FOR MORE INFORMATION

HALL & EVANS, L.L.C.
Denver, Colorado
www.hallevans.com

Douglas J. Kotarek, Esq.
kotarekd@hallevans.com

Matthew R. Martinez, Esq.
martinezm@hallevans.com.com

ALFA International
THE GLOBAL LEGAL NETWORK

MONTANA

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

§§ 39-71-101 to -4004, M.C.A.

NOTE: Unless otherwise indicated, all statutory references are to laws in effect as of January 2021. The Montana Supreme Court has consistently held that the statutes in effect as of the time of the claimant's injury control all benefit determinations. See, e.g., Iverson v. Argonaut Ins. Co., 198 Mont. 340, 342, 645 P.2d 1366 (1982). Consult local counsel to determine laws applicable to any specific injury.

SCOPE OF COMPENSABILITY

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

Except as provided in § 39-71-401(2), M.C.A., the Workers' Compensation Act applies to all employers and to all employees. § 39-71-401(1), M.C.A. *Effective until October 1, 2021*, an "employee" or "worker" is defined as follows:

> Each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. The terms include aliens and minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations, except those officers identified in 39-71-401(2), while rendering actual service for the corporations for pay. Casual employees, as defined by 39-71-116, are included as employees if they are not otherwise covered by workers' compensation and if an employer has elected to be bound by the provisions of the compensation law for these casual employments, as provided in 39-71-401(2). Household or domestic employment is excluded.

§ 39-71-118(1)(a), M.C.A.

"Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer." § 39-71-401(1), M.C.A. The Workers' Compensation Act does not apply to the following employments:

(a) household or domestic employment;

(b) casual employment;

(c) an employer's dependent family member for whom an exemption may be claimed

under the Internal Revenue Code;

(d) certain employments of sole proprietors, working members of a partnership, limited liability partnership, or member-managed limited liability company;

(e) a real estate, securities, or insurance salesperson paid solely by commission;

(f) employment as a direct seller as defined by 26 U.S.C. 3508;

(g) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States;

(h) a person performing services in return for aid or sustenance only, except volunteers under 67-2-105;

(i) employment covered by the FELA;

(j) officers at an amateur athletic event;

(k) a newspaper carrier or freelance correspondent if the person acknowledged the services are not covered;

(l) cosmetologist's and barber's services;

(m) a person who is employed by an enrolled tribal member or an entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted within the boundaries of an Indian reservation;

(n) a jockey who is licensed by the board of horseracing if the jockey has acknowledged in writing that he or she is not covered under the Workers' Compensation Act while performing services as a jockey;

(o) a trainer, assistant trainer, exercise person, or pony person who is licensed by the board of horseracing while on the grounds of a licensed race meet;

(p) an employer's spouse for whom an exemption based on marital status may be claimed by the employer under 26 U.S.C. 7703;

(q) a person who performs services as a petroleum land professional;

(r) certain officers of a quasi-public or a private corporation or, except as provided in subsection (3), a manager of a manager-managed limited liability company;

(s) an officer or a manager of a ditch company as defined in 27-1-731;

(t) service performed by a minister of a church in the exercise of the church's ministry or by a member of a religious order in the exercise of duties required by the order;

(u) service performed to provide companionship services or respite care when employed directly by a family member or legal guardian;

(v) a person performing the services of an intrastate or interstate common or contract motor carrier when hired by a broker or freight forwarder;

(w) a person who is not an employee or worker in this state as defined in 39-71-118(8);

(x) a person who is working under an independent contractor exemption certificate;

(y) an athlete by or on a team or sports club engaged in a contact sport;

(z) a musician performing under a written contract.

§ 39-71-401(2), M.C.A.

Sole proprietors, working members of partnerships, working members of limited liability companies, or working members of a member-managed limited liability company may elect to be exempt from the Act by obtaining an independent contractor exemption certificate from the Department of Labor. Approval of the application is conclusive as to the status of the applicant as an independent contractor and precludes the applicant from subsequently seeking benefits under the Act. Consult § 39-71-401, M.C.A., for conditions of exclusion.

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

"Employer" is defined in § 39-71-117, M.C.A. to include:

the state; each county, city, city school district, irrigation district, and all other districts established by law; all public- and quasi-public corporations and public agencies; each person; each prime contractor; each firm, voluntary association, limited liability company, limited liability partnership, and private corporation, including any public service corporation and including an independent contractor who has a person in service under an appointment or contract of hire; the legal representative, receiver, or trustee of any deceased employer;

any association, corporation, limited liability company, limited liability partnership, or organization that seeks permission and meets the requirements set by the department to operate as self-insured under plan No. 1 of this chapter;

any nonprofit association, limited liability company, limited liability partnership, or corporation or other entity funded in whole or in part by federal, state, or local government funds that places community service participants, as described in 39-71-118(1)(e), with nonprofit organizations or associations or federal, state, or local government entities;

a religious corporation, religious organization, or religious trust receiving remuneration from nonmembers for manufacturing or construction activities conducted by its members, or agricultural labor and services; and

An approved and authorized fiduciary, agent, or other person acting as fiscal agent under section 3504 of the Internal Revenue Code, 26 U.S.C. 3504, and 26 CFR 31.3504-

1.

There is a rebuttal presumption that an employer who uses the services of a worker furnished by another person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, is presumed to be the employer for workers' compensation premium and loss experience purposes for work performed by the worker. § 39-71-117(3), M.C.A.

An employer who contracts with an independent contractor to perform work of a kind regular to that employer's business is liable for the payment of benefits if the contractor has not properly complied with the coverage requirements of the Act. § 39-71-405(1), M.C.A. An employer who contracts with a party other than an independent contractor may also be liable for benefits for that contractor's employees if the work performed is part of the employer's trade or business. § 39-71-405(2). Where an employer contracts any work to be done, wholly or in part for the employer, by an independent contractor, where the work so contracted to be done is casual employment as to such employer, then the contractor shall become the employer. § 39-71-405(3), M.C.A.

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

A. Traumatic or "single occurrence" claims.

An injury is covered if it involves (1) internal or external physical harm to the body, as established by objective medical findings, (2) damage to prosthetic devices or appliances other than eyeglasses, contact lenses, dentures, or hearing aids, or (3) death. § 39-71-119(1), M.C.A. An injury must be caused by an accident, which is an unexpected traumatic incident or unusual strain, identifiable by time and place of occurrence and member or part of body affected and caused by specific event on a single day or during a single work shift. § 39-71-119(2), M.C.A. "Objective medical findings" means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings. § 39-71-116(22), M.C.A. The objective medical findings must contain sufficient factual and historical information concerning the relationship of the workers' condition to the original injury. § 39-71-407(10), M.C.A.

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

Montana repealed its Occupational Disease Act effective July 1, 1995. Under the current Workers' Compensation Act, "occupational disease" means harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a

single day or work shift but does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity. § 39-71-116(23), M.C.A. Compensation for occupational diseases must be equal to the compensation and medical benefits provided for injuries in this chapter. § 39-71-713(1), M.C.A. When the same medical condition may be claimed as an injury and an occupational disease, compensation payable to the claimant, the claimant's beneficiaries, or the claimant's dependents may not be duplicated for the same conditions over the same time-period. § 39-71-713(2), M.C.A.

An occupational disease is covered if it is established by objective medical findings and arises out of or is contracted in the course and scope of employment. § 39-71-407(12), M.C.A. Occupational diseases are considered to arise out of employment or be contracted in the course and scope of employment if the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease. *Id.* "Major contributing cause" means a cause that is the leading cause contributing to the result when compared to all other contributing causes. § 39-71-407(16), M.C.A. When compensation is payable for an occupational disease, the only employer liable is that in whose employment the employee was last injuriously exposed to the hazard of the disease. § 39-71-407(13), M.C.A.

A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition. § 39-71-119(5), M.C.A. Primary cause means a cause that is responsible for more than 50% of the physical condition with a reasonable degree of medical certainty. *Id.*

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

Injuries are compensable only if they meet the statutory definition of "injury" caused by an "accident," and if the alleged harm arising from the injury can be proven by objective medical findings. § 39-71-119, M.C.A. Physical or emotional conditions arising from emotional or mental stress, or nonphysical stimuli or activity, or a disease not caused by an accident, are excluded. § 39-71-119(3). The Montana Supreme Court has found the exclusion of mental or stress claims without a physical component does not violate equal protection of the law and is constitutional. *Stratemeyer v. Lincoln Cnty.*, 259 Mont. 147, 154, 855 P.2d 506 (1993). Amendments adopted by the 1993 Montana legislature specifically state that so-called "mental-mental" claims and "mental-physical" claims are not compensable either as workers' compensation or occupational disease claims. § 39-71-105(6)(a), M.C.A.

6. What psychiatric claims or treatments are compensable?

See answer to Question 5. Generally, only those claims with a physical component are compensable.

7. What are the applicable statutes of limitations?

Other than claims for occupation disease, claims for compensation must be filed within 12 months of the date of the accident, although the time-period may be waived by the insurer for up to an additional 24 months on showing of lack of knowledge of disability, latent injury, or equitable estoppel. § 39-71-601, M.C.A. Injuries other than death must be reported to the employer within 30 days of its occurrence. § 39-71-603(1), M.C.A.

Claims for benefits for occupational diseases must be submitted to the employer, the employer's insurer or the Department in writing, signed by the claimant or the claimant's representative within 1 year that the claimant knew or should have known that the condition resulted from occupational disease. § 39-71-601(3), M.C.A. When the claim is brought by a beneficiary, the 1-year time limit is based on the date the beneficiary knew or should have known the decedent's death was related to an occupational disease. *Id.*

If benefits are denied to a claimant, he or she must petition the Workers' Compensation Court for relief within two years of the denial. § 39-71-2905(2), M.C.A.

Statutes of limitations are tolled for injured workers who are mentally incompetent and without a guardian or who are under 18 years of age and may be without a parent or guardian. § 39-71-602, M.C.A.

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

See answer to Question 7 above. The notice to the employer must include notice of the time and place where the accident occurred and the nature of the injury. § 39-71-603(1), M.C.A. Notice may be given by the injured employee or someone on his or her behalf. *Id.* Actual knowledge of the accident and injury on the part of the employer or the employer's managing agent or superintendent in charge of the work in which the employee was engaged constitutes notices. *Id.*

The Department provides standardized reporting forms for claims. Employers must file reports of every injury or occupational disease with the Department. § 39-71-307(2), M.C.A. Many insurers now allow claims to be reported electronically (e.g., by phone).

9. Describe available defenses based on employee's conduct:

A. Self-inflicted injury.

Unknown; likely non-compensable so long as the employee's conduct is not found to be within the "course and scope of employment". There is no known case law on this subject.

B. Willful misconduct, "horseplay," etc.

If an employee is injured by another employer in the course and scope of his employment, the injury is compensable. *Penny v. Anaconda Co.*, 194 Mont. 409, 413, 632 P.2d 1114 (1981). However, the injury is not compensable if it arises from a fight with another employee where the altercation is of a personal nature and has no reasonable connection with the employment. *Id.* If the fight is reasonably connected to the conditions under which the employee pursues his employment, such as if another employee assaults him due to hostility related to the employment duties, the injury "arises out of and occurs in the course of the employment" and may be compensable. *See Pinyerd v. State Comp. Ins. Fund*, 271 Mont. 115, 894 P.2d 932, 935 (1995).

If an employee is intentionally injured by an intentional and deliberate act of the employee's employer or of a fellow employee while performing the duties of employment, the injured employee or his personal representative has a cause of action for additional damages against the person whose intentional and deliberate act caused the intentional injury, in addition to a workers' compensation claim. § 39-71-413(1)(a), M.C.A.

C. Injuries involving drugs and/or alcohol.

An employee is not eligible for benefits if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident. § 39-71-407(5), M.C.A. This provision does not apply if the employer knew of and failed to stop the employee's use of alcohol or drugs (marijuana not included). § 39-71-407(7), M.C.A. If the employee has written certification from a physician for the use of marijuana for a debilitating medical condition, he may still be eligible for benefits unless the use of marijuana is a major contributing cause of the injury or occupational disease. § 39-71-407(6), M.C.A. For additional provisions regarding marijuana, please see Question 62. The burden of proving an employee deviated from the course and scope of his employment is on the employer or workers' compensation insurer. *Van Vleet v. Mont. Ass'n of Counties Workers' Comp. Trust*, 2004 MT 367, ¶ 22, 324 Mont. 517, 103 P.3d 544.

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

A person who obtains or assists in obtaining benefits to which the person is not entitled or who obtains or assists another person in obtaining benefits to which the other person is not entitled under this chapter is guilty of theft and may be prosecuted the criminal theft statute. § 39-71-316(2)(a), M.C.A. A person convicted of theft may be required to pay an amount equal to 10 times the amount paid by an insurer on the false claim, provided that the amount does not exceed $50,000. § 39-71-316(3), M.C.A. The state fund has established a fraud prevention and detection unit. § 39-71-211, M.C.A.

A worker may not accept temporary total disability, permanent total disability, or rehabilitation benefits and wages without the written consent of the insurer. §§ 39-71-701(7); -702(6); and -1006(7). A worker receiving both wages and any of these benefits is guilty of theft and may be prosecuted under Montana criminal laws. *Id.* Further, if the Workers Compensation Court determines that a claim is false or fraudulent, the claim may be dismissed with prejudice.

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

Unknown. The Workers' Compensation Court has held that liability for an injury is decided on the basis of whether the job accident proximately caused injury and/or disability, as shown by objective medical findings.

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

To be compensable, an injury must arise out of "and in the course of employment." § 39-71-407. An injury is not in the course of scope of employment if the employee is on a paid or unpaid break, not at a worksite of the employer, and not performing any specific tasks for the employer during the break; or engaged in social or recreational activity, regardless of whether the employee pays for any portion of the activity. § 39-71-407(2), M.C.A. However, the exclusion for recreational activities does not apply to an employee who is paid while participating in the social or recreational activity or whose presence at the activity or required or requested by the employer, such that the employer asks the employee to assume duties for the activity so that the employee's presence is not completely voluntary. *Id.*

An employee who suffers an injury or dies while traveling is not covered unless: "(i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs

of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or (ii) the travel is required by the employer as part of the employee's job duties." § 39-71-407(4)(a). "A payment made to an employee under a collective bargaining agreement, personnel policy manual, or employee handbook or any other document provided to the employee that is not wages but is designated as an incentive to work at a particular jobsite is not a reimbursement for the costs of travel, gas, oil, or lodging, and the employee is not covered while traveling." § 39-71-407(4)(b).

The factors to be considered in determining whether a deviation from the scope of employment is substantial enough to take an employee out of the employment context are as follows: (1) the amount of time taken up by the deviation; (2) whether the deviation increases the risk of injury; (3) the extent of the deviation in terms of geography; and (4) the degree to which the deviation caused the injury. *Dale v. Trade St.*, 258 Mont. 349, 353; 854 P.2d 828, 830 (1993). *See generally Van Vleet*, 2004 MT 367.

13. Are injuries by co-employees compensable?

Yes, if committed within the course and scope of employment. See answer to Question 9B.

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

Section 39-71-412, M.C.A., provides:

Liability of third party other than employer or fellow employee -- additional cause of action. The right to compensation and medical benefits as provided by this chapter is not affected by the fact that the injury, occupational disease, or death is caused by the negligence of a third party other than the employer or the servants or employees of the employer. Whenever injury, occupational disease, or death occurs to an employee while performing the duties of employment and the event is caused by the act or omission of some persons or corporations other than the employee's employer or the servants or employees of the employee's employer, the employee or in case of death the employee's heirs or personal representative, in addition to the right to receive compensation under this chapter, has a right to prosecute any cause of action that the employee or heirs may have for damages against the persons or corporations.

BENEFITS

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

"Wages" mean all remuneration paid for services performed by an employee for an employer, including the cash value of all remuneration paid in any medium other than cash. § 39-71-123(1), M.C.A. Wages includes monetary commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and periods of sickness; backpay or any similar pay made for or in regard to previous service by the employee for the employer, other than retirement or pension benefits from a qualified plan; tips or other gratuities received by the employee to the extent that tips or gratuities are documented by the employee to the employer for tax purposes; income or payment in the form of a draw, wage, net profit, or money received or taken by a sole proprietor or partner, regardless of whether the sole proprietor or partner has performed work or provided services for that remuneration; payments made to an employee on any basis other than time worked, including but not limited to piecework, an incentive plan, or profit-sharing arrangement; board if it constitutes a part of the employee's remuneration and is based on its actual value; and lodging, rent, or housing if it constitutes part of the employee's remuneration and is based on a value as set by administrative rule. The values set by administrative rule must address the general geographic proximity to available housing and may consider other reasonable factors that affect value. *Id.* Wages do not include expense reimbursements; accrued but not paid sick leave; special monetary rewards; and monetary and other benefits paid as part of public assistance. § 39-71-123(2), M.C.A.

Generally, wages are calculated based on the average actual earnings for the four pay periods immediately preceding the injury, except if the term of employment is less than four pay periods, the wages are the hourly rate times the number of hours worked in a week for which the employee was hired to work. § 39-71-123(3)(a), M.C.A. "For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations." § 39-71-123(3)(b), M.C.A.

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

Weekly compensation benefits for injury producing temporary total disability are 66 2/3% of the wages received at the time of the injury, but the payments may not exceed certain maximum benefits, set by statute, based on the prior calendar year's state average weekly wage. § 39-71-701(3), M.C.A. Temporary total disability benefits must be paid for the duration of the worker's temporary disability. *Id.* The weekly benefit amount may not be adjusted for cost of living. *Id.*

Benefits for temporary partial disability are the difference between the injured worker's average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week, and the actual weekly wages earned during the period that the claimant is temporarily partially disabled, not to exceed the injured worker's temporary total disability benefit rate. § 39-71-712(2), M.C.A.

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

The insurer must accept or deny the claim for benefits within 30 days of receipt of a claim. § 39-71-606, M.C.A.

An insurer may pay the claim under reservation of rights so long as notice to do so is made within 30 days of receipt of claim, but an insurer may not make payments under a reservation of rights for more than 90 days without: (a) written consent of the claimant; or (b) approval of the department. § 39-71-608, M.C.A.

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

Compensation may not be paid for the first 32 hours or 4 days' loss of wages, whichever is less, that the claimant is totally disabled and unable to work because of an injury. § 39-71-736(1)(a), M.C.A. A claimant is eligible for compensation starting with the 5th day. *Id.* Separate benefits of medical and hospital services must be furnished from the date of injury. § 39-71-736(b), M.C.A. 39-71-736(1).

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

Temporary total benefits may be terminated on the date the worker has been released to return to work in some capacity. § 39-71-609(2), M.C.A. Temporary total benefits terminate if the treating physician releases the working to the same, modified, or alternate position that the worker is able and qualified to perform with the same employer, even if the worker has not reached maximum healing. § 39-71-701(4), M.C.A.

If the worker has been released by the treating physician to return to a modified or alternate position that he is able and qualified to perform with the same employer, the wages, when combined with the temporary partial disability benefits, would result in an equivalent or higher

wage than at the time of injury, and the worker refuses to accept the position, he is not eligible for temporary partial disability or temporary total disability benefits. § 39-71-712(3), M.C.A.

An insurer may only terminate biweekly compensation benefits with 14 days' written notice to the claimant, his representative, and the department, except if the insurer has knowledge the claimant has returned to work, compensation benefits may be terminated as of the time the claimant returned to work. § 39-71-609(1), M.C.A.

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

The amount may be credited in some situations, usually where the claimant has reached maximum healing and continues receiving temporary total benefits, where the insurer has advised it will credit those benefits. It is recommended that, if there is a basis to convert, it should be done immediately and temporary total payments should be discontinued.

Temporary partial disability may not be credited against any permanent partial disability award or settlement. § 39-71-712(4), M.C.A.

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

In addition to permanent partial disability, a maximum benefit award of $2,500.00 may be paid for serious face, head or neck disfigurement. § 39-71-708, M.C.A.

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

Benefits are calculated by adding percentage of impairment received under AMA Guidelines, and appropriate assigned percentages for (1) age, (2) education, (3) the extent of wage loss, and (4) degree of physical restriction, and then multiplying the result by 400 weeks. § 39-71-703(3), (5), M.C.A. The actual weekly benefit is equal to 66 2/3% percent of the "time of injury" wage, subject to a maximum of one-half of state average weekly wage. § 39-71-703(6), M.C.A.

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

Schedules were abolished effective July 1, 1987.

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

See above.

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

A claimant is eligible for total rehabilitation benefits if he meets the definition of a disabled worker as provided in 39-71-1011; or (2) the worker has, as a result of the work-related injury, a whole person impairment rating of 15% or greater, as established by objective medical findings, and has no actual wage loss. § 39-71-1006(1)(a), M.C.A. A rehabilitation provider must be appointed to develop a rehabilitation plan showing reasonable vocational goals and reemployment opportunity. § 39-71-1006(1)(b), M.C.A. If the worker is eligible due to impairment rating, the employee must have a reasonable increase in wages compared to the wages at time of injury with rehabilitation. § 39-71-1006(1)(b), M.C.A. If the worker is eligible due to wage loss, the employee must have a reasonable reduction in the actual wage loss with rehabilitation. *Id.*

A disabled worker is entitled to receive biweekly rehabilitation benefits at the temporary total disability rate for the period specified in the rehabilitation plan, not to exceed 104 weeks. § 39-71-1006(2), M.C.A. A worker may not receive temporary total benefits or wages, and rehabilitation benefits at the same time. § 39-71-1006(4), (7), M.C.A. A worker injured after July 1, 1997, may receive payment for tuition, fees, books, and other retraining expenses as specified in the rehabilitation plan. § 39-71-1006(3), M.C.A.

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

Weekly compensation benefits for injury resulting in permanent total disability are 66 2/3% of the wages received at the time of the injury, but the payments may not exceed certain maximum benefits, set by statute, based on the prior calendar year's state average weekly wage. § 39-71-702(3), M.C.A. A worker's benefit amount must be adjusted for a cost-of-living increase on the next July 1 after 104 weeks of permanent total disability benefits have been paid and on each succeeding July 1. § 39-71-702(5), M.C.A. The adjustment must be the percentage increase, if any, in the state's average weekly wage. *Id.* Permanent total disability rates must be paid for the duration of the disability. § 39-71-702(1), M.C.A.

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

A. Funeral expenses.

Such expenses may be recovered not exceeding $4,000. § 39-71-725, M.C.A. Effective October 1, 2021, the expense must not exceed $10,000.

B. Dependency claims.

To a surviving spouse, an unmarried child under 18, an unmarried child under 22 who is a full-time student, or an invalid child over 18 who is dependent on the decedent, weekly compensation benefits for an injury causing death are 66 2/3% of the decedent's wages. § 39-71-721(2), M.C.A. The maximum weekly compensation benefit may not exceed the state's average weekly wage at the time of injury. *Id.* The minimum weekly compensation benefit is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of death. *Id.*

To a dependent parent or brother or sister under 18, if the beneficiaries list above do not exist, weekly benefits must be paid to the extent of the dependency at the time of the injury, subject to a maximum of 66 2/3% of the decedent's wages. § 39-71-721(3), M.C.A. The maximum weekly compensation may not exceed the state's average weekly wage at the time of injury. *Id.*

If the decedent leaves no beneficiary, a lump-sum payment of $3,000 must be paid to the decedent's surviving parent or parents. § 39-71-721(4), M.C.A. There is a 500-week cap on benefits to a surviving spouse (subject to termination on remarriage prior to expiration of 500 weeks.) § 39-71-721(5), M.C.A.

Section 39-71-723 provides for apportionment of payment among more than one beneficiary.

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

An individual certified as a person with a disability may qualify. § 39-71-905(1), M.C.A. “Person with a disability” means a person who has a medically certifiable permanent impairment that is a substantial obstacle to obtaining employment or to obtaining reemployment if the person should become unemployed, considering such factors as the person's age, education, training, experience, and employment rejection. § 39-71-901(3), M.C.A. If certified and hired, the subsequent employer’s liability for a new injury is limited to 104 weeks, after which time liability is shifted to a state-run Subsequent Injury Fund. § 39-71-907(2), M.C.A.

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

Claims are "open" unless settled on a compromise basis. Settlements are considered contracts and governed by Montana contract law. Settled claims may be reopened upon a showing of mutual mistake of material fact in entering into the settlement agreement. *Kienas v. Peterson*, 191 Mont. 325, 624 P.2d 1 (1980). The statute of limitations for alleged mistake is 2 years from date of discovery of the mistake. § 27-2-203, M.C.A. A worker or an insurer may petition the Workers' Compensation Court for a change in disability status if medical conditions underlying the disability have changed. § 39-71-2909, M.C.A.

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

The claimant must show that the insurer's decision to deny benefits or terminate benefits was unreasonable, and the claim is later adjudged compensable. § 39-71-611(1), M.C.A. If an insurer denies a claim, and the Workers' Compensation Court finds it compensable and deems the denial unreasonable, reasonable attorney fees and costs may be awarded. § 39-71-611(1), M.C.A.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

There is general immunity subject to some exceptions. § 39-71-411, M.C.A.

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

(1) Intentional and deliberate acts: An injured employee has a cause of action for damages against an employer or the employer's employee only if the employer or fellow employee causes an injury by an intentional and deliberate act that is specifically and actually intended to cause injury and there is actual knowledge than an injury is certain to occur. § 39-71-413(1), M.C.A. However, the employer is not vicariously liable for the intentional and deliberate acts of any employee. § 39-71-413(2), M.C.A.

(2) Dual capacity doctrine: Not recognized in Montana. *Herron v. Pack & Co.*, 217

Mont. 429, 432, 705 P.2d 587 (1985).

(3) Contractual waiver: Employees may not voluntarily waive rights under the Act. § 39-71-409, M.C.A.

(4) Sexual harassment: Considered an intentional wrongful act not arising from an "accident." *Vainio v. Brookshire*, 258 Mont. 273, 280, 852 P.2d 596 (1993).

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

While there are no penalties against an employer for unsafe working conditions, all employers must institute and administer a safety program in accordance with rules adopted by the Montana Department of Labor & Industry. §§ 39-71-1504 and -1505, M.C.A. The Department may issue a safety recommendation to an employer who fails to comply with the requirements or with rules adopted by the Department. § 39-71-1504(3), M.C.A. Insurers must offer safety consultation services to insured employers requesting assistance in developing and implementing a safety program. §§ 39-71-1507, M.C.A. Also, an insurer may offer financial incentives, including a premium discount, to employers instituting and implementing a safety program. §§ 39-71-421, M.C.A.

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

None.

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

Claims for bad faith are governed by provisions of the Montana Insurance Code, specifically the Montana Unfair Trade Practices Act, §§ 33-18-101 through -1006, M.C.A. Claims are limited in part to certain proscribed activities by the insurer. reasonable basis in law or fact for contesting claim is a defense. A claim cannot be brought until the underlying action is settled or reduced to judgment. Exemplary or punitive damages may be available. Bad faith claims are cognizable only in separate state district court proceedings at the conclusion of the dispute over compensation benefits.

A workers' compensation court finding of "unreasonableness" in determining whether fees are awarded is not a finding of unfair claims practices within the meaning of the insurance code. §§ 39-71-611(2), -612(3). Similarly, a worker's compensation court finding of "unreasonableness" for

delay in paying or refusal to pay does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions. § 39-71-2907(3), M.C.A.

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

Terminations are governed by the Montana Wrongful Discharge from Employment Act, §§ 39-2-901 through -915, M.C.A. Furthermore, termination for filing a claim is a violation of the Workers' Compensation Act. § 39-71-317(1), M.C.A. Finally, the state Human Rights Act, Tit. 9, M.C.A., incorporates federal American with Disabilities Act definitions of disability and reasonable accommodation. Termination due to disability may be actionable depending upon the circumstances.

THIRD-PARTY ACTIONS

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

Yes. § 39-71-412, M.C.A.

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

Only if the injury was caused by an intentional and deliberate act, or one that is specifically and actually intended to cause injury and there is actual knowledge than an injury is certain to occur. § 39-71-413(1), M.C.A.

36. Is subrogation available?

Yes, but the right to assert subrogation has been limited by Montana Supreme Court decisions. Generally, the Act provides for certain subrogation rights. § 39-71-414, M.C.A. An insurer is entitled to full subrogation rights unless the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. § 39-71-414(6), M.C.A. Court decisions have effectively limited subrogation rights where there is evidence of lack of full legal redress obtained in third-party actions or claims. *See, e.g.*, *Francetich v. State Comp. Mut. Ins. Fund,* 252 Mont. 215, 827 P.2d 1279 (1992). As a result of this and related decisions, subrogation often cannot be asserted. Insurers interested in subrogation should consult local counsel for the specifics.

MEDICALS

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

An insurer must make payments at the fee schedule rate within 30 days of receipt of medical bills for an accept claim where no other disputes exist. § 39-71-704(6), M.C.A. The Workers' Compensation Court may find that delay in paying medicals was unreasonable and award a penalty of 20 percent of medical benefits. § 39-71-2907, M.C.A.

38. What, if any, mechanisms are available to compel the production of medical information at the administrative level?

An employee is required to file with the insurer "all reasonable information needed by the insurer to determine compensability." § 39-71-604(1), M.C.A. The employee's physician is required to "lend all necessary assistance . . . without charge to the worker." *Id.*

"A signed claim for workers' compensation or occupational disease benefits authorizes disclosure to the workers' compensation insurer . . . by the health care provider. The disclosure authorized by this subsection authorizes the physician or other health care provider to disclose or release only information relevant to the claimant's condition. Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery. A release of information related to workers' compensation must be consistent with the provisions of this subsection. Authorization under this section is effective only as long as the claimant is claiming benefits." § 39-71-604(2), M.C.A.

"A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer . . . to communicate with a physician or other health care provider about relevant health care information . . . without prior notice to the injured employee." § 39-71-604(3), M.C.A.

The Montana Administrative Procedures Act grants subpoena power to the Montana Department of Labor's hearings examiners in contested case hearings. This power can be used to access medical information. Comparable powers are granted to the Workers' Compensation Court.

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

A. Claimant's choice of physician.

A worker may choose the initial treating physician. § 39-71-1101(1), M.C.A. If that person agrees to assume the responsibilities, that person become the treating physician. *Id.* However, the insurer, after accepting liability, may designate or approve a treating physician, or direct the worker to a managed care organization. § 39-71-1101(2), M.C.A. Notice must be provided to the individual worker of the right to choose the initial treating physician. §§ 39-71-1101 and -1102, M.C.A.

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

Claimants may be required from time to time to report for an independent medical examination. § 39-71-605(1)(a), M.C.A. Scheduling examinations must be done with regard for the claimant's convenience, physical condition, and ability to attend at a time and place as close to the claimant's residence as is practical. § 39-71-605(1)(b), M.C.A. An examination outside the state is not necessarily forbidden. The claimant has the right to have his or her treating physician present. *Id.* The insurer may also require a functional capacities evaluation. § 39-71-605(4), M.C.A. Compensation benefits can be suspended if a claimant unreasonably refuses to attend an independent medical examination. § 39-71-605(1)(b), M.C.A.

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

The insurer is responsible for primary medical services, defined as those services necessary for achieving medical stability. §§ 39-71-704(1)(a) and -116(29), M.C.A. Secondary medical services, defined as those not medically necessary for achieving medical stability, are the responsibility of the insurer only if there is a clear demonstration of the cost-effectiveness of the services in returning the worker to actual employment. §§ 39-71-116(35)(a) and -704(1)(b), M.C.A. "Secondary medical services" include spas and hot tubs, work hardening, physical restoration programs, and comparable programs designed to address disability and not impairment. § 39-71-116(35)(a), M.C.A.

Insurers are not obliged to furnish palliative or maintenance care after the worker reaches medical stability, except in cases of permanent total disability where such care is necessary to monitor medications, for monitoring and replacing prosthetic devices, or when the treating physician believes the care is appropriate to enable the worker to continue current employment or there is a clear probability of returning to employment. § 39-71-704(1)(g), M.C.A.

With the exception of repair and replacement of prostheses, or the worker is permanently totally disabled, medical benefits terminate 60 months from the date of injury or diagnosis of

occupational disease, but the worker may request reopening of medical benefits. § 39-71-704(1)(f), M.C.A.

The insurer shall reimburse a worker for reasonable travel, lodging, meals, and miscellaneous expenses incurred in travel to a medical provider for treatment of an injury pursuant to rules adopted by the department. § 39-71-704(1)(d)(i), M.C.A. Reimbursement must be at the rates allowed for reimbursement for state employees. *Id.*

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

They are generally covered; there are no limitations. A prosthetic devise or prosthesis means an artificial substitute for a missing body part. § 39-71-116(30), M.C.A.

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

Unknown at this time. They are likely not covered, as they probably fall within the "secondary services" exception outlined above.

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

A medical fee guide is in effect. § 39-71-704(2), M.C.A. As discussed in § 39-71-1102, M.C.A., cost containment is addressed primarily through managed care, which is discussed below.

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

As explained in 39A, a worker may choose the initial treating physician. If an insurer directs the worker to a managed care organization or preferred provider organization, a health care provider who otherwise qualifies as a treating physician but who is not a member may not provide treatment unless authorized by the insurer. § 39-71-1101(9), M.C.A.

The Department of Labor is responsible for establishing criteria for medical providers wishing to serve as managed care organizations. § 39-71-1103(2), M.C.A. Once a group of physicians or institution is approved as a managed care organization, an insurer can then contract with that group or institution to provide the medical services authorized under the Act. § 39-71-1103(3), M.C.A.

If a worker unreasonably refuses to participate in the managed care program, fails to submit to medical treatment prescribed by the medical provides (except for invasive procedures); or fails to provide access to health care information, the insurer can terminate any benefits upon 14 days-notice to the worker and the Department of Labor. § 39-71-1106, M.C.A.

PRACTICE/PROCEDURE

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

An employee initiates the claim process by filing with the Department of Labor a claim for compensation. § 39-71-601, M.C.A. Employers are obliged to file a comparable first report of injury. § 39-71-307(1), M.C.A. The Department makes available a combined form reporting the circumstances of the injury, with a section to be signed by the worker.

After the filing of a claim, the insurer must investigate and either accept or deny the claim within 30 days of receipt. The insurer must accept or deny the claim for benefits within 30 days of receipt of a claim. § 39-71-606, M.C.A. If the insurer decides to contest the claim, it must notify the claimant in writing. *Id.* It may accept the claim and pay benefits under a reservation of rights, but acceptance of the claim under these conditions must also be communicated to the claimant in written notice. § 39-71-608, M.C.A. Payments in this circumstance cannot exceed 90 days without consent of the claimant or approval of the department. *Id.*

46. What is the method of claim adjudication?

A. Administrative level.

Generally, all disputes over benefits must first be mediated before the Department of Labor. § 39-71-2401. M.C.A. Mediation is informal and confidential. § 39-71-2410, M.C.A.

B. Trial court.

The party aggrieved of a mediator recommendation may then bring a petition before workers' compensation court. § 39-71-2905, M.C.A. A petition for hearing before the workers' compensation court must be filed within 2 years after benefits are denied. *Id.*

C. Appellate.

The Montana Supreme Court hears all appeals from workers' compensation court. § 39-71-2904, M.C.A.

47. What are the requirements for stipulations or settlements?

The requirements vary. Generally, only a claim involving payment of permanent total or permanent partial benefits can be compromised. Payments may be annuitized, but an insurer is ultimately liable if the annuity company becomes insolvent; an insurer not permitted to make complete assignment of benefit payments.

Statutorily, there is a limit of $20,000 on lump-sum conversion of permanent total benefits. § 39-71-741(2)(c), M.C.A.

The Workers' Compensation Court has on occasion approved lump-sum settlements outside the provisions of the aforementioned statutes through the use of a "stipulated judgment" procedure. Parties in litigation may settle their differences on the basis of payment of an agreed-upon sum, and the Court can then enter a "stipulated judgment" for that amount in a lump sum.

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

Generally, only on disputed liability cases. The Department and/or the Court may also approve settlements in some cases where liability was initially accepted and medicals paid if subsequent disputes develop over whether new and additional medical may be paid.

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

Yes, the Employment Relations Division of the Montana Department of Labor. § 39-71-741, M.C.A.

RISK FINANCE FOR WORKERS' COMPENSATION

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

Coverage is available through "Plan 1," self-insurance, Tit. 39, ch. 71, pt. 21; "Plan 2," authorized private companies, pt. 22; or, for state agencies and public corporations, "Plan 3," the state fund, pt. 23.

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

A. For individual entities.

Generally, proof of solvency subject to State Labor Department guidelines. § 39-71-2101 and -2105, M.C.A. Security of $250,000 or average of liabilities for prior 3 of 4 years, whichever is greater, is required. § 39-71-2106, M.C.A.

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

Similarly, proof of solvency subject to State Labor Department guidelines. Security of $250,000 or average of liabilities for prior 3 years, whichever is greater, required, and the Department may require additional security.

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"?

By statute, the terms "worker" and "employer" include aliens, whether lawfully or unlawfully employed. § 39-71-118(1)(a), M.C.A. Whether the federal act preempts coverage has yet to be litigated in this state.

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

A terrorist act would be subject to the same principles applicable to injuries by other third parties. See answer to Question 14 above.

54. Are there any state specific requirements that 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. §11396k(b).

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

HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462, provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. *See* 45 C.F.R. 164.512(l).

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

Of course, the definition of "employee" for worker's compensation purposes does not include independent contractors. § 39-71-118(1)(a), M.C.A. A certified independent contractor need not obtain a personal workers' compensation insurance policy. § 39-71-417(1(b), M.C.A. A person may not perform as an independent contractor unless the person has an independent contractor exemption certificate, is not required to have a certificate, or elects to be bound personally by the provisions of a worker's compensation plan. § 39-71-419(1)(a), M.C.A.

The Worker's Compensation Act does not apply to "employment of a person who is working under an independent contractor exemption certificate." § 39-71-401(2)(x), M.C.A. There is a conclusive presumption that the holder of a current, valid independent contractor exemption certificate is an independent contractor. § 39-71-105(2), M.C.A. Except for exempt officers or managers, a "person who regularly and customarily performs services at a location other than the person's own fixed business location shall apply to the department for an independent contractor exemption certificate. . . ." § 39-71-417(1)(a), M.C.A. "To obtain an independent contractor

exemption certificate, the applicant shall swear to and acknowledge the following: (i) that the applicant has been and will continue to be free from control or direction over the performance of the person's own services, both under contract and in fact; and (ii) that the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the department." § 39-71-417(4)(a), M.C.A.

An employer that hires an independent contractor is liable for worker's compensation payments to the employees of that independent contractor if the independent contractor has not properly complied with the coverage requirements of the Worker's Compensation Act. §39-71-405(1), M.C.A. Where an employer contracts to have any work done by a contractor other than an **independent contractor**, the employer is liable to pay all benefits under the Worker's Compensation Act. § 39-71-405(2), M.C.A. The procedure for resolving disputes regarding independent contractor status is set forth in § 39-71-415, M.C.A.

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

Yes. Under the Worker's Compensation Act, a temporary service contractor is the employer of a temporary worker. § 39-71-117(2), M.C.A. "Temporary service contractor" means a person, firm, association, partnership, limited liability company, or corporation conducting business that hires its own employees and assigns them to clients to fill a work assignment with a finite ending date to support or supplement the client's workforce in situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and projects. § 39-71-116(39), M.C.A. "Temporary worker" means a worker whose services are furnished to another on a part-time or temporary basis to fill a work assignment with a finite ending date to support or supplement a workforce in situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and projects. § 39-71-116(41), M.C.A.

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?

Yes. The Worker's Compensation Act does not apply to the "employment of a person performing the services of an intrastate or interstate common or contract motor carrier when hired by an individual or entity who meets the definition of a broker or freight forwarder, as provided in 49 U.S.C. 13102." § 39-71-401(2)(v), M.C.A.

Further, an interstate or intrastate common or contract motor carrier that maintains a place of business in Montana and uses an employee or worker in Montana is considered the employer of that employee under the Worker's Compensation Act unless: (a) the worker has an independent contractor exemption certificate; or (b) the company furnishing employees or workers in this state to a motor carrier has obtained Montana workers' compensation insurance on the employees or

workers in Montana both at the inception of employment and during all phases of the work performed. § 39-71-117(4), M.C.A.

60. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?

Financial exposure to workers' compensation is an expensive and complex challenge for every business. Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best means for reducing and eliminating that exposure is a strong and individualized "Best Practices" plan.

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:

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?

No state-specific requirements.

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

Generally, an employee is not eligible for workers' compensation benefits if they are using alcohol or drugs not prescribed by a physician, and the alcohol or drugs are the major contributing cause to the accident. However, specific provisions were passed for marijuana, which is legal for medicinal purposes in Montana. Although medicinal marijuana is legal, if it is the major contributing cause of an injury or occupational disease, workers' compensation benefits are not owed. Carriers are also not required to reimburse or pay for medicinal marijuana treatment. Finally, the benefits owed by an insurer may not be increased due to a workers' use of medicinal marijuana. The insurer is only liable for the benefits that would be owed absent the marijuana use.

Additionally, any affirmative defense a worker could claim with other prescription drugs does not apply to marijuana. For purposes of the Montana workers' compensation statute, marijuana is not

considered a prescription drug. § 39-71-407(5-7), M.C.A.

Employers may still prohibit marijuana use or possession during work hours, on employer premises and while using an employer's equipment or other property. House Bill 655, effective July 2021, disqualifies an individual from workers' compensation benefits if they fail or refuse to take a drug test in violation of an employer's written workplace drug policy. The law includes an exception for medical marijuana users.

Employers may continue to take adverse action against employees if their off-duty marijuana use:

- affects employees' ability to perform job-related employment responsibilities or the safety of other employees;
- conflicts with a bona fide occupational qualification that is reasonably related to the employees' employment; or
- violates a personal service contract with an employer and the unique nature of the services provided authorizes the employer to limit the use of marijuana (or other products).
- An employer can also take adverse action if the employer is a non-profit organization whose primary purpose or objective discourages the use of marijuana.

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

The provisions of number 63 apply here. With the passage of Initiative 190 in November 2020, recreational use of marijuana became legal on January 1, 2021 for adults 21 and older. Adults may possess no more than one ounce of marijuana for personal use in the state. House Bill 701 was passed by the legislature in late April of 2021 and signed by the Governor on May 18, 2021. The Bill allows recreational marijuana providers to begin selling to adults on January 1, 2022.