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WISCONSIN

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

Wis. Stat. §§ 102.01-102.89. Wisconsin Admin. Code Chapters DWD 80. For procedure and practice for workers compensation cases, see Wisconsin Admin. Code Chapter Department of Administration-Division of Hearings and Appeals (HA) 4. The Worker's Compensation Division has statutory authority to promulgate administrative rules that are necessary to carry out its duties and functions. Wis. Stat. § 102.15(1).

SCOPE OF COMPENSABILITY

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

Wis. Stat. § 102.07

a. Every person, including all officials, in the service of the state, or of any local governmental unit in this state, whether elected or under any appointment or contract of hire, express or implied, and whether a resident of the state or employed or injured within or without the state;
b. Every person, including all officials, in the service of the state, or of any local governmental unit of this state, whether elected or under any appointment or contract of hire, express or implied, and whether a resident of the state or employed or injured within or without the state.
c. Any peace officer engaged in the enforcement of the peace or the pursuit and capture of those charged with crime;
d. Every person in the service of another under any contact of hire, express or implied, all helpers and assistants or employees, whether paid by the employer or employee, if employed with the employer’s actual or constructive knowledge, including minors, but excluding domestic servants and other persons whose employment is not in the course of any trade or business or occupation of the employer, unless the employer elects to include them;
e. Members of volunteer fire companies, any legally organized rescue squad, or a legally organized diving team;
f. Certain independent contractors and employees of contractors;
g. National Guard members or active-duty state guard members (provided that equivalent federal benefits are not available);
h. A participant in a community work experience program;
i. Students in vocational, technical, and adult education districts who, as part of their program, perform services or manufacture goods sold by the school;
j. A child performing uncompensated community service as a result of an informal disposition, consent decree, or order;

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k. An adult performing uncompensated community service under a deferred prosecution program;
l. Inmates of state penal institutions if performing assigned work, or working in a work-release or transitional employment program;
m. Certain public or private school students under a work training, work experience, or work study program.
n. An employee, volunteer, member of an emergency management unit or a member of a regional emergency response team.
o. Fiscal Agents. Individuals who provide services to elderly and disabled people under long-term care programs are considered employees for purposes of worker's compensation of the entities providing fiscal management services (fiscal agents). Wis. Stat. § 46.275(4m), § 46.281(1k), § 46.2897(3) & §46.995(3).

Note: Domestic servants and true volunteers are not included. Wis. Stat § 102.07. Coverage can be obtained for volunteers.

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

The definition of "employer" is provided in Wis. Stat. § 102.04. In a 2022 amendment, the law provides that every person who at any time employs three or more employees in Wisconsin is an employer subject to the Wisconsin Worker's Compensation Act on the day on which the person employs three or more employees in this state. Wis. Stat. § 102.04(1)(b)(1).

An employee of an uninsured subcontractor under an insured general contractor may claim compensation from the general contractor for injuries sustained. Wis. Stat. §102.06 ("Contractor Under" provision). Practically, the State Uninsured Employers Fund (UEF) (see Wis. Stat. §102.80) would pick up any such claims so long as it is solvent which has essentially suspended the application of claims under Wis. Stat. §102.06. In Acuity v. Olivas, 2007 WI 12, 298 Wis. 2d 640, 726 N.W.2d 258, a general contractor hired a subcontractor to assist with drywall installation projects. The subcontractor recruited persons to assist him with the projects. The Wisconsin Supreme Court concluded that the persons the subcontractor recruited were employees under the Act but not employees of the subcontractor.

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

A. Traumatic or "single occurrence" claims.

The employee must establish that the single traumatic incident was a direct cause of injury, a temporary aggravation of a pre-existing condition, or that the traumatic event was a precipitation, aggravation and acceleration of a pre-existing condition. Lewellyn v. Industrial Comm., 38 Wis. 2d 43, 155 N.W.2d 678 (1968).

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

An employee must establish that the employment was either the sole cause of a condition or at

least a material contributory causative factor in the condition's onset or progression. Universal Foundry Co. v. DILHR, 82 Wis. 2d 479, 263 N.W.2d 172 (1978). An employee's permanent sensitization to cigarette smoke because of workplace exposure has been held to be a compensable occupational disease. Kufahl v. Wisconsin Bell, LIRC Dec. No. 88-000676 (12/11/90). The injury date for occupational disease is the date of disability, which in turn has been defined as "the date of the commencement of such wage loss." General Cas. Co. v. LIRC, 165 Wis. 2d 174, 180, 477 N.W.2d 422 (Ct. App. 1991).

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

Injuries that did not arise out of and while the employee was in the course of the employment are not covered.

6. What psychiatric claims or treatments are compensable?

Psychiatric injuries which are a direct consequence or an increase of a physically traumatic injury are compensable. The employee only needs to prove that the psychological injury was a direct result of the physical injury. Johnson v. Industrial Comm., 5 Wis. 2d 584, 93 N.W.2d 439 (1958). However, in a claim where the psychiatric injury is not the result of a physical injury, the employee must establish that he or she was exposed to extraordinary emotional stress beyond that experienced by all similarly situated employees. School District No. 1 v. DILHR, 62 Wis. 2d 370, 215 N.W.2d 373 (1974); Swiss Colony v. DILHR, 72 Wis. 2d 46, 240 N.W.2d 128 (1976); Probst v. LIRC, 153 Wis. 2d 185, 450 N.W.2d 478 (Ct. App. 1989).

7. What are the applicable statutes of limitations?

The statute of limitations is 12 years from the date of injury or death, or 12 years after the date that compensation, other than treatment or burial expenses, was last paid. Wis. Stat. §102.17(4). However, in the case of an occupational disease or a traumatic injury resulting in the loss or total impairment of a hand or any part of the rest of the arm proximal to the hand, or of a foot or any part of the rest of the leg proximal to the foot, any loss of vision, any permanent brain injury, or any injury causing the need for an artificial spinal disc or a total or partial knee or hip replacement, there shall be no statute of limitations. Benefits or treatment expenses for an occupational disease becoming due after 12 years from the date of injury or death or last payment of compensation, other than for treatment or burial expenses, shall be paid from the work injury supplemental benefit fund under §102.65, and in the manner provided in §102.66. Benefits or treatment expenses for such a traumatic injury becoming due after 6 years after that date shall be paid from that fund and in that manner if the date of injury or death or last payment of compensation, other than for treatment or burial expenses, is before April 1, 2006. Wis. Stat. §§102.17(4) and 102.66(1) & (2).

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

An employee alleging injury must report the incident within 30 days of its occurrence or the date the employee knew or should have known of the injury and its relationship to the employment. However, absence of notice will not bar recovery if it is found that the employer was not misled thereby. There is a laches provision in the statute extinguishing the claim after two years for failure to report. Wis. Stat §102.12. However, the laches provision does not apply if the employer knew or should have known, within the two year period, that the employee had sustained the injury upon which the claim is based.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Self-inflicted intentional injuries are not compensable. Wis. Stat. §102.03(1)(d). For purposes of this section, however, negligent acts (such as driving while intoxicated) that result in personal injury will reduce but not necessarily bar a claim for benefits. Dibble v. DILHR, 40 Wis. 2d 341, 161 N.W.2d 913 (1968). (A 15% reduction, up to $15,000, is possible if at a hearing the employer proves that the injury was caused by intoxication. Wis. Stat. §102.58). Death by suicide will be compensable if the claimant establishes any substantial evidence that a chain of causation exists linking the suicide to a compensable industrial injury. Brenne v. DILHR, 38 Wis. 2d 84, 156 N.W.2d 497 (1968). See also section 9(C) for injuries related to use of alcohol and drugs.

B. Willful misconduct, “horseplay,” etc.

Employees participating in horseplay and receiving injuries will not be compensable if the act was a deviation sufficient to remove the employee from the course of employment. Factors used to determine whether given horseplay was such a deviation includes: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation (i.e., abandonment of duty); (3) the extent to which horseplay had become an accepted part of the employment; and (4) the extent to which the nature of employment may be expected to include horseplay. Nigbor v. DILHR, 120 Wis. 2d 375, 355 N.W.2d 532 (1984). A nonparticipating victim of horseplay is entitled to benefits. Badger Furniture Co. v. Industrial Comm., 195 Wis. 134, 217 N.W. 734 (1928).

Willful misconduct can be a complete bar, provided the misconduct constitutes a complete deviation from the scope of employment. Vollmer v. Industrial Comm., 254 Wis. 162, 35 N.W.2d 304 (1948). The following events result in a reduction of compensation by 15% (not to exceed $15,000): (1) employee's failure to use safety devices; (2) employee's failure to obey safety rules; and (3) when the injury is due to the intoxication of the employee or use by the employee of a controlled substance. Wis. Stat. §102.58.

C. Injuries involving drugs and/or alcohol.

If an employee's injury is caused by the failure of the employee to use safety devices and that are adequately maintained, and the use of which is reasonably enforced by the employer, or if injury results from the employee's failure to obey any reasonable rule adopted and reasonably enforced by the employer for the safety of the employee and of which the employee has notice, the compensation and death benefit is reduced by 15% up to $15,000. Wis. Stat. §102.58(1); Haller Beverage Corp. v. DILHR, 49 Wis. 2d 233, 181 N.W. 2d 418 (1970). If an employee violates the employer's policy concerning employee drug or alcohol use and is injured, and if that violation is causal to the employee's injury, no compensation or death benefits are paid to the injured employee or a dependent of the injured employee and no payment under s. 102.49 (5) (b) or (c) shall be payable. Wis. Stat. §102.58(2).

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

Insurers and self-insured employers are required to report false or fraudulent claims, as defined by Wis. Stat. § 943.395, to the DWD. The DWD may require further investigation and refer appropriate cases to the Wisconsin Department of Justice or to the district attorney. Wis. Stat. § 102.125.

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

Unfortunately, falsification of information on employment records is not a bar to worker's compensation benefits. Tews Lime and Cement Co. v. DILHR, 38 Wis. 2d 665, 158 N.W.2d 377 (1968).

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

Vendors' recreational activities with their customers, such as fishing or hunting trips, are not deviations from employment if authorized or directed by the employer. Continental Casualty Co. v. Industrial Comm., 26 Wis. 2d 470, 132 N.W.2d 584 (1965); Schwab v. DILHR, 40 Wis. 2d 686, 162 N.W.2d 548 (1968).

One court used the following factors to hold that a baseball game was within the course of employment whether: (1) the employee was subject to the employer's rules of conduct while at the event; (2) participation was part of job description and performance reviews; (3) participation benefited the employer; and (4) the employer actively solicited employee participation. Wunsch v. City of Fond du Lac Fire Dept., LIRC Dec. No. 93-040966 (December 21, 1994).

A softball game played during a paid 20 minute break was deemed a momentary and insubstantial deviation from employment and hence the injury an employee sustained during the game was found to be compensable where the activity had gone on long enough for the employer to be aware of the activity and to become an incident of employment. E.C. Styberg

Engineering Co., Inc. v. LIRC, 2005 WI App. 20, 278 Wis. 2d 540, 692 N.W.2d 322.

Regarding wellness programs, there is a statutory exception precluding liability for injuries occurring while the employee is "engaging in a program designed to improve the physical well-being of the employee, whether or not the program is located on the employer's premises, if participation in the program is voluntary and the employee receives no compensation for participation." Wis. Stat. §102.03(1)(c)(3).

13. Are injuries by co-employees compensable?

Yes, there is compensation for an employee that brings an "action against any coemployee for an assault intended to cause bodily harm, or against a coemployee for negligent operation of a motor vehicle not owned or leased by the employer, or against a coemployee of the same employer to the extent that there would be liability or governmental unit to pay judgments against employees under a collective bargaining agreement or a local ordinance." Wis. Stat. §102.03(2).

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

Injuries caused by workplace violence may be compensable if the employment places the employee in a "zone of special danger". This is referred to as the "positional risk" doctrine.

There will be liability where the circumstances of employment put the employee at the time and place where he or she was injured by a force not solely personal to him or her. Allied Mfg. Ins. v. DILHR, 45 Wis. 2d 563, 173 N.W.2d 690 (1970); Cutler-Hammer, Inc. v. Industrial Commission, 5 Wis. 2d 247, 253-54, 92 N.W.2d 824 (1958).

Personally motivated assaults may invoke the positional risk doctrine if a condition of employment facilitates the injury. Weiss v. City of Milwaukee, 208 Wis. 2d 95, 559 N.W.2d 588 (1997).

BENEFITS

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

The "average weekly wage" is the greater of two factors: (1) the hourly wage rate multiplied by the number of hours normally scheduled to work (usually 40 hours per week); or (2) the average of the total gross wages earned in the 52 weeks preceding the injury. There are special rules for seasonal and part-time employees. Wis. Stat. §102.11. The average weekly wage for a part-time employee is calculated as the greater of the actual average weekly earnings of the employee for the 52 calendar weeks before the injury, except that weeks when no work was performed will not be considered, or the employee's hourly earnings on the injury date multiplied by the average number of hours worked in the 52 weeks before the injury, except that weeks when no

work was performed will not be considered. An employee's wage will be expanded only when the employee is employed by another employer at the time of injury, or if the employee was employed at part-time employment for less than 12 months before the injury. Wage expansion may be rebutted when there is evidence to show an employee chose to restrict employment to part-time. It is presumed, unless rebutted by reasonably clear and complete documentation, that the normal full-time workweek established by the employer is 24 hours for a flight attendant, 56 hours for a firefighter, and not less than 40 hours for any other employee. Wis. Stat. §102.11(1)(a)(4).

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

Temporary total disability benefits are paid at the rate of two-thirds of the average weekly wage. The maximum rate varies depending on the year in which the injury occurred. Wis. Stat. § 102.11(1).

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

There is no specific statutory requirement for "prompt payment" of disability benefits, but the Department of Workforce Development generally requires a self-insured employer or insurer to pay 80% of all indemnity claims within 14 days of the injury or the last day worked after the injury before the first day of compensable lost time. DWD 80.02(3)(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)?**

If an employee is off less than 8 days, there is a 3-day waiting period. If the employee is disabled on the 8th day there is no waiting period. Wis. Stat. §102.43.

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

Temporary disability must be paid when two things occur at the same time: (1) a wage loss; and (2) a healing period is not yet reached. Temporary disability may be terminated when the employee returns to work during the healing period. You may owe temporary partial benefits if there is a partial wage loss. Benefits are also terminated when a medical practitioner indicates that maximum medical improvement has been reached. See also, Wis. Admin. Code §DWD 80.47. Larsen Co. v. Industrial Comm., 9 Wis. 2d 386, 101 N.W.2d 129 (1960); Knobbe v. Industrial Comm., 208 Wis. 185, 242 N.W. 501 (1932). An employer/insurer must advise the employee and Department of Workforce Development that benefits are being terminated and that, if the employee disagrees, he or she has a right to a hearing on the issue. However, if an employee who has sustained a compensable injury undertakes in good faith invasive treatment that is generally medically acceptable, but that is unnecessary, the employer shall pay disability

indemnity for all disability incurred because of that treatment. An employer is not liable for disability indemnity for any disability incurred because of any unnecessary treatment undertaken in good faith that is noninvasive or not medically acceptable. Wis. Stat. §102.42 (1m).

Wis. Stat. §102.43(9) allows for the suspension of temporary total disability payments when an employee is able to return to restricted work during the healing period, if any of the following apply: (1) the employee is offered suitable employment within his or her physical and mental limitations; (2) the employee has been suspended or terminated due to the employee's alleged commission of a crime substantially related to the employment AND the employee has been formally charged (If the employee is found not guilty, temporary total disability is due); or (3) the employee has been suspended or terminated due to the employee's violation of the employer's drug policy during the period when the employee could return to a restricted type of work during the healing period (The drug policy must have been established in writing and regularly enforced prior to the date of injury).

Compensation for temporary disability is suspended for an employee who has been convicted of a crime, is incarcerated, and not available to return to work during the healing period. Wis. Stat. §102.43 (9)(d).

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

Any overpayment of temporary disability benefits is offset against the respondent's liability for permanent disability benefits. See McCune v. Industrial Comm'n, 260 Wis. 499, 50 N.W.2d 683 (1952).

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

The DWD may allow such sum as it considers just but not exceeding the employee's average annual earnings. In determining the potential for wage loss due to the disfigurement and the sum awarded, the DWD shall take into account the age, education, training, previous experience and earnings of the employee, the employee's present occupation and earnings, likelihood of future suitable occupational change, the appearance of the disfigurement, its location, and the likelihood of its exposure in occupations for which the employee is suited. Consideration for disfigurement allowance is confined to those areas of the body that are exposed in the normal course of employment. Disfigurement will not be allowed for an employee who returns to work for the employer at the time of injury or who is offered employment by that employer at the same or higher wage, unless employee has an actual wage loss. Wis. Stat. §102.56(1) & (2).

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

In a simple case, the treating physician determines the existence of a PPD and gives an impairment rating on or soon after the date the healing period ends. John D. Neal & Joseph Danas, Jr., Worker's Compensation Handbook, State Bar of Wisconsin (9th ed. 2019), section 6.18. The insurer is required to obtain and submit to the Department of Workforce Development

such a report (often on Form WKC-16) if any of the following occurs:

1. Compensation for temporary disability exceeds three weeks.
2. There is a known permanent disability (e.g., amputation).
3. Any surgery (other than hernia surgery) has been performed.
4. The employee sustains an eye injury requiring three or more sessions of off-site medical treatment.

Worker's Compensation Handbook, supra, section 6.18 citing Wis. Stat. § 102.13(2)(c); see also Wis. Admin. Code § DWD 80.02(2). Generally, the insurer must, upon receipt of such a report, either initiate PPD payments within 30 days or take steps to obtain another medical opinion following an examination conducted under terms of Wis. Stat. § 102.13(1)(a). Id., section 6.18 citing Wis. Stat. § 102.32(6)(b); Wis. Admin. Code § DWD 80.52. If a report of such examination is not available within 90 days after the date it was requested, PPD payments must be initiated. Id., section 6.18 citing Wis. Admin. Code § DWD 80.52(2). Even in the absence of a medical report finding permanent disability, PPD payments must be initiated (subject to rules governing accrual of benefits) when a mandatory minimum permanent disability exists pursuant to Wis. Admin. Code § DWD 80.32. Id., citing Wis. Stat. § 102.32(6)

The DWD has a long-standing policy requiring initiation of agreed-on or mandatory PPD payments immediately following the cessation of TTD or TPD payments, regardless of whether the TTD or TPD payments ended because the person reached the end of his or her healing period or because the person returned to work while the healing period continues. Id. PPD is accrued in intervals between periods when temporary disability is paid. Id. These are referred to by the DWD as "gap weeks." Id.

PPD Rate. The maximum weekly permanent partial disability (PPD) rate will increase to $415 for injuries occurring on and after April 10, 2022 and before January 1, 2023, and to $430 for injuries occurring on and after January 1, 2023. Wis. Stat. § 102.11(1).

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

Over two dozen identified permanent partial disabilities subject to the schedule are set forth in Wis. Stat. §102.52. Medical doctors determine "relative disabilities" to scheduled parts of the body. There is a guideline for determining relative disabilities in Wis. Admin. Code §DWD 80.32.

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

Injuries not specifically set forth in Wis. Stat. §102.52 are considered "unscheduled" and are available for a "whole person" rating. Such injuries include a disability affecting the torso, head, and mental faculties other than hearing or sight. The maximum number of weeks for a whole person permanent disability is 1,000. Wis. Stat. §102.44(3). This is a medical rating subject to certain guidelines.

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

recovery?

Vocational rehabilitation retraining maintenance benefits (temporary total disability during a school program) are available. Wis. Stat. §102.61. The employee can work part-time, or 24 hours per week, and still be entitled to the full temporary total disability benefit for that week. Wis. Stat. §102.43(5). An employee must have sustained permanent disability as the result of a compensable injury. If an employee is not able to return to suitable employment with the employer, he or she is to be evaluated by the state Division of Vocational Rehabilitation. Johnson v. LIRC, 177 Wis. 2d 736, 503 N.W.2d 1 (Ct. App. 1993). Suitable employment means employment that is within an employee's permanent work restrictions, that the employee has the physical capacity, knowledge, transferable skills, and ability to perform, and pays not less than 90% of the employee's pre-injury average weekly wage. Wis. Stat §102.61(1g)(a).

The insurance carriers and self-insured employers are liable for reasonable costs of a retraining program including the cost of tuition, fees, and books in cases where the Division of Vocational Rehabilitation provides services for the rehabilitative training program. Wis. Stat. §102.61(1), (1g) (b), (1m) (d) & (1r) (c).

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

If an employee is found to be permanently and totally disabled, the employee receives PTD benefits "for the period that the employee may live." Worker's Compensation Handbook, supra, section 6.34 citing Wis. Stat. § 102.44(2). Regardless of the cause of death, the employee's dependents also are entitled to death benefits, unless the employee's lifetime disability benefits have exceeded the limitations set forth in Wis. Stat. §§ 102.44 and 102.46 (1,000 weeks of total disability, or approximately 19 years). Id.

An employee is permanently and totally disabled if he or she has sustained total impairment for industrial use of both eyes, the loss of both arms at or near the shoulder or both legs at or near the hip, or the loss of one arm at the shoulder and one leg at the hip. Id. section 6.35 citing Wis. Stat. § 102.44(2). Complete paralysis of a member is treated the same as the total loss of the member. Id. section 6.35 citing Wis. Stat. § 102.55(2). Most insurance carriers will concede PTD to an employee whose schedule impairments do not satisfy Wis. Stat. § 102.44(2) if the number of weeks for which benefits should be paid for schedule impairments exceeds 1,000. Id.

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

A. Funeral expenses.

In all cases where death of an employee proximately results from the injury, the employer/insurer shall pay the reasonable expense for burial. For injuries sustained after May 1, 2010, the maximum burial expense is $10,000. (Wis. Stat. § 102.50.)

B. Dependency claims.

Dependents, usually the spouse or minor child of the deceased, are entitled to four times the employee's annual earnings (200 times the average weekly wage) at the time of injury as a death benefit subject to the maximum and minimum limitations. See Wis. Stat. §§ 102.11(1), (2), 102.46.

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

If at the time of injury an employee has permanent disability that if it had resulted from that injury would have entitled the employee to indemnity for 200 weeks and if as a result of that injury the employee incurs further permanent disability that entitles the employee to indemnity for 200 weeks, the employee shall be paid from the funds equivalent to the amount that would be payable for that previous disability if that previous disability had resulted from that injury or the amount that is payable for that further disability, whichever is less, except that an employee may not be paid that additional compensation if the employee has already received compensation under this subsection. If the previous and further disabilities result in permanent total disability, the additional compensation shall be in such amount as will complete the payments that would have been due had the permanent total disability resulted from that injury. Wis. Stat. §102.59(1).

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

All claims are open, unless specifically closed by compromise, for the length of the applicable limitation period. Wis. Stat. §102.17(4); Worker's Compensation Handbook, supra, section 9.36 citing Schenkoski v. LIRC, 203 Wis. 2d 109, 552 N.W.2d 120 (Ct. App. 1996). Thus, a compromise agreement will extinguish liability for medical expenses. Id. In those cases where a "final order" has been obtained after a hearing, only medical expense claims remain open. The duration of liability for medical expenses is subject only to the statute of limitation. Worker's Compensation Handbook, supra, section 9.36 citing Wis. Stat. § 102.17(4). An employer's liability for medical expenses cannot be terminated by a final order. Worker's Compensation Handbook, supra, section 9.36 citing Lisney v. LIRC, 171 Wis. 2d 499, 493 N.W.2d 14 (1992).

Administrative law judges are permitted to issue "interlocutory orders," reserving jurisdiction on any or all issues. There is some controversy over whether an interlocutory order as to one issue leaves open all issues. There is a strong policy coming from the administrative agency, the DWD, to leave cases open. The DWD retains permanent jurisdiction over a claim that is subject to an interlocutory order unless a final order is issued after a later hearing or a compromise agreement is approved. Worker's Compensation Handbook, supra, section 9.37.

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

All attorney fees are paid from the employee's award. Wis. Stat. §102.26.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Wis. Stat. § 102.03 provides that liability for worker's compensation exists only when the following conditions occur: 1. The employee sustains an injury; 2. At the time of the injury, both the employee and the employer are subject to the provisions of the workers compensation act; 3. At the time of the injury, the employee is performing service growing out of and incidental to his or her employment; 4. The employee's injury has not been self-inflicted; and 5. The accident or disease that causes the employee's injury arises out of his or her employment. In addition, an employee of or volunteer for an employer that provides firefighting, law enforcement, or medical treatment of COVID-19 is presume to suffer injury as a result of COVID-19 contracted between March 12, 2020 and June 10, 2020. When such conditions exist, the right to recover worker's compensation is the injured employee's exclusive remedy against his or her employer. Wis. Stat. § 102.03(2). The exclusive remedy provision protects the employer, co-employees and the worker's compensation insurer from third party suit. Wis. Stat. §102.03(2), §102.29(6) (temporary help agencies), §102.29(6m) (leased employees).

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

There are two statutory exceptions to coemployee immunity for private employers: (1) an assault intended to cause bodily harm by a co-employee; and (2) suit against a co-employee for negligent operation of a motor vehicle not owned or leased by the employer. Wis. Stat. §102.03(2); see Fitzgerald v. Capezza, No. 2016AP518, 2017 WL 1944374 (Wis. Ct. App. May 9, 2017) (unpublished opinion not citable per Wis. Stat. § 809.23[3]) (holding that despite vehicle involved in accident being titled in an individual's name, employer paid for vehicle and all expenses related to its use, registered it as a commercial vehicle, and insured the vehicle as a commercial vehicle, and therefore was owner of the vehicle). A comprehensive general liability (CGL) insurance policy containing an endorsement that removed the coemployee exclusion from the policy waives coemployee immunity. Maas v. Ziegler, 172 Wis. 2d 70, 492 N.W.2d 621 (1992).

There are also several limited exceptions recognized by appellate court decision:

(1) Implied waiver of the immunity by endorsement to an auto liability policy, Backhaus v. Krueger, 126 Wis. 2d 178, 376 N.W.2d 377 (Ct. App. 1985);

(2) Where the employer acted in a persona distinct from its status as an employer. Glowacki v. Lakeview Neurorehab CTR Midwest, Inc., No. 2017AP1636, 2018 WL 3089294, ¶¶ 9–10 (Wis. Ct. App. June 20, 2018) (unpublished opinion not citable per Wis. Stat. § 809.23[3]) (holding business that established a separate licensed entity is liable in tort only if the second persona is completely independent from and unrelated to its status as an employer); see Henning v.

General Motors Assembly Div., 143 Wis. 2d 1, 419 N.W.2d 551 (1988);

(3) Where a contractor expressly accepted responsibility for injuries to persons on a job site even without language waiving immunity, Schaub v. West Bend Mutual, 195 Wis. 2d 181, 536 N.W.2d 123 (Ct. App. 1995); and

(4) No waiver of related claims. Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997) (holding that the exclusive remedy provision does not bar a discrimination claim under the Wisconsin Fair Employment Act); Marino v. Arandell Corp., 1 F. Supp. 2d 947 (E.D. Wis. 1998) (holding that exclusive remedy provision does not bar claim for invasion of privacy based on employer's failure to maintain the confidentiality of a worker's medical records); St. Paul Fire & Marine Insurance Co. v. Keltgen, 2003 WI App 53 , 260 Wis. 2d 523 , 659 N.W.2d 906 (holding workers compensation act's exclusive remedy provision does not bar Wis. Stat. Ch. 51 [treatment and rehabilitation services for mental disorders, developmental disabilities, mental illness, alcoholism and other drug abuse] claim that serves separate purpose).

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

An employer can be compelled to pay an additional 15% of compensation, up to $15,000, where the injury was caused by the failure to follow Occupational Safety and Health Administration regulations or where the employer failed to provide a safe place of employment. Wis. Stat. §102.57; Wis. Stat. §101.11 ("Safe Place Statute").

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

When the injury is sustained by a minor illegally employed, compensation shall be doubled, up to a maximum of $7,500, if the employee does not have a written work permit; triple the compensation, up to a maximum of $15,000, is paid if the minor is working at prohibited employment. The penalty is not paid to the minor but rather is paid into the state Supplemental Benefit Fund. Wis. Stat. §102.60; Wis. Stat. §102.65.

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

The bad faith penalty is 200% of compensation, including medical expenses, up to a maximum of $30,000 for each act of bad faith. Wis. Stat. §102.18(1)(bp). Where the employer/insurer "inexcusably" fails to pay, a penalty of 10% of the delayed compensation can be awarded. Wis. Stat. §102.22(1). The two penalties may not be awarded concurrently.

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

An employer can be fined up to a year's wages for unreasonable refusal to rehire the employee. Wis. Stat. §102.35(3). The employer must prove the termination was: (1) "fit, fair and just under the circumstances"; (2) the result of an inability to provide work suited to the employee's physical and mental limitations; or (3) the result of a seniority provision in a collective bargaining

agreement. West Bend Co. v. LIRC, 149 Wis. 2d 110, 438 N.W.2d 823 (1989); West Allis School District v. DILHR, 116 Wis. 2d 410, 342 N.W.2d 415 (1984).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

An injured employee may sue a third party. Wis. Stat. §102.29(1). For Wis. Stat. § 102.29(1) to apply, (1) the action must be grounded in tort, (2) the action must be one for the employee's injury or death, and (3) the injury or death must be one for which the employer or its insurer has or may have liability. Johnson v. ABC Ins. Co., 193 Wis. 2d 35, 45, 532 N.W.2d 130 (1995); Houlihan v. ABC Ins. Co., 198 Wis. 2d 133, 142, 542 N.W.2d 178 (Ct. App. 1995). The worker's compensation insurance carrier also may do so if it paid any benefits to employee. The employee and the insurance carrier must give each other notice and an opportunity to join in any third-party action. Wis. Stat. § 102.29(1); see also Wis. Stat. § 102.29(4), Wis. Stat. § 102.29(5).

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

A co-employee cannot be sued, unless the injury resulted from an intentional assault, or the co-employee operated a motor vehicle not owned or leased by the employer. Wis. Stat. §102.03(2). Please see 29B, paragraph 1, supra.

36. Is subrogation available?

The employer/insurer/the Department (State Fund) enjoys the same right to sue the third party as the employee. The award is distributed in accordance with the schedule set forth in Wis. Stat. §102.29(1)(a).

MEDICALS

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

The Act does not contain a provision for penalizing an employer/insurer for late payment of a medical bill, although the state Office of Commissioner of Insurance generally holds that such bills should be paid or denied within 30 days of their receipt and accompanying proof of their alleged relationship to the injury.

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

The Department of Workforce Development may, after a prehearing conference, "issue an order requiring disclosure or exchange of any information or written material which it considers material to the timely and orderly disposition of the dispute or controversy." Wis. Stat. §102.17(1)(b). A failure to comply with the terms of such an order may result in a dismissal of a pending claim without prejudice or an order excluding evidence relating to the information at hearing. The DWD will order production of reports upon written request by a party to do so, even without a prehearing conference, as a matter of DWD policy.

To be admissible at hearing, medical reports must be filed and served on a form WKC-16-B at least 15 days in advance of the hearing. Wis. Admin. Code § HA 4.15(6). Unless good cause is shown, a failure to meet these preconditions will result in exclusion of non-conforming medical reports at the hearing. Id.

There is technically a waiver of the physician-patient privilege as to "reasonably related" medical records which occur as a matter of law when the employee reports an industrial injury, or makes a claim for benefits. Wis. Stat. §102.13(2). However, many medical records custodians will not disclose any records without a signed authorization. Records custodians also frequently misconstrue the term "reasonably related" so that relevant medical records are not disclosed. Complete medical records may be subpoenaed to hearing, but in such cases, the records are not available to the independent medical examiner or defense attorney in advance of the hearing and a concluding hearing may be necessary to protect the due process rights of the employer/insurer.

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?

Where the employer has notice of an injury and its relationship to the employment, the employer shall offer to the employee its choice of practitioner. Practitioners include physicians, chiropractors, psychologists, and podiatrists. The employee has a right to a second choice of attending practitioner on notice to the employer/insurer. Partners and clinics count as one practitioner, and treatment by one practitioner on referral from another is deemed to be treatment by one practitioner. Wis. Stat. §102.42(2).

An employee who claims compensation must submit to one or more reasonable examinations by a practitioner selected by the employer if the employer so requests in writing. Wis. Stat. §102.13(1). Employees who appear at examinations directed by employers and worker's compensation insurance carriers may have an observer present at the examination. Wis. Stat. §.102.13(1)(b). An employee may not be required to travel more than 100 miles to participate in the examination except in special circumstances. Wis. Stat. § 102.13(4). Expenses must be tendered in advance. Wis. Stat. §102.13(1)(b). By department policy, expenses include wages lost because of the examination and mileage. The notice of the examination must include the

date, time and place of the exam and the procedure for changing them, as well as the examiner's area of specialty. The notice must also explain the employee's rights to have a personal physician present at the exam, right to receive copies of all reports generated from the exam, and to have a translator present if the employee has difficulty communicating in English.

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

Wisconsin adopted treatment guidelines are Wis. Admin. Code Ch. DWD 81. The guidelines only apply to conceded claims. Wis. Admin. Code §DWD 81.01(2). For treatment not specifically covered in §§DWD 81.04 to 81.13, the code allows treatment reasonable and necessary for the diagnosis and to cure or relieve a condition consistent with the current accepted standards of practice within the scope of the provider's license or certification. Wis. Admin. Code §DWD 81.03(10).

In general, the guidelines require medical providers to evaluate the medical necessity of all treatment on an ongoing basis to determine if there is progressive improvement. If the provider determines there is not progressive improvement in two of the following categories - subjective reports of improving pain, progressively improving objective clinical signs, or progressively improving functional status – the modality shall be discontinued or significantly modified or the provider shall reconsider the diagnosis. Wis. Admin. Code §DWD 81.04(c). Providers may depart from the guidelines if there is a documented medical complication, previous treatment did not meet the accepted standard of practice, the treatment is necessary to assist the patient in the initial return to work where the work activities place stress on the body part affected by the workplace injury, the treatment continues to cause progressive improvement in the patient's condition, or there is an incapacitating exacerbation of the patient's condition. Wis. Admin. Code § DWD 81.04(5). The guidelines have specific provisions covering medical imaging studies and the treatment of low back pain, neck pain, thoracic back pain, upper extremity disorders, complex regional pain syndrome of the upper and lower extremities, inpatient hospitalizations, surgical procedures, and chronic management. Wis. Admin. Code Chapter DWD 81.

Covered treatment includes medical, surgical, chiropractic, psychological, podiatric, dental and hospital treatment, medicines, medical and surgical supplies, crutches, artificial members, appliances, and training in the use of artificial members and appliances. Wis. Stat. §102.42(1). A procedure has been established to resolve disputes concerning the reasonableness of fees and the necessity of treatment. The guidelines in Wis. Admin. Code Ch. 81 are factors for an impartial health care services review organization and a member from an independent panel of experts established by the department to consider in rendering opinions to resolve necessity of treatment disputes arising under Wis. Stat. § 102.16(2m) and Wis. Admin. Code § 80.73. With regard to reasonableness of fees, bills are subject to reduction if they exceed a fixed amount and set forth in a certified database. Wis. Admin. Code §DWD 80.72. There is an appeal process for the medical provider to challenge the decision. Wis. Admin. Code §DWD 80.72(4). The employee is not responsible to pay the difference between the allowed amount and the amount charged. Wis. Admin. Code §DWD 80.72. The DWD will have a third "independent" medical practitioner review disputes on necessity of treatment and that practitioner's finding binds the parties. Wis. Admin. Code §DWD 80.73.

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

Prosthetic appliances are subject to the same standard as all other medical treatment (see answer 40). Liability for repair and replacement of prosthetic devices is limited to the effects of normal wear and tear. Artificial members furnished at the end of the healing period for cosmetic purposes only need not be duplicated. Wis. Stat. § 102.42(5).

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

The Commission has held that a van is not a medical supply and thus the employer/insurer was not required to purchase a vehicle for an employee who developed paralysis after an injury. However, the employer/insurer was required to pay for modifications to the vehicle to accommodate the individual's disability. Flynn v. Allen Roofing & Construction Co., WC Claim No. 87-048518 (LIRC June 13, 1990).

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

Yes. Wis. Stat. §102.16(2), (2m); Wis. Admin. Code Chapter DWD 81.

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

None. A review of medical bills to determine whether they are reasonable is permitted under certain guidelines. See answer 40.

PRACTICE/PROCEDURE

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

Claims for indemnity and medical expense are contested by filing an application for hearing with the DWD. The respondents (employer/insurer) must answer within 20 days on forms provided by the DWD. If the employee is not represented or if there are multiple issues, then a prehearing conference may be held. A 30 minute discussion between the parties prior to trial also may be held. The Department has also recently enacted settlement conferences, prior to hearing on some cases. A formal hearing, usually limited between two and four hours, will be scheduled (usually within approximately two months of the filing of the Certification of Readiness form). That form notifies the Department that the employee/applicant is ready to proceed with a hearing. An administrative law judge finds facts and renders conclusions of law in a written decision following the hearing. The written decision should be issued within ninety days of the hearing and close of the record. Wis. Stat. §§102.17 and 102.18.

46. What is the method of claim adjudication?

A. Administrative hearing.

Initial determinations are made by an administrative law judge employed by the Department of Administration’s Office of Worker's Compensation Hearings: https://doa.wi.gov/Pages/LicensesHearings/DHAWorkersCompensation.aspx

There is a process before the Division of Hearings and Appeals where a non-lawyer may apply for a license to represent a person, firm or corporation as an agent. Wis. Stat. § 102.17(1)(c)(1). After a decision by an ALJ, the case can then be appealed to the Labor and Industry Review Commission (LIRC or Commission), a three-person politically appointed panel which acts on cases where petitions for review have been filled. Wis. Stat. § 102.18(3).

B. Circuit court.

Within 30 days after the date of a Commission order, an aggrieved party may commence an action in the circuit court of the county where the party resides. Wis. Stat. § 102.23(1)(a)(2). A Labor and Industry Review Commission award may be set aside because: (1) LIRC acted without authority or in excess of its powers; (2) the order was procured by fraud; or (3) LIRC’s findings of fact do not support the order or award. Wis. Stat. §102.23.

C. Appellate.

Appeal to the Court of Appeals may be taken pursuant to Wis. Stat. § 102.25 within 45 or 90 days after entry of the final judgment or order appealed from, depending when notice of entry of the judgment or order is served. See Wis. Stat. §§ 102.25(1), 808.04(1). A Court of Appeals decision is reviewable by the Wisconsin Supreme Court only if the Supreme Court grants a Petition for Review. The Petition for Review must be filed within 30 days of the date of the Court of Appeals’ decision. Wis. Stat. § 808.10.

47. What are the requirements for stipulations or settlements?

Stipulation and compromise agreements are permitted, both subject to review by the DWD. To obtain a full and final compromise on a particular claim, the DWD must find there is a “valid dispute” between the parties. No compromise is enforceable unless it is reviewed and approved by the DWD. Wis. Stat. §102.16(1); Wis. Admin. Code §DWD 80.03.

Alternate Dispute Resolution. The Worker's Compensation Division has statutory authority to conduct alternative dispute resolution activities to resolve disputed cases in which employees are not represented by attorneys. Wis. Stat. §102.16(1)(b)(2).

Uninsured Employer Fund. The Uninsured Employer Fund (UEF) receives the same distribution of proceeds from third party settlements as worker's compensation insurance carriers and self-insured employers. Wis. Stat. §§ 102.80(1)(d), 102.81(4)(b), 102.81(4)(b)(2), 102.81(5), 102.82(1) and 102.81(4)(c).

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

Liability for medical expenses generally does not cease with a final order but is subject only to the statute of limitation. Worker's Compensation Handbook, supra, section 5.1 citing Wis. Stat. § 102.17(4); Lisney v. LIRC, 171 Wis. 2d 499, 493 N.W.2d 14 (1992). Liability for future medical expenses can be extinguished by a full and final compromise approved by the Department of Workforce Development (DWD, or the department). Id. citing Schenkoski v. LIRC, 203 Wis. 2d 109, 552 N.W.2d 120 (Ct. App. 1996).

A worker's compensation insurer or self-insured employer must determine whether an employee is eligible for Medicare and report certain information to the Secretary of the Department of Health and Human Services. Worker's Compensation Handbook, supra, section 11.12 citing 42 U.S.C. § 1395y(b)(8). See Answer 54 below. Medicare is a secondary payer of all medical expenses associated with worker's compensation claims. Id. The Medicare Secondary Payer Act was enacted to prevent Medicare from covering the entire cost of worker's compensation medical expenses. Id. citing 42 U.S.C. § 1395y. The statute gives Medicare the right to recover medical expenses from work-related injuries that it has paid and that primary payers (i.e., employers or their insurers) wrongfully withheld. Id. There is greater consistency and predictability for primary payers to determine which medical expenses can and cannot be withheld. Id. citing 42 U.S.C. § 1395y(l). The statute provides that Medicare may recover from the primary payer or "an entity that receives payment from a primary" payer (perhaps including attorneys) the following: medical expenses, interest on those expenses, and possibly double damages if the payer or entity fails to timely reimburse Medicare for the full amount due. Id. citing 42 U.S.C. §§ 1395y(b)(2)(B)(ii), (b)(3)(A).

The Centers for Medicare and Medicaid Services (CMS) have begun to issue guidelines implementing these mandatory reporting requirements. Id. These guidelines govern the form and manner of reporting, including which claims must be reported and when. Id. The reporting requirements are designed to permit the CMS to take appropriate recovery actions. Id. The mandatory reporting requirements obligate insurers and self-insured employers to report any settlement, award, judgment, or other payment to the CMS. Id. Failure to comply with this provision will subject the insurer or self-insured employer to a $1,000 penalty for each day the report is late. Id. citing 42 U.S.C. § 1395y(b)(8)(B)(i).

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

Yes. Wis. Stat. §102.16(1). See answer 47.

RISK FINANCE FOR WORKERS' COMPENSATION

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

All "employers" within the meaning of Wis. Stat. §102.04(1) must be insured for worker's

compensation, receive an exemption, or receive permission from the DWD to be self-insured. Wis. Stat. §102.28. Private insurers service most employers. There is an "assigned risk pool" for those employers who are not able to obtain private insurance or permission to be self-insured.

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

A. For individual entities.

The requirements for self-insurance by an individual entity are set forth in Wis. Stat. §102.28(2) and Wis. Admin. Code Chapter DWD 80. Essentially, a determination is made as to whether the applicant for self-insurance status is financially solvent and able to meet its expected obligations, given past injury and claim history.

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

Insurance pools are permitted. See Wis. Stat. §611; Wis. Stat. §619. Contact should be made with the DWD and Office of Commissioner of Insurance before considering such action for workers compensation insurance.

52. Are "illegal aliens" entitled to benefits of worker's 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"?

Employees without authorization to work in the United States are entitled to worker's compensation benefits. Baker-Drayton v. St. Anne's Home for the Elderly, WC Claim No. 1995-038417 (LIRC, July 19, 1999) and Arista Rea v. Kenosha Beef International, WC Claim No. 1990-070904 (LIRC May 5, 1999).

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 14.

54. Are there state specific requirements that must be satisfied in light of the obligation of parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?

No. It is recommended to take Medicare's interests into consideration in all settlements, and to follow all policies adopted by the Centers for Medicare and Medicaid Services ("CMS"). Some judges in the Worker's Compensation Division will require the parties to address Medicare's interests by either providing for a Medicare Set-Aside Agreement, leaving future medical expenses open, or agreeing to pay future medical expenses in the compromise agreement

before a settlement is approved.

Under Medicare regulations (42 CFR 411.46), Medicare is secondary payer to the payment of worker's compensation by a worker's compensation carrier or self-insured employer. The obligation to pay for medical expenses for a compensable condition cannot be shifted to Medicare. Therefore, Medicare has an interest in all lump sum settlements of a worker's compensation matter, when the settlement closes out future medicals. CMS currently imposes the following review thresholds:

- The employee is already a Medicare beneficiary and the total settlement amount is greater than $25,000; or
- There is a reasonable expectation that the employee will be a Medicare beneficiary within 30 months of the settlement and the settlement amount is greater than $250,000.

These requirements are subject to change. CMS does not issue review letters for claims that do not meet their review thresholds. The recommended method to protect Medicare's interests is to consider and, if necessary, include a Workers' Compensation Medicare Set-aside Arrangement ("WCMSA") as part of the worker's compensation settlement.

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation laws?

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 for 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 duty to reimburse for payments is set forth in Wis. Stat. § 102.27(2)(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)?

Although state and federal law generally treat medical records as confidential, and these records may not be disclosed without the consent of the patient, HIPAA and state law permit disclosure of medical records to employers and insurers, for worker's compensation purposes, without an authorization. 45 C.F.R. 164.512(l); Wis. Stats. §§ 102.13(1)(a), 102.13(2)(a); Wis. Stat. §§146.81(4), 146.82(1). Even though there is this exception, the HIPAA regulations are adhered to when disclosing information to third parties. Also, the healthcare providers are concerned with the HIPAA regulations. In all practical purposes, an authorization is required to obtain complete medical records.

Limited Exception for Release of Confidential Records. The Worker's Compensation Division is authorized to provide limited information from its records to the Department of Health Services

or a county department of social services. The information is limited to the name and address of an employee, name and address of the employee's employer and financial information about the employee contained in the record. Creation of Wis. Stats. § 102.33 (2)(b)(7).

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

Wis. Stat. § 102.07(8)(b) provides a 9-part test to determine who is an independent contractor. All 9 elements must be met for a person to be deemed an independent contractor and not an employee. In practice, it is often difficult to establish that all 9 elements have been met.

An independent contractor will not be an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

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

Professional employment organizations, temporary service companies, and leasing companies are considered “temporary help agencies.” "Temporary help agency" means an employer who places its employee with or leases its employees to another employer who controls the employee's work activities and compensates the first employer for the employee's services, regardless of the duration of the services. Wis. Stat. 102.01(2)(f).

A temporary help agency is the employer of an employee whom the temporary help agency has placed with or leased to another employer that compensates the temporary help agency for the

employee's services. As a result of Wis. Stat. §102.29, a temporary help agency is liable under Wis. Stat. §102.03 for all compensation and other payments payable under this chapter to or with respect to that employee, including any payments required under Wis. Stats. §§ 102.16(3), 102.18(1)(b) or (bp), 102.22(1), 102.35(3), 102.57, or 102.60. Except as permitted under Wis. Stat. § 102.29, a temporary help agency may not seek or receive reimbursement from another employer for any payments made because of that liability. Wis. Stat. § 102.04(2m).

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?**

The 9-part test in Wis. Stat. § 102.07(8)(b) is used to determine whether an owner/operators of trucks or other vehicles for driving or delivery of people or property is an independent contractor is governed. Jarrett v. LIRC, 2000 WI App. 46, 233 Wis. 2d 174, 607 N.W.2d 326.

In C.W. Transport, Inc. v. LIRC, 128 Wis. 2d 520, 383 N.W.2d 921 (Ct. App. 1986), an owner/operator delivered a load for C.W. and entered a trip lease with another common carrier for the return trip. The court of appeals found that the owner/operator was an employee of C.W. and not the common carrier with whom the trip lease was signed because C.W. "reserved a modicum of direction and control during the trip lease." The modicum of direction and control consisted of the requirement that C.W. approve the trip lease, be apprised of the owner/operator's schedule, and retain 7% of the trip lease

payment for administrative expenses (the trip lease carrier issued payment to C.W. who would remit payment to the owner/operator less the 7%).

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

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