

LOUISIANA

1. Citation for the state's workers' compensation statute

Louisiana Revised Statutes Annotated §23:1021 et seq.

Louisiana Revised Statutes Annotated §33:2581 (Heart & Lung Statute for firefighters)

SCOPE OF COMPENSABILITY

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

All persons in the service of the state, or a political subdivision thereof, or of any incorporated public board, or under any appointment or contract of hire, except for officials of these bodies; and, except for employees of a contractor having a contract with the state, a political subdivision thereof, or a board or commission, are covered. La. Rev. Stat. Ann. §23:1034.

Persons performing services arising out of and incidental to the employment in the course of an employer's trade, business, or occupation are covered, except that the bona fide president, vice president, secretary, and treasurer of a corporation who owns not less than ten percent of the stock therein, or a partner, or a sole proprietor may by written agreement with his insurer or group self-insurance fund elect not to be covered by the Act. La. Rev. Stat. Ann. §23:1035(A). Such an election shall be binding on the widow, relatives, personal representative, heirs, or dependents of the one so electing. La. Rev. Stat. Ann. §23:1035(A). Employees of private residential household and private unincorporated farms are not covered. La. Rev. Stat. Ann. §23:1035(B)(1). Musicians and performers who are rendering services pursuant to a performance contract are also not covered. La. Rev. Stat. Ann. §23:1035(B)(2).

If an employee, while working outside the territorial limits of Louisiana, suffers an injury on account of which he or his dependents would have been entitled to workers' compensation benefits under Louisiana law, such employee or his dependents shall be entitled to benefits if, at the time of the employee's injury, his employment was principally located in Louisiana or he was working under a contract of hire made in Louisiana. La. Rev. Stat. Ann. §23:1035.1(1).

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

The 1997 amendment to Section 1061 by Act No. 315, effective June 17, 1997, was a major overhaul of the statutory employer law. The new law makes a clear statement that a statutory employer relationship shall exist whenever the principal is in the middle of two contracts. That is, the principle has a contract with one party to perform a certain work and then enters into a contract with another to do all or part of that work. This is the "two contract" defense, and it is

available to that principal to protect the principal from tort suits by any employee engaged in the work that is the subject of the contract. A party with the two contract defense does not need to have their status as a statutory employer recognized in the contracts. La. Rev. Stat. Ann. §23:1061. However, a principal who is not in the middle of two contracts who has entered into a contract with a contractor to do a particular work cannot be considered a statutory employer of any of the employees working under the contract unless the contract with the contractor specifically recognizes the principal as the statutory employer of the contractor's employees (or statutory employees). When there is such an acknowledgment, there is created a rebuttable presumption of a statutory employer relationship. The presumption can be rebutted by showing that the work is not "an integral part of, or essential to, the ability of the principal to generate its goods, products or services." La. Rev. Stat. Ann. §23:1061.

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

A. Traumatic or "single occurrence" claims.

An employee must prove by a preponderance of the evidence that his disability resulted from an accident that arose out of and was in the course of his employment. La. Rev. Stat. Ann. §23:1031(A); *Andrews v. Music Mountain Water Co.*, 637 So. 2d 571, 573 (La. App. 2 Cir. 1994). "Accident" under Louisiana law is defined as an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, with or without human fault, and directly producing at the time objective findings of an injury which is more than simply a gradual deterioration or progressive degeneration. La. Rev. Stat. Ann. §23:1021(1). Disability is presumed to have resulted from an accident if, before the accident, the employee was in good health, but commencing with the accident, symptoms of the disabling condition appeared and thereafter continuously manifested themselves. *Prudhomme v. DeSoto Professional Home Health Services*, 579 So.2d 1167 (La. App. 2d Cir. 1991).

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

"Occupational disease" is defined by the Act to mean "only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease." Occupational disease includes injuries due to work-related carpal tunnel syndrome. Degenerative disc disease, spinal stenosis, arthritis of any type, mental illness, and heart-related or perivascular disease are specifically excluded. La. Rev. Stat. Ann. §23:1031.1.B.

Generally, the employee must prove by a reasonable probability that he or she contracted an occupational disease. *Dunaway v. Lakeview Regional Medical Center*, 2002 CA 2313 (La. App. 1 Cir. 8/6/03), 859 So. 2d 131, 135. Expert testimony is required to support a finding of an occupational disease. *Jones v. Ruskin Manufacturing*, 36,548-WCA (La. App. 2 Cir. 12/11/02), 834 So. 2d 1126, 1130. In asbestosis cases, the employee must establish, by a preponderance of evidence, exposure to asbestos during the course of employment, that he or she suffers from asbestosis, and, in a

claim by a deceased employee's spouse, that asbestosis contributed significantly to the employee's death. *McDonald v. New Orleans Private Patrol*, 569 So.2d 106 (La. App. 4th Cir. 1990).

Effective June 29, 2001, §23:1031(1)(D) was amended to state that if an employee has been working for an employer for less than 12 months and contracts an occupational disease, it is presumed that the occupational disease was not contracted while in the course and scope of such employment. However, an employee may be compensated if he proves, by a preponderance of evidence, he contracted the disease during that period of employment, specifically proving that there is a disability that is related to an employment-related disease, such disease was contracted during the course of employment, and the disease is a result of the work performed. *Johnson v. Johnson Controls, Inc.*, 38,495-WCA (La. App. 2 Cir. 5/12/04), 873 So. 2d 923, 931-32,

Policemen or firefighters, who have completed two or more years of service, who contract hepatitis B or C disease shall be deemed to have an occupational disease or infirmity presumed to have been caused by or resulted from such work performed as a firefighter or policeman due to their exposure to blood and saliva of accident and crime victims. La. Rev. Stat. Ann. §33:1948(A).

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

"Injury" and "personal injuries" include only those injuries caused by violence to the physical structure of the body and those such diseases and infections that naturally result. La. Rev. Stat. Ann. §23:1021(8)(a) (It is generally recognized that degenerative disc disease, and gradual hearing loss are not compensable under the Louisiana Workers' Compensation Act). "These terms shall in no case be construed to include any other form of disease or derangement, however caused or contracted." La. Rev. Stat. Ann. §23:1021(8)(a). Also, in 1989 the legislature enacted §1031 of the Act which excludes claims for accidents resulting from "horseplay" and those arising out of a "dispute with another person or employee over matters unrelated to the injured employee's employment." La. Rev. Stat. Ann. §§23:1031(D)-(E).

6. What psychiatric claims or treatments are compensable?

The definition of "injury" and "personal injury" includes the following: (1) only mental injury that is caused by a sudden, unexpected and extraordinary stress related to the employment, demonstrated by clear and convincing evidence; and (2) only mental injury that is caused by physical injury and can be demonstrated by clear and convincing evidence. La. Rev. Stat. Ann. § 23:1021(8)(b). No mental injury or illness shall be compensable unless the mental injury or illness is diagnosed by a licensed psychiatrist or psychologist and the diagnosis of the condition meets the criteria as established in the most current Diagnostic and Statistical Manual of Mental Disorders presented by the American Psychiatric Association. La. Rev. Stat. Ann. §23:1021(8)(c). If the employee is claiming a mental disability injury which is the result of mental stress alone, the employee must show that the mental stress was a result of a sudden, unexpected, and extraordinary stress related to the employment. La. Rev. Stat. Ann. §23:1021(8)(b).

7. What are the applicable statutes of limitations?

A claim must be brought within one year from the date of accident or death or, in the case that any payment has been made, one year from the date of the last payment. When the injury does not result at the time of, or develop immediately after, the accident, the limitation shall not take effect until the expiration of one year from the time the injury develops, but in all such cases the claim must be brought within two years from the date of accident. La. Rev. Stat. Ann. §23:1209.

If temporary total disability benefits are paid, the employee has three years from the last payment to file for SEB. If SEB benefits are paid, the employee's right to additional SEB benefits ends (prescribes) after two years if the employee did not receive SEB benefits for 13 consecutive weeks during the two year period. La. Rev. Stat. Ann. §23:1221(3)(d)(1).

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

No claim is allowed unless notice of the injury has been given to the employer within thirty days after the injury or death. La. Rev. Stat. Ann. §23:1301. This requirement, however, is to be construed liberally in favor of the employee so as not to defeat the claim unless a delay resulted in prejudice to the employer. *Lloyd v. IMC Fertilizer, Inc.*, 557 So.2d 1078 (La. App. 2d Cir. 1990). The notice by the employee must: (1) be in writing; (2) contain the employee's name and address; (3) state in ordinary language the time, place, nature and cause of the injury; and (4) be signed by the person giving the notice. La. Rev. Stat. Ann. §23:1303.

The employer is required to post the name of the person to whom an employee may give notice. La. Rev. Stat. Ann. §23:1302(A). The employee may give notice to that person by delivering it or sending it by certified mail, return receipt requested. La. Rev. Stat. Ann. §23:1304. If an employer fails to keep such notice posted, the time within which notice of injury must be given is extended to twelve months from the date of injury. La. Rev. Stat. Ann. §23:1302(B). The notice is not rendered invalid by reason of inaccuracy as to time, place, nature, or cause of the injury unless the employer shows it was misled to its detriment. La. Rev. Stat. Ann. §23:1305.

Within ten days of actual knowledge of injury resulting in death or lost time in excess of one week, the employer is required to report to the insurer, if any, and to the Office of Workers' Compensation Administration, information pertinent to the employee and the injury. La. Rev. Stat. Ann. §23:1306(A). Upon receipt of the employer's report, the Administration mails a brochure to the employer and the employee outlining their respective rights, benefits and obligations. La. Rev. Stat. Ann. §23:1307.

9. Describe available defenses based on employee's conduct:

A. Self-inflicted injury.

A claim for such injuries is barred. Self-inflicted injuries do not constitute an "accident" because

they are neither unexpected nor unforeseen. La. Rev. Stat. Ann. §23:1081(1)(a).

B. Willful misconduct, "horseplay," etc.

An injury sustained in horseplay is not covered. La. Rev. Stat. Ann. §23:1031(D).

C. Injuries involving drugs and/or alcohol.

Compensation is not allowed for an injury caused by the employee's intoxication, unless the intoxication resulted from activities which were in pursuit of the employer's interest or in which the employer procured the intoxicating beverage or substance and encouraged its use during the employee's work hours. La. Rev. Stat. Ann. §23:1081(1)(b). There are a number of presumptions available to the employer to aid in proving intoxication, depending upon the percent by weight of alcohol in the employee's blood at the time of the accident. La. Rev. Stat. Ann. §§23:1081(3) and (4). The statute also allows the employer to administer drug and alcohol testing immediately after an alleged job accident. La. Rev. Stat. Ann. §23: 1081(7).

D. Initial Physical Aggressor.

No compensation shall be allowed for an injury to an employee caused to be the initial physical aggressor in an unprovoked physical altercation, unless excessive force was used in retaliation against the initial aggressor. R.S. 23:1081(1)(c). Note that Louisiana law has deleted the provision in 2001 whereby compensation would be disallowed for injury caused by the injured employee's deliberate failure to use an adequate guard or protection against accidents provided for him. La. R.S. 23:1081(1)(c).

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

It is unlawful for any person, for the purpose of obtaining or defeating any benefit or payment, either directly or for another, to willfully make or counsel someone to make a false statement or representation. La. Rev. Stat. Ann. §23:1208(A). Such benefits or payments shall include indemnity benefits, the cost or value of health care, medical case management, vocational rehabilitation, transportation expense, and the reasonable costs of investigation and litigation. La. Rev. Stat. Ann. §23:1208(C)(4). Violation of the statute when the benefits claimed or payments obtained are \$10,000.00 or more results in imprisonment for up to ten years, or fines up to \$10,000.00, or both. La. Rev. Stat. Ann. §23:1208(C)(1). Violations involving \$2,500.00 or more, but less than \$10,000.00, result in imprisonment for up to five years, or fines up to \$5,000.00, or both. La. Rev. Stat. Ann. §23:1208(C)(2). Violations involving less than \$2,500.00 result in imprisonment for up to six months, or fines up to \$500.00, or both. La. Rev. Stat. Ann. §23:1208(C)(3).

In addition to the criminal penalties, any person violating the statute may be assessed civil penalties by the Director of not less than \$500.00 nor more than \$5,000.00 payable to the Kids

Chance Scholarship Fund of the Louisiana Bar Foundation, and may be ordered to make restitution for benefits paid up until the time the employer became aware of the fraudulent conduct. La. Rev. Stat. Ann. §23:1208(D). An employee violating the statute shall, upon such a determination by the hearing officer, forfeit any right to compensation benefits. La. Rev. Stat. Ann. §23:1208(E).

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

Yes. The employer is allowed to inquire about previous injuries, disabilities or other medical conditions. An employee's failure to answer truthfully bars benefits, provided the failure to answer directly relates to the medical condition for which a claim for benefits is made or affects the employer's ability to receive reimbursement from the second injury fund. However, these provisions are unenforceable unless the written form on which the inquiries about previous medical conditions are made contains a notice, prominently displayed in bold faced block letter in of no less than ten point type, advising the employee that his failure to answer truthfully may result in his forfeiture of worker's compensation benefits. La. Rev. Stat. Ann. §23:1208.1.

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

Recreational or social activities are within the course of employment when: (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the ambit of the employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. *Jackson v. American Ins. Co.*, 391 So.2d 1339, rev'd, 404 So.2d 218 (La. 1981); *Winkler v. Wadleigh Offshore, Inc.*, 2001CA-1833 (La. App. 4 Cir. 4/24/02), 817 So. 2d 313, 317.

Whether an accident is compensable which occurs while an employee is "standing by" or "on call" is heavily dependent upon the facts in each case. See *Fortenberry v. C.R. Bard, Inc.*, 2001-2195 (La. App. 4th Cir. 10/16/02), 830 So.2d 1025.

13. Are injuries by co-employees compensable?

Yes, as long as the injury was not caused by an intentional act and occurred within the course and scope of the employment. La. Rev. Stat. Ann. §23:1032(B); See *Bradley v. Morton Thiokol, Inc.*, 27,411 (La. App. 2nd Cir. 9/29/95) 661 So.2d 691. However, for example, if two employees engage in a fight unrelated to employment, the employer would have a valid defense. La. Rev. Stat. Ann. §23:1031(E).

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

No. For a claim to be compensable, the worker must suffer an injury by accident which occurs during the course of the employment and which must “arise out of the employment.” La. Rev. Stat. Ann. §23:1031. Louisiana courts have generally applied the “increased risk” doctrine to determine whether an accident arises out of the worker’s employment. Under this theory, an accident does not “arise out of” the employment unless the injury was caused by an increased risk to which the employee, as opposed to the general public, was subjected to as a result of his employment. *Mundy v. Department of health and Human Resources*, 593 So.2d 346 (La. 1992).

Additionally, an injury by accident should not be considered as having arisen out of the employment and thereby not covered if the employer can establish that the injury arose out of a dispute with another person or employee over matters unrelated to the injured employee’s employment. La. Rev. Stat. Ann. §23:1031(E).

BENEFITS

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

The statute applies specific mathematic formulae, depending upon the method of payment of wages.

A. Hourly Wages.

(1) Employed 40 hours or more: the greater of 40 hours or (hourly rate) x (average actual hours for four weeks preceding accident date).

(2) Offered at least 40 hours, but regularly and voluntarily works less than 40 hours: average of total weekly earnings for four weeks preceding accident date.

(3) Part-time employees: (hourly rate) x (average actual hours for four weeks preceding accident date).

(4) Part-time employees with two or more employers in two or more successive employments, where injury in one employment causes loss of income from other successive employment(s): employer in whose service the employee was injured pays benefits and average weekly wage is calculated as above, using hourly rate in employment when injured and using total hours worked for all employers. However, total hours may not exceed the lesser of 40 hours or the average weekly hours worked.

(5) Seasonal employment: generally, AWW equals annual income divided by 52, but there are specific provisions for seasonal employees employed one year or less. Seasonal employment is any employment customarily operating only during regularly recurring periods of less than 44 weeks, annually.

- B. Monthly wages: (monthly salary x 12) divided by 52.
- C. Annual wages: annual salary divided by 52.
- D. There are specific provisions for employees employed on a unit, piecework, commission or other basis.

La. Rev. Stat. Ann. §§23:1021(13)(a)-(d).

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

Compensation is paid at sixty-six and two-thirds percent of wages during the period of disability, which disability must be proven by clear and convincing evidence, subject to a statutory maximum compensation rate. The maximum rate is determined each year, however the compensation rate is determined at the time of injury. La. Rev. Stat. Ann. §23:1221. "Wages" means average weekly wage at the time of the accident. La. Rev. Stat. Ann. §23:1021(12).

For injuries occurring on or after July 1, 1983, the maximum is seventy-five percent of the average weekly wage paid in all employment subject to the Louisiana Employment Security Law, and the minimum compensation for total disability is not less than twenty percent of such wage. The minimum compensation does not apply to Supplemental Earnings Benefits and Permanent Partial Disability benefits. La. Rev. Stat. Ann. §23:1202(A)(2).

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

On the fourteenth day after the employer acquires knowledge of the injury or death. La. Rev. Stat. Ann. §23:1201(B.)

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out ____ days before recovering benefits for the first ___ days)?

The employee must be out two weeks before recovering benefits for the first week. La. Rev. Stat. Ann. §23:1224.

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

Temporary total disability benefits cease when the employee's physical condition has resolved to the point that a reasonable and reliable determination of the extent of disability may be made, and the condition has improved to the point that continued, regular treatment by a physician is not required. La. Rev. Stat. Ann. §23:1221(1)(d).

An employer who switches an employee from temporary total benefits to supplemental earnings

benefits must send the employee a Form 1002 Notice of Payment, Modification, Suspension, Termination or Controversion of Compensation or medical Benefits form pursuant to the procedure set forth in . La. Rev. Stat. Ann. §23:1201.1.

An employer/insurer who terminates all benefits must inform the employee by sending a Form 1003 Stop Payment Form.

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

Yes. La. Rev. Stat. Ann. §23:1223

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

Where the employee is seriously and permanently disfigured or suffers a permanent hearing loss solely due to a single traumatic accident, or where the usefulness of the physical function or the respiratory system, gastrointestinal system, or genito-urinary system, as contained within the thoracic or abdominal cavities, is serious and permanently impaired, compensation not to exceed sixty-six and two-thirds percent of wages, for a period not to exceed one hundred weeks, may be awarded. La. Rev. Stat. Ann. §23:1221(4)(p).

22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?

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

The maximum number of weeks for each scheduled member are as follows: Thumb = 50; first finger = 30; any other finger = 20; great toe = 20; any other toe = 10; hand = 150; arm = 200; foot = 125; leg = 175; eye = 100; loss of both hands, or both arms, or both feet, or both legs, or both eyes, or one hand and one foot, or any of two thereof, or paraplegia, or quadriplegia shall, in the absence of conclusive proof of a substantial earning capacity, constitute permanent total disability. La. Rev. Stat. Ann. §§23:1221(4)(a)-(j).

First phalange of the thumb or great toe, or two phalanges of any finger or toe equals the loss of one-half of such member, and the compensation shall be one-half of the amount above specified. More than one phalange of a thumb, or more than two phalanges of any finger or toe equals the loss of the entire member; provided, that the maximum amount is equivalent to the loss of a hand or the loss of a foot as appropriate. Amputation between the elbow and the wrist equals the loss of a hand and amputation between the knee and ankle equals the loss of a foot; a permanent total anatomical loss of the use of a member is equivalent to the amputation of the member. Such benefits are paid at the rate of sixty-six and two-thirds percent of the employee's wages. La. Rev. Stat. Ann. §23:1221(4)(k)-(n).

No benefits shall be awarded or payable unless anatomical loss of use, or amputation, or loss of physical function is greater than twenty-five percent as established in the American Medical Association "Guides to the Evaluation of Permanent Impairment." La. Rev. Stat. Ann. §23:1221(4)(q).

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

An employee is entitled to prompt vocational rehabilitation when he or she suffers an injury which precludes him or her from earning wages equal to those earned prior to the injury and, prior to the workers' compensation judge adjudicating the employee to be permanently and totally disabled, the workers' compensation judge determines that there is reasonable probability, with appropriate training or education, that the employee may be rehabilitated to the extent that such employee can achieve suitable gainful employment and that it is in the best interest of such individual to undertake such training or education. La. Rev. Stat. Ann. §23:1226(A), (D).

24. How are permanent total disability benefits calculated, including the minimum and maximum rates?

Compensation for permanent total disability benefits is calculated at sixty-six and two-thirds percent of wages, during the period of such disability. La. Rev. Stat. Ann. §23:1221(2)(a). "Notwithstanding any judgment or determination that an employee is permanently and totally disabled, if such employee subsequently has or receives any earnings, including, but not limited to, earnings from odd-lot employment, sheltered employment, or employment while working in pain, such employee shall not receive benefits pursuant to this Paragraph but may receive [supplemental earnings benefits]." La. Rev. Stat. Ann. §23:1221(2)(d). The maximum and minimum benefits are calculated the same as temporary total disability benefits. (See answer 16).

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

A. Funeral expenses.

In every death case, the employer shall pay, in addition to any other recoverable benefits, reasonable expenses of the burial of the employee up to \$8,500. La. Rev. Stat. Ann. §23:1210(A). The statute further provides that if the burial expenses are less than \$7,500, the difference between the expenses and \$7,500 shall be paid to the heirs in addition to any other benefits. La. Rev. Stat. Ann. §23:1210(B).

B. Dependency claims.

La. Rev. Stat. Ann. §23:1231 provides that for death within two years after the last treatment resulting from the accident, a legal dependent, actually and wholly dependent upon the employee's earnings at the time of the accident and death, receives a weekly sum as provided

below:

Payment is computed and divided among dependents as follows:

(1) if the spouse alone, 32 1/2% of wages; (2) if the spouse and one child, 46 1/4% of wages; (3) if the spouse and two or more children, 65% of wages; (4) if one child alone, 32 1/2% of wages; (5) if two children, 46 1/4% of wages; (6) if three or more children 65% of wages; (7) if there are neither spouse or child, then to the father or mother 32 1/2% of wages; and (8) if there are both father and mother, 65% of wages. If none of the aforementioned, then to one brother or sister, 32 1/2% of wages with 11% additional for each brother or sister in excess of one. If other dependents than those enumerated, 32 1/2% of wages for one and 11% additional for each such dependent in excess of one, subject to a maximum of 65% of wages for all, regardless of the number of dependents. La. Rev. Stat. Ann. §§23:1232(1)-(8). Death benefits to a surviving spouse shall terminate upon the death or remarriage of such surviving spouse. La. Rev. Stat. Ann. §23:1233.

If the employee leaves only partial dependents, the weekly compensation to be paid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents in the year prior to the death bears to the earnings of the deceased at the time of the accident. La. Rev. Stat. Ann. §23:1231(B)(1).

If the employee leaves no legal dependents entitled to benefits under any government compensation system, the sum of \$75,000.00 shall be paid to each surviving parent of the deceased employee, in a lump sum, which shall constitute the sole and exclusive compensation. La. Rev. Stat. Ann. §23:1231(B)(2).

26. What are the criteria for establishing a "second injury" fund recovery?

An employer who knowingly employs, re-employs, or retains an employee who has a permanent partial disability shall qualify for reimbursement from the Second Injury Fund, if the employee incurs a subsequent injury arising out of and in the course of his employment resulting in a greater liability due to the merger of the subsequent injury with the preexisting permanent partial disability. La. Rev. Stat. Ann. §23:1378(A).

The legislature recently amended the Second Injury Fund statute to specify the knowledge required by employers to be eligible for reimbursement by the Second Injury Fund. To qualify, following criteria must be established: (1) the employer has knowledge that the preexisting PPD was caused by a job accident or occupational disease while employed by the same employer seeking reimbursement from the Fund, (2) the PPD was disclosed to the employer on a form promulgated by the Office of Workers' Compensation, (3) the employer employs, retains or re-employs employee from the Permanent Partial Disability Employee Registry, and (4) the employer gives the Second Injury Fund Board an affidavit stating that the person signing the affidavit has

hire and fire authority, states how and when he acquired knowledge of a PPD, states how the PPD was a hinderance to employment, and the affidavit has an acknowledgment that any false statements may result in penalties.

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

The Office of Workers' Compensation would be the proper forum to seek modification of an award or order of a workers' compensation judge as such judge's power and jurisdiction is continuing. La. Rev. Stat. Ann. §23:1310.8(A)(1). There is also jurisprudential support for the extension of the workers' compensation judge's modification jurisdiction to district court judgments. In *Ross v. Highlands Ins. Co.*, 590 So.2d 1177 (La. 1991), the Louisiana Supreme Court, in dicta, acknowledged the jurisdiction of the hearing officer system to modify a district court's judgment.

The party seeking the modification has the burden to prove that there has been a change in conditions. *Jeanise v. Cannon*, 04-1049 (La. App. 3 Cir. 2/23/05), 895 So. 2d 651, 660. All issues, except disability, are res judicata and cannot be litigated in the modification proceeding. Id. The time limit for filing a motion or suit for modification has generally been recognized as one year from the last payment of weekly benefits. La. Rev. Stat. Ann. §23:1310.8; La. Rev. Stat. Ann. §23:1209. However, the Louisiana Supreme Court has found that prescription is not applicable to claims for modification of a workers' compensation award. *Falgout v. Dealers Truck Equipment Co.*, 98-C-3150 (La. 10/19/99), 748 So. 2d 399, 407.

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

The failure to pay the first installment of compensation for temporary total disability, permanent total disability or death or supplemental earnings benefits within 14 days after the employer has notice of the injury or death and/or the failure to pay medical benefits within 60 days and/or the failure to consent to the employee's request to select or change a treating physician can result in an award of penalties and attorney's fees. However, there can be no award of penalties and/or attorney's fees if the claim is reasonably controverted. La. Rev. Stat. Ann. §§23:1201(A)-(F). Any employer/insurer who at any time discontinues payment of benefits due, when such discontinuance is found to be arbitrary, capricious, or without probable cause, shall be subject to the payment of all reasonable attorney's fees or the prosecution and collection of such claims. La. Rev. Stat. Ann. §23:1201(I); *Smith v. Phillip Morris, U.S.A.*, 2002 CA 0103 (La. App. 1 Cir. 12/20/02), 858 So. 2d 443, 450. (See also answers 32, 33 and 37).

In addition, in 2013, Louisiana enacted La. Rev. Stat. Ann. §23:1201.1 which provides an employer/insurer with a "Safe Harbor" to protect against the award of penalties and attorney's fees when suspending, terminating or controverting a claim. To qualify for the protections set forth in the statute, the employer must first accept the claim and send the initial payment to the worker along with a Form 1002 Notice of Payment, Modification, Suspension, Termination, or Controversion of Compensation and/or Medical Benefits in accordance with the procedures set

forth in La. Rev. Stat. Ann. §23:1201.1. Thereafter, to suspend, terminate or controvert benefits, the employer must continue to follow the procedure set forth in the statute. If an employer follows the procedures set forth, it will not be liable for penalties or attorney's fees even if benefits are found due.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

With the exception for intentional acts, the rights and remedies of the Act are generally exclusive. La. Rev. Stat. Ann. §23:1032(A)(1)(a).

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

If the injury is the result of an intentional act, the employer may be subject to a fine or penalty under any other statute, civil or criminal, in addition to civil or criminal liability. La. Rev. Stat. Ann. §23:1032(B). Immunity shall not extend to: (1) any officer, director, stockholder, partner, or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of the employment; or (2) to the liability of any partner in a partnership which has been formed for purpose of evading this section. La. Rev. Stat. Ann. §23: 1032(C). No contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability except as provided. La. Rev. Stat. Ann. §23:1033.

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

Employers may face a surcharge, non-renewal or cancellation for failure to comply with reasonable safety requirements. La. Rev. Stat. Ann. §23:1412(B).

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

There are no such penalties in *Louisiana. Ewert v. Georgia Casualty & Surety Co.*, 548 So. 2d 358, 361 (La. App. 3 Cir. 1989).

32. What is the potential exposure for "bad faith" claims handling?

An employer/insurer shall be subject to a penalty not to exceed \$8,000.00 and a reasonable attorney fee for the prosecution and collection of such claims for discontinuing payment of claims where such discontinuance is found to be arbitrary, capricious, or without probable cause. La. Rev. Stat. Ann. §23:1201(I); *Jeanise v. Cannon*, 04-1049 (La. App. 3 Cir. 2/23/05), 895 So. 2d 651, 666.

Note that two provisions of §23:1202.2 were repealed in 1995: (1) the employer/insurer's duty to

pay reasonable attorney's fees for the prosecution and collection of a claim where the failure to make payment within sixty days after receipt of written notice is found to be arbitrary, capricious, or without probable cause; (2) if a partial payment or tender has been made in such a case, the employer/insurer is liable for all reasonable attorney's fees for the prosecution and collection of the difference between the amount paid or tendered and the amount due. Whether or not the "discontinuance" language can be construed to encompass a complete failure to pay is uncertain.

In addition, in 2013, Louisiana enacted La. Rev. Stat. Ann. §23:1201.1 which provides an employer/insurer with a "Safe Harbor" to protect against the award of penalties and attorney's fees when suspending, terminating or controverting a claim. To qualify for the protections set forth in the statute, the employer must first accept the claim and send the initial payment to the worker along with a Form 1002 Notice of Payment, Modification, Suspension, Termination, or Controversion of Compensation and/or Medical Benefits in accordance with the procedures set forth in La. Rev. Stat. Ann. §23:1201.1. Thereafter, to suspend, terminate or controvert benefits, the employer must continue to follow the procedure set forth in the statute. If an employer follows the procedures set forth, it will not be liable for penalties or attorney's fees even if benefits are found due.

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

An employer cannot refuse to hire a person or discharge them simply because of a compensation claim. La. Rev. Stat. Ann. §23:1361(A). An employer who is found to discriminate against an employee who files a claim is subject to a civil penalty equal to the amount the employee would have earned but for the discrimination, based on the starting salary of the position sought or the earnings of the employee at the time of discharge, not to exceed one year's earnings, plus reasonable attorney's fees and court costs. La. Rev. Stat. Ann. §23:1361(C).

However, note that any party found to have brought a frivolous claim under §23:1361 shall be held responsible for reasonable damages incurred as a result of the claim, including reasonable attorney's fees and court costs. La. Rev. Stat. Ann. §23:1361(E).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. La. Rev. Stat. Ann. §23:1101(A).

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

No. La. Rev. Stat. Ann. §23:1032(A)(1)(a).

36. Is subrogation available?

Yes. La. Rev. Stat. Ann. §23:1101(B).

MEDICALS

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

Any claim must be paid within sixty days after receipt of written notice. La. Rev. Stat. Ann. §23:1201(E)(1). If, however, the medical provider utilizes electronic bill pursuant to La. Rev. Stat. Ann. §23:1203.2, the claim must be paid within thirty days of receipt. La. Rev. Stat. Ann. §23:1201(E)(2).

Failure to make a timely payment shall result in a penalty of 12% of any unpaid medical benefits or fifty dollars per calendar day, whichever is greater, for each day in which any and all medical benefits remain unpaid, in addition to reasonable attorney's fees. The fifty dollar per calendar day penalty shall not exceed \$2,000.00. La. Rev. Stat. Ann. §23:1201(F).

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

La. Rev. Stat. Ann. §23:1127 mandates that health care providers who have treated an employee relating to a workers' compensation claim provide copies of all medical records and information without the need for a medical authorization to the employee, a license vocational rehabilitation specialist, the employer, the workers' compensation insurer, and other healthcare providers.

Additionally, the normal discovery devices are available to the parties, including interrogatories, requests for production and requests for admission. Failure by a party to respond can result in the filing of a motion to compel, seeking responses and sanctions. Failure to comply with an Order or subpoena issued by a Hearing Officer may ultimately result in the offending party being held in contempt. La. Rev. Stat. Ann. §23:1310.7.

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

A. Claimant's choice of a physician.

The Act requires that employee seek all medical treatment within the State when available. La. R.S. Ann. §23:1203(A).

An employee has the right to select one treating physician in any field or specialty. After the initial choice, the employee must obtain prior consent from the employer or his carrier for a change of treating physician within the same field or specialty. The employee, however, is not required to

obtain approval for change to a treating physician in another field or specialty. La. R.S. Ann. §23:1121(B)(1).

B. Employer's right to second opinion and/or independent medical examination.

An injured employee shall submit himself to an examination by a duly qualified medical practitioner provided and paid for by the employer, as soon after the accident as demanded, and from time to time thereafter as often as may be reasonably necessary. The employer or his carrier shall not require the employee to be examined by more than one duly qualified medical practitioner in any one field or specialty unless prior consent has been obtained from the employee. La. R.S. Ann. §23:1121(A). Case law has recognized that a defendant in a compensation suit is always entitled to have plaintiff examined prior to trial by defendant's physician, so long as examination is reasonable. See *Fontenot v. Cox*, 68 So.2d 656 (La. App. 1st Cir. 1953); *Green v. Liberty Mutual Ins. Co.*, 184 So.2d 801 (La. App. 3rd Cir. 1966). If the employee refuses to submit himself to a medical examination as best provided in this section, his right to compensation and to prosecute any further proceedings shall be suspended until the examination takes place. La. R.S. Ann. §23:1124(A).

It should also be noted that if any dispute arises as to the condition, capacity to work, or the current medical treatment of the employee, the Court, on application of either party or on its own motion under the circumstances, can order an examination by a physician appointed by the Court. La. R.S. Ann. §23:1123; *Johnson v. Coppage*, 360 So.2d 275 (La. App. 4th Cir. 1978).

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

The employee is entitled to all necessary medical, surgical, hospital services and medicines or any non-medical treatment recognized by the state's laws as legal (e.g., chiropractors). La. Rev. Stat. Ann. §23:1203(A).

On July 13, 2011, new Medical Treatment Guidelines under La. Rev. Stat. Ann. §23:1203.1 went into effect. La. Rev. Stat. Ann. §23:1203.1 give the Office of Workers' Compensation Medical Director the power to establish certain treatment guidelines for various types of injuries. The statute *requires* all treating healthcare providers and insurance carriers, absent exigent circumstances, to comply with new medical treatment schedules in providing medical treatment to all injured employees. Under these new guidelines, medical treatment owed by the employer shall mean care, services, and treatment in accordance with the medical treatment schedule. Accordingly, medical treatment that is not within the schedule is not owed by the employer and denial of treatment will not be considered arbitrary and capricious. However, the statute does afford an injured worker the possibility to obtain medical treatment that varies from the schedule if it is demonstrated to the Office of Workers Compensation Medical Director by a preponderance of scientific medical evidence that the variance is reasonably required to cure or relieve the injured worker.

Although additional guidelines are being developed, the guidelines currently address medical treatment for the spine, upper and lower extremities, neurological and neuromuscular disorders, and pain. Specifically, the current categories of Medical Guidelines include Carpal Tunnel Syndrome (CTS), Cervical Spine Injury, Chronic Pain Disorder, Complex Regional Pain, Syndrome/Reflex, Sympathetic Dystrophy, Low Back Pain Lower Extremity Injury, Shoulder Injury, and Thoracic Outlet Syndrome.

41. Which prosthetic devices are covered, and for how long?

Any prosthetic devices, including but not limited to eyeglasses, artificial limbs, hearing aids and dentures, are covered. La. Rev. Stat. Ann. §23:1203(C). The employer is also liable for the actual expenses reasonably and necessarily incurred by the employee for mileage reasonably and necessarily traveled in order to obtain the prosthetic devices. La. Rev. Stat. Ann. §23:1203(D).

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

An award has been made to a paraplegic employee for expenses incurred for an emergency telephone, a ramp, and hand controls on a van. *Cottonham v. Rockwood Ins. Co.*, 403 So.2d 773 (La. App. 3d Cir. 1981), cert. denied, 407 So.2d 732 (La. 1983).

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

The obligation to pay is limited to the mean of the usual and customary charges for such care, services, treatment drugs and supplies, as determined under the reimbursement schedule annually published pursuant to La. Rev. Stat. Ann. §23:1203(B).

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

No provision specifically addresses managed care. However, the broad language of 23:1203(A) probably encompasses such care. See answer 40.

PRACTICE/PROCEDURE

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

A. Claims filed with the Office of Workers' Compensation district courts.

A claim for benefits, the controversion of entitlement to benefits, or other relief under the Act, is initiated by the filing of a LWC-WC Form 1008 "Disputed Claim for Compensation." with the Office of Workers' Compensation Administration. La. Rev. Stat. Ann. §23:1310.3(A). The matter is then assigned to one of nine districts. The district office effects service of process on any named defendant, who must then file an answer within fifteen days of service or within the delay for

answering granted by the workers' compensation judge, not to exceed an additional ten days. La. Rev. Stat. Ann. §23:1310.3(B). At the time the claim is filed, an employee who is a Louisiana domiciliary is required to elect one of the following judicial districts as the situs of necessary hearing by a hearing officer: (1) the judicial district of the parish of domicile at the time of injury; (2) the judicial district of the parish where the injury occurred, or (3) the judicial district of the parish of the employer's principal place of business. Employees who are not Louisiana domiciliaries have more limited options. La. Rev. Stat. Ann. §23:1310.4(A).

In addition, in 2013, Louisiana enacted La. Rev. Stat. Ann. §23:1201.1 which provides an employer/insurer with a "Safe Harbor" to protect against the award of penalties and attorney's fees when suspending, terminating or controverting a claim. The suspension, termination or controversion can be for several reasons, including the employee's refusal to submit to a medical examination, failure to provide a Choice of Physician form, fraud, disputes of compensability, employee's failure to provide a monthly report of earnings, or otherwise to controvert that the employee was injured in a workplace accident. To qualify for the protections set forth in the statute, the employer must first accept the claim and send the initial payment to the worker along with a Form 1002 Notice of Payment, Modification, Suspension, termination, or Controversion of Compensation and/or Medical Benefits in accordance with the procedures set forth in La. Rev. Stat. Ann. §23:1201.1. Thereafter, to suspend, terminate or controvert benefits, the employer must continue to follow the procedure set forth in the statute. If an employer follows the procedures set forth, it will not be liable for penalties or attorney's fees even if benefits are found due.

B. Claims for treatment in accordance with the Medical Guideline Schedule.

La. R.S. 23:1203.1 also establishes additional deadlines and procedures for authorization and appeal of requested medical treatment under the Medical Guideline Schedule. The statute also establishes deadlines and procedures for authorization and appeal of requested medical treatment. The employee's medical provider must submit a request for authorization of his plan of medical treatment to the employer's workers' compensation insurance carrier/payor. Once the medical provider submits to the payor the request for authorization, the payor must notify the medical provider of their action on the request within 5 five business days of receipt of the request. La. R.S. 23:1203.1(J)

If any dispute arises as to whether the recommended care, services, or treatment is in accordance with the medical treatment schedule, or whether a variance from the medical treatment schedule is reasonably required, La. RS 23:1203.1(J) requires the aggrieved party to file a LWC-WC 1009 "Disputed Claim for Medical Treatment" appeal with the office of workers' compensation administration medical director. To properly challenge a denial of medical services, an injured worker must complete and submit a LWC-WC 1009 Disputed Claim for Medical Treatment form, via mail, to the OWCA Medical Director along with the supporting medical documentation.

The statute requires this appeal to be filed within fifteen calendar days of the denial by the Carrier/Self-insured employer. Additionally, a copy of the completed 1009 form must be mailed to

all involved parties. The statute mandates that the Medical Director render a decision as soon as practicable, but in no event, not more than 30 calendar days from date of filing the appeal. The LWC-WC Form 1009 is posted on the website, www.LAWWORKS.net and can be accessed using the numerical listing by clicking on Downloads, then on Workers Compensation, then Forms – Numerical.

In the event that either party disagrees with the determination issued by the Medical Director, any party may then appeal the decision by filing a LWC-WC Form 1008 "Disputed Claim for Compensation." However, under the statute, the Medical Director's decision will only be overturned when it is shown by clear and convincing evidence that it was not in accordance with the schedule. La. R.S. 23:1203.1(K).

46. What is the method of adjudication?

A. Administrative level/Trial court.

At the administrative level, a hearing officer presides over a hearing and renders a decision. Discovery is permitted. La. Rev. Stat. Ann. §23:1310.1; La. Rev. Stat. Ann. §23:1310.5(A)(1).

B. Appellate.

An appeal from a hearing officer's decision may be taken to the circuit court of appeal for the judicial district elected by the employee upon filing the petition. The appeal is taken on the record, no additional evidence may be submitted, and the case is reviewed using "manifest error - clearly wrong" standard of review. An employer who appeals a decision must secure a bond. La. Rev. Stat. Ann. §23:1310.5.

An appeal from the circuit court is heard by the Louisiana Supreme Court. Louisiana does not follow the common law; therefore, the scope of review is the same as any other civil law case.

47. What are the requirements for stipulations or settlements?

A lump sum payment or compromise settlement for full and final discharge and release of the employer/insurer is allowed only: (1) upon agreement between the parties, including the insurer's duty to obtain the employer's consent; (2) when it can be demonstrated that a lump sum payment is clearly in the best interests of the parties; and (3) upon the expiration of six months after termination of temporary total disability. However, such expiration may be waived by consent of the other parties. La. Rev. Stat. Ann. §§23:1271(A)(1)-(3). Additionally, such agreements must be approved by the hearing officer. La. Rev. Stat. Ann. §23:1272(A).

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

There is no such specific provision in the Act but full and final settlements with closed medicals are allowed.

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

Yes. See answer 47.

RISK FINANCE FOR WORKERS' COMPENSATION

50. What insurance is required, and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

Employers are required to secure compensation to their employees through one of several available means: (1) by obtaining workers' compensation insurance from an authorized insurer; (2) by entering into an agreement with a group self-insurance fund; (3) by entering into an agreement with an interlocal risk management agency; (4) by using any combination of life, accident, health, property, casualty or other insurance policies offered through authorized companies; or (5) by qualifying as a self-insurer. La. Rev. Stat. Ann. §23:1168.

In 1991, the legislature enacted the "Workers' Compensation Cost Containment Act," which is intended to reduce occupational accidents and to decrease insurance rates for employers in high rate classifications. La. Rev. Stat. Ann. §23:1175 et seq. In 1991, the legislature also discontinued the Assigned Risk Plan and created, in its place, the Louisiana Workers' Compensation Corporation, whose purpose is to operate as a nonprofit domestic mutual insurer to Louisiana employers. La. Rev. Stat. Ann. §23:1391 et seq.

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

A. For individual entities.

The employer must furnish satisfactory proof of ability to pay compensation. The Director, pursuant to rules adopted by the Office for an individual self-insured, shall require that an employer: (1) deposit with the director securities or a surety bond in an amount determined by the director which would be at least an average of the yearly claims for the last three years; and (2) provide proof of excess coverage with such terms and conditions as is commensurate with their ability to pay the benefits required by the provisions of the Workers' Compensation Act. La. Rev. Stat. Ann. §23:1168(A)(5).

The Director may waive the requirements of La. Rev. Stat. Ann. §23:1168(A)(5) if the employer is able to pay benefits and the requirements of these provisions are unnecessary. Rules which set standards for such waiver must be established. La. Rev. Stat. Ann. §23:1168(B).

B. For groups or "pools" or private entities.

Five or more employers who are member of the same bona fide trade or professional association, and who meet specified qualifications, may pool their liabilities. La. Rev. Stat. Ann. §23:1195 et seq.

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"?**

The Louisiana Workers' Compensation Act does not exclude illegal aliens from securing workers' compensation benefits when justified. The Act provides a list of employees who are not covered and since there is not clear indication that the Legislature intended to exempt illegal aliens from recovering under the Act, the employer is burdened with showing the application of some specific exclusion under which benefits may be denied. See *Artiga v. M.A. Patout and Son*, 671 So.2d 1138 (La. App. 3rd Cir. 1996).

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

Terrorist acts are covered. La. Rev. Stat. Ann. §23:1031(A) provides that any employee receiving personal injury "by accident arising out of and in the course of his employment" is entitled to workers' compensation benefits. "Accident" is defined as "an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, with or without human fault, and directly producing at the time objective findings of an injury..." La. Rev. Stat. Ann. §23:1021.

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?**

Pursuant to La. Rev. Stat. Ann. §46:153(E), anyone applying for, and subsequently becoming eligible to receive, or by accepting medical assistance under any provision of the federal Social Security Act "shall be deemed to have made an assignment to the department of his right to any hospitalization, accident, medical, or health benefits owed to applicant or recipient by any third party, as well as rights to such benefits or medical support payments owed by any third party to applicant's or recipient's children or any other person for whom applicant or recipient has legal authority to execute such an assignment." As such, a workers' compensation claimant who has previously received Medicare benefits cannot settle with and release the employer-carrier to the extent of the Medicare payments as the right to recoup those payments has been assigned to the Louisiana Department of Health and Hospitals. The right to recover those Medicare expenses belongs to the Louisiana Department of Health and Hospitals, who should be included in any purported settlement.

La. Rev. Stat. Ann. §46:153(H) further provides that the Department of Health and Hospitals shall not lose its right to recover the assistance payments and medical expenses the department has paid or was obligated to pay on behalf of an injured, ill, or deceased person in connection with

said injury, illness, or death if the department does not intervene or file its own cause of action or take any other action allowed pursuant to the assignment of rights provision of subsection (E) of this section, or La. Rev. Stat. Ann. §46:446.

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 to 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. §1396(k)(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. §1396(k)(b).

Pursuant to La. Rev. Stat. Ann. §46:446(F), the Louisiana Department of Health and Hospitals has a privilege for medical payments made to an injured or ill Medicaid recipient (1) on the amount payable to the injured recipient out of the total amount of recovery, whether by judgment or settlement/compromise, from another person and (2) on the amount payable by any insurance company under any contract providing for indemnity or compensation to the injured person. This privilege becomes effective if, prior to the payment of insurance proceeds or the payment of any judgment, settlement or compromise, a written notice containing the name and address of the injured person (and if known, the name of the person alleged to be liable to the injured person on account of the injuries received) is mailed by the Louisiana Department of Health and Hospitals, by certified mail, return receipt requested, to the injured person, his attorney, the person alleged to be liable to any insurance carrier which insured such person against liability and "to any insurance company obligated by contract to pay indemnity or compensation to the injured person." La. Rev. Stat. Ann. §46:446(G). The privilege is effective against the persons given notice according to these provisions, and is not negated as to those persons given notice due to failure to give similar notice to other persons listed in the statute. *Id.* Any insurer or other person who, having received notice in accordance with these provisions, pays over any monies subject to the privilege is liable to the Louisiana Department of Health and Hospitals for the amount of the privilege up to the amount paid by the insurer or other person. La. Rev. Stat. Ann. §46:446(H).

As for health insurers, any company which contracts for health care benefits for an employee has a right of reimbursement against the workers' compensation insurer if the health insurer paid health care benefits for which the workers' compensation carrier is liable. La. R.S. §23:1205(B). The amount of reimbursement cannot exceed the amount of the workers' compensation insurer's liability for the workers' compensation benefit.

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)?

HIPAA provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers under state law. 45 C.F.R. §164.512(a)(1).

In any claim for compensation benefits, a health care provider who treated the employee for injuries related to the compensation claim must release any requested medical information and records relative to the employee's injury to the employee, the licensed and approved vocational rehabilitation counselor assigned to the employee's claim, other health care providers examining the employee, the employer and the employer's workers' compensation insurer. La. Rev. Stat. Ann. §23:1127(B). Records relating to other treatment or conditions can be obtained through subpoena or written release by the employee. Nevertheless, "any such records or information furnished to the employer or insurer or any other party pursuant to this Section shall be held confidential by them and the employer or insurer or any other party shall be liable to the employee for any actual damages sustained by him as a result of a breach of this confidence up to a maximum of \$1,000.00, plus all reasonable attorney fees necessary to recover such damages." La. Rev. Stat. Ann. §23:1127(C)(4). These strict confidentiality provisions do not appear to create any conflict with federal law or the Health Insurance Portability and Accountability Act (HIPAA).

57. What are the provisions for "Independent Contractors"?

La. Rev. Stat. Ann. §23:1021(6) provides as follows:

"Independent Contractor" means any person who renders service, other than manual labor, for a specified recompense for a specified result either as a unit or as a whole, under the control of his principal as to results of his work only, and not as to the means by which such result is accomplished, and are expressly excluded from the provisions of this chapter unless a substantial part of the work time of an independent contractor is spent in manual labor by him in carrying out the terms of the contract, in which case the independent contractor is expressly covered by the provisions of this chapter.

The courts' interpretations of the definition of "independent contractor" have stated that the inquiry to determine whether a relationship is that of independent contractor or of employment hinges on a principal test: the control over the work reserved by the principal. The amount of supervision and control actually exercised is not the crucial question, but rather the amount of supervision and control reserved by the principal from the nature of the relationship. *Fuller v. United States Aircraft Insurance Group*, 530 So.2d 1282 (La. App. 2d Cir. 1988), writ denied, 534 So.2d 444 (La. 1988). There are eight factors to be considered in determining whether an individual would be considered an employee or an independent contractor:

- (1) The degree of supervision and control actually exercised by the principal over the work performed;
- (2) Whether the work undertaken can be discontinued or terminated at any time by either party

and without a corresponding liability for its breach;

- (3) Whether the worker renders service for a specified price to be paid for a specified result either as a unit or a whole;
- (4) The manner in which the worker is carried on the payroll of the principal;
- (5) The right of the worker, whether exercise or not, to hire helpers and assistants;
- (6) The source of the materials and equipment to be used by the worker;
- (7) Whether the worker performing the services is an integral part of the principal's business or whether he is independent of the principal's business; and
- (8) Whether a person performs work for a principal on a continuing and exclusive basis.

Id. at 1289-1292.

58. Are there any specific provisions for “Independent Contractors” pertaining to professional employment organizations/temporary service companies/leasing companies?

There are no specific provisions for independent contractors pertaining to professional employment organizations/temporary service companies/leasing companies. However, the Louisiana Workers Compensation Act provides tort immunity for both “statutory employers” and “borrowing employers”. With regard to statutory employers, La. Rev. Stat. Ann. §23:1061(A)(1) provides in pertinent part that when any “principal” undertakes to execute any work which is part of his trade, business or occupation and contracts with any “contractor” for the execution by or under the contractor of the whole or any of the work undertaken by the principal, then the principal is entitled to immunity and becomes responsible for the payment of workers compensation benefits. Work is considered to be part of the principal's trade, business or occupation if it is integral part of or essential to the ability of the principal to generate that individual principal's goods, products or services.

La. Rev. Stat. Ann. §23:1061(A)(2) states that a statutory employer relationship shall exist whenever the service or work performed by the immediate employer is contemplated by or included in a contract between the principal and any person or entity other than the employee's immediate employer. If this section is not satisfied La. Rev. Stat. Ann. §23:1061(A)(3) provides that a statutory employer relationship shall not exist unless there is a written contract between the principal and a contractor which is the employee's immediate employer or statutory employer, which recognizes the principal as the statutory employer. If such a written contract has been executed there is a rebuttable presumption that a statutory employer relationship exists.

An entity can also be considered an employer for workers compensation purposes pursuant to the “borrowed servant” doctrine. La. Rev. Stat. Ann. §23:1031(C) states in part that when an employee is employed by a borrowing employer and is under the control and direction of the

borrowing employer in the performance of the work, the borrowing employer and the immediate employer are jointly liable for the payment of workers compensation benefits. The borrowing employer is also entitled to the exclusive remedy provisions of the Act.

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?

Yes. La. Rev. Stat. Ann. §23:1021(10) defines “owner/operator” and provides that such owner/operators are independent contractors pursuant to the Louisiana Workers’ Compensation Act. The article provides as follows:

“Owner/operator” means a person who provides trucking transportation services under written contract to a common carrier, contract carrier, or exempt haulers which transportation services include the lease of equipment or a driver to the common carrier, contract carrier, or exempt hauler. An owner/operator, and the drivers provided by an owner/operator, are not employees of any such common carrier or exempt hauler for the purposes of this chapter if the owner/operator has entered into a written agreement with the carrier or hauler that evidences a relationship in which the owner/operator identifies itself as an independent contract. For purposes of this chapter, owner/operator does not include an individual driver who purchases his equipment from the carrier or hauler, and then directly leases the equipment back to the carrier or hauler with the purchasing driver.

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

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