

NEW HAMPSHIRE

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

New Hampshire Revised Statutes Annotated 281-A. Predecessor statute in effect until July 1, 1989, is New Hampshire Revised Statutes Annotated 281.

SCOPE OF COMPENSABILITY

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

"Employee," with respect to private employment, means any person in the service of an employer subject to the provisions of this chapter under any express or implied, oral or written, contract of hire, except a railroad employee engaged in interstate commerce whose rights are governed by the Federal Employers' Liability Act. If they elect to be personally covered by this chapter, 'employee' includes persons who regularly operate businesses or practice their trades, professions, or occupations, whether individually, in partnership, or association with other persons, whether or not they hire others as employees. Sole proprietors do not need to purchase coverage for themselves although they must for their employees. See RSA 281-A:2,VI(a). A corporation or limited liability company may elect to exclude up to three executive officers or members from the compulsive coverage requirements of the statute. RSA 281-A:18-a. Only direct sellers, real estate brokers, agents or appraisers and people providing services as part of a residential placement for individuals with developmental, acquired or emotional disabilities are not presumed to be employees. [RSA 281-A:2,VI\(b\)\(1\)](#).

Any person except for a direct seller, qualified real estate broker, agent, or appraiser, or person providing services as part of a residential placement for persons with developmental, acquired or emotional disabilities who is working for a private employer is presumed to be an employee for workers' compensation purposes. RSA 281-A:2,VI(b). This presumption may be rebutted if ALL 12 of the criteria cited in the statute can be shown to apply.

The strong statutory presumption is that a person who performs services for another, for pay, is an employee. This provision makes it very difficult for an employer to deny coverage on the grounds that the worker is an independent contractor. Employers must carefully document the grounds to support a finding that the injured worker is an independent contractor. A contemporaneously written agreement signed by both the employer and the person performing services which describes the services to be performed and affirms they will be performed in accordance with the 12 criteria in VI(b)(1)(A)-(L) "is prima facie evidence that the criteria have been met." RSA 281-A:2,VI(c).

"Employee" also includes public employees, including all legislators, fire fighters, special police officers (even if they are volunteers), volunteer members or trainees of the state emergency

management corporation, voluntary forest fire fighters, and voluntary rescue personnel. RSA 218-A:2,VII(a).

Inmates of county or state correctional facilities who are allowed or required to perform services for which no significant remuneration is provided, are excluded from employee status. RSA 281-A:2,VII(b). Also excluded are those performing community service pursuant to a court order or any person providing services as part of residential placement services for individuals with developmental, acquired or emotional disabilities. Id.

Persons participating in a local welfare work program are considered employees unless the local governing body votes to make this chapter not applicable to local welfare work program participants under RSA 165:1,II. RSA 281-A:2,VII(b).

RSA 281-A requires that all homeowners' policies issued in New Hampshire include coverage of domestics also known as residence employees. The statute defines a domestic as "a person performing domestic services in a private residence of the employer, where the employer is an individual, family, local college club, or local chapter of a college fraternity or sorority and not an agency or other entity engaged in the business of providing domestic workers to the public and the person is not defined as an independent contractor under RSA 281-A:2,VI(b)." RSA 281-A:2,V-a.

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

"A contractor who subcontracts all or any part of a contract shall bear the liability of the subcontractor of that contract for the payment of compensation under this chapter to the employees of the subcontractor, unless the subcontractor has secured the payment of compensation as provided for in this chapter." RSA 281-A:18. Contractors should always obtain certificates of insurance from their subcontractors. A contractor who becomes liable to a subcontractor's employee under this section may recover the compensation paid from the subcontractor. Id. A homeowner who contracts with another to hire that other to perform work does not thereby become a "contractor" who is liable to injured employees of the uninsured other employer. Appeal of Harleysville Ins. Co., 156 NH 532 (2007).

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

A. Standard of Proof Applicable to All Injuries

The claimant must prove both medical and legal causation. Medical causation requires a showing that the disability was actually caused by the work-related event; that the work-related activity caused the disability as a matter of medical fact. Appeal of Newcomb, 141 NH 664 (1997). Legal causation requires a showing that the injury is work connected. Legal causation "defines the degree of exertion that is necessary to make the injury work-connected." Appeal of Briggs, 138 NH 623, 628 (1994). Where there is no pre-existing condition or if the pre-existing condition was

asymptomatic (i.e. degenerative disc disease without symptoms), almost any work-related activity which causes the injury as a matter of medical fact is sufficient to show legal causation. New Hampshire Supply v. Steinberg, 119 NH 223, 231 (1979). Where there is a pre-existing condition that is active, the employment must be shown to have “contributed something substantial” to the medical condition. The work-related conditions must pose a greater risk to cause the condition than those risks encountered in normal non-employment activities whether of the claimant or a regular person. Appeal of Redimix, 158 NH 494 (2009).

New Hampshire Supreme Court recently set forth the increased risk test for compensable injuries. Injuries caused by risks associated with the employment are always compensable. Injuries caused by risks personal to the claimant are never compensable. Injuries caused by a “mixed risk” (combination of a personal risk and an employment risk) are usually compensable, depending on the prior health of the claimant. The occurrence of the personal risk will not defeat compensability where the employment risk was a substantial contributing factor. The fourth category, “neutral risks” are of neither distinctly employment nor distinctly personal character may be compensable depending upon the circumstances when weighed between the contribution of personal and employment risks. Appeal of Margeson, 162 NH 273 (2011).

B. Traumatic or “single occurrence” claims.

The definition of injury under the statute is very broad. It includes all accidental injuries or deaths arising out of and in the course of the employment. RSA 281-A:2,XI.

C. Repetitive Trauma.

Injuries caused by repetitive trauma rather than by a single event are compensable. The date of injury in a cumulative trauma claim is date of first medical treatment. RSA 281-A:16. The date of injury for an aggravation of a cumulative trauma injury is the date of first treatment for the aggravation.

D. Mental Distress.

Disability caused by work related stress is compensable. Even though the cause may be routine and not “accidental,” a claim is compensable if the effect on the worker is unexpected. Appeal of Briand, 138 NH 555 (1994). Where there is a pre-existing condition, claimant must show the employment contributed “something substantial” to aggravate her medical condition. Injury “shall not include a mental injury if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer.” RSA 281-A:2,XI. The statute has been amended to state that for “emergency response/public safety worker” under RSA 281-A:2-V-C “injury” or “personal injury” now include acute stress disorder and PTSD and there is a *prima facie* presumption that such disorders in emergency responders, are occupationally caused. RSA 281-A:17-c.

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

Occupational diseases are compensable if “due to causes and conditions characteristic and peculiar to the particular trade, occupation or employment. It shall not include other diseases or death therefrom unless they are the direct result of an accidental injury arising out of or in the course of employment nor shall it include either a disease which existed at the commencement of the employment.” RSA 281-A:2,XIII. Dustin v. Lewis, 99 NH 404 (1955); Boucher v. John Swenson Granite Co., 104 NH 63 (1962).

F. Emergency responder.

In emergency responder per RSA 281-A:2, V-c, there is a *prima facie* presumption that the First Responder’s COVID-19 exposure and infection are occupationally related. This shall remain in effect for duration of State of Emergency declared in April 2020.

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

Idiopathic injuries are not compensable. Mental stress injuries without physical manifestation are not compensable. RSA 281-A:2,XI. Injuries caused by the willful intent to injure oneself or another are excluded. Id. Injuries caused in whole or in part by intoxication or the serious and willful misconduct of the employee are also excluded from coverage so long as the employer was unaware of the intoxication. RSA 281-A:14. Injuries resulting from participation in athletic or recreational events, whether on or off premises, are not compensable unless the employee “reasonably expected, based on the employer’s instruction or policy, that such participation was a condition of employment or was required for promotion, increased compensation or continued employment.” RSA 281-A:2,XI. “‘Injury’ or ‘personal injury’ shall not include a mental injury if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action taken in good faith by an employer. . . . Conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable only if contributed to or aggravated or accelerated by the injury.” RSA 281-A:2,XI. Injuries caused by “risks that are so clearly personal” are not compensable even if the injury occurs at work. Margeson at 162 N.H. 277.

6. What psychiatric claims or treatments are compensable?

Psychiatric claims are compensable only if there is a physical manifestation of the injury. The physical component may be the injury itself which causes mental stress but if the stress is the only injury, a nervous tic may be sufficient to constitute the physical manifestation. RSA 281-A:2,XI. See also 4D above. If the employee meets definition of “emergency response/public safety worker” under RSA 281-A:2,V-c, “injury” includes acute stress disorder and post-traumatic stress disorder.

7. What are the applicable statutes of limitations?

An employee must give notice to the employer of an injury within two years of the date of the injury or of the date that the employee knew or should have known of the injury and its relationship to the employment if that date is later than the date of injury. Appeal of Phillips, 165 N.H. 226 (2013). RSA 281-A:19. Even where notice of an injury is given in a timely manner, the employee must file a claim for benefits within three years of the date of injury or the date that the employee knew or should have known of the injury and its relationship to the employment. Failure to request benefits within 3 years of giving notice of the injury bars the claim. RSA 281-A:21-a. If a claim for benefits is made but is denied by the employer, the employee must request a hearing before the Labor Department to contest the denial within eighteen months of the employee's receipt of the Denial or the claim is barred. RSA 281-A:42(d). Once a claim has been accepted and some period of benefits has been paid, the employee has four years from the date of the last payment of indemnity benefits to file a request with the DOL to have the weekly indemnity benefits be reinstated. If more than four years elapse from the date of the last indemnity payment on an accepted claim, the employee would still be entitled to payment of medical bills but not to any further indemnity payments in the event of a recurrence of disability causally related to the original injury. RSA 281-48,I. Appeal of Gamas, 158 NH 646 (2009). Causally related medical bills are compensable for the life of the employee and may not be settled.

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

Notice must be given to the employer within two years of the date of injury or the date that the employee knew of should have known of the injury and its relationship to the employment. RSA 281-A:19. If an employer has actual notice of the injury, RSA 281-A:19 is satisfied. Appeal of Gamas, 158 NH 646 (2009); Appeal of Phillips, 165 N.H. 226 (2013). A technical defect in the form of the notice given to the employer will probably not bar the claim. In addition to satisfying RSA 281-A:19, a claim for benefits must also be filed within 3 years of the date of injury. RSA 281-A:21-a.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

No compensation is allowed for injury proximately caused by the employee's willful intention to injure himself/herself or another. RSA 281-A:2,XI.

B. Willful misconduct, "horseplay," etc.

Injuries suffered during "horseplay" are generally compensable. To be considered non-compensable, such activity must be both "serious and willful." RSA 281-A:14. Only

misconduct which is willful, flagrant and of “a grave and aggravated character” or deliberate and premeditated will bar a claim. RSA 281-A:14; Newell v. Moreau, 94 NH 439 (1947).

C. Injuries involving drugs and/or alcohol.

If an injury is “caused in whole or in part by the intoxication” of the employee, the injury is not compensable unless the employer knew that the employee was intoxicated. RSA 281-A:14. The intoxication need not be the sole cause of the injury so long as there is some causal connection between the intoxication and the injury. Employer knowledge of the intoxication vitiates the defense. In the recent case of Appeal of Phillips, the court held that the intoxication defense is barred . . . “only if the employer knew the employee was intoxicated at the time of the injury.” Actual knowledge of the intoxication is required, not mere proof that the employer *should have* known of the intoxication. Appeal of Phillips, 165 N.H. 226 (2013).

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

If a person knowingly makes a false statement, he or she is subject to prosecution and punishment for false swearing or unsworn falsification under RSA 641:1, 2, and 3. RSA 281-A:56. A violation of this statute is a misdemeanor. Upon conviction for the false statement, the Court may order forfeit all of the person’s rights to the compensation sought and the employer shall be entitled to restitution. RSA 281-A:56,I. This section was broadened to cover false statements made not only by employees, but also employers, insurers or their representatives. Therefore, false statements made in the course of reporting, investigating or adjusting a claim are also actionable. RSA 281-A:56,II.

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

There is no specific statutory defense unless the falsification is made for the purpose of obtaining benefits. See RSA 281-A:56. Such falsification may serve as a basis to attack the employee’s credibility, and may be actionable under RSA 281-A:56, but it does not automatically bar receipt of benefits unless the person is convicted for false swearing under RSA 641:2, unsworn falsification under RSA 641:3 or perjury under RSA 641:1.

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

It depends on the circumstances but generally, injuries suffered during recreational events are not compensable. “Notwithstanding any law to the contrary, ‘injury’ or ‘personal injury’ shall not mean accidental injury, disease, or death resulting from participation in athletic/recreational activities, on or off premises, unless the employee reasonably expected, based on the employer’s instruction or policy, that such participation was a condition of employment or was required for promotion, increased compensation, or continued employment.” RSA 281-A:2,XI; In re: Malouin, 155 NH 545 (2007).

13. Are injuries by co-employees compensable?

They may be so long as the injury caused by the co-employee arises out of and in the course of the employment; i.e., the injury does not arise solely from a risk personal to the claimant. For example, injuries resulting from a fight may be compensable where the quarrel arises due to conditions of the employment rather than from personal causes unrelated to the employment. Appeal of Griffin, 140 NH 650, 656 (1996). See also, Appeal of Margeson, 162 NH 273 (2011). The employee would have a third-party action against the co-employee only if the co-employee's *intentional* tort caused the injury. To prove intent, the employee must show that the tortfeasor knew that the conduct was "substantially certain" to result in injury. Thompson v. Forest, 136 NH 215 (1992). The employer/insurer has a lien on any amounts recovered from such a third party to the extent of "compensation, medical, hospital, or other remedial care already paid," less the expenses and costs of the action. The lien also extends to amounts paid as permanent impairment but not to vocational rehabilitation. RSA 281-A:13, I(b).

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

Probably not where the injury arises solely from a risk personal to the claimant; i.e., where the dispute between third party and worker is unrelated to work. Where the employee is just performing his job and is an innocent bystander, his injuries probably are compensable. However, where the fight is strictly over a personal issue, i.e., a love affair, the injuries resulting from the fight to the combatant are probably not compensable as a "risk personal to the claimant." Appeal of Margeson, 162 NH 273 (2011). An employee being hit by a stray bullet shot from outside the workplace, would probably not be compensable. Margeson; Appeal of Kelly, 167 N.H. 489 (2015).

BENEFITS

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

Average weekly wage computation is governed by RSA 281-A:15. Generally, the average weekly wage is based on the gross earnings of the employee for the 26 weeks prior to the injury from all employments. The employee may use a 52-week wage schedule (or a combination of consecutive weeks from 26 to 52 weeks) if that would result in greater indemnity benefits. The employee's rate is based upon the total amount of all wages in all concurrent employments "subject to this chapter" regardless of which employment the employee was injured in. If one of the employee's two jobs is solely in another state such that the second employer is not subject to this chapter, those out of state wages cannot be combined. Appeal of HCA Parkland Medical Center, 143 NH 92 (1998); Lab. Rule 506.02(d). If the employee has worked for so short a period

of time that an average weekly wage cannot fairly be computed, the Labor Department may look to the rate of hire or to the average weekly wage of other employees in the same position with the employer or to similarly situated employees with other employers. RSA 281-A:15,I(a)-(c).

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

In terms of the maximum rate, if an employee's average weekly wage exceeds 30% of the state average weekly wage (\$1,005.00 as of 07/01/2016), the weekly compensation rate shall be 60% of that employee's average weekly wage or 30% of the state average weekly wage whichever is greater. The compensation rate, in any event, must not exceed 150% of the state average weekly wage. The maximum rate also cannot exceed 100% of the employee's after-tax earnings. RSA 281-A:28,II. The maximum rate as of 07/01/2016 is \$1,507.50 per week.

In terms of the minimum rate, if an employee's average weekly wage is 30% or less of the state average weekly wage, weekly compensation is the full amount of that employee's average weekly wage. The maximum allowable weekly compensation rate under this paragraph, however, shall not exceed 90% of the employee's after tax earnings as determined by RSA 281-A:15. RSA 281-4:28,I. The DOL utilizes the Supplemental Wage Schedule, Form 76 WCA1 to calculate the compensation rate when the average weekly wage is 30% or less of the State's average. As of 07/01/2016 the State's minimum compensation rate is \$301.50 per week.

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

The employer/insurer has 21 days from the date of receipt of the Notice of Injury to accept the claim and pay benefits or to file a Memo of Denial contesting the claim. Lab. Rule 506.02. If no Memo of Denial is filed within that time-period, the employer/insurer must commence and must continue making the statutory payments unless and until it obtains authorization from the Labor Department to terminate or reduce benefits or until the employee returns to work. Payments made no longer than 3 weeks after notice of the injury shall be without prejudice. Lab. Rule 506.02(b); RSA 281-A:41. The employer may unilaterally cease payments during the three-week provisional period simply by filing a Memo of Denial. Lab. Rule 506.02(b). After the three-week period following notice of the injury, benefits may be reduced or terminated only if the employee returns to employment or if approval is given by the Department of Labor either administratively or through a hearing before a hearing officer. Lab. Rule 506.02.

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 is entitled to collect benefits on the fourth day of disability. If the disability lasts longer than 14 days, the employee must also be paid retroactively for the first three days of disability. RSA 281-A:22.

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

Temporary partial or total benefits may be terminated if the employee returns to work at regular wages. Benefits may be reduced to the temporary partial rate if the return to work is restricted by the injury to part time work or a reduced rate of pay. A Memo of Payment must be filed with the Department. Absent a return to work, temporary benefits may not be terminated without Labor Department approval. Generally, the Department will not administratively grant modification on the basis of an independent medical examination. The Department is more likely to administratively modify benefits on the basis of a treating physician's report. If the employer/insurer terminates benefits without prior Department approval, it is likely that fines will be assessed. If the request for administrative modification is not granted, a hearing on the issue of extent disability will be scheduled before a hearing officer. Most often benefits will not be terminated or reduced absent a hearing before the DOL. RSA 281-A:48.

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

No.

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

Permanent scarring may be compensable in New Hampshire “[i]f an injury . . . involves scarring, disfigurement, or other skin impairment resulting from a burn or burns, an award shall be made on the basis of a maximum of 350 weeks with the appropriate number of weeks to be determined in proportion to the maximum in accordance with the percent of the whole person specified for such bodily losses in the 5th Edition of “Guides to the Evaluation of Permanent Impairment,” published by the American Medical Association. RSA 281-A:32,IX. Scarring that limits the ability to move or use other listed body parts may produce a ratable impairment of that other body part. RSA 281-A:32.

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

If the employee has a permanent impairment under RSA 281-A:32, has reached maximum medical improvement and has a partial ability to work, the employer pays benefits equal to 60% of the difference between his pre-injury average weekly wage and the average weekly wage he is able to earn thereafter. Payments shall not continue after the disability ends and in any event, no longer than a total 262 weeks. RSA 281-A-:31-a.

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

The number of weeks for a total permanent impairment to each listed member is determined under RSA 281-A:32. Payment of an award shall be made in a single payment. RSA 281-A:32,XI. The disability rate used to calculate the permanent impairment award is based on the employee's Temporary Total Disability rate at the time of the injury. Appeal of Lorrette, 154 NH 271 (2006). If the employee dies, the balance of an unpaid weekly scheduled award shall be payable to the estate of the employee. The impairment is to be calculated using the 5th Edition of the AMA Guides to Evaluation of Permanent Impairment. The percentage of impairment is multiplied by the number of weeks set forth for the body part and the result is multiplied by the compensation rate.

Payment of the scheduled award "becomes due upon prompt medical disclosure after maximum medical improvement is achieved. . . ." The employer must notify the DOL "no later than 15 days following such disclosure . . ." whether it objects to the disclosed amount of scheduled loss. The employer must schedule a medical examination within 30 days thereafter and request a hearing before the commissioner to determine the amount of scheduled impairment. Failure to comply with time deadlines negates the employer's right to object to the amount of the scheduled loss. RSA 281-A:32,XI.

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

The maximum amount of "whole person" benefits is 350 weeks, based on the employee's compensation rate for temporary total disability. An employee is entitled to a whole person rating if two or more specified bodily members have a permanent impairment or "if the injury is to the spine or spinal column, or to the brain, or involves scarring, disfigurement or other skin impairment from a burn or burns..." RSA 281-A:32,IX. The award is the percentage of whole person impairment x 350 x compensation rate. Loss of individual members of the listed body parts or parts thereof, entitle an employee to an award based on a fewer number of weeks as set forth in the statute. The amount of impairment is to be calculated using the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment.

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

If an employee is unable to return to the former employment or other employment for which he or she has training, the employee "shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore such employee to suitable employment." RSA 281-A:25,I. Except in unusual cases, or where necessary to achieve a successful result, vocational rehabilitation training, treatment or service will not extend for more than one year. RSA 281-A:25,III. The Department of Labor uses a hierarchy of vocational services. Depending on the nature of the injury, the severity of the restrictions, and the employee's prior experience and transferable skills, job placement services are usually the first step. If such services are unsuccessful or if the employee's restrictions are too severe, the Department may order an on-the-job training program or retraining for the employee. The

employee's entitlement to a particular level of vocational benefits (i.e., new skill training, higher level vs. help to return to a different job with a different employer, lower level) depends on certain factors which include the employee's transferable skills education, average weekly wage, age and medical factors. Lab. Rule 509.02. Thus, a severely disabled worker with a high average weekly wage will usually be entitled to a higher level of services (i.e., education) than a low wage earner with the same injury (i.e., job placement). However, since indemnity benefits must be paid as long as the disability is total, in some cases, the employer may be well served by providing a higher level of vocational benefits than might be required by law, in order to return the injured worker to employment. If an employee refuses to accept VR services he may lose compensation for each week of refusal. RSA 281-A:25,V.

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

For injuries occurring on and after February 8, 1994, a totally disabled employee is entitled to 60% of his average weekly wage, but no more than 150% of the state average weekly wage. If the employee's average weekly wage is 30% or less of the state average weekly wage, the rate is the full amount of the weekly compensation rate up to a maximum of 90% of the employee's after-tax earnings. RSA 281:28-a. The employee is entitled to receive benefits for as long as he is totally disabled, however, one cannot be adjudged "permanently" disabled so as to *guarantee* indemnity payments to the employee for life or "permanently." Compensation for "Permanent total disability" is payable only "during the continuance of such total disability." RSA 281-A:28-a. The carrier is always free to contest extent of disability based on a change of condition. The challenge should be based on competent medical evidence. The burden of proof to show a change in condition such that the employee is no longer totally disabled, is on the employer. If, after receiving a combination of total disability and partial disability benefits for more than 262 weeks, a worker is found to be only partially disabled, the weekly indemnity benefits terminate immediately as temporary partial indemnity benefits are available only for a total of 262 weeks. RSA 281-A:31. Such a finding can only be made by the Department of Labor.

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

A. Funeral expenses.

The employer/insurer must pay for burial expenses up to \$10,000 for deaths occurring after January 1, 2010, RSA 281-A:26,IV.

B. Dependency claims.

Weekly death benefits are calculated at the Temporary Total Disability rate set forth in RSA 281-A:28.

If the work-related injury results in death, the surviving spouse is entitled to weekly benefits until

remarriage or death. RSA 281-A:26,II.

Dependent children receive the weekly compensation that would accrue to the employee, until age 18, or to age 25 if the child is enrolled as a full-time student in an accredited institution. In the event that the dependent child is physically or mentally incapacitated, the entitlement to compensation continues as long as the incapacity continues. Compensation ceases if the child becomes married, legally adopted, or is determined to be self-supporting. RSA 281-A:26,VI,VII.

The Commissioner determines how the dependency benefit is apportioned between the surviving spouse and minor children. RSA 281-A:26,I.

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

In order to qualify for the Second Injury Fund, the employee must have had a permanent pre-existing physical or mental impairment from any cause that constituted a hindrance to obtaining employment, at the time of hire and the employer must have been aware of this handicap at the time of hire or must have retained the employee if the first injury occurs during the employment. The disability from the combined effects of the pre-existing impairment and the new injury must be greater than the disability from the new injury alone. RSA 281-A:54,I. Also, the employer must have a written document, prepared contemporaneously with the hire, showing knowledge of the predicate impairment at the time of the hire or of the retention. Almost any writing will suffice; even a note on a work application. This requirement is easier to satisfy if the “pre-existing permanent impairment” was caused by an injury suffered while in the employ of the same employer because the First Report of Injury satisfies the requirement for a written document. The employer’s decision to retain a permanently injured employee is given the same consideration as its decision to hire an employee with a pre-existing impairment.

The New Hampshire Department of Labor uses several forms that must be submitted by the employer/insurer in order to qualify for the Second Injury Fund. The employer/insurer must notify the Fund of a possible claim no later than 100 weeks from the date of the subsequent injury. Notification after the 100th week permanently bars utilization of the Second Injury Fund. RSA 281-A:55; NH Code Admin. R. 506.04. The employer/carrier is responsible for payments to the injured employee in the first instance. The carrier shall be reimbursed 100% of indemnity and medical payments made to the claimant, after the first 104 weeks of disability. Prior to the first 104 weeks of disability, the carrier will be reimbursed only at the rate of 50% after the first \$10,000 paid on compensation for indemnity or medical benefits. RSA 281-A:54,I.

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

If not done by agreement, the claim can be re-opened based on a change in condition, by the filing of a Petition with the Commissioner to review a Denial or an award of compensation no later than 4 years after the last denial of such benefits or the last payment of weekly indemnity

benefits. RSA 281-A:48. The burden of proof is on the party seeking to prove the change in condition. Appeal of Elliot, 140 NH 607 (1996). Generally, if the Petition is filed more than four years from the last payment of indemnity benefits, only medical bills can be re-opened. RSA 281-A:48. Appeal of Dean Foods, 158 NH 467 (2009). However, if medical treatment is “purposefully and intentionally postponed for medical reasons” beyond the 4-year limit, the employee may petition to review the award of benefits “no later than 180 days after the date of the postponed treatment.” RSA 281-A:48, I-a. Causally related medical bills are compensable for life. Permanency awards can be requested at any time “upon prompt medical disclosure after maximum medical improvement is achieved.” RSA 281-A:32, XI. A permanency award may become due several years after the original injury and even though there may be no further entitlement to other benefits under the statute. Petition of Markievitz, 135 NH 455 (1992).

The Supreme Court has held that the Compensation Appeals Board has continuing jurisdiction over cases to reopen and modify its decisions on extent of disability to correct mistakes of law or mistakes as to the nature or extent of the injury or disability even where there has been no physical change of condition. Appeal of Carnahan, 160 NH 73 (2010).

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

Generally, legal services rendered at an initial hearing at the Department of Labor level are solely the responsibility of the employee. However, even at the DOL level, when an employer or carrier “disputes the causal relationship of a medical bill to the claimant’s injury, or whether a medical bill was required by the nature of the injury, and denies payment of such bill, is after a hearing, ordered to pay or reimburse the bill by the commissioner, the employee shall be entitled to reimbursement of reasonable counsel fees and costs as approved by the commissioner.” RSA 281-A:44, II. Effective 01/01/2011, once a hearing has been scheduled to determine compensability of medical bills, if the carrier reverses its denial of such bills less than seven business days prior to the scheduled hearing, the claimant shall be entitled to reasonable counsel fees and costs. If a Labor Department decision is appealed to the Workers’ Compensation Appeal Panel or to the Supreme Court by either party, and if the employee “prevails” on appeal (regardless of which party filed the appeal), the employee is entitled to “reasonable counsel fees and costs.” RSA 281-A:44, I. To “prevail” means the employee must receive an award for disability benefits, medical, hospital and remedial care, a scheduled permanent impairment award, vocational rehabilitation or reinstatement of the employee which is greater in amount or scope than that awarded in the decision being appealed from. RSA 281-A:44, I(a)(1). If the employer appeals, “prevail” means the decision must be affirmed.

Interest on indemnity awards is calculated from date of injury if compensability is disputed and no indemnity has been paid or from date of termination or reduction if extent of disability is in issue. RSA 281-A:44, III. Interest on permanent impairment awards is calculated from the date payment becomes due. RSA 281-A:44, IV. Interest on awards for medical, hospital, or remedial care is payable only on those amounts the claimant paid out of pocket. RSA 281-A:44, V. Interest is calculated at the same rate as for judgments under RSA 336:1. RSA 281-A:44, II.

Any request for fees must be approved by the Department or the Supreme Court, depending on where the appeal was tried. Although there is no set schedule of fees, the Labor Department routinely approves employees' attorney fees of \$150 to \$250 per hour depending on the nature, length, and complexity of the service performed, the usual and customary charge for such services and the benefit accruing to the claimant. RSA 281-A:44,VI.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive:

A. Scope of immunity.

With certain limited exceptions, employers have immunity even for intentional torts. RSA 281-A:8. Co-employees also have immunity, except for intentional torts. RSA 281-A:8; Thompson v. Forest, supra. The employee may file a third-party action against non-excluded parties, including co-employees, for intentional torts, and against manufacturers of defective products. The employee must show that the co-employee knew that his or her conduct was "substantially certain" to cause injury to be "intentional". Thompson v. Forrest, supra. In the event the employee does not file a third-party claim within nine months of the date of injury, the employer can file the action. RSA 281-A:8. Claims for loss of consortium are barred by exclusivity provision unless an exception applies such as for intentional torts.

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

Exclusivity provision does not bar claims for intentional injuries caused by co-employees. RSA 281-A:8,1(b). The dual capacity doctrine is an exception to employer immunity under the workers' compensation law respecting tort liability but not an exception to co-employee immunity. The doctrine permits suit against the employer if he or she acts, in addition to his or her capacity as an employer, in a second capacity which confers on him or her obligations independent of those imposed on him or her as employer. Ryan v. Hiller, 138 NH 348 (1994). Exclusive remedy provision does not bar employee's action for wrongful discharge.

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

Yes. If there is a prior violation of the same kind recorded in the Department or if an employer fails to comply with a written Departmental recommendation applicable to a first violation within reasonable time, the injured employee is entitled to double compensation. The employer is solely liable for the additional amount. RSA 281-A:33. Employers who fail to comply with safety regulations or with written Department of Labor orders regarding safety are also subject to fines.

Employers of fifteen or more employees must prepare a written safety program to be filed biennially with the commissioner on January 1st. RSA 281-A:64,II. Every employer of five or more employees shall create a joint loss management committee composed of equal numbers of employee and employer representatives. RSA 281-A:64,III. The commissioner may assess an administrative penalty of up to \$250 per day on employers not in compliance with sections II and III. RSA 281-A:64,VIII

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

If a minor is injured during the course of a hazardous occupation in violation of the Youth Employment Law, RSA 276-A, prohibiting hazardous occupations for youth, and if a prior violation of the same kind is recorded in the Department, the employer shall be liable for double compensation, however, if the employer is insured, the employer and the carrier shall share equally the compensation under this section. RSA 281-A:33.

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

The Commissioner “shall” assess civil penalties of up to \$2,500 but not less than \$500 against insurers who fail to pay or deny compensation promptly, fail to give timely notice, or fail to provide vital information in a timely manner as required by statute. Lab. Rule 512.01. There is no prohibition in the statute against filing a common law or statutory claim for damages resulting from bad faith claims handling. RSA 417 provides a cause of action for unfair insurance trade practices.

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

An employer may terminate an injured employee at any time for good cause unrelated to the mere fact of a work injury. The statute does not bar an employee from filing suit against the employer for wrongful discharge. Damages for lost wages or other benefits of the employment are recoverable. However, the United States District Court for the District of New Hampshire has held that the statute bars a claim for emotional distress damages due to intentional infliction of emotional distress arising solely out of the termination of the employee. Frechette v. Wal-Mart Stores, 925 F.Supp. 95 (D.NH 1995); Schrepfer v. Framatome Connectors USA, Inc., 115 F.Supp.2d 182 (DNH 1999).

For injuries that occur on or after February 8, 1994, an injured employee of any employer with five or more employees “shall” be reinstated any time within eighteen months of the date of injury if the position exists and is available and the employee is able to do the work with “reasonable accommodations” for his or her limitations. The position is “available” even if it was filled by a replacement employee during the period of disability. If the position has been eliminated, reinstatement shall be in any other existing position which is within the employee’s limitations. The right to automatic reinstatement terminates: (1) if the treating doctor determines the employee cannot return to work; (2) the employee accepts employment with

another employer; or (3) eighteen months from the date of injury. Reinstatement is not required for employees hired as replacements for the injured employee, seasonal or temporary employees or for construction workers if the particular project has been completed. Lab. Rule 504.05. The Commissioner may assess employers in violation of this section all weekly wage benefits retroactive to the date the employee was eligible for reinstatement. RSA 281-A:25-a.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. The employer/insurer retains a lien on any recovery to the extent of compensation, medical, hospital or other remedial care already paid or agreed to be paid or awarded to be paid to the employee, less a pro rata share of expenses and costs of the action. The employer/insurer has a “holiday” on payment of future benefits to the extent of the employee’s net recovery from a third party. RSA 281-A:13.

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

Yes, but only if the co-employee’s intentional tort caused the injury. Thompson v. Forest, 136 NH 215 (1992). See answers 13 and 29.

36. Is subrogation available?

Yes. If the employee or the estate fails to file a third-party action within nine months of the date of the injury, the “employer or the employers insurance carrier may so 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 third person.” RSA 281-A:13,III(b)(1). If there is a subrogation recovery in excess of the statutory lien, which includes expenses and costs of the action, the excess shall be paid to the injured employee or to the estate of a deceased employee. RSA 281-A:13,III(b)(2). The procedure for approval of a settlement and for safeguarding the injured employee’s rights is the same as is provided for protecting the rights of the employer in case of a third-party claim filed by the employee. The settlement and the division of costs and expenses, including attorneys’ fees must be approved by the commissioner or the superior court. RSA 281-A:13,IV.

MEDICALS

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

The employer/insurer has 30 days from the date of the receipt of a medical bill to either pay the

bill or issue a Denial for the bill. Failure to pay the bill or issue a Denial within that time period essentially means that the insurer has accepted the bill. RSA 281-A:23,V; Lab. Rule 506.2(i)(j). The Commissioner may assess a civil penalty of up to \$2,500 on an employer/insurer who fails either to pay a medical bill within thirty days of receipt or properly deny the bill. The denial “shall give a valid reason for the denial and shall advise the claimant of the right to petition the commissioner for a hearing.” Denials must be sent to the provider, the claimant, and the DOL. RSA 281-A:23,V(e)(2).

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

With regard to obtaining medical reports from a treating doctor, the law requires that each treating health care provider submit a report with the bill. Although the statute does not define what constitutes an adequate report, the employer/insurer can deny any medical bills where the accompanying report is not included. The mere fact that a report/treatment note is not enclosed is grounds for denial. The Commissioner may assess a civil penalty of up to \$2,500 against a medical provider who fails to provide reports as required by statute. RSA 281-A:23,V(d); Lab. Rule 506.02.

The statute authorizes providers to provide medical records to employers or carriers or their attorneys without need for an authorization whenever a claimant has filed a claim for benefits. Information regarding prior conditions may be obtained if the prior conditions are similar to that presented in the claim. RSA 281-A:23,V(a). Effective 07/01/2010, every request for medical records based on the statutory authorization must state: “in bold print, in a font size two points larger than used in the request”:

This request is strictly limited to medical information relevant to the occupational injury or illness that underlies the patient’s workers’ compensation claim, including any past history of complaints of, or treatment of, a condition similar to that presented in the claim.

Further, carriers must not send irrelevant records to others even if received in error or face a \$2,500 penalty. Upon request, claimant shall sign a medical authorization for employer to obtain medical records for any condition the claimant claims is related to the work injury or which employer has reason to believe is relevant to the work injury. Lab. Rule 503.01(b). The Department may compel compliance with this rule, generally after a hearing on the issue.

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

A. Claimant’s choice of physician.

An employee has a right to select his or her own physician. The employee may switch physicians at will. RSA 281-A:23,I. The carrier may object to treatment as being unrelated or not

“reasonable and necessary” for treatment of the injury. *In re Filion*, 145 N.H. 104 (2000). However, if the employer utilizes a managed care program approved by the DOL, the physician must be a member of the managed care network. RSA 281-A:23-a; Lab. Rule 702.01. The employee may switch providers within the network once as a matter of right. RSA 281-A:38-a; Lab. Rule 704.01. The employee must be given reasonable access to a second medical opinion inside or outside the medical network when the treating doctor remains uncertain about the nature of the injury or the proper course of treatment to cure or alleviate it. Lab. Rule 702.01(a)(8). The employee must ask the Commissioner for permission to seek a second opinion and the Commissioner shall grant one such request as a matter of course. Lab. Rule 703.01.

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

Any employee entitled to collect weekly indemnity benefits or medical benefits shall submit to an Independent Medical Examination (“IME”) at the carrier’s request. The independent doctor must be “certified by the appropriate specialty board as recognized by the American Board of Medical Specialties ...” unless permission is obtained from the Commissioner for a specialty not recognized by those Boards and shall maintain a current practice in that area of specialty. RSA 281-A:38,II. The IME shall take place within a 50 mile radius of the employee’s home, unless, within the discretion of the Commissioner, examination outside the 50-mile radius is needed to obtain services of a provider who specializes in evaluation and/or treatment of the workers’ specific condition. The worker shall not be required to submit to more than 2 independent examinations per year absent special circumstances. RSA 281-A:38,II.

Effective 01/01/2011, an injured employee may record the independent examination and may have a lay witness present during the exam. If the employee brings a witness to the exam, she must sign an authorization waiving any right she might otherwise have to privacy. RSA 281-A:38,II.

If the employee fails to attend the IME or obstructs the examination, his or her right to weekly payments shall be suspended until the examination takes place and no compensation shall be payable for or during such period. RSA 281-A:39. If the issue is payment of medical bills and the employee refuses to attend the IME, her right to a hearing on compensability of medical bills is suspended. Id.

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

The employer/insurer is required to “furnish or cause to be furnished to an injured employee reasonable medical, surgical and hospital services, remedial care, nursing, medicines and mechanical and surgical aids for such period as the nature of the injury may require.” This includes chiropractic, massage or physical therapy. It could also include more non-traditional forms of treatment. RSA 281-A:23,I. The treatment does not need to be curative to be compensable. “Treatment may be reasonable and required by the injury even though the

treatment does not improve the patient's medical condition." Appeal of Levesque, 136 NH 211 (1992). There is no state mandated schedule of fees for medical procedures or treatments in New Hampshire. Effective 09/01/2015, the employer must pay the reasonable value of such medical services but if reasonableness of the bills is contested, the health provider now has the burden of proof to establishing its bill for services is reasonable. RSA 281-A:24,(a),(b).

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

All prosthetic devices are covered, and include artificial limbs, eyes, teeth, orthopaedic appliances and physical and surgical aids. The insurer must pay for all such devices as long as they are necessitated by the causally related injury, for the employee's life. The insurer may always contest the reasonableness or causal relationship of any medical bill or procedure or prosthetic device. RSA 281-A:23,I.

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

To the extent that vehicle and/or home modifications are required by the nature of the injury and the physical limitations thereby placed on the employee, such modifications are compensable. However, as with all medical and remedial bills, the insurer has the statutory right to first contest the causal relationship or reasonableness of the bill.

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

No. Carriers must pay the reasonable value of such services. RSA 281-A:23,I(a). A carrier may request a hearing to challenge medical fees which are excessive and the burden of establishing that the bills are reasonable is on the medical provider. RSA 281-A:24,I(b). RSA 281-A:23. Fees for managed care providers are generally negotiated in advance.

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

Employers who are self-insured or insured on the voluntary market may provide medical treatment required under the statute through a managed care program which has been approved by the Commissioner. RSA 281-A:23-a,I. Each employer who is in the assigned risk pool is required to be a participant in a managed care program. To gain approval of the Commissioner, the care network must be "sufficiently comprehensive with respect to both geography and medical specialties, including reasonable access to treatment for injuries or personal injuries". RSA 281-A:23-a,I(a). The Plan must "provide for treatment and aids outside of the network" if the necessary treatment cannot be provided within the network or in the event of an emergency. RSA 281-A:23-a,I(b). The Plan must provide for both inpatient and outpatient care and reasonable access to second opinions. RSA 281-A:23-a,I(e)(f). The network must employ a "sufficient number of injury management facilitators ... to manage the injured employee's medical, hospital and remedial care, vocational rehabilitation, modified duty and return to work plans." RSA 281-A:23-a, V. If an employee is dissatisfied with a network's findings regarding "compensability, degree of disability or degree of impairment arising from an injury...", he or she

may request an independent examination of his or her own choice and the Commissioner “shall grant one such authorization as a matter of course”. RSA 281-A:38-a.

PRACTICE/PROCEDURE

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

As long as an employer/insurer has not accepted a claim, it can issue a Memo of Denial within twenty-one days of its receipt of a First Report of Injury or a Notice of an injury and refuse to pay benefits unless otherwise ordered by the Department after a hearing. Lab. Rule 506.02(a). If a claim is denied, the employee must request a hearing on causal relation or compensability. Once a claim has been accepted or ordered to be paid by the Department, the employer/insurer can request administrative modification of benefits based on a change in circumstances, i.e., a new injury or medical documentation indicating no further disability, or it can request a hearing before the Labor Department on these same issues. RSA 281-A:48. In re: Woodmansee, 150 NH 63 (2003). The employer/insurer can also request a hearing on causal relationship at any point in the life of a claim if that issue has not previously been adjudicated. RSA 281-A:41. Any issue arising under the statute may be addressed by either party requesting a hearing at the Department of Labor.

46. What is the method of claim adjudication?

A. Administrative level.

The DOL may issue decisions on certain issues administratively. If a party disagrees with an administrative decision, the procedure is to file an appeal to the Compensation Appeal Board (“CAB”). The DOL rarely issues orders administratively terminating or reducing indemnity benefits; most often, a request to reduce or terminate weekly benefits is decided through a first level hearing.

B. Trial court.

If an administrative order is not issued, a first level hearing will be held before a DOL hearing officer. Parties must be given notice of a hearing at least 14 days in advance. RSA 281-A:43,1(a). The hearing is supposed to be scheduled within 6 weeks of the initial request. Either party may request the addition of issues with 14 days’ notice prior to hearing. Hearing decisions are to be issued within 30 days of the hearing. Id. A hearing officer’s decision becomes final 30 days after issuance unless appealed to the CAB.

C. Appellate.

Any party to a DOL Hearing Officer’s decision has the right to a *de novo* appeal to a three-member Compensation Appeal Panel of any issue raised before the hearing officer. Each appeal

board panel consists of a member who represents labor, a member who represents employers or workers' compensation insurers and an attorney who serves as a neutral member. RSA 281-A:42 The appeal must be filed within 30 days of the date of the oral or written decision of the hearing officer, whichever is earlier. Although an appeal is *de novo*, the scope of appeal is limited to those issues which were raised at the time of the initial hearing and which were actually appealed to the CAB. Appeal of Staniels, 142 NH 794, 797 (1998). A change in condition which occurs subsequent to the initial hearing may provide the basis for a new hearing at the initial level but is not the basis for a *de novo* appeal hearing. Appeal of Hiscoe, 147 NH 223 (2001).

Decisions of the Appeal Board are appealable only to the state Supreme Court pursuant to RSA 281-A:43 and RSA 541. Effective 01/01/2011, issues of fact are appealable to the Supreme Court. Prior to requesting an appeal to the Supreme Court, the appellant must first file a Request for Rehearing with the CAB within 30 days of the CAB decision. The Request for Rehearing must set forth in detail all alleged errors made by the CAB. The CAB has 30 days to issue a decision on the Request. The appellant then has 30 days to file a Rule 10 Notice of Appeal to the Supreme Court. RSA 541 and RSA 281-A:43,I(b)-(e). A CAB decision becomes final 30 days after its issuance in the absence of an appeal. RSA 281-A:43,II.

47. What are the requirements for stipulations or settlements?

The Labor Department requires the use of its "Lump Sum Settlement" forms, and no settlement of a claim that has been accepted or adjudicated as compensable, is valid or enforceable until and unless approved by the Commissioner. RSA 281-A:37; Lab. Rule 511.01. The Commissioner has discretion to approve settlements "where the best interests of all concerned will be served . . ." and settlements will usually be approved only after twelve (12) months of continuous disability. RSA 281-A:37. A hearing is always required before final approval is granted. RSA 281-A:37,III. Attorney fees must also be approved and fee requests are ordinarily limited to 20% of the actual recovery, excluding medical benefits. Lab. Rule 511.02. Once a claimant has settled the case, she no longer has any ability to pay an attorney on a contingent fee basis in the event further litigation is required, i.e., to obtain payment of medical bills. The Commissioner has recently started to withhold approval of settlements unless the claimant's attorney agrees to represent the claimant in the future if the need arises.

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

No. Medical benefits in a compensable claim may not be closed regardless of a lump sum settlement. Causally related medical bills are open for the claimant's life. RSA 281-A:37,II. An employer/insurer may deny bills as not causally related or not reasonable or necessary to treat the work injury. The employee may then request a hearing on such Denials.

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

All settlements where compensability is admitted or has been ordered, must be approved by the Labor Department. RSA 281-A:37,III.

RISK FINANCE FOR WORKERS' COMPENSATION

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

“Employers,” as defined in RSA 281-A:2, must obtain workers’ compensation insurance. Numerous private insurers provide coverage and there is an assigned risk pool. The New Hampshire Guaranty Fund provides coverage for claims against employers whose insurer has become insolvent. Employers may also be self-insured if they meet the Department of Labor requirements. RSA 281-A:5-a.

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

A. For individual entities.

Self-insurance is permitted. The self-insured employer must maintain adequate loss reserves, maintain excess coverage and make available their administration contracts for review by the Department. The self-insured employer must also obtain a surety bond running to the state in a penal sum equal to the amount of risk retention. RSA 281-A:5-a through d. Lab. Rule 405.03. See Lab. Rule 400 et seq generally.

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

Homogeneous groups may become self-insured as an association or group. They must file an application to the Department, specifying all members of the association. The association becomes responsible for payment of benefits and the insolvency or dissolution of a member does not relieve the association of its liabilities under the statute. Otherwise, the requirements are substantially identical to those for individual self-insureds. RSA 281-A:5.

52. **Are “illegal aliens” entitled to benefits of workers’ compensation?**

Although not specifically addressed in the statute, the Department of Labor has long taken the position that illegal aliens are “employees” and therefore covered under the employer’s policy.

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

Probably not. Injuries caused by acts of terrorism are not specifically addressed by the statute but recovery may be precluded as caused by a non-related neutral risk of the employment. Neutral risks are not clearly personal or employment related in nature. Appeal of Margeson, 162

N.H. 273 (2011). Whether an injury due to a neutral risk is compensable is a question of fact. The claimant would need to prove both legal and medical causation. Legal causation requires proof that the employment related stress or risk is greater than that which is encountered in normal non-employment life. The employee must show he faces an “increased quantity of a risk” to be compensable.

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?

No specific statutes apply. Medicare’s future interests are usually provided for automatically in a settlement because medical benefits cannot be settled under New Hampshire’s workers’ compensation statute. RSA 281-A:37,II.

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).

The New Hampshire statute does not specifically provide a lien to Medicaid or other health insurers. The only statutory lien is that provided to the workers’ compensation carrier under RSA 281-A:13.

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, 42 C.F.R. parts 160-164 and 65 F.R. 82462, 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(1)]. Under New Hampshire law, “the act of the worker in applying for workers’ compensation benefits constitutes authorization to any physician, hospital, chiropractor, or other medical vendor to supply all relevant information regarding the worker’s occupational injury or illness to the insurer, the worker’s employer, the worker’s representative, and the department.” RSA 281-A:23,V(a). Commencing 07/01/2010, a written request for records under this statute must contain the following:

This request is strictly limited to medical information relevant to the occupational injury or illness that underlies the patient’s workers’ compensation claim, including any past history of complaints of, or treatment of, a condition similar to that presented in the claim.

The mandatory language must appear in bold print, in a font size two points larger than used in the request.

57. What are the provisions for “Independent Contractors”?

A true independent contractor is responsible for his own worker’s compensation insurance. However, where the independent contractor fails to procure coverage for his employees, the general contractor becomes liable for coverage for the injured employees of the independent contractor. RSA 281-A:18.

Because there is a strong statutory presumption in favor of finding a worker to be an employee rather than an independent contractor, employers should carefully document all 12 of criteria necessary to rebut the presumption that a worker is an employee. RSA 281-A:2,VI (b)(1)(A)-(L).

As of 01/01/2011, a written agreement signed by the employer and the person providing services, on or about the date such person was engaged, which describes the services to be performed and affirms that such services are to be performed in accordance with each of the [12] criteria is *prima facie* evidence that the criteria have been met. RSA 281-A:2,VI(c). However, if the DOL finds that an employer misrepresented the employment relationship, the Commissioner can assess fines of up to \$2,500 plus \$100 per day, per employee. RSA 281-A:2,VI(d).

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?”

The “Best Practices” would include:

- Obtain as comprehensive a set of medical records as possible, including prior medicals. Determine whether these are prior injuries and whether prior carriers may be responsible for payment of benefits.
- Obtain a recorded statement from the claimant before memories fade.

- Review employer's personnel and other files on claimant to determine if Second Injury Fund is applicable.
- Identify and speak with witnesses early on in process.
- Identify whether there is potential for subrogation early on in case. Much of evidence gathered during investigation of the compensation claim may be very helpful to recovery against third party.

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

None. Causally related medical bills cannot be closed out through settlement.

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

New Hampshire does permit the therapeutic use of cannabis. RSA 126-X. A "qualifying patient" shall not be subject to arrest or prosecution for the therapeutic use of cannabis if she possesses no more than two ounces of usable cannabis or any amount of unusable cannabis. RSA 126-X:2-I. "A qualifying patient may use the cannabis on privately-owned real property only with the written permission of the property owner . . ." RSA 126-X:3. Nothing in the medical marijuana chapter exempts any person from arrest or prosecution for "being under the influence of cannabis while . . . in his or her place of employment, without the written permission of the employer or [while] operating heavy machinery or handling a dangerous instrumentality." RSA 126-X:3,II. The workers' compensation statute provides no exception to allow use of marijuana while working or to require payment for therapeutic use of marijuana prescribed for a work injury.

In Appeal of Panaggio, 172 N.H. 13 (2019) the Court held medical marijuana could be found to be "reasonable, medically necessary and causally related to the work injury" but remanded the case for a determination of whether federal criminal law prohibits carriers from paying for medical marijuana. *Id.*

63. Does your state permit the recreational risk of marijuana and what other restrictions for use and work activity in your state workers' compensation law.

Recreational use of marijuana is not legal per se, however, it has been decriminalized at certain levels. A person knowingly possessing three-quarter of an ounce or less who is over 21 years of age shall be guilty of a violation (RSA 318-B:2-c,II) and subject to a fine of \$100 for a first or

second offense, or up to \$300 for a subsequent offense within any three year period. RSA 318-B:2-c,V. If a person is 18 to 21 years of age, he shall be guilty of a misdemeanor. RSA 318-B:2-c,IV. The N.H. workers' compensation statute makes no provision for use of marijuana at work.