benefits in New York State. The Board may determine that the claim is subject to New York workers' compensation benefits if the employer directs and controls the out-of-state employees' work activities from the New York office, or the employer issues paychecks from the New York office.

Due to every state and nation having different thresholds as to when an outside company working in their jurisdiction needs their specific coverage, New York employers working outside of New York State, even temporarily, should check for the local workers' compensation requirements in each state or nation where the employer is conducting business.

Nonprofit Organizations

Individuals that volunteer their services for not-for-profits are generally not eligible for workers' compensation benefits. Accordingly, a not-for-profit entity that is not compensating individuals for their services is not required to obtain a workers' compensation insurance policy. Please note that compensation includes stipends, room and board, and other "perks" that have monetary value. Money used solely to offset expenses incurred while performing activities for the nonprofit are not counted as stipends.

Under WCL §2 [4] and WCL §3 Group 18, not-for-profits that are compensating individuals for their services are required to obtain a workers' compensation insurance policy with the following exceptions:

- Paid clergy and members of religious orders are exempt from mandatory coverage (but can be covered voluntarily). To be exempt the clergy and members of religious orders must be performing only religious duties.
- Members of supervised amateur athletic activities operated on a nonprofit basis, provided that such members are not otherwise engaged or employed by any person, firm, or corporation participating in such athletic activity.
- Paid individuals engaged in a teaching capacity in or for a religious, charitable or educational institution (Section 501(c)(3) under the IRS tax code) are also exempt from mandatory coverage (but can also be covered voluntarily). To be exempt, the teachers must only be performing teaching duties.
- Paid individuals engaged in a non-manual capacity in or for a religious, charitable or educational institution (Section 501(c)(3) under the IRS tax code) are also exempt from mandatory coverage (but can also be covered voluntarily). [Manual labor includes but is not limited to such tasks as filing; carrying materials such as pamphlets, binders, or books; cleaning such as dusting or vacuuming; playing musical instruments; moving furniture; shoveling snow; mowing lawns; and construction of any sort.]
- Persons receiving charitable aid from a religious or charitable institution (Section 501(c)(3) under the IRS tax code) who perform work in return for such aid and who are not under any express contract of hire, and certain persons receiving rehabilitation services in a sheltered workshop.

Nonprofit Executive Officer Exclusions

A not-for-profit entity that is not compensating individuals (including executive officers) for their services is not required to obtain a workers' compensation insurance policy. Please note that compensation includes stipends, room and board, and other "perks" that have monetary value. Money used solely to offset expenses incurred while performing activities for the nonprofit are not counted as stipends.

If a nonprofit has a workers' compensation insurance policy, its uncompensated executive officers of that not-for-profit corporation or unincorporated association are exempt, as long as that nonprofit corporation or association has elected to exclude those individuals from coverage (Form C-105.52).

Compensated executive officers of a not-for-profit corporation or unincorporated association are exempt, as long as the organization is classified as religious, charitable or educational (Section 501(c)(3) under the IRS tax code) and the executive officers perform no manual labor.

[Manual labor includes but is not limited to such tasks as filing; carrying materials such as pamphlets, binders, or books; cleaning such as dusting or vacuuming; playing musical instruments; moving furniture; shoveling snow; mowing lawns; and construction of any sort.]

All compensated executive officers of a not-for-profit corporation or unincorporated association that is not classified as religious, charitable or educational (Section 501(c)(3) under the IRS tax code) must be covered by a workers' compensation insurance policy. WCL §54 [6][a.]

Other States' Government Employees

New York's Workers' Compensation Law does not cover the government employees of any other states. Employees of any local government that is not located in New York State are also NOT COVERED by New York State's Workers' Compensation Law. Accordingly, other states and local governments that are not located in New York State are not required to provide New York State workers' compensation coverage for the individuals working in New York State for those government entities.

However, employees working for any publicly-owned corporations formed by other states may be covered by the New York State Workers' Compensation Law if the employee has been injured in an accident arising out of and in the course of employment in New York. Under such circumstances, both New York and the other state may have jurisdiction to adjudicate the claim (Workers' Compensation Board Subject No 370.1 issued May 12, 1994).

Out-of-state Employers with Employees JUST LIVING in New York State

Many businesses whose only locations are outside New York State have employees working for them who live in New York State. These employees, who are NY residents, commute to work to their employer's out-of-state business locations. Out-of-state employers having employees that just live in New York State and commute to work at a company location outside New York State are not required to carry New York State workers' compensation

insurance as long as those employees living in New York do not do any work for their employer's business in New York State. To be exempt, the employees just living in New York State must also not receive any direction and control in their homes from their out-of –state employer.

Out-of-state Employers with Employees WORKING in New York State

As part of the 2007 Workers' Compensation Reform Legislation, Workers' Compensation Law Section 50(2) was amended to state that when compensation is secured via a stock corporation, mutual corporation or reciprocal insurer authorized to transact the business of workers' compensation insurance in this state, that such coverage be obtained "through a policy issued under the law of this state."

On July 12, 2007, Subject Number 046-198 was issued stating that "effective September 9, 2007, all out-of-state employers with employees working in New York State will be required to carry a full statutory New York State workers' compensation insurance policy." A full, statutory NYS workers' compensation insurance policy is one where New York is listed in item 3A on the Information Page of an employer's workers' compensation insurance policy.

Thereafter, in September 2007, the Board posted on its website notice that the Board was reviewing the applicability of this provision to out-of-state employers whose employees are attending meetings, seminars, or other minimal activities in New York State. The Board has concluded its review of this matter and now issues the following **Out-of-State Employers policy**. Insurance carriers, agents, and brokers, as well as out-of-state employers, should carefully review this policy.

Full NY Workers' Compensation Coverage Required

An out-of-state employer with an individual or individuals working in New York State is required to have a full NYS workers' compensation insurance policy if that employer (as defined in the WCL) meets **ANY** of the following criteria:

- The employer is required to register with the NYS Department of Labor and pay Unemployment Insurance for any period in question.
- The employer has a permanent physical location in New York or has employees whose primary work location is here.
- The employer is operating in New York under a permit, contract, or license granted by the State of New York, its counties or any municipality as defined under §57 of the Workers' Compensation Law.
- The employer is working as a contractor/general contractor/subcontractor on a construction project in New York.
- In the previous year, the employer had employees physically in New York for:
    - at least 40 hours of every week for a period of longer than 2 consecutive weeks; or
    - 25 or more individual days (e.g.- 5 employees working for 5 days in New York equals 25 individual employee days).

Employees traveling through the State not stopping for deliveries, pick-ups, or other work are not deemed to have worked a day here. An employer that has reason to know that it will meet these criteria in the current year, even if it has not done so in the prior year, must obtain the required coverage.

If an out-of-state employer with an individual or individuals working in New York State meets any of the above requirements, NY **MUST** be listed on Item 3A on the Information Page of an employer's

workers' compensation insurance policy. This means that the employer is fully covered under the NY Workers' Compensation Law.

Full NY Workers' Compensation Coverage NOT Required, 3C Coverage Acceptable

When out-of-state employers send employees into New York for work purposes and a full, statutory NYS workers' compensation insurance policy is not required, the employer must have such coverage for workers' compensation as required under the laws of its state, and New York must be listed in item 3C on the Information Page of the employer's workers' compensation insurance policy. If the insurance carrier writing the out-of-state employer's workers' compensation insurance policy is not authorized by the NYS Insurance Department to write workers' compensation and employers' liability coverage in New York, for the 3C coverage to comply with this policy, the insurance carrier must have completed, signed, and filed the **Statement of Compliance With Workers ' Compensation Law** with the Chair, Form C-105.11 .

An out-of-state employer having a new worker's compensation insurance policy issued after February 1, 2011 by a private insurance carrier not licensed in New York and listing New York under 3C of that policy will not qualify for the specific exemptions set forth in the Out-of-State Employers Policy statement unless the carrier completes, signs, and files the **Statement of Compliance With Workers ' Compensation Law** with the Chair, Form C-105.11 .

The Board will post on its website a list of all carriers that have filed the Statement of Compliance with Workers' Compensation Law, and will provide periodic updates to such listing.

It may be appropriate to contact your insurance broker, carrier or agent, check with your trade association, or conduct additional research to find the most appropriate insurance coverage for your company. In addition, a New York State workers' compensation policy may be obtained from the New York State Insurance Fund by calling 1-888-875-5790 and a disability benefits insurance policy may be obtained from the New York State Insurance Fund by calling 1-866-697-4332.

Please contact the Board's Bureau of Compliance at 1-866-298-7830 if you have any questions regarding these requirements.

Partnerships

Workers' compensation coverage IS NOT required for partners of a business that is a partnership under the laws of New York State that does not have employees (see Employees).

Partners of a business that is a partnership under the laws of New York State and has employees are automatically **excluded** from the business' workers' compensation insurance coverage. The partners may elect to have themselves included in that coverage by filing Form C-105.32 with the insurance carrier. That coverage election form may be obtained from the insurance carrier or is available on the Board's website.

However, if a business that is a partnership under the laws of New York State has no employees but obtains a workers' compensation policy, the partners are automatically **included** in that policy. The partners may elect to have themselves excluded from that coverage by filing a proper form with the insurance carrier. That coverage election form may be obtained from the insurance carrier.

Workers' compensation insurance coverage is required for partnerships that consist solely of partners that are other business legal entities. Workers' compensation insurance coverage is also required for partnerships that consist of a combination of an individual(s) and another business legal entity(ies). WCL §2 [4] & WCL §54 [8]

Payroll Companies

Payroll companies can not and do not procure NYS workers' compensation and/or NYS statutory disability benefits insurance for their clients. Obtaining workers' compensation and statutory disability benefits insurance coverage is the sole responsibility of the clients of payroll companies, the employer.

Clients of payroll companies must directly obtain NYS workers' compensation and/or NYS statutory disability benefits insurances from insurance professionals. Please note that some payroll companies use their own insurance agents to assist clients in obtaining the necessary insurance for their companies. A payroll company may offer this assistance to its clients; however the insurance must be purchased by the client-employer in its own name and under the client-employer's FEIN.

Performing Artists

Employee shall include, for purposes of the Workers' Compensation Law, a professional musician or a person otherwise engaged in the performing arts who performs services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter.

If by written contract, such musician or person otherwise engaged in the performing arts is stipulated to be an employee of another employer covered by this chapter, then such musician or person otherwise engaged in the performing arts is considered an independent contractor of the TV or radio station or network etc. The party that is listed in the contract as the musician's or person's employer is responsible for providing workers' compensation coverage.

Engaged in the performing arts shall mean performing service in connection with the production of or performance in any artistic endeavor, which requires artistic or technical skill or expertise. WCL §2 [4]

Real Estate Brokers

Licensed real estate brokers or real estate sales associates are independent contractors if the licensed real estate broker or sales associate meets all of the following requirements:

1. Has income based upon sales and not on the number of hours worked;
2. Has entered into a written contract that outlines the services that they are to perform - this contract may be terminated by either party at any time upon notice given to the other party and must contain the following provisions:
3. Can work any hours they choose;
4. Can engage in outside employment;

5. Incur their own expenses including automobile, travel and entertainment (office facilities and supplies may be provided by real estate firm); and
6. Shall not be treated as an employee for state and federal tax purposes

For a complete description of the written contract requirements, refer to WCL §2 [4].

Religious Organizations

Workers' compensation insurance coverage is not required for a religious organization that only pays its clergy (including sextons), and/or teachers and/or individuals providing non-manual labor. (To be exempt the clergy must be performing only religious duties and the teachers must only be performing teaching duties.)

[Manual labor includes but is not limited to such tasks as filing; carrying materials such as pamphlets, binders, or books; cleaning such as dusting or vacuuming; playing musical instruments; moving furniture; shoveling snow; mowing lawns; and construction of any sort.]

Workers' compensation insurance is also not required for persons receiving charitable aid from a religious or charitable institution (Section 501(c)(3) under the IRS tax code) who perform work in return for such aid and who are not under any express contract of hire, and certain persons receiving rehabilitation services in a sheltered workshop.

A religious organization must be a nonprofit (Section 501(c)(3) under the IRS tax code) and as such does not require New York State workers' compensation insurance coverage as long as its members are volunteering their services on activities or enterprises that benefit only that religious organization. For example, volunteering in a religiously owned store — a store owned by the religious community itself, not someone who is a member of that religion. Another example is parishioners volunteering their services to build a picnic shelter for their church.

Volunteers cannot receive compensation including stipends, room and board, and other "perks" that have monetary value. Money used solely to offset expenses incurred while performing activities for the nonprofit is not counted as stipends.

If an enterprise is not owned by the religious organization itself, but instead is owned by an individual, partnership, corporation etc., then the enterprise must abide by the regular New York State coverage requirements for workers' compensation insurance.

In other words, if someone owns a business, it doesn't matter if he/she is Amish, Buddhist, Catholic, Christian Scientist, Hindu, Jehovah Witness, Jewish, Mennonite, Mormon, Muslim, Protestant or a member of any other religion, regular New York State coverage requirements for workers' compensation and disability benefits insurance apply to that business. Further, the private business is NOT covered by either the church's insurance or a declaration by the church that its members are self-insured. WCL §3 [18]

Sole Proprietorships

Workers' compensation coverage **is not** required for a sole proprietor who does not have employees (see Employees).

A sole proprietor that has employees is automatically **excluded** from the business' workers' compensation insurance coverage. The sole proprietor may elect to have him/herself included in that coverage by filing Form C-105.32 with the insurance carrier. That coverage election form may be obtained from the insurance carrier.

However, if a sole proprietor has no employees but obtains a workers' compensation policy, the sole proprietor is automatically **included** in that policy. The sole proprietor may elect to have him or herself **excluded** from that coverage by filing a proper form with the insurance carrier. That coverage election form may be obtained from the insurance carrier. This may occur when the sole proprietor is hiring subcontractors but does not wish to be included on the policy. WCL §2 [4] & WCL §54 [8]

Spouses

Except for the **spouses** of farmers, spouses providing paid or unpaid services to a for-profit business **are** counted as **employees for workers' compensation coverage purposes** under the Workers' Compensation Law (regular owner/officer exclusions apply). (Please see Spouse of Employer coverage requirements under the Disability Benefits Law.) WCL §2 [4]

Student Interns

Student interns are individuals that are providing services to gain work experience.

An unpaid student intern providing services to a for-profit business, a nonprofit or a government entity is generally considered to be an employee of that organization and should be covered under that organization's workers' compensation insurance policy. Workers' Compensation Law Judges have ruled that the training received by student interns constitutes compensation (even though the student interns may not be receiving actual "cash payments" for their efforts).

Exception: Please note that student interns (paid or unpaid) providing non-manual services to a religious, charitable or educational institution (covered under Section 501(c)(3) of the IRS tax code) are exempt from mandatory coverage (but can also be covered voluntarily). [Manual labor includes but is not limited to such tasks as filing; carrying materials such as pamphlets, binders, or books; cleaning such as dusting or vacuuming; playing musical instruments; moving furniture; shoveling snow; mowing lawns; and construction of any sort.]

Naturally, a paid student intern providing services to a for-profit business, a nonprofit (other than a nonprofit that is covered under Section 501(c)(3) of the IRS tax code) or a government entity should be covered under that organization's worker's compensation insurance policy.

Taxi Cabs - Most Taxi Cab Operators Are Considered Employees

A taxi driver, operator or lessee is an employee unless such person is leasing a taxi from the owner of the taxi and the owner of the taxi personally, regularly drives the taxi an average of 40 or more hours a week. For the lessee to be considered an independent contractor, the owner-operator may not control, direct, supervise, or have the power to hire or fire such lessee.

For Workers Compensation purposes ONLY, any independent livery base in New York City, and Nassau and Westchester Counties must provide coverage for these drivers through membership in the Independent Livery Drivers Benefit Fund or by obtaining a full New York workers' compensation insurance policy. Naturally, nonexempt office staff and dispatchers must also be covered by a full New York workers' compensation insurance policy. WCL §2 [3 & 4], WCL §18-c. Coverage may be obtained by calling 718-361-9191.

Temporary Service Agencies

A Temporary Service Agency provides workers to a variety of businesses. Based on New York State workers' compensation case law, such workers are generally considered to be the employees of the temporary service agency since that agency hires, fires, and has direction and control over these individuals. Therefore, it is the responsibility of the Temporary Service Agency to provide New York State workers' compensation insurance coverage to both its administrative staff and the workers that it sends out to various clients. (A Temporary Service Agency is a business that is classified as a temporary service agency under the business' North American Industrial Classification System (NAICS) code.)

Please note that any business that is not a temporary service agency cannot lend its employees to another business without each business having a workers' compensation insurance policy in its own legal name.

Unions

As a general rule, all for-profit unions in New York State need coverage – no exceptions.

A union that is established as a nonprofit entity and pays salaries and/or stipends to anyone, including its union officers and/or shop stewards, is required to obtain a New York State's workers' compensation insurance policy in that union's name. Money used solely to offset expenses incurred while performing activities for the nonprofit are not counted as stipends.

If a union is established as a nonprofit entity and does not pay salaries and/or stipends to anyone, then that union is exempt from New York State workers' compensation insurance requirements. Money used solely to offset expenses incurred while performing activities for the nonprofit are not counted as stipends.

Volunteers

Unpaid and uncompensated volunteers doing charitable work for a nonprofit organization are not considered employees and do not have to be covered by a workers' compensation policy. Please note that compensation includes stipends, room and board, and other "perks" that have monetary value. Money used solely to offset expenses incurred while performing activities for the nonprofit are not counted as stipends.

NOTE 1: For purposes of workers' compensation coverage, for-profit business entities cannot have "volunteers" doing work for the business. These individuals are employees and must be covered.

NOTE 2: Volunteer firefighters and volunteer ambulance workers are provided benefits for death or injuries suffered in the line of duty under the Volunteer Firefighters' Benefit Law and Volunteer Ambulance Workers' Benefit Law.

Wrap-Up Workers' Compensation Insurance Policies for Construction Projects

It is standard practice on large construction projects for the main general contractor to take out a workers' compensation insurance policy to cover all workers on a specific construction project job site. This policy is called a wrap-up policy. The wrap-up policy will have an expiration date that coincides with the projected completion date of the construction project.

All legal entity subcontractors are listed as separate policyholders on the wrap-up policy. The general contractor and the majority of the subcontractors will each also have their own separate workers' compensation insurance policy. These separate policies cover these employers for workers that are performing tasks not related to the specific construction project job site. In fact, insurers routinely require proof of the separate workers' compensation policies for general contractors and their subcontractors before adding them on to a wrap-up policy.

As a result, many contractors will have two or more separate active insurance policies. A "wrap-up" indicator identifies the wrap-up policies.

If you have any additional questions regarding workers' compensation coverage requirements, please call the Bureau of Compliance at (866-298-7830).

Business Permits/Licenses/Contracts and the Workers' Compensation Law

WCL §57 and §220 [8] require the heads of all municipal and State entities to ensure that businesses applying for permits, licenses or contracts have appropriate workers' compensation and disability benefits insurance coverages. This requirement applies to both original issuances and renewals, and also applies whether the governmental agency is having the work done or is simply issuing the permit, license or contract. (Prove It to Move It)

Ensuring that businesses receiving permits, licenses or contracts from municipal and State agencies, comply with the WCL protects both injured workers and employers. In addition, such oversight helps to level the playing field, by strictly enforcing the requirement that all businesses maintain mandatory insurance coverages. Municipal and State agency cooperation in enforcing WCL §57 and §220 [8] is a critical component of encouraging business compliance.

WCL §57 — Restriction on Issue of Permits and the Entering of Contracts Unless Compensation Is Secured

§57 of the WCL requires the heads of all State and municipal entities, prior to issuing any permits, licenses or entering into contracts, to ensure that businesses applying for those permits, licenses or entering into contracts have appropriate workers' compensation insurance coverage. (Please note: ACORD forms are NOT acceptable proof of New York State workers' compensation coverage under WCL §57.) (Prove It to Move It)

To comply with coverage provisions of the WCL, businesses must:

- Be legally exempt from the requirement to provide workers' compensation insurance coverage;
- Obtain such coverage from an insurance carrier; or
- Be self-insured.

To assist state and municipal entities in enforcing WCL §57, businesses requesting permits, licenses or seeking to enter into contracts must provide ONE of the following forms to the government entity issuing the permit, license or entering into a contract:

- CE-200 , Certificate of Attestation of Exemption from NYS Workers' Compensation and/or Disability Benefits Coverage; or
- C-105.2 — Certificate of Workers' Compensation Insurance (the business' insurance carrier will send this form to the government entity upon request) Please Note: The New York State Insurance Fund provides its own version of this form, the U-26.3 ; or
- SI-12 — Certificate of Worker's Compensation Self-Insurance (the business calls the Board's Self- Insurance Office at 518-402-0247), or
- GSI-105.2 — Certificate of Group Worker's Compensation Self-Insurance (the business' Group Self- Insurance Administrator will send this form to the government entity upon request).
- **NYS Agencies Acceptable Proof**: Letter from the NYS Department of Civil Service indicating the applicant is a New York State government agency covered for workers' compensation under Section 88-c of the Workers' Compensation Law and exempt from NYS disability benefits.

The certificate of exemption, Form CE-200 must only be used to show a government agency that the business is not required to obtain New York State workers' compensation and/or disability benefits insurance. Form CE-200 may not be used to "prove exemption" from workers' compensation and/or disability benefits insurance to another business or that business's insurance carrier.

Please call the Bureau of Compliance at (518) 486-6307 with any general questions regarding WCL §57 Workers' Compensation Law.

Businesses that are unsure as to whether they are required to obtain a New York State workers' compensation insurance policy should call the Workers' Compensation Board's Enforcement Unit in the nearest district office:

Albany — (518) 486-3349
Binghamton — (607) 721-8179
Brooklyn — (718) 802-6870
Buffalo — (716) 842-2057
Hauppauge — (631) 952-6698
Hempstead — (516) 560-7741
Manhattan — (212) 932-7576
Peekskill — (914) 788-5804
Queens — (718) 523-8409
Rochester — (585) 238-8335
Syracuse — (315) 423-1141

Out-of-State Companies Working in New York State

Workers' Compensation Insurance Requirements

Effective September 9, 2007, all out-of-state employers with employees or subcontractors working in New York State and obtaining a government issued permit, license or contract are required to carry a full, statutory New York State workers' compensation insurance policy.

An employer has a full, statutory New York State workers' compensation insurance policy when New York is listed in Item "3A" on the Information Page of the employer's workers' compensation insurance policy. Please contact the Board's Bureau of Compliance at 1-866-298-7830 if you have any questions regarding these requirements.

Workers' Compensation Restriction on Issuance of Government Issued Permits, Licenses and Contracts

To assist state and municipal entities in enforcing WCL §57, businesses requesting permits, licenses or seeking to enter into contracts must provide ONE of the following forms to the government entity issuing the permit, license or entering into a contract:

- CE-200 , Certificate of Attestation of Exemption from NYS Workers' Compensation and/or Disability Benefits Coverage; or
- C-105.2 — Certificate of Workers' Compensation Insurance (the business' insurance carrier will send this form to the government entity upon request) Please Note: The New York State Insurance Fund provides its own version of this form, the U-26.3 ; or
- SI-12 — Certificate of Worker's Compensation Self-Insurance (the business calls the Board's Self- Insurance Office at 518-402-0247), or
- GSI-105.2 — Certificate of Group Worker's Compensation Self-Insurance (the business' Group Self- Insurance Administrator will send this form to the government entity upon request).

Please note: Form CE-200 may be filed by out-of-state **employers** for a NYS workers' compensation exemption only if all work for the permit, license or contract is done outside of New York and no employees of the out-of-state business work in the state.

It may be appropriate to contact your insurance broker, carrier or agent, check with your trade association, or conduct other additional research to find the most appropriate insurance coverage for your company. In addition, a workers' compensation policy may be obtained from the New York State Insurance Fund by calling 1-888-875-5790 and a disability benefits insurance policy be obtained from the New York State Insurance Fund by calling 1-866-697-4332.

Disability Insurance Requirements

Please note: New York State statutory disability benefits (DB) insurance coverage is totally different from and is not included in New York State workers' compensation insurance coverage. Statutory New York State disability benefits insurance covers employees for an off-the-job accident, injury or illness and pays half an employee's weekly wage, up to $170 per week, for up to 26 weeks.

An out-of-state employer needs a New York State disability benefits insurance policy if the employer employs one or more individuals on each of at least 30 days in a calendar year in New York State.

It may be appropriate to contact your insurance broker, carrier or agent, check with your trade association, or conduct other additional research to find the most appropriate insurance coverage for your company. In addition, a disability benefits insurance policy be obtained from the New York State Insurance Fund by calling 1-866-697-4332 and a workers' compensation policy may be obtained from the New York State Insurance Fund by calling 1-888-875-5790 .

Disability Benefits Restriction on Issuance of Government Issued Permits, Licenses and Contracts

To assist state and municipal entities in enforcing Sec. 220 Subd. 8 of the New York State Disability Benefits Law, out-of-state businesses requesting permits, licenses or seeking to enter into contracts must provide one of the following forms to the government entity issuing the permit, license or entering into a contract:

- CE-200 , Certificate of Attestation of Exemption from NYS Workers' Compensation and/or Disability Benefits Coverage; or
- DB-120.1 — Certificate of NYS Disability Benefits Insurance (the business' disability benefits carrier will send this form to the government entity upon request)
- DB-155 — Certificate of NYS Disability Benefits Self-Insurance. (businesses that are self-insured in NYS for disability benefits insurance should call the Workers' Compensation Board's Self-Insurance Office at (518) 402-0247 to obtain this form.)

To be eligible for a disability benefits exemption using Form CE-200, an out-of-state **employer** must not have one or more individuals working on each of at least 30 days in a calendar year in New York. *(Independent contractors are not considered to be employees under the Disability Benefits Law.)*

Debarment Lists

The 2007 Workers' Compensation Reform Legislation included provisions that would prevent employers that had various types of workers' compensation noncompliance infractions from bidding on or being awarded Public Work Projects. (WCL §141-b)

Specifically, people are banned for one year from the conviction date for final assessments of civil fines, penalties or a stop work order. Those convicted of a misdemeanor under sections 26, 52 or 131 of the Workers' Compensation Law, and any substantially owned affiliated entity of such person are also barred from bidding on public work contracts or subcontracts with the state.

There is a five-year ban for felony convictions, or violators of the discrimination provisions of section 125 or 125-a of the Workers' Compensation Law. The debarment list is published on the Board's website.

For purposes of Workers' Compensation Law § 141-b (Suspension and debarment), the term 'public work' only applies to projects covered by Article 8 of the Labor Law, which is limited to only work related to public construction projects.

Failure to Maintain Accurate Payroll Records

An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years (WCL §131). An employer that fails to keep accurate payroll records may, in addition to all other penalties, fines or assessments, be penalized $1,000 for each ten day period of non-compliance or a sum not in excess of two times the cost of compensation for its payroll for the period of such failure.

Where the employer is a corporation, the president, secretary and treasurer thereof shall be liable for the penalty. Additionally, the fine for criminal conviction is from $5,000 to $25,000.

Misrepresentation

An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years (WCL §131). Any attempt by an employer to: 1) intentionally and materially understate or conceal payroll, 2) conceal employee duties to avoid proper classification, or 3) conceal any other information pertinent to the calculation of premium paid to secure compensation may result in a fine of $2,000 per every 10-day period of noncompliance or two times the cost of compensation. Additionally, the fine for criminal conviction is from $1,000 to $50,000. (WCL §52(1)(d)).

Examples of misrepresentation include:

Failure to pay appropriate workers' compensation premiums by:

a) Paying workers "off the books,"
b) Not reporting wages paid to illegal aliens,
c) Misclassifying employees as "independent contractors," and

d) Misclassifying the work of a business to a classification that is less hazardous (identifying all roofers as secretarial staff), and/or
e) Intentionally, materially misrepresenting or concealing information pertinent to calculation of premium paid.

Stop Work Orders

WCL §141-b states that a business may be issued a stop work order (which requires the immediate cessation of all business activities) if workers' compensation coverage is not in place or if there is any outstanding debt owed to the Board. Receipt of a stop work order may lead to debarment from any State, municipal or public body Public Works contract or subcontract for 1 year (5 years for felony conviction).

Chapter Four

Employers' Responsibilities

1. Employers must obtain and keep in effect workers' compensation coverage for their employees (See Employee); there must be no lapse in coverage even when switching insurance carriers.

2. The law requires almost all employers operating in New York State to have workers' compensation coverage for their employees. This requirement can be fulfilled by purchasing insurance coverage through an insurance carrier or by obtaining authorization from the Board to be self-insured.

3. According to Section 51 of the Workers' Compensation Law, employers must post a notice of workers' compensation coverage (Form C-105). Most employers obtain this form from their workers' compensation insurance carrier. Employers that are approved by the Board as self-insurers may contact the Self-Insurance Office at 518-402-0247 for copies of this form; while employers that are participating in Group Self-Insurance may contact their Group Administrator.

4. The Workers' Compensation Board prescribes Form C-105 and requires that the form include the name, address and phone number of the insurer and the policy number of the employer. It must be posted in a conspicuous place in the employer's place of business. Violations of this requirement can result in a fine of up to $250 per violation.

5. An employer must provide the Workers' Compensation Board with access to all books, records and payrolls related to employees upon request.

6. **Payroll Records** -- An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years (WCL §131). An employer that fails to keep accurate payroll records may, in addition to all other penalties, fines or assessments, be penalized $1,000 for each ten day period of non-compliance or a sum not in excess of two times the cost of compensation for its payroll for the period of such failure.

   Where the employer is a corporation, the president, secretary and treasurer thereof shall be liable for the penalty. Additionally, the fine for criminal conviction is from $5,000 to $25,000.

7. **Misrepresentation** -- An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years (WCL §131). Any attempt by an employer to: 1) intentionally and materially understate or conceal payroll, 2) conceal employee duties to avoid proper classification, or 3) conceal any other information pertinent to the calculation of premium paid to secure compensation may result in a fine of $2,000 per every 10-day period of noncompliance or two times the cost of compensation. Additionally, the fine for criminal conviction is from $1,000 to $50,000. (WCL §52(1)(d)).

8. Examples of misrepresentation include:

   Failure to pay appropriate workers' compensation premiums by:

   - Paying workers "off the books,"
   - Not reporting wages paid to illegal aliens,
   - Misclassifying employees as "independent contractors,"
   - Misclassifying the work of a business to a classification that is less hazardous (identifying all roofers as secretarial staff), and/or
   - Intentionally, materially misrepresenting or concealing information pertinent to calculation of premium paid.

9. An employer may not discriminate against an employee or applicant because he or she has claimed or attempted to claim workers' compensation or testifies in a workers' compensation hearing. (WCL §120)

10. An employer must report most injuries to the Board and the insurance company, if insured, on Form C-2 (Employer's Report of Work-Related Injury/Illness) within 10 days after an accident. An employer shall furnish a report of an occupational disease incurred by an employee on the same form. (WCL §110)

11. A record must be made and maintained on Form C-2 of ANY injury or illness incurred by an employee in the course of employment, even if the extent of the injury does not require that the C-2 be filed with the Board or carrier.

    A C-2 report must be filed with the Board and carrier if the accident results in personal injury which has caused or will cause a loss of time from regular duties of one day beyond the working day or shift on which the accident occurred, or which has required or will require medical treatment beyond ordinary first aid or more than two treatments by a person rendering first aid. Failure to file a C-2 or failure to file it timely may result in a penalty of up to $2,500.

12. C-2 forms must be maintained by the employer or designated third party for at least 18 years and are subject to review by the Board at any time.

13. An employer must report an injured worker's wages or other compensation to the Board on a Form C-240 , Employer's Statement of Wage Earnings.

14. An employer must report any changes in an injured worker's pay or work status to the Board on a Form C-11 , Employer's Report of Injured Employee's Change in Employment Status Resulting from Injury.

15. Certain employers must undergo safety consultations if directed to do so. If an employer has an experience modification factor of greater than 1.2 and a payroll in excess of $800,000, they must participate in a mandatory safety and loss prevention program, as outlined by the New York State Department of Labor. (WCL §134)

Employers' Rights

1. An employer has the right to request that the insurance carrier contest the compensability of a claim. A claim can be contested for a variety of reasons, including, for example, that the injury was not related to work or that the employee is not injured to the extent he or she is claiming. An employer can request that the insurance carrier contest the claim, but since the carrier has assumed liability for the claim, it is not required to comply with the employer's request. In addition, employers or carriers who engage in dilatory tactics will be penalized.
2. An employer has the right to attend any hearings related to a claim filed by one of the employer's workers.
3. An employer has the right to electronically access the Board's case file for a claim filed by the employer's worker by visiting one of the Board's customer service centers.
4. The Board's Electronic Case Folder (ECF) allows parties of interest to view the documents in the claim file electronically. Employers should go to one of the eleven district offices or 30 Customer Service Centers with identification to obtain a password to access the files. Based on the confidentiality of workers' compensation records, please be prepared to offer proof that you are the employer of record in the claim.
5. A self-insured employer, or an employer who has failed in his or her obligation to secure workers' compensation coverage, has the right to participate in the claims hearing and present relevant evidence about disputed issues at a hearing. Employers may request that a hearing be scheduled on a particular issue by writing to the appropriate district office in a timely manner. Corporations must be represented by counsel in proceedings before the Board. Certain defenses will be waived if they are not promptly raised or if the employer or carrier does not timely file a Form C-7 , Notice that Right to Compensation is Controverted.
6. An employer has the right to report suspected workers' compensation fraud to the Fraud Inspector General. Fraud Referral Hotline: 1-888-363-6001.
7. An employer has the right to seek administrative review and/or appeal to the Appellate Division. If insured, it may request that the insurance carrier seek review on appropriate grounds of a Board decision.
8. Any party may seek administrative review of a notice of decision within 30 days by writing to the Board and requesting Board review; however, a party filing a frivolous application may be penalized.
9. The WCL allows an employer to take reasonable steps to secure a steady, reliable and adequate work force. Employers may terminate employees who have filed workers' compensation claims and/or are receiving benefits IF the termination is not retaliatory but is happening for a valid business reason, such as misconduct, insubordination, lack of work/economic reasons, lengthy absence from work, inability to perform the job, or poor job performance. Employers are prohibited from terminating an employee because the employee has filed a claim for compensation or received compensation pursuant to WCL §120 or testifies in a workers' compensation hearing.

Chapter Five

Complying with New York's Workers' Compensation Law

The Workers' Compensation Law requires that employers obtain and continuously keep in effect workers' compensation coverage for all their employees. (See Employees)

Businesses meet this requirement of the law by:

- Obtaining and maintaining a workers' compensation insurance policy; or
- Obtaining self-insurance for workers' compensation; or
- Being legally exempt from the requirement to provide workers' compensation coverage.

Are Any For-Profit Businesses Exempt?

There are only very limited situations where for-profit businesses are exempt from providing workers' compensation coverage, including:

- The business is owned by one individual with no employees, no leased employees, no borrowed employees, no part-time employees, no unpaid volunteers (including family members) and no subcontractors and is not a corporation; or
- The business is a partnership under the laws of New York State, and there are no employees, no leased employees, no borrowed employees, no part-time employees, no unpaid volunteers (including family members) and no subcontractors; or
- The business is a one-or-two person owned corporation, with those individuals owning all of the stock and holding all offices of the corporation and there are no employees, no leased employees, no borrowed employees, no part-time employees, no unpaid volunteers (including family members) and no subcontractors. Specifically, if two people own the corporation, each person must own at least one share of stock and between them own all the shares of stock in the corporation. In addition, they both must be corporate officers and between the two of them hold all the offices of the corporation.

For further clarification, see Sole Proprietorships , Partnerships , and Corporate Officer Coverage Requirements . Also, see Identifying an Independent Contractor for exceptions.

What Does Workers' Compensation Insurance Buy?

When purchasing workers' compensation insurance, an employer is buying the following protections:

- Medical services needed to treat the job injury or illness;
- Temporary disability payments to the employee to help replace lost wages;
- Permanent disability payments to the employee to compensate for permanent effects of the injury;

- A death benefit for the employee's survivors in the event of a fatal injury;
- Legal representation for the employer by the insurance carrier; and
- Protection for the employer against most lawsuits for on-the-job injuries/illnesses.

The employer must pay for the cost of insurance coverage; it is illegal to require employees to pay any of the costs associated with workers' compensation premiums or injuries.

Obtaining Workers' Compensation Insurance Coverage

Employers may obtain workers' compensation insurance coverage in the following manner:

- Purchasing a workers' compensation insurance policy from one of the more than 200 private insurance carriers authorized by the New York State Insurance Department to provide workers' compensation insurance to employers and are currently writing such insurance. (It may be appropriate to contact your insurance broker, carrier or agent, check with your trade association, or conduct additional research to find the most appropriate insurance coverage for your company.);
- Purchasing a workers' compensation insurance policy from the New York State Insurance Fund , a public insurance carrier in New York State, by calling 1-888-875-5790;
- Becoming authorized by the Board to be individually self-insured for workers' compensation, typically reserved for larger employers who can demonstrate the financial strength to self-insure; or
- Becoming a member of a group self-insurer authorized by the Board.

Your firm's Federal Employer Tax Identification Number (FEIN) is the Workers' Compensation Board's primary identification for your business. Please note that each business that is a legal entity (i.e. Sole proprietorship, partnership, corporation, etc.) has its own, unique FEIN assigned to it. Sole proprietors may report their Social Security Number or obtain a FEIN for reporting purposes

If you need a FEIN, you can download an application (Form SS4) or apply on-line at the I.R.S. website . You can also obtain an application by calling the I.R.S. at 1-800-829-3676. For general information about the Internal Revenue Service, visit www.irs.gov .

PLEASE give your FEIN # to your insurance carrier when obtaining or modifying your workers' compensation coverage.

Once your firm has obtained a workers' compensation insurance policy, it is your workers' compensation insurance carrier's responsibility to electronically notify the NYS Workers' Compensation Board of that coverage using your firm's FEIN number.

Insurance Carriers

Private Insurance

Generally, private insurance is purchased through a broker or agent. Different insurance carriers cater to different markets and offer different incentives to policyholders. It is important for an employer to "shop around" to make sure that they are buying the coverage that is best for them. Some insurance carriers may choose not to write insurance for a

particular industry or size of employer. If employers find themselves in this situation, they should contact their agent and ask them to look around for other coverage. The costs can and do vary between insurance carriers due to discounts, dividends and incentive programs.

State Insurance Fund (SIF)

The New York State Insurance Fund is a not-for-profit agency of the State of New York that was established in 1914 to provide a guaranteed source of workers' compensation insurance coverage at the lowest possible cost to employers within New York State. Despite its State agency status, SIF acts as a self-supporting insurance carrier that competes with private insurers. Just like an insurance carrier, SIF collects premiums from employers to pay for the claims and related medical expenses of employees who are injured on the job. The premiums are required by law to be fixed at the lowest possible rates, since SIF must provide coverage to any employer who seeks it, regardless of type of business, safety record or size. However, if an employer owes SIF money from a previous bill or account, coverage can be denied.

Note: SIF is a separate and distinct entity from the New York State Workers' Compensation Board.

Safety Group Plans

The New York State Insurance Fund offers an alternative called Safety Groups, which are available to certain industries. These are plans designed for employers in the same trade or industry who, by cooperative effort, seek to curtail accidental injuries or occupational disease, thereby reducing their insurance costs. Qualified participants receive an advance discount. Based upon the safety performance of the members of the group, each group member receives a proportionate share of any dividend earned.

Self-Insurers

An employer qualifies as a self-insurer by furnishing to the Chair of the Board satisfactory proof of its financial ability to pay compensation. Employers who wish to self-insure may do so in one of three ways: (1) by becoming an individual self-insurer or (2) by becoming a member of a self-insured group or (3) by being a local government entity that has not obtained a workers' compensation insurance policy. **Private employers who wish to self-insure for either workers' compensation or disability benefits must apply to and be approved by the Board's Office of Self-Insurance.**

Individual Self-Insurance

Individual self-insurance is primarily used by **larger employers** who can meet the significant financial standards to self-insure in their own right. Every private individual self-insurer must post with the Board a security deposit which is based upon their outstanding indemnity and medical obligations. These deposits can take the form of a surety bond, letter of credit, cash and/or certain types of securities. The amounts posted are updated every year. In the event that the employer defaults on its obligations the deposit will be used by the Board to ensure claimants receive the benefits to which they are entitled. (WCL §50 [3]). In addition, all members of the individual and group self insurance programs are subject to an assessment made pursuant to WCL §50 (5). This assessment is used to make claims

payments to injured workers when a group or individual self insurer has defaulted and is unable to make such payments.

Group Self-Insurance

Joining a group is an alternative that allows smaller employers who may not meet the criteria for individual self-insurance to enjoy the privilege of self-insurance. Group self-insurers consist of employers performing related activities in a given industry that contractually agree to assume the workers' compensation liabilities of each associated member. Each group is controlled by a board of trustees, at least two-thirds of which must be representatives of employer members. In addition, most trustees will hire a group administrator and a licensed third party administrator to handle many of the day to day functions of running the group. Groups must maintain a trust fund dedicated to the payment of the workers' compensation obligations of the employer members. (WCL §50 [3-a.]) Members of a group self-insured trust must also file an application for participation in the group as well as an indemnity agreement acknowledging their joint and several liability to the trust and the other trust members. Joint and several liability means that each member is liable not only for those benefits, losses and assessments associated with its own employees but also for those of the other members. In addition, all members of the individual and group self insurance programs are subject to an assessment made pursuant to WCL §50 (5). This assessment is used to make claims payments to injured workers when a group or individual self insurer has defaulted and is unable to make such payments.

Local Government Self-Insurance

A county, city, village, town, school district, fire district or other political subdivision of the State is automatically considered self-insured unless it purchases a workers' compensation insurance policy. Nevertheless, it is required to file with the Board a notice of election to self-insure along with a resolution from its governing body, which states that they have elected to provide workers' compensation benefits through self-insurance. Political subdivisions that elect to self-insure for workers' compensation are exempt from posting security deposit or maintaining dedicated trust funds. The basis for this exemption is that political subdivisions have the ability to utilize their taxing authority to guarantee the payment of their claims. (WCL §50 [4-a.])

Getting the Right Coverage

Workers' Compensation insurance can be an expensive cost of doing business. However employers can take responsibility for those costs by following some of the tips below:

- Start getting quotes from a variety of insurance carriers through your agent. Do this several months before you need the policy.
- Make sure that the underwriter is using the proper classification of employees. If you misclassify your employees to get an initial lower rate, an audit will catch this and you will be charged retroactively. You may also be subject to penalties and/or felony prosecution for misclassification of employees.
- Discuss what types of alternative plans are available (deductibles, premium credits, safety programs).

- Research the insurer's claims handling practices. A carrier that either automatically pays every claim or controverts many claims can directly affect your premium in the future.
- Collect certificates of New York State workers' compensation insurance from all subcontractors that are providing services to your business. Insurance carriers routinely charge general contractors workers' compensation insurance premiums for all subcontractors not covered by their own New York State workers' compensation policies (see Independent Contractors).

It is important to note that WCL Section 31 specifically states that it is a misdemeanor for employers to make deductions from the salary or wages of an employee to offset the costs of workers' compensation insurance coverage. Employers may also be subject to penalties and fraud prosecution for misclassifying a direct employee as a subcontractor (see Employee). Further, Section 32 of the WCL specifically states that NO agreement by an employee to waive his/her right to workers' compensation benefits shall be valid if it does not relate to a specific claim and has not been approved by the Board.

Posting of Notice of Workers' Compensation Insurance Coverage

According to Section 51 of the Workers' Compensation Law, employers must post a notice of workers' compensation coverage (Form C-105). Most employers obtain this form from their workers' compensation insurance carrier. Employers that are approved by the Board as self-insurers may contact the Self-Insurance Office at 518-402-0247 for copies of this form; while employers that are participating in Group Self-Insurance may contact their Group Administrator.

The Workers' Compensation Board prescribes Form C-105 and requires that the form include the name, address and phone number of the insurer and the policy number of the employer. It must be posted in a conspicuous place in the employer's place of business. Violations of this requirement can result in a fine of up to $250 per violation.

If you have any questions, please call the Board's Bureau of Compliance at 866-298-7830 or the Self-Insurance Office at (518) 402-0247.

Penalties and Liabilities for Not Carrying Workers' Compensation Coverage

The law requires employers operating in New York State to have workers' compensation coverage for their employees, with limited exceptions. Employers are required to obtain and keep in effect workers' compensation coverage for all employees, even part-time employees and family members that are employed by the company. The following is a brief summary of the liability and penalties for violations of mandatory workers' compensation insurance coverage requirements.

Ascertaining Violations of the Law

The Workers' Compensation Board may require an employer to furnish proof that the employer:

- Has a valid workers' compensation insurance policy;
- Is self-insured for workers' compensation; or
- Is legally exempt from having to obtain workers' compensation coverage, and/or
- Is keeping proper, accurate business records.

If an employer fails to provide this information within 10 days following the Board's request, under the WCL the Board is required to assume that the employer is violating the WCL. (WCL §52 [3])

Personal Accountability

The sole proprietor, partners or the president, secretary and treasurer of a corporation are personally liable for the business' failure to secure workers' compensation insurance.

Liability for Claims Incurred by an Uninsured Employer

Section 26-a says an employer is liable for a penalty of $1,000 per 10-day period of noncompliance, plus the actual award (including both compensation and medical costs), plus any other penalties the Board assesses for noncompliance. In cases involving severely injured employees, the medical costs alone could be in the hundreds of thousands of dollars per injury.

Penalties for Noncompliance

1. **Failure To Secure Coverage (Criminal) --** Section 52 [1] (a) of the Workers' Compensation Law provides that a failure to secure the payment of compensation for five or less employees within a 12 month period shall constitute a misdemeanor punishable by a fine of not less than $1,000 nor more than $5,000.

   Failure to secure the payment of compensation for more than five employees within a 12 month period shall constitute a class E felony punishable by a fine of not less than $5,000 nor more than $50,000 and is in addition to any other penalties otherwise provided by law.

2. **Subsequent Failure To Secure Coverage (Criminal)** Section 52 [1] (b) Where any person has previously been convicted of a failure to secure the payment of compensation

within the preceding five years, upon conviction for a subsequent violation such person shall be guilty of a class D felony, fined not less than $10,000 nor more than $50,000 and is in addition to any other penalties including fines otherwise provided by law.

Cases investigated by the Board are referred to the Attorney General and the local district attorney's offices for prosecution.

3. **Misrepresentation (Civil and Criminal)--** An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years (WCL §131). Any attempt by an employer to:

    1) intentionally and materially understate or conceal payroll,

    2) conceal employee duties to avoid proper classification, or

    3) conceal any other information pertinent to the calculation of premium paid to secure compensation may result in a fine of $2,000 per every 10-day period of noncompliance or two times the cost of compensation. Additionally, the fine for criminal conviction is from $1,000 to $50,000. (WCL §52 [1] (d)).

    Examples of misrepresentation include:

    Failure to pay appropriate workers' compensation premiums by:

    a) Paying workers "off the books,"
    b) Not reporting wages paid to illegal aliens,
    c) Misclassifying employees as "independent contractors," and
    d) Misclassifying the work of a business to a classification that is less hazardous (identifying all roofers as secretarial staff), and/or
    e) Intentionally, materially misrepresenting or concealing information pertinent to calculation of premium paid.

4. **Failure To Secure Coverage (Civil)** Section 52 [5] of the Workers' Compensation Law provides that the Chair, upon finding that an employer has failed for a period of not less than ten consecutive days to make the provision for payment of compensation may impose upon such employer, in addition to all other penalties, fines or assessments, a penalty of $2,000 dollars for each ten day period of non-compliance or a sum not in excess of two times the cost of compensation for its payroll for the period of such failure, which sum shall be paid into the uninsured employers' fund.

    When an employer fails to provide business records sufficient to enable the chair to determine the employer's payroll for the period requested for the calculation of the penalty provided in this section, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the New York state average weekly wage, multiplied by 1.5. Where the employer is a corporation, the president, secretary and treasurer thereof shall be liable for the penalty.

5. **Failure To Maintain Accurate Payroll (Criminal)** Section 131 [1] of the Workers Compensation Law provides that every employer shall keep a true and accurate record of the number of his or her employees, the classification of employees, information regarding employee accidents and the wages paid by him or her for a period of four years

which records shall be open to inspection at any time, and as often as may be necessary to verify the same by investigators of the board, by the authorized auditors, accountants or inspectors of the carrier with whom the employer is insured, or by such other authorized by statute.

Any employer who shall fail to keep such records, who shall willfully fail to furnish such record as required in this section or who shall falsify any such records, shall be guilty of a misdemeanor and subject to a fine of not less than $5,000 nor more than $10,000 in addition to any other penalties otherwise provided by law. Any employer that has previously been subject to criminal penalties under this section within the prior ten years shall be guilty of a class E felony, and subject to a fine of not less than $10,000 nor more than $25,000 in addition to any penalties otherwise provided by law.

6. **Failure To Maintain Accurate Payroll Records (Civil)** Section 131 [3] of the Workers' Compensation Law provides that the Chair, upon finding that an employer has failed to keep accurate payroll records may impose upon such employer, in addition to all other penalties, fines or assessments, a penalty of $1,000 for each ten day period of non-compliance or a sum not in excess of two times the cost of compensation for its payroll for the period of such failure, which sum shall be paid into the uninsured employers' fund.

   When an employer fails to provide business records sufficient to enable the chair to determine the employer's payroll for the period requested for the calculation of the penalty provided in this section, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the New York state average weekly wage, multiplied by 1.5. Where the employer is a corporation, the president, secretary and treasurer thereof shall be liable for the penalty.

Additional Liability for Uninsured Employers

An uninsured employer is responsible for obtaining and paying for any legal representation required to defend against a workers' compensation claim. (An insured employer's workers' compensation insurance carrier provides such representation as part of the workers' compensation insurance policy's coverage.)

An uninsured employer can be directly sued by an injured employee. (WCL §11) (In most cases, an employer's workers' compensation insurance is the sole recourse for the employer's injured employees.)

An uninsured employer is responsible for all wage and medical benefits awarded to anyone ruled to be their employee. There is no cap on these benefits in New York.

Debarment Lists

The 2007 Workers' Compensation Reform Legislation included provisions that would prevent employers that had various types of workers' compensation noncompliance infractions from bidding on or being awarded Public Work Projects. (WCL §141-b)

Specifically, people are banned for one year from the conviction date for final assessments of civil fines, penalties or a stop work order. Those convicted of a misdemeanor under sections

26, 52 or 131 of the Workers' Compensation Law, and any substantially owned affiliated entity of such person are also barred from bidding on public work contracts or subcontracts with the state.

There is a five-year ban for felony convictions, or violators of the discrimination provisions of section 125 or 125-a of the Workers' Compensation Law. The debarment list is published on the Board's website.

For purposes of Workers' Compensation Law § 141-b (Suspension and debarment), the term 'public work' only applies to projects covered by Article 8 of the Labor Law, which is limited to only work related to public construction projects.

Failure to Maintain Accurate Payroll Records

An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years (WCL §131). An employer that fails to keep accurate payroll records may, in addition to all other penalties, fines or assessments, be penalized $1,000 for each ten day period of non-compliance or a sum not in excess of two times the cost of compensation for its payroll for the period of such failure.

Where the employer is a corporation, the president, secretary and treasurer thereof shall be liable for the penalty. Additionally, the fine for criminal conviction is from $5,000 to $25,000.

Misrepresentation

An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years (WCL §131). Any attempt by an employer to: 1) intentionally and materially understate or conceal payroll, 2) conceal employee duties to avoid proper classification, or 3) conceal any other information pertinent to the calculation of premium paid to secure compensation may result in a fine of $2,000 per every 10-day period of noncompliance or two times the cost of compensation. Additionally, the fine for criminal conviction is from $1,000 to $50,000. (WCL §52(1)(d)).

Examples of misrepresentation include:

Failure to pay appropriate workers' compensation premiums by:

a) Paying workers "off the books,"
b) Not reporting wages paid to illegal aliens,
c) Misclassifying employees as "independent contractors," and
d) Misclassifying the work of a business to a classification that is less hazardous (identifying all roofers as secretarial staff), and/or
e) Intentionally, materially misrepresenting or concealing information pertinent to calculation of premium paid.

Stop Work Orders

WCL §141-b states that a business may be issued a stop work order (which requires the immediate cessation of all business activities) if workers' compensation coverage is not in place or if there is any outstanding debt owed to the Board. Receipt of a stop work order may

lead to debarment from any State, municipal or public body Public Works contract or subcontract for 1 year (5 years for felony conviction).

Coverage Search Application

The Workers' Compensation Board has developed a coverage search application for public usage. This web-based application allows interested parties to search employers' workers' compensation policy and coverage information free of charge. The policy and coverage information listed displays submissions from insurance carriers from 2001 to date. This information is updated daily by Proof of Coverage filings from carriers.

To use this application, go to www.wcb.state.ny.us and select "Does Employer Have Coverage"? Selecting the 'Employer Coverage Search' button on the overview page takes you to the disclaimer. Please read the disclaimer carefully and follow the search instructions.

To report an employer that you suspect is violating the workers' compensation coverage requirements, please complete the Employer Referral Form found on the overview page of this web application.

The Workers' Compensation Noncompliance Process

The Board monitors the coverage status of all subject employers in the State (a number that exceeds 800,000). The Board ensures that employers maintain required insurance coverage so that their employees can receive timely statutory benefits under the WCL and DBL. It also ensures employers in similar industries are subject to similar costs of doing business regarding these statutorily required insurances.

To keep track of all of those businesses, the Board uses a database that gathers information on businesses from a number of sources, including: the New York State Department of State (corporations, LLCs, LLPs, and LPs), the New York State Department of Labor, insurance carrier records, Board investigations and claims information. Once a database record for the employer is established, it is updated by workers' compensation coverage information sent to the Board from insurance carriers and approved self-insurers. The Board is notified whenever a workers' compensation insurance policy is written, modified or canceled by an insurance carrier. (The Board has instituted a program that requires insurers and self-insurers to send this information to the Board electronically using the employer's FEIN.). Employers in New York State are required to maintain continuous workers' compensation coverage. Accordingly, based upon the information contained in the database, the Board sends computer-generated noncompliance and penalty notices to subject employers found in noncompliance.

In most cases, if the Board does not have coverage information for an employer for a specific period of time, it will send out an inquiry notice to a business requiring the business to identify how it is complying with the mandatory coverage provisions of the WCL — if the business secured a workers' compensation policy, or if the business is legally exempt from the workers' compensation coverage requirement.

If no response is received, the first penalty notice will be sent. The penalties for noncompliance are $2,000 for every 10-day period without coverage (WCL §52 [5]). By the time that an employer receives their first penalty notice, the penalty may be more than

$12,000. The penalty accrues for the time period in which the employer had no workers' compensation coverage and had individuals providing services integral to the business.

Once the Board levies a penalty, businesses have 30 days from the date of the initial penalty to seek redetermination review of such penalty, explaining why there was a lapse in coverage and asking for the penalty to be reduced. Information about how to seek redetermination review is located on the back of the penalty notice. The Board processes the redetermination review of penalties based on information provided by the business. Redetermination determinations may result in penalties being rescinded, reduced or upheld.

If the business has not either paid or sought redetermination review of the penalty within approximately three months, the Board sends the penalty to collection agencies. If the collection agencies are not successful in collecting the penalty, then the Board is able to issue a judgment against the business for the delinquent penalty amounts. All monies collected are deposited into the Uninsured Employer's Fund, the special fund used to pay no insurance claims.

Important Note for Employers Regarding FEINs

Your firm's FEIN is the Board's primary identification for your business. Please note that each business that is a legal entity (e.g. sole proprietorship, partnership, corporation, etc.) has its own, unique FEIN assigned to it. Generally, all businesses that have individuals providing services integral to the business must be listed as a legal entity on a workers' compensation insurance policy.

Please give your FEIN to your insurance carrier when obtaining or modifying your workers' compensation coverage. If you have multiple legal entities using employees, provide your carrier with the legal name and FEIN for each of these companies.

Once your firm has obtained a workers' compensation insurance policy, it is your carrier's responsibility to electronically notify the Board of that coverage using your firm's FEIN number(s).

Chapter Six

Understanding Insurance

New York's Workers' Compensation Law requires that employers obtain workers' compensation insurance with an insurance carrier authorized by the New York State Workers' Compensation Board. Another option is for an employer to be authorized by the Board to be self-insured, either individually or as part of a group.

The cost of the insurance must be paid entirely by the employer, no amount can be charged to employees .

The Board has the legal authority to require employers to provide coverage and can penalize those that do not. The Board does not, however, provide any insurance, pay claims, set rates, or oversee the insurance carriers. Yet many employers turn to the Board with questions and assistance regarding these matters, so this chapter provides a brief overview of insurance. (Self-insurance is discussed in another chapter.)

When employers buy workers' compensation insurance, the insurer is assuming the employer's statutory obligation to pay medical, indemnity and death benefits under the law. Premiums reflect the employer's potential liability for claims based on individual experience, wages paid to employees and the type of industry in which they are engaged.

Rates

Prior to October 1, 2008, rates for workers' compensation coverage were established by the Insurance Department upon recommendation from the Compensation Insurance Rating Board (CIRB). Based upon New York State employers' experience and future projections, the CIRB recommended a percentage increase or decrease in the rates to the Insurance Department each year.

New York State has moved to a lost cost system to develop workers' compensation rates as of October 1, 2008. (See Loss Costs)

Lost Costs

Loss costs are the actual claim expenses (compensation and medical), for workers' compensation coverage, established by the New York's Insurance Department, upon recommendation from the Compensation Insurance Rating Board. Based upon New York State employers' experience and future projections, the CIRB recommends a percentage increase or decrease in the loss costs to the Insurance Department each year.

New York State uses a loss cost system to determine workers' compensation rates. In the loss cost system, CIRB continues to collect and aggregate industry data, but rather than file a manual rate with the New York State Insurance Department for approval, it submits the loss costs, which is that portion of the rate that does not include general expenses such as overhead, taxes, or profit. Rates, subject to New York State Insurance Department's approval, are then determined using carrier-specific *loss cost multipliers* that are filed by

each carrier and reflect each carrier's individual underwriting skill and expense structure. This lost cost approach is currently used by a majority of states. This rate-setting process is intended to increase price competition among insurers.

There are more than 500 classifications of workers, each carrying a different loss cost for determining workers' compensation premiums. A classification code assigned to an employer is based on the actual work being performed, or the classification that most closely represents the type of work being performed if there is not an exact match. In most cases, the loss cost assigned to the employer is for the classification which best represents the nature of the employer's business. Most, if not all, of the employees within the business are assigned to this class. Some of the other employees are grouped into what is referred to as *standard exception classifications,* which include occupations common to many businesses such as clerical workers, drivers, messengers, and outside salespersons.

Therefore, as long as a secretary works in an office and is not exposed to the hazardous part of the business, the payroll for a secretary in a construction firm will be included in the clerical class, and not a more expensive construction classification like the remainder of the payroll.

Because they entail similar risks, individual businesses doing similar work are grouped together within the same classification. Each classification is assigned its own loss cost rate based upon its contribution to total workers' compensation costs. The loss cost is based upon the average loss experience of all the members of the class taken as a whole, meaning the likelihood of injuries in that occupation, not the accident history of the individual company.

Classification lost cost rate percentages are multiplied by every hundred dollars of payroll, and change every year.

Each classification rate is also assigned a carrier's minimum premium, which is the lowest premium that an insurance company will accept to provide the workers' compensation insurance.

Experience Modification Factor

The Compensation Insurance Rating Board (CIRB) develops experience modification factors for employers who have workers compensation annual premiums of $5,000 or more. An experience modification factor adjusts an individual employer's premium to reflect the difference between the employer's own loss experience and the average experience that is expected for its classification(s) and size. The Experience Rating Plan places an emphasis on the number (frequency) of claims and (to a lesser extent) the severity of workplace accidents. If an employer has better experience than is expected for an average employer in the same industry with the similar payroll, the employer receives a premium credit. On the other hand, if the employer's experience is worse than the comparable average, the employer receives a premium surcharge. The ability of the employer to directly affect his/her premium in this manner serves as an incentive to control or eliminate workplace injuries.

Assessments

The New York State Workers' Compensation Board is classified as a Revenue Agency within state government, and does not receive any funding through general tax revenue. Therefore, the Workers' Compensation Board itself must fully recover all the costs it incurs in the delivery of its services through its own revenue sources.

By law, the recovery of the Board's administrative costs, which includes the cost of personnel, plant, supplies, travel, etc. is done through a series of general administrative assessments that are paid by insurance carriers and self-insured employers. Assessments also fund several other special programs that reimburse carriers or pay claimants under special circumstances, including the Special Disability Fund (also known as Second Injury Fund), Fund for Reopened Cases, Uninsured Employers Fund, and Special Fund for Disability Benefits. These other special program assessments are also paid by insurance carriers and self-insured employers. (WCL §108, §151, §214 and §228)

The workers' compensation assessments against carriers are passed on to employers through a surcharge on their annual premiums. This surcharge is based on a set percentage of premium and the percentage changes every year. As the losses and liabilities for these programs rise and fall, so does the assessment charged to insurance carriers and self-insured employers.

In addition, there are annual assessments against self-insured employers. The amount of each year's assessment is based on the cost of administering the self-insurance program, which includes the costs associated to payment of claims related to a defaulted self-insured. Each self-insurer's share of the total assessment is calculated by the Board using the employer's paid indemnity.

Terrorism

Although workers' compensation premiums always covered workers for job related injuries and illnesses related to acts of terrorism, policy premiums now have the cost of this terrorism insurance specifically itemized.

Payroll

When an insurance company writes a workers compensation policy for an employer, the classification rate (Loss Cost adjusted by carrier Loss Cost Multiplier), experience modification, and assessment are all used to calculate premium. The insurance carrier requests an estimate of total annual payroll from the employer. The premium cost is the classification rate for a classification multiplied by every $100 of payroll, the application of the employer's experience modification factor plus the assessment cost.

Since the premium is based in part on payroll that is estimated at the beginning of the policy year, the final premium could be more or less, depending on the actual payroll at the end of the policy year. Adjustments are made at that time, resulting in either a refund or an additional charge. An employer who understates the payroll at the beginning of the policy may receive a smaller bill for a year or two, but once the policy is audited, the error will be caught and the employer will receive a large bill to pay for these "back" premiums. The

employer is liable for all outstanding premium amounts that the employer owes, even if the policy has already expired or been cancelled.

Every carrier has the right to audit a policy at least every three years; some policies are audited several times a year. During an audit, the employer must provide copies of canceled checks, payroll, general ledgers and other financial information. Employers may be penalized by the New York State Workers' Compensation Board for not maintaining accurate and adequate records at a rate of $1,000 for each ten days that such records are deficient/nonexistent.

Further, any attempt by an employer to 1) intentionally and materially understate or conceal payroll, 2) conceal employee duties to avoid proper classification, or 3) conceal any other information pertinent to the calculation of premium paid to secure compensation, may result in a fine of $2,000 per every 10-day period of noncompliance or two times the cost of compensation. Additionally, the fine for criminal conviction is from $1,000 to $50,000. (WCL§52(1)(d)).

Payrolls of Executive Officers/Sole Proprietors/Partners/Members

Payrolls for Executive Officers/Sole Proprietors/Partners/Members of LLC's, etc., are calculated differently than those of regular employees. Minimum and maximum payrolls are applied to these positions. The rules governing these payrolls are promulgated by the Compensation Insurance Rating Board (CIRB), and can be found in the CIRB manual at: http://www.nycirblib.org/2007/manuals/pdf/nywcelm08.pdf

Deductibles

Deductibles Under the NYS Workers' Compensation Law

Similar to auto insurance policies, many employers have the option of choosing to have a deductible for NYS workers' compensation insurance (WCL §50(3-e)(a)). Higher deductibles result in lower premiums. Under the deductible program, the insurer pays all costs for each compensable claim under Part One of the policy. Then, the policyholder reimburses the insurer subject to the limits of the deductible amount for each occurrence.

The policyholder is liable to the insurer for the deductible amount in regard to benefits paid for compensable claims, and failure by a policyholder to reimburse any deductible amounts to the insurer shall be treated as nonpayment of premiums. Policyholders may choose one of the following deductible amounts, per occurrence: $100, $200, $300, $400, $500, $1,000, $1,500, $2,000, $2,500 or $5,000.

According to the 2008 New York Compensation Insurance Rating Board's Manual, a medical and indemnity deductible program is available to policyholders with an estimated annual premium at inception of $12,000 or more as part of the policy or by endorsement. An insurer, at the insurer's option may also offer this deductible program to any insured with an estimated annual premium at inception of less than $12,000.

Deductibles Under the NYS Insurance Law

The New York State Insurance Law provides for much larger NYS workers' compensation insurance deductibles (ISC §3443). An insurer issuing a workers' compensation and

employers' liability insurance policy, and a group self-insurer for municipal corporations, may offer, as part of the policy or by endorsement, deductibles optional to the policyholder for benefits payable under the policy, subject to approval by the Superintendent of Insurance and subject to underwriting by the insurer. Once again the insurer pays the claim to the person or provider entitled to benefits and then seeks reimbursement from the policyholder for the applicable deductible amount. Failure by a policyholder to reimburse any deductible amounts to the insurer shall be treated as nonpayment of premiums.

Under the insurance law, an employer may have a policy with a deductible of $250,000, $500,000, or more.

Before obtaining a workers' compensation policy with a deductible, employers should conduct a cost-benefit analysis and carefully evaluate if a deductible program will lower their total workers' compensation coverage costs. Raising the deductible amount should reduce premiums, but is that right for a particular employer? An employer should take a quote with a higher deductible, look at the last few years' incidents, and compute how the employer would have fared with this higher deductible. The premium may be lower, but the employer's overall cost for its workers' compensation coverage (including premiums plus out-of pocket expenses to cover the deductibles) may actually be higher.

Misrepresentation

An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years (WCL §131). Any attempt by an employer to: 1) intentionally and materially understate or conceal payroll, 2) conceal employee duties to avoid proper classification, or 3) conceal any other information pertinent to the calculation of premium paid to secure compensation may result in a fine of $2,000 per every 10-day period of noncompliance or two times the cost of compensation. Additionally, the fine for criminal conviction is from $1,000 to $50,000. (WCL §52(1)(d)).

Examples of misrepresentation include failure to pay appropriate workers' compensation premiums by:

a) Paying workers "off the books,"
b) Not reporting wages paid to illegal aliens,
c) Misclassifying employees as "independent contractors," and
d) Misclassifying the work of a business to a classification that is less hazardous (identifying all roofers as secretarial staff), and/or
e) Intentionally, materially misrepresenting or concealing information pertinent to calculation of premium paid.

New York Construction Employment Payroll Limitation

The Payroll Limitation Law was enacted to apply a maximum payroll limitation for eligible construction classification codes for workers' compensation insurance premium determination purposes. The Law does not apply, however, to employments engaged in the construction of one or two-family residential housing.

A payroll limitation is applied to the actual weekly payroll per employee in each of the eligible construction classification codes. Actual payroll, and not the limited payroll, is used for employments engaged in the construction of one or two-family residential housing.

The Law also created three geographic territories for the purpose of varying the required classification rate off-balance between upstate and downstate employers. These off-balance charges are referred to as territory premium differentials.

Please contact the Compensation Insurance Rating Board (CIRB) at 212-697-3535 or at www.nycirb.org for more information regarding the Payroll Limitation Law.

New York State Loss Prevention Programs — Surcharge and Credits

Compulsory Workplace Safety and Loss Consultation Program

The Compulsory Workplace Safety and Loss Consultation Program is a program administered by the New York State Department of Labor that requires employers with poor safety records to hire consultants to identify safety issues and then implement a plan to remedy those issues. Carriers shall impose a 5% premium surcharge on an employer subject to the Compulsory Workplace Safety and Loss Consultation Program for failure to initiate a required safety program or implement the recommendations of a certified loss consultant. ***Note:*** An additional 5% charge shall be made in each successive year of noncompliance (e.g., first year, 5%; second year, 10%; third year, 15%; etc.)

Workplace Safety and Loss Prevention Incentive Program

The Workplace Safety and Loss Prevention Incentive Program (WSLPIP) is a program administered by the New York State Department of Labor that grants premium credits, as set forth by the New York State Insurance Department, to eligible employers who implement one or more of the following programs:

a. Safety Incentive Program - Insurance carriers will apply a premium credit to qualified employers for the implementation of an approved safety incentive program.

Note: An employer subject to the Compulsory Workplace Safety and Loss Consultation Program is not eligible for this credit unless the employer completely fulfills the requirements of the compulsory program, meets the WSLPIP eligibility criteria and obtains approval of a safety incentive program.

b. Drug and Alcohol Prevention Program - Insurance carriers will apply a premium credit to qualified employers for the implementation of an approved drug and alcohol prevention program.

c. Return to Work Program - Insurance carriers will apply a premium credit to qualified employers for the implementation of an approved return to work program.

Audit

Every carrier has the right to audit a policy at least every three years; some policies are audited several times a year. During an audit, the employer must provide copies of canceled checks, payroll, general ledgers and other financial information. Employers may be penalized by the New York State Workers' Compensation Board for not maintaining

accurate and adequate records at a rate of $1,000 for each ten days that such records are deficient/nonexistent.

Because employers can only estimate the amount of payroll they may have during the forthcoming year, premiums are based upon estimated payrolls. The estimated payroll can often be either much higher or lower than the actual payroll. This results in either a higher or lower premium at the beginning of the policy period. The premium is corrected when a payroll audit is conducted. Upon completion of the payroll audit, the actual payroll figures will be used to determine actual premium and the employer will either get a refund or surcharge. Therefore, it is in the employers' best interest to attempt to correctly forecast the amount of the payroll. Pease note that if an employer intentionally initially understates payroll, it could be classified as fraud, a class E felony.

Payroll Audits

Auditing of Payroll – Independent Contractors

The New York State Workers' Compensation Law does not require sole proprietors, partners or officers of one or two-person corporations to provide coverage for themselves. The situation is more complex when a business that is exempt from coverage requirements either engages subcontractors or is a subcontractor that is engaged by a general contractor. In many instances, under Section 2 and 3 of the WCL, a Judge finds a subcontractor to be the direct employee of the general contractor. In addition, WCL Section 56 provides that a general contractor or its insurance carrier is liable for payments of compensation to an injured employee of an uninsured subcontractor.

Insurance carriers protect themselves against such claims by charging an additional premium for any policyholder that uses independent contractors.

In addition, insurance carriers often assess general contractors premiums for coverage of all "subcontractors" on the job site, unless the subcontractors furnish proof that they have their own workers' compensation insurance policy. Accordingly, general contractors routinely require that subcontractors provide proof of their own workers' compensation coverage in order to co-work on the job. This results in many sole proprietors, partnerships, and one or two person owned corporations with no employees who are not otherwise legally required to acquire a workers' compensation policy, being required to purchase a policy (and include themselves in that policy) in order to work for a particular general contractor.

Classifying Independent Contractors and Employees

A business cannot require employees working for that business to obtain their own workers' compensation insurance policy or contribute towards a workers' compensation insurance policy. (See Employee)

However, a business may require an independent business that has its own employees or an independent business acting as a sole proprietorship, partnership or one or two person owned corporation with no employees to obtain a workers' compensation insurance policy if the independent business is working as a subcontractor. (An independent business usually has characteristics such as media advertising, commercial telephone listing, business cards, business stationary or forms, its own Federal Employer Identification Number (FEIN), working under its own permits or operating authority, business insurance (liability & WC),

and/or maintaining a separate establishment. The independent business has a significant investment in facilities and means of performing work.)

For example, if Business "A" contracts with Business "B" to perform services and Business "B" is an independent business with or without its own employees, Business "A" can require Business "B" to have its own workers' compensation insurance policy and obtain a certificate of insurance for this policy. This will help ensure that Business "A's" workers' compensation premiums are as low as possible.

The New York State Workers' Compensation Board cannot make advance determinations regarding independent contractor status, and only makes such decisions on an individual basis in the event a claim is filed.

Auditing of Payroll – Remuneration

Please refer to the Compensation Insurance Rating Board Manual at http://www.nycirblib.org/2007/manuals/pdf/nywcelm08.pdf for the specific rules regarding Remuneration.

Remuneration means money or substitutes for money. Remuneration is an essential part of determining the amount of premium an employer should pay.

Although the term 'payroll' is often used to describe the premium basis for workers compensation insurance, premium is computed on the basis of the total remuneration paid by the insured for services of employees covered by the policy.

Exceptions

Some classifications have a different premium basis other than total remuneration. For example, premium for domestic worker classifications is computed on a per capita (number of employees) basis. Refer to Rule XIV in the CIRB Manual.

Certain construction classifications have premiums computed on the basis of limited remuneration. Refer to Rule V.G. XIV in the CIRB Manual. (See New York Construction Employment Payroll Limitation)

Remuneration for determining premiums includes

1. Wages or salaries including retroactive wages or salaries, commissions and draws against commissions, bonuses including stock bonus plans, annuity plans, most extra pay for overtime, paid holidays, vacations and sick days. Payments for salary reduction, employee savings plans, retirement or cafeteria plans (Internal Revenue Code §125) which are made through employee authorized salary deductions from the employee's gross pay are also included.
2. Payment for piecework, profit sharing or incentive plans.
3. Payment by an employer of amounts otherwise required by law to be paid by employees to statutory insurance or pension plans, such as the Federal Social Security Act;
4. Payment or allowance for hand tools or power tools used by hand provided by employees.
5. The rental value of lodging, an apartment or a house provided for an employee based on comparable accommodations.

6. The value of meal, store certificates, merchandise, credits or any other substitute for money received by employees as part of their pay. Refer to Exclusions below for certain fringe benefit exclusions.
7. Expense reimbursements to employees to the extent that an employer's records do not substantiate that the expense was incurred as a valid business expense;

   Note: When it can be verified that the employee was away from home on the business of the employer, but the employer did not maintain verifiable receipts for incurred expenses, a reasonable expense allowance within prescribed limits will be permitted.
8. Payment for filming of commercials excluding subsequent residuals which are earned by the commercial's participant(s) each time the commercial appears in print or is broadcast.

Remuneration for determining premiums excludes:

- Tips and other gratuities received by employees;
- Certain payments by an employer to group insurance or group pension plans for employees
- The value of special rewards for individual invention or discovery.
- Dismissal or severance payments except for time worked or accrued vacation;
- Certain reimbursed expenses and allowances
- Payments for active military duty;
- Employee discounts on goods purchased from the employee's employer;
- Supper money for late work;
- Work uniform allowances;
- Sick pay paid to an employee by a third party such as an insured's group insurance carrier which is paying disability income benefits to a disabled employee.
- Employer provided perquisites ("perks") such as:
  1) An automobile;
  2) An airplane flight;
  3) An incentive vacation (e.g., contest winner);
  4) A discount on property or services;
  5) Club memberships;
  6) Tickets to entertainment events.
- Employer contributions to salary reduction, employee savings plans, retirement, or cafeteria plans ((Internal Revenue Code §125)—Contributions made by the employer, at the employer's expense, which are determined by the amount contributed by the employee.

Wages Paid for Time Not Worked

Some employers pay employees for time not worked. The entire amount of wages paid for idle time is to be included as payroll.

Tips for Employers to Potentially Reduce Their Workers' Compensation Insurance Premiums

It is every employer's responsibility to provide workers' compensation insurance for their workers. This protects both the worker and the employer in the event of an on the job injury. Keeping workers' compensation premiums as legally low as possible is also in everyone's interest. While there have been significant reforms and insurance cost reductions over the past few years in workers' compensation insurance, there are many things employers can do to lower their costs further.

1. Reducing workplace hazards can lower an employer's experience ratings, resulting in additional savings. Aggressive risk management that identifies and mitigates hazards is the most basic approach to reducing costs. This is a worthwhile investment, in terms of dollars saved, injuries avoided and good will created with employees.

   Form a labor/management safety team. Cooperation between the two groups is essential to eliminating real health and safety threats. Perform safety inspections – which can be as simple as labor and management walking through a facility to identify potential threats to employee safety. Other options are conducting a private safety inspection, or finding out if an employer's insurance carrier provides any safety inspection support.

   Following inspection, promptly remove easily rectified, inexpensive-to-fix hazards. Then, set up an achievable, realistic plan to implement safety strategies that address the remaining issues, and follow through. Implementation is essential. It's not only less costly to mitigate dangers than to have an employee suffer a severe or fatal injury: it's the right thing to do.

2. Employers should talk to their insurance carrier or agent. Their insurer may not verify information annually, so employers must make certain their insurer has up-to-date information on their company, particularly the correct number of employees and payroll amount. Both drive your insurance costs. If your premium is based on incorrect information, the carrier can retroactively rebate you, or reassess you for back premiums.

3. It's not always just rates: the types of service provided are sometimes the best reason to choose a carrier. The insurer with the cheapest rates may not be the least expensive alternative over time. Take, for example, a small manufacturing firm with frequent injuries. It may be more cost-effective to insure with a carrier that provides an excellent safety program, so the employer can reduce the number of accidents. That lowers the employer's experience modification factor, which then means lower premiums. Eliminating accidents is always a positive outcome.

   Conversely, if a business is in a low-risk classification, the employer already has an aggressive risk management program in place, and the employer already enjoys an excellent experience modification factor, it's probably all right to shop primarily by price.

4. Employers should make sure their insurer uses the correct employee classification. While most firms are correctly classified, employers should check their code, because that drives their rates. For example, when a central New York company felt it belonged in a different classification category, the Compensation Insurance Rating Board (CIRB) conducted an on-site audit. CIRB agreed this company's premiums were based on an incorrect classification category. That firm cut its annual workers' compensation premium by $35,000.

5. It is absolutely critical to make duty assignments consistent with classifications. Consider a firm with salespeople in one building and shop people in another. The sales staff brings sales orders to the shop people in the shop buildings. That work assignment will get the entire workforce classified at the more expensive shop rate.

   This employer could lower premiums if the shop people pick up the sales orders from the sales people. (Maybe electronically, which is instantaneous and doesn't even require physical transit?) Then, as long as the sales people do not enter the more hazardous shop facility, the carrier could reclassify the sales people according to the lower sales classification code.

6. Ask about deductibles. An employer raising its deductible should reduce premiums, but is that right for the employer? An employer should take a quote with a higher deductible, look at the last few years' incidents, and compute how the employer would have fared with this higher deductible. The premium may be lower, but the employer's overall cost for its workers' compensation coverage (including premiums plus out-of pocket expenses to cover the deductibles) may actually be higher.

Please contact your insurance professional if you have additional questions. If questions still persist, you may contact the Advocate for Business at 800-628-3331.

Policy Cancellations

The New York State Workers' Compensation Law requires insurance carriers to notify the Chair of the Workers' Compensation Board and employers of policy cancellations. Carriers are required to notify the employer by certified mail 10 days prior to the cancellation of an insurance policy for nonpayment. When cancellation is due to any reasons other than nonpayment of premiums, the carrier must provide at least 30 days notice to the employer by certified mail. (WCL §54) Carriers are also required to electronically notify the Chair of the Workers' Compensation Board of such cancellations within the above timeframes. (WCL §124 [3])

If an employer currently insured by the New York State Insurance Fund (SIF) wishes to place coverage elsewhere, they must give 30 days written notice to SIF. (WCL §94)

If an employer receives a notice of cancellation for nonpayment and does not pay the balance within the allotted time, the policy will generally not be reinstated, even if the bill is paid in full at a later date. The employer will be without insurance, subject to penalties from the Board and will, in all probability, be liable for the full payment of any claims that occur

during this period of lapse. (WCL §26-a) The employer must get new insurance coverage immediately and may file, if appropriate, an application for Board review of any award on the claim or penalties assessed by the WCL Judge for noncompliance (WCL §26-a [6]) The employer may also apply, if appropriate, for a redetermination review of any penalties it has for noncompliance. (WCL §52 [5]) If there is a cancellation of coverage, the employer should arrange an audit with the insurance carrier as soon as possible to determine the final bill.

When a policy is cancelled by either party (nonpayment or the employer chooses another carrier) on a date other than the anniversary date of the policy, a short rate penalty is usually charged by the insurance carrier. This penalty, which is a percentage based on the amount of time the policy was in effect for the policy year, is in addition to any premium due. Therefore, the bill for a policy that was in effect for only six months of the policy year would actually be 60% of a full year's premium rather than the 50% amount if the premium was prorated.

The High Cost of Going Without Workers' Compensation Insurance

An employer's failure to provide workers' compensation coverage is a crime, punishable by fines and/or criminal prosecution. A stop work order may be issued. Add onto that the legal cost of a defending and possibly losing a civil suit for an injury of an employee, and the cost of workers' compensation insurance is very reasonable. (See Penalties And Liabilities For Not Carrying Required Workers' Compensation Insurance Coverage).

Uninsured Employers Fund

If an employee is hurt when there is no workers' compensation policy in effect and that employee chooses to file a workers' compensation claim, the employer will be liable for the actual cost of medical care and compensation payments, in addition to penalties. If a corporation has failed to secure workers' compensation coverage, the president, secretary and treasurer of a corporation are personally liable for the medical care, compensation payments, penalties and possible criminal prosecution. (WCL §26-a)

The New York State Workers' Compensation Board's Bureau of Compliance oversees uninsured claims. The Uninsured Employers Fund (UEF) is the funding mechanism for compensation and medical payments to injured employees whose employer was not properly insured at the time of the accident. These claims are processed by staff, who collect all evidence, prepare the claim for hearings and administer the payment of all compensation and medical benefits. The Bureau also has a team of lawyers to represent the UEF at Workers' Compensation Board hearings.

Illegal Forms of Coverage and How to Avoid Them

Certain insurance products or benefit plans are sometimes offered to businesses as alternatives to workers' compensation insurance coverage. For example, some insurers offer Occupational Accident insurance policies.

Employers should be very cautious when any alternative is offered that seems "too good to be true," or at a much lower price than statutory New York State workers' compensation insurance. Employers must cover individuals deemed to be employees under the NYS Workers' Compensation Law with NYS workers' compensation insurance. There are no legal substitutes for this insurance coverage. (WCL §50)

Sellers of alternative benefit plans may falsely say that these plans are legal because they come under federal laws that supersede New York law, and therefore are beyond state jurisdiction. This simply is not true.

The fact is that no alternative (except federal government coverage and special tribal programs operating on sovereign tribal land) can place a New York employer outside the jurisdiction of New York law. If you are an employer operating in New York, you are subject to New York law and are required to have New York listed on Item 3A on the Information Page of your workers' compensation insurance policy. Legitimate insurance companies are regulated and audited by the Insurance Department in New York to ensure that they are financially sound and able to pay their claims. They are required to contribute to state-regulated "guarantee funds" to provide a backup in case a company fails.

Both New York State courts and Federal courts have upheld that alternative plans are not an acceptable substitute for New York workers' compensation coverage.

An insurance policy or benefit plan that does not meet the requirements of law is far more than just a technical violation. Employers with such non-statutory coverage are subject to penalties and liabilities for noncompliance. (See Penalties and Liabilities for Not Carrying Workers' Compensation Coverage)

In addition, such non-statutory coverage may place the employer {or the client business, in employee leasing arrangements (See Leased Employees: Professional Employer Organization } seriously at risk and leave injured workers unprotected. The workers' compensation law of New York provides specific protection for employers who come under its jurisdiction - the protection from tort liability lawsuits under the "exclusive remedy" doctrine. No such protection exists under alternate coverage.

If you are approached by someone selling an attractive alternative, you are encouraged to telephone the NYS Workers' Compensation Board's Bureau of Compliance at 866-298-7830. The Bureau of Compliance can analyze the product and find out if it is legitimate; if it is not, your call may benefit you and help protect other employers who could have bought a worthless plan.

Chapter Seven

What to Do When an Accident Happens

The First Steps

Everyone has probably heard the old adage "The least expensive accident is one that never occurs." But accidents do happen, and employers need to become involved before the first form is filed.

Obtaining Medical Treatment

The employee should immediately tell his or her employer or supervisor when, where and how they were injured and obtain medical treatment. The treating health care provider must be authorized by the Workers' Compensation Board, except in an emergency situation. Information about authorization can be found in the WCB's website. In addition, the employee should submit written notice within 30 days to his or her employer. (WCL §18)

As a general rule, employers may not direct their employees to a particular health care provider. Exceptions exist for employers who participate in the Preferred Provider Program or an Alternative Dispute Resolution Program. Employers could and still can recommend care providing they inform employees of their rights to choose providers of their choice (Form C-3.1). As of March 13, 2007, self-insured employers, insurance carriers and the State Insurance Fund are authorized to require employers to obtain diagnostic tests from a provider who is part of a network the employer, carrier and SIF has contracted with to provide such services. (WCL §13-a(7)(c)) In addition, beginning July 11, 2007, employers, carriers, and SIF may require employees to obtain prescriptions from a pharmacy with which they contract. (WCL §13[i]) In both situations, notice must be provided to the employee.

Investigation and Communication

All accidents should be investigated fully to ensure that all the facts are gathered. In addition, the employer should contact the insurance carrier and maintain those communications throughout the claim.

Any written contact with the claimant's health care provider should be copied to the claimant and the claimant's legal representative, if any. Any attempt to influence the health care provider in any way may be considered interference with the claimant's treatment, which is a misdemeanor.

Minor Injuries

If the injury is minor, requiring two or fewer treatments by a person rendering first aid, and with lost time of less than one day beyond the end of the working shift on which the accident occurred, the employer may choose to pay for the first aid treatments directly. In this instance, the employer completes a Form C-2 "Employer's Report of Work-Related Injury/Illness", but does not send it to the Board or the insurance carrier. Instead, the employer maintains the form in their files for the statutory 18-year period. (WCL §110) C-2 forms are available from the insurance carrier, a Board office or online at http://www.wcb.state.ny.us.

Reporting Injuries

All other injuries not fitting the above criteria must be reported to the Board and insurance carrier. Failure to file within 10 days after the occurrence of the accident is a misdemeanor and punishable by a fine. In addition, the Board may impose a penalty of up to $2,500 (WCL §110 and 12 NYCRR §310.1).

When completing a C-2 form, it is important to remember that statements may be legally binding. The employer should note on the C-2 if they believe the claim to be questionable or fraudulent. The insurance carrier can also be contacted for assistance with completing the form. The C-2 can be filed by a third party designated by the employer, however the employer is ultimately responsible for ensuring it is filed.

Filing the C-2 form is not necessarily an admission that you agree with the facts of an accident. It is a statement that an employee reported a work-related injury or illness to the employer.

Continued Payment of an Injured Employee's Wages

When an employer continues to pay an employee wages or advances the employee compensation payments following a work related injury or illness, the employer may seek reimbursement for those wage payments out of any subsequent compensation awards *so long as* the employer has made a claim for reimbursement prior to the award of compensation (WCL §25[4]).

IMPORTANT: An employer will forfeit its right to reimbursement for these advance payments unless the claim for reimbursement is made before the Board makes an award of compensation.

The employer may be entitled to reimbursement whether the payments were made voluntarily or as a negotiated benefit as might be contained in a collective bargaining agreement.

The claim for reimbursement should be in writing, although it may be made at a Board hearing where a hearing reporter is present to transcribe the proceedings and thus make a record of the request.

The Path of a Claim

Immediately: The worker obtains the necessary medical treatment and notifies his/her supervisor about the accident and how it occurred.

The employee notifies the employer of the accident in writing, as soon as possible, but within 30 days. The Board can excuse the lack of notice if notice couldn't be given, the employer had knowledge, or if the employer is not harmed by lack of notice (WCL §18).

The employee may file a claim with the Board on Form C-3 by filing the form with the Board. This must be done within two years of the accident, or within two years after the employee knew or should have known, that the injury was related to employment (WCL §28). The employee must file Form C-3.3 if the employee received treatment for a previous injury to the same body part or for an illness similar to one described on Form C-3.

Within 48 hours of the first medical treatment: The doctor completes a preliminary medical report on Form C-4 and mails it to the appropriate District Office. Copies must also be sent to the employer or its insurance carrier, the injured worker, and his/her representative, if any (WCL §13-a [4][a]).

Within 10 days of the occurrence of the accident: The employer, or its third party designee, reports the injury to the Board and the insurance company on Form C-2 (WCL §110 [2]).

Within 14 days of receipt of Form C-2: The insurer provides the injured worker with a written statement of his/her rights under the law (Form C-430S). This must be done within 14 days after receipt of the C-2 from the employer or with the first check, whichever is earlier (WCL §110 [2]). If the insurer requires the injured worker to use a provider within a network for diagnostic tests it must provide the injured worker with the name and contact information from the network (WCL §13-a[7][b]).

Within 15 days of initial treatment: The doctor completes a 15-day report of the injury and treatment on Form C-4 and mails it to the District Office (WCL §13-a[4][a]) .

Within 18 days after the first day of disability or 10 days after the employer first has knowledge of the alleged accident, or within 10 days after the carrier receives the Form C-2, whichever is greater. The insurer begins the payment of benefits if lost time exceeds seven days. If the claim is being disputed, the insurer must inform the Workers' Compensation Board (and the claimant and his/her representative, if any). If the claim is not disputed, but payment is not being made for specific reasons stated on the notice, (e.g. that there is no lost time or that the duration of the disability is less than the 7-day waiting period), the insurer must also notify all the parties (WCL §25 [1] and 12 NYCRR §300.22).

The insurer files Form C-669 or Form C-7 with the Board indicating either that payment has begun or the reasons why payments are not being made. A copy of the Form C-669 or Form C-7 must be transmitted to the claimant and his/her attorney/licensed representative, if any, simultaneously with the filing with the Board. If the employee does not notify the employer timely, this notice may be filed within 10 days of learning of the accident.

Within 25 days of the notice of indexing: Where controverted – When the Board notifies an employer or its insurance carrier that a workers' compensation case has been indexed against the employer, and the employer or insurance carrier decides to controvert the claim, a notice of controversy (Form C-7) shall be filed with the Board within 25 days from the date of mailing of the notice of indexing. Failure to file the notice of controversy within the prescribed 25 day time limit could bar the employer and its carrier from pleading certain defenses to the claim (WCL §25[2][b]).

Where not controverted – If the right to compensation is not controverted but payment has not begun because no compensation is presently due, prescribed Form C-669 shall be filed with the Board not later than 25 days after the Board has transmitted a notice of indexing a case to the employer or its insurance carrier.

Every 2 weeks: The insurer continues to make payments of benefits to the injured employee (if the case is not being disputed). The carrier must notify the Board on Form C-8/8.6 when compensation is stopped or modified within 16 days after the date on which payments were stopped or modified (WCL §25 [1][d]).

The doctor periodically submits progress reports following every treatment on Form C-4.2 to the Board.

Before the employee has lost 12 weeks of time from work (continuous or intermittent), the insurer considers the necessity of rehabilitation treatment for the injured employee (Board Form R).

Hearings: Notices of hearings will ordinarily be sent by the Board to the carrier for the employer, or directly to the employer if self-insured. An employer having knowledge of a hearing is not obligated to attend unless a hearing notice is sent to the employer, specifically requesting attendance, or unless a representative of insurance carrier requests attendance.

Responsibilities of the Insurance Carrier

The insurance carrier has 18 days from the date of disability or 10 days after the employer first has knowledge of the alleged accident or within 10 days after the carrier receives Form C-2 , whichever is greater, to determine whether to pay benefits or controvert all or part of a claim. Until such controversy is resolved, the carrier does not have to pay indemnity or medical benefits, although the health care provider must continue to treat during this period.

If the insurance carrier agrees with the claim, payment of benefits must begin within 10 days of receiving the C-2 form, or 18 days after the date of disability or 10 days after the employer first has knowledge of the alleged accident.

Controverting a Claim

The insurance carrier can contest the claim for a variety of reasons, including that the injury was not related to work, or the employee is not injured to the extent that he or she is claiming. An employer can also request that the insurance carrier contest the claim. However, since the insurance carrier has assumed the liability for the claim, it is not required to comply with the employer's request.

Once a claim is controverted, a Pre-Hearing Conference will be scheduled to give a Judge the opportunity to hear both sides of a disputed issue. A Pre-Hearing Conference will not be scheduled until both a Form C-7 and a medical report indicating an injury is supplied to the Board. The Board may hold a hearing or hearings before a WCL Judge. The Judge may take testimony, order depositions, review medical and other evidence and will decide whether the claimant is entitled to benefits. If the claim is determined to be compensable, the Judge determines the amount and duration of the compensation award.

Settling a Claim

Under Section 32 of the WCL, parties may enter into a binding agreement settling upon and determining the compensation and other benefits due to the claimant. If approved by the Board, the settlement is binding on all the parties and not subject to appeal. Section 32 agreements can expedite the adjudication of issues or entire claims, while assuring the rights of the claimant and all other parties.

Another method to settle a claim is the Board's WISK Program (Walk-In Stipulation Calendar). When interested parties wish to settle matters quickly and equitably, the WISK program allows them to stipulate to certain findings and resolve claims. Upon reaching agreements, the parties may request time on the WISK to seek approval of the agreed upon terms from a Judge.

A third option of settling a claim is through a lump-sum settlement, which allows the parties to agree to a lump-sum amount to be paid to the claimant. A lump-sum settlement is considered closed unless there is a change in the claimant's condition that was not contemplated at the time of the agreement.

Administrative Review of a WCLJ Decision

Either side may seek administrative review of the decision within 30 days of the filing of the Judge's decision. This is done by applying in writing for Board review. A panel of three Board Members will review the case. This panel may affirm, modify or rescind the Judge's decision, or restore the case to the calendar for further development of the record. In the event the panel is not unanimous, any interested party may make application in writing for mandatory review of the full Board. The full Board must review and either affirm, modify or rescind such decision. In addition, following a unanimous decision of the Board panel, a party may file an application for discretionary full Board review. The application for discretionary full Board review will either be denied by the Board or, when warranted, the Board panel decision may be rescinded by resolution of the full Board. When the original Board panel decision is rescinded a new panel decision will be issued.

Appeals of Board Panel decisions may be taken to the Appellate Division, Third Department, Supreme Court of the State of New York, within 30 days (WCL §23). The decision of the Appellate Division may be appealed to the Court of Appeals.

Note: When seeking administrative review, the carrier does not pay for any contested weekly benefits while the claim is being reviewed by a Board Panel (WCL §23). The carrier must pay any portion of the award that is not the subject of dispute. For example if the carrier concedes that the employee has a mild disability and the WCLJ found the disability was total, the carrier must pay the employee at the mild rate while it seeks administrative review of the finding of total disability. When the carrier does not concede any liability, then the entire WCLJ award is stayed pending administrative review by the Board panel.

Following administrative review, the carrier must make any payment of compensation and physician's bills directed by the Board Panel, even if an application for discretionary full Board review and/or an appeal is made to the Appellate Division. (*Lehsten v. NACM*, 93 NY2d 368 [1999]).

Keeping a Claim Moving

Immediately following a work-related injury or illness, most employees become very fearful about their financial future and ability to return to work. The longer an employee stays out of work, the more difficult it becomes to return, both physically and psychologically. Following these tips can help to keep a claim moving:

Keep in touch with the employee, letting him or her know that you care about them and what happened to them. Contact them periodically to let them know what is going on at work.

When appropriate, contact the carrier to discuss light duty positions if that is an option. Make such positions available if possible (see Chapter 8 – Return to Work). Descriptions of any light duty position must be in writing. Any contact with the claimant's health care provider, however, must not violate Section 13-a (6) of the WCL, which provides in part that the "improper influencing or attempt to influence the medical opinion of any physician who has treated or examined an injured employee shall be a misdemeanor."

Make sure that the claims administrator has all the necessary information, and keep in touch with the insurance carrier.

Avoiding Future Accidents

- Accident frequency, not severity, is what drives up insurance costs. Employers should evaluate every accident, particularly the smaller, more frequent ones, to determine how to avoid them in the future.
- Ideally, the time to work on preventing accidents is before they occur. If safety rules and equipment are not enforced or used or worse yet, nonexistent, a careless attitude toward safety will surely develop.
- Developing a safety culture is an important aspect to reducing or avoiding altogether lost-time accidents. Following these rules consistently and reminding employees of them on a regular basis, is a strong step toward that goal:
- Remind employees of the rules and encourage them to make suggestions regarding safety.
- Educate new employees about the safety program and requirements of the job. Knowing how to do the job the right way, whether it is heavy lifting or work at a keyboard, can eliminate some of the common workplace injuries, repetitive strain and low back injuries.
- Keep records of training and safety meetings.
- Make the use of safety equipment second nature. Make ample use of reminders and incentives to encourage the correct use of the equipment.
- Interview employees after each injury to determine not only the facts, but if the injury could have been avoided.
- Collect physical evidence such as equipment logs and photographs of the location where the injury occurred.
- Learn from these accidents. Once a problem area has been identified and analyzed, steps can be taken to eliminate hazards. Ergonomics, better lighting, improved ventilation, machine guarding or a change in process may be all that is necessary.

Employer's Rights During a Claim

An employer has the right to request that the insurance carrier contest the compensability of a claim. A claim can be contested for a variety of reasons, including, for example, that the injury was not related to work or that the employee is not injured to the extent he or she is claiming. An employer can request that the insurance carrier contest the claim, but since the carrier has assumed liability for the claim, it is not required to comply with the employer's request. In addition, employers or carriers who engage in dilatory tactics will be penalized.

An employer has the right to attend any hearings related to a claim filed by one of the employer's workers.

An employer has the right to electronically access the Board's case file for a claim filed by the employer's worker by visiting one of the Board's customer service centers. The Board's Electronic Case Folder (ECF) allows parties of interest to view the documents in the claim

file electronically. Employers should go to one of the 11 district offices or 30 Customer Service Centers with identification to obtain a password. Based on the confidentiality of workers' compensation records, please be prepared to offer proof that you are the employer of record in the claim.

A self-insured employer, or an employer who has failed his or her obligation to secure workers' compensation coverage, has the right to participate in the hearing and present relevant evidence about disputed issues at a hearing. Employers may request that a hearing be scheduled on a particular issue by writing to the Board in a timely manner. Corporations must be represented by counsel in proceedings before the Board. Certain defenses will be waived if they are not timely raised or if the employer or carrier does not timely file a Form C-7, Notice that Right to Compensation is Controverted.

An employer has the right to report suspected workers' compensation fraud to the Fraud Inspector General. Fraud Referral Hotline: 1-888-363-6001.

An employer has the right to seek administrative review or, if insured, to request that the insurance carrier seek administrative review on appropriate grounds a decision of a Judge regarding a claim filed by an employee.

Any party may seek administrative review of a notice of decision within 30 days by writing to the Board requesting Board review; however, a party filing a frivolous application will be penalized.

Privacy of Case Records

Workers' Compensation Law section 110-a limits access to an individual's workers' compensation file to the claimant, the claimant's attorney or licensed representative (upon filing of an OC-400 form), and the employer/ insurance carrier or their agents acting within the scope of their duties in evaluating, processing, and settling the claim.

Access can be gained by other parties by securing authorization from the claimant by filing an OC-110A , an authorization from the claimant or a court ordered subpoena or court order from a court of competent jurisdiction, and then submitting it to the Board. The original authorization, subpoena or court order must be filed with the Board. Copies of the original are not sufficient to gain access.

The law prohibits authorization by the claimant directing disclosure of records to a prospective employer, or in connection with assessing fitness or capability for employment. It is unlawful for any employer to inquire into, or to consider for the purpose of assessing fitness or capability for employment, whether a job applicant has filed for or received workers' compensation benefits (WCL §125).

Discrimination

Employers are prohibited from terminating an employee because the employee has filed a claim for compensation or received compensation pursuant to WCL §120 or testifies in a workers' compensation hearing. However, this is not a job security provision. To be a valid discriminatory claim, the employer must be retaliating against the employee for filing the claim or receiving benefits or for testifying in a workers' compensation hearing. If an

employer terminates an employee for a valid business reason, without any retaliation, then there is no discrimination. Valid business reasons include misconduct, insubordination, lack of work/economic reasons, lengthy absence from work, inability to perform the job, or poor job performance.

Chapter Eight

Medical Treatment Guidelines

The New York State Workers' Compensation Board ("Board") has implemented Ua major change in how medical care is provided to injured workersU. Effective December 1, 2010, Medical Treatment Guidelines were implemented as the mandatory standard of care for the mid and low back, neck, shoulder, and knee, regardless of the date of injury.

Treatment of injuries to the mid and low back, neck, knee and shoulder were chosen since they constitute forty percent (40%) of workers' compensation claims and more than sixty (60%) of medical costs in the system.

The NYS Workers' Compensation Medical Treatment Guidelines will:

- Set a single standard of medical care for injured workers,
- Expedite quality care for injured workers,
- Improve the medical outcomes for injured workers,
- Speed return to work by injured workers,
- Reduce disputes between payers and medical providers over treatment issues,
- Achieve timely payments to medical providers, and
- Reduce overall system costs.

The Medical Treatment Guidelines are a result of the March, 2007 Workers' Compensation Reform Legislation. The Governor directed the NYS Insurance Department to establish a task force and advisory committee of experienced professionals to develop the Guidelines.

The task force and advisory committee used existing guidelines from the American College of Occupational and Environmental Medicine (ACOEM), the State of Colorado, and input from the committee to develop draft NYS Medical Treatment Guidelines. The draft Guidelines were evidence-based, wherever possible, and were based on the consensus of experienced medical professionals.

The task force presented the draft Medical Treatment Guidelines to the Insurance Department. The Insurance Department then sent the draft Medical Treatment Guidelines to the NYS Workers' Compensation Board for review and adoption. The Board solicited comments on the draft Guidelines from all stakeholders, made revisions and then issued final Medical Treatment Guidelines which took effect on December 1, 2010.

Pilot Program

Prior to the actual implementation of the Medical Treatment Guidelines, the Workers' Compensation Board created a pilot program that developed and tested potential forms, processes and procedures to administer the Guidelines.

This pilot program involved 1,400 actual workers' compensation cases. The experience and feedback of pilot participants were instrumental in finalizing the Guidelines' forms, processes and procedures.

In a survey of pilot participants, both provider and payer representatives indicated that the Guidelines and the Board's processes were effective. Ninety percent (90%) of respondents felt that the Guidelines improved the exchange of information between doctors and carriers. Eight-five percent (85%) of respondents agreed or strongly agreed that claimants received faster access to medical care and that medical disputes were reduced when using the Guidelines. One hundred percent (100%) of respondents believed that the pilot experience made the statewide implementation of the Medical Treatment Guidelines easier.

Medical Treatment Guidelines Regulations

Regulations incorporate, by reference, the Medical Treatment Guidelines and establish implementation procedures. For purposes of the regulations and their related processes, the Regulations also define Treating Medical Providers and Carriers as follows:

Treating Medical Provider

Treating Medical Provider, as defined by the regulations, means any physician, podiatrist, chiropractor, or psychologist that is providing treatment and care to an injured worker pursuant to the Workers' Compensation Law. The Medical Treatment Guidelines also require that physical therapists and occupational therapists adhere to Guideline requirements, although they are not included in the definition of Treating Medical Provider and therefore cannot request an optional prior approval or a variance.

Carrier

Carrier means Tall private and municipal self-insured employers, group self-insured trusts, all Special Funds, the State Insurance Fund, and private insurance carriers.

Administrative Aspects of the Medical Treatment Guidelines

Treatment Preauthorization

With few exceptions, all treatment consistent with the Guidelines is preauthorized. This preauthorization reflects a fundamental change in approving medical treatment for workers' compensation cases and is an underlining premise of the Guidelines.

The exceptions include twelve specific procedures listed in the Medical Treatment Guidelines and any second or subsequent performance of a surgery due to the failure or incomplete success of the same surgical procedure performed earlier (specifically defined in the Regulations).

The regulations require that carriers must pay providers for services rendered consistent with the Guidelines. Treatment that is outside the Guidelines will not be reimbursed unless it is first approved through a variance process.

Optional Prior Approval

The optional prior approval process allows a Treating Medical Provider to request a determination from a participating Carrier that the planned medical treatment is consistent with the Guidelines. Carriers that participate in the optional prior approval process must designate a qualified employee as a point of contact for the Board and Treating Medical Providers. Carriers are allowed to opt-out of the Optional Prior Approval process completely if they notify the Board. The Board's website contains the list of designated contacts for participating carriers and provides information on the opt-out process.

Variances

There can be exceptions or variances to the Medical Treatment Guidelines because injured workers have unique circumstances that may call for a different approach to treatment. Health Care Providers may request permission to vary from the Medical Treatment Guidelines when the injured worker:

- Has healed more slowly than expected,
- Has co morbid conditions or other extenuating circumstances which delay response to treatments or procedures, or
- Will benefit from new or alternative treatments supported by respected peer reviewed studies.

The Treating Medical Provider determines when to request a variance and must provide the medical justification for the request.

New and Revised Forms

Since the Medical Treatment Guidelines reflect a major change in medical care treatment and its related billing, the Board created or modified forms to reflect this new process. Treating medical providers, medical providers' office staff, insurers, attorneys, licensed representatives, and internal Board staff will use the new and revised forms and processes to comply with the regulations.

WCB Medical Director's Office

The Workers' Compensation Board's Medical Director's Office has an important role in the administration of the Medical Treatment Guidelines. The office is comprised of the Medical Director, Assistant Medical Director and nursing staff located in Albany and Brooklyn.

The Medical Treatment Guidelines provide for a Medical Arbitrator whose responsibility is to decide disputes regarding denials of medical treatment. This Medical Arbitrator serves as an alternative to the hearing process for review of optional prior approvals and variances.

What Is In The Future?

The Guidelines will change over time as new medical technologies and processes are developed, and as scientific evidence evolves. The Board is developing a process by which Guidelines will be reviewed and updated regularly using the most recent medical evidence. The Board also expects to develop additional Medical Treatment Guidelines for other common workplace injuries and illnesses in the future. The Workers' Compensation Board's website will be updated and notification will be sent to system participants when future changes are made.

Chapter Nine

Why Have A Return to Work Program?

Return to work programs can assist businesses in controlling expenses while helping the injured workers to return to work as quickly as medically possible. Many injured workers expect the workers' compensation system to replace all their wages and benefits, and are often dissatisfied by the realization that it cannot.

Experience shows that injured workers recover faster when they return to work. Experience also shows that the longer an injured worker remains away from work, the more difficult it is to return. Returning to regular work usually occurs more quickly when modified duty is offered to the injured employee.

Some injuries are so severe that a return to any type of work is impossible. Yet with new advances in assistive technologies, there are fewer and fewer instances where job modifications cannot be made to accommodate even the most severe injuries.

The employer also benefits from a return to work program because the indemnity benefit that an employee receives is offset by the amount he or she is receiving in wages (WCL §15 [5-a]). The less money that an insurance company is spending to pay benefits, the better the experience modification factor, and ultimately, the lower the premium costs. In fact, according to the State Insurance Fund, companies that have return to work programs have seen savings up to 20-40 percent or more in workers' compensation costs.

The Most Important Player – The Employee

Two of the most important factors in considering the workers' response to the injury are motivation and pre-morbid personality. Motivation, or the worker's expectation of his or her performance, is probably one of the biggest predictors of success in any return to work program. The worker's expectation of his or her performance is a predictor of how well he or she will perform.

The second major factor is pre-morbid personality – the worker's level of self-esteem and self-confidence will have a major impact on how he or she deals with disability. If a person was already prone to anxiety and depression, these factors will impact his or her acceptance of the injury and view of the future.

The Return to Work Team

In larger firms, the return to work program is comprised of a number of individuals that function as a team. The small employer, who cannot afford a staff with such diverse expertise, can still look at each of the tasks to determine what is necessary to return an injured employee back to work safely by following the following steps:

- Determine the nature and extent of the disability and overall health, to determine capacities and limitations for the extent and type of work that the injured worker can perform.

- Look at the existing job and analyze it from the viewpoint of skills required and its physical demands. Based on existing claims information and medical reports, look at work history, education, training, skills, licenses, etc. to determine how the worker's existing skills fit into the requirements of the job.
- Focus on removing the barriers preventing a successful return to work, with a special focus on environmental barriers, family issues, psychological barriers and economic disincentives. A Board social worker can assist the injured worker with accepting the severity of the disability and the occupational limits it imposes and the need to make reasonable plans and decisions for economic security.
- Review job descriptions with a knowledge of the skills and other requirements that are necessary to satisfactorily perform a given job.
- Understand the detailed description of the actual job, including the requirements and skills to perform it effectively. The supervisor can also be given realistic expectations as to what to expect from the worker upon returning.
- Use the expertise of the insurance company claims examiner, who pays the bills, has detailed information about the injury and medical treatment, and a wealth of experience in dealing with a variety of workplace injuries.

The Various Steps to Return to Work

While the ultimate goal is to return an employee to his or her same job at the same pay, this is not always possible. But that does not mean the employment relationship has to end. The other options an employer can utilize during the recovery period include:

- Modified job
- Part-time job
- Different job
- Job-sharing
- On-the-job training

For the vast majority of injured workers, the lost time is minimal, the physician authorizes return to work and the worker goes back to the same job. For the more serious injuries, the physician still does the physical capacity evaluation, but also needs some vocational evaluation and understanding of the physical demands of the job to give informed opinions.

If the physical capacities are compatible with the physical demands of the job, then the injured worker can go back to the same job with the same employer. Where there is a discrepancy between the physical demands and the capacity to do the work, the next step is to assess whether some type of job modification or restructuring could enable the worker to return to the same job. It might be possible that some unessential functions could be eliminated, or essential tasks could be rearranged to accommodate the worker.

In one instance, a parts inspector sustained a back injury from constantly having to pick up three to five pound parts from cases on the floor. His physician stated that he could not continue to do this job without risking further deterioration of his condition. A Board

counselor went to the site and analyzed the job. After recommending that the cases of parts be stacked on pallets, so the employee would not have to bend over, the problem was solved at minimal cost.

If job modification is not workable then alternative work must be considered. The first option is to look for a different job utilizing transferable skills. Here the skills analysis is critical to determine which skills may be transferable to keep the learning curve short. The employer needs to do a thorough job of skill assessment and analyzing the worker's potential for training and learning new skills. For example, a drill press operator with a back injury could no longer work for eight hours while standing on a concrete floor. A workers' compensation counselor visited the job site and found a position for the injured worker doing grinding and burring, a job that utilized existing skills and allowed him to sit on a high stool. This transfer was accomplished with the cooperation of the union and the Human Resource Manager.

The next level of alternative work entails on-the-job training with the same employer. In this case the emphasis is on aptitudes and learning capacity for new skills and training. Attention also needs to be focused on vocational interests and career goals.

When the injured worker cannot return to the employer, it may be because the injuries are so severe that there has been extensive lost time and the job could not be held open, or that the injuries prevent the worker from performing his or her usual job, or there is a poor match between transferable skills and existing jobs. When cases are more complex, that is, as lost time becomes more extensive (more than three months) the costs escalate and the odds for a successful return to work begin to decline.

Employers are prohibited from terminating an employee because the employee has filed a claim for compensation or received compensation pursuant to WCL §120 or testifies in a workers' compensation hearing. However, this is not a job security provision. To be a valid discriminatory claim, the employer must be retaliating against the employee for filing the claim or receiving benefits or for testifying in a workers' compensation hearing. If an employer terminates an employee for a valid business reason, without any retaliation, then there is no discrimination.

The WCL does not prevent an employer from taking reasonable steps to secure a steady, reliable and adequate work force. Employers may terminate employees who have filed workers' compensation claims and/or are receiving benefits if the termination is for a valid business reason, such as insubordination, lack of work/economic reasons, misconduct, lengthy absence from work, inability to perform the job, or poor job performance, and is not retaliatory. The determination of whether a discharge is discriminatory or for a valid business reason will be made by the Board if a discrimination claim is made. Employers may wish to seek legal advice on this issue, and with respect to any other State or Federal laws or collective bargaining agreements that may apply to termination of employees.

In summary, many variables go into crafting a successful return to work program. There are no easy answers or solutions. Developing a good plan early helps everyone to clearly see their role and to be able to work together effectively to bring about a win/win situation.

Chapter Ten

The Office of the Fraud Inspector General

Section 136 (3) of the Workers' Compensation Law created the Office of the Fraud Inspector General to investigate violations of the laws and regulations pertaining to the operation of the workers' compensation system. To accomplish that purpose, the inspector general is authorized, among other things,

a) To conduct and supervise investigations, within or without this state, of possible fraud and other violations of laws, rules and regulations pertaining to the workers' compensation system; and

b) To subpoena witnesses, administer oaths or affirmations, take testimony and compel the production of such books, papers, records and documents as the inspector general may deem to be relevant to an investigation undertaken pursuant to this section.

Insurance Fraud

Section 114 of the Workers' Compensation Law, in relevant part, defines insurance fraud to include when

- *a person, knowingly and with intent to defraud, presents a written statement in support of an application for the issuance, or the rating of an insurance policy which written statement the person knows contains a false material statement, a false material representation, or omits a material fact;*
- *a person, knowingly and with intent to defraud, makes a false statement or representation as to a material fact for the purpose of obtaining, maintaining or renewing insurance whether for himself or herself or for any other person or entity or for the purpose of evading the requirements of section fifty of this chapter.*

Violation of Section 114 constitutes a Class E felony. A person (a) who is convicted of a second or subsequent offense under this section, within ten years of the prior conviction, or (b) who subsequently violates any provision of this section concerning two or more claimants, shall be guilty of a class D felony.

In addition to violating the Workers' Compensation Law, insurance fraud is also a violation of New York State's Penal Law, Section 176.05 which provides, in relevant part, that

> *(1) A fraudulent insurance act is committed by any person who, knowingly and with intent to defraud presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer, self-insurer, or purported insurer, or purported self-insurer, or any agent thereof, any written statement as part of, or in support of, an application for the issuance of, or the rating of a commercial insurance policy, or certificate or evidence of self-insurance for commercial insurance or commercial self-insurance, or a claim for payment or other benefit pursuant to an insurance policy or self-insurance program for commercial or personal insurance which he knows to: (i) contain*

materially false information concerning any fact material thereto; or (ii) conceal, for the purpose of misleading, information concerning any fact material thereto.

When a person commits a fraudulent insurance act and wrongfully takes, obtains or withholds, or attempts to wrongfully take, obtain or withhold property with a value in excess of $1,000, it constitutes a Class E felony that may be charged in addition to a violation of Workers' Compensation Law, Section 114.

Failure to Obtain Workers' Compensation Insurance Coverage: A Strict Liability Crime

Section 52(1)(a) of the Workers' Compensation Law, in relevant part, provides that an employer is strictly liable for the employer's failure to obtain workers' compensation coverage for its employees within a twelve-month period. If the number of employees exceeds five, such violation shall constitute a class "E" felony, punishable by a fine of not less than five thousand dollars nor more than fifty thousand dollars, in addition to any other penalties provided by law. If the number of employees is five or less, such violation shall constitute a misdemeanor punishable by a fine of not less than one thousand dollars nor more than five thousand dollars.

Section 52(1)(b) of the Workers' Compensation Law, in relevant part, provides that an employer who has previously been convicted for the failure to obtain insurance coverage within the preceding five years, and who is subsequently convicted for a subsequent violation, such violation shall constitute a class "D" felony, punishable by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, in addition to any other penalties provided by law.

For more information, see Penalties and Liabilities for Not Carrying Workers' Compensation Coverage.

Types of Cases Investigated by the Office of the Fraud Inspector General

In addressing fraud and violations of law relevant to the workers' compensation system, the Office of the Inspector General conducts investigations into the following types of unlawful conduct:

1. Employee Fraud

Occurs when an employee knowingly and intentionally misrepresents, or causes another to misrepresent a material fact about an injury for the purpose of obtaining, or helping another obtain workers' compensation benefits to which they are not otherwise entitled. The misrepresentation must be knowingly made, as an inadvertent or unintentional misstatement is not fraud. The misrepresentation must have been made for the purpose of obtaining or denying benefits, and important enough to impact upon receipt of those benefits. For example, a misrepresentation by an employee that they were 25 years of age when, in fact, they were 22 years of age would not be a material misrepresentation constituting fraud unless the age difference was somehow significant to the claimed injury and to the determination of workers' compensation benefits. For example,

- Filing a claim for an injury that did not occur on, or has no relation to the job.
- Lying about work status when questioned directly, such as at a hearing or on a questionnaire supplied by the insurance carrier, while receiving compensation benefits other than reduced earnings.
- Misrepresenting the severity of a claimed injury.

2. Employer Fraud

Occurs when an employer knowingly misrepresents facts about its employees in order to obtain a workers' compensation coverage for a premium price that is less than what the employer would otherwise be obligated to pay if all the facts about its employees were known to the issuer of the policy. Also occurs when an employer knowingly misrepresents facts to avoid, deny or obtain compensation on behalf of employees, or knowingly lies about entitlement to benefits to discourage an injured employee from pursuing a claim. Examples include:

- Under-reporting the number of employees.
- Under-reporting the amount of money paid to employees.
- Misclassifying employees as independent contractors.
- Misrepresenting the nature of the work performed by the employee.
- Misrepresenting past loss experience.
- Misrepresenting the company ownership.
- Falsely informing an employee that workers' compensation benefits are only available if he or she has been employed for six months or more. (A person is eligible for workers' compensation benefits as soon as they start working.)

3. Health Care Provider Fraud

Occurs when a health care provider knowingly and intentionally submits a material misrepresentation about medical treatment afforded a workers' compensation claimant in a bill or invoice that the health care provider presents to the Board or to the insurance carrier for payment. Health care fraud includes frauds committed by any provider in the workers' compensation system, such as doctors, rehabilitation counselors, pharmacists, or chiropractors. Examples include:

- Billing for exams of patients who were never examined.
- Billing for treatment of patients who were never treated.
- Duplicate billing in order to receive payment from different insurance carriers for the same medical treatment.
- Billing follow-up exams as "first exams" to receive greater payment from the carrier.
- Bundling unnecessary medical services with necessary services.
- Misrepresenting the true code for the medical treatment provided.

4. Attorney Fraud

Occurs when an attorney/licensed representative knowingly and intentionally misrepresents material facts concerning the occurrence of an injury or the severity of an injury in order to either secure or deny compensation for a client and/or themselves. Examples include:

- Knowingly assisting a client in pursuing a false claim.
- Soliciting a person to file a false claim.
- Submitting false documentation as to hours worked on a case or expenses incurred in order to gain authorization for an inflated fee paid from a claimant's settlement account.
- Offering forged documents purporting to show a claimant's agreement to settle a claim or change venue submitted without the approval or knowledge of the claimant.

5. Insurance Carrier Fraud

Occurs when a claims representative knowingly and intentionally misrepresents the truth in order to deny or support a claim; or offers or accepts any form of consideration for the referral or settlement of a claim. Examples include:

- Accepting a gift from a doctor's office in exchange for an implied promise of patient referrals.
- Altering the evidence in a claim in order to support a denial or receipt of benefits.
- Accepting a gratuity to perform their job.
- Accepting a bribe in exchange for a requested resolution of a claim.

6. Paybacks, Gratuities and Bribes

For any party to offer a payment, gratuity or bribe to an employee of the Board or to an employee or agent of any insurance carrier for the referral or settlement of a workers' compensation case is a reportable and prosecutable crime. Corrupt payments indirectly feed the problem of fraud and increase costs for everyone.

Reporting Fraud

Any claim of suspected workers' compensation fraud should be referred to the Office of the Fraud Inspector General for investigation and prosecution by the State Attorney General's Office, or local District Attorney. A complaint can be made anonymously and may be phoned in to our Fraud Hotline, 1-888-363-6001, submitted on-line at our web site, http://www.wcb.state.ny.us/content/main/fraud/Fraudpg.jsp , or sent by mail to the Inspector General - Fraud Investigations, New York State Workers' Compensation Board, 20 Park St, Albany, New York.

Chapter Eleven

Disability Benefits Coverage

What are Disability Benefits?

New York is one of a handful of states that require employers to provide disability benefits coverage to employees for an off-the-job injury or illness. Coverage for disability benefits can be obtained through a disability benefits insurance carrier who is authorized by the New York State Workers' Compensation Board to write such policies. Another option is for large employers to become authorized by the Board to self-insure (WCL §211).

Disability benefits are temporary cash benefits paid to an eligible wage earner, when he/she is disabled by an off the job injury or illness. The Disability Benefits Law (Article 9 of the WCL) provides weekly cash benefits to replace, in part, wages lost due to injuries or illnesses that do not arise out of or in the course of employment (WCL §204). Disability benefits are also paid to an unemployed worker to replace unemployment insurance benefits lost because of illness or injury (WCL§207).

Disability benefits include cash payments only.

Medical care is the responsibility of the claimant. It is not paid for by the employer or insurance carrier. Cash benefits are 50 percent of a claimant's average weekly wage, but no more than the maximum benefit allowed, currently $170 per week (WCL §204).

Benefits are paid for a maximum of 26 weeks of disability during 52 consecutive weeks (WCL §205). For employed workers, there is a 7-day waiting period for which no benefits are paid. Benefit rights begin on the eighth consecutive day of disability (WCL §208). An employer must supply a worker who has been disabled more than seven days with a Statement of Rights under the Disability Benefits Law (form DB-271), within five days of learning that the worker is disabled (WCL §229[2]).

An employer is allowed, but not required, to collect contributions from its employees to offset the cost of providing benefits. An employee's contribution is computed at the rate of one-half of one percent of his/her wages, but no more than 60 cents a week (WCL §209).

If an employee has more than one job at the same time, with combined wages of more than $120 per week, the employee may request each employer to adjust the contributions in proportion to the earnings of each employment. The combined contributions may not exceed 60 cents per week. The request should be made as soon as the employee enters a second job. **(WCL §209[3], 12 NYCRR §362.1(b))**

Disability Benefit Plans

An employer may provide benefits under a Board approved Plan for Disability Benefits {or one negotiated by agreement and accepted by the Chair of the Board as meeting the requirements of the New York State Disability Benefits Law (DBL)(WCL §211) only when such a Plan is insured through one of the carriers licensed by New York State to write statutory disability benefits insurance policies or by an employer who has been authorized by the New York State Workers' Compensation Board to self-insure for disability benefits. All

Plans accepted by the New York State Workers' Compensation Board shall cover only those employees that are eligible for benefits under the New York State DBL. Such accepted Plans must meet or exceed ALL statutory requirements as set forth by the New York State DBL.

Benefits (rate, duration and waiting period) are payable as provided by the Plan. In addition, the employer may pay the entire cost of the Plan. There are some accepted Disability Benefits Plans under which employees are required to contribute more than the usual maximum of 60 cents per week, but only by agreement and provided the employees' contributions are reasonably related to the value of the benefits. Under an arrangement in which employees are required to contribute, the employer must add a contribution to make up the balance of the cost of insurance.

Complying with the Disability Benefits Law

An employer who has had in New York State employment one or more employees on each of at least 30 days in any calendar year shall be a "covered employer" subject to the Disability Benefits Law after the expiration of four weeks following the 30th day of such employment (WCL §202). These 30 days of employment need not be consecutive days but must be work days of employment in one calendar year. In addition to the above-stated provisions, effective January 1, 1984, employers of personal or domestic employees in a private home are subject if they employ at least one employee who works 40 or more hours per week for that one employer.

An employer who by operation of law becomes successor to a covered employer, or who acquires by purchase or otherwise the trade or business of a covered employer, immediately becomes a covered employer.

A "covered employer" under the law is required to provide for the payment of Disability Benefits to all eligible employees, which includes full-time and part-time employees. The employer may comply by purchasing a policy of insurance or by applying to the Chair for approval as a self-insurer with permission to deposit securities or file a surety bond. Insurance may be purchased from any insurance company authorized to write Disability Benefits insurance in this state, including the New York State Insurance Fund.

All information pertaining to premium rates, filing of forms or other data in connection with the policy will be supplied by the carrier of the employer's choice. Accordingly, employers are not required to send any forms to the Workers' Compensation Board nor make any premium payments to the Board. Premiums for Disability Benefits insurance policies are paid directly to the insurance carrier by the employer.

A covered employer is authorized to collect from each employee, through payroll deduction, a contribution of 1/2 of 1% of wages paid, but not in excess of 60 cents per week. However, an employer may waive all employee contributions or, by employee agreement and acceptable to the Chair, arrange for employee contributions in excess of the statutory rate if the amount is reasonably related to the value of the benefits provided. Every covered employer bears the cost of providing benefits in excess of the contributions collected from employees (WCL §§209, 210).

Each covered employer must post and maintain conspicuously at the place or places of business a prescribed form, Notice of Compliance, Form DB-120, stating the provisions have been made for the payment of Disability Benefits to all eligible employees. Also, whenever an

employee of a covered employer is absent from work due to disability for more than seven consecutive days, the employer shall, within five days thereafter, provide the employee with prescribed Form DB-271S , Statement of Rights under the Disability Benefits Law. **Both forms may be obtained from your insurance carrier.**

Obtaining Disability Benefits Insurance

It may be appropriate to contact your insurance broker, carrier or agent, check with your trade association, or conduct additional research to find the most appropriate insurance coverage for your company. In addition, a disability benefits insurance policy may be obtained from the New York State Insurance Fund by calling 1-888-697-4332.

Private Disability Plans

Many organizations have sick leave plans, salary continuance arrangements or other disability plans on a voluntary basis or as a result of collective bargaining (WCL §211). Although some of these plans may comply with the Disability Benefits Law, if secured by disability benefits insurance or approved self-insurance, most do not. When employers make inquiries to qualify their plans, Board staff will suggest modifications to make such plans "at least as favorable" as the benefits required by the Disability Benefits Law and therefore, acceptable to the Chair. The Board welcomes all such inquiries.

An employer may provide benefits under a Board-approved Plan for Disability Benefits, or one negotiated by agreement and accepted by the Chair of the Board as meeting the requirements of the New York State Disability Benefits Law, only when the plan is insured through a carrier licensed by New York State to write statutory disability benefits insurance policies, or by an employer authorized by the New York State Workers' Compensation Board to self-insure for disability benefits. **(WCL §211[5], 12 NYCRR §360.1(a))**

Questions in connection with the acceptability of disability benefit plans or with respect to employer compliance with the Disability Benefits Law should be directed to the Disability Benefits Coverage Section, 100 Broadway-Menands, Albany, NY 12241.

Illegal Forms of Coverage and How to Avoid Them

Certain insurance products or disability benefit plans are sometimes offered to businesses as alternatives to statutory NYS disability benefits insurance coverage.

NYS statutory disability benefits (DB) insurance coverage is totally different from and is not included in NYS workers' compensation insurance coverage.

Statutory NYS disability benefits insurance covers employees for OFF the job accident, injury or illness and pays 1/2 an employee's weekly wage up to $170 per week for up to 26 weeks. An employer needs a NYS disability benefits insurance policy if the employer employs one or more individuals (has one or more people working) on each of at least 30 days in a calendar year in NYS.

A statutory disability benefits insurance policy is issued **ONLY** by one of the carriers licensed by New York State to write statutory disability benefits insurance policies. (**WCL §211), 12 NYCRR §360.1(a))**

Employers should be very cautious when any alternative is offered that seems "too good to be true," or at a much lower price than statutory New York State disability benefit insurance. Employers must cover individuals deemed to be employees under the NYS Disability Benefits Law with NYS disability benefits insurance if the employer employs one or more individuals (has one or more people working) on each of at least 30 days in a calendar year in NYS. Other than an employer that has been approved by the Workers' Compensation Board to be self-insured for disability benefits coverage, there are no other legal substitutes for this insurance coverage.

Legitimate insurance companies are regulated and audited by the Insurance Department in New York to ensure that they are financially sound and able to pay their claims. They are required to contribute to state-regulated "guarantee funds" to provide a backup in case a company fails.

An insurance policy or benefit plan that does not meet the requirements of law is far more than just a technical violation. Employers with such non-statutory coverage are subject to penalties and liabilities for noncompliance. (See Liabilities & Penalties for Not Having Required Disability Benefits Insurance Coverage)

If you are approached by someone selling an attractive alternative, you are encouraged to telephone the NYS Workers' Compensation Board's Bureau of Compliance at 866-298-7830. The Bureau of Compliance can analyze the product and find out if it is legitimate; if it is not, your call may benefit you and help protect other employers who could have bought a worthless plan.

Who Is and Who Is Not Covered

Who is Covered?

1. An employer of one or more persons on each of 30 days in any calendar year becomes a "covered" employer four weeks after the 30th day of such employment (WCL §202).
2. Employees or recent employees of a "covered" employer, who have worked at least four consecutive weeks (WCL §203).
3. Employees of an employer who elects to provide benefits by filing an Application for Voluntary Coverage (WCL §212).
4. Employees who change jobs from one "covered" employer to another "covered" employer are protected from the first day on the new job. Generally, an eligible employee does not lose protection during the first 26 weeks of unemployment, provided he/she is eligible for and is claiming unemployment insurance benefits (WCL §203).
5. Domestic or personal employees who work 40 or more hours per week for one employer (WCL §201[5]) (see Domestic Workers).

Who is not Covered (WCL §203, 12 NYCRR §355.2)?

1. A minor child of the employer.
2. Government, railroad, maritime or farm laborers.
3. Ministers, priests, rabbis, members of religious orders, sextons, Christian Science readers.
4. Individuals that volunteer their services for nonprofit organizations and receive no compensation. Compensation includes stipends, room and board, and other "perks" that have monetary value. Money used solely to offset expenses incurred while performing activities for the nonprofit are not counted as stipends.
5. An executive officer of an incorporated religious, charitable or educational institution,and persons engaged in a professional or teaching capacity in or for a religious, charitable, or educational institution (Section 501(c)(3) under the IRS tax code), and persons receiving rehabilitation services in a sheltered workshop operated by such institutions under a certificate issued by the U.S. Department of Labor. For purposes of disability benefits coverage, professional means an individual who devotes at least 80% of hours worked in a workweek to the following:
    a) activities with advanced specialized scientific or intellectual degrees, as distinguished from a general academic education, or are original and creative in an area of recognized artistic endeavor;
    b) whose work is not subject to routine supervision and whose work requires constant discretion and judgement; and
    c) whose work is predominantly intellectual and whose output cannot be standardized in relation to a given period of time.

    For disability benefits purposes, professional does not include an executive director of a 501(c)(3) nonprofit, clerical staff or other administrators. (WCL §355.2 (d))
6. Persons receiving aid from a religious or charitable institution, who perform work in return for such aid.
7. One or two corporate officers who either singly or jointly own all of the stock and hold all of the offices of a corporation that employs no other employees.
8. Golf caddies.
9. Daytime students in elementary or secondary school, who work part-time during the school year or their regular vacation period. (See Students)
10. Employees who change to jobs in an exempt employment or with a "non-covered" employer, and work in such employment for more than four weeks, lose protection until they work four consecutive weeks for a "covered" employer.
11. The spouse of an employer that files a spousal exclusion form (DB-212.5). (See Spouse)

Note: A "noncovered" employer may elect at any time to provide disability benefits coverage by filing an Application for Voluntary Coverage with the Chairman of the Workers' Compensation Board.

Who Is An Employee Under the Disability Benefits Law?

Employees in For-profit Businesses

Under the New York State Disability Benefits Law (DBL), any individual providing services to a for-profit business can be deemed an employee of that business and such an individual is required to be covered by the employer for disability benefits insurance. This applies unless those services are specifically excluded as employment under the DBL. (WCL §203, 12 NYCRR §355.2)

There are many factors that are used to decide whether an individual is an employee under the DBL. However, for enforcement purposes, if a business meets any of the criteria listed below and the individual that business is hiring does not meet the criteria listed under Independent Contractors or the services rendered are not specifically exempted as employment under the DBL, that business is required to obtain a disability benefits insurance policy.

Right to Control- The degree of direction and control a person or organization exercises over someone they contract with to perform a task is always a central issue in determining an employer-employee relationship. A person or organization controlling the manner in which the work is to be performed indicates that the task is being performed by an employee. If the person doing the labor controls the time and manner in which the work is to be done this may indicate that the task is being done by an independent contractor. If an individual is truly independent, the individual generally works under his/her own operating permit, contract or authority.

Character of Work Is the Same as Employer- Work being done that is consistent with the primary work performed by the hiring business indicates that the labor is being done by an employee. Work done by a person that is different than the primary work of the hiring business may indicate the task is being performed by an independent contractor. (For example, someone installing shingles for a roofer is generally considered the employee of that roofer. Conversely, a plumber hired on a one time basis to fix a broken pipe for a retail store owner is generally considered an independent contractor,)

Method of Payment- Employees tend to be paid wages on an hourly, daily. weekly, or monthly basis. Naturally, employment is indicated if the hiring business withholds taxes and/or provides other employee benefits (Unemployment Insurance, health insurance, pensions, FICA, etc.) Whether the labor is paid using a W2 or 1099 Form for tax purposes does not matter in determining an employer/employee relationship for workers' compensation purposes. A business paying cash to an individual for services usually indicates that the individual is an employee. Payment made for performance of the task as a whole may indicate the task is being done by an independent contractor.

Furnishing Equipment/Materials- A business providing the equipment and/or materials used by people in performing the work tends to indicate an employer-employee relationship.

Right to Hire/Fire- A business retaining the authority to hire and fire the individuals performing the work indicates an employee is performing the work. An independent contractor retains a degree of control over the time when the work is to be accomplished and is not subject to be discharged by the hiring entity because of the method he chooses to use in

performing the work. Naturally, an independent contractor's services may be terminated if the services rendered do not meet contractual requirements,)

Exceptions: A business that is using individuals that are NOT considered employees under the New York State Workers' Compensation Law or a business using individuals that are considered Independent Contractors as specified below.

Employees In Non-Profit Organizations

Other than a nonprofit with NO compensated individuals providing services; or the exceptions listed under Non-Profit Religious, Charitable And Educational Institutions, individuals working for a nonprofit organization are defined the same as those working for a for profit business. (See Non-profit Religious, Charitable and Educational Institutions)

Identifying an Independent Contractor

The following are factors that a workers' compensation law judge will consider to determine whether an individual is an independent contractor, and thus not an employee:

1. Control the time and manner in which the work is to be done;
2. Obtain a Federal Employer Identification Number from the Federal Internal Revenue Service (IRS) or have filed business or self-employment income tax returns with the IRS based on work or service performed the previous calendar year;
3. Maintain a separate business establishment;
4. Perform work that is different than the primary work of the hiring business and perform work for other businesses;
5. Operate under a **specific** contract, and is responsible for satisfactory performance of work and is subject to profit or loss in performing the specific work under such contract, and be in a position to succeed or fail if the business's expenses exceed income;
6. Obtain a liability insurance policy (and if appropriate, workers' compensation and disability benefits insurance policies) under its own legal business name and Federal Employer Identification Number;
7. Have recurring business liabilities and obligations;
8. Have its own advertising such as commercials, listing in phone book and/or business cards;
9. Provide all equipment and materials necessary to fulfill the contract; and
10. The individual works under his/her own operating permit, contract or authority.

Special Note for the Trucking Industry: To be considered an Independent Contractor, drivers must also be transporting goods under their own bill of lading and under their own Department of Transportation Number.

When Coverage Can or Cannot be Required: A business CANNOT require individuals working for that business to obtain their own disability benefits insurance policy.

However, a business should require an independent business that has its own employees to obtain a disability benefits insurance policy if the independent business is working as a subcontractor. (An independent business usually has characteristics such as media advertising, commercial telephone listing, business cards, business stationary or forms, its own Federal Employer Identification Number (FEIN), business insurance (liability & WC), and/or maintaining a separate establishment. The independent business has a significant investment in facilities and means of performing work.)

For example, if Business "A" contracts with Business "B" to perform services and Business "B" is an independent business with its own employees, Business "A" should require Business "B" to have its own disability benefits insurance policy and obtain a certificate of insurance for this policy.

Examples of Applications Where Disability Benefits Insurance Coverage is Generally Required

Example 1. Doctors and nurses staffing an Emergency Room at a hospital are generally considered employees of that hospital under the Disability Benefits Law since their services are an integral part of the operations of the hospital.

Example 2. A bookkeeper that works one day per week on-site at the business location of a general contractor is generally an employee of that general contractor, even if that bookkeeper works for other employers on other days.

Example 3. Persons hired to paint buildings by a painting company are likely to be deemed employees since their services are an integral part of the operations of the painting company and they are likely using paint supplied by the painting company.

Example 4. Persons hired by a roofing company to install shingles are likely to be deemed employees since their services are an integral part of the operations of the roofing company and they are installing shingles supplied by the roofing company.

Example 5. ABC General Contracting Inc subcontracts a roofing job to XYZ Roofing Inc who will be using XYZ's employees and day labor to do the work. ABC General Contracting Inc needs to have a disability benefits insurance policy since the work of XYZ Roofing Inc is integral to the operations of ABC General Contracting Inc. XYZ Roofing Inc also is required to have a disability benefits insurance policy since that corporation has employees. Accordingly, it would be practical for ABC General Contracting Inc to require XYZ Roofing Inc to have a disability benefits insurance policy and obtain a certificate of insurance for this policy.

Example 6. People hired as computer programmers for a computer software company are likely to be deemed employees since their services are an integral part of the operations of the computer software company.

Example 7. A barber rents space from a barber shop owner on a monthly basis. The space includes the chair, sink and other amenities. The store is in a mall and as part of the contract with the mall, the store owner must keep the barber shop open from 10 AM through 10 PM seven days per week. The barber shop owner requires the barber to work on specific days and times. This barber is generally considered an employee under the Disability Benefits Law.

Example 8. The owner of a large apartment building contracts with a management company to provide a superintendent for the apartment building. The superintendent can be considered the employee of either or both the apartment building owner and/or the management company. Accordingly, the apartment building owner needs to obtain a disability benefits insurance policy since the superintendent's work is integral to the operations of the apartment building. Further, it would be practical for the owner of the apartment building to require the management company to have a disability benefits insurance policy and obtain a certificate of insurance for this policy.

Example 9. The owner of ABC Trucking Inc, a trucking company, hires drivers to drive its trucks. The trucks are all registered with the Department of Transportation under the name of ABC Trucking Inc. The drivers are generally considered employees of ABC Trucking Inc under the Disability Benefits Law.

Example 10. ABC Taxi Company Inc. has medallions for 10 taxis. Cab drivers pay a fixed fee to lease the taxis on a daily basis. The taxi drivers are generally considered employees of ABC Taxi Company Inc under the Disability Benefits Law. Any dispatcher, taxi owner or medallion broker who does not personally drive the taxi 40 or more hours per week must have a workers' compensation insurance policy to cover the drivers of the taxi. (See Taxi Cabs)

Example 11. ABC Home Delivery Food Company Inc has "owner operators" purchase its refrigerated trucks, company uniforms and all frozen foods that these "owner operators" will then sell and deliver to customers. These "owner operators" have assigned regions and can only sell within their regions. Further, these "owner operators" have signed a contract indicating that they can not sell products from competitors of ABC Home Delivery Food Company. These "owner operators" are generally considered employees of ABC Home Delivery Food Company Inc under the Disability Benefits Law.

Example 12. ABC Nursing Home Inc pays no employees, but instead, borrows all of its employees from XYZ Hospital Inc. XYZ Hospital Inc pays for all the salaries and benefits for all of the employees who work for XYZ Hospital Inc. and also for those who work for ABC Nursing Home Inc. In this example, both XYZ Hospital Inc and ABC Nursing Home Inc must have a disability benefits policy under their respective legal name and FEIN since both corporations are using people to provide their services. If there is common majority ownership between these two corporations, there can be one policy that lists both legal entities as insureds. Each legal entity would be able to obtain a Certificates of Insurance listing their respective legal name and FEIN.

Example 13. A trucker drives a truck owned by ABC Trucking Company Inc. The bill of lading lists ABC Trucking Company Inc and the truck has Department of Transportation Numbers printed on it that belong to ABC Trucking Company Inc. The driver is generally considered an employee of ABC Trucking Company Inc.

Examples of Applications Where Disability Benefits Insurance Coverage is Generally Not Required

Example 1. An accountant owns her own business and has her own office. She is hired to do an annual tax return for a restaurant. This accountant is likely to be deemed not an employee under the Disability Benefits Law. A professional that does not work on site for a business and has complete control as to when and how to accomplish the work and obtains work from many clients is generally not an employee under the Disability Benefits Law.

Example 2. A clothing retail store owner has a broken pipe in the retail store, looked in the yellow pages of the phone book, and called a plumber to fix the pipe. The plumber comes whenever his time permits, in a company truck with the plumbing company's logo on it and brings his own materials and equipment. The plumber is generally not an employee of the clothing store under the Disability Benefits Law. However, it may be practical for the clothing retail store owner to obtain a certificate of workers' compensation insurance from the plumber. This will help ensure that clothing retail store owner premiums are as low as possible.

Example 3. A beautician rents space from a beauty shop owner on a monthly basis. The space includes the chair, sink and other amenities. The beautician sets her own appointments, has her own license, brings her own cutting tools and orders her own supplies. She comes and goes as she pleases. This beautician is generally not an employee under the Disability Benefits Law.

Example 4. A person who buys merchandise at a wholesale rate and sells that merchandise in addition to competitors merchandise at retail price at any location and at any time of his/her choosing is generally not an employee under the Disability Benefits Law.

Example 5. A truck driver that owns his own truck, has his own Department of Transportation numbers printed on the truck, hauls for various businesses and operates under his own bill of lading is generally not an employee under the Disability Benefits Law.

Additional New York State Disability Benefits Coverage Situations

Domestic Workers

Domestic workers include chauffeurs, nannies, home health aides, nurses, baby-sitters, maids, cooks, housekeepers, laundry workers, butlers, companions, and gardeners working in a private household. (12 NYCRR §355.2)

Domestic workers employed forty or more hours per week by the same employer (including full-time sitters or companions, and live-in maids) are required to be covered by a New York State disability benefits insurance policy if they work 30 or more days in a calendar year for that employer. Time spent at the residence including sleeping and eating and any additional time spent off premises running errands and performing other duties for the employer count towards the total hours worked per week. Also included in the calculation of hours worked per week are all hours where the employer requires the domestic worker's presence. For example, if the employer goes away for two full days and requires the domestic's presence, this counts as 48 hours worked.

Disability benefits insurance is NOT required IF the only people who work for the household are domestic workers in a private household who individually work less than 40 hours per week for that household and do not live on premises.

Farms

Farms are employers under the DBL. Farmers do not have to provide disability benefits coverage for their "farm laborers," but may cover them voluntarily. Farm laborers are defined as employees that perform farm-specific duties such as planting, sowing etc. Those employees that perform nonfarm specific duties such as bookkeeping, truck driver, retail sales are required to be covered. (12 NYCRR §355.2)

Foreign Government Employees

Foreign Governments are not required to provide New York State disability benefits coverage for the individuals working in America for those foreign governments as long as they are performing strictly governmental work for the foreign government and are not engaged in any commercial activity for that foreign government. (e.g. Clerks that are working for the Consulate General of Japan. These individuals are United States citizens that are performing strictly governmental work for Japan and are not engaged in any commercial activity for Japan. Based upon these understandings, the Consulate General of Japan does not require a New York State disability benefits policy.) Please note that any individuals from a foreign government that are working on a commercial venture in New York State (I.E. foreign government-owned airline or bank) must be covered by a New York State disability benefits insurance policy.

Independent Contractors — Certain Licensed Insurance Agents

Licensed Insurance Agents or Brokers are independent contractors if the Licensed Insurance Agent or Broker: Licensed Insurance Agents or Brokers are independent contractors IF the Licensed Insurance Agent or Broker meets ALL of the following requirements:

1. Has income based upon sales and not on the number of hours worked;
2. Is not a life insurance agent receiving a training allowance subsidy;
3. Has entered into a written contract that outlines the services that they are to perform -- this contract may be terminated by either party at any time upon notice given to the other party;
4. Can work any hours they choose;
5. Incur their own expenses including automobile, travel and entertainment (office facilities and supplies may be provided by real estate firm); and
6. Shall NOT be treated as an employee for State and Federal tax purposes (other than FICA that is required for full time life insurance agents). (WCL §201[6], 12 NYCRR §355.2)

For a complete description of the written contract requirements, refer to WCL §201[6].

Independent Contractors – Certain Licensed Real Estate Brokers`

Licensed Real Estate Brokers or Real Estate Sales Associates are independent contractors IF the Licensed Real Estate Broker or Sales Associate:

1. Has income based upon sales and not on the number of hours worked;
2. Has entered into a written contract that outlines the services that they are to perform —this contract may be terminated by either party at any time upon notice given to the other party;
3. Can work any hours they choose;
4. Can engage in outside employment;
5. Incur their own expenses including automobile, travel and entertainment (office facilities and supplies may be provided by real estate firm); and
6. Shall NOT be treated as an employee for State and Federal tax purposes.

For a complete description of the written contract requirements, refer to WCL §201[6].

Leased Employees: Professional Employer Organization

Disability Benefits Coverage Requirements for Clients of Leasing Firms

Leased employees are the employees of the company that is paying to lease them and that company must have a disability benefits policy in its name. A leasing firm (Professional Employer Organization - PEO) assumes a dual employer relationship with their client employers. The employer generally recruits and hires its employees and contracts with the leasing firm to handle the payroll, taxes and benefit packages for its employees. Leasing firms (PEOs) must be licensed by the New York State Department of Labor.

Currently, clients of PEOs may be covered by either of the following methods:

- Each client of a leasing firm may procure its own disability benefits insurance policy to cover its leased employees (as well as any non-leased employees), or
- The leasing firm can procure a **separate** disability benefits insurance policy to cover the leased employees of each of its client firms. Such a policy would identify the insured as: ABC Leasing Company Inc. L/C/F XYX Machine Shop Inc. This policy only covers the leased employees of the client firm. If the client firm hires any non-leased employees, the client firm must purchase a separate disability policy covering the non-leased employees. Since the employer will have two or more separate disability policies covering its employees, class specific policy documentation must be manually filed to the Plans Acceptance Unit of the Workers' Compensation Board. Please contact the Disability Benefits Plans Acceptance Unit at 518-402-6279 for more information.

Disability Benefits Coverage Requirements for the Leasing Firm

Regarding coverage requirements for the leasing firm (PEO) itself, individuals performing the administrative services of the PEO are counted as employees of the PEO. However, leased employees used by the clients of the PEO are NOT counted as employees of the PEO.

Using the above employee definitions for PEOs, regular instate and out-of-state coverage requirements for legal entities apply.

LLCs & LLPs

Under the Disability Benefits Law, members of a Limited Liability Company (LLC) or a Limited Liability Partnership (LLP) are treated the same as partners of a business that is a partnership under the laws of New York State.

Disability benefits coverage **is not** required for a LLC or LLP that has no employees (see Employees). The members may not voluntarily cover themselves for NYS disability insurance.

If the LLC or LLP has employees, the members of the LLC or LLP, themselves, are automatically excluded from the business' disability benefits coverage and cannot be included.

Disability benefits insurance coverage is required for LLCs or LLPs that consist solely of members that are other business legal entities. Disability benefits insurance coverage is required for LLCs or LLPs that consist of a combination of an individual(s) and another business legal entity(ies).

Media Sales Representatives

Media sales representatives are independent contractors **if** the representative:

- Is a contractor engaged in the sale or renewal of magazine advertising space;
- Has income based upon sales/services and not on the number of hours worked;
- Is incorporated and shall be solely liable for payment of workers' compensation premiums;
- Has entered into a written contract (not entered into under duress) that outlines the services that Media Sales Representative will perform. This contract must include the following statements:

  The media sales representative:

  - Shall not be treated as an employee for State and Federal tax purposes;
  - Can work any hours they choose subject to restrictions in the New York State Business Law;
  - Can work at any site other than on the premises of the person for whom the services are performed;
  - Incurs his/her own expenses other than those outlined in the written contract; and
  - Is able to terminate the contract with two weeks notice given to the person for whom the services are performed.

For a complete description of the written contract requirements, refer to WCL §201[6].

Native American Enterprises

Disability benefits insurance coverage is not required for Native American enterprises owned by the Native American tribe itself (i.e. Casinos) — (the Native Americans and non-Native Americans working at the enterprise may be covered voluntarily).

Disability benefits insurance coverage is not required for enterprises not owned by the tribe, but instead owned by an individual, partnership, corporation etc., whose employees are working solely on a Native American Reservation. However, Native Americans and non-Native Americans working at the enterprise may be covered voluntarily.

Any enterprise not owned by the Native American tribe itself that is working in New York State outside a Native American Reservation must abide by the regular New York State coverage requirements for disability benefits insurance.

Non-profit Religious, Charitable and Educational Institutions

Religious, charitable or educational institutions operating on a non-profit basis are required to obtain disability benefits insurance or to provide disability benefits through approved self-insurance to all of their employees, with exceptions, as noted below, if they employ one or more employees.

The following classes of employees are excluded from mandatory coverage: a duly ordained, commissioned or licensed minister, priest or rabbi; a sexton; a christian science reader; a member of a religious order (**WCL §201[5],** 12 NYCRR §355.2).

Also excluded from mandatory coverage are persons engaged in a professional or teaching capacity in or for a "religious, charitable or educational institution"; or an executive officer of an incorporated religious, charitable or educational institution; or persons participating in or receiving rehabilitative services in a sheltered workshop operated by such institutions under a certificate issued by the U.S. Department of Labor; or volunteers in or for such institutions; or recipients of charitable aid from a religious or charitable institution who perform work in or for such institution which is incidental to or in return for the aid conferred, and not under an expressed contract of hire (12 NYCRR §355.2). For purposes of disability benefits coverage, professional means an individual who devotes at least 80% of hours worked in a workweek to the following:

a) activities with advanced specialized scientific or intellectual degrees, as distinguished from a general academic education, or are original and creative in an area of recognized artistic endeavor;

b) whose work is not subject to routine supervision and whose work requires constant discretion and judgement; and

c) whose work is predominantly intellectual and whose output cannot be standardized in relation to a given period of time.

For disability benefits purposes, professional does not include an executive director of a 501(c)(3) nonprofit, clerical staff or other administrators. (WCL §355.2 (d))

The term "religious, charitable or educational institution" means a corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual. (**WCL §201[5])**

NOTE: If an enterprise is not owned by a religious organization itself, but instead is owned by an individual, partnership, corporation etc., then the enterprise must abide by the regular New York State coverage requirements for disability benefits insurance.

In other words, if someone owns a business, it doesn't matter if he/she is Amish, Buddhist, Catholic, Christian Scientist, Hindu, Jehovah Witness, Jewish, Mennonite, Mormon, Muslim, Protestant or a member of any other religion, regular New York State coverage requirements for workers' compensation and disability benefits insurance apply to that business. Further, the private business is NOT covered by either the church's insurance or a declaration by the church that its members are self-insured.

Out-of-state Employers with Employees JUST LIVING in New York State

Many businesses whose only locations are outside New York State have employees working for them who live in New York State. These employees, who are NY residents, commute to work to their employer's out-of-state business locations. Out-of-state employers having employees that just live in New York State and commute to work at a company location outside New York State are not required to carry New York State disability benefits insurance as long as those employees living in New York do not do any work for their employer's business in New York State on 30 or more days in a calendar year. To be exempt, the employees just living in New York State must also not receive any direction and control in their homes from their out-of –state employer.

Out-of-State Companies with Employees Working in New York State

Disability Benefits Coverage Requirements

New York State statutory disability benefits (DB) insurance coverage is totally different from and is not included in New York State workers' compensation insurance coverage. Statutory New York State disability benefits insurance covers employees for an off-the-job accident, injury or illness and pays half an employee's weekly wage, up to $170 per week, for up to 26 weeks.

An out-of-state employer needs a New York State disability benefits insurance policy if the employer employs one or more individuals on each of at least 30 days in a calendar year in New York State. If an out-of-state employer meets this criterion, the employer is required to carry a New York State disability benefits insurance policy. (The employer has four weeks from the completion of the 30th day of work by one or more individuals to obtain the disability benefits policy.)

It may be appropriate to contact your insurance broker, carrier or agent, check with your trade association, or conduct other additional research to find the most appropriate insurance coverage for your company. In addition, a workers' compensation policy may be obtained from the New York State Insurance Fund by calling 1-888-875-5790 and a disability benefits insurance policy be obtained from the New York State Insurance Fund by calling 1-866-697-4332.

Disability Benefits Restriction on Issuance of Government Issued Permits, Licenses and Contracts

To assist state and municipal entities in enforcing Sec. 220 Subd. 8 of the DBL, businesses requesting permits or seeking to enter into contracts must provide one of the following forms to the entity issuing the permit, license or entering into a contract:

- CE-200, Certificate of Attestation of Exemption from NYS Workers' Compensation and/or Disability Benefits Coverage; or
- DB-120.1 — Certificate of Disability Benefits Insurance (the business' disability benefits carrier will send this form to the government entity upon request)

- DB-155 — Certificate of Disability Benefits Self-Insurance. (businesses that are self-insured in NYS for disability benefits insurance should call the Workers' Compensation Board's Self-Insurance Office at (518) 402-0247 to obtain this form.

To be eligible for Form CE-200, an out-of-state employer must not have one or more individuals working on each of at least 30 days in a calendar year in New York. *(Independent contractors are not considered to be employees under the Disability Benefits Law.)*

Partnerships

Disability benefits coverage **is not** required for a partnership that has no employees (see Employees). The partners may not voluntarily cover themselves for NYS disability insurance.

If a partnership has employees, the partners, themselves, are automatically excluded from the business' disability benefits insurance coverage and cannot be included.

Disability benefits insurance coverage is required for partnerships that consist solely of partners that are other business legal entities. Disability benefits insurance coverage is also required for partnerships that consist of a combination of an individual(s) and another business legal entity(ies).

Payroll Companies

Payroll companies can not and do not procure NYS statutory disability benefits insurance and/or NYS workers' compensation for their clients. Obtaining NYS statutory disability benefits insurance and/or NYS workers' compensation insurance coverage is the sole responsibility of the clients of payroll companies, the employer.

Clients of payroll companies must directly obtain NYS statutory disability benefits insurance and/or NYS workers' compensation insurances from insurance professionals. Please note that some payroll companies use their own insurance agents to assist clients in obtaining the necessary insurance for their companies. A payroll company may offer this assistance to its clients; however the insurance must be purchased by the client-employer in its own name and under the client-employer's FEIN.

Sole Proprietorships

Disability benefits coverage **is not** required for a sole proprietor who does not have employees (see Employees). Sole proprietors may not voluntarily cover themselves for NYS disability insurance.

A sole proprietor that has employees is automatically **excluded** from the business' disability benefits insurance coverage and cannot be included.

Spouse of Employer

The spouse of an employer must be covered by New York State disability benefits unless a spousal exclusion form (DB-212.5) is filed. (12 NYCRR §355.2)

Students — Elementary and High School Students

Coverage is not required for employees in regular attendance during the day as a student in an elementary or secondary school who work part-time during all or any part of the school year or regular vacation periods. (12 NYCRR §355.2)

Taxi Cabs - Most Taxi Cab Operators Are Considered Employees

A taxi driver, operator or lessee is an employee if the driver(s), operator(s) or lessee(s) of that employer work 30 or more days in a calendar year, unless such person is leasing a taxi from the owner of the taxi and the owner of the taxi personally, regularly drives the taxi an average of 40 or more hours a week. For the lessee to be considered an independent contractor, the owner-operator may not control, direct, supervise, or have the power to hire or fire such lessee.

For independent livery bases that are members of the Independent Livery Drivers Benefit Fund, disability benefits coverage is not required for their affiliated drivers. (**WCL §201[5])**

Voluntary Coverage (WCL §212)

Generally speaking, voluntary coverage may be obtained for compensated employees in New York State employments for whom disability benefits are not required by law with a few exceptions (i.e. members of an LLC or LLP, and sole proprietors).

Employers who wish to provide voluntary coverage must complete an application for voluntary coverage (form DB-135 or DB-136). Once approved, the employer is a covered employer with respect to the employees voluntarily covered, subject to the provisions of the DBL.

If an employer wishes to discontinue voluntary coverage, they must provide ninety (90) days written notice to the Chair and to the employees, with provisions made for the payment of obligations incurred on and prior to the effective termination date. Voluntary coverage must be maintained for not less than one year. Voluntary coverage may be provided for:

- a minor child (less than 18 years old) of the employer.
- a domestic or personal worker in a private home who is employed for less than forty hours per week by any one employer.
- a duly ordained, commissioned, or licensed minister, priest or rabbi, a sexton, a Christian Science Reader, or a member of a religious order.
- one or two executive officers of a corporation that has no other employees, who at all times during the period involved owns all of the issued and outstanding stock of the corporation and holds all of the offices and have no other employees (one or two executive officers of a corporation who at all times during the period involved own all of the issued and outstanding stock of the corporation and hold all the offices and have other employees may elect to be voluntarily excluded from coverage).

- an executive officer of an incorporated religious, charitable or educational institution, or persons engaged in a professional or teaching capacity in or for a religious, charitable or educational institution. For purposes of disability benefits coverage, professional means an individual who devotes at least 80% of hours worked in a workweek to the following:

    a) activities with advanced specialized scientific or intellectual degrees, as distinguished from a general academic education, or are original and creative in an area of recognized artistic endeavor;

    b) whose work is not subject to routine supervision and whose work requires constant discretion and judgement; and

    c) whose work is predominantly intellectual and whose output cannot be standardized in relation to a given period of time.

  For disability benefits purposes, professional does not include an executive director of a 501(c)(3) nonprofit, clerical staff or other administrators. (WCL §355.2 (d))

- volunteers in or for a religious, charitable or educational institution, or persons participating in a receiving rehabilitative services in a sheltered workshop operated by a religious, charitable or educational institution under a certificate issued by the US Department of Labor, or recipients of charitable aid from a religious or charitable institution who perform work in or for the institution which is incidental to or in return for the aid conferred, and not under an express contract of hire.
- persons performing services for a public authority, municipal corporation or a fire district or other political subdivision.
- persons performing services as farm laborers.

Restriction on Issuing Permits and Entering Contracts Without Disability Benefits

Section 220 Subd. 8 of the Disability Benefits Law (DBL), part of the WCL, requires the heads of all state and municipal entities, prior to issuing any permits, licenses or entering into contracts, to ensure that businesses applying for those permits, licenses or entering into contracts have appropriate disability benefits insurance coverage. (Prove It to Move It)

To comply with coverage provisions of the DBL, a business must:

- be legally exempt from the requirement to provide disability benefits insurance coverage;
- obtain such coverage from an insurance carrier; or
- be self-insured.

To assist state and municipal entities in enforcing Sec. 220 Subd. 8 of the DBL, businesses requesting permits or seeking to enter into contracts must provide one of the following forms to the entity issuing the permit or entering into a contract:

- CE-200 , Certificate of Attestation of Exemption from NYS Workers' Compensation and/or Disability Benefits Coverage; or
- DB-120.1 — Certificate of NYS Disability Benefits Insurance (the business' disability benefits carrier will send this form to the government entity upon request)
- DB-155 — Certificate of NYS Disability Benefits Self-Insurance. (businesses that are self-insured in NYS for disability benefits insurance should call the Workers' Compensation Board's Self-Insurance Office at (518) 402-0247 to obtain this form)
- **NYS Agencies Acceptable Proof**: Letter from the NYS Department of Civil Service indicating the applicant is a New York State government agency covered for workers' compensation under Section 88-c of the Workers' Compensation Law and exempt from NYS disability benefits.

If an employer **does not** employ one or more individuals on each of at least 30 days in a calendar year in New York State, New York State disability benefits coverage is not required. (*Independent contractors are not considered to be employees under the Disability Benefits Law.)* The certificate of exemption, Form CE-200 must only be used to show a government agency that the business is not required to obtain New York State workers' compensation and/or disability benefits insurance. Form CE-200 may not be used to "prove exemption" from workers' compensation and/or disability benefits insurance to another business or that business's insurance carrier. To be eligible for a disability benefits exemption using Form CE-200, an out-of-state employer must not have one or more individuals working on each of at least 30 days in a calendar year in New York.

Please call the Bureau of Compliance at (518) 486-6307 with any general questions regarding Section 220 Subd. 8 of the Disability Benefits Law.

Liabilities & Penalties for Not Having Required Disability Benefits Insurance Coverage

Failure of an employer to provide disability benefits coverage as required by law will subject the employer to penalties and the cost of any claims associated with the noncompliance. The Board has the authority under the DBL to determine when coverage is required. Sole proprietors, partners of a partnership, and the President, Secretary and Treasurer of a corporation may be held personally liable for an employer's failure to secure disability benefits insurance. Liabilities and penalties for not having the required disability benefits coverage include, but are not limited to:

Penalties for Noncompliance with Disability Benefits Mandatory Coverage Requirements

Section 220 (2) of the DBL - The Board shall impose upon an employer a penalty of 1/2 of one percent of the employer's payroll during the period of noncompliance PLUS an additional sum of $500 for each period of noncompliance.

Section 220 (1) of the DBL - Not securing required disability benefits insurance is a misdemeanor, punishable by a fine of not less than $100 nor more than $500 or imprisonment for up to one year or both. A second violation of the Law within five years may result in a fine of not less than $250 nor more than $1250. A third or subsequent violation of the Law within five years may result in a fine up to $2500.

Liability for Claims Against an Uninsured Employer Under the DBL, Section 213 (1)

In addition to the penalties assessed under Section 220, subdivision 2, the employer is liable for either the total value of any disability benefits claims paid by the Special Fund for Disability Benefits during the period of noncompliance OR one percent of the employer's payroll during the period of noncompliance, whichever is greater.

Coverage Search Application

The Workers' Compensation Board has developed a coverage search application for public usage. This web based application allows interested parties to search employers' disability benefits policy and coverage information free of charge. The policy and coverage information listed displays submissions from insurance carriers from 2001 to date. This information is updated daily by Proof of Coverage filings from carriers.

To use this application, go to www.wcb.state.ny.us and select "Does Employer Have Coverage"? Selecting the 'Employer Coverage Search' button on the overview page takes you to the disclaimer. Please read the disclaimer carefully and follow the search instructions.

Chapter Twelve

Resources for Employers

Workers' Compensation Board

New York State Workers' Compensation Board
20 Park St
Albany, NY 12207

Website: www.wcb.state.ny.us

Please call 877-632-4996 (General Information) for questions regarding:

- Injury/Claims
- Workers' Compensation Law
- Self-Insurance Medical Provider Requirements
- Disputed Medical Bills

Please call 866-298-7830 (Bureau of Compliance) for questions regarding:

- Penalties
- Compliance/Coverage
- Business Owner/Corporate Officer Options
- Enforcement

If you are a member of the business community and have attempted to resolve a workers' compensation issue without success, please call 1-800-628-3331 (Advocate for Business).

Compensation Insurance Rating Board

New York Compensation Insurance Rating Board
200 E. 42nd St.
New York, NY 10017
212-697-3535

Website: www.nycirb.org

Please call 212-697-3535 (Compensation Insurance Rating Board) for questions regarding:

- Rates
- Classifications
- Experience Modification Factors
- Endorsements
- Underwriting Rules

New York State Insurance Fund

New York State Insurance Fund
199 Church St.
New York, NY 10007
1-888-875-5790
212-312-9000

Website: www.nysif.com

If you are a current policyholder or a potential customer of the State Insurance Fund, please call either 1-888-875-5790 or 212-312-9000 (State Insurance Fund) with questions regarding:

- Quotes for Insurance (for potential customers)
- Audits
- Corporate officer exemptions
- Payroll Reporting
- Policy Cancellations

Chapter Thirteen

Commonly Used Workers' Compensation and Disability Benefits Terms

Abey a Case: To suspend action on a case, while seeking further information, with a notation that an Examiner is to review the case by a specified future date.

Abey an Issue: To postpone a decision on an issue in a case until a later date, when it is expected than additional pertinent information may or will be available.

Accident (Work-Related): (WCB) An event, arising out of and in the course of employment, that results in personal injury to a worker.

Accident, Notice and Causal Relationship (ANCR): (WCB) Minimal conditions that must be met before financial responsibility can be assigned to a claim for workers' compensation. Specifically, it must be established that:

A work-connected accident covered by the Workers' Compensation Law occurred;

Following the accident, the claimant notified his/her employer within the time limit required by the Workers' Compensation Law; and

A causal relationship exists between the accident and a resulting injury or disability.

Adjourn (a Hearing): (WCB) To put off or suspend until a future time, without making any findings.

Adjudication: The act or process of adjudicating a determination or decision by the Board.

Administrative Determination: (WCB) In a case in which no controversy or outstanding issue exists, a proposed decision is prepared and the parties are notified. A hearing is held only if one of the parties objects to the proposed decision.

Administrative Review Division: (WCB) A department of the Workers' Compensation Board which processes requests for reopening closed cases and objections to Workers' Compensation Law Judge decisions. In addition, the unit previously processed requests to close compensation cases with lump sum non-schedule adjustments, but since 1995 such requests have been handled by the district offices.

Aggregate Trust Fund (ATF): A special fund, created by the Workers' Compensation Law and administered by the State Insurance Fund, designed to pay bi-weekly indemnity benefits on behalf of the carrier or self-insured employer to certain claimants and beneficiaries in death cases, thereby relieving the carrier or self-insured employer of that long-term responsibility. Any award for permanent partial disability made on or after July 1, 2007 requires a mandatory deposit by the carrier or self-insured employer of the present value of the entire permanent partial disability award into the Aggregate Trust Fund**,** together with an additional sum necessary for a proportionate payment of expenses of administering the fund. In addition, for permanency awards made before July 1, 2007 and for death claims, the Board has discretion to require the carrier or the self-insured employer to deposit into the Aggregate Trust Fund an amount equal to the present value of all unpaid death benefits or other compensation in cases in which awards are made for total permanent or permanent

partial disability for a period of one hundred and four weeks or more, together with the necessary proportionate payment of expenses of administering the Aggregate Trust Fund. Once a deposit is made by the carrier or self-insured employer, the Aggregate Trust Fund has the authority to enter into a waiver agreement for indemnity benefits pursuant to § 32 of the WCL.

Appeal: (WCB) A legal action taken by one of the parties to the Appellate Division, Third Department, to reverse or amend a decision or direction made by a Board Panel or the Chair of the Workers' Compensation Board.

Apportionment: (WCB) A proportionate division of all or part of the liability in a case between two or more sources of disability for the same claimant, based on an evaluation of the relative contribution that the sources of disability have made to the claimant's permanent disability.

Arising Out of and in the Course of Employment: (WCB) Two necessary conditions that must be met to establish a work-connected accidental injury; an injury that "arises out of" is one that results from a hazard of the employment, while an injury "in the course of employment" is one that occurred at a time, place and under circumstances related to the employment. There is a presumption under the WCL that an injury that occurs in the course of employment arises out of the employment unless the employer or carrier presents substantial evidence to the contrary.

Attorney Fees: (WCB) Fees approved by the Board for claimant attorneys in workers' compensation cases. Under WCL .24, no claims for services or supplies are enforceable unless approved by the Board and, if approved, such claims become a lien upon the compensation awarded.

Average Weekly Wage (AWW) for Workers' Compensation Claims: Wage used to calculate compensation and death benefit rates. Defined at 1/52nd of the injured worker's average annual earnings (200-300 times average daily wage, depending on work schedule), based on the prior year's payroll data. If an injured worker has not worked a substantial portion of the immediately preceding year, the average wage of a comparably employed worker is used in the Board's calculations.

Average Weekly Wage (AWW) for Disability Benefits Claims: Wage used to calculate disability benefit rates. AWW for disability benefits is based on the disabled employee's earnings during the eight weeks prior to the start of disability.

Board Panel: (WCB) A panel, usually comprised of three Workers' Compensation Board members, that reviews requests to amend decisions made by Workers' Compensation Law Judges, reopens closed cases and considers applications for lump sum non-schedule adjustment awards. (WCL §142[2])

Calendar: A list of the cases scheduled to be heard on a given date at a specific part at a district office or hearing point.

Cancel (a Case): (WCB) An action by the Board to nullify assembly or indexing when two case numbers are assigned to a single claim.

Case: (WCB) A reported work injury or illness which has been assembled and assigned a case number by the Case Assembly Unit of the Workers' Compensation Board.

Case Number: (WCB) A unique identifier assigned by the Workers' Compensation Board at the time a case is assembled. The case number consists of 8 characteristics and has two possible formats:

For regular cases (not involving volunteer firefighters or volunteer ambulance workers), the format is DYYSSSSS, where D is a code for the WCB district office in which the case was indexed (0,1=Brooklyn, Manhattan, Queens; 2=Hempstead; 3=Peekskill; 4=Hauppauge; 5=Albany; 6=Syracuse; 7=Rochester; 8=Buffalo; 9=Binghamton); YY represents the last two digits of the year of assembly; and SSSSS is a 5-digit sequence number, beginning with 00001 on January 1.

For cases involving volunteer firefighters or volunteer ambulance workers, the format is VDYSSSS, where: V is a letter indicating a firefighter (F) or ambulance worker (A); D and YY are the same as for regular cases; and SSSS is a 4-digit sequence number beginning with 0001 on January 1.

Effective September 29, 2008, for cases involving volunteer firefighters the format is FASSSSSS, FA represents volunteer firefighters and SSSSSS represents a six digit number. For cases involving volunteer ambulance workers, the format is AASSSSSS, AA represents volunteer ambulance workers and SSSSSS represents a six digit number.

Effective September 29, 2008, for regular cases (not involving volunteer firefighters or volunteer ambulance workers), the format is GSSSSSSS and SSSSSSS is a 5-digit sequence number. This is not an intelligent number so District and year of assembly cannot be identified.

Cause of Accident: (WCB) Object, substance or condition that directly contributed to the occurrence of an accident.

Causation/Causative Factor: The fact of being the cause of something produced or of happening. The act by which an effect is produced. An important doctrine in fields of negligence and criminal law.

Claim: (WCB) A request, on a prescribed Form C-3, for workers' compensation for work-connected injury, occupational disease, disablement, or death (Form C-62). A claimant must file a claim within a two-year period from the occurrence of the accidental injury, knowledge of occupational disablement, or death. Failure to file a claim may bar an award for compensation unless the employer has made advance benefit payment or fails to raise the issue, in which event the claim filing requirement is deemed waived.

Claims Information Systems (CIS): (WCB) A data system used by the Board's Claims Unit to record basic case information such as parties of interest, current issues and scheduled hearings. CIS has historically been utilized in calendaring of cases (i.e., establishing hearing schedules) and in case identification.

Classification Code: (NCCI, NYCIRB) A system of insurance risk classification based on industrial or occupational categories, supported by the National Council on Compensation Insurance and in use in about 40 states where private insurance is available. The system, which includes several thousand 4-digit numeric codes (with more than 700 classifications in use in New York), is extensively used to identify an employer's rate making class(es) and establish basic pricing for workers' compensation insurance.

Close (a Case): (WCB) To remove a case from further consideration; a decision to close a case is based on a judge's determination that no further rulings by the Board will be necessary in the case. A case closing is effected by a statement on a WCB decision (e.g., "Case is closed."). The closing date is the date of the hearing or the effective date of the decision. A Board Panel may also close a case.

Compensated Cases Closed (CCC): (WCB) A data system used to summarize cases that have been closed with an award of indemnity benefits during a particular calendar year. The annual files generally contain 120,000-140,000 case records and include information about case/claimant background, employment, injury/accident characteristics, extent of disability, indemnity benefits and selected decision characteristics.

Conciliation: (WCB) A Workers' Compensation Board process established to resolve, in an expeditious and informal manner (e.g. through meetings or telephone conferences), issues involving non-controverted claims in which the expected duration of benefits is fifty-two weeks or less. Failure to reach an agreement through the conciliation process results in the case being scheduled for a hearing.

Contested: To bring an action at law. To make the subject of dispute, contention, or litigation.

Continue (a Case): (WCB) To complete a hearing on a case without closing the case, leaving additional matters to be resolved at a future hearing.

Controverted Claim: (WCB) A claim challenged by the insurer on stated grounds. The Board sets a pre-hearing conference for the determination of the grounds and directs the parties to appear and present their case.

C-2 : A Board form titled "Employer's Report of Work-Related Injury/Illness" filed by employers within ten days after an accident occurs, as required by WCL Section 110. The form includes a section identifying the case and principal parties and additional sections labeled "Accident," "Injured Person," "Nature of Injury," "Cause of Accident," "Fatal Cases.", "date the employee gave notice of accident/illness", "employee's supervisor", and a list of any witnesses. Revised Form C-2 is available for electronic submission to the Board from the website. Failure to make timely C-2 filings subjects employers to potential administrative and criminal penalties.

C-3 : A Board form titled "Employee's Claim," that should be completed by the injured worker and submitted to the Board within two years of the accident or onset date. The C-3 form contains much of the same information as the C-2 (sections describing the Injured Person, Employer, Place and Time of accident, Injury, Nature and Extent of Injury, Medical Benefits received, Compensation Benefits received/claimed, date hired, supervisor's name, and information regarding previous injuries to the same body part or a previous similar illness, etc.). Revised Form C-3 is available for electronic submission to the Board from the website.

C-3S – Form C-3S is a new form which is a Spanish version of the redesigned *Employee Claim* form and is available on the Board's website.

C-3.3 – Form C-3.3 is a new form for authorizing the limited release of medical information. This form is to be completed by claimants who have had a previous injury to the same body part or a previous similar illness. Form C-3.3 can be found at the end of Form C-3 and as a separate form on the Board's website.

C-4 : A Board form titled "Doctor's Initial Report," that requests information about claimant/claim identification, claim parties of interest, injury history, diagnosis, treatment, disability, causal relation of accident to disability, and degree of impairment. This form is to be completed the first time a provider treats a claimant for a particular workers' compensation claim. One item of note is that the request for medical authorization is not included in the new C-4 form; instead new Form C-4AUTH (see below) should be used to request authorization. Revised Form C-4 is available for electronic submission to the Board from the website. [Also used as Carrier/Employer Billing Form.]

C-4.2 – Form C-4.2 (*Doctor's Progress Report*) is a new, shorter version of Form C-4 which is to be used for all subsequent visits to report continuing services. Form C-4.2 is available for electronic submission to the Board from the website.

C-4.3 – Form C-4.3 is a new form to be completed once a patient has reached Maximum Medical Improvement and captures the percentage of permanent impairment. Form C-4.3 is available for electronic submission to the Board from the website.

C-4AUTH – Form C-4AUTH (Attending Doctor's Request for Authorization and Carrier's Response) is a new form with which the attending health care provider may request authorization from the carrier for a special medical service costing over $1,000. The carrier will submit its response to the provider on the same C-4AUTH form sent by the provider. This new form allows providers to highlight the special services they feel are medically needed, enables carriers to easily respond to such requests in writing, and enables the Board to track requests and responses to insure that all statutory timeframes are met.

C-7 : A Board form titled "Notice that Right to Compensation is Controverted," that a carrier (as appropriate) must file within (1) 18 days of the date disability begins, (2) ten days of the date the employer first had knowledge of the alleged injury, or (3) within 10 days after the receipt of a copy of the C-2, whichever is later. The form contains:

Information identifying the claim, person (allegedly) injured, employer and carrier,

A description of the alleged injury and town/county/state where alleged injury occurred,

Reasons why right to compensation is controverted,

Dates for start of alleged disability, employer/carrier first knowledge of injury, receipt of a C-2 from the employer and

A statement concerning whether notification has been given to the disability benefits insurance carrier, and date of notification.

C-8/8.6 : A Board form. Titled *Notice that Payment of Compensation for Disability has been Stopped or Modified*, carriers are required to file within 16 days of the date on which benefit payments are stopped or modified. The form includes:

information identifying the claim, injured person, employer and carrier,

a summary of total disability benefits, partial disability benefits and disfigurement awards paid,

a summary of the claimant's return-to-work and earnings status and

if appropriate, an explanation of why indemnity benefits have not been paid in full.

Depending on circumstances cited by the carrier and the claimant's response, the filing of a C-8/8.6 may or may not trigger an immediate hearing.

Debarment – The 2007 Workers' Compensation Reform Legislation included provisions that would prevent employers that had various types of workers' compensation noncompliance infractions from bidding on or being awarded Public Work Projects. (WCL §141-b)

Specifically, people are banned for one year from the conviction date for final assessments of civil fines, penalties or a stop work order. Those convicted of a misdemeanor under sections 26, 52 or 131 of the Workers' Compensation Law, and any substantially owned affiliated entity of such person are also barred from bidding on public work contracts or subcontracts with the state.

There is a five-year ban for felony convictions, or violators of the discrimination provisions of section 125 or 125-a of the Workers' Compensation Law. The debarment list is published on the Board's website.

For purposes of Workers' Compensation Law § 141-b (Suspension and debarment), the term 'public work' only applies to projects covered by Article 8 of the Labor Law, which is limited to only work related to public construction projects.

Decision: A determination arrived at after consideration. A report of a conclusion.

Decision and Award Data System (D&A): A recently added component of the Board's Claims Information System designed to facilitate production of trial calendar decision notices and other materials prepared by Claims unit keyboard specialists. The system is also being developed as a source of information about case/decision characteristics and indemnity benefits.

Dependent: A person eligible to receive death benefits in a fatal injury case; the regular receipt of contributions by the alleged dependent upon which he/she relies and needs to sustain his/her customary mode of living constitutes dependency. Surviving widows and children under age 18 years are eligible for benefits without proving dependency, and other eligible recipients (if dependency is established) may include dependent handicapped children over age 18 years of age, grandchildren, brothers and sisters under age 18, dependent parents and grandparents, and college students.

Disablement: To deprive of legal right, qualification, or capacity. To make incapable or ineffective; esp: to deprive of physical, moral, or intellectual strength.

Examiner: (WCB) An incumbent in the Workers' Compensation Examiner job title series who performs examining work, applying knowledge of law and of Board rules, regulations, policies and procedures to compensation and disability benefit case information. Among the actions regarding workers' compensation cases that examiners may perform include:

- determining whether a case should be indexed;
- evaluating claim forms and developing information required by judges for case decisions;
- requesting information (by phone, letter, etc.) needed for case development;
- evaluating whether a compensation case may be processed on an informal calendar;
- referring appropriate cases to the conciliation process; and
- preparing formal notices of decision based on judge's directions.

Exclusive Remedy: The premise on which the Workers' Compensation system is based: workers gave up the right to sue the employer in exchange for medical care and wage replacement benefits for their injuries.

Experience Modification Factor: The Compensation Insurance Rating Board (CIRB) develops experience modification factors for employers who have workers compensation annual premiums of $5,000 or more. An experience modification factor adjusts an employer's premium to reflect the difference between the employer's loss experience and the average experience that is expected for its classification(s) and size. The Experience Rating Plan places an emphasis on the number (frequency) of claims and (to a lesser extent) the severity of workplace accidents. If an employer has better experience than is expected for an average employer in the same industry with the similar payroll, the employer receives a premium credit. On the other hand, if the employer's experience is worse than the comparable average, the employer receives a premium debit. The ability of the employer to directly affect his/her premium in this manner serves as an incentive to control or eliminate workplace injuries.

Extent of Disability: (WCB) A single-digit numeric code used by the WCB's Research and Statistics unit to characterize the disability classification assigned to a case closed with indemnity benefits. The codes are:

0 = Death case

1 = Permanent total disability

2 = Permanent partial disability (PPD) - Schedule award only

3 = Facial disfigurement award only

4 = Schedule PPD and facial disfigurement award

5 = Temporary disability only

6 = Temporary disability and facial disfigurement award

7 = Non-schedule PPD - Lump sum settlement

8 = Non-schedule PPD - No present loss of earnings

9 = Non-schedule PPD - Carrier to continue payments

Final Adjustment Hearing: (WCB) A hearing held in cases involving the loss or loss-of-use of a member or organ of the body in which the principal issue is the extent of loss or loss-of-use (e.g., claims normally involving schedule awards).

Hearing: (WCB) The WCL provides that no case may be closed without notice to all interested parties, with all such parties having an opportunity to be heard. Board hearings are held before Workers' Compensation Law Judges who hear and determine claims for compensation, for the purpose of ascertaining the rights of the parties. The Board, upon receipt of an application for review of a judge's decision, may also hold hearings.

Indemnity Benefits: Compensation paid to the workers' compensation claimants for lost time resulting from an injury or illness. Seven types of award are permitted by the WCL:

- temporary total disability benefits (for periods of total wage loss);
- temporary partial disability benefits (for periods of partial wage loss);
- facial disfigurement awards (at judge's discretion but subject to a maximum, for cosmetic facial disfigurement resulting from the accident or exposure);
- permanent partial disability benefits (for loss of physical function or for periods of partial wage loss after a claimant has been classified as having a permanent partial disability);
- schedule loss of use award for the permanent percentage loss of use of a body part or member.
- permanent total disability benefits (for loss of wage earning capacity after a claimant has been classified as having a permanent total disability); and
- death benefits (compensation benefits awarded to spouse, children or under certain circumstances, other family members following a work-related death).

Indexed Claim: (WCB) A claim case folder that has been assembled and a notice of indexing has been sent to all parties on notice pursuant to WCL Section 25-2(b).

Judge: See Workers' Compensation Law Judge.

Jurisdiction: (WCB) The right to hear and determine a workers' compensation case. The Board has jurisdiction over most work-related injuries occurring in New York State. Notable exclusions from the Board' jurisdiction in New York State include: federal government workers and certain employees of local government, many NYC government occupations (civil service police, firefighters, sanitation workers), most NYC teachers, and casual employments (yard work by minors, baby-sitters, etc.). Workers covered by separate compensation systems under federal laws (maritime employments, merchant seafarers, interstate railroad employees, etc.) may elect to submit to New York State jurisdiction by waiving their federal rights and remedies.

Coverage for some worker classes in New York State is elective (e.g., part-time household workers, sole proprietors, corporate officers, certain musicians, and farm workers earning less than $1,200 per year).

Licensed Representative: (WCB) (a) Any person other than an attorney who is authorized by the Board to represent claimants or insurance carriers before the Board and, in some instances, to receive a fee, fixed by the Board, for such services. (b) Any person other than an attorney who is authorized by the Board to represent self-insurers before it. (12 NYCRR §302)

Licensed Claimant Representative: (WCB) (a) Any person other than an attorney who is authorized by the Board to represent claimants or insurance carriers before the Board and, in some instances, to receive a fee, fixed by the Board, for such services. (b) Any person other than an attorney who is authorized by the Board to represent self-insurers before it.

Lost Time: (WCB) A period of total wage loss and loss of earning capacity, beyond the statutory waiting period, caused by the claimant's work-connected disability. In workers' compensation cases only, if the disability period exceeds 14 days, compensation will be paid from the first day of disability. There is no waiting period for volunteer ambulance worker or volunteer firefighter cases.

Lump Sum Settlement: (WCB) A negotiated and Board-approved agreement, termed a "non-schedule adjustment," between a claimant with a non-schedule permanent partial disability and the insurer(s). As a result of the agreement the claimant receives a sum of money representing all future compensation for his/ her disability, and the case is considered closed. Under WCL Section 15(5-b), granting of a settlement by the Board requires that:

(a) the right to compensation has been established and compensation has been paid for at least three months,

(b) the continuance of disability and of future earning capacity cannot be ascertained with reasonable certainty,

(c) there has been a physical examination of the claimant prior to approval, and

(d) the Board considers the settlement "fair and in the best interest of the claimant."

In practice, lump sum settlements are usually final, but the law provides for reopenings if the Board finds that there has been a change in condition or degree of disability not contemplated at the time of the settlement.

Manual Rates: The listed premium, stated as dollars per $100 of weekly earnings for each employee, in a state's current schedule; in New York the manual rates are linked to the Classification Code system (i.e., rates are stated for each work classification code used in the state).

Maximum Medical Improvement (MMI): (WCB) An assessed condition of a claimant based on medical judgment that (a) the claimant has recovered from the work injury to the greatest extent that is expected and (b) no further change in his/her condition is expected. A finding of maximum medical improvement is a normal precondition for determining the permanent disability level of a claimant.

Medical Benefits: Medical treatment provided, under the Workers' Compensation Law, to injured workers as a result of injuries arising out of and in the course of employment.

Medical Fee Schedule: A schedule, established by the Chair of the Workers' Compensation Board, of charges and fees for medical treatment and care furnished to workers' compensation claimants.

Medical Treatment: (WCL) Care (other than first aid) administered by a physician, chiropractor or podiatrist or on a physician's referral, by a psychologist, or physical or occupational therapist.

Medical Treatment Guidelines: The mandatory standard of medical care for the mid and low back, neck, shoulder, and knee, effective for dates of service on or after December 1, 2010. The Medical Treatment Guidelines apply to all treatments and testing for injuries or illnesses to these specific areas of the body regardless of the date of injury. This will expedite appropriate care and speed provider reimbursement.

Misclassification: An action by an employer to intentionally attempt to reduce required workers' compensation insurance premiums by misclassifying employees as "independent contractors," and/or misclassifying the work that of a business to a classification that is less hazardous. An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years. Failure to keep adequate and/or accurate records may result in a fine of $2,000 per every 10-day period of noncompliance or two times the cost of compensation. Additionally, the fine for criminal conviction is from $1,000 to $50,000.

Misrepresentation: An action by an employer to intentionally attempt to reduce required workers' compensation insurance premiums by not keeping accurate/adequate payroll records, paying workers "off the books," misclassifying employees as "independent contractors" and/or misclassifying the work that of a business to a classification that is less hazardous. An employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years. Failure to keep adequate and/or accurate records may result in a fine of $2,000 per every 10-day period of noncompliance or two times the cost of compensation. Additionally, the fine for criminal conviction is from $1,000 to $50,000.

Modify a Decision: A decision that partially changes a previous decision -- e.g., a Board Panel memorandum of decision which amends a Workers' Compensation Law Judge decision.

National Council on Compensation Insurance (NCCI): An association of workers' compensation insurers which serves as the workers' compensation rating organization in about two-thirds of the states. The group establishes standards for use in rate making, develops policy forms, collects statistics, and provides statistical support and services.

National Institute for Occupational Safety and Health (NIOSH): An agency within the U.S. Department of Health and Human Services established in 1970. It is part of the Center for Disease Control and Prevention and is generally responsible for conducting research and making recommendations for the prevention of work-related illnesses and injuries. NIOSH's responsibilities include: investigating potentially hazardous working conditions (as requested by employer or employees), evaluating workplace hazards, creating and disseminating

methods for preventing disease/injury/disability, conducting scientifically valid research on safety issues, and providing education and training in the field of occupational safety and health.

New York Compensation Insurance Rating Board (CIRB): A private, non-profit association of licensed insurance companies that provide workers' compensation insurance in New York; the organization is responsible (among other things) for collecting and reviewing compensation loss experience from carriers, developing policy forms and rating plans, conducting actuarial analyses and preparing rate filings with the New York State Insurance Department.

No Further Action (NFA): A claim classified as such, based on the determination that no further rulings by the Workers' Compensation Board can be made unless action is taken by Parties of Interest in the case.

Non-Compensated Case: A closed case which has never awarded indemnity benefits.

Non-schedule Permanent Partial Disability: Non-fatal injuries that do not involve schedule permanent partial disabilities or cosmetic facial disfigurement and in which the claimant retains some earning capacity are assigned permanent disability benefits based on the claimant's actual or presumed wage loss, with benefits to continue for the duration of the wage loss disability. The 2007 Reform Legislation has placed caps on benefits for cases with a date of accident on or after March 13, 2007.

Notice: Written notification from an employee to his/her employer, indicating that a work-connected injury or injury has occurred. For accidental injuries, notice must be given no later than 30 days after the accident; the Board may excuse a failure to give notice on the grounds that a) for some reason, notice could not have been given; b) the employer had knowledge of the accident; or c) the employer's case has not been prejudiced. In cases involving occupational diseases, the time period for notice is 2 years from the date of disablement or from the date when the employee knew, or should have known, that the disease was due to the nature of employment.

NYCIRB (Carriers): A demand for payment or recovery for loss under an insurance contract. Cases are counted as claims only when a payment is made (for indemnity and/or medical benefits) or a reserve is established.

Occupation: (Census Bureau) A numeric coding structure widely adopted by federal, state and private occupation analysts, for identifying the occupation of an injured worker.

Occupational Disease (OD): A disease arising from employment conditions for a class of workers, with the disease occurring as a natural incident for particular occupations, distinct from and exceeding the ordinary hazards and risks of employment. To be considered an occupational disease, there must be some recognizable link between the disease and some distinctive feature of the workers' job.

Occupational Disease, Notice and Causal Relationship (ODNCR): (WCB) Minimal conditions that must be met before financial responsibility can be assigned to a claim for workers' compensation based on occupational disease. Specifically, it must be established that (a) the claimant has an occupational disease recognized by the WCL, (b) the claimant has, after the onset of the disease, notified his/her employer within the statutory time limit

(two years from date of disablement or from date when claimant knew or should have known that the disease was due to the nature of the employment, whichever is greater), and (c) a causal relationship exists between work-related activities and exposure, the development of the occupational disease, and a subsequent disability.

Occupational Illness: Any abnormal condition or disorder, other than one resulting from an occupational injury, caused by exposure to environmental factors associated with employment; it includes acute and chronic illnesses or diseases which may be caused by inhalation, absorption, ingestion or direct contact.

Occupational Injury: Any injury, such as a fracture, sprain, amputation, etc. - which results from a work accident or other exposure involving a single accident in the work environment.

Party of Interest: The claimant, employer, carrier and any statutory fund that may be liable in the particular case.

Permanent Partial Disability: Injuries that do not involve serious facial disfigurement or schedule loss of use awards and in which the claimant retains some earning capacity are assigned disability benefits based on the claimant's actual or presumed wage loss.

Planned Coverage: An employer may provide benefits under a Board approved Plan for Disability Benefits (or one negotiated by agreement and accepted by the Chair of the Board as meeting the requirements of the New York State Disability Benefits Law (DBL)) ONLY when such a Plan is insured through one of the carriers licensed by New York State to write statutory disability benefits insurance policies or by an employer who has been authorized by the New York State Workers' Compensation Board to self-insure for disability benefits. All Plans accepted by the New York State Workers' Compensation Board shall cover only those employees that are eligible for benefits under the New York State DBL. Such accepted Plans must meet ALL statutory requirements as set forth by the New York State DBL.

Premium: The total amount paid annually for workers' compensation coverage. For workers' compensation insurance, premiums are normally calculated using a rate per $100 of the payroll for covered employees.

Prima Facie Medical Evidence: "Prima Facie Medical Evidence" means a medical report referencing an injury, which includes traumas and illnesses, except for an independent livery driver as defined in section 309.1(i) of this Title it means either:

a medical report referencing an injury covered by the Independent Livery Driver Benefit Fund as set forth in Executive Law section 160-ddd or,

for injuries resulting from a crime as defined in section 309.1(d) of Part 309 of this Title against an independent livery driver, a medical report referencing an injury and a police report indicating that a crime against an independent livery driver occurred.

Professional: For purposes of disability benefits coverage, professional means an individual who devotes at least 80% of hours worked in a workweek to the following:

a) activities with advanced specialized scientific or intellectual degrees, as distinguished from a general academic education, or are original and creative in an area of recognized artistic endeavor;

b) whose work is not subject to routine supervision and whose work requires constant discretion and judgement; and

c) whose work is predominantly intellectual and whose output cannot be standardized in relation to a given period of time.

For disability benefits purposes, professional does not include an executive director of a 501(c)(3) nonprofit, clerical staff or other administrators. (WCL §355.2 (d))

Reduced Earnings: (WCB) A compensation rate based on the claimant's partial wage loss or partial loss of earning capacity due to a condition related to a compensable work-connected injury. A reduced earnings calculation is made when a claimant returns to work at lower wages than he or she earned before the work related accident or illness.

Reimbursement, Employer's Request for: A request by an employer for reimbursement for wages paid to an employee for a period during which the employee was eligible to receive workers' compensation or disability benefits. A request by a compensation carrier for reimbursement out of the Special Disability Fund. A request by a disability benefits carrier for reimbursement of benefits paid to a claimant while the workers' compensation case was being litigated.

Reopened Case: A workers' compensation case which had been determined to need no further action by a Workers' Compensation Law Judge or a Board Panel that is subsequently made active again to determine the claimant's eligibility for benefits.

Reopened Cases Fund: (WCB) A fund established to assume liability for additional awards in cases in which the application to reopen the case occurs more than seven years from the date of injury and more than three years from the payment of the last payment of compensation. The Fund is financed through payments in non-dependency death cases and through assessments made as needed against all carriers.

Request for Further Action: When a Party-of-Interest in a case requests Board intervention.

Rescind (a Decision): (WCB) A Board Panel memorandum of decision which voids or annuls a Workers' Compensation Law Judge decision. Decisions to rescind are usually issued without prejudice in order to allow the parties to present evidence or testimony not previously presented to a Workers' Compensation Law Judge.

Rescind (a Penalty): (WCB): In certain instances the New York State Workers' Compensation Board mistakenly issues a penalty for noncompliance with the mandatory coverage provisions of the New York State Workers' Compensation Law for workers' compensation and/or disability benefits to a legal entity that is not required to carry such insurance policy(ies). The Workers' Compensation Board will review documentation submitted by the legal entity that shows that such coverage is not required and the Workers' Compensation Board will "rescind" (withdraw or cancel) the penalty action. The legal entity is not required to pay the penalty amount related to the rescinded penalty,

Review, Request for: (WCB) A written request for a Board Panel review of a Workers' Compensation Law Judge decision.

Schedule Permanent Partial Disability: (WCB) Maximum benefit week schedules in section 15 of the WCL are generally used in determining lifetime benefits for injuries to major body parts. Injuries amounting to less than a 100 percent functional loss are awarded a

percentage of the scheduled weeks, and there are also provisions for additional weeks required for a protracted healing period. This is also known as a schedule loss of use award.

Second Injury Fund: A special fund, technically known in New York as the Special Disability Fund, which assumes, in certain cases, part of the permanent disability liability resulting from injuries to previously handicapped workers. The fund, which is funded by assessments against carriers and self-insureds, was created to assure handicapped workers receive full workers' compensation benefits, while encouraging employers to hire physically handicapped persons by protecting them against disproportionate liability in the event of subsequent employment injury. The 2007 Reform legislation provides for the elimination of this fund.

Self-Insurance: (Workers' Compensation) In lieu of purchasing insurance from a private insurance carrier or the State Insurance Fund, an employer or group of employers may apply to self-insure those benefits. Employers that wish to self-insure on either an individual or group basis must regularly file proof of their financial ability to ensure that benefits will be paid. Individual self-insurers must post security deposits which guarantee those benefits in the event of a default. Group self-insurers must maintain trust funds dedicated to the payment benefits.

Self-Insurance: (Disability Benefits) In lieu of purchasing insurance from a private insurance carrier or the State Insurance Fund, an employer or group of employers may apply to self-insure those benefits. An employer that wishes to self-insure must regularly file proof of its financial ability to ensure that benefits will be paid. Individual self-insurers must post security deposits which guarantee those benefits in the event of a default.

Special Funds: Funds established under the WCL to assure payments of benefits associated with claims. The Special Fund for Reopened cases will assume the carrier's role in a case, including full responsibility for payment. The Second Injury Fund will reimburse a carrier for payments made in compensation cases.

State Insurance Fund: A quasi-public agency whose activities include a) providing workers' compensation insurance coverage to private and public employers; b) providing other lines of insurance coverage; and c) acting as an agent in New York State in workers' compensation cases involving New York State employees. The New York State Insurance Fund must offer workers' compensation insurance to any employer requesting it, making the Fund an "insurer of last resort" for employers otherwise unable to obtain coverage.

Statutory Disability Benefits Insurance Policy: New York is one of a handful of states that require employers to provide disability benefits coverage to employees for an off-the-job injury or illness. Cash benefits are 50 percent of a claimant's average weekly wage, but no more than the maximum benefit allowed, currently $170 per week. Benefits are paid for a maximum of 26 weeks of disability during 52 consecutive weeks. Coverage for statutory disability benefits can be obtained through a disability benefits insurance carrier who is authorized by the New York State Workers' Compensation Board to write such policies. Another option is for large employers to become authorized by the Board to self-insure.

Stop Work Orders: A stop work order means that a business MUST cease all operations – no work at all may take place until the Stop Work Order is officially removed. Section 141-b of the WCL states that a business may be issued a stop work order if workers' compensation coverage is not in place. Receipt of a stop work order may lead to disbarment from any State,

municipal or public body Public Works contract or subcontract for 1 year (5 years for felony conviction).

Symptomatic Treatment: Medical treatments aimed at providing relief from the symptoms of a disease or injury, rather than providing a permanent remedy to the underlying condition.

Tentative Rate: A weekly rate assigned by the Workers' Compensation Board for carrier indemnity payments, pending final adjudication of outstanding issues relating to benefit rates.

Third Party Action: (WCB) This term refers to lawsuits against equipment manufacturers, facility owners and other non-employer parties whose products or services contributed to the occurrence of an accident. Under WCL, a compensation claim is a workers' sole remedy against the employer, but lawsuits may be initiated against third parties for contributory negligence, product defects, etc.

Total Disability: A claimant will be found to be totally disabled when his or her earning capacity has been lost totally as a result of the work related injury or illness. A total disability may be characterized as temporary or permanent.

Trial Calendar Hearing: (WCB) A regularly scheduled hearing on a case conducted by a WCLJ that is designed to permit the introduction of evidence and/or witnesses and the presentation of arguments by the parties.

Uninsured Employers' Fund (UEF): A special fund which provides for the payment of workers' compensation cases where the employer was not insured nor self-insured and has defaulted in the payment of workers' compensation.

Wage: See Average Weekly Wage.

Wage Expectancy: (WCB) When it is established that a permanently disabled employee was under the age of twenty-five when injured, and that under normal conditions his or her wages would be expected to increase, that fact may be considered in order to increase his or her average weekly wage for payments related to permanency (WCL §14[5]).

Wage Replacement: (WCB) The proportion of pre-injury wages replaced by workers' compensation benefits.

Waiting Period: (WCB) Period covering the first seven days of disability resulting from a work-connected injury or illness. Workers' compensation indemnity benefits are not allowable for the first seven days of disability, except that (a) in cases where the disability period exceeds 14 days, indemnity awards are allowed from the date of disability, and (b) there is no waiting period for VAWBL/VFBL cases. There is also a seven day waiting period for disability benefits.

Waiver Agreement (Section 32 Agreement): An agreement settling and determining the compensation and other benefits due to a claimant. Section 32 of the Workers' Compensation Law requires that an opportunity to settle the claim be made to the claimant by the self-insured employer or insurance carrier within the later of: two years after the date the claim was indexed by the board or six months after the claimant is classified with a permanent disability. In a death claim, the opportunity to settle must be made within six months after entitlement to benefits is established for all beneficiaries. **Note:** Claims that are not settled via Section 32 Agreement after a finding of permanent partial disability are subject to full

payment of the present value of the entire award into the Aggregate Trust Fund together with necessary proportionate costs of administration of that fund. For a complete definition, refer to "Aggregate Trust Fund" herein.

Workers' Compensation Board, New York State (WCB): (a) The agency charged with administering the Workers' Compensation Law, the Volunteer Ambulance Workers' Benefit Law and the Volunteer Firefighters' Benefit Law and the Disability Benefits Law. (b) The thirteen member Board responsible (directly or through review of delegated authority) for determining all issues involving claims under the WCL. Members are appointed to seven-year terms by the Governor, by and with the advice and consent of the Senate. The Governor designates the Chair and Vice-Chair.

Workers' Compensation Law (WCL): Chapter 67 of the Consolidated Laws, governing the workers' compensation system; separate laws cover compensation benefits for volunteer firefighters and volunteer ambulance workers.

Workers' Compensation Law Judge (WCLJ) aka: Compensation Claims Referee: (WCB) An officer appointed by the Chair of the Workers' Compensation Board from a Civil Service competitive process to hear and determine claims and to conduct such hearings and investigations and make such orders, decisions and determinations as may be required in the adjudication of the claims. A Judge's decision is deemed the decision of the Board unless the Board modifies or rescinds such decision.