

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

The Virginia Workers' Compensation Act, Title 65.2 Code of Virginia 1950, as amended.

SCOPE OF COMPENSABILITY

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

Effective January 1, 2004, an Employee is defined as “[e]very person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed, except one whose employment is not within the usual course of the trade, business, occupation or profession of the employer...” VA. CODE ANN. § 65.2-101.

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

“When any person...undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person...for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken [,]...the [person] shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.” VA. CODE ANN. § 65.2-302.

This section only applies in cases where there are at least “four persons in interest” – (1) an owner or other person who is having work executed for himself; (2) an independent contractor who has undertaken to execute the work for the person first mentioned; (3) a subcontractor, between whom and the independent contractor there is a contract for the execution by or under the subcontractor of the whole or some part of the work; and (4) a workman employed in the work. See *Bamber v. City of Norfolk*, 138 Va. 26, 121 S.E. 564 (1924).

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

A. **Traumatic or “single occurrence” claims.**

An employee must prove by a preponderance of the evidence that the injury was caused by an identifiable incident, a single piece of work, or a sudden precipitating event that resulted in an obvious, sudden mechanical or structural change in the body. Injuries from repetitive trauma,

continuing mental or physical stress, or other cumulative events, as well as most injuries sustained at an unknown time, do not satisfy this requirement. VA. CODE ANN. § 65.2-101.

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

An employee has a compensable occupational disease when he or she proves by a preponderance of the evidence that the disease arose out of the course of employment. A disease shall be deemed to arise out of the employment only if the following factors are present: (1) a direct causal connection between the conditions under which work is performed and the occupational disease; (2) it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; (3) it can be fairly traced to the employment as the proximate cause; (4) it is neither a disease to which an employee may have had substantial exposure outside of the employment, nor any condition of the neck, back or spinal column; (5) it is incidental to the character of the business and not independent of the relation of employer and employee; and (6) it had its origin in a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction. VA. CODE ANN. § 65.2-400. Examples of diseases traditionally thought to be occupational diseases are: (1) asbestosis; (2) silicosis; (3) coal miner's pneumoconiosis; and (4) mesothelioma.

For an ordinary disease of life to be compensable, the employee must prove by clear and convincing evidence, to a reasonable degree of medical certainty, that the disease: arose out of and in the course of the employment; and that one of the following exists: (1) it follows as an incident of occupational disease as defined in this title; or (2) it is an infectious or contagious disease contracted in the course of one's employment in a hospital or sanitarium or laboratory or nursing home...or while otherwise engaged in the direct delivery of health care, or in the course of employment as emergency rescue personnel and those volunteer emergency rescue personnel referred to in VA. CODE ANN. § 65.2-101; or (3) it is characteristic of the employment and was caused by conditions peculiar to such employment. VA. CODE ANN. § 65.2-401. Examples of diseases traditionally thought to be ordinary diseases of life are: (1) hearing loss; (2) sight loss; (3) carpal tunnel syndrome; (4) tenosynovitis; and (5) ruptured heel cord.

In 1996, the Supreme Court of Virginia held that repetitive motion or cumulative trauma injuries were not compensable no matter how they are labeled or defined. *The Stenrich Group v. Jemmott*, 251 Va. 186, 467 S.E.2d 795 (1996). In 1997, the Virginia General Assembly responded by amending the occupational disease and ordinary disease of life statutes to expressly include hearing loss and carpal tunnel syndrome as compensable ordinary diseases of life, making them subject to the elevated burden of proof: by clear and convincing evidence. VA. CODE ANN. §§ 65.2-400(C), 65.2-401. Other conditions resulting from repetitive motion or cumulative trauma, such as tenosynovitis, trigger thumb, and even cubital tunnel syndrome, are not compensable in Virginia.

The Supreme Court of Virginia has further ruled that a floral designers' allergic contact dermatitis, which developed from prolonged and repeated exposure to certain flowers, is compensable. *A New Leaf, Inc. v. Webb*, 257 Va. 190, 511 S.E.2d 102 (1999).

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

See answers 4 and 9.

6. What psychiatric claims or treatments are compensable?

Psychiatric claims may be compensable (although this rarely occurs in practice) when the psychiatric or psychological injury occurred from an identifiable incident, occurring at a reasonably definite time, resulting in an injury. No physical injury is required. Absent a physiological structural change, a psychological injury will be recognized where the injury was precipitated by dramatic sudden shock or fright experienced by the employee apart from their ordinary course of business. The level of alarm or fright must rise to a level which would shock the conscience. *Teasley v. Montgomery Ward & Co., Inc.*, 14 Va. App. 45, 415 S.E.2d 596 (1992); *Hercules, Inc. v. Gunther*, 13 Va. App. 357, 412 S.E.2d 185 (1991). Psychiatric treatment can also be compensable under the Doctrine of Compensable Consequences, which provides that “where...the chain of causation from the original injury to the condition for which compensation is sought is direct, and not interrupted by an intervening cause attributable to the employee’s own intentional conduct, the subsequent condition should be compensable.” *Foods Distribs. v. Estate of Ball*, 24 Va. App. 692, 485 S.E.2d 155 (1997) (internal quotation marks omitted).

Post-traumatic stress disorder (PTSD) can, depending on the circumstances, be proven to be an injury by accident, an occupational disease or an ordinary disease of life. *Fairfax County Fire & Rescue Dep’t, et al. v. Mottram*, 263 Va. 365, 559 S.E.2d 698 (2002).

7. What are the applicable statutes of limitations?

There is a two year statute of limitations for the filing of claims for injury by accident from the date of the accident. VA. CODE ANN. § 65.2-601. The limitations periods for filing claims for occupational disease is generally two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injurious exposure, whichever occurs first. There are different periods for certain specified diseases such as pneumoconiosis, byssinosis, asbestosis, and AIDS. VA. CODE ANN. § 65.2-406(A).

There are different limitation periods for claims involving death benefits. If the death results from an injury by accident, a claim for benefits must be filed within two years of the accident, and the death benefits claim must be filed within two years of the death. VA. CODE ANN. § 65.2-601. If the death results from an occupational disease within the applicable limitation period, a death benefits claim must be filed within three years of death. VA. CODE ANN. § 65.2-406(B).

A change in condition application must be filed twenty-four months from the last day for which compensation was paid pursuant to an award. VA. CODE ANN. § 65.2-708(A). If no award has been entered, this limitation does not apply. A change in condition application based on the diseases set forth in §65.2-406 or on §65.2-503 (Permanent Loss) must be filed within thirty-six months from the last day for which compensation was paid. VA. CODE ANN. §65.2-708(A).

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

Typically, written notice is required (although in practical terms verbal notice is sufficient) within thirty days of the accident. No entitlement to medical or indemnity benefits accrues until notice is given unless reasonable excuse is made to the satisfaction of the Virginia Workers' Compensation Commission and the employer has not been prejudiced by the delay. VA. CODE ANN. § 65.2-600(D). The notice shall state the name and address of the employee, the time and place of the accident, and the nature and cause of the accident and injury. VA. CODE ANN. §65.2-600(B). For claims involving occupational diseases, the written notice must be given within sixty days after the diagnosis is first communicated to the employee. VA. CODE ANN. § 65.2-405(A).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Intentionally self-inflicted injuries are not compensable. VA. CODE ANN. § 65.2-306(A).

B. Willful misconduct, "horseplay," etc.

Injuries caused by the employee's attempt to injure another, or by willful misconduct are barred. Claims are also barred for injury caused by an employee's: (1) willful failure or refusal to use a safety appliance or perform a duty required by statute; or (2) willful breach of any reasonable rule or regulation adopted by the employer and brought, prior to the accident, to the knowledge of the employee. *Id.* See answer 13 regarding injuries due to "horseplay."

C. Injuries involving drugs and/or alcohol.

No compensation is allowed for injury caused by the employee's intoxication or use of a non-prescribed controlled substance. VA. CODE ANN. § 65.2-306(A).

D. Injuries caused by the employee's willful breach of any reasonable rule or regulation.

No compensation is allowed when an employee's injury is caused by his willful breach of any reasonable rule or regulation adopted by the employer and brought, prior to the accident, to the knowledge of the employee. VA. CODE ANN. § 65.2-306(A)(5).

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

Any person knowingly making, filing or using any writing or document known to be false, fictitious or fraudulent in connection with the entry of an award is guilty of a class 6 felony in the jurisdiction where the injury occurred. Doctors or lawyers convicted under this statute may have their licenses suspended or revoked. VA. CODE ANN. § 65.2-312. Any payment to an employee pursuant to the Uninsured Employers' Fund and later determined to have been procured by fraud, mistake or unreported change of condition shall be recovered from the employee and credited to the Uninsured Employers' Fund. Payments to employees procured by fraud, misrepresentation, or failure to report any incarceration, return to

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employment, increase in earnings, remarriage or change in status as a full-time student, may be recovered from the employee either by way of credit against future compensation payments due or by action at law. VA. CODE ANN. § 65.2-712. Any payment to any employer/insurer from the Second Injury Fund later determined to have been procured by fraud or mistake shall be recovered from the employer/insurer and credited to the Fund. VA. CODE ANN. § 65.2-1105.

Effective January 1, 1999, insurance carriers who know or have reason to believe that an employee has procured benefits by fraud or misrepresentation, have a statutory obligation to furnish and disclose any information in his possession concerning the fraud to the Insurance Fraud Investigation Unit of the Department of State Police. Any insurer providing such information shall have immunity from any causation of action for defamation, invasion of privacy, or negligence. *Virginia Fraud Reporting Immunity Act*.

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

Benefits for an otherwise compensable accident will be denied if material misrepresentation as to physical condition is made by a prospective employee to the prospective employer and employment is offered on the basis of the misrepresentation to the employer's detriment. Evidence must be clear that: (1) the misrepresentation was material; (2) it was made by the employee knowing it to be false; (3) the employer relied on the misrepresentation; and (4) that there was a causal connection between the misrepresentation and the injury.

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

Recreational activities on the premises at a time closely related to working hours and involving some concurrent benefit to the employer are incidents of employment, and injuries while engaged therein arise out of and in the course of the employment and are compensable. The activity itself must be an accepted and normal activity within the employment to be compensable. Such claims are evaluated on a case-by-case basis on their specific facts. Kum Ja Kim v. Sportswear, 10 Va. App. 460, 393 S.E.2d (1990).

13. Are injuries by co-employees compensable?

Injuries caused by co-employees are compensable if the assault was directed against the employee as an employee or because of the employment. Employees who are innocent bystanders and are injured as a result of horseplay, whether condoned by the employer or not, can recover. Injuries from condoned horseplay are compensable, while injuries from mutual horseplay are not. Dublin Garment Co., Inc. v. Jones, 2 Va. App. 165, 342 S.E.2d 638 (1986).

An employee who is sexually assaulted by a co-employee, employer or third-party, while in the course of their employment, may be entitled to workers' compensation benefits. The employee must promptly report the assault to the appropriate law enforcement agency. If the injured employee can establish that the nature of the employment substantially increased the risk of such assault, the employee shall be deemed to have sustained an injury arising out of the employment and shall have a valid claim for workers' compensation benefits. VA. CODE ANN. § 65.2-301(A). The assault cannot be deemed to have been "personal" in nature and must have some direct relation to the nature of the employment.

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

No. In order to be compensable, the acts of third parties must be related to the fact that the employee is an employee or because of the employment. Hopson v. Hungerford Coal Co., 187 Va. 299, 46 S.E.2d 392 (1948).

The provisions governing employee sexual assault described in Answer 13 extend to attacks perpetrated by third-parties. If the nature of the employment substantially increased the risk of sexual assault, then workers’ compensation benefits may be awarded. Merely because an assault occurs in the course of the employment does not necessarily mean that it arises out of the employment. The terms “arising out of” and “in the course of” are used conjunctively and both conditions must occur before compensation will be awarded. Dreyfus & Co. v. Meade, 142 Va. 567, 129 S.E. 336 (1925).

BENEFITS

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

Use the past 52 weeks of employment wages. VA. CODE ANN. § 65.2-101(1)(a). For employees with less than 52-weeks employment with the employer, other calculations may be used so that the average is a fair replacement of wages lost as a result of the accidental injury. VA. CODE ANN. § 65.2-101(1)(b).

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

Temporary total disability is calculated by taking two-thirds of the average weekly wage. The maximum number of weeks of payment is 500. VA. CODE ANN. § 65.2-500. The minimum and maximum rates for the last five years are as follows:

<u>Year</u> (Effective July 1)	<u>Minimum</u>	<u>Maximum</u>
2018	\$270.50	\$1082.00
2019	\$275.50	\$1102.00
2020	\$284.25	\$1137.00
2021	\$298.75	\$1195.00
2022	\$322.50	\$1290.00
2023	\$335.75	\$1343.00

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

An employer/insurer must pay temporary total disability benefits within fourteen days of the employee's disability period once the employee's award is established and final. An award is established when both parties execute an Agreement to Pay Benefits and submit the Agreement to the Virginia Workers' Compensation Commission. An award shall also become established and final when, following a contested hearing, no party seeks appellate review from an Opinion authored by the Virginia Workers' Compensation Commission. The fourteen day period in which the employer/insurer must supply benefits does not begin until the Award becomes final and a request for appellate review stays the fourteen day time period. VA. CODE ANN. § § 65.2-524, 706. Once a final award has been established, a twenty percent penalty for payments made more than fourteen days after the award becomes final may be assessed. VA. CODE ANN. § 65.2-524.

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 compensation is allowed for the first seven days of incapacity because of an injury, but if the incapacity extends past that time, compensation commences with the eighth day. The employee must be out more than twenty-one days before recovering benefits for the first seven days. VA. CODE ANN. § 65.2-509.

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

The standard procedure for terminating a temporary total award is execution by both parties of a Termination of Wage Loss Award detailing why the employee is no longer entitled to indemnity benefits. If the employee refuses to sign the Termination of Wage Loss Award the employer can file an Application for Hearing, and suspend payments until a Deputy Commissioner hears the case. Rule 1.4.

Compensation shall be paid through the date the Application for hearing was filed. If the application alleges the employee returned to work, then payment shall be made to the date of the employee's return. If the application alleges a refusal of selective employment or refusal of medical attention or examination, then payment shall be made to the date of the refusal or 14 days before filing, whichever is later. Id. If the application alleges a failure to cooperate with vocational rehabilitation, then payment must be made through the date the application is filed. Id.

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

For accidents prior to 1991, the payment of permanency benefits cannot go beyond 500 weeks aggregate for temporary total, temporary partial and permanent partial benefits.

For accidents after 1991, the employee may be entitled to payment of permanent partial disability benefits after 500 weeks have been paid for temporary total and/or temporary partial if the total amount of all compensation including temporary total, temporary partial and permanent partial disability does not exceed the result obtained by multiplying the average weekly wage in effect at the time by 500. If the employee has been paid more than that amount, then he or she is not entitled to additional benefits. VA. CODE ANN §§ 65.2-503, 518.

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

Employees may receive permanent partial disability not exceeding sixty weeks for severely marked disfigurement of the body resulting from an injury not otherwise compensated. VA. CODE ANN. § 65.2-503(B)(16).

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?

Loss of a member is compensated at the rate of two-thirds of the employee’s average weekly wage for the following periods:

Thumb	60 weeks
Index Finger	35 weeks
Second Finger	30 weeks
Third Finger	20 weeks
Little Finger	15 weeks
Great Toe	30 weeks
Any other toe	10 weeks
Hand	150 weeks
Arm	200 weeks
Foot	125 weeks
Leg	175 weeks

VA. CODE ANN. § 65.2-503(B).

For example, if an employee sustained a twenty percent loss of use of his or her arm, and the pre-injury wages resulted in a weekly compensation rate of \$162.00, he or she would receive \$162.00 per week for 40 weeks, *i.e.*, 20% x 200 weeks = 40 weeks.

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

There is no recovery for whole person impairment in Virginia, unless the employee has qualified for permanent total disability or lifetime benefits. See answer to question 24.

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

Employers must furnish vocational rehabilitation services where reasonable and necessary. These may include vocational evaluation, counseling, job coaching, job development, job placement, on-the-job training, education and retraining, which is dependent upon the employee’s pre-injury job and wage

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classifications, age, aptitude and level of education, likelihood of success in a new vocation, and relative costs and benefits to be derived from such services. VA. CODE ANN. § 65.2-603(A)(3). Either the employer or employee may request vocational rehabilitation, and the Commission also has the authority to direct the employer to perform a vocational evaluation absent a request from either party. Irwin v. Contemporary Woodcrafts, Inc., No. 0xxx-xx-4 (99-287).

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

Total and permanent incapacity is defined as the loss of “both hands, both arms, both feet, both legs, both eyes, or any two thereof in the same accident” or an injury that for all practical purposes results in total paralysis as determined by the Commission based on the medical evidence, or an injury to the brain which is so severe as to render the employee permanently unemployable in gainful employment. VA. CODE ANN. § 65.2-503(C). Benefits are paid at the rate of two-thirds of the employee’s average weekly wage and are subject to the maximum and minimum rates. VA. CODE ANN. § 65.2-503(E).

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

A. Funeral expenses.

The employer shall pay funeral expenses up to \$10,000.00 and reasonable transportation expenses of the deceased up to \$1,000.00. VA. CODE ANN. § 65.2-512(B).

B. Dependency claims.

If death results from the compensable accident within nine years, the employer pays compensation in weekly payments equal to two-thirds of the employee’s average weekly wage, but not more than 100 percent nor less than twenty-five percent of the average weekly wage of the Commonwealth as defined in VA. CODE ANN. § 65.2-500. Payments are to be made: (1) to persons wholly dependent upon the deceased for 500 weeks from date of injury; (2) if there are no total dependents, to those presumed to be wholly dependent for a period of 400 weeks; or (3) if there are no total dependents, to partial dependents in fact for 400 weeks. VA. CODE ANN. § 65.2-512(A).

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

The Commission enters awards against the Second Injury Fund in favor of an employer/insurer only upon finding that: (1) the employee has a prior loss or loss of use, supported by medical evidence, of not less than twenty percent or more of the arm, hand, leg, foot, eye, finger, toe or any combination of two or more thereof; (2) the employee has suffered in an industrial accident an additional loss or loss of use of any of the members set forth above of not less than twenty percent; (3) the condition of both impairments rendered the employee totally or partially disabled; (4) the employer/insurer has paid temporary total/temporary partial disability compensation, permanent partial disability and medical treatment; and (5) the employee is entitled to further compensation for disability which has been paid by the employer/insurer. VA. CODE ANN. § 65.2-1103.

For purposes of § 65.2-1103, disability shall mean: (i) the partial or total loss or loss of use of an arm, hand, leg, foot, eye, finger, toe, or any combination of two or more thereof in an industrial accident and (ii) actual

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incapacity for work at the claimant's average weekly wage. VA. CODE ANN. § 65.2-1102.

An employee has thirty-six months from receipt of the last payment of compensation to file a Change in Condition application seeking permanent partial disability benefits. VA. CODE ANN. § 65.2-708.

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

An employee has the greater of twenty-four months from the last day in which indemnity benefits were paid or thirty-six months from the day in which benefits were paid pursuant to a permanent partial disability to seek re-opening of a claim for worsening condition. After the lapse of the applicable twenty-four or thirty-six month time period, indemnity benefits shall be barred while lifetime medical benefits will continue. VA. CODE ANN. § 65.2-708.

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

An employer/insurer who unreasonably defends a claim may be subject to an assessment for attorney's fees by the Commission. VA. CODE ANN. § 65.2-713(A).

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The employee's rights under the Act preclude all other rights or remedies of such employee, his or her heirs and assigns, on account of the injury and/or death. VA. CODE ANN. § 65.2-307(A).

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

The Act is the exclusive remedy for occupational diseases even in the case of intentional torts. However, in a situation involving an accident, where the employer's actions were committed with the intent to injure, there can be no accident and thus an employee's action for intentional infliction of emotional distress was not barred by the exclusivity provisions of the Act.

An executive officer may reject coverage for injury or death by accident, but not with respect to occupational diseases. If such rejection is elected, the executive officer may proceed at common law against the employer to recover damages for personal injury or death. VA. CODE ANN. § 65.2-300.

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

Not under the Workers' Compensation Act, but OSHA may penalize an employer.

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

None.

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

None aside from the remedies addressed in question 28 and VA. CODE ANN. § 65.2-713.

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

The discharge of an employee for exercising his or her rights under the Act is prohibited. VA. CODE ANN. § 65.2-308(A). Fraudulent claims by employees do not apply. The employee's remedy is a suit in a circuit court having jurisdiction over the employer. Damages may include monetary awards, attorney's fees, reinstatement and back pay plus interest. VA. CODE ANN. § 65.2-308(B).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes.

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

The exclusivity provisions of the Act prohibit suits against co-employees for work-related injuries, even in cases where an employee suffers a work-related injury due to the intentional tortious conduct of a fellow employee.

36. Is subrogation available?

Yes. An employer/insurer has the right to recover damages from a legally liable third party. VA. CODE ANN. § 65.2-309. The employer/insurer also has subrogation rights to recover uninsured and underinsured motorist benefits pursuant to insurance coverage carried by and at the expense of the employer. VA. CODE ANN. § 65.2-309.1.

MEDICALS

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

Generally, itemized medical bills are to be paid within sixty days of receipt by the employer/carrier unless they are contested, denied, or incomplete. VA. CODE ANN. § 65.2-605.1. Denials, disputes, or requests for more complete information must be made within forty-five days of receipt of the bill. VA. CODE ANN. § 65.2-605.1. A failure to pay within the required time, requiring the employee to secure counsel to remedy the matter, may result in an assessment of attorney's fees against the employer/insurer. VA. CODE ANN. § 65.2-714.

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

Any physician attending to an employee must, upon request of the employee, employer or insurer, furnish a copy of any medical report. VA. CODE ANN. § 65.2-604. No fact communicated through, or otherwise learned by, any physician or surgeon who attended or examined an employee or was present during an examination of an employee is privileged either in workers' compensation hearings or in actions of law brought against the employer by the employee to recover damages. VA. CODE ANN. § 65.2-607.

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?

An employer/insurer is required to provide an employee with a panel of three physicians from which to choose a physician for treatment of the injury. The treatment is required to be paid and furnished by the employer/insurer for as long as it is medically necessary. VA. CODE ANN. § 65.2-603(A)(1). The employer's failure to offer a panel of physicians or the employer's denial of a claim allows the employee to select a physician of his or her own choosing.

The employer/insurer can require the injured employee to submit to one independent medical examination per year, per specialty performed by a duly qualified physician. Additional independent medical examinations will not be allowed without authorization from the Virginia Workers' Compensation Commission. VA. CODE ANN. § 65.2-607(A).

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

All medical care that is reasonable and necessary as a result of the injury is covered, including chiropractic care and physical therapy. VA. CODE ANN. § 65.2-603.

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

An employer/insurer is required to provide and repair any prosthesis necessary as a result of an industrial accident, including special orthopedic shoes. This duty includes the proper fitting and training in the use of such devices and appliances. This applies to situations where the accident results in loss of an arm, hand, foot, leg or eye or loss of natural teeth or loss of hearing. VA. CODE ANN. § 65.2-603(A).

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

Yes, provided that the aggregate cost of all such items and modifications required to be furnished on account of any one accident shall not exceed \$55,000.00. VA. CODE ANN. § 65.2-603(A).

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

Yes.

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

In addition to the requirement of providing a three physician panel to the employee, an employer/insurer is required to furnish any other necessary medical attention. VA. CODE ANN. § 65.2-603. For example, nursing care at home is owed, provided that the care is deemed to be both “medical attention” and “necessary.”

When an employer provides the employee with a three physician panel and also assumes all or part of the cost of providing health care coverage for that employee, either as a self-insured or under a group health insurance policy, the employer must inform the employee whether each physician named is eligible to receive payment under the employee’s health care coverage provided by the employer. VA. CODE ANN. § 65.2-603(E).

PRACTICE/PROCEDURE

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

Once an employee has filed his claim for benefits with the Commission, the Commission will send “30-Day Orders” to the employer/insurer, requesting them to advise, within 30 days, whether they will accept or deny the claim and the reasons for denial. If the claim is contested, it will be referred to a docket and scheduled for an evidentiary hearing before a Deputy Commissioner.

46. What is the method of claim adjudication?

A. Administrative level.

The Virginia Workers’ Compensation Commission has exclusive jurisdiction over workers’ compensation issues. All proceedings are administrative level proceedings.

B. Trial court.

There are no jury trials in Virginia on compensation issues.

C. Appellate.

Appeals are as a matter of right to the Full Commission (a three panel body) from Deputy Commissioner opinions (hearing level) and as a matter of right to the Virginia Court of Appeals from the Full Commission. Appeals to the Supreme Court of Virginia from the Court of Appeals are by writ and are rarely granted unless an issue of precedential importance is raised. VA. CODE ANN. § 65.2-706.

47. What are the requirements for stipulations or settlements?

Parties may agree to lump sum settlements to fully and finally resolve disputes between them. VA. CODE ANN. § 65.2-701. Settlements are not binding unless and until they are approved by the Virginia Workers’ Compensation Commission. The parties may stipulate to compensability of a claim as well as periods of disability by signing and filing an Agreement to Pay Benefits or Supplemental Agreement to Pay Benefits.

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The parties may also stipulate to a change in the type or length of disability by signing and filing a Termination of Wage Loss Award.

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

Yes.

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

A settlement and/or memorandum of agreement must be filed with the Commission for approval. If approved, the agreement is binding, and an award of compensation entered on such an agreement is enforceable. An agreement will be approved only when the Commission is clearly of the opinion that the best interests of the employee or his or her dependents will be served by its entry. VA. CODE ANN. § 65.2-701.

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 with three or more employees is required to: (1) secure coverage with an insurer licensed to transact business in the Commonwealth; (2) receive a certificate from the Commission authorizing the employer to be an individual self-insured; or (3) be a member in good standing of a group self-insurance association licensed by the State Corporation Commission. An assigned risk pool is available for employers unable to secure coverage. An application to the State Corporation Commission is required to become a part of the assigned risk pool. VA. CODE ANN. § 65.2-800 *et seq.*

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

A. For individual entities.

Every employer with three or more employees is required to: (1) secure coverage with an insurer licensed to transact business in the Commonwealth; (2) receive a certificate from the Commission authorizing the employer to be an individual self-insured; or (3) be a member in good standing of a group self-insurance association licensed by the State Corporation Commission. An assigned risk pool is available for employers unable to secure coverage. An application to the State Corporation Commission is required to become a part of the assigned risk pool. VA. CODE ANN. § 65.2-800 *et seq.*

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

The State Corporation Commission has the same requirements for securing licensure by a group self-insurance association as apply to those seeking to qualify as individual self-insurers. VA. CODE ANN. § 65.2-802.

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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”?**

Effective January 1, 2000, the Virginia General Assembly amended the term *Employee* as found in the Virginia Workers’ Compensation Act to embrace “every person, including aliens...whether lawfully or unlawfully employed.” VA. CODE ANN. § 65.2-101.

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

Injuries sustained by an employee that result from terrorist attacks may be compensable under the Workers’ Compensation Act, if the acts were targeted at the employer or employee because of their employment or if the employment placed the employee at a higher risk of attack.

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?**

There are no Virginia state specific rules on this issue. With respect to federal law, however, when settling a matter, if the claimant is currently entitled to Medicare or the settlement is over \$250,000.00 and there is a reasonable expectation of Medicare entitlement within thirty months, then the parties must appropriately address the Medicare Secondary Payer Act, normally by a Medicare set-aside trust in an amount approved by the Centers for Medicare and Medicaid Services (CMS). If a Medicare set-aside trust is appropriate, documentation of approval by CMS may be required. CMS does not require a review of WCMSA proposals for Medicare beneficiaries where the total settlement amount is less than \$25,000.

55. **How are subrogation liens of Medicaid and health insurers treated under workers’ compensation law?**

The Federal Medicaid statute requires states to include in their plan for medical assistance provisions (1) that the individual will assign to the state any rights to payment for medical care from any third party and (2) that the individual will cooperate with the state in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. §1396k(a). The state is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. §1396k(b).

The Virginia Workers’ Compensation Commission does not have jurisdiction over subrogation claims brought by Medicaid or other health insurers. However, liens or potential liens should always be taken into consideration when settling a workers’ compensation claim.

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 & Accountability Act of 1996 (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. 45 C.F.R. 164.512(l). Therefore, your current

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practice of obtaining medical records could proceed under state law.

Any physician attending to an employee must, upon request of the employee, employer or insurer, furnish a copy of any medical report. VA. CODE ANN. § 65.2-604(A). No fact communicated through, or otherwise learned by, any physician or surgeon who attended or examined an employee or was present during an examination of an employee is privileged either in workers' compensation hearings or in actions of law brought against the employer by the employee to recover damages. VA. CODE ANN. § 65.2-607(A). An employee may request a protective order from the Commission to seal medical records unrelated to the workers' compensation claim.

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

Independent contractors are not considered employees under the Virginia Worker's Compensation Act. However, an independent contractor of any employer may fall under the inclusion of the Act at the election of such employer provided (1) the independent contractor agrees to such inclusion and (2) unless the employer is self-insured, the employer's insurer agrees in writing to such inclusion. All or part of the cost of the insurance coverage of the independent contractor may be borne by the independent contractor. Va. Code Ann. § 65.2-101.

If an independent contractor undertakes to perform or execute any work which is part of his trade, business, or occupation and contracts with any other person for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him. The purpose of this provision is to expand the definition of employer in order to bring independent contractors and subcontractors who are engaged in work that is part of the trade, business, or occupation of the owner within the scope of the Act. Thus, the employees of independent contractors and subcontractors may fall within the scope of the Act and become statutory employees of the owner if the work being done is part of the owner's general business. Va. Code Ann. § 65.2-302.

A worker may recover compensation from a subcontractor or the principal contractor, but the worker may not collect from both. VA. CODE ANN. § 65.2-303. When sued by a worker of a subcontractor, a principal contractor shall have the right to join that subcontractor or any intermediate contractor as a party. VA. CODE ANN. § 65.2-304.

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

No.

59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

No. However, a fairly recent Virginia Circuit Court case held that, because a grocery delivery truck driver was still in the process of completing a delivery at the time of his alleged injury and therefore still engaged in the trade, business, or occupation of the grocery store at the time of his accident, the exclusive remedy

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was under the Virginia Workers' Compensation Act. Walls v. Food Lion, L.L.C., 66 Va. Cir. 26 (2004).

- 60. 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?**

Financial exposure to workers' compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized "Best Practices" plan.

Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.

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

No, although the Virginia Workers' Compensation Commission insists on an approved MSA for settlement of a claim that meets the CMS threshold for a required MSA.

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

As of July 1, 2021, medical marijuana is permitted in Virginia and can be purchased from one of four medical dispensaries across the state. Qualifying conditions include anxiety, chronic pain, fibromyalgia and PTSD.

- 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?**

As of July 1, 2021 Adults are able to purchase up to 4 ounces of cannabis and grow 4 plants per household. However, there are no retail sales until 2024. Intoxication by marijuana (usually referred to as "cannabis" in Virginia law) during an accident could qualify as willful misconduct. Please see answer to question 9B for more information on defending against willful misconduct, including intoxication by marijuana.