

Ohio

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

Ohio Revised Code §4121.01 et. seq.

Ohio Administrative Code §4121-1 et. seq. Ohio Revised Code §4123.01 et. seq.

Ohio Administrative Code §4123-01 et. seq. Ohio Revised Code §4125.01 et. seq.

Ohio Administrative Code §4125-1-01 et. Seq

Joel R. Hlavaty

jhlavaty@frantzward.com

Josh A. Friedman

jfriedman@frantzward.com

SCOPE OF COMPENSABILITY

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

"Employee" means: Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education. Ohio Rev. Code §4123.01(A)(1)(a).

Every person in the service of any person, firm, or private corporation, including any public service corporation, that (i) employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single household and casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer, or (ii) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by this chapter. Ohio Rev. Code §4123.01(A)(1)(b).

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

Every person, firm, professional employer organization, alternate employer organization, and private corporation, including any public service corporation, that (i) has in service one or more employees or shared employees regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, or (ii) is bound by any such contract of hire or by any other written contract, to pay into the insurance fund the premiums provided by this chapter. Ohio Rev. Code §4123.01(B)(1)(b).

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

A. Traumatic or “single occurrence” claims.

“Injury” includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of the injured employee’s employment. Ohio Rev. Code §4123.01(C). *Village v. General Motors, Corp., G.M.A.D., 15 Ohio St.3d 129 (1984).*

B. Occupational disease (including respiratory and repetitive use)

"Occupational disease" means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general. Ohio Rev. Code §4123.01(F).

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

"Injury" does not include: (1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate; (2) Injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body; (3) Injury or disability incurred in voluntary participation in an employer-sponsored recreation or fitness activity if the employee signs a waiver of the employee's right to compensation or benefits under this chapter prior to engaging in the recreation or fitness activity; (4) Injury or disability sustained by an employee who performs the employee's duties in a work area that is located within the employee's home and that is separate and distinct from the location of the employer, unless all of the following apply:

- (a) The employee's injury or disability arises out of the employee's employment.
- (b) The employee's injury or disability was caused by a special hazard of the employee's employment activity.
- (c) The employee's injury or disability is sustained in the course of an activity

undertaken by the employee for the exclusive benefit of the employer; or (5) A condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury. Such a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation. Ohio Rev. Code §4123.01(C)(1-5).

If an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section. It is the intent of the general assembly to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section. Ohio Rev. Code § 4123.56(F).

Recently, the Ohio Supreme Court held that lost wages must be a “direct result” of the industrial injury and cannot be a “direct result” of reasons outside the injury. Employment is a “fundamental tenet” of temporary total disability compensation such that when an injured worker is not working as a direct result of something other than their allowed condition, there are no compensable lost earnings *State ex rel. AutoZone Stores, Inc. v. Indus. Comm.*, Slip Opinion No. 2024-Ohio-5519.

6. What psychiatric claims or treatments are compensable and is PTSD a compensable diagnosis?

Psychiatric claims are not compensable unless the claimant's psychiatric condition has arisen from an injury or occupational disease sustained by the claimant, or where the claimant's psychiatric condition has arisen from sexual conduct that the claimant was forced by threat of physical harm to engage or participate in. Ohio Rev. Code §4123.01(C)(1). *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568 (Claimant must establish that his/her mental injury is causally related to his/her compensable physical injuries and not simply his/her involvement in the accident).

7. What are the applicable statutes of limitations?

Claims for single occurrence injuries or death are barred unless filed within one year from the date of injury or death. Ohio Rev. Code §4123.84.

In all cases of occupational disease, or death resulting from occupational disease, claims for compensation or benefits are forever barred unless, within one year after the disability due to the disease began, or within such longer period as does not exceed six months after diagnosis of the occupational disease by a licensed

physician, certified nurse-midwife, clinical nurse specialist, or certified nurse practitioner or within one year after death occurs, application is made to the industrial commission or the bureau of workers' compensation or to the employer if the employer is a self-insuring employer. Ohio Rev. Code §4123.85. In *White v. Mayfield*, the Ohio Supreme Court held disability due to an occupational disease shall be deemed to have begun on the date on which the claimant first became aware through medical diagnosis that he or she was suffering from such disease, or the date on which claimant first received medical treatment for such disease, or the date claimant first quit work on account of such disease, whichever is latest. *White v. Mayfield*, 37 Ohio St.3d 11, 14 (1988).

Each day that an employer fails to file a report required by Ohio Rev. Code §4123.28 constitutes an additional day within the time period given to a claimant by the applicable statute of limitations for the filing of a claim based on the injury or occupational disease. A failure to file a report shall not extend the applicable statute of limitations for more than two additional years. Ohio Rev. Code §4123.28.

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

A claim must be filed in writing and should be reported on the First Report of Injury (“FROI”) form provided by the Bureau of Workers’ Compensation. The FROI can be completed and submitted online at www.bwc.ohio.gov, or faxed to the BWC at 1-614-3437.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Purposely self-inflicted injuries are not compensable under the workers’ compensation laws in Ohio. Ohio Rev. Code §4123.54 (A)(1) and §4123.46.

B. Willful misconduct, “horseplay”, etc.

The general rule in Ohio is that no compensation is recoverable under the Workmen’s Compensation Acts for injuries sustained through horseplay or fooling around which was done independently of, and disconnected from, the performance of any duty of the employment. *Sanders v. Fridd*, 2013-Ohio-4338, 998 N.E.2d 526, ¶ 27 (10th Dist.) (citing *Indus. Comm. v. Bankes*, 127 Ohio St. 517, 522 (1934)). Exceptions to the general rule exist where the employee who is injured through horseplay or fooling around by other employees took no part in the fooling around, but was attending to his duties and where the employee is injured by horseplay commonly carried on by the employees with the knowledge and consent or acquiescence of the employer. *Id.* When deciding cases involving assaults and fights during work hours at the place of employment, Ohio courts have consistently focused on two factors: (1) whether the origin of the incident was

work-related, and (2) whether the claimant was the instigator. Courts have found an injury compensable when the origin was found to be work-related and the claimant did not instigate the assault. In turn, when both findings have not been made, courts have found no compensable injury. *Indus. Comm. v. Pora* (1919), 100 Ohio St. 218, 125 N.E. 662; *Delassandro v. Indus. Comm.* (1924), 110 Ohio St. 506, 144 N.E. 138.

C. Intoxication and impairment by illegal drugs.

Employees are not entitled to receive compensation or benefits under this division if the employee's injury or occupational disease is caused by the employee being intoxicated, under the influence of a controlled substance not prescribed by a physician, or under the influence of marijuana if the employee being intoxicated, under the influence of a controlled substance not prescribed by a physician, or under the influence of marijuana is the proximate cause of the injury. Ohio Rev. Code §4123.54(A)(2) and (B).

In order for compensation to be denied on the basis that an employee was intoxicated, "the employee must be so intoxicated, as shown by the evidence, that the court can say, as a matter of law that the injury arose out of his drunken condition and not out of his employment." *Phelps v. Positive Action To Co.*, 26 Ohion St.3d 142 (1986).

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

The Ohio Revised Code provides that no person, with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following: Receive workers' compensation benefits to which the person is not entitled; Make or present or cause to be made or presented a false or misleading statement with the purpose to secure payment for goods or services rendered under Chapter 4121., 4123., 4127., or 4131. of the Revised Code or to secure workers' compensation benefits; Alter, falsify, destroy, conceal, or remove any record or document that is necessary to fully establish the validity of any claim filed with, or necessary to establish the nature and validity of all goods and services for which reimbursement or payment was received or is requested from, the bureau of workers' compensation, or a self-insuring employer under Chapter 4121., 4123., 4127., or 4131. of the Revised Code; Enter into an agreement or conspiracy to defraud the bureau or a self-insuring employer by making or presenting or causing to be made or presented a false claim for workers' compensation benefits; Make or present or cause to be made or presented a false statement concerning manual codes, classification of employees, payroll, paid compensation, or number of personnel, when information of that nature is necessary to determine the actual workers' compensation premium or assessment owed to the bureau by an employer; Alter, forge, or create a workers' compensation certificate to falsely show current or correct workers' compensation coverage; Fail to secure or maintain workers' compensation coverage as required by Chapter 4123. of the Revised Code with the intent to defraud the bureau of workers' compensation. Ohio Rev. Code §2913.48.

Whoever violates Ohio Rev. Code §2913.48 is guilty of workers' compensation fraud which is misdemeanor of the first degree, and can be a felony depending on the value. Ohio Rev. Code §2913.48(B).

In regard to adjudications before the Ohio Industrial Commission, MEMO S2 re Overpayment also notes: When a decision at hearing results in an overpayment due to fraudulent activity, the hearing officer shall make a specific finding of fraud in his or her order. This finding must be supported by reliable, probative, and substantial evidence. The evidence should demonstrate that the individual knowingly used deception to obtain the overpayment. The prima facie elements of fraud that must be established are: (1) a representation, or where there is a duty to disclose, concealment of fact; (2) which is material to the transaction at hand; (3) made falsely, with the knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. All of the elements must be proven by a preponderance of the evidence and all evidence establishing fraud shall be specifically cited in the order. The hearing officer shall declare that the fraudulent overpayment be collected pursuant to the fraud provisions of R.C. 4123.511(K).

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

No compensation shall be awarded on account of disability or death from disease experienced by an employee who, at the time of entering into the employment from which the disease is claimed to have resulted, willfully and falsely represented self as not having previously had such disease. Ohio Rev. Code §4123.70.

There is also a statutory defense to occupational disease claims for silicosis, asbestosis or coal miners' pneumoconiosis in the event of a failure or omission on the part of the employee to truthfully state, when seeking employment, the place, duration and nature of previous employment in answer to an inquiry made by the employer. Ohio Rev. Code §4123.68.

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

Yes, unless a waiver is signed. Ohio Rev. Code §4123.01(C)(3).

Such waivers must be signed for each specific recreational activity and are good for two years. Ohio Adm. Code 4121-3-31.

13. Are injuries by co-employees compensable?

Injuries caused by co-employees are compensable, unless the horseplay defense applies. Co-employees are immune from suit if the injury is compensable. Ohio Rev. Code §4123.741; *Caygill v. Jablonski* (1992), 92 Ohio App. 3d 31.

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

The essential requirement in order to entitle an injured employee to compensation under Ohio law is the causal connection between the employment and the injury. Where the injury inflicted is personal to the employee and not relating to his employment, the injured employee will not be entitled to compensation under Ohio law. See *Brown v. Industrial Commission*, 86 Ohio App. 256, 82 N.E.2d 878 (10th Dist. 1948).

BENEFITS

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

The average weekly wage ("AWW") is calculated by dividing the total earnings for the year prior to the disability or injury by 52. This calculation includes wage information from all employers during the prior year. Ohio Rev. Code §4123.61. Any period of unemployment due to sickness, industrial depression, strike, lockout, other causes beyond the employee's control, or when special circumstances exist, are deleted. The burden is on the employee to prove that the 52 weeks is an accurate denominator under the circumstances. Special circumstances are not defined by the statute, but can be invoked if the standard calculation yields a result that is substantially unjust. *State ex rel. Wireman v. Indus. Comm.*, 49 Ohio St.3d 286 (1990). In calculating the AWW, two considerations dominate. First, the AWW must do substantial justice to the claimant. Second, it should not provide a windfall. *Id.*

- A. Standard 52-Week Calculation
- B. Partial Employment or Irregular Work History
- C. Discretionary Method (Fairness-Based)

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

The Ohio Bureau of Workers' Compensation ("OBWC") (or a self-insuring employer) considers earnings from all employers that employed the injured worker during the 52 weeks prior to the date of injury when setting wages. OBWC (or a self-insuring employer) bases the full weekly wage (FWW) on a comparison of earnings for the first six weeks prior to the date of injury and the first full week of earnings prior to the date

of injury. OBWC (or a self-insuring employer) bases the average weekly wage (AWW) on 52 weeks prior to the date of injury.

For the first 12 weeks of missed work, OBWC (or a self-insuring employer) may pay temporary total wages at the rate of 72 percent of the injured worker's FWW, subject to the statewide maximum for the injury year and any applicable offsets. After 12 weeks of missed work, OBWC (or a self-insuring employer) may pay temporary total wages at the rate of 66 2/3 percent of the injured worker's AWW, subject to the statewide maximum or minimum for the injury year and any applicable offsets. O.R.C. 4123.56.

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

In uncontested state-fund claims, payment of compensation is to begin on the date the Administrator completes the investigation of the claim and issues an order of allowance. order is to be issued within 28 days after the Bureau of Workers' Compensation has notified the Such an employer of its receipt of the claim and the facts alleged therein, unless a medical examination is required by statute.

In contested claims where the employee is successful, compensation is payable after the district hearing order is received, while medical benefits are not payable until after the issuance of the Staff Hearing Officer's order. (The district hearing is the first, and the staff hearing the second, of three administrative levels of hearings). Ohio Rev. Code §4123.511.

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out 21 days before recovering benefits for the first 3 days)?

For a work-related injury resulting in the loss of seven or fewer calendar days of work, OBWC (or a self-insuring employer) pays related medical expenses but not compensation to replace lost income. If an injured worker loses eight or more calendar days of work, OBWC (or a self-insuring employer) pays related medical expenses and may pay temporary total for lost wages beginning on the eighth day of disability. When an injured worker is off work for 14 consecutive days due to the work-related injury, OBWC (or a self-insuring employer) pays the injured worker for the first seven days he/she missed work as well as the other days of disability.

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

Temporary total disability may be terminated by a self-insured employer or the OBWC in of any of the following: (a) the employee returns to work; (b) the employee's treating physician the event finds that the employee is capable of returning to his former position of available suitable employment; (c) the employee's treating physician finds the employee has

employment or other reached maximum medical improvement. Ohio Adm. Code §4121-3-32(B)(1).

Temporary total disability compensation may be terminated after a hearing as follows: (a) upon the finding of a district hearing officer, staff hearing officer, deputy or the industrial commission that either the employee returned to work or the employee's treating physician finds that the employee is capable of returning to work; (b) upon the finding of district hearing officer, staff hearing officer, deputy or the industrial commission that the employee is capable of returning to his/her former position of employment; (c) upon the finding of a district hearing officer, staff hearing officer, deputy or the industrial commission that the employee has reached maximum medical improvement; or (d) upon the finding of a district hearing officer, staff hearing officer, deputy or the industrial commission that the employee has received a written job offer of suitable employment. Ohio Adm. Code §4121-3-32(B)(2).

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

No. A permanent partial award is separate and distinct from temporary total disability compensation. An injured worker may file for a percentage of permanent partial disability 26 weeks after receiving their last payment of temporary total or wage loss, 26 weeks from the date of injury or contraction of an occupational disease if compensation is not paid, or 26 weeks from the date of injury when the employer paid full salary/wages and no other compensation has been paid for claims with dates of injury on or after June 30, 2006. Ohio Rev. Code §4123.57.

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

In case an injury or occupational disease results in serious facial or head disfigurement which either impairs or may in the future impair the opportunities to secure or retain employment, the administrator shall make an award of compensation as it deems proper and equitable, in view of the nature of the disfigurement, and not to exceed the sum of ten thousand dollars. For the purpose of making the award, it is not material whether the employee is gainfully employed in any occupation or trade at the time of the administrator's determination. Ohio Rev. Code §4123.57(B).

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

Permanent partial disability (PPD) awards are based on two-thirds of the injured statewide average weekly wage, not to exceed a maximum one-third of the average weekly wage. OBWC sets maximum rates each year. The award is based upon a percentage of disability determined by a medical expert examination. Ohio Rev. Code §4123.57(A).

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

<u>Bodily Loss</u>	<u>Maximum Weeks</u>
Thumb	60
Index Finger	35
Middle Finger	30
Ring Finger	20
Little Finger	15
Loss of Metacarpal	10
Hand	175
Arm	225
Great Toe	30
(Loss of great toe up to the joint is equal to the loss of 1/2 a great toe. Loss of great toe beyond joint is equal to loss of the whole great toe)	
Any Other Toe	10
(2/3 loss equals total loss. No award for less than 2/3)	
Foot	150
Leg	200
One Eye	125
(no award for loss less than 25% vision)	
Loss of Hearing	125

One Ear	25
Both Ears	125

(no award for less than permanent and total loss of hearing in at least one ear)

Ohio Rev. Code §4123.57(B). This payment is based upon the maximum rate payable for temporary total disability for the year of injury.

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

If the percentage of the permanent disability of the employee equals or exceeds ninety (90%) percent, compensation for permanent partial disability shall be paid for two hundred (200) weeks. Ohio Rev. Code §4123.57(A).

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

Vocational rehabilitation is strictly voluntary. To be eligible for rehabilitation services the injured worker must meet the following criteria: (1) Referred claim that is: (a) A claim allowed by an order of the bureau of workers' compensation or the industrial commission or of its hearing officers with eight or more days of lost time due to a work related injury; or (b) A claim certified by a state university or state agency; or (c) A claim certified by a self-insuring employer. (2) The injured worker must have a significant impediment to employment or the maintenance of employment as a direct result of the allowed conditions in the referred claim. (3) The injured worker must have at least one of the following present in the referred claim: (a) The injured worker is receiving or has been awarded temporary total, non-working wage loss, or permanent total compensation for a period of time that must include the date of referral. For purposes of this rule, payments made in lieu of temporary total compensation (e.g. salary continuation) shall be treated the same as temporary total compensation; (b) Granted a scheduled loss award under division (B) of section 4123.57 of the Revised Code; or (c) The injured worker is not currently receiving compensation but has job restrictions in the claim documented by the physician of record and dated not more than one hundred eighty days prior to the date of referral.

Received or awarded a permanent partial award under division (A) of section 4123.57 of the Revised Code and has job restrictions as a result of that award documented by the physician of record and dated not more than one hundred eighty days prior to the date of referral; or (d) Determined to have reached maximum medical improvement in the claim (with eight or more days of lost time due to a work related injury) by an order of the bureau or the industrial commission, or the injured worker's physician of record has documented in writing that the injured worker has reached maximum medical

improvement in the claim, and the injured worker is not currently receiving compensation and has job restrictions in the claim documented by the physician of record and dated not more than one hundred eighty days prior to the date of referral; or (e) Is receiving job retention services to maintain employment or satisfies the criteria set forth in paragraph (E) of this rule on the date of referral; or (f) Sustained a catastrophic injury claim and a vocational goal can be established; or (g) Was receiving living maintenance wage loss not more than ninety days prior to the date of referral, has continuing job restrictions documented by the physician of record as a result of the allowed conditions in the claim, and has lost his or her job through no fault of his or her own. (4) The injured worker must not be working on the date of referral, with the exception of referral for job retention services. Ohio Adm. Code §4123-18-03.

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

In cases of permanent total disability, the employee shall receive an award to continue until the employee's death in the amount of 66 and 2/3 percent of the employee's average weekly wage. The employee shall not receive more than a maximum amount of weekly compensation which is equal to 66 and 2/3 percent of the statewide average weekly wage in effect on the date of the injury or on the date of the disability due to the occupational disease begins, nor not less than a minimum weekly compensation which is equal to 50 percent of the statewide average weekly wage in effect on the date of injury or on the date the disability due to the occupational disease begins, unless the employee's average weekly wage is less than 50 percent of the statewide average weekly wage at the time of the injury, in which event the employee shall receive compensation in an amount equal to the employee's average weekly wage. Ohio Rev, Code §4123.58(A).

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

A. Funeral expenses.

Reasonable funeral expenses up to \$7,500 may be recovered. Ohio Rev. Code §4123.66(A).

B. Death benefits calculation.

If there are no dependents, the disbursements from the state insurance fund is limited to the expenses provided for in section 4123.66 of the Revised Code. Ohio Rev. Code §4123.59(A).

If there are wholly dependent persons at the time of the death, the weekly payment is 66 and 2/3 percent of the average weekly wage, but not to exceed a maximum aggregate amount of weekly compensation which is equal to 66 and 2/3 percent of

the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not in any event less than a minimum amount of weekly compensation which is equal to fifty percent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, regardless of the average weekly wage. Ohio Rev. Code §4123.59(B).

C. Dependency benefits duration.

Payment will continue from the date of death of an injured or disabled employee until the death or remarriage of such dependent spouse. If the dependent spouse remarries, an amount equal to two years of compensation benefits at the weekly amount determined to be applicable to and being paid to the dependent spouse shall be paid in lump sum to each spouse and no further compensation shall be paid to such spouse. Ohio Rev. Code §4123.59(B)(1).

The portion of the payment applicable to wholly dependent persons other than a spouse shall continue from the date of death of an injured or disabled employee to a dependent until the dependent: (a) reaches 18 years of age; (b) if pursuing a full-time education program while enrolled in an accredited education institution and program, reaches 25 years of age; (c) if

D. Death benefit savings

Ohio law does not provide for “death benefit savings.”

E. Conclusion.

The Ohio Bureau of Workers’ Compensation calculates and divides benefits among all eligible dependents. The OBWC distributes benefits every two weeks and they will continue until the dependent is no longer eligible. Individuals who may be eligible include the surviving spouse, dependent children under the age of 18, dependent children 18 to 25 who are attending an accredited education institution full time, dependent children 18 years or older that are physically or mentally incapacitated, and certain other dependent family members.

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

Ohio’s “second injury” fund is called Handicap Reimbursement. Ohio’s Handicap Reimbursement program is designed to encourage the hiring and retention of handicapped employees. employer can request that a percentage of the costs in a workers’ compensation claim be charged The to, or refunded from, the Statutory Surplus Fund.

Employers can only be granted reimbursement costs associated to claims of injured workers

with certain statutorily specified conditions. Ohio Rev. Code §4123.343(A)(1)-(25).

An employer requests handicap reimbursement through the filing of an Application for Disability Relief (form CHP-4A) which must be supported by medical evidence that the employee suffered from one of the conditions listed above, evidence that the condition qualified for reimbursement, evidence that the injury, disease, or disability caused employee to be absent for at least eight days or resulted in a scheduled loss under R.C. 4123.47(B), and evidence to support that injury or disease would not have occurred but for pre-existing disability. Eligible employers include all state-fund employers and public employers (except some state agencies and universities) while the claim is within the employer's experience.

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

The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of medical benefits being provided under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last medical services being rendered or the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. Ohio Rev. Code §4123.52; Ohio Adm. Code 4123-3-15(B)(7) (PPD increases).

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

Pursuant to Ohio Rev. Code §4123.512(F), an employee may be reimbursed for his costs, including attorney fees, associated with a successful court appeal seeking participation in the fund. The current cap on the fees is \$5,000.00. *Holmes v. Crawford*, 134 Ohio St.3d 303, 2012-Ohio-5380, 982 N.E.2d 643.

Reasonable attorney's fees may be assessed against an employer in a retaliatory action

claim under Ohio Rev. Code §4123.90.

EXCLUSIVITY/TORT IMMUNITY

29. Are there any specific compensability requirements or applicable statutes for hybrid employees?
30. Is the compensation remedy exclusive?
- A. Scope of immunity.

Workers' Compensation is generally an exclusive remedy in Ohio. An employee injured cannot sue their employer in civil court for damages if that injury is covered by workers' compensation.

Employers shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under Ohio

Workers' Compensation laws. Ohio Rev. Code §4123.74.

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

In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed **the tortious act with the intent to injure another** or with the belief that the injury was substantially certain to occur. Ohio Rev. Code §2745.01(A). Substantially certain to occur means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. Ohio Rev. Code §2745.01(B). Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result. Ohio Rev. Code. §2745.01(C).

Immunity may also be waived by contract, if the contract specifically waives workers' compensation immunity. *Kendall v. U.S. Dismantling Co.*, 20 Ohio St.3d 61 (1985).

For the dual capacity doctrine to apply, there has to be an allegation and showing that the employer occupied two independent and unrelated relationships with the

employee, that at the time of these roles of the employer there were occasioned two different obligations to this employee, and that the employer had during such time assumed a role other than that of employer. *Schump v. Firestone Tire & Rubber Co.*, 44 Ohio St.3d 148 (1989).

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

The Industrial Commission has the authority to determine claims for additional awards where an employer has failed to comply with any specific requirement for the protection of the lives, health, or safety of employees. Ohio Const. Art. II §35. To obtain an award for an employer's violation of a specific safety requirement (VSSR), a claimant must show that his injury resulted from his employer's failure to comply with a specific safety requirement. A VSSR award is considered an employer penalty, and therefore specific safety requirements are strictly construed in the employer's favor. *State ex rel. Richmond v. Indus. Comm.*, 2014-Ohio-1604. The amount of a VSSR award can vary from 15% to 50% of all compensation paid to the claimant at the maximum rate, and the penalty will apply to all compensation paid over the entire life of the claim. Ohio Const. Art. II §35.

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

A minor employee can bring a claim under his or her name without the intervention of a guardian. No other person has a right to compensation arising from a minor's work-related injury. However, any lump sum settlement award must be paid to the guardian of the minor. Ohio Rev. Code §4123.89.

Section 4123.89 of the Ohio Revised Code provides for an additional award of 100% of the maximum workers' compensation award established by law to any minor whose injury, occupational disease, or death was caused by prohibited employment. However, this provision was held unconstitutional because it conflicts with the constitutional provision that any additional

award to a claimant for an employer's violation of a specific safety requirement may not exceed 50% of the maximum award established by law. *State, ex rel. Kanter Corp. v. Stringer*, 67 Ohio St.2d 8 (1981) (citing Ohio Const. Art. II §35).

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

A self-insured employer may be liable in tort for failing to process a workers' compensation claim in violation of its statutorily-mandated responsibilities. *Vandemark v. Southland Corp.*, 38 Ohio St.3d 1 (1988). The doctrine of employer-employee immunity is not as the cause of action is no longer a workers' compensation claim, but rather a tort for damages outside the scope of workers' compensation statutes. *Id.*

applicable to such
circumstances,
common law ac

An employee may also bring a cause of action against a self-insured employer for the employer's intentional and wrongful termination of the employee's workers' compensation benefit *v. Arkansas Best Freight System, Inc.*, 18 Ohio St. 3d 126 (1985). An employee's participation in the workers' compensation scheme does not preclude him from enforcing common law against his employer for this type of intentional conduct. *Id.*

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

No employer shall discharge, demote, reassign, or take any punitive action against an employee because the employee filed a claim or instituted, pursued, or testified in a workers' compensation proceeding. Ohio Rev. Code § 4123.90. If successful in a civil suit, the employee is entitled to reinstatement with back pay (if the action is based upon discharge) or an award for lost wages (if the action is based upon demotion, reassignment, or other punitive actions). The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken. *Id.* However, claimants who are currently receiving temporary total compensation may be terminated and are not thereby entitled to a cause of action for wrongful discharge in violation of public policy so long as a termination "for good and just cause" provision is absent from the employee's contract. *Bickers v. W. & S. Life Ins. Co.*, 2007-Ohio-6751.

THIRD PARTY ACTIONS

34.

35. Can third parties be sued by the employee?

Yes. An employee may sue a third-party for the injuries sustained as a result of that party's negligence, even if the employee has obtained workers' compensation, and even if both the third party and employer have complied with the Workers' Compensation Act.

George v. City of Youngstown, 139 Ohio St. 591 (1942); *Trumbull Cliffs Furnace Co. v. Shachovsky*, 111 Ohio St. 791 (1924).

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

No. A co-employee who is responsible for a fellow employee's compensable workers' compensation claim is immune from suit. Ohio Rev. Code §4123.741.

37. Is subrogation available?

Yes. Payment of compensation or benefits creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. Ohio Rev. Code §4123.93 *et seq.*

If a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party, the claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, except that the net amount recovered may instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee. O.R.C. 4123.91(B).

A claimant may establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation cost, or death benefits, reduced to present value, from which the claimant must make reimbursement payments to the statutory subrogee for the future payments of compensation, medical benefits, rehabilitation costs, and death benefits. O.R.C. 4123.91(E)(1)

A claimant shall notify a statutory subrogee and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery, except that when the statutory subrogee is a self-insuring employer, the claimant need not notify the attorney general. No settlement, compromise, judgment, award, or other recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee and, when required, the attorney general, with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee and, when required, the attorney general are not given that notice, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest. O.R.C. 4123.91(G)

MEDICALS

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

All medical bills must be filed with the OBWC or Commission within one year of the date on which the service was rendered, or one year after the date the services become payable under Ohio Rev. Code §4123.511(I), whichever is later, or shall be forever barred. Ohio Adm. Code 4123-3-23(A). Medical bills are to be paid no later than 30 days after receipt of a proper invoice

by the OBWC or self-insured employer. Ohio Adm. Code 4123-19-03(L)(5). Interest may be assessed on late payments. Ohio Rev. Code §126.30.

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

Claimants are required to promptly provide a current signed release of medical information, records, and reports when requested by the employer. Ohio Rev. Code §4123.651(B). If the employee refuses, the right to have the claim considered is suspended during the refusal. Ohio Rev. Code §4123.651(C). The Industrial Commission generally takes the position that an employee must sign an unrestricted medical release form in order to comply. Ohio Adm. Code 4121-3-09(A)(3). An employer may file a motion with the Industrial Commission to compel compliance. Ohio Adm. Code 4121-3-09(A)(4). Each party must provide the opposing party with copies of the evidence they intend to introduce at hearing prior to the hearing. Ohio Adm. Code 4121-3-09(A). The Industrial Commission Hearing Administrator may issue subpoenas, upon request and showing of good cause. *Id.*

The application for benefits is also a release of the physician-patient privilege. Furthermore, privileged communications and acts are waived under Ohio Rev. Code §2317.02 for anyone who files a claim under the Workers' Compensation Act.

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

A. Claimant's choice of physician.

An employee has the right to select a licensed physician for treatment, subject to the provisions and limitations of the managed care rules. Ohio Adm. Code 4123-6-06.2. However, to be eligible for reimbursement, physicians must be OBWC-certified. Ohio Adm. Code 4123-6-02.2.

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

The employer of a claimant who is injured or disabled in the course of his employment may require, without the approval of the administrator or the Industrial Commission, that the claimant be examined by a physician of the employer's choice one time upon any issue asserted by the employee or a physician of the employee's choice or which is to be considered by the Commission.

Ohio Rev. Code §4123.651(A). Any further requests for medical examinations shall be made to the Commission, which shall consider and rule on the request. *Id.* The employer shall pay the cost of any examinations initiated by the employer. *Id.*

If, without good cause, an employee refuses to submit to any examination scheduled under Ohio Rev. Code §4123.651 or refuses to release or execute a release for any medical information, record, or report that is required to be released under §4123.651 and involves an issue pertinent

to the condition alleged in the claim, then the employee's right to have his claim for compensation or benefits considered—if his claim is pending before the Administrator, Commission, or a district or staff hearing officer, or to receive any payment for compensation or benefits previously granted—is suspended during the period of refusal. *Id.*

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

Medical supplies and services will be considered for payment when they are reasonably related to the work related injury, the requested services are reasonably necessary for treatment of the work related injury, and the costs of the services are medically reasonable. O.A.C. Rule 4123-6-25. *Miller v. Indus. Comm. 71 Ohio St.3d 229,643 N.E.2d 113 (1994).*

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

Prosthetic device means a custom fabricated or fitted medical device that is a type of artificial appliance used to replace a missing appendage or other external body part. It includes an artificial limb, hand, or foot, but does not include devices implanted into the body by a physician, artificial eyes, intraocular lenses, dental appliances, ostomy products, cosmetic devices such as breast prostheses, eyelashes, wigs, or other devices that do not have a significant impact on the musculoskeletal functions of the body. Prosthetic devices, including wheelchairs, canes, crutches, walkers and braces, shall be paid for if a claimant requires the purchase or repair of a prosthetic device, as determined by any one of the following: (1) the Amputee Clinic at the Ohio State University Medical Center; (2) the Opportunities for Ohioans With Disabilities Agency; or (3) a multidisciplinary amputee clinic or prescribing physician approved by the administrator or the administrator's designee. Ohio Adm. Code 4123-6-39.

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

These are not specifically covered by statute. These may, however, be approved on a case-by- case basis. Ohio Rev. Code §4121.61. BWC's provides applicants an opportunity to apply for Home Modification Requests and will reimburse home modification specifically needed due to physical limitations due to the result of allowed claim conditions.

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

There is a fee schedule. Fees are limited to the usual, customary and reasonable fee charged for like services in the area in which the services are provided, but in no event

shall such charges be greater than the fee schedule. See answer 44; Ohio Adm. Code 4123-6-01 et seq.

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

State-fund employers are permitted to self-select an MCO, and the OBWC will select an MCO for a state-Managed Care was authorized in 1993 by House Bill 107. The OBWC's program is known as the Health Partnership Plan ("HPP"), which requires all state-funded employers to utilize a Managed Care Organization ("MCO") for the medical management of their workers' compensation claims. fund employer that fails to select an MCO, if necessary. Ohio Adm. Code 4123-6-05.2.

The OBWC approves medical providers who meet its credentialing requirements. Ohio Adm. Code 4123-6-02.2. Those providers must complete a "provider agreement" which requires them to follow a published fee schedule and follow the treatment protocols of an approved MCO. Ohio Adm. Code 4123-6-02.

When an employee is injured, the employer directs the employee to the MCO, which will medically manage the employee's care. The MCO authorizes treatment, monitors the medical bills, and disburses payment to the providers according to the Bureau fee schedule. If the employee goes to a provider who has not signed an agreement with the OBWC, only the first medical bill will be paid. The provider is not allowed to bill his or her employer's MCO, but such a provider will be paid for treatment beyond the first visit only if it applies to the MCO for emergency credentialing as necessary for care and services which are unavailable through like MCO panel providers. Ohio Adm. Code 4123-6-01 et seq. MCOs are paid directly by the OBWC, and no MCO may receive a fee for services, or a portion of a fee, from one of its providers.

PRACTICE/PROCEDURE

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

Upon submission of a claim application, the employer has the opportunity to accept or reject the claim. If the employer rejects the claim or appeals from a Bureau Order allowing a claim, it is scheduled for hearing before a District Hearing Officer of the Industrial Commission of Ohio for a decision on the allowance of the claim. Ohio Rev. Code §4123.511; Ohio Adm. Code 4123-3-09.

47. What is the method of claim adjudication?

A. Administrative level.

There is a four-tiered administrative process for adjudicating claims. The Bureau of Workers' Compensation makes the decision at the first stage in state-fund claims (self-insured claims go directly to the second stage if rejected by the self-insurer). The second level is the district hearing. These decisions are appealable by right to a Staff Hearing Officer. The decision of a Staff Hearing Officer is subject to a discretionary appeal to the full Industrial Commission of Ohio. Each such appeal must be filed within 14 days of the date the appeal is made. Ohio Rev. Code §4123.511.

B. Trial court.

An employee or employer has the right to appeal a decision of the Industrial Commission of Ohio to the Court of Common Pleas, **other than a decision as to the extent of disability**. The appeal must be made to the Court of Common Pleas of the county where the injury or exposure occurred, or in which the contract of employment was made if the injury occurred outside of the state. An appeal to the court must be filed within 60 days after the date of receipt of the Industrial Commission's decision. The appeal is *de novo*, and the jury is not to consider the amount of compensation to be paid. Ohio Rev. Code §4123.512; *Forster v. Ohio Bur. of Workers' Comp.*, 102 Ohio App.3d 744 (8th Dist. 1995).

C. Appellate.

A decision by the Court of Common Pleas may be appealed to the Appellate Court. An appeal from that Appellate Court to the Ohio Supreme Court is subject to discretionary review.

Decisions of the Industrial Commission regarding extent of disability are not appealable to the Court of Common Pleas, and instead, must be challenged in a mandamus review by the Tenth District Court of Appeals (where the Commission is located) or the Ohio Supreme Court. There is an appeal of right to the Ohio Supreme Court from a mandamus action in an extent of disability case. Ohio Rev. Code §4121.27.

48. What are the requirements for stipulations or settlements?

Claims involving self-insured employers may be settled by agreement, to be approved by the Industrial Commission. The settlement agreement will be deemed approved

unless, within thirty days of submission, a Staff Hearing Officer deems it to be clearly unfair or a gross miscarriage of justice. Ohio Rev. Code §4123.65.

Claims involving state-fund employers may also be settled. The application for such a settlement requires: (1) the settlement agreement; (2) the signatures of the claimant and employer, unless:

(i) the employer is no longer doing business in Ohio; (ii) the claim is outside the employer's experience as provided in Ohio Rev. Code §4123.34(B) and the claimant is no longer employed with that employer; or (iii) the employer has failed to comply with Ohio Rev. Code §4123.35; and

(3) an indication of the parties' agreement to the terms and a recitation of the circumstances by reason of which the settlement is deemed desirable. Ohio Rev. Code §4123.65(A). The OBWC has the sole authority to approve such a settlement, which will be effective 30 days after approval. Ohio Rev. Code §4123.65(C).

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

Yes. Ohio Rev. Code §4123.65.

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

Yes, by the Industrial Commission, but a settlement is deemed approved unless the Industrial Commission specifically disapproves it within 30 days. Ohio Rev. Code §4123.65. The settlement application must clearly set forth the circumstances by reason of which the proposed settlement is deemed desirable in order for the settlement to be validated. *State ex rel. Wise v. Ryan*, 118 Ohio St. 3d 68 (2008).

RISK FINANCE FOR WORKERS' COMPENSATION

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

Ohio is a monopolistic state and private insurance is not permitted. All employers must either participate in the state insurance fund or be approved as self-insured.

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

A. For individual entities.

Generally, employers of more than 500 employees who have done business in Ohio for

more than two years may be granted self-insured status by the Administrator by showing they have sufficient financial ability to satisfy and pay compensation to employees and their dependents. Ohio Rev. Code §4123.35(B). Five years of audited financial statements are required. *Id.* Employers should apply for self-insurance at least 90 days prior to the date they want their self-insurance coverage to take effect.

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

State-fund employers may join groups of at least 100 members engaged in similarly conducted business in order to increase their aggregate payroll and take advantage of rate reductions. Ohio Rev. Code §4123.29(A)(4); Ohio Adm. Code 4123-17-61 *et seq.* There are no provisions for self-insurance based on "pools" of private entities.

53. **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 definition of "employee"?**

Ohio Rev. Code §4123.01(A) neither includes nor excludes "illegal aliens" from the definition of "employee." However, an Ohio appellate court found that the statute's inclusion of the term "alien" in the statutory definition of "employee" also included an "illegal alien" *Rajeh v. Steel City Corp.*, 157 Ohio App. 3d 722 (2004). Therefore, the court found that an illegal alien is considered an "employee" who is entitled to compensation under Ohio's Workers' Compensation Fund. *Id.*

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

Covered. All state fund claims alleging potential non-accidental exposure to anthrax or other

biological agents will be automatically referred to OBWC's medical advisor for occupational disease medical review. Where the worker tests negative for anthrax, OBWC will disallow the claim in accordance with Ohio law. In the event a worker actually contracts anthrax, the claim will be handled as an occupational disease claim. Ohio Rev. Code §4123.68(A).

Emergency medical diagnostic service is necessary to investigate the claim and confirm or rule out an anthrax diagnosis will be paid by OBWC as occupational disease claim investigative costs. Prophylactic antibiotic therapy, initiated in accordance with Ohio Department of Health and the Centers for Disease Control protocol, will also be reimbursed by OBWC. Reimbursement for prophylactic antibiotic therapy initiated prior to substance testing will be considered on a case by case basis and OBWC may limit reimbursement in these cases.

In addition, only individuals who receive the smallpox vaccine as part of Phase 1 of the Centers Disease Control and Prevention's (CDC's) smallpox vaccination program are eligible for workers' for compensation benefits under this policy. This includes healthcare response team volunteers and local health department employees who develop a serious adverse reaction from the vaccine.

Ohio's workers' compensation system does not exclude injuries caused by terrorist attacked as long as they are work-related and meet the general definition of "injury."

See <https://www.bwc.ohio.gov/downloads/blankpdf/MCOPolicyChapter3.pdf>.

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

No.

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

The federal Medicaid statute requires states to include the following provisions in their plan for medical assistance: 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. §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. §1396k(b).

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

HIPPA 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(I). Therefore, your current practice of obtaining medical records can proceed under state law. 45 C.F.R.

parts 160-164 and 65 F.R. 82462.

The OBWC and Managed Care Organizations (MCO) do not qualify as covered entities HIPAA, since they do not meet HIPPA's definition of a "health plan," "healthcare clearing house," or "healthcare provider." 45 C.F.R. §160.102 and §160.103. This means any transaction between under OBWC and the MCO, or between OBWC and provider does not have to be conducted in compliance with the HIPAA electronic transaction standards. 45 C.F.R. §162.923(a).

The Ohio Supreme Court held that an independent tort exists for the unauthorized, unprivileged disclosure to a third-party of non-public medical information that a physician or hospital has learned within a physician-patient relationship. *Biddle v. Warren General Hospital*, 86 Ohio St.3d 395 (1999). However, the application for benefits is a release of the physician-patient privilege. Furthermore, privileged communications and acts are waived under Ohio Rev. Code §2317.02 for anyone who files a claim pursuant to Ohio's Workers' Compensation Act. Thus, when a physician's report is "made in the manner prescribed by law," the physician has not breached his duty towards his patient and is therefore not liable. *Biddle* at 402.

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

An independent contractor is not "employee," "workman," or "operative" within meaning of Ohio's Workers' Compensation Act. Ohio Rev. Code §4123.01; *John Walters v. Americab*, 118 Ohio App.3d 180 (1997).

Ohio Rev. Code §4123.01(A)(1)(c) applies to any person who performs labor or provides services pursuant to a construction contract if there is an issue as to whether that person is an independent contractor. There are twenty factors set forth in the statute that replace the common law "right to control" test in these situations. This is not a bright-line rule, but rather a set of non-exhaustive factors. Those factors are: (1) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services; (2) The person is required by the other contracting party to have particular training; (3) The person's services are integrated into the regular functioning of the other contracting party; (4) The person is required to perform the work personally; (5) The person is hired, supervised, or paid by the other contracting party; (6) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time; (7) The person's hours of work are established by the other contracting party; (8) The person is required to devote full time to the business of the other contracting party; (9) The person is required to perform the work on the premises of the other contracting party; (10) The person is required to follow the order of work set by the other contracting party; (11) The person is required

to make oral or written reports of progress to the other contracting party; (12) The person is paid for services on a regular basis such as hourly, weekly, or monthly; (13) The person's expenses are paid for by the other contracting party; (14) The person's tools and materials are furnished by the other contracting party; (15) The person is provided with the facilities used to perform services; (16) The person does not realize a profit or suffer a loss as a result of the services provided; (17) The person is not performing services for a number of employers at the same time; (18) The person does not make the same services available to the general public; (19) The other contracting party has a right to discharge the person; (20) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement. ~~If any ten of these twenty factors apply, the person is an employee under the Act.~~ Ohio Rev. Code §4123.01(A)(1)(c).

Independent contractors are required by law to carry workers' compensation coverage for their employees, but must elect to cover themselves. Ohio Rev. Code §4123.01(A).

Employers should be cautious not to misclassify their employees as independent contractors in order to avoid paying workers' compensation premiums.

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

Ohio has a specific statute which governs professional employment organizations ("PEOs"). A PEO means a sole proprietor, partnership, association, LLC, or corporation that enters into an agreement with one or more client employers for the purpose of co-employing all or part of the

client employer's workforce at the client employer's work site. Ohio Rev. Code §4125.01. A "client employer" means a sole proprietor, partnership, association, LLC, or corporation that enters into a PEO agreement and is assigned shared employees by the PEO. *Id.* "shared employee" is an individual that is intended to be assigned to a client employer on a permanent basis who is co-employed by a PEO and a client employer. *Id.*

A PEO must register and submit GAAP-audited financial statements on an annual basis to the OBWC. Ohio Rev. Code §4125.05. When a client employer enters into a contract with a PEO, the PEO is the employer of record and the succeeding employer for the purposes of determining a

workers' compensation experience rating. Ohio Revised Code §4125.04(A); Ohio Adm. Code 4123-17-15.1. A PEO agreement experience-transfer table can be found at:

<https://www.bwc.ohio.gov/downloads/blankpdf/PEOExpTrnsfrTable.pdf>.

60. 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. There are no specific provisions in the statute on this issue, however, the definition of "employee" under Ohio Rev. Code §4123.01(A)(1)(c) does provide some guidance. (See Answer to Question No. 57). Although that section of the Code specifically refers to people who perform labor or provide services pursuant to a construction contract, the OBWC applies the same criteria to all employment situations when determining whether an employer is properly reporting payroll in terms of which individuals are independent contractors, and which are actual employees. In fact, the questionnaire that the OBWC sends to employers about this classification issue contains

the same factors as Ohio Rev. Code §4123.01(A)(1)(c). The OBWC's questionnaire is available at:

<https://www.bwc.ohio.gov/infostation/content/1/1.8/independent%20contractor-employee%20questionnaire.pdf>.

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

1. Maintain a "Drug free" Working Environment

2. Designate a person to meet with an injured employee as soon as practicable to investigate the injury, getting all details in writing.

3. Memorialize your injury reporting policy in writing, and make sure employees have access to it, review it, and sign of acknowledging said policy.

4. Once an employee is injured, ask them to sign a medical authorization form, and provide a list of doctors allowing you to communicate with the employee's doctor.

5. Using the medical authorization obtained from the employee, request and review comprehensive pre-injury records.

6. Consider assigning an employee that is injured but still able to work, to a temporary light duty position. Stay in touch with an employee that is injured and unable to work at all.

7. Consider adopting an employee wellness program, however, be wary of employment laws protecting individuals with disabilities.

62. 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?

Ohio lawyers should note Ohio Supreme Court Ethics Opinion 2011-1. It is improper for a claimant's attorney to agree to indemnify the opposing party for Medicare secondary payer liability with respect to settlement. It is also improper for the opposing party's attorney to ask for an indemnification.

Notice is provided to the injured worker on the settlement request form and on the final settlement agreement (C-240, C-241). There is a documented allocation of costs.

The Ohio Bureau of Workers' Compensation will sometimes require the injured worker to obtain a conditional payment letter prior to settlement or establish a Medicare set-aside trust. A conditional payment letter is required if the claim file reflects a significant drop in medical costs, the injured worker has recently obtained a HICN, and there is no obvious explanation for the change in medicals.

Medicare Set-Asides are generally considered when a claimant is a Medicare beneficiary, and the claim settled for over \$25,000.

The purpose of such is to cover potential future medical treatment related to the workers' compensation injury that Medicare would otherwise cover, insuring that Medicare does not cover expenses when there are funds available in the Medicare Set-aside (MSA).

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

On June 8, 2016, Ohio legalized medical marijuana via House Bill 523. Medical marijuana is not covered by the Ohio BWC for reimbursement, as it is not FDA approved, remains a federal schedule 1 drug, and is not listed in the Ohio BWC formulary of approved medication.

Even though medical marijuana is legal, Ohio Revised Code § 3796.28 specifically notes that an employer is not required to accommodate an employee's use of medical marijuana.

64. 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?

On November 7, 2023, Ohio became the 24th state to legalize adult-use recreational marijuana with the passed of Issue 2. Ohio employers may still prohibit use of marijuana on the job and are not required to accommodate such.

In Ohio, there is still a legal defense of voluntary intoxication when an injured worker tests positive for a prohibited substance, including marijuana, within 32 hours of an injury via a qualified test.