

## NORTH DAKOTA

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

North Dakota Century Code Title 65 (Chapters 65-01 through 65-10). NOTE: North Dakota has a mandatory state-run fund and, consequently, insurers are not involved in workers' compensation matters in North Dakota. The fund is administered by the North Dakota Workforce Safety & Insurance Organization ("Organization"). The Organization was formerly known as the North Dakota Workers' Compensation Bureau.

## SCOPE OF COMPENSABILITY

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

The term "employee" is generally defined as every person who performs hazardous services for another for remuneration unless the person is an independent contractor. N.D. Cent. Code § 65-01-02(16).

The term "employee" includes all elective and appointed officials of the state and its political subdivisions, the legislative assembly, elective officials of the state's counties, and all elective peace officers of any city. N.D. Cent. Code § 65-01-02(16)(a)(1). The term also includes aliens, human service zone general assistance workers, and minors. N.D. Cent. Code § 65-01-02(16)(a)(2)-(4).

The term "employee" does not include any person whose employment is both casual and not in the course of the trade, business, profession, or occupation of that person's employer; any person who is engaged in an illegal enterprise or occupation; the spouse or child, under the age of 22, of the employer; in general, any real estate broker or real estate salesperson; the members of the board of directors of a business corporation who are not employed in any other capacity by the corporation; any individual delivering newspapers or shopping news, if substantially all of the individual's remuneration is directly related to sales; and any employer. N.D. Cent. Code § 65-01-02(16)(b).

Each person who performs services for another for remuneration is presumed to be an employee of the person for whom the services are performed, unless it is proven that the person is an independent contractor. N.D. Cent. Code § 65-01-03. A person who is an independent contractor rather than an employee does not fall within the scope of the workers' compensation statutes. *Schaefer v. North Dakota Workers Compensation Bureau*, 462 N.W.2d 179,180 (N.D. 1990).

**3. Identify and describe any “statutory employer” provision.**

Persons employed by a subcontractor, or by an independent contractor operating under an agreement with the general contractor, are deemed to be employees of the general contractor who is liable and responsible for the payments of premiums for the coverage of the employees until the subcontractor or independent contractor has secured the necessary coverage and paid the premium for the coverage. This subdivision does not impose any liability upon a general contractor other than liability to the Organization for the payment of premiums which are not paid by a subcontractor or independent contractor. N.D. Cent. Code § 65-01-02(17)

**4. What types of injury is covered and what is the standard of proof for each:**

**A. Traumatic or “single occurrence” claims.**

Injuries which occur by accident and arise out of and in the course of hazardous employment, and which are established by medical evidence supported by objective medical findings, meet the statutory definition of “compensable injury.” See N.D. Cent. Code § 65-01-02(11). Injuries to artificial members are compensable. N.D. Cent. Code § 65-01-02(11)(a)(2). Injuries arising out of employer-required or supplied travel to and from a remote job site or activities performed at the direction or under the control of the employer also are compensable. N.D. Cent. Code § 65-01-02(11)(a)(4). Injuries caused by the willful act of a third person directed against an employee because of the employee’s employment is compensable. N.D. Cent. Code § 65-01-02(11)(a)(5). The claimant has the burden of proving by a preponderance of the evidence that the claimant is entitled to participate in the Workforce Safety & Insurance Fund. N.D. Cent Code § 65-01-11.

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

In general, the term “compensable injury” includes any disease caused by a hazard to which an employee is subjected in the course of employment, and which must be incidental to the character of the business and not independent of the relation of employer and employee. See N.D. Cent. Code § 65-01-02(11)(a)(1). Ordinary diseases of life to which the general public outside of employment is exposed or preventive treatment for communicable diseases are not compensable, except that the Organization may pay for preventive treatment for a health care provider, firefighter, peace officer, correctional officer, court officer, law enforcement officer, emergency medical technician, or an individual trained and authorized by law or rule to render emergency medical assistance or treatment who is exposed to a blood borne pathogen occurring in the course of employment and for exposure to rabies occurring in the course of employment. N.D. Cent. Code § 65-01-02(11)(b)(1). A disease is fairly traceable where there is a direct causal connection

between the disease and the work conditions. *Engebretson v. North Dakota Workers Compensation Bureau*, 1999 ND 112, ¶ 11, 595 N.W.2d 312.

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

The following injuries are not included in the term “compensable injury:” (1) ordinary diseases of life to which the general public outside of employment is exposed or preventative treatment for communicable diseases; (2) an injury caused by the employee’s willful intention to injure or kill himself or another; (3) an injury caused by the use of intoxicants or the illegal use of controlled substances; (4) an injury that arises out of an altercation in which the injured employee is an aggressor, unless the injured employee is required to engage in altercations as a part of their job duties, such as a police officer or private security personnel; (5) an injury that arises out of the commission of an illegal act by the injured employee; (6) an injury that arises out of an employee’s voluntary nonpaid participation in any recreational activity; (7) injuries attributable to a pre-existing injury, disease, or condition, including when the employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity; (8) a nonemployment injury that, although acting upon a prior compensable injury, is established as an independent intervening cause of injury; (9) a latent or asymptomatic degenerative condition, caused in substantial part by employment duties, which is triggered or made active by a subsequent injury; (10) a mental injury arising from mental stimulus. N.D. Cent Code § 65-01-02(11)(b).

**6. What psychiatric claims or treatments are compensable?**

Physical injury caused by mental stimulus, if: (1) causally related to the employee’s employment with reasonable medical certainty; and (2) with reasonable medical certainty, it is determined that unusual stress is at least fifty percent of the cause of the injury or disease as compared with all other contributing causes combined. N.D. Cent. Code § 65-01-02(11)(a)(3). A mental or psychological condition caused by a physical injury, but only when the physical injury is determined with reasonable medical certainty to be at least fifty percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not pre-exist the work injury. N.D. Cent. Code Ann. § 65-01-02(11)(a)(6). Mental injury arising from mental stimulus is not compensable. N.D. Cent. Code § 65-01-02(11)(b)(10).

**7. What are the applicable statutes of limitations?**

All original claims for compensation must be filed by the employee, or someone on the employee’s behalf, within one year after the injury or within two years after the death. The date of injury for

the purposes of this section is the first date that a reasonable person knew or should have known that the employee suffered a work-related injury and has either lost wages because of a resulting disability or received medical treatment. N.D. Cent. Code § 65-05-01.

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

A written claim must be filed within the time specified (see answer 7) by: (1) delivering it at the office of the Organization or to any person whom the Organization by regulation may designate; or (2) depositing it in the mail properly stamped and addressed to the Organization or to any person whom the Organization, by regulation, may designate. N.D. Cent. Code § 65-05-01.

An employee who is involved in an accident while on the job must take immediate steps to notify the employer of the accident and the general nature of the injury, if apparent. N.D. Cent. Code § 65-05-01.2. Notice may be either oral or written and, absent good cause, may not be given later than seven days after the accident occurred or the general nature of the employee's injury became apparent. *Id.* If an employee fails to comply with the notice requirements, the Organization may consider that failure to notify in determining whether the employee's injury is compensable. N.D. Cent. Code § 65-05-01.3.

The employer must file a first report of notice of injury with the Organization within seven days from the date the employer receives the notice of injury from the employee. N.D. Cent. Code § 65-05-01.4. Failure of the employer to file a first report of notice of injury is an admission by the employer that the alleged injury may be compensable. *Id.*

Every claim must be made on forms furnished by the Organization and must contain all of the information required by the Organization. N.D. Cent. Code § 65-05-02. Each claim must be signed by the employee or by the person acting on his or her behalf and, except in the case of death, must be accompanied by a certificate of the employee's doctor stating that the employee was physically examined, stating the nature of the injury and the nature and probable extent of the disability. *Id.*

**9. Describe available defenses based on employee conduct:**

**A. Self-inflicted injury.**

Any injury caused by the employee's willful intention to injure or kill himself or another is not a

compensable injury. N.D. Cent. Code § 65-01-02(11)(b)(2).

### **B. Willful misconduct, “horseplay,” etc.**

An exclusion for injuries caused by willful misconduct or horseplay is not explicitly provided for in the workers’ compensation statutes. There is, however, an exclusion for the willful intention to injure or kill another. *See* N.D. Cent. Code § 65-01-02(11)(b)(2). Term “compensable injury” includes only those injuries caused by accident arising out of and in the course of employment, and which must be established by medical evidence supported by objective medical findings. *See* N.D. Cent. Code § 65-01-02(11). Thus, it could be argued that an injury caused by willful misconduct or horseplay does not arise out of and in the course of employment and is therefore not a compensable injury. However, in another context, the North Dakota Supreme Court has found as a matter of law that an employee’s act of horseplay in intentionally pushing the knees out from under a co-employee was not a sufficiently substantial deviation from the course of employment to transform the employee from a co-employee to a third-person tortfeasor. *See Mitchell v. Sanborn*, 536 N.W.2d 678, 683-86 (N.D. 1995). *Fetzer v. North Dakota Workforce Safety and Ins.*, 2012 ND 73, 815 N.W. 2d 539 (Horseplay not extended to include an employee who fell at work without explanation).

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

Injuries caused by the use of intoxicants or the illegal use of controlled substances are not compensable. N.D. Cent. Code § 65-01-02(11)(b)(3).

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

Any person claiming benefits or payment for services who: (1) willfully files a false claim or makes a false statement; (2) willfully misrepresents that person’s physical condition; or (3) willfully fails to notify the Organization as to the receipt of income, or an increase in income, from employment after the issuance of an order awarding benefits is guilty of a Class A misdemeanor. N.D. Cent. Code § 65-05-33(1). If the act is committed to obtain, or pursuant to a scheme to obtain, more than one thousand dollars in benefits or payment for services, the offense is a class C felony. N.D. Cent. Code § 65-05-33(2). The term “statement” includes any testimony, claim form, notice, proof of injury, proof of return to work status, bill for services, diagnosis, prescription, hospital or doctor records, x-ray, test results, or other evidence of loss, injury, or expense. N.D. Cent. Code § 65-05-33(4). In addition to any other penalties provided by law, the person making a false statement or filing a false claim must reimburse the Organization for any benefits paid based upon the false claim or statement, and must forfeit any additional benefits relative to that injury. N.D. Cent. Code

§ 65-05-33(3). To trigger any consequences for claims involving fraud, the false statements must be intentional, not inadvertent, and must be material, not peripheral. *Horob v. North Dakota Workers Compensation Bureau*, 2004 N.D. 114, ¶ 14, 611 N.W.2d 875, 880 (N.D. 2000).

Although compensation and claims are usually exempt from claims of creditors, a claim by the Organization for any payments made due to fraud is not exempt. N.D. Cent. Code § 65-05-29(1)(c)(3). The recipient shall repay the payment, or the unpaid amount of the sum may be recouped from any future payments due to the recipient on any claim with the Organization. *Id.*

Once it is proven that a false statement has been willfully made, the claimant forfeits any additional benefits relative to that injury. N.D. Cent. Code § 65-05-33(3); *Hopfauf v. North Dakota Workers Compensation Bureau*, 575 N.W.2d. 436 (N.D. 1998). The false statement must be sufficiently material to support a forfeiture of future benefits, however. *Horob v. North Dakota Compensation Bureau*, 2000 N.D. 114, ¶ 15, 611 N.W.2d 875. Materiality is proven when the Organization shows the false claim or false statement caused the benefits to be paid in error. *Id.* To trigger the civil penalties, the Organization must prove the fraud by a preponderance of the evidence. *Renault v. North Dakota Workers Compensation Bureau*, 1999 N.D. 187, ¶10, 601 N.W.2d 580. If the claimant wrongfully conceals his or her income, which impedes the Organization's proof of materiality, the claimant suffers the consequences by bearing the burden. *Unser v. North Dakota Workers Compensation Bureau*, 1999 N.D. 129, ¶22, 598 N.W.2d 89. When the Organization terminates benefits, the burden shifts to the claimant to prove the right to continued benefits. *Id.*

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

See Answer 10.

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

Any injury that arises out of an employee's purely voluntary non-paid participation in any recreational activity, even though the employer pays some or all of the cost of the activity, is not a compensable injury. N.D. Cent. Code § 65-01-02(11)(b)(6).

13. Are injuries by co-employees compensable?

Yes, if the injuries meet the statutory definition of “compensable injury” as defined in N.D. Cent. Code § 65-01-02(11).

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

This is not explicitly provided for in the statute. Generally, the term “compensable injury” includes only those injuries caused by an accident arising out of and in the course of employment, which must be established by medical evidence supported by objective medical findings. See N.D. Cent. Code § 65-01-02(11). Additionally, the statute provides a subrogation right to the Fund in situations where it provides benefits to an employee who was injured under circumstances creating in some person other than the Organization a legal liability to pay damages to the employee. N.D. Cent. Code § 65-01-09.

## BENEFITS

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

Average weekly wage means the weekly wages the employee was receiving from all employments at the date of first disability. In cases where the employee’s wages are not fixed by the week because the employee is self-employed or is paid hourly, monthly, or biweekly, the employee’s average weekly wage must be determined by using various formulas provided by statute, e.g., monthly rate multiplied by twelve months and divided by fifty-two weeks, biweekly rate divided by two, etc. See N.D. Cent. Code § 65-01-02(6).

Average weekly wage in the state means a determination made of the average weekly wage in the state by Job Service North Dakota on or before July 1 of each year, computed to the next highest dollar. N.D. Cent. Code § 65-01-02(6).

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

If an injury causes temporary total disability or permanent total disability, the Organization pays the employee during such disability a weekly compensation equal to sixty-six and two-thirds of the

employee's gross weekly wage, subject to a minimum of 60% and a maximum of 125% of the state average weekly wage. N.D. Cent. Code § 65-05-09. There are provisions for a social security offset (N.D. Cent. Code 65-05-09.1) and a retirement offset (N.D. Cent. Code § 65-05-09.2).

If the injury causes temporary partial disability resulting in a decrease of earning capacity, the compensation is sixty six and two-thirds of the difference between the employee's average weekly wages before the injury and the wage earning capacity after the injury in the same or another employment. N.D. Cent. Code § 65-05-10.

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

Upon the filing of a claim, the Organization must send to the employer a copy of the claim along with a form provided for the employer's response. N.D. Cent. Code § 65-01-16. The employer has fourteen days to file or mail a response. *Id.* The Organization may then make an informal decision on the claim. *Id.* If the Organization determines that more information is needed to process the claim, but that the information provided indicates that the employee is more likely than not to receive benefits, the Organization may pay preacceptance disability benefits while the claim is pending, equal to the minimum weekly disability benefit allowed under section 65-05-09. N.D. Cent. Code § 65-05-08.2. The Organization may not pay more than sixty days of preacceptance benefits. *Id.*

**18. What is the waiting or retroactive period for temporary benefits?**

The employee must be out five consecutive calendar days before recovering benefits for those days. N.D. Cent. Code § 65-05-08.

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

Prior to the expiration of a period of disability certified by a doctor, if a report certifying an additional period of disability has not been filed, or upon receipt of a report or other evidence indicating a claimant who is receiving disability benefits has been or will be released to return to work, the Organization shall send to the claimant a notice of intention to discontinue benefits. N.D. Cent. Code § 65-05-08.1(6). Such benefits may then be discontinued on the date of release to return to work or 21 days following mailing of the notice, whichever occurs first. *Id.* The notice must include an explanation of the reason for the action, an explanation of the right to respond,



and the procedure for filing the required report or challenging the proposed action. *Id.*

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

No. N.D. Cent. Code § 65-05-12.2 provides for procedure by which a claimant receives a permanent partial disability award. No case law addresses this point, either, although the courts have offset a claimant's award of permanent partial impairment benefits with previously paid permanent partial impairment benefits. *See Witcher v. North Dakota Workers Compensation Bureau*, 602 N.W.2d 704 (N.D. 1999).

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

Disfigurement resulting from an injury is included within the definition of permanent impairment (i.e., permanent partial disability). *See* N.D. Cent. Code § 65-01-02(27). Benefits would be calculated as set forth in answer 22 below.

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

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

North Dakota uses the terminology permanent partial impairment rather than permanent partial disability. If the injury causes the loss of a scheduled member, the Organization shall pay to the impaired employee a lump sum, calculated by multiplying thirty-five percent of the average weekly wage in the state on the date of the impairment evaluation, rounded to the highest dollar, by the number of weeks set forth in the statutory schedule for various injuries. N.D. Cent. Code § 65-05-12.2. If the injury is not specifically scheduled, the award is determined by reference to the whole person impairment percentages described below.

- B. Number of weeks for whole person and standard for recovery.

If the injury causes permanent impairment, other than scheduled injuries, the percentage which such impairment bears to total impairment must be determined, and the Fund shall pay to the

impaired employee a lump sum, calculated by multiplying thirty-five percent of the average weekly wage in the state on the date of the impairment evaluation, rounded to the highest dollar, by the number of weeks set forth in the statutory schedule for the percentage of whole body impairment. N.D. Cent. Code § 65-05-12.2.

Any rating of impairment should be in accordance with the standards for the evaluation of permanent impairment as published in the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment unless proven otherwise by clear and convincing medical evidence. *Id.*

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

Rehabilitation services are generally provided for under N.D. Cent. Code § 65-05.1. The employee has the burden to seek, obtain, and retain reasonable and substantial employment in order to reduce the period of temporary disability to a minimum. N.D. Cent. Code § 65-05.1-04(1). The goal of rehabilitation is to return the employee to substantial gainful employment, by returning him to the same position, by returning him to a modified position, by training or retraining, etc. N.D. Cent. Code § 65-05.1-01(3). The various rehabilitation options are prioritized (e.g., return to the same position, return to the same occupation, etc.). See N.D. Cent. Code § 65-05.1-01(4). Vocational rehabilitation services may be initiated by the Organization on its own motion, or by the employee or the employer if proof exists that the claimant has reached maximum medical recovery, that the claimant is not working, and has not voluntarily retired or removed himself from the labor force, and that the employee has made good faith efforts to seek, obtain, and retain employment. See N.D. Cent. Code § 65-05.1-01(8).

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

If an injury causes permanent total disability, the Organization pays the employee during such disability a weekly compensation equal to sixty six and two-thirds of the employee's gross weekly wage, subject to a minimum of 60% and a maximum of 125% of the state average weekly wage. N.D. Cent. Code § 65-05-09. There are provisions for a social security offset (N.D. Cent. Code 65-05-09.1) and a retirement offset (N.D. Cent. Code § 65-05-09.2).

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

### A. Funeral expenses.

If death benefits are payable, funeral expenses are paid subject to a \$10,000 maximum. N.D. Cent. Code § 65-05-26.

### B. Dependency claims.

The spouse or guardian of the children of the decedent receives an amount equal to the benefit rate for total disability under section 65-05-09. N.D. Cent. Code § 65-05-17(1). These benefits continue until the death of the spouse; or, in the case of a guardian, until the child or children of the decedent no longer meets the definition of a child. *Id.* Where there is more than one guardian for the children of a decedent, death benefits must be divided equally among guardians. *Id.*

Each child of the deceased employee receives \$15 per week. N.D. Cent. Code § 65-05-17(2). The Organization may make this payment directly to the child of the deceased employee or to the surviving parent or guardian of the child. *Id.*

In addition, the Organization shall make a payment in the sum of \$2,500 to the spouse or guardian of the decedent's child or children and \$800 for each dependent child. N.D. Cent. Code § 65-05-17(3). When there is more than one guardian, the \$2,500 must be divided equally among the guardians. *Id.*

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

No North Dakota statutory or case law addresses this issue directly. However, this should be governed by the same criteria applicable to an initial injury as set forth in answers 2 through 14 above.

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

The Organization has continuing jurisdiction over claims properly filed, and the Organization may at any time, on its own motion or on application, review an award. N.D. Cent. Code § 65-05-04. There is no appeal available from an Organization decision not to re-open a claim after the Organization's order on the claim has become final. *Id.*

**28. What situation would place responsibility on the employer to pay a claimant's attorney fees?**

If an employer wrongfully retaliates, or willfully threatens to discharge an employee for seeking payments under this Title, then the employer is liable in a civil action for damages, including reasonable attorney's fees. N.D. Cent. Code § 65-05-37.

## EXCLUSIVITY/TORT IMMUNITY

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

**A. Scope of immunity.**

Where the employer has secured payment of compensation by contributing to the Fund, the workers' compensation statutes are the employee's exclusive remedy against the employer. See N.D. Cent. Code § 65-01-08. The immunity also extends to staffing agencies and their client companies who contribute to the Fund. *Id.*

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

An employer remains liable for an employee's injuries caused by the employer's intentional acts. N.D. Cent. Code § 65-01-01.1; see also *Bartholomay v. Plains Grain & Agronomy, LLC*, 2016 N.D. 138, ¶ 6, 881 N.W.2d 249. Additionally, the exclusive remedy rule does not prohibit enforcement of an employer's contractual agreement to indemnify a third party tortfeasor. *Barsness v. General Diesel & Equip. Co.*, 422 N.W.2d 819, 824 (N.D. 1988).

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

Matters concerning the Organization's role with respect to safety in the work place are provided for in N.D. Cent. Code Ch. 65-03. A violation of any reasonable safety rule or regulation made by the Organization can result in the employer being guilty of an infraction, and the Organization may penalize the premium rating of that employer. N.D. Cent. Code § 65-03-02.

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

There are no apparent additional penalties under the statute for injury to minors.

**32. What is the potential exposure for “bad faith” claims handling?**

In North Dakota, the Workforce Safety & Insurance Organization is a state-run fund, and private insurers are not involved.

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

There are no apparent provisions in the statute addressing this situation. Any potential claims against the employer would be left to other law, e.g., civil actions for wrongful discharge. *See also* answer no. 28.

## THIRD-PARTY ACTIONS

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

Yes. N.D. Cent. Code § 65-01-09.

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

No. Under the exclusive remedy provisions of the statute, an employee is prohibited from bringing an action against a co-employee for damages for personal injuries. N.D. Cent. Code § 65-01-08(1).

**36. Is subrogation available?**

Yes. In a third party action, the Fund is subrogated to the rights of the employee or the employee's dependents for 50% of the damages recovered, up to a maximum of the total amount that it has paid or would otherwise pay in the future. N.D. Cent. Code § 65-01-09.

## MEDICALS

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

None provided by North Dakota law.

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

A North Dakota employer or the employer's duly authorized representatives, who are required to have access to an injured worker's claim file for performance of their duties, may review and have access to any files of their own injured workers with the North Dakota Workforce Safety & Insurance Organization. N.D. Cent. Code § 65-05-32(2). No written authorization from the employee is required.

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

The employee may choose the doctor to render initial treatment. N.D. Cent. Code § 65-05-28. Upon a determination that the injury is compensable, the Organization may require the employee to begin treating with another doctor, to better direct the medical aspects of the claim. *Id.* No employee may change doctors while under treatment, or after being released, without the Organization's prior written authorization. N.D. Cent. Code § 65-05-28(1). The Organization may at any time require an employee to submit to an independent medical examination by a doctor designated or approved by the Organization. N.D. Cent. Code § 65-05-28(3). Notwithstanding the provisions of § 65-05-28, any employer may select a preferred provider to render medical treatment to employees who sustain compensable injuries. N.D. Cent. Code § 65-05-28.1.

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

As a general rule, the Fund will furnish such reasonable and appropriate medical, surgical, and hospital services and supplies as the nature of the injury may require. N.D. Cent. Code § 65-05-07.

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

The Fund may furnish such artificial members and replacements as in the judgment of the

Organization may be necessary to rehabilitate the employee. N.D. Cent. Code § 65-05-07.

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

If the Organization determines that it is necessary to provide permanent additions, remodeling, or adaptations to real estate to those employees who sustain catastrophic injury, such improvements may be made, but may not exceed \$75,000 for the life of the employee, regardless of any subsequent claim. N.D. Cent. Code § 65-05-07(5)(a). The Organization may pay an amount not to exceed one hundred fifty thousand dollars to provide the most cost-effective, specially equipped motor vehicle or adoptions in the case of a catastrophic injury if the Organization determines it is necessary. N.D. Cent. Code § 65-05-07(5)(b).

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

The statute requires the Organization to adopt fee schedules for medical and hospital services. See N.D. Cent. Code § 65-02-08. The fee schedule promulgated by the Organization in accordance with its authority as set forth in N.D. Cent. Code § 65-02-08 as it relates to air ambulance services is preempted by the Airline Deregulation Act. *Valley Med Flight, Inc. v. Dwelle*, 171 F. Supp.3d 930, 947 (D. N.D. 2016).

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

The Organization shall establish a managed care program to effect the best medical solution for an employee. N.D. Cent. Code § 65-02-20. The managed care administrator assists the Organization in the medical management of claims within the bounds of workers' compensation law. *Id.* There are provisions for dispute resolution with respect to the recommendations of the managed care program. *Id.*

## PRACTICE/PROCEDURE

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

An employer may file a response to an initial claim form within 14 days from the date the response form was mailed to the employer. N.D. Cent. Code § 65-01-16(1). A failure to do so constitutes an admission that the information in the claim form is correct. *Id.* See also answer to 46 below.

**46. What is the method of claim adjudication?**

**A. Administrative level.**

The Organization may conduct an informal review on any matter subject to its jurisdiction. N.D. Cent. Code § 65-01-16(2). The Organization shall issue to the parties a notice of its informal decision. N.D. Cent. Code § 65-01-16(3). Following issuance of the notice of informal decision, any party may request reconsideration within thirty days from the date the notice was mailed. N.D. Cent. Code § 65-01-16(4). The Organization shall thereafter issue its notice of decision reversing the previous decision, or may issue an administrative order. N.D. Cent. Code § 65-01-16(5). Following the issuance of an order, a rehearing may be requested within thirty days. N.D. Cent. Code § 65-01-16(7). A hearing is then held before a hearing officer. N.D. Cent. Code § 65-01-16(8). A post-hearing administrative order may be appealed to district court. N.D. Cent. Code § 65-01-16(10).

**B. Trial court.**

The statute does not provide for trial court proceedings. However, the state district courts function as an appellate court in appeals from decisions of the Organization. N.D. Cent. Code § 65-01-16(10).

**C. Appellate.**

An appeal from the administrative level is originally made to the state district court in accordance with the Administrative Agencies Practice Act, N.D. Cent. Code § 28-32-01 et seq. A party aggrieved by the decision of the district court may take an appeal to the North Dakota Supreme Court. See N.D. Cent. Code § 28-32-49.

**47. What are the requirements for stipulations or settlements?**

If an employee is determined to be permanently and totally disabled, the Organization may pay the employee a lump sum equal to the present value of all future payments of compensation. N.D. Cent. Code § 65-05-25(1). The Organization may not pay the employee a lump sum unless it is first determined that there is clear and convincing evidence that the lump sum payment is in the employee's best interest. *Id.*



The Organization and any employee may compromise to resolve a disputed claim. N.D. Cent. Code § 65-05-25(2). The contract of settlement made is enforceable by the parties. *Id.* If the employee breaches the contract, the Organization may require the employee to repay the benefits received under the agreement. *Id.*

As the employer's insurer, the Organization will resolve claims on the employer's behalf. Therefore, there are no provisions in the statute for an employer's ability to resolve a claim with an employee-claimant. *See id.*

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

N.D. Cent. Code § 65-05-25 appears to allow for final settlements with closed medicals in the discretion of the Organization.

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

All agreements are made between the Organization and the employee. *See* N.D. Cent. Code § 65-05-25.

## **RISK FINANCE FOR WORKERS' COMPENSATION**

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

Each employer subject to the statute must pay into the state fund annually the amount of premiums determined and fixed by the Organization for the employment or occupation of the employer. N.D. Cent. Code § 65-04-04. Premiums are calculated by taking into account the statewide average annual wage, and other factors. *See* N.D. Cent. Code § 65-04-04.2.

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

**A. For individual entities.**

Not permitted.

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

Not permitted.

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 an “employee”?**

Aliens are considered employees for purposes of this Title. N.D. Cent. Code § 65-01-02(16)(a)(2). There is no differentiation in the statute between ‘illegal’ and ‘legal’ aliens although, § 65-01-02(16)(a)(4) provides that minors, whether lawfully or unlawfully employed, are deemed employees and are entitled to benefits. The statute does provide that any person engaged in unlawful enterprise or occupation is not an employee under this Title. N.D. Cent. Code § 65-01-02(16)(b)(2).

Further, federal preemption would seem to bar the State from adopting a law which states that illegal aliens are incapable of entering a lawful employment contract.

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

There is no special treatment of terrorist acts or injuries Title 65 of North Dakota’s statute.

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?**

Under Medicare regulations (42 CFR §411.20, 411.40), Medicare is secondary payer to the payment of workers’ compensation by a workers’ compensation carrier or self-insured employer. The obligation to pay medical expenses for a compensable condition cannot be shifted to Medicare. 42 CFR § 411.32, 411.40, 411.46. Therefore, Medicare has an interest in all lump sum

settlements of a workers' compensation matter if at the time of the settlement the employee meets the following criteria:

- the employee is already a Medicare enrollee and the total settlement amount is greater than \$25,000.; or
  
- there is a reasonable expectation that the employee will be a Medicare enrollee within 30 months of the settlement *and* the settlement amount is greater than \$250,000. See *Frazer v. CNA Ins. Co.*, 374 F.Supp.2d 1067, 1076 (N.D. Ala. 2005).

If the employee meets the criteria for consideration by Medicare, Medicare must be notified in the event of a settlement. *Id.*

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.

There are no special provisions in Title 65 regarding the effect of Medicare trusts and liens on settlements with the Organization. However, the statute provides a retirement presumption and termination of benefits under certain circumstances where the employee begins receiving social security benefits. See N.D. Cent. Code § 65-05-09.3(2).

**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. §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).

There are no special provisions in Title 65 regarding subrogation liens of Medicaid and health insurers. However, the state is generally entitled to subrogation against worker's compensation benefits and health insurance providers are generally entitled to subrogation if the individual

policies provide that right.

**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)?**

The Health Insurance Portability and Accountability Act of 1996, HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462, went effect on April 14, 2003. The law provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. [45 C.F.R. 164.512] Therefore, the current practice of obtaining medical records should proceed according to state law.

Under North Dakota's Title 65, information contained in the claim files and records of injured employees is confidential and not open to public inspection, other than to the Organization employees or agents in the performance of their official duties. N.D. Cent. Code § 65-05-32. Exceptions are provided for: 1) the injured employee or the employee's agents; 2) the employer or their duly authorized representatives needing access for the performance of their duties; 3) physicians or health care providers treating or examining the claimant or providing medical advice to the Organization regarding the claim; and 4) other persons who are providing assistance to the Organization at any stage in the claim proceedings. *Id.* The medical portion of the hearing may be closed upon a claimant's request. *Id.* The claimant's name, date of birth, injury date, employer name, type of injury, whether the claim was denied, accepted or remains pending, and whether the claim is in active pay status will be available to the public. *Id.*

The effect of HIPAA (Health Insurance Portability and Accountability Act of 1996) on the Workforce Safety & Insurance laws is somewhat uncertain. However, the North Dakota Organization has taken the position that it is exempt from the federal HIPAA requirements. The Organization has taken the position that "[a]ll disclosures to workers' compensation are specifically exempted from HIPAA. A covered entity, as a result, shall disclose protected health information in order to comply with workers' compensation requirements." See <http://www.nd.gov/risk/workers-comp/workers-compensation>.

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

If a person qualifies as an independent contractor under the "common law" test, he or she is not an employee under the North Dakota definition. N.D. Cent. Code § 65-01-02(16). In addition, see answer 2.

**58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment Organizations/temporary service companies/leasing companies?**

No, except for certain real estate brokers and real estate salespersons. See answer 2.

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?**

No, with a limited exception for certain individuals delivering newspapers or shopping news. See answer 2.

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.

61. **Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interests when settling the right to medical treatment benefits under a claim?**

Under Medicare regulations (42 CFR §411.20, 411.40), Medicare is secondary payer to the payment of workers' compensation by a workers' compensation carrier or self-insured employer. The obligation to pay medical expenses for a compensable condition cannot be shifted to Medicare. 42 CFR § 411.32, 411.40, 411.46. Therefore, Medicare has an interest in all lump sum settlements of a workers' compensation matter if at the time of the settlement the employee meets the following criteria:

- (1) the employee is already a Medicare enrollee and the total settlement amount is greater than \$25,000; or
- (2) there is a reasonable expectation that the employee will be a Medicare enrollee within 30 months of the settlement and the settlement amount is greater than \$250,000. See *Frazer v. CNA Ins. Co.*, 374 F.Supp.2d 1067, 1076 (N.D. Ala. 2005).

If the employee meets the criteria for consideration by Medicare, Medicare must be notified in

the event of a settlement. *Id.*

Although there are no statutory or regulatory provisions that require parties to submit a Workers' Compensation Medicare Set-Aside Agreement ("WCMSA"), allocating a portion of the settlement towards future medical expenses, parties may choose to submit a WCMSA to the Centers for Medicare and Medicaid services for review and approval so long as the above thresholds are satisfied. DEP'T OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE AND MEDICAID SERVICES, May 11, 2011 Memorandum re: Medicare Secondary Payer-Workers' Compensation, *available at* <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/May-11-2011-Memorandum.pdf>.

There are no special provisions in Title 65 regarding the protection of Medicare's interests during settlement with the Organization. However, the statute provides a retirement presumption and termination of benefits under certain circumstances where the employee begins receiving social security benefits. See N.D. Cent. Code § 65-05-09.3(2).

**62. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?**

In November, 2016 North Dakotans voted to legalize medical marijuana creating N.D.C.C. 19-24. The legislature enacted SB 2344, also known as "The Compassionate Care Act" (CCA) on April 17, 2017 when it was signed into law by Governor Doug Burgum. On April 18, 2017, Chapter 19-24 of the N.D.C.C. was repealed and ch.19-24.1 was enacted.

House Bill (HB) 1156 was signed by Governor Doug Burgum on April 10, 2017 and enacted into statute. N.D. 1603, 65th Sess., at 1603 (N.D. 2017). The amendments to Title 65 prohibit the payment of workers' compensation benefits for medical marijuana. The definition of medical marijuana is the use of all parts of the plant of the genus *cannabis*, the seeds of the plant, the resin extracted from any part of the plant and every compound of the plant. It does not include treatments or preparations approved by the United States Food and Drug Administration as a drug product (edibles). Section 65-01-02(22). The Organization may not pay for medical marijuana and "the Organization may not pay wage loss benefits if the wage loss is related to the use or presence of medical marijuana. N.D.C.C. 65-05-07. (8)(l); N.D.C.C. 65-05-08(12).

There is currently no case law in North Dakota outlining whether injuries which occur by accident and arise out of and in the course of employment while under the influence of (state) legalized medical marijuana are a compensable injury. Additionally, an employer may not need to pay compensatory costs because marijuana is a Schedule 1 controlled substance, and is therefore illegal under federal law. 21 U.S.C.; See answer 9(c).

**63. Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?**

Currently recreational use of marijuana is illegal under North Dakota and Federal law. *See answer 9(c).*

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, listed below:

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