

VERMONT

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

Vermont Statutes Title 21, § 601 et seq.

SCOPE OF COMPENSABILITY

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

The statute covers a person who has entered into the employment of or works under a contract of service or apprenticeship with an employer. The following are excluded: casual employees, persons engaged in amateur sports, persons engaged in farm or agricultural employment for an employer with an aggregate payroll of less than \$10,000.00 per year, members of an employer's family dwelling in the employer's house, and persons engaged in any type of service in or about a private dwelling, sole proprietors or partners/owners of an unincorporated business provided they satisfy statutory requirements, under certain circumstances, an individual who performs services as a real estate broker or real estate salesperson, if approved by the commissioner certain members of a corporation or LLC, independent contractors, assistant judges and illegally hired minors. Persons falling under these exclusions may be covered at the employer's option. 21 V.S.A. § 601(12), 601(14); *Falconer v. Cameron*, 151 Vt. 530 (1989); *Wolck v. Fort Drummer Mills*, 98 Vt. 449 (1925).

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

The statutory definition of employer includes the owner or lessee of premises or the operator of a business conducted on the premises who is not the direct employer of the employees employed there. 21 V.S.A. § 601(3). Vermont courts have determined that, for purposes of workers' compensation, an employer includes anyone who is capable of supervising an employee and replacing him if the work performance is unsatisfactory, notwithstanding the absence of a monetary compensation exchange. *Candido v. Polymers, Inc.*, 166 Vt. 15 (1996). In order to find a person an employer under this provision, the work being carried out by an independent contractor on the owner's or proprietor's premises must be of the type that could have been carried out by employees of the owner or proprietor in the course of his or her usual trade or business. *King v. Snide*, 144 Vt. 395 (1984).

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

The statute covers accidental personal injury arising out of and in the course of one's employment,

including injury caused by the willful act of a third person. Personal injury includes: death resulting from an injury within two years, injury to and cost of acquiring and replacement of prosthetic devices, hearing aids and eye glasses. 21 V.S.A. § 601(7), 601(11)(A), 618.

To have a compensable injury, an employee must prove that: (1) the accident arose out of the employment; and (2) occurred in the course of the employment. *Miller v. International Business Machines Corp.*, 161 Vt. 213 (1993). A personal injury occurs during the course of employment when it is within the period of time when the employee is on duty and in a location where he is expected to fulfill the obligations of his employment position. *Id.* As for the second element, "Arising out of" the Vermont Supreme Court has adopted a "but for" rationale. *Shaw v. Dutton Berry Farm*, 160 Vt. 594 (1993). Under this theory, also known as the "positional risk" doctrine, an injury arises out of the employment if the injury would not have occurred, but for the employment. *Id.*

A. Traumatic or "single occurrence" claims.

A personal injury by accident, arising out of and in the course of the employment, is compensable.

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

"Occupational disease" means a disease that results from causes and conditions characteristic of and peculiar to a particular trade, occupation, process or employment, and to which an employee is not ordinarily subjected or exposed outside or away from the employment and arises out of and in the course of the employment. 21 V.S.A. §601(23)

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

Injuries caused: (1) by an employee's willful intention to injure himself or herself or another; (2) by or during intoxication; or (3) by an employee's failure to use a safety appliance for his or her use, are not compensable. 21 V.S.A. § 649. However, it should be noted that these defenses inject an analysis of fault into a no fault system. Because of that fact these are affirmative defenses and the burden of proof with regards to these defenses remains with the employer and the evidence supporting these defenses is scrutinized carefully by the Department of Labor.

4. What psychiatric claims or treatments are compensable?

“Mental-mental” claims are claims for workers’ compensation benefits for a mental condition that arose from a mental stimulus. Previously, the injured worker was required to prove a causal connection between the stress and the injury, that the stresses encountered while working for the employer were significant and objectively real, that the job placed greater emotional strain and tension on him/her than other employees, and the stress could not be the result of bona fide personnel issues. However, an amendment to 21 V.S.A. §601(11)(J)(i), effective on July 1, 2017, provides that a mental condition resulting from a work-related event or stress shall be a compensable claim if it is demonstrated by the preponderance of the evidence that: “(i) the work-related event or work-related stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee across *all* occupations; and (ii) the work-related event or work-related stress, and not some other event or source of stress, was the predominant cause of the mental condition.” The section also provides that a mental condition is not compensable if it results from disciplinary action, work evaluation, job transfer, layoff, demotion, termination or similar action taken in good faith by the employer. The employee still has the burden of proof to demonstrate that he/she can meet the standard by a preponderance of the evidence. Despite predictions of an expansion in the number of mental-mental claims as a result of this shift, we have seen no evidence of one so far. The Department of Labor has thus far provided no guidance as to what standard will be used when determining what constitutes the “pressures and tensions experienced by the average employee across all occupations.”

At the same time, 21 V.S.A. §601(11) was amended to state that “in the case of police officers, rescue or ambulance workers, or firefighters, post-traumatic stress disorder that is diagnosed by a mental health professional shall be presumed to have been incurred during service in the line of duty and shall be compensable, unless it is shown by a preponderance of the evidence that the post-traumatic stress disorder was caused by nonservice-connected risk factors or nonservice-connected exposure.” The amendment further states that a police officer, rescue or ambulance worker or firefighter who is diagnosed with post-traumatic stress disorder within three years of his/her last date of employment as a police officer, rescue or ambulance worker, or firefighter shall be eligible for workers’ compensation benefits under this section. The amendment creates a presumption that any emergency worker diagnosed with post-traumatic stress disorder has a compensable workers’ compensation claim for benefits. In order to deny the compensability of the claim, the carrier/employer will have to show by a preponderance of the evidence that the post-traumatic stress disorder was caused by something unrelated to the emergency service work.

5. What are the applicable statutes of limitations?

A claim for compensation must be made within 3 years after the injury or death. Any proceedings under the statute are contract claims, which must be commenced within six years of the injury. "Date of injury" for purposes of these provisions, means the point in time when the injury becomes reasonably discoverable and apparent. The limitations do not apply to any person who is mentally

incompetent or a minor dependent so long as such person has no guardian. 21 V.S.A. § 656, 661; *Hartman v. Ovellette Plumbing & Heating Corp.*, 146 Vt. 443 (1985); *Hoisington v. Ingersoll Electric*, Op. No. 52-09WC (Dec. 28, 2009).

In occupational disease claims, the Vermont legislature repealed § 1006(a) and enacted 21 V.S.A. § 660(b), which provides that a workers' compensation claim for an occupational disease must be made within two years from the date on which the disease is reasonably discoverable and apparent. *Murray v. Luzenac Corp.*, 2003 VT 37.

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

Notice must be given to the employer as soon as practicable after the injury and a claim for compensation must be made within six months of the injury. Notice must be in writing and provide the time, place, nature and cause of the injury, and must be signed by the employee. However, notice will not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury unless the employer was in fact misled as a result of such inaccuracy. 21 V.S.A. § 656, 658. Want of or delay in giving notice, or in making a claim, shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer, the employer's agent or representative, had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice. 21 V.S.A. § 660.

7. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Willfully self-inflicted injuries are not compensable. This defense, however, is an affirmative one. 21 V.S.A. § 649.

B. Willful misconduct, "horseplay," etc.

Employees injured as a result of "horseplay" by fellow employees are covered if the commission of such an act was within the reasonable contemplation of the employer and the probability of its commission created an additional hazard incidental to the employment. *Myott v. Vermont Plywood, Inc.* 110 Vt. 131 (1938). Whether horseplay participant is entitled to recover workers' compensation benefits usually hinges on whether participant's injury occurred in course of employment, which, in turn, depends on extent of participant's deviation from work duties. *Clodgo*

v. Rentavision, Inc., 166 Vt. 548 (1997). Also, compensation is not allowed for injuries caused by an employee's failure to use a safety appliance provided for his or her use. 21 V.S.A. § 649.

C. Injuries involving drugs and/or alcohol.

Injuries caused by or during an employee's intoxication are excluded. The burden of proof is on the employer/insurer in all of these defenses. 21 V.S.A. § 649. The Vermont Supreme Court held in 2010 that for the employer to successfully raise the employee's intoxication as a defense to a claim, the employer must show that the intoxication played a role in causing the injury, either actively – "caused by" or passively – "caused during." *Cyr v., McDermott's Inc.*, 187 Vt. 392 (2010).

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

The statute provides that a person who willfully makes a false statement or representation for the purpose of obtaining any benefit or payment under the workers' compensation statute on anyone's behalf will be fined up to \$20,000.00 and forfeit all or a portion of any right to compensation as determined by the commissioner after the commissioner has determined the person willfully made a false statement or misrepresentation. An employer who willfully makes a false statement or report for the purpose of obtaining a lower workers' compensation premium may be assessed an administrative penalty up to \$20,000 in addition to any other appropriate penalty. 21 V.S.A. § 708; 8 V.S.A. §3661(c). Either an employee or employer may be prosecuted for workers' compensation fraud under 13 V.S.A. § 2024.

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

Any person making such a falsification for the purpose of obtaining benefit or payment will be fined up to \$20,000 and forfeits all or a portion of any right to compensation after a determination by the commissioner. 21 V.S.A. § 708.

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

If an injury occurred while engaged off the premises of the employer in a recreational activity that is available to the employee as part of the employee's compensation package or as an inducement to attract employees, it shall not be considered to have occurred in the course of employment unless (A) the employer derived substantial benefit from the activity, beyond that of attracting

labor or improving employee health and morale; (B) the activity was reasonably part of the employee's regular duties or undertaken to meet the expectations of the employer; or (C) the activity was undertaken at the request of the employer. 21 V.S.A. § 618. An injury arising from an on-premises recreational activity shall be presumed to be compensable if it occurred during a lunch or recreation period as a regular incident of employment. *Grather v. The Gables Inn*, 170 VT 377 (2000).

13. Are injuries by co-employees compensable?

Yes, so long as the injuries arise in the course of the employment. *Shaw v. Dutton Berry Farm*, 160 Vt. 594 (1993).

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

It depends on the facts and circumstances of the case. The Vermont Supreme Court has held that an injury, caused by the unprovoked stabbing by another employee in the employer-provided bunkhouse after work, arose from the employment as a matter of law. The Court overruled a case in which an employee was denied benefits for injuries received in a fight in an employer-provided bunkhouse because, at the time of the fight, he was not engaged in any activity benefiting the employer. *Shaw v. Dutton Berry Farm*, 160 Vt. 594 (1993).

BENEFITS

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

The average weekly wage must be computed in such a manner as is best calculated to give the average weekly earnings of the employee during the 26 weeks preceding the injury. 21 V.S.A. § 650(a). Weeks in which the injured employee worked less than half time are not included in the calculation. Bonuses, overtime, tips and second jobs are included in the calculation of the average weekly wage.

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

Benefits are paid at two-thirds of the employee's average weekly wage during the 26 weeks preceding the injury. "Two-thirds" is determined by multiplying the average weekly wage by 0.667. For purposes of the statute, the Department of Labor establishes, on a yearly basis, the maximum and minimum weekly wages, which are presently set at \$1,281.00 and \$427.00 respectively. For purposes of determining temporary total or temporary partial disability compensation, the maximum and minimum compensation rates apply. Vt. Stat. Ann. tit. 21, § 650(a).

Effective July 1, 2013 if a claimant consents in writing, the carrier *may* pay the employee's weekly temporary benefits by means of direct deposit or with an electronic prepaid benefit card account. 21 V.S.A. § 618(f)(1). These prepaid benefit card accounts shall not be used to pay permanent impairment benefits or lump sum benefits. 21 V.S.A. § 618(f)(1). The issuer of the card shall comply with consumer protection laws that apply to payroll account cards. 21 V.S.A. § 618(f)(1).

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

The employer/insurer must begin paying such benefits after three days of the disability. 21 V.S.A. § 642.

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

An employee must be out of work for three days to begin receiving benefits, the first three days are not compensated by the employer. 21 V.S.A. § 642. Once the employee has been out of work for ten consecutive days, the first three days are compensable. 21 V.S.A. §642.

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

Unless an employee has returned to work, the employer must file a notice of intention to discontinue benefits indicating the date of and reasons for the proposed discontinuance. The discontinuance must also document that the claimant was referred for a vocational screening if the claimant was absent from work due to the work injury for 90 days and attach all the evidence that is relevant to the file. The Commissioner will review the notice to determine the sufficiency of the basis for the discontinuance. If the Commissioner finds that the discontinuance is supported by a preponderance of the evidence, the Commissioner may order that payments continue until a hearing is held and a decision is rendered. The employer/insurer may also terminate benefits

when the employee has reached a "medical end result." 21 V.S.A. § 643a. In the case of termination on the basis of the claimant's failure or refusal to return to work, the notice must be accompanied by written documentation establishing the following: (A) that the claimant has been medically released to return to work, either with or without restrictions; AND (B) that the claimant has been notified both of the fact of his or her release and his or her obligation to conduct a good faith search for suitable work in writing; AND (C) that the claimant has either failed to conduct a good faith search for suitable work and/or has refused an offer of suitable available work once notified.

Payments must continue for seven days after notice is received by the commissioner and the employee. 21 V.S.A. § 643a.

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

No. Permanency benefits are not awarded until all the temporary benefits have ended, i.e., the employee has reached a medical end result and is back to work. *Orvis v. Hutchins*, 123 Vt. 18 (1962).

The payments are made during the seven days subsequent to the filing of notice of discontinuance are made without prejudice and may be deducted from any amount due for permanent partial disability benefits should the discontinuance be approved by the commissioner. 21 V.S.A. § 643a.

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

Only if allowed by the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.

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

The employee receives benefits based upon two-thirds (0.667) of the average weekly wage and receives a number of weeks of benefits based upon the percentage of permanent impairment. The minimum and maximum average weekly wages are presently set at \$427.00 and \$1,281.00. The benefits paid are based on the employee's compensation rate on the date of injury exclusive of dependents. COLA increases only apply if permanency benefits go through July 1. 21 V.S.A. § 650.

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

There is no longer a schedule of members/parts standard for recovery. The standard is now based on the percentage of whole body impairment according to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. 21 V.S.A. §648(b). The percentage impairment for mental and behavioral disorders is calculated according to the AMA Guides to the Evaluation of Permanent Impairment, 6th Edition. 21 V.S.A. §648(b); Rule 10.1310.

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

Whole person impairment is based upon percentage of impairment. For injuries occurring after April 5, 1995, impairment ratings will be calculated on a whole person basis with the applicable weekly benefit determined as a percentage of loss of the whole person multiplied by 550 weeks for a spine injury and 405 weeks for an injury to any other body part.

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

An employee is entitled to vocational rehabilitation when, as a result of a work-related injury, the employee is unable to perform work for which he or she had previous training or experience. 21 V.S.A. § 641

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

In order to qualify for permanent total disability, the injury must result in: (1) the loss of actual earnings or earning capacity; and (2) the employee having no reasonable prospect of finding regular, gainful employment. 21 V.S.A. §644. In order to determine permanent total disability, the commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education and mental capacity. *Id.* The employee receives a minimum of 330 weeks of benefits, and payments continue thereafter during such disability. 21 V.S.A. §645. Benefits are paid at two-thirds of the employee's average weekly wage, subject to the maximum and minimum weekly compensation rates. *Id.*

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

A. Funeral expenses.

Burial expenses of up to \$10,000.00 and expenses for out-of-state transportation of the decedent to the place of burial up to \$5,000.00 are allowed. 21 V.S.A. § 632.

B. Dependency claims.

A spouse receives at minimum a sum equal to two thirds of the deceased employee's weekly wage until remarriage or until age 62 if the spouse is eligible for social security. 21 V.S.A. §635. In no event shall the spouse receive an amount less than 330 weeks at the maximum compensation rate unless the spouse dies. A spouse with one child receives 71^{2/3}%. A spouse with two dependent children receives 76^{2/3}%. If there is no spouse, but there is one dependent child, the child receives 76^{2/3}%. If there is a child or children and no spouse then the amount payable to the spouse is divided equally among the children. If there is no spouse or children, then 30% is awarded to a dependent parent, or 20% to a partially dependent parent, or if no parent then the same percentages are awarded to a dependent grandparent. If there is none of the above, but there is a dependent grandchild, brother or sister then 15% is awarded for the first dependent and 5% for each additional grandchild, brother or sister up to 25% to be divided equally among the dependents. 21 V.S.A. § 632.

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

The "Second Injury Fund" was repealed.

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

A claim may be re-opened by application of a party or the Commissioner by his or her own motion where there has been a change in condition if brought within six years of the award. The moving party must give the other parties or their attorneys six days' notice of the re-opening. 21 V.S.A. § 668.

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

An attorney fee may be awarded by the court if the employee prevails in an appeal to the Superior or Supreme Court. The Commissioner also may allow an attorney fee when the employee prevails at the Workers' Compensation Board. Vt. Stat. Ann. tit. 21, § 678; *Hodgeman v. Jard Co.*, 157 Vt. 461 (1991); *Coleman v. United Parcel Service*, 155 Vt. 646 (1990). Absent a formal workers' compensation hearing, the Commissioner may award fees to a claimant if: (1) the employer or insurance carrier is responsible for undue delay in adjusting the claim, or (2) the claim was denied without reasonable basis, or (3) the employer or insurance carrier engaged in misconduct or neglect AND the legal representation to resolve the issues was necessary, the representation provided was reasonable, and neither the claimant nor the claimant's attorney has been responsible for any unreasonable delay in resolving the issues.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Compensation benefits are the employee's exclusive remedy. 21 V.S.A. § 622.

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

Nothing short of a specific intent to injure falls outside the scope of the Act. The wanton and willful acts of an employer will not take the injury outside the scope of the statute. *Kittell v. Vermont Weatherboard, Inc.*, 138 Vt. 439 (1980). The standard pronounced in *Kittell* was reaffirmed as the applicable test in the recent decision of *Mead v. Western Slate, Inc.*, 2004 VT 11. An illegally employed minor does have the right to a common law remedy for injuries sustained. Express indemnification agreements may also provide an exception. Vermont courts have not considered whether an employer possessing an independent "persona" is subject to a tort suit.

The injured employee or the employee's personal representative shall be prohibited from commencing a civil action to enforce liability against the workers' compensation insurance carrier for conducting workplace inspections, or an employer-employee safety committee except in the case of gross negligence or willful misconduct. 21 V.S.A. §624(h).

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

Vermont occupational safety and health law imposes penalties for unsafe working conditions. 21 V.S.A. § 210.

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

Where a minor is illegally employed under Vermont child labor law, the employer may be subject to a civil action. However, in *Bruley v. Fonda Group, Inc.*, 157 Vt. 1 (1991), the Vermont Supreme Court barred a minor's civil action and held that the minor's remedy was workers' compensation despite the fact that he operated a lawn tractor which violated federal, but not state, law.

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

Willful neglect of claims procedure can result in a requirement that the employer take out insurance independently. Depending on the circumstances, the Commissioner may order an insurer to pay benefits based on faulty claims handling or bad faith. 21 V.S.A. § 689.

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

The employer may be enjoined from terminating the employee on the basis of his/her filing of a workers' compensation claim and may face civil penalties in accordance with the Vermont Consumer Fraud Act. 21 V.S.A. § 710. An employer is not required to employ a person who does not meet the qualifications of the position. *Id.* However, if the employee recovers within two years of the date of disability onset, the worker shall be offered the next available position if certain conditions are met.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. An employee may file a claim against a third party where the injury was caused under circumstances creating a legal liability in some party other than the employer. 21 V.S.A. § 624.

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

Yes, a co-employee is considered a third party for purposes of 21 V.S.A. § 624, and therefore can be sued. *See Libercent v. Aldrich*, 149 Vt. 76 (1987). In determining whether an individual is a co-employee, and therefore subject to suit, or an employer, and therefore immune from suit, the Vermont Supreme Court held that the critical factor is whether the injury occurred in the performance of a non-delegable duty of the employer, as opposed to arising out of an obligation owed to the injured employee. *Gerrish v. Savard*, 169 Vt. 468 (Vt. 1999).

36. Is subrogation available?

Yes. The employer/insurer must be reimbursed monies paid from any third party recovery. 21 V.S.A. § 624(e). Procedurally, the injured employee has the right to bring the claim for the first year. Thereafter, the employer/insurer may bring the claim in the name of the injured employee. 21 V.S.A. § 624(a).

MEDICALS

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

The time limit to pay medical bills or deny them is 30 days and the Commissioner may suspend the license of an employer/insurer for refusing or neglecting to promptly pay medical bills. 21 V.S.A. § 688. The Commissioner can also compel an employer who neglects or refuses to pay medical bills promptly to obtain compensation insurance.

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

The filing of a claim constitutes a waiver of privilege between the parties. Therefore, upon request of the employer, the employee is obligated to execute a medical authorization, authorizing the release of all relevant medical records to the employer. If an employee fails or refuses to provide a medical authorization upon request, benefits may be suspended or the claim may be dismissed without prejudice. Rule 3.2130.

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.

After the employer initially designates the treating health care provider, the employee may select another provider after giving the employer written notice of the reasons for the employee's dissatisfaction with the provider, as well as the name and address of his or her choice of provider. 21 V.S.A. § 640(b).

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

An employer may designate the treating health care provider to initially treat an injured employee immediately following a compensable injury. 21 V.S.A. § 640(b). If the employee selects another provider, the employer shall have the right to require other medical examinations.

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

Reasonable hospital, surgical, medical and nursing services and supplies are covered. 21 V.S.A. § 640(a). Chiropractic treatment and physical therapy are generally covered if shown to be reasonable and necessary. Palliative care may also be covered.

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

Such issues are dealt with on a case-by-case basis, but generally, prosthetic devices are covered.

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

Yes.

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

Yes. Medical services may not exceed the maximum fee for a particular service as provided by the Commissioner's schedule of fees and rates unless the employee demonstrates a need for

reimbursement at a rate higher than the scheduled rate and the necessary treatment is not available at the scheduled rate. 21 V.S.A. § 640(d); Rule 40.

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

The Act does not have specific provisions addressing managed health care, and does not address specific medical issues other than the requirement that any medical care sought be reasonable, necessary and causally linked to the work injury. 21 V.S.A. § 640.

PRACTICE/PROCEDURE

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

If an agreement cannot be reached concerning compensation benefits, the employer/insurer must notify the Commissioner and the employee, in writing, within 21 days of notice to the employer of the injury, of the denial of the claim and the reasons for the denial. 21 V.S.A. § 662(b). Either party may apply to the Commissioner for a hearing concerning disputed issues. 21 V.S.A. § 663.

46. What is the method of claim adjudication?

A. Administrative level.

After at least one information conference, an aggrieved party may ask for a hearing before an administrative law judge at the Department of Labor and evidence is taken. The parties have an opportunity to examine witnesses and to submit memoranda on the legal and factual issues. Rule 17.0000.

B. Trial court.

A *de novo* trial takes place at the trial court level after an appeal has been made. Either party is entitled to a trial by jury. 21 V.S.A. § 670, 671.

Appellate.

Legal questions may be appealed to the Vermont Supreme Court. 21 V.S.A. § 672.

47. What are the requirements for stipulations or settlements?

Settlement agreements are filed with the Commissioner for his or her approval, which will only be given when the agreement conforms with the Act or, in the case of a compromise, the agreement is considered by the Commissioner to be in the employee's best interests. Once executed by the parties and approved by the Commissioner, settlement agreements shall become binding agreements and absent evidence of fraud or material mistake of fact, the parties shall be deemed to have waived their right to contest the material portions thereof.

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

Yes, but only under limited circumstances.

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

Yes. 21 V.S.A. § 662(a).

RISK FINANCE FOR WORKERS' COMPENSATION

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

Primary and direct coverage is required in full. 21 V.S.A. § 693. This may be done by means of a private insurer, guarantee insurance, self-insurance or non-profit self-insurance corporation.

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

A. For individual entities.

Self-insurance is available. Requirements for self-insurance are established pursuant to certain tests which take into account an employer's cash flow, working capital, liquidity, net worth to debt ratio, and profitability. Rule 26.0000.

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

Employers, with the approval of the Commissioner, may form corporations without capital stock for the purpose of establishing and maintaining Mutual Workers' Compensation Insurance Associations. 8 V.S.A. § 4361 *et seq.*

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

There are no cases addressing this issue in Vermont. As for the statutory construction, since the definition of "employee" under the Act is so broad (i.e. a person who has entered into the employment of or works under a contract of service or apprenticeship with an employer) and because there is no statutory exclusion for illegal aliens, it seems as though they would be entitled to workers' compensation benefits.

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

Neither the workers' compensation statute, nor Vermont case law have addressed this issue. However, coverage will most likely be analyzed on a case-by-case basis to determine if the injuries arose in the course of the employment.

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 411.46), 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. 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, in which case there is not a threshold settlement amount; 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.

If the employee meets the criteria for consideration by Medicare, Medicare must be notified in the event of a settlement. Upon review of the file, Medicare may conclude that the settlement does not meet its criteria, or it may require a Medicare set aside trust for large settlements, or it may require merely a custodial self-administered trust account. (Reference 42 CFR 404, 411; 42 USC § 1395)

Claims for reimbursement of the costs of medical services rendered shall be approved by the commissioner. If so approved, they may be enforced against compensation awards in such manner as the commissioner may direct. 21 V.S.A. § 682.

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).

Claims for reimbursement of the costs of medical services rendered shall be approved by the commissioner. If so approved, they may be enforced against compensation awards in such manner as the commissioner may direct. 21 V.S.A. § 682. With regard to Medicaid, the pertinent statute provides as follows: "To the extent that payment for covered expenses has been made under the state Medicaid program or through any state agency administering health benefits or a health benefit plan for which Medicaid is a source of funding for health care items or services furnished to an individual, in any case where a third party has a legal liability to make payments, the state is considered to have acquired the rights of the individual to payment by any other party for those health care items or services." 33 V.S.A. § 1907, 1910.

Insurers shall take reasonable steps to discover whether the Department of Vermont Health Access has paid medical bills associated with workers' compensation claims. 33 V.S.A. §1910 (b)(2). The legislation provides that the State of Vermont Human Service Agency has a lien against the insurer for monies paid for medical expenses on behalf of a person who has an injury, illness or disease and the person initiates a claim against an insurer for that injury, illness or disease. Additionally the legislation provides that "Payment to the recipient instead of the agency does not discharge the insurer from payment of the agency's claim." 33 V.S.A. §1910 (b)(2).

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

At the present time, HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462, went into 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(l)] Therefore, your current practice of obtaining medical records could proceed under state law.

Vermont does not have any specific confidentiality/privacy requirements specific to workers' compensation information. However, workers' compensation Rule 3.2100 provides as follows: "the filing of a claim for workers' compensation shall be a waiver of all claims to privilege as between the parties regarding relevant medical records and reports. Therefore, upon request by the employer in the course of its investigation, the claimant shall execute a Workers' Compensation Medical Authorization (Form 7) for the release of all relevant medical records." Employers must comply with any applicable state regarding the confidentiality and/or privacy of one medical information, i.e. (12 V.S.A. § 1612). In addition, the medical confidentiality requirements of the Americans with Disabilities Act are also essentially applicable to an employee who sustains a workers' compensation injury. Similarly, employers must adhere to the privacy requirements of HIPAA if they submit first reports of injury electronically to either the workers' compensation carrier or the Vermont Department of Labor.

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

The Vermont Statutes do not specifically define "independent contractors;" however, the case law imposes liability on business owners who utilize the services of independent contractors "to carry out some phase of their business." *Frazier v. Preferred Operators Inc.*, 2004 VT 95 (2004). To determine whether an independent contractor is also deemed an employee for the purpose of workers' compensation benefits the Court evaluates "whether the type of work being carried out by the independent contractor is the type of work that could have been carried out by the owner's employees as part of the regular course of business." *Edson v. State*, 2003 VT 32, ¶ 6 (2003).

The Vermont Supreme Court has addressed whether an Independent Contractor is subject to negligence actions when an employee of a hiring company is injured or whether the workers' compensation statute protects the independent contractor by limiting the employee's redress. Specifically the Court was presented with the issue of whether a company contracted to perform cleaning services for an electrical company was the co-employer of an employee of the electric company for the purpose of workers' compensation benefits. *Smedburg v. Detlef's Custodial Services, Inc.*, 2007 VT 99, at ¶ 25 (2007). In that case, the employee of the electric company slipped and fell and sued the cleaning company for negligence. *Id.* at ¶ 3. The Court found that the cleaning company was an independent contractor and not protected by the workers' compensation laws, which would have limited Claimant's redress to that set forth in 21 V.S.A. §601 *et. seq.* Ultimately, the Court denied a motion to dismiss as a matter of law and permitted an action of negligence against the cleaning company.

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

No.

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. Vermont permits the use of medical marijuana, which is covered by Chapter 86 of Title 18 of the Vermont Statutes. However, 18 V.S.A. §4474c(b)(4) specifically states that the chapter shall not be construed to require that an employer [as defined in 21 V.S.A. §601(3)] provide coverage or reimbursement for the use of marijuana for symptom relief be provide by, for purposes of workers' compensation, an employer as defined in 21 V.S.A. §601(3). A person who uses medical marijuana is not exempt from arrest or prosecution for being under the influence of marijuana in a workplace or place of employment or smoking marijuana in any public place, including, but not limited, a workplace. 18 V.S.A. §4474c(a)(1), (3).

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?

Yes, as of January 22, 2018 marijuana has been legalized to a limited degree. The law has decriminalized personal possession of no more than 1 ounce of Marijuana or 5 grams or less of hashish and two mature marijuana and four immature plants on private property [for individuals 21 or older]. This limit also applies per dwelling unit. Anything above these amounts is still a controlled substance and carries penalties of increasing severity based on the amount found in the possession of the individual. Additional restrictions of use include: no use in public places or while driving. Nothing in either the 2018 act or the current draft of the tax-and-regulate bill under consideration by the Legislature requires an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the work place. Employers have the right to include prohibition of marijuana use in their policies and cannot be sued for discharging an employee who violates these policies.

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 firm for your state, listed above.