

## OREGON

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

Oregon Revised Statutes § 656.001 *et seq.* This chapter may be cited as the Workers' Compensation Law. Or. Rev. Stat. § 656.001.

### SCOPE OF COMPENSABILITY

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

A worker is defined as "any person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, but does not include any person whose services are performed as an inmate or ward of a state institution, or as part of the eligibility requirements for a general or public assistance grant." Or. Rev. Stat. § 656.005(30). For the purpose of determining entitlement to temporary disability benefits or permanent total disability benefits under this chapter, "worker" does not include a person who has withdrawn from the workforce during the period for which such benefits are sought. *Id.*

All workers are covered except those specifically excluded as "non-subject" workers under Or. Rev. Stat. § 656.027.

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

An "employer" is defined as a private or public entity "who contracts to pay a remuneration for and secures the right to direct and control the services of any person." Or. Rev. Stat. § 656.005(13)(a). The "contract" to pay a remuneration may be implied. *See Wallowa County v. Fordice*, 45 P.3d 963, 965 (Or. Ct. App. 2002).

A "subject employer" is defined as "every employer employing one or more subject workers in the state." Or. Rev. Stat. § 656.023. A general contractor or intermediate contractor is normally not considered the employer of a sub-contractor or its workers and, therefore, is not protected by the exclusivity provisions of Chapter 656. *Martelli v. R.A. Chambers & Assoc.*, 783 P.2d 31 (Or. Ct. App.

1989), *aff'd* 800 P.2d 766 (Or. 1990).

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

A. Traumatic or “single occurrence” claims.

An accidental injury to a person or his or her prosthetic appliances arising out of and in the course of employment requiring medical services or resulting in disability or death, is compensable. Or. Rev. Stat. § 656.005(7)(a). An injury is accidental if the result is an accident, whether or not it is due to accidental means. *Id.*

A compensable injury must be established by medical evidence supported by objective findings, with the following limitations: (1) the compensable injury must be the major contributing cause of the consequential condition; and (2) if the compensable injury combines with a pre-existing disease or condition, the resulting condition is compensable only to the extent the compensable injury is and remains the major contributing cause of the disability or need for treatment. Or. Rev. Stat. § 656.005(7)(a)(A)&(B).

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

To be compensable as an occupational disease, the condition must arise in the course of employment and must be caused by circumstances to which a worker is not ordinarily subjected or exposed other than during a period of regular, actual employment. Or. Rev. Stat. § 656.802(1). The worker cannot establish that an injury or occupational disease is compensable merely by disproving other possible explanations of how the injury or disease occurred. Or. Rev. Stat. § 656.266(1).

While the burden is normally on the worker to prove, with competent medical evidence, the causal relationship between the work environment and the occupational disease, the Oregon Court of Appeals has ruled that, in appropriate cases, inconclusive medical evidence will not defeat the claim. *Mueller v. SAIF*, 575 P.2d 673, 674 (Or. Ct. App. 1978).

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

Non-compensable injuries include those: (1) to active participants in assaults or combats which

are not connected to the job assignment and which amount to a deviation from customary duties; (2) sustained while engaging in or performing, or as the result of, any recreational or social activities primarily for the worker's personal pleasure; and (3) where the major contributing cause of which is demonstrated by preponderance of the evidence is the worker's consumption of alcoholic beverages or cannabis or the unlawful consumption of any controlled substance, unless the employer permitted, encouraged, or had actual knowledge of such consumption. Or. Rev. Stat. § 656.005(7)(b). (See answers to Questions 9 and 12-14).

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

A psychological condition arising out of or exacerbated by working conditions may be compensable as an occupational disease. Or. Rev. Stat. §§ 656.802(1), 656.802(2)(a). The worker must establish: (a) the employment conditions producing the mental disorder exist in a real and objective sense; (b) the employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles; (c) there is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community; and (d) there is clear and convincing evidence that the mental disorder arose out of and in the course of employment. Or. Rev. Stat. § 656.802(3)(a)-(d). Generally known as "stress claims," these conditions are subject to a high standard of proof.

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

A worker or dependent must give notice of an accident resulting in injury or death immediately, or not later than 90 days after the accident. Or. Rev. Stat. § 656.265(1).

After the last award or arrangement of compensation, an injured worker is entitled to additional compensation for worsened conditions resulting from the original injury. Or. Rev. Stat. § 656.273(1). A claim for additional compensation, also known as an "aggravation claim," must be filed within five years after the first notice of closure of the claim for a disabling claim, or after the date of injury provided the claim has been classified as non-disabling for at least one year after the date of acceptance. Or. Rev. Stat. § 656.273(4).

All occupational disease claims shall be filed within one year from the date the worker first discovered, or in the exercise of reasonable care should have discovered, the occupational disease; or the date the claimant became disabled or was informed by a physician that he/she was suffering from an occupational disease. Or. Rev. Stat. § 656.807(1). If the occupational disease

results in death, the claim may be filed within one year of the date the worker's beneficiary first discovered, or in the exercise of reasonable care should have discovered, that the cause of death was an occupational disease. Or. Rev. Stat. § 656.807(2).

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

In order to report a claim, notice of an accident resulting in an injury or death must be given immediately by the worker or a dependent, to the employer, but not later than 90 days after the accident. Or. Rev. Stat. § 656.265(1). The employer then must acknowledge the receipt of such notice. *Id.*

The notice does not need to be in any particular form, as long as it is in writing and appraises the employer of when, where, and how an injury has occurred. Or. Rev. Stat. § 656.265(2). A report or statement from a worker, or from the doctor of the worker and signed by the worker, can be considered notice. *Id.* The notice must be given to the employer by mail, addressed to the employer at the last-known place of business of the employer, or by personal delivery to the employer or to a foreman or other supervisor of the employer. Or. Rev. Stat. § 656.265(3). If for any reason it is not possible to do so, notice may be given to the Director of the Department of Consumer and Business Services ("the Director") and referred to the insurer or self-insured employer. *Id.*

Failure to give notice within one year of the date of the accident bars a claim unless: (a) the employer had knowledge of the injury or death; or (b) the worker died within 180 days after the date of the accident. Or. Rev. Stat. § 656.265(4). The issue of failure to give notice must be raised at the first hearing on a claim for compensation in respect to the injury or death. Or. Rev. Stat. § 656.265(5).

The Director has uniform forms for workers to report their injuries to their employers. Or. Rev. Stat. § 656.265(6). The worker's failure to use a specified form shall not, in itself, defeat the claim, if the worker has complied with the requirement that the claim be presented in writing. *Id.*

## 9. Describe available defenses based on worker conduct:

### A. Self-inflicted injury.

Intentionally self-inflicted injury or death is not compensable. Or. Rev. Stat. § 656.156(1).

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

An employer is not responsible for injury incurred during assaults or combats which are not connected to the job assignment or which amount to a deviation of customary duties. Or. Rev. Stat. § 656.005(7)(b)(A). An injury is not compensable unless it: (1) occurs in the course of employment; and (2) arises out of the employment. Or. Rev. Stat. § 656.005(7)(a). “Course of employment” deals with the time, place and circumstances of the injury. Phrases “arise out of” and “in the course of” are two elements of a single inquiry known as the “work-connection” test. *Redman Indus., Inc. v. Lang*, 943 P.2d 208, 210 (Or. 1997); *Fred Meyer, Inc. v. Hayes*, 943 P.2d 197, 200 (Or. 1997). Both elements must be satisfied, but not necessarily to the same degree. *Id.* (See answer to Questions 13 and 14).

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

An injury is not compensable if the major contributing cause of an injury is shown by a preponderance of the evidence to be the worker’s consumption of alcoholic beverages, cannabis, or the unlawful consumption of any controlled substance, unless the employer permitted, encouraged, or had actual knowledge of such consumption. Or. Rev. Stat. § 656.005(7)(b)(C).

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

Any person or entity who knowingly makes a false statement or representation for the purpose of obtaining any benefit or payment, either for themselves or any other person, or who knowingly misrepresents the amount of a payroll, or who knowingly submits a false payroll report, is subject to criminal prosecution and punishment by imprisonment of not more than one year or by a fine of not more than \$6,250, or both. Or. Rev. Stat. §§ 656.990(1), 161.635(1)(a), 161.615(1).

Insurers have statutory authority to take a credit or offset of workers’ compensation benefits previously paid against future benefits on cases where a worker admits to having obtained the previous benefits through fraud or in cases where a civil judgment or criminal conviction is entered against the worker for obtaining the previously paid benefits through fraud. Or. Rev. Stat. § 656.268(13).

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

No. An employer/insurer may raise as a defense or basis for denial of a claim if there was a prior injury and the prior injury rather than the current injury is the cause of the worker's complaints. The issue is then medical causation, regardless of notice or knowledge of the prior injury by the employer/insurer.

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

Recreational or social activities engaged in primarily for the worker's personal pleasure are not compensable. Or. Rev. Stat. § 656.005(7)(b)(B). Recreational or social activities are within the course of employment when: (1) they occur on the premises during a lunch or recreational period as a regular incident of the employment; (2) the employer brings the recreational activity within the orbit of employment; or (3) the employer derives substantial direct benefit from the recreational activity. *Colvin v. Indus. Indem.*, 730 P.2d 585, 588 (Or. Ct. App. 1986).

For example, in *Roberts v. SAIF Corp.*, 102 P.3d 752, 755 (Or. Ct. App. 2004), the court held that claimant's injury – incurred while riding a co-worker's motorcycle in the employer's parking lot – was not compensable since the activity was for the worker's own personal pleasure. Similarly, in *Geoff Saunders*, 57 Van Natta 796 (2005), the claimant injured his elbow while arm-wrestling with a coworker on the employer's break room table. Arm-wrestling was not one of the claimant's work-related duties and violated the employer's conduct code. As such, the court held that claimant's activities were "recreational, primarily for his "personal pleasure," and concluded the claimant's injury was excluded from coverage.

However, in *Liberty Nw. Ins. Corp. v. Nichols*, 64 P.3d 1152 (Or. Ct. App. 2003), the court held that broken tooth which claimant sustained while eating an employer-supplied snack at work was not incurred while engaging in or performing a recreational or social activity primarily for his personal pleasure within meaning of Or. Rev. Stat. § 656.005(7)(b)(B). The court explained that "the 'activity' the statute refers to is not the particular action that causes the injury (eating), but the activity within which that action occurs (working or not working). *Id.* at 1155 n.4. Since the claimant was working while eating, the court held that the eating was "merely incidental to work." *Id.* at 1155.

### 13. Are injuries by co-workers compensable?

The exclusion of workers' compensation benefits for a claimant's participation in an assault does not apply unless both statutory elements are met, which are that: 1) claimant was an active participant, and 2) the assault was not connected to the job. *C.W. McCallen Const. Co., Inc. v. MacDonald*, 19 P.3d 977, 979 (Or. Ct. App. 2001).

Stated another way, assault may be compensable because risk of an assault by a co-worker in the workplace is a risk to which the work environment exposes a worker when an assault is caused by circumstances associated with the work environment. *Redman Indus., Inc. v. Lang, supra*; Or. Rev. Stat. § 656.005(7). (See answer to Question 14).

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

An employer is not responsible for injury incurred during assaults or combats which are not connected to the job assignment and which amount to a deviation of customary duties. Or. Rev. Stat. § 656.005(7)(b)(A). Although the risk of an assault by a co-worker in the workplace is a risk to which the work environment exposes an employee, that fact does not necessarily lead to the conclusion that an injury resulting from an assault by a co-worker arises out of employment for workers' compensation purposes. *Panpat v. Owens-Brockway Glass Container, Inc.*, 49 P.3d 773, 776 (Or. 2002), *on remand* 71 P.3d 553 (Or. Ct. App. 2003). In *Panpat v. Owens-Brockway Glass Container, supra*, a worker of Owens-Brockway killed his former girlfriend (who was also a plant worker) while at work. The Oregon Supreme Court held that the death did not "arise out" of the worker's employment. The wrongful death claim was therefore not subject to the exclusivity provision of Workers' Compensation Law.

"When the motivation for an assault by a co-employee is an event or circumstance pertaining to the assailant and the claimant that originated entirely separate from the workplace, and the only contribution made by the workplace is to provide a place for the assault," the assault does not "arise out of employment" and is not compensable. *Redman Indus., Inc.*, 943 P.2d at 213; *see also Sisco v. Quicker Recovery*, 180 P.3d 46 (Or. Ct. App. 2008).

## BENEFITS

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

“Average weekly wage” means the average weekly wage of workers in covered employment in Oregon, as determined by the Employment Division of the Department of Human Resources, for the last quarter of the calendar year preceding the fiscal year in which compensation is paid and as computed by the Employment Division as of May 15 of each year. Or. Rev. Stat. § 656.211.

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

Temporary total disability benefits are equal to two-thirds of the worker’s wages, but may not be more than 133 percent of the worker’s average weekly wage, or less than 90 percent of the worker’s average weekly wage or \$50 a week, whichever is less. Or. Rev. Stat. § 656.210(1).

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

The first installment of compensation must be paid within 14 days after notice or knowledge of the claim if the attending physician or nurse practitioner authorized to provide compensable medical services. Or. Rev. Stat. § 656.262(4)(a). Or. Rev. Stat. § 656.245 authorizes the payment of temporary disability compensation. Written authorization is required.

**18. What is the “waiting” or “retroactive” period for temporary benefits (e.g. must be out \_\_\_ days before recovering benefits for the first \_\_\_ days)?**

No disability payment is recoverable for temporary disability during the first three calendar days after the worker leaves work or loses wages as a result of the compensable injury, unless the worker is totally disabled after the injury for a period of 14 consecutive days or unless the worker is admitted to a hospital within 14 days of the first onset of total disability. Or. Rev. Stat. § 656.210(3).

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

If there is an accepted claim, temporary total benefits continue until the first of the following occurs: (1) the worker returns to regular or modified employment; (2) the attending physician or nurse practitioner provides the worker a written release to return to regular employment; or (3) the attending physician or nurse practitioner provides the worker a written release to return to



modified employment, which is offered to the worker in writing, and the worker fails to begin such employment. Or. Rev. Stat. § 656.268(4)(a)-(c).

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

No. Or. Rev. Stat. § 656.216(2).

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

Scarring or disfigurement without the loss of use of the body or its parts is not considered a permanent disability.

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

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

Permanent Partial Disability benefits may be paid monthly at 4.35 times the rate per week as provided for compensation for temporary total disability at the time the determination is made. In no case is the payment less than \$108.75 per month. Or. Rev. Stat. § 656.216 (1). A worker may also elect to have her permanent partial disability benefits paid in a lump sum.

If the worker has been released to regular work by the attending physician or nurse practitioner, or has returned to regular work at the job held at the time of injury, disability benefits will be for impairment only. Or. Rev. Stat. § 656.214 (2)(a). Impairment benefits are expressed as a percentage of the whole person, ranging from a minimum of 1 percent (for loss of a toe other than the “great toe”) to a maximum of 94 percent (for partial loss of vision in both eyes). Or. Rev. Stat. § 656.214(3). Impairment benefits are determined by multiplying the impairment value times 100 times the average weekly wage. Or. Rev. Stat. § 656.214(2)(a).

If the worker has not been released to regular work, or has not returned to regular work at the job held at the time of injury, disability benefits will be for impairment and work disability. Or. Rev. Stat. § 656.214(2)(b). Work disability benefits will be determined by multiplying the impairment

value, as modified by factors of age, education and adaptability to perform a given job, times 150 times the worker's weekly wage for the job at injury as calculated under Or. Rev. Stat. § 656.210(2). *Id.* The factor for the worker's weekly wage used for the determination of the work disability may be no more than 133 percent or not less than 50 percent of the average weekly wage. *Id.*

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

All disability ratings in Oregon are set forth in degrees of impairment and not determined based on the "whole person." (See answer to Question 22 A).

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

Workers who have sustained compensable injuries that result in, or are likely to result in, permanent disability may be eligible to receive vocational assistance. Or. Rev. Stat. § 656.340(6)(a). Workers are entitled to receive temporary disability compensation or special maintenance after becoming medically stationary while actively engaged in an authorized training program. Or. Rev. Stat. § 656.340. The benefits will be proportionately reduced by any sums earned during the training. Or. Rev. Stat. § 656.268(2).

Further, a worker who has sustained a compensable injury must be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. Or. Rev. Stat. § 659A.043. In the alternative, a worker who has sustained a compensable injury which prevents that worker from performing the duties of the worker's former regular employment must, upon the worker's demand, be reemployed by the worker's employer at employment which is "available and suitable." Or. Rev. Stat. § 659A.046.

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

Permanent total disability requires a showing that the worker's disability permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. Or. Rev. Stat. § 656.206(1)(d). The worker has the burden of proving total disability status and must establish a willingness to seek regular gainful employment and that he or she has made reasonable efforts to obtain such employment. Or. Rev. Stat. § 656.206(3). A finding of permanent total disability results in a monthly benefit so long as the worker remains permanently and totally

disabled. Permanent total disability status may be rescinded if the worker ceases to meet the criteria for that status. Benefits are equal to two-thirds of wages, not to exceed 133 percent of the state average weekly wage or less than the amount of 33 percent of the state average weekly wage. Or. Rev. Stat. § 656.206(2) Rev. Effective: Jan. 1, 2018.

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

**A. Funeral expenses.**

The cost of burial, including transportation of the body, is paid but may not exceed twenty (20) times the weekly average wage in any case. Or. Rev. Stat. § 656.204(1).

**B. Dependency claims.**

When a worker dies from an on-the-job injury, occupational disease, or while permanently and totally disabled, the worker's surviving spouse, children, and other dependents are entitled to death benefits. The surviving spouse is entitled to monthly benefits equaling 4.35 times two-thirds of the average weekly wage until remarriage. Or. Rev. Stat. § 656.204(2)(a). Upon remarriage or cohabitation for an aggregate period for more than one year from which a child has resulted, the surviving spouse must be paid 36 times the monthly benefit in a lump sum. Or. Rev. Stat. § 656.204(2)(b)-(c).

In addition, a surviving spouse with children of the deceased will receive 4.35 times 25 percent of the weekly average wage per month for each child under 19 years of age. The total benefits provided may not exceed 4.35 times 133-1/3 percent of the average weekly wage. If the sum of the individual benefits exceeds this maximum, the benefit for each child must be reduced proportionally. Or. Rev. Stat. § 656.204(3)(a)-(b).

If a worker leaves a dependent, a monthly payment must be made to each dependent that is equal to 50 percent of the average monthly support the dependent actually received from the worker during the 12 months preceding the occurrence of the accidental injury. However, the total benefits may not exceed 4.35 times 10 percent of the average weekly wage. If the sum of the individual benefits exceeds this maximum, the benefit for each dependent must be reduced proportionally. If a dependent is under the age of 19 years at the time of the accidental injury, the payment to the dependent must cease when the dependent becomes 19 years of age. The payment to any dependent must cease under the same circumstances that would have terminated the dependency had the injury not happened.

However, the benefit is the same regardless of the child's dependence on the worker's surviving spouse or age at the time of the worker's death Or. Rev. Stat. §656.204(4)(a)-(b).

If a child or dependent is between 19 and 26 years of age at the time of a worker's death, or becomes 19 years of age after the worker's death, monthly benefits must be paid for not more than 48 months until the age of 26 during a period in which the child or dependent is completing secondary education, is obtaining a general educational development certificate or is attending a program of higher education. Or. Rev. Stat. §656.204(6)(a). If a child or dependent who is eligible for benefits while such a program does not have a surviving parent, the child or dependent must receive 4.35 times 66-2/3 percent of the average weekly wage. Or. Rev. Stat. §656.204(6)(b). Rev. Effective: Jan. 1, 2018.

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

Under Oregon law, a Reemployment Assistance Program has been established for the benefit of employers and workers. Or. Rev. Stat. § 656.622.

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

A worker has five years from the date of the first notice of closure made for a disabling claim. Or. Rev. Stat. § 656.273(4)(a). If no determination order was issued and the injury was non-disabling (meaning no time loss benefits accrued), the worker must file a claim within five years from the date of the original injury. Or. Rev. Stat. § 656.273(4)(b). A claim for aggravation must be in writing in a form and format prescribed by the Director and signed by the worker or the worker's representative as well as the worker's attending physician. Or. Rev. Stat. § 656.273(3). The employer or insurer shall process the claim when it receives a completed aggravation form. *Id.* The Director's forms are available on the DCBS website.

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

Attorney fees are specifically authorized by statute and administrative rule. Or. Rev. Stat. § 656.382 *et seq.* The general principle for attorney fees is that a fee will be allowed only when it is determined that: 1) the employer refused to pay compensation due under an order of an Administrative Law Judge ("ALJ"), board, or court, or otherwise unreasonably resisted payment of compensation; 2) a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer, and the

ALJ, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced; or 3) the employer initiated a hearing for purposes of delay. Or. Rev. Stat. § 656.382. The amounts of fees recoverable are set forth in regulations.

## EXCLUSIVITY/TORT IMMUNITY

### 29. Is the compensation remedy exclusive?

#### A. Scope of immunity.

Generally, a worker's sole remedy against an employer for a "compensable" injury which occurs during the course and scope of a worker's employment, is reimbursement under the Workers' Compensation Law. Or. Rev. Stat. § 656.018.

Also, an employer may not be protected where the worker's injury or death results from an incident of workplace violence unrelated to the worker's job. In *Panpat v. Owens-Brockway Glass Container, Inc.*, 49 P.3d 773 (Or. 2002), a worker of Owens-Brockway killed his former girlfriend (who was also a plant worker) while at work. The Oregon Supreme Court held that the death did not "arise out" of the worker's employment. The wrongful death claim was therefore not subject to the exclusivity provision of Workers' Compensation Act. (See answers to Questions 9 and 12-14).

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

If injury or death results to a worker from the worker's deliberate intention to produce such injury or death, then neither the worker nor the surviving spouse, child or dependent of the worker shall receive any payment whatsoever under this chapter. Or. Rev. Stat. § 656.156(1).

If injury or death results from the employer's deliberate intention, then the worker or beneficiaries are entitled to compensation and may also pursue any other remedy against the employer for damages over the amount of compensation payable. Or. Rev. Stat. § 656.156(2).

Workers' Compensation Law immunity does not extend to legal action against third parties where the injury to a worker is due to the negligence or wrong of a third person not in the same employ. Or. Rev. Stat. § 656.154.

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

The employer may be subject to penalties or assessments for violation of applicable rules under the Oregon Safety and Health Act ("OSHA") or regulations which resulted in injury to the worker. Oregon Safe Employment Act, Or. Rev. Stat. § 654.001 *et seq.*

Effective January 1, 2018, the DCBS director or an authorized representative, when setting maximum penalties under ORS 654.025(2), shall consider, but may not exceed, the maximum penalties under the federal Occupational Safety and Health Act.

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

A minor is included under the definition of a worker even if unlawfully employed. Or. Rev. Stat. § 656.005(30). Absent either a certificate authorizing employment of the minor or a good faith belief that the minor was of age, the minor is entitled to compensation benefits, and the employer is subject to a penalty equal to 25 percent of the amount paid or set apart under statute, but not less than \$100 or more than \$500, payable to the Consumer and Business Fund. Or. Rev. Stat. § 656.132(3). Potential penalties may also be assessed by the Oregon Bureau of Labor and Industries, which administers Oregon's child labor laws.

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

Penalties (up to 25 percent of the amount due to the worker) and reasonable attorney fees up to \$4,000, absent a showing of extraordinary circumstances, are to be paid if the employer/insurer unreasonably "refuses" or "delays" payment of compensation, or delays acceptance or denial of a claim. Or. Rev. Stat. § 656.262(11)(a).

**33. What is the exposure for terminating a worker who has been injured?**

It is a violation of Oregon Civil Rights laws to terminate a worker who has invoked rights available under workers' compensation law or has testified under workers' compensation provisions. Or. Rev. Stat. § 659A.109 (formerly Or. Rev. Stat. § 659.410).

### THIRD PARTY ACTIONS

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

Yes. Or. Rev. Stat. § 656.578.

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

Under Or. Rev. Stat. § 656.018(3), a worker may not sue a co-worker under workers' compensation provisions unless the act causing the injury is intentional.

#### 36. Is subrogation available?

Yes. The payor has a lien against any cause of action the worker may have against a third person or non-complying employer. Or. Rev. Stat. § 656.580.

### MEDICALS

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

Medical bills must be paid or denied within 60 days of receipt and failure to pay or deny will result in a penalty assessment. Or. Rev. Stat. §656.262.

#### 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 the claim constitutes a release of medical records. The employer has a right to obtain the worker's medical records, including any past history of complaints or treatments similar to that presented in the claim. Or. Rev. Stat. § 656.252. Physicians and nurse

practitioners treating the worker are obligated to submit a variety of notices and reports to the employer concerning the status of the claim. Or. Rev. Stat. § 656.252(2). Administrative rules provide further information as well as penalties against providers who fail to comply with these reporting requirements.

The employer may also require the worker to submit to an independent medical examination (IME) regarding the claim. Or. Rev. Stat. § 656.325(1). The exam is conducted by a physician selected from a list of qualified physicians established by the Director of the Department of Consumer and Business Services. Or. Rev. Stat. § 656.325(1)(b).

Monetary penalties may be assessed against workers who are not receiving temporary disability benefits and fail to attend an IME. Or. Rev. Stat. § 656.325(1)(b)(B). Sanctions may be imposed against medical services providers who fail to provide diagnostic records required for an IME in a timely manner. Or. Rev. Stat. § 656.325(1)(b)(C).

The physician-patient privilege does not apply in workers' compensation contested claim hearings. *Booth v. Tektronix*, 823 P.2d 402, 406 (Or. 1991).

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

The worker may choose an attending doctor, physician, or nurse practitioner within the State of Oregon. Or. Rev. Stat. § 656.245(2)(a). The worker may choose the initial attending physician or nurse practitioner and may subsequently change attending physician or nurse practitioner two times without approval from the Director. *Id.* If the worker thereafter selects another attending physician or nurse practitioner the insurer or self-insured employer may require the Director's approval of the selection and, if requested, the Director shall determine with the advice of one or more physicians, whether the selection by the worker shall be approved. *Id.* The decision of the Director is subject to a contested case review. *Id.* The worker also may choose an attending doctor or physician in another country or in any state or territory or possession of the United States with the prior approval of the insurer or self-insured employer. *Id.*

Except as otherwise provided for workers subject to a managed care contract, "attending physician" means a doctor, physician, or physician's assistant who is primarily responsible for the treatment of a worker's compensable injury and who is either a medical doctor, an osteopath, a podiatrist, or an oral/maxillofacial surgeon, or who is, for a cumulative total of 60 days from the first visit on the initial claim or for a cumulative total of 18 visits (whichever occurs first), a chiropractor, a physician's assistant, or a naturopath. Or. Rev. Stat. § 656.005 (12)(b). A worker



cannot be denied compensation or benefits because he or she was treated by prayer or spiritual means. Or. Rev. Stat. § 656.010.

As discussed above, the employer may require the worker to submit to a medical examination regarding the claim by a physician chosen by the employer. Or. Rev. Stat. § 656.325.

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

Compensable medical treatment includes medical, surgical, hospital, nursing, ambulance and other related services, drugs, medicine, crutches and prosthetic appliances, braces and supports, and, where necessary, physical restorative services. Or. Rev. Stat. § 656.245(1)(b). "Physical restorative services" encompasses physical therapy and other therapeutic, recuperative and restorative methods and devices. Medical treatment the Director finds to be unscientific, unproven, outmoded or experimental may be excluded. Or. Rev. Stat. § 656.245(3). The decision to exclude treatment is subject to review under Or. Rev. Stat. § 656.704. *Id.*

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

Neither statute nor regulation delineates which devices are covered. A showing of medical necessity and causal relationship to the compensable injury is generally required.

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

Vehicle and/or home modifications are not mentioned, but may be covered upon a showing of medical necessity and causal relationship to the compensable injury.

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

Medical fee schedules are promulgated by rule of the Director, based on several factors including: (a) the current procedural codes and relative value units of the Department of Health and Human Services Medicare Fee Schedules for all medical service provider services included therein; (b) the average rates of fee schedules of the Oregon health insurance industry; (c) a reasonable rate of markup for the sale of medical devices or other medical services; (d) a commonly used and accepted medical service fee schedule; or (e) the actual cost of providing medical services. Or. Rev. Stat. § 656.248(1)(a)-(e).

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

Or. Rev. Stat. § 656.260 governs certification of managed care organizations and their procedures as well as peer review, service utilization and contract review for managed health care providers. A potential managed care provider must submit a written application to, and its methods and procedures must be approved by, the Director of Oregon's Department of Health and Human Services.

**PRACTICE/PROCEDURE**

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

Any party to a worker's claim, including the Director of the Department of Consumer and Business Services, may within certain time limitations request a hearing on any question concerning the claim. Or. Rev. Stat. § 656.283(1). The limited formal requirements for a hearing request include that it: (1) be in writing; (2) be signed by or on behalf of the party requesting the hearing; and (3) include the party's address. Or. Rev. Stat. § 656.283(2). Administrative rules also require that the party seeking the hearing state the issues to be resolved.

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

**B. Administrative level.**

Upon request (see answer to Question 45), a hearing in front of an ALJ on any question concerning the claim may be held. Upon conclusion of the hearing, or prior thereto with concurrence of the parties, the ALJ shall decide the matter and make an order in accordance with his/her determination within 30 days after the hearing. Or. Rev. Stat. § 656.289(1). This order is considered "final" unless one of the parties requests review by the Workers' Compensation Board ("the Board") within 30 days after the date the order is mailed to the parties. Or. Rev. Stat. § 656.289(3).

When review has been requested, the record of such oral proceedings at the hearings before the ALJ shall be transcribed at the expense of the Board and provided to the Board along with a list of all exhibits received by the ALJ. Or. Rev. Stat. § 656.295(3). The review shall be based upon the submitted records and such oral or written argument as it may receive. Or. Rev. Stat. § 656.295(5).

Notice of the review shall be given to the parties by mail and the Board shall set a date for review

not later than 90 days after its receipt of the initial request for review. Or. Rev. Stat. § 656.295(4). The Board may affirm, reverse, modify or supplement the ALJ's order and make such disposition of the case as it determines to be appropriate. Or. Rev. Stat. § 656.295(6). The Board must make its decision within 30 days after the review. *Id.* An order of the Board is final unless one of the parties appeals to the Court of Appeals within 30 days after a copy of the order is mailed to the parties. Or. Rev. Stat. § 656.295(8). Practically, it is not uncommon for the ALJs and the Board to take longer than 30 days to issue the opinion.

**B. Trial court.**

Not applicable.

**C. Appellate.**

The legislature eliminated the Court of Appeals' *de novo* review in workers' compensation cases replacing it with Administrative Procedure Act ("APA")-type review. Or. Rev. Stat. § 656.298(7). The review by the Court of Appeals must be on the entire record forwarded by the Board and as provided in Or. Rev. Stat. § 183.482(7). *Id.* There is no right of appeal, but an aggrieved party may petition for review by the Oregon Supreme Court. That court only accepts cases containing important or legal questions.

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

Settlement of any or all matters regarding a claim, except for medical services and/or benefits, may also be resolved by disposition. Or. Rev. Stat. § 656.236. The disposition must be filed with the Board and will be approved unless the ALJ who mediated the agreement or the Board finds the disposition is unreasonable as a matter of law, it is the result of an intentional misrepresentation of material fact, or within 30 days of submitting the disposition, the worker, insurer, or self-insured employer requests that it be disapproved. Or. Rev. Stat. § 656.236(1)(a)(A)-(C). An order approving disposition of a claim is not subject to review, however an order disapproving a disposition is subject to review by the Court of Appeals. Or. Rev. Stat. § 656.236(2).

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

No. Or. Rev. Stat. § 656.245(1)(a).

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

Yes. Or. Rev. Stat. § 656.289(4).

**RISK FINANCE FOR WORKERS' COMPENSATION**

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

Every employer must maintain assurance with the Department of Consumer and Business Services that workers will receive compensation for compensable injuries by qualifying as: (1) a carrier-insured employer; or (2) a self-insured employer. Or. Rev. Stat. § 656.017(1).

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

**A. For individual entities.**

To qualify as self-insured, the employer must demonstrate to the Department of Consumer and Business Services that it has: (1) an adequate staff to process claims promptly; and (2) the financial ability to make prompt payment of compensation that may become due. Or. Rev. Stat. § 656.407(1). Proof of financial ability is made by a showing of funds in an amount not less than the employer's normal expected annual claim liabilities and in no event less than \$100,000. Or. Rev. Stat. § 656.407(2).

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

The Director may certify five or more employers in the same industry as a self-insured employer group, if: (1) as a group they meet the requirements of a self-insured employer; (2)(a) they as a group have insurance with a retention of \$100,000 or more, have a combined net worth of \$1 million or more, or, (b) if insurance is less than \$100,000, they have a combined net worth at least equal to the proportion of \$1 million that the retention bears of \$100,000; (3) the group is likely to improve accident prevention and claims handling for the employer; (4) each employer agrees in writing that it will be jointly and severally liable for payment due to the Department of Consumer and Business Services incurred by a member of the group; (5) the group is organized as a corporation or cooperative; (6) the group has designated an entity responsible for centralized

claims processing and other administrative functions; and (7) the group has presented a method approved by the Director to notify the Department of Consumer and Business Services of an employer's commencement or termination of membership from the group and its effect on the net worth of the group. Or. Rev. Stat. § 656.430(7).

Effective January 1, 2018, public bodies that do not have the statutory authority to pass ordinances, including some special districts, to form a self-insured employer group for workers' compensation if they have already established a self-insurance program for tort liability or property damage. Previously, self-insured employer groups made up of public employers were required to be organized as an intergovernmental entity ratified by ordinance.

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"?

Under Oregon law, a "worker" means *any* person, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, subject to the direction and control of an employer. Or. Rev. Stat. § 656.005(30) (emphasis supplied). An "illegal alien" is described in Oregon law as an "undocumented alien." There is no distinction in the statutes between legally authorized workers and undocumented aliens. There is also no case law in Oregon suggesting that undocumented aliens are not considered "workers" under the Oregon statute and in fact, there is at least one case awarding workers' compensation benefits to an undocumented alien. See *Aguilar v. Simplot Co.*, 742 P.2d 709 (Or. Ct. App. 1987). In Oregon, there is an absolute right to be paid for work performed.

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

Oregon workers' compensation law has not addressed the question of whether terrorist acts or injuries are covered or excluded under workers' compensation.

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.

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).

When a worker elects to bring an action against a third party or a non-complying employer under Or. Rev. Stat. § 656.578, the paying agency has a lien against the cause of action which is preferred to all claims except the cost of recovering the damages. Or. Rev. Stat. § 656.580. “Paying agency” is defined as “the self-insured employer or insurer paying benefits to the worker or beneficiaries.” Or. Rev. Stat. § 656.576. This definition appears to include Medicaid if Medicaid paid benefits to the worker or beneficiaries. However, the Oregon Supreme Court has held that the Workers’ Compensation Board has the authority to determine who is a “paying agency” entitled to a share of settlement proceeds. *SAIF Corp. v. Wright*, 817 P.2d 1317, 1320 (Or. 1991). On remand, the Oregon Court of Appeals held that the insurer must be paying benefits at the time of a settlement or distribution in order to qualify as a “paying agency.” *SAIF Corp v. Wright*, 832 P.2d 1238, 1240 (Or. Ct. App. 1992).

The procedures for the paying agency to recover from third persons and non-complying employers is provided for in Or. Rev. Stat. §§ 656.583 to 656.596. The paying agency may require the worker, other beneficiary or legal representative of a deceased worker to exercise the election to bring an action against a third party or a non-complying employer by serving a written demand on the worker, other beneficiary or legal representative. Or. Rev. Stat. § 656.583(1). Unless the election is made within 60 days from the receipt of the demand or unless an action is commenced within the time granted by the paying agency, the worker, beneficiary or legal representative, is deemed to have assigned the cause of action to the paying agency. Or. Rev. Stat. § 656.583(2).

Any compromise by the worker, beneficiary or legal representative of the right of action against a non-complying employer or a third party is void unless made with the written approval of the paying agency or, if there is a dispute between the parties, by order of the Workers’ Compensation Board. Or. Rev. Stat. § 656.587.

An election not to proceed against the non-complying employer or a third party operates as an assignment to the paying agency of the cause of action. Or. Rev. Stat. § 656.591(1). The paying agency may then bring an action in the name of the injured worker or other beneficiaries. *Id.* The sum recovered by the paying agency in excess of its expenses in making the recovery and the amount expended by the paying agency for compensation, first aid or other medical, surgical or hospital service, together with the present value of the monthly payments of compensation to

which the worker or other beneficiaries may be entitled, shall be paid to the worker or other beneficiaries. Or. Rev. Stat. § 656.591(2).

If the worker or the beneficiaries elect to recover damages from the employer or third person, notice shall be given to the paying agency. Or. Rev. Stat. § 656.593(1). The paying agency shall also be given notice of the name of the court in which such action is brought, and a service of such notice on the paying agency shall be filed with the clerk of the court but shall not be a part of the record except to give notice to the defendant of the lien of the paying agency. *Id.* The proceeds of any damages recovered from an employer or third person by the worker or beneficiaries shall be subject to a lien of the paying agency for its share of the proceeds. *Id.*

The total proceeds shall be distributed as follows: (a) costs and attorney fees not to exceed the advisory schedule of fees established by the Workers' Compensation Board; (b) the worker or the beneficiaries shall receive at least one-third of the balance of such recovery; (c) the paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to-be-expected future expenditures for compensation and other costs of the worker's claim; (d) the balance of the recovery shall be paid to the worker or the beneficiaries. Or. Rev. Stat. § 656.593(1). Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the Board. *Id.*

The amount retained by the worker or the beneficiaries of the worker shall be in addition to the compensation or other benefits to which such worker or beneficiaries are entitled under workers' compensation. Or. Rev. Stat. § 656.593(2).

Any third-party case may be settled with the approval of the paying agency. Or. Rev. Stat. § 656.593(3). The paying agency is authorized to accept such a share of the proceeds as may be just and proper and the worker or the beneficiaries shall receive the amount to which the worker would be entitled for a recovery under Or. Rev. Stat. § 656.593(1) and (2). *Id.* Any conflict as to what may be a just and proper distribution shall be resolved by the Board. *Id.*

The Department of Consumer and Business Services shall be repaid for its expenditures from the proceeds recovered by the paying agency in an amount proportional to the amount of the Department's reimbursement of the paying agency's costs. Or. Rev. Stat. § 656.593(5). All moneys received by the Department shall be deposited in the same fund from which the paying agency's costs originally had been reimbursed. *Id.*

Prior to and instead of the distribution of proceeds as described in Or. Rev. Stat. § 656.593(1), when the worker or the beneficiaries are entitled to receive payment pursuant to a judgment or a settlement in the third-party action in the amount of \$1 million or more, the worker or the beneficiaries may elect to release the paying agency from all further liability on the workers'

compensation claim, thereby canceling the lien of the paying agency as to the present value of its reasonably expected future expenditures for workers' compensation and other costs of the worker's claim, if certain conditions as stated in the statute are met as part of the claim release. See Or. Rev. Stat. § 656.593(6)(a)-(g).

When a release of further liability, as provided in Or. Rev. Stat. § 656.593(6), has been filed, and when payment to the paying agency has been made, the effect of the release is that the worker or beneficiaries shall have no further right to seek benefits pursuant to the original claim, or any independent workers' compensation claim regarding the same circumstances, and the claim shall not be reasserted, re-filed or reestablished through any legal proceeding. Or. Rev. Stat. § 656.593(7).

If no workers' compensation claim has been filed or accepted at the time a worker or the beneficiaries of a worker recover damages from a third person or non-complying employer, the amount of the damages shall constitute an offset against compensation due the worker or beneficiaries for the injuries for which the recovery is made to the extent of any lien that would have been authorized by Or. Rev. Stat. §§ 656.576 to 656.596 if a workers' compensation claim had been filed and accepted at the time of recovery of damages. Or. Rev. Stat. § 656.596(1).

The offset shall be recoverable from compensation payable to the worker, the worker's beneficiaries and the worker's attorney. Or. Rev. Stat. § 656.596(2). No compensation payments shall be made to the worker, the worker's beneficiaries or the worker's attorney until the offset has been fully recovered. *Id.*

**The worker or the beneficiaries shall notify the paying agency or potential paying agency of the amount of any damages recovered from a third person or non-complying employer at the time of recovery or when the worker or the beneficiaries of a worker file a workers' compensation claim that is subject to Or. Rev. Stat. §§ 656.576 to 656.596. Or. Rev. Stat. § 656.596(3).**

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

The Health Insurance Portability and Accountability Act ("HIPAA"), 45 C.F.R. parts 160-164 and 65 F.R. 82462, provide 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.

Insurers and claims agents must maintain the confidentiality of worker medical and vocational claim records. Or. Rev. Stat. § 656.360. Worker medical and vocational claim records may be disclosed under the following circumstances:

- A. Disclosure is made with the consent of the worker or, if deceased, the



worker's beneficiary

- B. Disclosure is made because it is reasonably necessary for the insurer or the claims agent to manage, defend, or adjust the claim, or to perform any other function arising out of the insurer's or agent's delineated statutory or contractual duties
- C. **Disclosure is made to detect or prevent criminal activity, fraud, material misrepresentation or non-disclosure;**
- D. **Disclosure is made pursuant to a written agreement that requires the receiving party to maintain confidentiality; or**
- E. As otherwise required or permitted by law. Or. Rev. Stat. § 656.360(1)-(5).

Violation of the confidentiality provisions may subject the insurer or claims agent to civil liability. There is no liability for defamation, invasion of privacy or negligence if: (1) the insurer or agent discloses records in accordance with Or. Rev. Stat. § 656.360; and (2) the disclosure or provision of false information is not made with malice or willful intent to injure. Or. Rev. Stat. § 656.362.

To date, there are no cases that have interpreted the language or discussed the interplay between these statutes, general discovery statutes and the HIPAA, 42 U.S.C. § 201 *et. seq.*

HIPAA generally requires that a covered entity may disclose protected health information in response to a subpoena, discovery request or other civil process only after obtaining "satisfactory assurances" that the requesting party has made a reasonable effort to notify the patient of the disclosure in writing or obtain a qualified protective order limiting the use of the information. The patient must be given a reasonable opportunity to object and, if necessary, challenge the disclosure in court or in another tribunal.

Oregon Rules of Civil Procedure ("ORCP") 55 H establishes the method by which "individually identifiable health information" may be obtained from health care providers, health plans, employers, or health care clearinghouses. The statute provides that the issuing party must give at least 14-days notice to the person whose records are sought before serving the subpoena on the hospital, only if the records are being subpoenaed to the issuing attorney. ORCP 55 H(2)(c). ORCP 55 H(2) provides that if disclosure of requested records is restricted or limited by state or federal law, protected records shall not be disclosed in response to a subpoena unless the requesting party has complied with the applicable law.

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

“Independent contractor” is defined as a person who provides services for remuneration and who, from the provision of the services, is 1) free from the direction and control over the means and manner of providing the services (subject only to the right of the person for whom the services are provided to specify the desired results); and 2) customarily engaged in an independently established business (with certain exceptions). Or. Rev. Stat. §§ 656.005(31), 670.600(2).

Independent contractors are not considered “subject workers,” however, an independent contractor may submit a written application to an insurer to become entitled as a “subject worker” to compensation benefits. Or. Rev. Stat. § 656.128(1). Thereupon, the insurer may accept such application and fix a classification and an assumed monthly wage at which such person shall be carried on the payroll as a worker for purposes of workers’ compensation computations. *Id.*

When the application is accepted, the independent contractor is subject to the provisions and entitled to workers’ compensation benefits. Or. Rev. Stat. § 656.128(2). The independent contractor shall promptly notify the insurer whenever his or her status as an employer of subject workers changes. *Id.* Any subject worker employed by the independent contractor after the effective date of the election of the independent contractor shall, upon being employed, be considered covered automatically by the same guaranty contract. *Id.*

A worker may be considered both a subject worker and an independent contractor. In *Day v. Advanced M & D Sales, Inc.*, 86 P.3d 678 (Or. 2004), a worker, who was both an employee and an independent contractor for the same employer, first filed a claim for workers’ compensation benefits and then attempted to withdraw the claim after filing suit against the employer for negligence and failure to comply with Employer Liability Law. The employer asserted a defense based on various forms of estoppel, given the exclusive remedy provision of the Workers’ Compensation Act. The Oregon Supreme Court held that estoppel did not bar the claimant’s action against the employer. The court reasoned that the Workers’ Compensation Act’s rapid “pay now, litigate later” approach allows for the possibility that new information later may affect a claimant’s view regarding the compensability of the claim.

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

Oregon law provides specific provisions for “Worker Leasing Companies.” A “worker leasing company” is defined as “a person who provides workers, by contract and for a fee, to work for a client but does not include a person who provides workers to a client on a temporary basis.” Or. Rev. Stat. § 656.850(1)(a). A person performing services as a worker leasing company must

obtain a license from the Director. Or. Rev. Stat. § 656.850(2).

When a worker leasing company provides workers to a client, the worker leasing company must provide workers' compensation coverage for those workers and any subject workers employed by the client unless, during the term of the lease arrangement, the client has proof of coverage on file with the Director that extends coverage to subject workers employed by the client and any workers leased by the client. Or. Rev. Stat. § 656.850(3).

When a worker leasing company provides subject workers to work for a client and also provides workers' compensation coverage for those workers, the worker leasing company must notify the Director in writing. Or. Rev. Stat. § 656.850(5). The notification shall be given in such manner as the Director may prescribe. *Id.*

A worker leasing company may terminate its obligation to provide workers' compensation coverage for workers provided to a client by giving to the client and the Director written notice of the termination. *Id.* A notice of termination shall state the effective date and hour of the termination, but the termination shall be effective not less than 30 days after the notice is received by the Director. *Id.* Notice to the client must be given by mail, addressed to the client at the client's last-known address. *Id.* If the client is a partnership, notice may be given to any of the partners. *Id.* If the client is a corporation, notice may be given to any agent or officer of the corporation upon whom legal process may be served. *Id.*

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?**

Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. Financial exposure to workers' compensation is an expensive and complex challenge for all businesses. The best means for reducing and eliminating that 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?**

Oregon permits the use of medical marijuana, but if a worker's injury is caused by the worker's consumption of alcohol, cannabis, or the unlawful consumption of a controlled substance, it is not compensable.

Effective April 21, 2017, Senate Bill 302 amended the Uniform Controlled Substances exclude cannabis from the definition of a controlled substance. The bill required change throughout the Oregon Revised Statutes, adding marijuana or cannabis where language already refers to alcohol, illegal drugs, or controlled substances.

Because marijuana was excluded from the definition of a controlled substance, the workers' compensation rules were amended to address the impact this definitional change on the compensability of workers' compensation claims involving marijuana.

The new rule clarifies that an injury is not compensable if the major contributing cause of an injury is shown by a preponderance of the evidence to be the worker's consumption of alcoholic beverages, cannabis, or the unlawful consumption of any controlled substance, unless the employer permitted, encouraged, or had actual knowledge of such consumption. The statute did not previously make a specific reference to cannabis. Or. Rev. Stat. § 656.005(7)(b)(C).

**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?**

Please see the response to Question #61. No designation between recreational and medical marijuana use is made in Oregon's workers' compensation law.

The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers' compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers' Compensation attorney for your state, listed below: