

RHODE ISLAND

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

Workers Compensation Insurance. R.I. Gen. Laws. 27-7.1-1, et. seq.; 28-36-1, et. seq. General Provisions. R.I. Gen. Laws. 28-29-1, et. seq. Report of Injuries. R.I. Gen. Laws. 28-32-1, et. seq. Benefits. R.I. Gen. Laws. 28-33-1, et. seq. Occupational Diseases. R.I. Gen. Laws. 28-34-1, et. seq. Procedure. R.I. Gen. Laws. 28-35-1. et. seq.

SCOPE OF COMPENSABILITY

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

Employee means any person who has entered into the employment of or works under the contract of service or apprenticeship with any employer, except that in the case of a city or town other than the City of Providence, it only means those classes of employees as may be designated by a city, town, or regional school district. Any person employed by the State of Rhode Island, except for sworn employees of the Rhode Island State Police, who are otherwise entitled to the benefits of chapter 45-19 are subject to the state workers' compensation act. It does not include any partner or sole proprietor, independent contractor, or a person whose employment is of a casual nature, and who is employed otherwise than for the purpose of the employer's trade or business, or a person whose services are voluntary or who performs charitable acts, nor the members of the regularly organized fire and police departments of any town or city. Any person who on or after January 1, 1999, was an employee and became a corporate officer remains an employee, unless and until coverage under these chapters is waived. Any person who is appointed a corporate officer between January 1, 1999 and December 31, 2001, and was not previously an employee of the corporation, will not be considered an employee, unless that corporate officer opts back in under the state compensation act by providing the appropriate notice. As of September 1, 2000, corporate officers are considered employees unless they specifically opt out of the workers' compensation system. In addition, the Act applies to all employees, even if the corporation only has one employee. R.I. Gen. Laws. 28-29-2(4).

It does not include a licensed real estate broker, sales person or appraiser, if substantially all of the remuneration for their services performed is directly related to sales or other output rather than the number of hours they have worked. R.I. Gen. Laws. 28-29-7.1. It does not include farmers, nursery workers, arborists, or farm laborers unless the employer employs twenty-five or more laborers and meets other requirements. This particular statutory provision relating to arborists was in effect until January 1, 2009. R.I. Gen. Laws. 28-29-7.2.

Effective January 1, 2009, R.I. Gen. Laws §28-29-7.2 WAS amended to include arborists as employees under the Act.

There is a presumption that a person is an independent contractor where that person files a notice of designation as an independent contractor with the director of the Department of Labor on forms provided by the Department of Labor. Independent contractor status is unabated until revoked by the individual. R.I.Gen. Laws. 28-29-17.1

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

A general employer includes but is not limited to temporary help companies, employee leasing companies, and one, who for consideration and as the regular course of its business, supplies an employee with or without a vehicle to another person. R.I. Gen. Laws §28-29-2 (6) (i). A special employer means a person who contracts for services with a general employer for the use of an employee, a vehicle, or both. R.I. Gen. Laws §28-29-2(6) (ii). Where a general employer supplies to the special employer an employee and the general employer pays or is obligated to pay the wages or salaries of the supplied employee, then, notwithstanding the fact that the direction and control shall be in the special employer and not the general employer, the general employer, if subject to the provisions of the workers' compensation act, shall be deemed to be the employer. R.I. Gen. Laws §28-29-2(6) (iii).

Whenever the general employer enters into a contract or arrangement with a special employer to supply an employee or employees for work, the special employer shall require written documentation evidencing that the general employer carries workers' compensation insurance with no indebtedness for its employees for the term of the contract or arrangement. In the event that the special employer fails to obtain the written documentation from the general employer, the special employer is deemed to be the employer.

Immunity from civil suit pursuant to the Exclusive Remedy Doctrine applies to the general employer and the special employer.

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

A. Traumatic or “single occurrence” claims.

Injuries arising out of and in the course of employment connected with and referable to the employment are compensable. R.I. Gen. Laws § 28-33-1.

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

More than thirty (30) specific diseases are identified as compensable. R.I. Gen. Laws §28-34-2. The statute also identifies as compensable any disability "arising from any cause connected with or arising from the peculiar characteristics of the employment". R.I. Gen. Laws §28-34-2(33). Repetitive trauma could be considered an occupational disease under that definition. Carpal tunnel injuries, for example, have been characterized as an occupational disease arising from peculiar characteristics of the employment. *Vater v. HB Group*, 667 A.2d 283 (R.I. 1995). The employee's burden is to prove a disease arose out of and in the course of the employment. R.I. Gen. Laws 28-34-4. Impartial physicians may be appointed by the court to examine claimants and to provide a written opinion to the court. R.I. Gen. Laws 28-34-5.

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

The following are excluded:

- A. An injury resulting from willful intent or intoxication. R.I. Gen. Laws §28-33-2.
- B. Injuries occasioned by employer sponsored, non-work-related activities. R.I. Gen. Laws §28-33-2.1.
- C. Injuries occurring while going to and from work. *Branco v. Leviton Mfg. Co.*, 518 A.2d 621 (R.I. 1986).
- D. Claims for any period during which the employee was gainfully employed or found capable of gainful employment at an average weekly wage equal to or in excess of the pre-injury average weekly wage he or she was earning at the time of injury. R.I. Gen. Laws 28-33-17.1(a).
- E. Weekly indemnity benefits to an employee imprisoned as a result of a conviction of a criminal offense. Further, an employee is not entitled to compensation when disposition of criminal charges results in a conviction and the employee is given credit for time served in that the time served for which he/she is given credit becomes a period served as a result of the conviction. R.I. Gen. Laws §28-33-17.1(c).

F. Employees that are classified as a seaman under the Jones Act do not qualify for recovery under the workers compensation system. *Benders v. Bd. Of Governors*, 636 A.2d 1313 (R.I. 1994).

6. What psychiatric claims or treatments are compensable?

Disablement from mental injury caused by or accompanied by identifiable physical trauma or from a mental injury caused by emotional stress resulting from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious mental injury is compensable. R.I. Gen. Laws § 28-34-2(36). In addition, the Rhode Island Supreme Court has acknowledged that a flow-from psychological injury is compensable where such psychological injury is solely caused by the work-injury. *Amick v. Nat'l Bottle*, 507 A.2d 1352 (R.I. 1986).

7. What are the applicable statutes of limitation?

The statute of limitation for all workers compensation claims is two (2) years. The toll begins after the occurrence or manifestation of an injury or death. If an injury or disease is latent or undiscovered, the toll does not begin until the claimant knew or should have known of the existence of the injury and the causal relationship to his or her employment, or disablement, whichever is later. In any case in which weekly compensation benefits have been paid in which the employer has failed to file required notices, the right to petition for benefits shall be preserved without limitation. R.I. Gen. Laws §28-35-57. A claimant may petition to amend a claim without limitation if the purpose of the petition is to include another part of the body that was injured at the same time as the original injury. *Ponte v. Malina Co.*, 745 A.2d 127 (R.I. 2000). However, no claim will be acknowledged if filed more than ten (10) years after the date of the final payment made to the employee or the date of entry of the last decree, whichever is longer.

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

No benefits are paid unless a notice of injury is given to the employer within thirty (30) days of the happening or manifestation of the injury. R.I. Gen. Laws §28-33-30. However, this provision is generally not followed in practice.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Willful self-inflicted injuries are not compensable. R.I. Gen. Laws §28-33-2.

B. Willful misconduct, “horseplay”, etc.

Employers may not allege negligence or assumption of the risk as a defense. R.I. Gen. Laws 28-29-3. The Rhode Island Supreme Court has interpreted this to mean that an employee may recover from injuries sustained where the employee was a participant in horseplay, provided the injury arose in the course of employment. *Carvalho v. Decorative Fabrics Co.*, 366 A.2d 157 (R.I. 1976).

C. Injuries involving drugs and/or alcohol.

No compensation is allowed for an injury resulting from intoxication or unlawful use of controlled substances. R.I. Gen. Laws 28-33-2. When a recreational activity is sufficiently employment related to allow recovery and the employer permits the use of alcohol, this defense is unavailable. *Beauchesne v. David London & Co.*, 375 A.2d 920 (R.I. 1977).

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

Any employee collecting benefits has an affirmative duty to report any earnings and could be subject to civil and/or criminal liability as well as forfeiture of benefits for failure to do so. An employer may recover overpayments of benefits, along with costs and attorney's fees. A violation is also considered criminal larceny according to the criminal statutes of the State of Rhode Island. R.I. Gen. Laws §28-33-17.2.

It is unlawful to: (1) knowingly make or cause to be made any false or fraudulent material statement or representation for the purpose of obtaining or denying compensation or regarding the continuation, termination or modification of benefits; (2) knowingly make or cause to be made any false or fraudulent statements with regard to entitlement to benefits with the intent to discourage the employee from pursuing them; (3) willfully misrepresent or fail to disclose any material fact in order to obtain workers' compensation insurance at a lower rate; (4) willfully fail to report or provide false or misleading information regarding ownership changes as required by an approved experienced rating plan or regulations promulgated by the Insurance Commissioner; or (5) knowingly assist, aid and abet, solicit, or conspire with any person who engages in any such unlawful act. Anyone who engages in prohibited conduct is subject to criminal fines up to the greater of fifty thousand dollars (\$50,000.00) or double the value of the fraud, or by imprisonment of up to five (5) years, or both. R.I. Gen. Laws §28-33-17.3(b).

An uninsured employer who disposes of property in any way with the intent to avoid the payment of compensation is guilty of a misdemeanor which is punishable by a fine that is calculated for each day of noncompliance or by imprisonment of up to one year or both. R.I. Gen. Laws §28-36-16. Upon petition by the employee, employer or other interested party, the Workers' Compensation Court may vacate, modify or amend any final Decree entered within a six (6) month period prior to the filing of the petition if the Decree was procured by fraud. R.I. Gen. Laws §28-35-61.

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

Rhode Island law provides that a claim is barred from the date the employee commences employment for two (2) years if the employee willfully provided false information as to his or her ability to perform the essential functions of the job. R.I. Gen. Laws §28-35-57.1. However, this provision has been rendered void by the implementation of the Americans with Disabilities Act.

An occupational disease claim is not payable if an employee willfully and falsely represents in writing that he or she has not previously had an occupational disease which is the cause of disability or death. R.I. Gen. Laws 28-34-7.

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

No compensation is allowed for the injury or death of an employee occasioned by or during voluntary participation in an employer-sponsored social or non-professional athletic activity. R.I. Gen. Laws 28-33-2.1. However, *See, Beauchesne v. David London & Co.*, 375 A.2d 1920 (R.I. 1977) (when a recreational activity is sufficiently employment-related and the employer permits the use of alcohol, the injury is compensable).

13. Are injuries by co-employees compensable?

Yes, if they arise out of and in the course of the employment. R.I. Gen. Laws 28-33-1. An injury received from fighting with another employee, however, is an injury that falls outside the course of employment. *See Gaudet v. Glas-Kraft*, 163 A.2d 213 (R.I. 1960).

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

No. Rhode Island has adopted the “actual risk” theory for determining whether an act may trigger an entitlement to workers’ compensation benefits. The employee bears the burden of showing that the risk of injury was in fact a risk of his or her employment. *Maggiacomo v. R.I. Pub. Transit Auth.*, 508 A.2d 402, 403 (R.I. 1986).

BENEFITS

15. What criteria are used for calculating the average weekly wage?

For full-time or regular employees, divide the gross wages, inclusive of overtime pay, provided that bonuses and overtime shall be averaged over the length of the employment, but not in excess of the preceding fifty two (52) week period, earned by the injured worker at employment by the employer in whose service he or she was injured during the thirteen (13) calendar weeks immediately preceding the week in which he or she was injured by the number of calendar weeks during which, or any portion of which, the worker was actually employed by that employer, including any paid vacation time. When the employment prior to the injury is less than a net period of two (2) calendar weeks, his or her weekly wage is considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury. Where the employee has worked for more than one employer during the thirteen (13) weeks immediately preceding an injury, the average weekly wage is calculated based on wages earned from all those employers in that period. Special expenses are not considered part of the employee's wages.

In seasonal occupations, the average weekly wage is taken to be 1/52nd of the total wages which the employee has earned during the twelve (12) calendar months immediately preceding the injury. Wages of part-time employees are the gross wages earned during the number of weeks so employed or of weeks in which the employee worked, up to a maximum of twenty six (26) calendar weeks immediately preceding the date of injury, divided by the number of weeks employed, or by twenty six (26). "Part-time" means working by custom and practice under a verbal or written employment contract, in force at the time of the injury, where the employee agrees to work or is expected to work on a regular basis less than twenty (20) hours per week. R.I. Gen. Laws §28-33-20.

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

Weekly compensation is equal to seventy five percent (75%) of the employee's average weekly spendable base wage, inclusive of overtime pay, provided that bonuses and overtime shall be averaged over the length of employment but not in excess of the preceding fifty two (52) week period. Compensation for total disability shall not exceed one hundred and ten percent (110%) of the state average weekly wage. R.I. Gen. Laws §28-33-17(a). There is no minimum. The calendar for temporary partial disability is the same. R.I. Gen. Laws §28-33-18(a). In any event, the employee is not entitled to receive more than eighty percent (80%) of his average weekly wage including dependency benefits, except where death benefits are applicable.

Spendable wages are the employee's gross average weekly wages, including any gratuities reported as income, reduced by an amount determined to reflect amounts which would be withheld from such wages under federal and state income tax laws, and under the Federal Insurance Contributions Act (FICA), relating to Social Security and Medicare taxes. R.I. Gen. Laws §28-33-17(a)(3)(i).

In calculating the average weekly wage for employees who have multiple employers, simply add the aggregate of earnings and divide by the number of weeks worked, up to thirteen (13) weeks preceding the injury for full-time employees and twenty six (26) weeks for part-time employees. R.I. Gen. Laws 28-33-20.

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

The employee may file a petition for payment with the court after waiting twenty one (21) days from the date of the injury. R.I. Gen. Laws 28-35-12(a). There is no requirement that the employer accept or reject a claim.

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 for four (4) days before recovering benefits. Compensation, when awarded, commences on the fourth day. R.I. Gen. Laws §28-33-4.

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

In practice, there are two practical ways to suspend benefits. First, benefits may be terminated after the employee and employer have signed a suspension agreement. R.I. Gen. Laws 28-35-7.1.

Second, the employer or insurer can terminate benefits by obtaining an order of the court. The first step in obtaining a court order is to notify the court and employee of the intent to discontinue benefits with an affidavit describing the factual basis for discontinuance and a copy of medical reports to further justify discontinuance. This notice must be filed fifteen (15) days prior to the date of proposed discontinuance. R.I. Gen. Laws 28-35-46.

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

Yes. R.I. Gen. Laws §28-33-18. The only difference between benefits for total incapacity and partial incapacity is that, when an employee receives total incapacity benefits, he/she is also entitled to dependency benefits at a rate of fifteen dollars (\$15.00) per week for each qualified dependent. R.I. Gen. Laws 28-37-10.

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

Disfigurement is compensable at a maximum of ninety dollars (\$90.00) per week and a minimum of forty five dollars (\$45.00) per week and is payable in a lump sum within fourteen (14) days of the entry of the Decree, Order or agreement of the parties, in addition to all other applicable sums. The number of weeks awarded for permanent disfigurement may not exceed five hundred (500) weeks. R.I. Gen. Laws §28-33-19 (a) (3) (i).

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?

For injuries to scheduled members, an employee receives weekly payments equal to one-half of the average weekly earnings of the injured employee, but in no case more than ninety dollars (\$90.00) nor less than forty five (\$45.00) per week. For injuries sustained on or after January 1, 2012 specific compensation is compensable at a maximum rate of one hundred and eighty dollars (\$180.00) per week and a minimum rate of ninety dollars (\$90.00) per week. Scheduled members and corresponding number of weeks of benefits available for each are:

<u>Bodily Loss</u>	<u>Number of Weeks</u>
Loss of arm at or above the elbow	312
Loss of leg at or above the knee	312
Both hands	312
Loss of Sight in one or both eyes	312
One hand and one foot	312
Sight in both eyes	312
One arm	244
One foot	205
Sight in one eye	160
Thumb	35-75
Index finger	25-46
Second finger	16-30
Middle finger	12-25
Fore finger (ring finger)	12-25
Little finger	10-20
Great toe	20-38
Any other toe	10

R.I. Gen. Laws 28-33-19(a) (1) (i)-(xi).

Proportionate benefits as outlined above shall be paid for the period of time that the partial loss by severance bears to the total loss by severance. R.I. Gen. Laws §28-33-19(a) (1).

Total occupational deafness of one ear	75
Total occupational deafness of both ears	244

Total occupational deafness in one ear and total occupational deafness in both ears shall be paid in addition to all other compensation applicable pursuant to the Rhode Island Workers'

Compensation Act at a weekly rate of not more than ninety dollars (\$90.00) per week and not less than forty-five dollars (\$45.00) per week.

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

Weekly payment calculation for permanent body disfigurement may not exceed five hundred (500) weeks.

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

Yes. An employer or injured employee with total disability or permanent partial disability, to whom the insurance carrier has paid compensation for three (3) months or more, may file a petition with the Workers' Compensation Court requesting approval of a rehabilitation program or may mutually agree to a rehabilitation program. R.I. Gen. Laws §28-33-41(b) (1). Thereafter, the Workers' Compensation Court will approve of a program that conforms to the rules of practice of the Rhode Island Workers' Compensation Court. Compensation payments may not be terminated while the employee is participating in a rehabilitation program approved of by the Workers' Compensation Court or agreed to by the parties. However, compensation payments may be suspended where an employee willfully refuses to participate in such plan. R.I. Gen. Laws §28-33-41(c). Upon completion of a vocational rehabilitation plan, the vocational counselor must recommend an earnings capacity.

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

Total disability benefits, whether permanent or temporary, are calculated in the following manner: (1) the employee's earnings for the thirteen (13) weeks prior to the injury are averaged to determine the “gross wages”; (2) a spendable earnings guide is used to determine what percentage of that gross income should be considered “spendable earnings”, considering also the number of exemptions claimed by the employee; and (3) the employee's compensation rate is seventy five percent (75%) of the spendable earnings. Bonus payments are averaged over fifty two (52) weeks or the length of employment, whichever is shorter. Overtime pay is specifically included in the calculation of the average weekly wage. Once the base compensation rate is calculated, a total of fifteen dollars (\$15.00) per dependent is added to the weekly base compensation rate. The aggregate of those amounts, however, may not exceed eighty percent (80%) of the employee's average weekly wage (This limit does not apply when receiving weekly benefits resulting from the death of an employee in connection with the work-related injury). R.I.

Gen. Laws §28-33-17 and R.I. Gen. Laws §28-33-20. There are no minimum rates. The maximum rate cannot exceed one hundred and ten percent (110%) of the state average weekly wage.

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

A. Funeral expense.

The employer pays twenty thousand dollars (\$20,000.00). R.I. Gen. Laws §§28-33-16 and 28-33-23.

B. Dependency claims.

The employer pays the dependents of the employee, from the date of his or her injury, a weekly payment equal to the rate that would have been payable for total incapacity to the deceased employee. If the dependant is a surviving spouse upon whom there are dependent one or more children of the deceased employee, the employer pays the surviving spouse the weekly rate for total incapacity the deceased employee would have been entitled to receive plus forty dollars (\$40.00) per week for each dependent child. Upon remarriage or death of the surviving spouse, or if there is no surviving spouse, then upon the death of the employee, the compensation benefits are paid to the dependent children. Benefits for children terminate at age eighteen (18), or age twenty three (23) if the child is enrolled as a full-time student in an accredited college.

For partial dependents, the employer pays the dependent from the date of the injury weekly compensation equal to the amount of the average weekly contribution by the employee to such partial dependents not exceeding the weekly payments provided for persons wholly dependent. R.I. Gen. Laws §28-33-12.

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

Rhode Island does not provide for second injury fund recovery. See *D. Corso Excavating, Inc. v. Edna Poulin*, 747 A.2d 994 (R.I. 2000).

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

The Workers' Compensation Court has discretion to reopen a claim upon its own motion or by petition within ten (10) years from the time of the agreement or Decree. R.I. Gen. Laws §28-35-45. The employee must first request relief from the employer before filing a petition with the Workers' Compensation Court.

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

Attorney's fees are awarded to employee's counsel who successfully prosecute petitions for compensation, petitions for medical expenses, petitions to amend a preliminary order or memorandum of agreement, and all other employee petitions, except petitions for lump sum commutations, and to employees who successfully defend, in whole or in part, proceedings seeking to reduce or terminate any or all workers' compensation benefits. R.I. Gen. Laws §28-35-32. In petitions involving commutations and other settlements, the court awards no more than a twenty percent (20%) counsel fee which is deducted from the gross settlement amount paid to the employee. R.I. Gen. Laws § 28-33-25.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The right to compensation for an injury is in lieu of all rights and remedies as to that injury now existing, either at common law or otherwise against an employer or its directors, officers, agents or employees. R.I. Gen. Laws §28-29-20.

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

An employee of an employer subject to the workers compensation statute has waived a right to common law recovery for personal injuries unless the employee expressly notifies the employer in writing that he or she reserves those rights at the time of hire. A copy of this letter must also be sent to the Director of Labor within ten (10) days after the employer was given notice. R.I. Gen. Laws 28-29-27. Since an injury to reputation is not an injury within the meaning of the workers' compensation statute, the exclusivity provision does not bar an employee from maintaining a defamation action against an employer or co-workers.

Nassa v. Hook-SupeRx, 790 A.2d 368 (R.I. 2002).

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

No. Even gross negligence of the employer does not restore common law rights to employees. *Nat'l India Rubber Co. v. Kilroe*, 173 A. 86 (R.I. 1934).

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

If the minor is illegally employed in violation of the law of the state or of the United States relating to the employment of minors, the compensation is treble the amount otherwise payable. R.I. Gen. Laws §28-33-22(a). In fixing the amount of any compensation due, allowance is made for any sum which the employer may have paid to any minor or to his or her dependents on account of the injury, except such sums as the employer may have expended or directed to be expended for medical, surgical or hospital service. R.I. Gen. Laws §28-33-22(b). Misrepresentation of age at the time of employment does not prevent recovery of additional compensation. *Deignan v. Cowen Plastic Prods. Corp.*, 206 A.2d 534 (R.I. 1965).

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

Generally, in Rhode Island, there is no fiduciary obligation between the workers' compensation claimant and the insurance carrier. The insurer is within their right to deny any claim. *See, Cianci v. Nationwide Ins. Co.*, 659 A.2d 662, 664-666 (R.I. 1995). However, if any judge determines that any proceedings have been brought, prosecuted, or defended without reasonable grounds, the entire costs are assessed upon whoever is responsible. If counsel is responsible, the appropriate disciplinary authority is notified. If a subsequent order requires that additional compensation be paid, a penalty of double the amount of retroactive benefits ordered must be paid to the employee and such penalty shall not be included in any formula utilized to establish premium rates for the workers' compensation insurance. R.I. Gen. Laws §28-33-17.3.

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

If the employee demands and qualifies for his/her “right to reinstatement”, and the employer refuses to reinstate the employee, the Workers' Compensation Court is authorized to order reinstatement, award back pay, and award the cost of fringe benefits lost during such period. The court may also require the employer to reimburse the carrier for indemnity benefits. R.I. Gen. Laws 28-33-47(d).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. The employee may pursue a claim against a third person where the work-related event or occurrence creates legal liability in such person, other than the employer, while pursuing a workers' compensation claim against its employer. The employee may commence proceedings simultaneously against both the third person and the employer. The employee is entitled to receive both damages and compensation but an employee is prohibited from double recovery because the workers' compensation carrier has a lien with respect to indemnity and medical benefits paid. R.I. Gen. Laws §28-35-58.

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

An employee who receives workers' compensation benefits is not entitled to bring a separate action in tort against co-employees. R.I. Gen. Laws 28-29-20; *Boucher v. McGovern*, 639 A.2d 1369, 1376 (R.I. 1994).

36. Is subrogation available?

Yes. When any employer is insured against liability for compensation and the insurer has paid any compensation for which the employer was liable and has assumed the liability of the employer, the insurer is subrogated to all the rights and duties of the employer and may enforce those rights in its own name. R.I. Gen. Laws §28-36-8. The insurer's lien is applied to the gross amount of the employee's settlement. The employer is then responsible for payment of its pro rata share of the employee's costs and attorney's fees.

The insurer and/or the self-insured employer's rights may be subrogated to all the rights and duties of the injured employee. In any case in which the employee, or in the case of death, the administrator of the employee's estate, neglects to exercise the employee's right of action by failing to file a lawsuit against such third person within two (2) years and eight (8) months after the injury, the self-insured employer or the employer's insurance carrier may proceed and shall be subrogated to the rights of the injured employee, or in the case of death, to the rights of the administrator to recover against such person, upon providing the employee or the administrator, in the case of death, with appropriate notice of the impending action. R.I. Gen. Laws §28-35-58.

MEDICALS

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

Compensation for medical expenses and other services is due and payable within twenty one (21) days from the date a request is made for payment. R.I. Gen. Laws §28-33-8(f) (1). In the event payment is not made within twenty one (21) days from the request, the provider may add interest at twelve percent (12%) per annum. R.I. Gen. Laws §9-21-10. The twenty one (21) day period begins on the date the insurer receives a request with the appropriate documentation required to determine whether the claim is compensable and the payment requested is due. R.I. Gen. Laws §28-33-8(f) (2).

The employer has fourteen (14) days to pay court ordered medical bills. R.I. Gen. Laws 28-35-12(a).

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

Any party to a claim must provide to opposing counsel all medical reports and documentary evidence which it possesses and intends to present at the pretrial conference. R.I. Gen. Laws §28-35-20(b). No charges shall be assessed for producing the record if necessary for the purpose of supporting a claim under the provisions of the workers' compensation act upon request by the employee for medical records. The medical provider shall furnish the records requested within thirty (30) days of the request. Moreover, any party may subpoena the records of an employee provided that the employee first receives twenty one (21) days notice of the subpoena. R.I. Gen. Laws §23-17-19.1(16).

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

A. Claimant's choice of a physician.

The employee initially has the freedom of choice to obtain health care, diagnosis and treatment. The initial provider may, without prior approval, refer the employee to any qualified specialist. If the employer/insurer has a Preferred Provider Network approved by and kept on record with the Medical Advisory Board, any change by the employee from the initial health care provider can only be to a health care provider listed in the network. If the employee seeks to change to a health care provider not listed, the employee must obtain the employer/insurer's approval. Examination or treatment at a facility providing emergency care or by a physician under contract with the employer/insurer does not constitute the employee's initial choice. The employee may treat with

more than one provider. R.I. Gen. Laws §28-33-8(a).

B. Employer's right to a second opinion and/or Independent Medical Examination.

Upon request by the employer, the employee is required to submit him or herself to an examination by a physician or rehabilitation counselor in cases where the employee has received compensation for a period of more than three (3) months, furnished and paid for by the employer. The employee has the right to have a physician that he/she requests present at the examination. The employer must pay the expenses associated with having that physician present. There is no requirement, according to this provision, that the employee needs to be receiving benefits as a condition precedent to the requirement of an examination. R.I. Gen. Laws §28-33-34. The employer may request or petition the court to appoint an Impartial Medical Examiner or a Comprehensive Independent Health Care Review Team to act as medical examiner, at the cost of the employer. R.I. Gen. Laws §28-33-35.

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

The employer must promptly provide such reasonable medical, surgical, dental, optical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus for a period as necessary in order to cure, rehabilitate or relieve the employee from the effects of his or her injury. R.I. Gen. Laws §28-33-5. The employer/insurer is not responsible for payment for major surgery unless the employee obtains written authorization for same from the Workers' Compensation Court, the employer or the insurance carrier, except in instances where it would be detrimental or fatal to the employee to do so.

Palliative care may be available, which includes services by a licensed physician for twelve (12) visits, after reaching maximum medical improvement. Additional palliative care must be authorized by the insurer or self-insured employer. R.I. Gen. Laws §28-33-10(c).

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

The employer provides all medical, optical, dental and surgical appliances and apparatus required to cure, relieve or rehabilitate the employee from the effects of the injury, including, but not limited to the following: ambulance and nursing service, eyeglasses, dentures, braces and supports, artificial limbs, crutches, and other similar appliances. There is no time limit, only a requirement that such care is reasonable and necessary. The employer is not liable to pay for or provide hearing aids or other amplification devices. R.I. Gen. Laws §28-33-5.

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

In *Savaria v. DiSano*, 373 A.2d 820 (R.I. 1977), the Rhode Island Supreme Court denied a paralyzed employee's request that he be provided with an automatic lift or elevator, despite his physician's testimony that an elevator would relieve him from the effects of his injury. The Court explained that to be chargeable to the employer under R.I. Gen. Laws § 28-33-5, benefits must be medical in nature.

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

Any dispute as to the reasonableness of the amount of any medical charge is determined by the Workers' Compensation Court after a hearing. The Director of the Department of Labor and Training has established a schedule of rates of reimbursement for those medical and dental services, excluding non-physician hospital charges, which are most often provided to employees receiving workers' compensation. The liability of the employer/insurer for any such charges and/or payment is limited to the rates of reimbursement set forth in the schedule. Petitions may be filed in cases where the reasonableness of a particular rate is questioned, but the court is limited to a determination as to whether the rate as applied in that particular case is reasonable. The burden is on the petitioner seeking payment of the medical bill to establish by a preponderance of the evidence that the rate is reasonable in light of the peculiar nature of the services performed or other circumstances requiring a greater than normal expertise or expenditure of time or effort in providing the service. R.I. Gen. Laws §§28-33-5, 28-33-7 and 28-33-8.

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

An employer or insurer may petition the Director of the Department of Labor and Training and the Director of Business Regulation for authority to provide health care, diagnosis and treatment through any health plan, health maintenance organization, or managed care provider licensed by the state. The directors have discretion to approve or disapprove such a petition and approval of both directors is required to authorize the managed care program. R.I. Gen. Laws §28-33-8.1.

PRACTICE/PROCEDURE

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

Any person in interest may file with the administrator of the Workers' Compensation Court a petition setting forth the names and residences of the parties, the facts relating to the employment at the time of the injury, the cause, extent and character of the injury, the amount of wages, earnings, or salary received at the time of the injury, and the employer's knowledge or notice of the occurrence of the injury, and such other facts as may be necessary. There is no burden on the respondent/employer to "controvert" a claim. R.I. Gen. Laws §28-35-12.

46. What is the method of claim adjudication?

A. Administrative level.

All matters originate at the Workers' Compensation Court.

B. Trial court.

Before any case proceeds to trial, the judge conducts a mandatory informal pretrial conference within twenty one (21) days of the date of filing of a petition to expedite the case and to reduce the issues in dispute. The judge renders a pretrial order at the close of the conference which sets forth in a simplified manner any agreements reached between the parties and grants or denies, in whole or in part, the relief sought by the petitioner. Any payments ordered including, but not limited to, weekly benefits, medical expenses, costs and attorney's fees, must be paid within fourteen (14) days of the entry of the order. R.I. Gen. Laws §28-35-20.

Any party aggrieved by the entry of a judge's order may claim a trial on any issue that was not resolved by agreement at the pretrial conference by filing with the Administrator of the Workers' Compensation Court, within five (5) days of the date of the entry of the order, a claim for trial. If no timely claim for trial is filed, or is filed and withdrawn, the pretrial order becomes a final decree of the court. All trials are assigned for hearing and decision to the same judge who presided over the pretrial conference. All trials are de novo, except that issues resolved by agreement at the conference may not be reopened. If after full trial an employee's original petition is denied, the insurer may recoup monies paid pursuant to a pretrial order which granted the petition from the State Administrative Fund. The employee is not responsible for reimbursement. R.I. Gen. Laws §28-35-20.

C. Appellate.

Trial decisions may be appealed to the Workers' Compensation Court Appellate Division by filing

with the Administrator of the Court, within five days of the date of the decree, a claim of appeal. Within such time as a judge fixes, the appellant must file the reasons of appeal stating specifically all matters which he or she desires to appeal, together with so much of the transcript of testimony and rulings as he or she deems pertinent. Within ten (10) days thereafter, the parties may file such briefs and memoranda as they may desire. Appellate panels consist of three members of the court. The appellate panel will affirm, reverse or modify the decree appealed from, and by itself take such further proceedings as just, or may remand the matter to the trial judge for further reconsideration. The court may award costs, including reasonable attorney fees, to the prevailing party in the absence of a justiciable issue of either law or fact. R.I. Gen. Laws §28-35-28.

Decrees of the Workers' Compensation Court Appellate Division may, within twenty (20) days from the entry of such final decree, be appealed to the Rhode Island Supreme Court by petition for writ of certiorari. The Supreme Court has discretion to deny the writ without a hearing. R.I. Gen. Laws §28-35-29. The Court may affirm, set aside or modify any decree of the appellate division only upon the following grounds: (1) the Workers' Compensation Court acted without or in excess of its authority; (2) the order, decree or award was procured by fraud; or (3) the appellate division erred on questions of law or equity. R.I. Gen. Laws §28-35-30.

47. What are the requirements for stipulations or settlements?

Where payments have continued for more than six (6) months, the parties may petition the Workers' Compensation Court for an order approving a settlement of the future liability for a lump sum or structured-type periodic payment. The petition will be granted if it is shown that the settlement in lieu of future weekly payments will be in the best interest of all parties, including the employee, the employer and insurer. Any proposed lump sum settlement that exceeds one hundred and four (104) weeks of compensation for partial incapacity may be rejected by the Chief Judge in his or her discretion. No case may be settled to a lump sum payment where the Rhode Island Temporary Disability Insurance Fund and/or the Department of Social and Rehabilitation Services has a claim for payments without making appropriate arrangements for payment out of the proceeds of the settlement. Further, no case for a lump sum can be settled unless it be placed upon the record in open session that the employer has been advised by the insurer of the potential effect of the settlement on its premium and has the opportunity to appear and state its disapproval. R.I. Gen. Laws §28-33-25.

Where liability of the employer has not been finally established, the parties may submit a settlement proposal, referred to as a denial and dismissal settlement, to the Workers' Compensation Court which, if deemed to be in the best interests of the parties, may be approved. In denial and dismissal settlements, liability is formally denied. Payments made in connection with such settlements are not considered workers' compensation payments. Unlike a commutation settlement, the employee may be required to pay his or her own medical expenses in addition to

paying attorney fees out of the gross settlement proceeds. R.I. Gen. Laws §28-33-25.1.

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

Yes. All settlements are final, with medicals closed as of the date the Workers' Compensation Court enters a decree approving the settlement. R.I. Gen. Laws §§28-33-25, 28-33-25.1.

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

All settlements must be approved of by the Workers' Compensation Court. R.I. Gen. Laws §§28-33-25 and 28-33-25.1.

RISK FINANCE FOR WORKERS' COMPENSATION

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

All employers, including those with one employee are required to carry workers' compensation insurance. Assigned risks are assigned to the Beacon Mutual Insurance Company, a state chartered, private mutual insurance company. There is a voluntary market. The Beacon Mutual Insurance Company underwrites voluntary as well as assigned risks. There are many insurance companies currently servicing Rhode Island.

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

A. For individual entities.

The requirements for individual self-insured entities are similar to those for members of "pools" of private entities. R.I. Gen. Laws §28-47-1 et seq. See answer 51B.

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

Any group consisting exclusively of those employers outlined in R.I. Gen. Laws §28-47-1(a) may adopt a plan for group self-insurance. The group must furnish satisfactory proof to the Director of

the Department of Labor and Training of its financial ability to pay compensation. The director will require the filing of a bond to secure its liability to pay. R.I. Gen. Laws §28-47-2 et seq.

Each group self-insurer, except any group self-insurer composed of the state, municipal governments, governmental authorities of the state or municipalities, or quasi-municipal subdivisions of the state or municipalities, must pay premium taxes, as close as practicable, on the same basis as insurers. Each group self-insurer must pay assessments for the Administrative Fund, as provided in R.I. Gen. Laws §28-47-12. No group may operate as a self-insurer without maintaining both specific and aggregate reinsurance and/or excess insurance in a form and from a reinsurer and/or insurer approved by the director. R.I. Gen. Laws §28-47-13.

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”?**

In *Villa v. Eastern Wire Products Co.*, 554 A.2d 644 (R.I. 1989), the Rhode Island Supreme Court held that the trial court erred in denying benefits to the employee based on the court's disapproval of his illegal entry into the country. The Court cited to cases in other jurisdictions in support of its holding that even an alien residing illegally in this country may not be denied workers' compensation if he or she is otherwise entitled to such benefits. Although the workers' compensation act fails to address whether illegal aliens are entitled to compensation benefits, the case law seems to allow for an entitlement to benefits for illegal aliens if individuals would otherwise have a right to collect such benefits.

More importantly, the Court has held that an employee's benefits cannot be terminated for his/her failure to accept employment where an employee cannot legally accept such employment.

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

This issue has not been specifically addressed by the Rhode Island Supreme Court or the Workers' Compensation Court. It is anticipated that if an employee was injured or killed by terrorist acts while performing his or her job duties, the impairing condition would be compensable. R.I. Gen. Laws §28-29-2(8)(i).

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?**

The parties must satisfy the court that the interests of the Center for Medicare and Medicaid Services (CMS) have been considered. The court, in its discretion, must ultimately determine whether the parties have satisfied their obligation in this regard. R. I. Gen Laws §§28-33-25(a) (2) (ii) and 28-33-25.1. The act is silent as to the means for satisfying the court that CMS' interests have been considered. The court recently implemented a rule requiring counsel to explain, in writing, their justification for the amount agreed upon when the parties agree to a voluntary Medicare Set Aside.

In practice, insurance carriers and or employers generally require that a petitioner/employee make Affidavit that Medicare has not paid for services or items furnished to him/her or on his/her behalf, that he/she has not applied for or become qualified to receive such payments from Medicare and that he/she is not a Medicare beneficiary, has never collected or been qualified to receive Medicare or Social Security benefits, whether for disability or age. That affidavit is marked at the settlement hearing and reviewed by the court. The court will generally reference that affidavit when determining whether the parties have satisfied the court that the settlement is in CMS' best interests. In the event that the person is a Medicare beneficiary, the parties seek to establish a Medicare Set Aside prior to settlement if the settlement is in excess of twenty five thousand dollars (\$25,000.00). Similarly, if the settlement is in excess of two hundred and fifty thousand dollars (\$250,000.00), the parties generally seek to have a Medicare Set Aside approved prior to the settlement if the employee reasonably expects to become a Medicare beneficiary within thirty (30) months.

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).

Please see the response to Question 54 regarding Medicaid subrogation liens. The only enforceable liens which are recognized by the workers' compensation act are those issued by the Department of Human Services and the Department of Labor's Temporary Disability Insurance Division and Unemployment Compensation Division. Therefore, private health insurers do not have any authority under which they can assert a valid lien against a workers' compensation

insurer.

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, 45 C.F.R. parts 160-164 and 65 F.R. 82462 provides an exception for workers' compensation claims which allows the collection of medical records by employers and insurers. [45 C.F.R. 164.512(l)]

As a general rule, the state's Confidentiality of Health Care Communications and Information Act ("RICHCIA"), states that a provider cannot release or transfer confidential health care information without the written consent of the patient or the patient's authorized representative. R.I. Gen. Laws §5-37.3-4. However, subsection 4(b) contains twenty three (23) exceptions to the general rule, among which is an exception for workers' compensation litigation when the employee's physical or mental condition has been placed at issue. Under such circumstances, no consent or court order is required prior to disclosure.

Likewise, the Federal Health Insurance Portability and Accountability Act ("HIPAA"), protects an individual's right to privacy. In particular, this relates to their privacy rights against the production of medical records. HIPAA also has exceptions in which no prior consent is necessary for the disclosure of an individual's medical records. There are certain circumstances in which no consent is required for the disclosure of health information including instances of legal compulsion where a party demonstrates during pending litigation that medical records exist which may contain information directly related to the pending matter.

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

An independent contractor is not an employee pursuant to the workers' compensation act. For injuries occurring on or after January 1, 2001, a person is presumed to be an independent contractor upon filing with the director of the Rhode Island Department of Labor and Training a notice of designation form provided by the director indicating that the person is an independent contractor. R. I. Gen. Laws § 28-29-17.1 (a). By filing the notice of designation, an individual declares him/herself an independent contractor pursuant to R.I. Gen. Laws § 28-29-17.1 and acknowledges his/her ineligibility for workers' compensation benefits. The notice of designation remains in effect until the independent contractor files a written notice with the director on forms provided by the director withdrawing his designation as an independent contractor. Any party may petition the court to vacate the notice of designation if the notice of designation was obtained improperly.

The failure to file the notice of designation form with the director does not preclude the court from finding independent contractor status pursuant to R. I. Gen. Laws §28-29-17.1. In determining independent contractor status, the court examines the degree of control the employer has over the individual in the performance of the essential elements of employment. The court looks to the criteria used by the Internal Revenue Service when classifying individuals as an employee or as an independent contractor as indicia of the individual's status.

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

Please see the answer to Question 3.

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.

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

Yes. The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, G.L. 1956 §§ 21-28.6-1 et seq. (the "*Hawkins-Slater Act*" or "*RIMMA*"), permits the medical use of marijuana. In the Workers' Compensation context, there has been no finding that marijuana meets the criteria for compensability under the Workers' Compensation Statute, or in other words, that it is reasonable and necessary treatment to cure, rehabilitate or relieve the employee from the effects of the work-related injury. However, a recent Rhode Island Superior Court case, *Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181 (R.I. Super. May 23, 2017) (hereinafter "*Callaghan*"), sheds some

light on how the RIMMA and the Workers' Compensation Statute might interact. *Callaghan* stands for the proposition that an applicant for employment has a private right of action to sue for discrimination if denied employment based on his or her status as a cardholder or status as a medical marijuana user under the RIMMA. The significance of this decision in terms of restrictions for use and for work activity in the Workers' Compensation context lies in the dicta. *Callaghan* reiterates that under RIMMA an employer has no obligation to tolerate an employee rendered incapable of performing his or her duties in a competent manner while under the influence of medical marijuana where it would constitute "negligence" or "professional malpractice." R.I. Gen. Laws §21-26.6-7(a)(1). An employer need not accommodate the medical use of marijuana in any workplace R.I. Gen. Laws §21-26.6-7(b)(2).

62. 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?

No. Please see answer to No. 62.

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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