1. Citation for the State's workers’ compensation statute.

Wis. Stat. §102.01-.89 (2011) with April 17, 2012 Amendments

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers’ compensation?

a. Every person, including elected officials, in the service of the state or any of its municipalities, regardless of whether the person is a resident or is employed or injured inside or outside of the state;

b. Peace officers engaged in the enforcement of the peace or the pursuit and capture of those charged with crime;

c. Every person in the service of another under any contact of hire, express or implied, and all helpers, assistants or employees if employed with the employer’s actual or constructive knowledge, including minors, but excluding domestic servants and other persons whose employment is not in the course of any trade or business unless the employer elects to include them;

d. Every person selling or distributing newspapers or magazines on the street or from house to house;

e. Members of volunteer fire companies or of any legally organized rescue squad;

f. Certain independent contractors and employees of contractors;

g. National Guard members or active-duty state guard members (provided that equivalent federal benefits are not available);

h. A participant in a community work experience program;

i. Students in vocational, technical, and adult education districts who, as part of their program, perform services or manufacture goods sold by the school;

j. A child performing uncompensated community service as a result of an informal disposition, consent decree, or order;

k. An adult performing uncompensated community service under a deferred prosecution program;
l. Inmates of state penal institutions if performing assigned work, or working in a work-release or transitional employment program;

m. Certain public or private school students under a work training, work experience, or work study program.

n. An employee, volunteer, member of an emergency management unit or a member of a regional emergency response team.

Note: Domestic servants and true volunteers are not included. Wis. Stat §102.07. Coverage can be obtained for volunteers.

3. Identify and describe any "statutory employer" provision.

An employee of an uninsured subcontractor under an insured general contractor may claim compensation from the general contractor for injuries sustained. Wis. Stat. §102.06 ("Contractor Under" provision). Practically, the State Uninsured Employers Fund would pick up any such claims so long as it is solvent which has essentially suspended the application of claims under Wis. Stat. §102.06. In Acuity v. Olivas, 2007 WI 12, 298 Wis. 2d 640, 726 N.W.2d 258, a general contractor hired a subcontractor to assist with drywall installation projects. The subcontractor recruited persons to assist him with the projects. The Wisconsin Supreme Court concluded that the persons the subcontractor recruited were employees under the Act but not employees of the subcontractor.

4. What types of injuries are covered and what is the standard of proof for each:

A. Traumatic or "single occurrence" claims.

The employee must establish that the single traumatic incident was a direct cause of injury, a temporary aggravation of a pre-existing condition, or that the traumatic event was a precipitation, aggravation and acceleration of a pre-existing condition. Lewellyn v. Industrial Comm., 38 Wis. 2d 43, 155 N.W.2d 678 (1968).

B. Occupational disease (including respiratory and repetitive use).

An employee must establish that the employment was either the sole cause of a condition or at least a material contributory causative factor in the condition's onset or progression. Universal Foundry Co. v. DILHR, 82 Wis. 2d 479, 263 N.W.2d 172 (1978). An employee's permanent sensitization to cigarette smoke as a result of workplace exposure has been held to be a compensable occupational disease. Kufahl v. Wisconsin Bell, LIRC Dec. No. 88-000676 (12/11/90). The injury date for occupational disease is the date of disability, which in turn has been defined as "the first date of wage loss through lost work time attributable to the effects of the occupational disease." General Cas. Co. v. LIRC, 165 Wis. 2d 174, 180, 477 N.W.2d 422 (Ct. App. 1991) If there was no prior lost time, the date of loss is the last date of employment for the employer whose work was a
material and significant causative factor in the onset and progression of the condition.

5. What, if any, injuries or claims are excluded?

Injuries that did not arise out of and while the employee was in the course of the employment are not covered.

6. What psychiatric claims or treatments are compensable?

Psychiatric injuries which are a direct consequence of a physically traumatic injury are compensable. The employee only needs to prove that the psychological injury was a direct result of the physical injury. *Johnson v. Industrial Comm.*, 5 Wis. 2d 584, 93 N.W.2d 439 (1958). However, in a claim where the psychiatric injury is not the result of a physical injury, the employee must establish that he or she was exposed to extraordinary emotional stress beyond that experienced by all similarly situated employees. *School District No. 1 v. DILHR*, 62 Wis. 2d 370, 215 N.W.2d 373 (1974); *Swiss Colony v. DILHR*, 72 Wis. 2d 46, 240 N.W.2d 128 (1976); *Probst v. LIRC*, 153 Wis. 2d 185, 450 N.W.2d 478 (Ct. App. 1989).

7. What are the applicable statutes of limitations?

The statute of limitations is 12 years from the date of injury or death, or 12 years after the date that compensation, other than treatment or burial expenses, was last paid. Wis. Stat. §102.17(4). However, in the case of an occupational disease or a traumatic injury resulting in the loss or total impairment of a hand or any part of the rest of the arm proximal to the hand, or of a foot or any part of the rest of the leg proximal to the foot, any loss of vision, any permanent brain injury, or any injury causing the need for an artificial spinal disc or a total or partial knee or hip replacement, there shall be no statute of limitations. Benefits or treatment expenses for an occupational disease becoming due after 12 years from the date of injury or death or last payment of compensation, other than for treatment or burial expenses, shall be paid from the work injury supplemental benefit fund under §102.65, and in the manner provided in §102.66. Benefits or treatment expenses for such a traumatic injury becoming due after 12 years after that date shall be paid from that fund and in that manner if the date of injury or death or last payment of compensation, other than for treatment or burial expenses, is before April 1, 2006. Wis. Stat. §§102.17(4) and 102.66(1) & (2).

8. What are the reporting and notice requirements for those alleging an injury?

An employee alleging injury must report the incident within 30 days of its occurrence or the date the employee knew or should have known of the injury and its relationship to the employment. However, absence of notice will not bar recovery if it is found that the employer was not misled thereby. There is a laches provision in the statute extinguishing the claim after two years for failure to report. Wis. Stat §102.12. However, the laches provision does not apply if the employer knew or should have known, within the two year period, that the employee had sustained the injury upon which the claim is based.
9. **Describe available defenses based on employee conduct:**

**A. Self-inflicted injury.**

Self-inflicted intentional injuries are not compensable. Wis. Stat. §102.03(1)(d). For purposes of this section, however, negligent acts (such as driving while intoxicated) that result in personal injury will reduce but not necessarily bar a claim for benefits. *Dibble v. DILHR*, 40 Wis. 2d 341, 161 N.W.2d 913 (1968). (A 15% reduction, up to $15,000, is possible if at a hearing the employer proves that the injury was caused by intoxication. Wis. Stat. §102.58). Death by suicide will be compensable if the claimant establishes any substantial evidence that a chain of causation exists linking the suicide to a compensable industrial injury. *Brenne v. DILHR*, 38 Wis. 2d 84, 156 N.W.2d 497 (1968).

**B. Willful misconduct, "horseplay," etc.**

Employees participating in horseplay and receiving injuries will not be compensable if the act was a deviation sufficient to remove the employee from the course of employment. Factors used to determine whether given horseplay was such a deviation includes: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation (i.e., abandonment of duty); (3) the extent to which horseplay had become an accepted part of the employment; and (4) the extent to which the nature of employment may be expected to include horseplay. *Nigbor v. DILHR*, 120 Wis. 2d 375, 355 N.W.2d 532 (1984). A nonparticipating victim of horseplay is entitled to benefits. *Badger Furniture Co. v. Industrial Comm.*, 195 Wis. 134, 217 N.W. 734 (1928).

Willful misconduct can be a complete bar, provided the misconduct constitutes a complete deviation from the scope of employment. *Vollmer v. Industrial Comm.*, 254 Wis. 162, 35 N.W.2d 304 (1948). The following events result in a reduction of compensation by 15% (not to exceed $15,000): (1) employee's failure to use safety devices; (2) employee's failure to obey safety rules; and (3) when the injury is due to the intoxication of the employee or use by the employee of a controlled substance. Wis. Stat. §102.58.

**C. Injuries involving drugs and/or alcohol.**

Where the employer proves the injury was caused by intoxication, compensation is reduced by 15% with a maximum reduction of $15,000. Wis. Stat. §102.58; *Haller Beverage Corp. v. DILHR*, 49 Wis. 2d 233, 181 N.W. 2d 418 (1970). Wis. Stat. §102.58 has been amended to include use of a controlled substance or its analog as set forth in Wis. Stat. §961.01(4m).

10. **What, if any, penalties or remedies are available in claims involving fraud?**

In 1971, Wisconsin enacted a statute specifically designed to deal with fraud in insurance and employee benefit claims. A knowingly false or fraudulent representation, benefit application, account, certificate or proof of loss, to support a claim for payment under a policy of insurance or employee benefit program, to an employer, insurer or agency
charged with administering an employee benefit program, is a violation of criminal law. Wis. Stat. §943.395. Fraud not exceeding $2,500 is a Class A misdemeanor, punishable by a fine of $10,000 or imprisonment not to exceed 9 months, or both, while fraud exceeding $2,500 is a Class I felony, punishable by a fine of $10,000 or imprisonment not to exceed three and one half (3 ½) years, or both.

Prior to January 1, 1994, fraudulent claims for worker's compensation benefits could permissibly be referred to a county district attorney or the Wisconsin Attorney General for prosecution. Effective January 1, 1994, employers/insurers are required to report fraudulent claims to the Department of Workforce Development if the employer/insurer is satisfied that reporting the claim will not impede the ability to defend it. Wis. Stat. §102.125. DWD is mandated to "refer credible cases" to the appropriate district attorney for prosecution. Wis. Stat. §943.395.

11. Is there any defense for falsification of employment records regarding medical history?

Unfortunately, falsification of information on employment records is not a bar to worker's compensation benefits. *Tews Lime and Cement Co. v. DILHR*, 38 Wis. 2d 665, 158 N.W.2d 377 (1968).

12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?

Vendors' recreational activities with their customers, such as fishing or hunting trips, are not deviations from employment if authorized or directed by the employer. *Continental Casualty Co. v. Industrial Comm.*, 26 Wis. 2d 470, 132 N.W.2d 584 (1965); *Schwab v. DILHR*, 40 Wis. 2d 686, 162 N.W.2d 548 (1968).

One court used the following factors to hold that a baseball game was within the course of employment whether: (1) the employee was subject to the employer's rules of conduct while at the event; (2) participation was part of job description and performance reviews; (3) participation benefited the employer; and (4) the employer actively solicited employee participation. *Wunsch v. City of Fond du Lac Fire Dept.*, LIRC Dec. No. 93-040966 (December 21, 1994).

A softball game played during a paid 20 minute break was deemed a momentary and insubstantial deviation from employment and hence the injury an employee sustained during the game was found to be compensable where the activity had gone on long enough for the employer to be aware of the activity and to become an incident of employment. *E.C. Styberg Engineering Co., Inc. v. LIRC*, 2005 WI App. 20, 278 Wis. 2d 540, 692 N.W.2d 322.

With regard to wellness programs, there is a statutory exception precluding liability for injuries occurring while the employee is "engaging in a program designed to improve the physical well-being of the employee, whether or not the program is located on the employer's premises, if participation in the program is voluntary and the employee
receives no compensation for participation." Wis. Stat. §102.03(1)(c)(3).

13. **Are injuries by co-employees compensable?**

Wisconsin generally follows the rule of innocence. If the employee was an innocent bystander to a fight or was not the aggressor, the claim is compensable. Where the employee was the aggressor, the administrative law judges have generally determined that the injuries are not compensable. No state appellate court has commented on these cases.

14. **Are acts by third parties unrelated to work, but committed on the premises, compensable (e.g., "irate paramour" claims)?**

Injuries caused by workplace violence may be compensable if the employment places the employee in a "zone of special danger". This is referred to as the "positional risk" doctrine.

There will be liability where the circumstances of employment put the employee at the time and place where he or she was injured by a force not solely personal to him or her. *Allied Mfg. Ins. v. DILHR*, 45 Wis. 2d 563, 173 N.W.2d 690 (1970); *Cutler-Hammer, Inc. v. Industrial Commission*, 5 Wis. 2d 247, 253-54, 92 N.W.2d 824 (1958).

Personally motivated assaults may invoke the positional risk doctrine if a condition of employment facilitates the injury. *Weiss v. City of Milwaukee*, 208 Wis. 2d 95, 559 N.W.2d 588 (1997).

**BENEFITS**

15. **What criterion is used for calculating the average weekly wage?**

The "average weekly wage" is the greater of two factors: (1) the hourly wage rate multiplied by the number of hours normally scheduled to work (usually 40 hours per week); and (2) the average of the total gross wages earned in the 52 weeks preceding the injury. The employee must have been employed for 90 days to use the average gross wage. There are special rules for seasonal and part-time employees. Wis. Stat. §102.11. It is presumed, unless rebutted by reasonably clear and complete documentation, that the normal full-time workweek established by the employer is 24 hours for a flight attendant, 56 hours for a firefighter, and not less than 40 hours for any other employee. Wis. Stat. §102.11(4).

16. **How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?**

Temporary total disability benefits are paid at the rate of two-thirds of the average weekly wage. The maximum rate varies depending on the year in which the injury occurred. For 2015 injuries, the maximum temporary total disability rate is $911 per week. Average weekly earnings for temporary disability, permanent total disability or death benefits for
injury after January 1, 1982, shall not be less than $30. Wis. Stat. § 102.11(1).

17. **How long does the employer/insurer have to begin temporary benefits from the date disability begins?**

There is no specific statutory requirement for “prompt payment” of disability benefits, but the Department of Workforce Development generally requires an employer/insurer to pay 80% of all indemnity claims within 14 days of the injury.

18. **What is the “waiting” or “retroactive” period for temporary benefits (e.g., must be out _____ days before recovering benefits for the first _____ days)?**

If an employee is off less than 8 days, there is a 3 day waiting period. If the employee is disabled on the 8th day there is no waiting period. Wis. Stat. §102.43.

19. **What is the standard/procedure for terminating temporary benefits?**

Temporary disability must be paid when two things occur at the same time: (1) a wage loss; and (2) a healing period is not yet reached. Temporary disability may be terminated when the employee returns to work during the healing period. You may owe temporary partial benefits if there is a partial wage loss. Benefits are also terminated when a medical practitioner indicates that maximum medical improvement has been reached. See also, Wis. Admin. Code §DWD 80.47. Larsen Co. v. Industrial Comm., 9 Wis. 2d 386, 101 N.W.2d 129 (1960); Knobbe v. Industrial Comm., 208 Wis. 185, 242 N.W. 501 (1932). An employer/insurer must advise the employee and Department of Workforce Development that benefits are being terminated and that, if the employee disagrees, he or she has a right to a hearing on the issue. However, if an employee who has sustained a compensable injury undertakes in good faith invasive treatment that is generally medically acceptable, but that is unnecessary, the employer shall pay disability indemnity for all disability incurred as a result of that treatment. An employer is not liable for disability indemnity for any disability incurred as a result of any unnecessary treatment undertaken in good faith that is noninvasive or not medically acceptable. Wis. Stat. §102.42 (1m).

Wis. Stat. §102.43(9) allows for the suspension of temporary total disability payments when an employee is able to return to restricted work during the healing period, if any of the following apply: (1) the employee is offered suitable employment within his or her physical and mental limitations; (2) the employee has been suspended or terminated due to the employee’s alleged commission of a crime substantially related to the employment AND the employee has been formally charged (If the employee is found not guilty, temporary total disability is due); or (3) the employee has been suspended or terminated due to the employee’s violation of the employer’s drug policy during the period when the employee could return to a restricted type of work during the healing period (The drug policy must have been established in writing and regularly enforced prior to the date of injury).
Compensation for temporary disability will be suspended for an employee who has been convicted of a crime, is incarcerated, and not available to return to work during the healing period. Wis. Stat. §102.43 (9)(d).

20. **Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?**

You are only entitled to a credit if there has been an overpayment of temporary total disability benefits.

21. **What disfigurement benefits are available and how are they calculated?**

Benefits are awarded where the disfigurement is: (1) permanent; (2) visible in the ordinary course of employment; and (3) likely to occasion a potential wage loss. Wis. Stat. §102.56. As of April 17, 2012, Wis. Stat. §102.56(1) & (2) is amended. Now, disfigurement will not be allowed for an employee who returns to work for the employer at the time of injury or who is offered employment by that employer at the same or higher wage, unless employee has an actual wage loss. The maximum benefit is the average annual earnings, or 50 times the average weekly wage at the time of injury. In addition to the appearance and location of the disfigurement, factors considered in determining the award include the employee’s age, education, training, previous experience and earnings, current occupation and earnings, and likelihood of future suitable occupational change.

22. **How are permanent partial disability benefits calculated including the minimum and maximum rate?**

Benefits are two-thirds of the average weekly earnings at the time of injury, but not less than $30. The average weekly earnings for permanent partial disability for injuries occurring on or after January 1, 2010, and before May 1, 2010, with wages of at least $423, resulting in a maximum compensation rate of $282, and, for injuries occurring on or after May 1, 2010, earning at least $438, resulting in a maximum compensation rate of $292. For injuries occurring on or after January 1, 2011, and after January 1, 2012, the rate is $302. For injuries occurring on or after April 17, 2012, the rate is increased to $312. For injuries occurring on or after January 1, 2013, January 1, 2014, or January 1, 2015, the maximum rate remains at $322.

A. **How many weeks are available for scheduled members/parts, and the standard for recovery?**

Over two dozen named injuries subject to the schedule are set forth in Wis. Stat. §102.52. Medical doctors determine “relative disabilities” to scheduled parts of the body. There is a guideline for determining relative disabilities in Wis. Admin. Code §DWD 80.32. An example of the calculation of a relative disability is as follows. Assume a permanent disability of 10% at the hip joint. Total disability at the hip joint is 500 weeks of permanent disability. A 10% disability in this case is 50 weeks of permanent partial disability. The benefits are paid on a weekly or monthly basis after the healing plateau is
reached and temporary disability benefits have been terminated. Benefits are increased by 25% if the employee sustains an injury to the hand listed in the schedule and the injured hand is the employee’s dominant hand. Wis. Stat. §102.54.

B. Number of weeks for “whole person” and standard for recovery.

Those injuries not specifically set forth in Wis. Stat. §102.52 are considered “unscheduled” and available for a “whole person” rating. Such injuries include a disability affecting the torso, head, and mental faculties other than hearing or sight. The maximum number of weeks for a whole person permanent disability is 1,000. Wis. Stat. §102.44(3). This is a medical rating subject to certain guidelines. However, “unscheduled” functional permanency cases are also available for an assessment of lost earning capacity by a vocational expert. *Northern States Power Co. v. Industrial Comm.*, 252 Wis. 70, 30 N.W.2d 217 (1947). Wisconsin is an “earning capacity” state, so the vocational experts determine what percentage the pre-injury earning capacity has been diminished by the physical residuals of an injury. Comparison between pre- and post-injury wages is relevant but not dispositive. Any functional permanency that has been paid for an unscheduled injury is deducted from the loss of earning capacity assessment.

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

Vocational rehabilitation retraining maintenance benefits (temporary total disability during a school program) are available. Wis. Stat. §102.61. The employee can work part-time, or 24 hours per week, and still be entitled to the full temporary total disability benefit for that week. Wis. Stat. §102.43(5), effective April 17, 2012. An employee must have sustained permanent disability as the result of a compensable injury. If an employee is not able to return to suitable employment with the employer, he or she is to be evaluated by the state Division of Vocational Rehabilitation. *Johnson v. LIRC*, 177 Wis. 2d 736, 503 N.W.2d 1 (Ct. App. 1993). Suitable employment means employment that is within an employee’s permanent work restrictions, that the employee has the physical capacity, knowledge, transferable skills, and ability to perform, and pays not less than 90% of the employee’s pre-injury average weekly wage. Wis. Stat §102.61(1g)(a). If the employee cannot receive retraining through the DVR, the suitable employment wage requirement is decreased to 85% of the employee’s pre-injury average weekly wage. Wis. Admin. Code §DWD 80.49(4) and (5).

The DVR counselor’s decision regarding retraining may not be challenged unless there is a showing of fraud or a flagrant abuse of discretion. *Massachusetts Bonding & Ins. Co. v. Industrial Comm.*, 275 Wis. 505, 82 N.W.2d 191 (1957).

Based on the April 17, 2012 amendments, the insurance carriers and self-insured employers will be liable for reasonable costs of a retraining program including the cost of tuition, fees, and books in cases where the Division of Vocational Rehabilitation provides services for the rehabilitative training program. Wis. Stat. §102.61(1), (1g) (b), (1m) (d) & (1r) (c).
24. How are permanent total disability benefits calculated, including the minimum rates?

Permanent total disability can be awarded under two sets of circumstances. There are certain “scheduled permanent total disabilities” that warrant the automatic award of permanent total disability. Wis. Stat. §102.44(2). There are also “vocational permanent total disabilities” arising out of an assessment of 100% vocational disability by a vocational expert. See answer 23. In either case, benefits are paid at the applicable temporary total disability rate (two-thirds of the average weekly wage) for as long as the employee lives. You may be entitled to take a social security disability offset against these payments.

25. How are death benefits calculated, including the minimum and maximum rates?

A. Funeral expenses.

In all cases where death of an employee proximately results from the injury, the employer/insurer shall pay the reasonable expense for burial. As of May 1, 2010, the maximum burial expense was increased to $10,000, and as of 2015 it remains at that amount. (Wis. Stat. § 102.50.)

B. Dependency claims.

Dependents, usually the spouse or minor child of the deceased, are entitled to four times the employee’s annual earnings (200 times the average weekly wage) at the time of injury as a death benefit. Such benefits are paid in four yearly installments starting on the date of death. The maximum death benefit for a 2015 injury is $273,300. Wis. Stat. §§102.46-.50; Wis. Stat. §102.11(1).

26. What is the criteria for establishing a “second injury” fund recovery?

An employee must establish permanent disability from a compensable injury equal to 200 weeks of compensation and permanent disability from a non-work condition of 200 weeks permanent disability. Benefits are then available for the second non-work permanency at the termination of all work-related disability payments. Wis. Stat. §102.59(1). (April 17, 2012 amendment clarifies that an employee will only be limited to one (1) claim from the Second Injury Fund.)

27. What are the provisions for reopening a claim for worsening of condition, including applicable limitation periods?

All claims are open, unless specifically closed by compromise, for the length of the applicable limitation period. Wis. Stat. §102.17(4). In those cases where a “final order” has been obtained after a hearing, only medical expense claims remain open. Administrative law judges are permitted to issue “interlocutory orders,” reserving jurisdiction on any or all issues. There is some controversy over whether an interlocutory order as to one issue leaves open all issues. There is a strong policy coming from the
administrative agency, the DWD, to leave cases open.

28. **What situation would place responsibility on the employer to pay an employee’s attorney fees?**

   All attorney fees are paid directly to the attorney from the employee’s award. Wis. Stat. §102.26(3)(b).

**EXCLUSIVITY/TORT IMMUNITY**

29. **Is the compensation remedy exclusive?**

   **A. Scope of immunity.**

   The exclusive remedy provision protects the employer, co-employees and the worker’s compensation insurer from third party suit. Wis. Stat. §102.03(2).

   **B. Exceptions (intentional acts, contractual waiver, “dual capacity,” etc.).**

   There are two statutory exceptions: (1) an assault intended to cause bodily harm by a co-employee; and (2) suit against a co-employee for negligent operation of a motor vehicle not owned or leased by the employer. Wis. Stat. §102.03(2). There are also several limited exceptions recognized by appellate court decision: (1) implied waiver of the immunity by endorsement to an auto liability policy, *Backhaus v. Krueger*, 126 Wis. 2d 178, 376 N.W.2d 377 (Ct. App. 1985); (2) where the employer acted in a persona distinct from its status as an employer, *Henning v. General Motors Assembly Div.*, 143 Wis. 2d 1, 419 N.W.2d 551 (1988); and (3) where the employer expressly accepted responsibility for injuries to persons on a job site, *Schaub v. West Bend Mutual*, 195 Wis. 2d 181, 536 N.W.2d 123 (Ct. App. 1995).

30. **Are there any penalties against the employer for unsafe working conditions?**

   An employer can be compelled to pay an additional 15% of compensation, up to $15,000, where the injury was caused by the failure to follow Occupational Safety and Health Administration regulations or where the employer failed to provide a safe place of employment. Wis. Stat. §102.57; Wis. Stat. §101.11 (“Safe Place Statute”).

31. **What is the penalty, if any, for an injured minor?**

   When the injury is sustained by a minor illegally employed, compensation shall be doubled, up to a maximum of $7,500, if the employee does not have a written work permit; triple the compensation, up to a maximum of $15,000, is paid if the minor is working at prohibited employment. The penalty is not paid to the minor but rather is paid into the state Supplemental Benefit Fund. Wis. Stat. §102.60.

32. **What is the potential exposure for “bad faith” claims handling?**
The bad faith penalty is 200% of compensation, including medical expenses, up to a maximum of $30,000 for each act of bad faith. Wis. Stat. §102.18(1)(bp). Where the employer/insurer “inexcusably” fails to pay, a penalty of 10% of the delayed compensation can be awarded. Wis. Stat. §102.22(1). The two penalties may not be awarded concurrently.

33. **What is the exposure for terminating an employee who has been injured?**

An employer can be fined up to a year’s wages for unreasonable refusal to rehire the employee. Wis. Stat. §102.35(3). The employer must prove the termination was: (1) “fit, fair and just under the circumstances”; (2) the result of an inability to provide work suited to the employee’s physical and mental limitations; or (3) the result of a seniority provision in a collective bargaining agreement. *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 438 N.W.2d 823 (1989); *West Allis School District v. DILHR*, 116 Wis. 2d 410, 342 N.W.2d 415 (1984).

**THIRD PARTY ACTIONS**

34. **Can third parties be sued by the employee?**

Yes. The employer, insured, or the Department (State Fund), if the Department pays or is obligated to pay a claim under Wis. Stat. §§102.18(1) or 102.66(1), shall have the right to share in any settlement based on a statutory right. Wis. Stat. §102.29(1)(a). (Statute renumbered and changed effective April 17, 2012.)

35. **Can co-employees be sued for work-related injuries?**

A co-employee cannot be sued, unless the injury resulted from an intentional assault, or the co-employee operated a motor vehicle not owned or leased by the employer. Wis. Stat. §102.03(2).

36. **Is subrogation available?**

The employer/insurer/the Department (State Fund) enjoys the same right to sue the third party as the employee. The award is distributed in accordance with the schedule set forth in Wis. Stat. §102.29(1)(a).

**MEDICALS**

37. **Is there a time limit for medical bills to be paid, and are penalties available for late payment?**

The Act does not contain a provision for penalizing an employer/insurer for late payment of a medical bill, although the state Office of Commissioner of Insurance generally holds that such bills should be paid or denied within 30 days of their receipt and accompanying proof of their alleged relationship to the injury.
38. **What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?**

The Department of Workforce Development (formerly DILHR) may, after a prehearing conference, “issue an order requiring disclosure or exchange of any information or written material which it considers material to the timely and orderly disposition of the dispute or controversy.” Wis. Stat. §102.17(1)(b). A failure to comply with the terms of such an order may result in a dismissal of a pending claim without prejudice or an order excluding evidence relating to the information at hearing. The DWD will order production of reports upon written request by a party to do so, even without a prehearing conference, as a matter of DWD policy.

To be admissible at hearing, medical reports must be filed and served on a form WKC-16-B at least 15 days in advance of the hearing. Wis. Stat. §102.17(1)(d); Wis. Admin. Code §DWD 80.22. Unless good cause is shown, a failure to meet these preconditions will result in exclusion of non-conforming medical reports at the hearing.

There is technically a waiver of the physician-patient privilege as to “reasonably related” medical records which occur as a matter of law when the employee reports an industrial injury, or makes a claim for benefits. Wis. Stat. §102.13(2). However, many medical records custodians will not disclose any records without a signed authorization. Records custodians also frequently misconstrue the term “reasonably related” so that relevant medical records are not disclosed. Complete medical records may be subpoenaed to hearing, but in such cases, the records are not available to the independent medical examiner or defense attorney in advance of the hearing and a concluding hearing may be necessary to protect the due process rights of the employer/insurer.

39. **What is the rule on choice (a) Claimant’s choice of physician; (b) Employer’s right to a second opinion and/or Independent Medical Evaluation?**

Where the employer has notice of an injury and its relationship to the employment, the employer shall offer to the employee its choice of practitioner. Practitioners include physicians, chiropractors, psychologists, and podiatrists. The employee has a right to a second choice of attending practitioner on notice to the employer/insurer. Partners and clinics count as one practitioner, and treatment by one practitioner on referral from another is deemed to be treatment by one practitioner. Wis. Stat. §102.42(2).

An employee who claims compensation must submit to one or more reasonable examinations by a practitioner selected by the employer if the employer so requests in writing. Wis. Stat. §102.13(1). Claimant may not be required more than 100 miles to participate in the examination except in special circumstances. Expenses must be tendered in advance. Wis. Stat. §102.13(1)(b). By department policy, expenses include wages lost as a result of the examination and mileage. The notice of the examination must include the date, time and place of the exam and the procedure for changing them, as well as the examiner’s area of specialty. The notice must also explain the employee’s rights to have a personal physician present at the exam, right to receive copies of all reports generated from the exam, and to have a translator present if the employee has
difficulty communicating in English.

40. **What is the standard for covered treatment (e.g., chiropractic care, physical therapy, etc.)?**

Wisconsin adopted treatment guidelines effective for treatment received on or after November 1, 2007. Wis. Admin. Code Ch. DWD 81. The guidelines only apply to conceded claims. Wis. Admin. Code §DWD 81.01(2). For treatment not specifically covered in §§DWD 81.04 to 81.13, the code allows treatment reasonable and necessary for the diagnosis and to cure or relieve a condition consistent with the current accepted standards of practice within the scope of the provider’s license or certification. Wis. Admin. Code §DWD 81.03(10).

In general, the guidelines require medical providers to evaluate the medical necessity of all treatment on an ongoing basis to determine if there is progressive improvement. If the provider determines there is not progressive improvement in two of the following categories - subjective reports of improving pain, progressively improving objective clinical signs, or progressively improving functional status – the modality shall be discontinued or significantly modified or the provider shall reconsider the diagnosis. Wis. Admin. Code §DWD 81.04(c). Providers may depart from the guidelines if there is a documented medical complication, previous treatment did not meet the accepted standard of practice, the treatment is necessary to assist the patient in the initial return to work where the work activities place stress on the body part affected by the workplace injury, the treatment continues to cause progressive improvement in the patient’s condition, or there is an incapacitating exacerbation of the patient’s condition. The guidelines have specific provisions covering medical imaging studies and the treatment of low back pain, neck pain, thoracic back pain, upper extremity disorders, complex regional pain syndrome of the upper and lower extremities, inpatient hospitalizations, surgical procedures, and chronic management.

Covered treatment includes medical, surgical, chiropractic, psychological, podiatric, dental and hospital treatment, medicines, medical and surgical supplies, crutches, artificial members, appliances, and training in the use of artificial members and appliances. Wis. Stat. §102.42(1). A procedure has been established to resolve disputes concerning the reasonableness of fees and the necessity of treatment. The guidelines in Wis. Admin. Code Ch. 81 are factors for an impartial health care services review organization and a member from an independent panel of experts established by the department to consider in rendering opinions to resolve necessity of treatment disputes arising under Wis. Stat. § 102.16(2m) and Wis. Admin. Code § 80.73. With regard to reasonableness of fees, bills are subject to reduction if they exceed a fixed amount and set forth in a certified database. There is an appeal process for the medical provider to challenge the decision. The employee is not responsible to pay the difference between the allowed amount and the amount charged. Wis. Admin. Code §DWD 80.72. The DWD will have a third “independent” medical practitioner review disputes on necessity of treatment and that practitioner’s finding binds the parties. Wis. Admin. Code §DWD 80.73.
41. Which prosthetic devices are covered, and for how long?

Prosthetic appliances are subject to the same standard as all other medical treatment (see answer 40). Liability for repair and replacement of prosthetic devices is limited to the effects of normal wear and tear. Artificial members furnished at the end of the healing period for cosmetic purposes only need not be duplicated. Wis. Stat. § 102.42(5).

42. Are vehicle and/or home modifications covered as medical expenses?

The Commission has held that a van is not a medical supply and thus the employer/insurer was not required to purchase a vehicle for an employee who became a paraplegic after an injury. However, the employer/insurer was required to pay for modifications to the vehicle to accommodate the individual’s handicap. Flynn v. Allen Roofing & Construction Co., WC Claim No. 87-048518 (LIRC June 13, 1990).

43. Is there a medical fee guide or schedule, or other provisions for cost containment?

Yes. Wis. Stat. §102.16(2), (2m), Wis. Admin. Code Chapter DWD 80.

44. What, if any, provisions or requirements are there for “managed care”?

None. A review of medical bills to determine whether they are reasonable is permitted under certain guidelines. See answer 40.

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

Claims for indemnity and medical expense are contested by filing an application for hearing which the DWD. The respondents (employer/insurer) must answer within 20 days on forms provided by the DWD. If the employee is not represented or if there are multiple issues a prehearing conference may be held. A 30 minute discussion between the parties prior to trial, may be held. The Department has also recently enacted settlement conferences, prior to hearing on some cases. A formal hearing, usually limited between two and four hours, will be scheduled within approximately two months of the filing of the Certification of Readiness form, which notifies the Department that the Applicant is ready to proceed with a Hearing. An administrative law judge finds facts and renders conclusions of law in a written decision following the hearing. The written decision should be issued within ninety days of the hearing and close of the record. Wis. Stat. §§102.17 and 102.18.

46. What is the procedure for contesting all or a part of a claim?

A. Administrative level.

Initial determinations are made by an administrative law judge employed by the Department of Workforce Development’s Worker’s Compensation Division. The case
can then be appealed to the Labor and Industry Review Commission, a three-person politically appointed panel which acts on cases where petitions for review have been filled.

B. Trial court.

Circuit court appeals are permitted. A Labor and Industry Review Commission (LIRC) award may be set aside because: (1) LIRC acted without authority or in excess of its powers; (2) the order was procured by fraud; or (3) LIRC’s findings of fact do not support the order or award. Wis. Stat. §102.23.

C. Appellate.

The Wisconsin Court of Appeals and Supreme Court are subject to the same jurisdictional requirements as the circuit court.

47. What are the requirements for stipulations or settlements?

Stipulation and compromise agreements are permitted, both subject to review by the DWD. In order to obtain a full and final compromise on a particular claim, the DWD must find there is a “valid dispute” between the parties. No compromise is enforceable unless it is reviewed and approved by the DWD. Wis. Stat. §102.16(1); Wis. Admin. Code §DWD 80.03.

48. Are full and final settlements with closed medical available?

Yes. Yet, you also need to address Medicare Set-Aside issues.

49. Must stipulations and/or settlements be approved by the state administrative body?

Yes. Wis. Stat. §102.16(1). See answer 47.

RISK FINANCE FOR WORKERS’ COMPENSATION

50. What insurance is required, and that is available (e.g., private carriers, State Fund, assigned risk pool, etc.)?

All “employers” within the meaning of Wis. Stat. §102.04(1) must be insured for worker’s compensation or receive permission from the DWD to be self-insured. Wis. Stat. §102.28. Private insurers service the majority of employers. There is an “assigned risk pool” for those employers who are not able to obtain private insurance or permission to be self-insured.

51. What are the provisions/requirements for self-insurance?

A. For individual entities.

The requirements for self-insurance by an individual entity are set forth in Wis. Stat.
§102.28(2) and Wis. Admin. Code Chapter DWD 80. Essentially, a determination is made as to whether the applicant for self-insurance status is financially solvent and able to meet its expected obligations, given past injury and claim history.

B. For groups or “pools” of private entities.

Insurance pools are permitted. “Safety group dividends” may be formed among employers with similar classes, industries, trades or professions, so long as they agree to a special loss control program. Wis. Stat. §631.51. It is also possible for a group of employers to form a “mutual insurance company.” Wis. Stat. §611. Risk sharing pools are also permitted. Wis. Stat. §619. Risk sharing pools are groups of private employers who contract with a single insurer to insure each member of the group. This is a highly regulated area and contact should be made with the DWD and Office of Commissioner of Insurance before taking such action.

52. Are “illegal aliens” entitled to benefits of workers’ compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of “employee”?


53. Are terrorist acts or injuries covered or excluded under workers’ compensation law?

A terrorist act would be subject to the same principles applicable to injuries by other third parties. See answer 14.

54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare’s interests pursuant to the Medicare Secondary Payer Act?

Wisconsin does not have any formal requirements that must be satisfied when Medicare’s interests are implicated in a worker’s compensation claim. Yet, we advise clients to take Medicare’s interests into consideration in all settlements, and to follow all policies adopted by the Centers for Medicare and Medicaid Services (“CMS”). Some judges in the Worker’s Compensation Division will require the parties to address Medicare’s interests by either providing for a Medicare Set-Aside Agreement, leaving future medical expenses open, or agreeing to pay future medical expenses in the compromise agreement before a settlement will be approved.

Under Medicare regulations (42 CFR 411.46), Medicare is secondary payer to the payment of worker’s compensation by a worker’s compensation carrier or self-insured
employer. The obligation to pay for medical expenses for a compensable condition cannot be shifted to Medicare. Therefore, Medicare has an interest in all lump sum settlements of a worker’s compensation matter, when the settlement closes out future medicals. CMS currently imposes the following review thresholds:

- The employee is already a Medicare beneficiary and the total settlement amount is greater than $25,000; or
- There is a reasonable expectation that the employee will be a Medicare beneficiary within 30 months of the settlement and the settlement amount is greater than $250,000.

Note that these requirements are subject to change. CMS does not issue review letters for claims that do not meet their review thresholds. The recommended method to protect Medicare’s interests is to consider and, if necessary, include a WCMSA as part of the worker’s compensation settlement.

Medicare has several options and sanctions, but the enforcement varies for geographical regions of the country. Consult your ALFA lawyer for the current practice in your state for this evolving area of the law.

55. **How are subrogation liens of Medicaid and health insurers treated under workers’ compensation law?**

The Federal Medicaid statute requires States to include in their plan for medical assistance provisions (1) that the individual will assign to the State any rights for payment for medical care from any third party and (2) that the individual will cooperate with the State in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. §1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. §1396k(b). The duty to reimburse for payments is set forth in Wis. Stat. § 102.27(2)(b).

56. **What are the requirements for confidentiality and privacy of medical records under workers’ compensation law and how are they affected by state and federal law (HIPAA)?**

Although state and federal law generally treat medical records as confidential, and these records may not be disclosed without the consent of the patient, HIPAA and state law permit disclosure of medical records to employers and insurers, for worker’s compensation purposes, without an authorization. [45 C.F.R. 164.512(l), and Wis. Stats. §§102.13(1)(a), (2)(a), and 146.81(4), 146.82(1)]. Even though there is this exception, the HIPAA regulations are adhered to when disclosing information to third parties. Also, the healthcare providers are concerned with the HIPAA regulations. In all practical purposes, an authorization is required to obtain complete medical records.

57. **What are the provisions for “Independent Contractors”?**
Wis. Stat. § 102.07(8)(b) provides a 9-part test to determine who is an independent contractor. All 9 elements must be met in order for a person to be deemed an independent contractor and not an employee. In practice, it is often difficult to establish that all 9 elements have been met.

An independent contractor will not be an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.

2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.

3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.

4. Incurs the main expenses related to the service or work that he or she performs under contract.

5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.

6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.

7. May realize a profit or suffer a loss under contracts to perform work or service.

8. Has continuing or recurring business liabilities or obligations.

9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

Employers in the construction, painting, and drywall trades are subjected to a $25,000 penalty, per occurrence, for misclassifying employees as independent contractors.

58. Are there any specific provisions for “Independent Contractors” pertaining to professional employment organizations/temporary service companies/leasing companies?
Professional employment organizations, temporary service companies, and leasing companies are considered “temporary help agencies.” "Temporary help agency" means an employer who places its employee with or leases its employees to another employer who controls the employee's work activities and compensates the first employer for the employee's services, regardless of the duration of the services. Wis. Stat. 102.01(2)(f).

A temporary help agency is the employer of an employee whom the temporary help agency has placed with or leased to another employer that compensates the temporary help agency for the employee's services. A temporary help agency is liable under Wis. Stat. § 102.03 for all compensation and other payments payable under this chapter to or with respect to that employee, including any payments required under Wis. Stats. §§ 102.16(3), 102.18(1)(b) or (bp), 102.22(1), 102.35(3), 102.57, or 102.60. Except as permitted under Wis. Stat. § 102.29, a temporary help agency may not seek or receive reimbursement from another employer for any payments made as a result of that liability. Wis. Stat. § 102.04(2m).

59. Are there any specific provisions for “Independent Contractors” pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

The 9-part test in Wis. Stat. § 102.07(8)(b) is used to determine whether an owner/operators of trucks or other vehicles for driving or delivery of people or property is an independent contractor is governed. Jarrett v. LIRC, 2000 WI App. 46, 233 Wis. 2d 174, 607 N.W.2d 326.

In C.W. Transport, Inc. v. LIRC, 128 Wis. 2d 520, 383 N.W.2d 921 (Ct. App. 1986), an owner/operator delivered a load for C.W. and entered a trip lease with another common carrier for the return trip. The court of appeals found that the owner/operator was an employee of C.W. and not the common carrier with whom the trip lease was signed because C.W. “reserved a modicum of direction and control during the trip lease.” The modicum of direction and control consisted of the requirement that C.W. approve the trip lease, be apprised of the owner/operator’s schedule, and retain 7% of the trip lease payment for administrative expenses (the trip lease carrier issued payment to C.W. who would remit payment to the owner/operator less the 7%).

60. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?

Financial exposure to workers’ compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized “Best Practices” plan.

Every business must deal with the expense of workers’ compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.
The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers’ compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers’ Compensation attorney for your state by contacting ALFA at (312) 642-ALFA (2532).