

TEXAS

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

Texas Labor Code Annotated § 401.001 *et. seq.* Note: The statute is broad and provides for additional rules prescribed by the Division of Workers' Compensation, a part of the Texas Department of Insurance, to effectuate its goals. *See* TEX. LAB. CODE ANN. § 402.001. Additionally, with respect to employees leased pursuant to a staff leasing services agreement, *see*, TEX. LAB. CODE ANN. § 91.001 *et. seq.* and for employees retained through temporary agencies *see*, TEX. LAB. CODE ANN. § 92.001 *et. seq.*

SCOPE OF COMPENSABILITY

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

An employee is one in the service of another under a contract of hire. It includes one employed in the usual course and scope of the employer's business who is temporarily asked to perform services outside the usual course and scope of the business. Also included are persons who are trainees under the Texans Work program established under Chapter 308 of the Labor Code. An independent contractor is not an employee under the Act. TEX. LAB. CODE ANN. § 401.012.

Workers covered by federal compensation statutes are excluded from coverage under the Texas worker's compensation statute. TEX. LAB. CODE ANN. § 406.091(a)(2).

If one employer has the right to control the details of another employer's employee at the time of the accident, the employer with the right of control may be considered to be the "employer" for worker's compensation purposes under the "borrowed servant" doctrine. *Dodd v. Twin City Fire Ins. Co.*, 545 S.W.2d 766 (Tex. 1977). An employee that is hired by a temporary employment agency, and is then assigned to perform work for a client of the agency, is an employee of both the agency and the client. For purposes of the Texas Workers Compensation Act, the temporary employment agency and the client of the agency are employers of the employee. The Texas Supreme Court has recognized this as the "dual employer" doctrine. *Wingfoot Enterprises v Alvarado*, 111 S.W.3d 134 (Tex. 2003). If both the temporary agency and the client have workers compensation insurance coverage, the employee can not bring a common law claim for injury against either the agency or the client for any injury sustained while performing duties for either of them. *Garza v Exel Logistics, Inc.*, 161 S.W.3d 473 (Tex. 2005)

The Act applies to farm and ranch employees if they are migrant workers; seasonal workers who are employed on a truck farm, orchard, or vineyard or employed by a person with a gross annual payroll for the preceding year in an amount not less than the greater of the required payroll for the year preceding that year (adjusted for inflation) or \$25,000.00; or are employed by a farmer, ranch operator, or labor agent who employs a migrant worker and are doing the same work at the same time and location as the migrant worker. TEX. LAB. CODE ANN. § 406.162.

In addition, for years prior to 1991, farm and ranch employees, other than migrant or seasonal

workers, are covered if they were employed by a person with a gross annual payroll for the preceding year of at least \$50,000.00. For 1991 and subsequent years, such employees are covered if they were employed by a person with gross annual payroll for the preceding year in an amount not less than the greater of the required payroll for the year preceding that year (adjusted for inflation) or \$25,000.00, or by a person who employs three or more farm or ranch employees (other than migrant or seasonal workers). TEX. LAB. CODE ANN. § 406.162.

Professional athletes who are, by contract or labor agreement, entitled to benefits for medical care and weekly benefits that are equal to or greater than the benefits provided for under the Act may not receive both benefits under the Act and the equivalent benefits under the contract of hire or a collective bargaining agreement. The athlete must make an election as to the benefits he or she will receive. TEX. LAB. CODE ANN. § 406.095.

Resident or nonresident alien employees or legal beneficiaries are entitled to compensation under the Act. TEX. LAB. CODE ANN. § 406.092.

Minors and other legally incompetent employees may have guardians exercise on their behalf the rights and privileges granted to them under the Act. TEX. LAB. CODE ANN. § 406.093.

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

A general contractor and a subcontractor can enter into a written agreement whereby the general contractor provides workers’ compensation coverage to the employees of the subcontractor and the subcontractor. TEX. LAB. CODE ANN. § 406.123(a). If the general contractor has workers’ compensation, but its subcontractor does not and has no employees, the general contractor is treated as the employer of the subcontractor for workers’ compensation purposes. TEX. LAB. CODE ANN. § 406.123(b). The general contractor can deduct the premium from the contract proceeds. TEX. LAB. CODE ANN. § 406.123(b), (d). The employees of the subcontractor and the subcontractor become employees of the general contractor for purposes of Texas workers’ compensation law only. TEX. LAB. CODE ANN. § 406.123(e).

Additionally, if an employer contracts with a staff leasing services company and is assigned employees by that company under that contract, for worker’s compensation insurance purposes, the staff leasing services company and the employer shall be co-employers of the assigned employee. TEX. LAB. CODE ANN. § 91.042(c).

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

A. Traumatic or “single occurrence” claims.

An injury is any damage or harm to the body, including diseases or infections that naturally result from such damage or harm. The term also includes an occupational disease. TEX. LAB. CODE ANN. § 401.011(26). A compensable injury generally is an accidental injury, which is an injury that results from an “untoward event traceable to a definite time, place and cause.” *Olson v. Hartford Accident and Indemnity Company*, 477 S.W.2d 859 (Tex. 1972). An insurer is liable for compensation if the employee was subject to the Act and was acting within the course and scope of the employment at the time of injury. TEX. LAB. CODE ANN. § 401.011(10).

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

An “occupational disease” means a disease arising out of and in the course and scope of the employment that causes damage or harm to the physical structure of the body, including repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. It does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is incident to a compensable injury or occupational disease. TEX. LAB. CODE ANN. § 401.011(34).

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

Excluded claims include injuries where: (1) the employee was in a state of intoxication; (2) the injury was caused by the employee’s willful attempt to injure himself or to unlawfully injure another person; (3) the injury arose out of an act of a third person intended to injure the employee for a personal reason not related to employment; (4) the injury arose out of voluntary participation in an off-duty recreational, social, or athletic activity unless the activity is reasonably expected to be or is expressly or impliedly required by the employment; (5) the injury arose out of an Act of God unless the employment exposes the employee to a greater risk of harm than members of the general public; or (6) the injury was caused by the employee's horseplay. TEX. LAB. CODE ANN. § 406.032.

6. What psychiatric claims or treatments are compensable?

Mental or emotional injuries that arise from legitimate personnel action, including transfers, promotions, demotions, or terminations are not compensable. TEX. LAB. CODE ANN. § 408.006. Any other psychiatric injury, which legitimately arises out of the employee’s job function and is incident to a traumatic work event is covered.

7. What are the applicable statutes of limitations?

An employee must notify the employer of an injury no later than 30 days after it occurs. In the case of an occupational disease, the employee must notify the employer no later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. TEX. LAB. CODE ANN. § 409.001. Failure to file this notice with the employer relieves the employer and the employer’s insurance carrier of liability unless (1) the employer or the insurance carrier have actual notice of the injury, (2) the division determines there is good cause for failure to report the injury, or (3) the claim is not contested by the employer or insurance carrier. TEX. LAB. CODE ANN. § 409.002. A claim for injury must be filed with the Texas Department of Insurance, Division of Workers’ Compensation, no later than one year after the injury. For occupational diseases, the claim must be filed no later than one year after the date on which the employee knew or should have known that the disease was related to the employment. TEX. LAB. CODE ANN. § 409.003 Failure to file a claim for compensation with the Division within this time period relieves the employer and the employer’s insurance carrier from liability unless (1) there is good cause for failure to file the claim, or (2) the employer or the insurance carrier do not contest the claim. TEX. LAB. CODE ANN. § 409.004.

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

An employee or a person acting on the employee's behalf shall notify the employer or an employee who holds a supervisory or management position with the employer of an injury not later than the 30th day after the date the injury occurred; or if the injury is an occupational disease, the 30th day after the date the employee knew or should have known that the injury may be related to employment. TEX. LAB. CODE ANN. § 409.001.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

A willful self-inflicted injury is not compensable. TEX. LAB. CODE ANN. § 406.032(1)(B).

B. Willful misconduct, "horseplay," etc.

An injury due to horseplay or caused by an attempt to unlawfully injure another person is not compensable. TEX. LAB. CODE ANN. §§ 406.032(1)(B), 406.032(2).

C. Injuries involving drugs and/or alcohol.

An injury while the employee is in a state of intoxication is not compensable. TEX. LAB. CODE ANN. § 406.032(1)(A). Intoxication means having an alcohol concentration of 0.08 or more, or loss of the normal use of one's mental or physical faculties resulting from the voluntary induction in to the body of: (1) an alcoholic beverage; (2) a controlled substance; (3) a dangerous drug; (4) an abusable glue or aerosol paint; or (5) any other similar substance, the use of which is regulated under state law. TEX. Penal Code § 49.01(2); TEX. LAB. CODE ANN. § 401.013(a). Intoxication does not include the loss of use of mental or physical faculties resulting from the introduction of substances (1) taken under and in accordance with a prescription written by the employee's doctor; or (2) inhaled or absorbed incidentally in the employee's work. TEX. LAB. CODE ANN. § 401.013(b).

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

The Act provides that certain conduct is considered to be fraudulent if committed knowingly or intentionally in an effort to obtain or deny payment of a workers' compensation benefit. Such conduct includes: (1) making a false or misleading statement; (2) misrepresenting or concealing a material fact; (3) fabricating, altering, concealing, or destroying a document; or (4) conspiring to commit such an act. One who fraudulently obtains a payment is liable for full repayment of the benefit plus interest. If the person is an employee or claiming death benefits, the repayment may be achieved through deduction from future payments if possible. An employer who commits such an act that results in the denial of benefits is liable for the past benefit payments plus interest. TEX. LAB. CODE ANN. § 415.008.

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

No. See Answer 10.

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

An injury sustained during activities paid for or supported by the employer is not compensable where the injury arises out of the voluntary participation in an off-duty recreational, social, or athletic activity not constituting a part of the work-related duties, unless the activity is a reasonable expectancy of or is expressly or impliedly required by the employment. TEX. LAB. CODE ANN. § 406.032(1)(D).

“ . . . an injury is not “in the course and scope of employment” unless (1) participation in such activity is expressly or impliedly required by the employer; or, (2) the employer derives some benefit from the activity, other than the health and morale of the employee; or (3) where the injury takes place at the place or immediate vicinity of employment while the employee is required to hold himself or herself in readiness for work, and the activity takes place with the employers express or implied permission.”

Mersch v. Zurich Insurance Co., 781 S.W.2d 447 (Tex. App- Fort Worth 1989, writ denied)

13. Are injuries by co-employees compensable?

Yes, unless it is an intentional injury for personal reasons. TEX. LAB. CODE ANN. § 406.032(1)(C).

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

No. Injuries that arise out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of the employment are not compensable. TEX. LAB. CODE ANN. §§ 406.032(1)(C).

BENEFITS

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

The average weekly wage is calculated according to the status of the employee and the length of employment preceding the injury. The basic distinction centers around whether the employee worked 13 consecutive weeks immediately preceding the injury: (1) if at least 13 weeks, the wage equals the sum of the wages paid in the 13 weeks immediately preceding the injury divided by 13; and (2) if less than 13 weeks or where the rate of pay is undetermined at the time of injury, the wage is equal to the normal wage the employer pays a similar employee for similar services. If no such similar employee exists, the average weekly wage equals the normal wage paid in the community for the same or similar services provided for pay. TEX. LAB. CODE ANN. § 408.041.

If neither established method can be applied reasonably because the employee’s employment has been irregular or because the employee has lost time from work during the 13-week period immediately preceding the injury because of illness, weather, or another cause beyond the control of the employee, the Division may determine the employee’s average weekly wage by any method that the Division considers fair, just and reasonable to all parties and consistent with the

established methods. TEX. LAB. CODE ANN. §§ 408.041(c).

The average weekly wage of a part-time employee who limits the employee's work to less than a full-time workweek as a regular course of that employee's conduct is computed in a similar fashion. TEX. LAB. CODE ANN. §§ 408.042.

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

The Act does not refer to temporary total disability ("TTD") benefits. Temporary Income Benefits have partially replaced TTD. When an employee has been under a disability for at least one week, temporary income benefits are then payable at the rate of 70% of the difference between an employee's average weekly wage and the post-injury earnings, until the employee reaches maximum medical improvement. If the employee earns less than \$8.50 an hour, for the first 26 weeks, the benefit is 75% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's average weekly wage. However, such benefits are not to exceed 100% of the state average weekly wage nor be less than 15% of the state average weekly wage. Such benefits may also not exceed the employee's actual earnings for the previous year. TEX. LAB. CODE ANN. §§ 408.061, 408.062, 408.082, 408.101, 408.102, 408.103.

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

An insurer must begin payment of temporary income benefits no later than the seventh day after the date on which it receives written notice of the injury, provided the carrier does not dispute the claim. TEX. ADMIN. CODE Tit. 28 §§ 124.7. [And, See answer 18.]

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

The employee must be out eight days before recovering benefits for the first seven days. In the case of injuries not producing immediate disability within the first eight days, benefits begin to accrue on the eighth day after disability begins. TEX. LAB. CODE ANN. § 408.082(b); TEX. ADMIN. CODE Tit. 28 § 124.7.

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

Temporary income benefits terminate when the employee: (1) reaches maximum medical improvement; (2) dies; or (3) no longer suffers from a "disability" or an inability to obtain or retain employment. TEX. LAB. CODE ANN. §§ 408.102(a), 408.081(d), 408.101. Benefits also terminate at the expiration of 104 weeks from the date of accrual without consideration of the employee's status as to disability. This result is reached by virtue of the definition of maximum medical improvement. Maximum medical improvement is reached at the earlier of: (1) the point at which no further material recovery from or lasting improvement to an injury can be reasonably anticipated in medical probability; or (2) the expiration of 104 weeks from the date benefits begin to accrue. TEX. LAB. CODE ANN. §§ 401.011(30), 408.102. The 104-week period for maximum

medical improvement can be extended if the employee has undergone spinal surgery. TEX. LAB. CODE ANN. § 408.104.

Temporary income benefits may also be terminated if the employee, without good cause, fails or refuses to attend a scheduled Insurance Medical Exam (“IME”) required by the TWCC. TEX. LAB. CODE ANN § 408.004(e).

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

See Answers 16 and 22.

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

The term “disfigurement” is not defined in the Act. However, the term “injury” includes any damage or harm to the physical structure of the body. TEX. LAB. CODE ANN. § 401.011(26). Disfigurement could be a basis for the recovery of benefits only where it results in a disability, *i.e.*, the inability because of a compensable injury to obtain or retain employment at a wage rate equivalent to the pre-injury wage. TEX. LAB. CODE ANN. §§ 401.011(16), 408.101.

22. How are permanent partial disability benefits calculated, including the minimum and maximum rate and number of weeks?

The Act does not provide for “permanent partial disability benefits.” Instead, in addition to Temporary Income Benefits, it provides for “impairment income benefits.” It defines impairment as any anatomic or functional abnormality or loss resulting from a compensable injury, reasonably presumed to be permanent, and continuing to exist after maximum medical improvement. TEX. LAB. CODE ANN. § 401.011(23). An impairment rating is the percentage of permanent impairment of the whole body resulting from a compensable injury. TEX. LAB. CODE ANN. § 401.011(24). Impairment income benefits are calculated at 70% of the employee’s pre-injury average weekly wage; not to exceed 70% of the state average weekly wage, nor be less than 15% of the state average weekly wage. TEX. LAB. CODE ANN. §§ 408.126, 408.061(b), 408.062(a).

An employee is entitled to impairment income benefits if evidence of impairment exists based on an objective clinical or laboratory finding. If a doctor chosen by the claimant identifies an impairment and the finding is contested, a designated doctor or a doctor selected by the insurance carrier must be able to confirm the objective clinical or laboratory finding on which the impairment finding is based. TEX. LAB. CODE ANN. § 408.122. An award for an impairment income benefit must be based on an impairment rating using the AMA’s “Guides to the Evaluation of Permanent Impairment.” TEX. LAB. CODE ANN. § 408.124. An employee is entitled to impairment income benefits from the day after maximum medical improvement until the earlier of: (1) the expiration of a period computed at three weeks for each percentage point of claimant’s impairment rating; or (2) the employee’s death. In no event, however, are impairment income benefits to be paid for greater than 401 weeks from the date of the injury. TEX. LAB. CODE ANN. §§ 408.081(d), 408.083, 408.121.

Upon expiration of entitlement to impairment income benefits (see answer 22), an employee may

be eligible for supplemental income benefits. In order to obtain such benefits, the employee must: (1) have an impairment rating of greater than 15% or greater due to the injury; (2) have remained unemployed or earning less than 80% of the average weekly wage due to the impairment; (3) not have chosen to commute a portion of the impairment income benefit under § 408.128; and (4) have complied with the Work Search Compliance Standards adopted under § 408.1415. TEX. LAB. CODE ANN. § 408.142(a).

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

No. The Division shall analyze each report of injury received from an employer to determine whether the injured employee would be assisted by vocational rehabilitation. If the Division so finds, it will notify the employee in writing. The Division will also notify the affected insurance carrier and the Department of Assistive and Rehabilitative Services. TEX. LAB. CODE ANN. § 409.012.

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

The Act does not provide for Permanent Total Disability Benefits. The employee may obtain temporary income benefits (see answers 16-19) until 104 weeks from the date the benefits accrued. If the disability still exists, the employee is entitled to impairment income benefits where the physician has assigned an impairment rating to the employee. (See answer 22) Upon expiration of entitlement to impairment income benefits (see answer 22), an employee may be eligible for supplemental income benefits. In order to obtain such benefits, the employee must: (1) have an impairment rating of greater than 15% or greater due to the injury; (2) have remained unemployed or earning less than 80% of the average weekly wage due to the impairment; (3) not have chosen to commute a portion of the impairment income benefit under § 408.128; and (4) have complied with the Work Search Compliance Standards adopted under § 408.1415. TEX. LAB. CODE ANN. § 408.142(a).

An employee not entitled to supplemental income benefits upon expiration of entitlement to impairment income benefits may become entitled to supplemental income benefits at any time within one year after the date the impairment income benefit period ends provided the employee earns wages for at least 90 days that are less than 80% of the employee's average weekly wage, the decrease in earnings is a direct result of the compensable injury, and the employee meets the other necessary requirements to receive supplemental income benefits. TEX. LAB. CODE ANN. § 408.142(b).

Supplemental Income Benefits are paid monthly at the rate of 80% of the difference between 80% of the employee's average weekly wage and the wages per week the employee has earned during the quarterly period of calculation, up to 70% of the state average weekly wage. TEX. LAB. CODE ANN. §§ 408.061(c), 408.144.

All income benefits, excluding lifetime and death benefits, terminate upon the expiration of 401 weeks from the date of injury. TEX. LAB. CODE ANN. § 408.083. An employee is entitled to lifetime income benefits until death only in limited circumstances, such as a head injury resulting in insanity

or imbecility, an injury resulting in paralysis in two or more extremities, the loss of two or more feet or hands (in combination), or the loss of one's sight, or third degree burns that cover at least 40 percent of the body and require grafting or third degree burns covering either both hands or one hand and the face, or whole body impairment that is rated 85 percent or greater based on "Guides to the Evaluation of Permanent Impairment" and is the result of a single accident. TEX. LAB. CODE ANN. § 408.161.

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

A. Death Benefits

Death benefits are calculated as 75% of the employees average weekly wage. The weekly benefits payment is subject to the maximum allowable weekly benefit prescribed by statute. TEX. LAB. CODE ANN. § 408.181(b).

An insurance carrier may pay death benefits through an annuity if the annuity agreement meets the terms and conditions for annuity agreements adopted by the commissioner by rule. The establishment of an annuity does not relieve the insurance carrier of the liability for ensuring that the death benefits are paid. TEX. LAB. CODE ANN. § 408.181(d).

B. Dependency claims.

A workers compensation carrier is liable for death benefits when an injured employee's compensable injury results in the death of the employee. Death benefits are paid to the legal beneficiaries of the deceased employee. A legal beneficiary may be a spouse, child, grandchild, or other dependent of the deceased employee, or eligible parent. If there are no legal beneficiaries or no timely claim has been filed, the carrier must pay the death benefits to the Division of Workers Compensation for deposit in the subsequent injury fund. Each beneficiary seeking to receive death benefits must file a separate claim for these benefits with the Division, unless the claim expressly includes orders made on behalf of another person. TEX. LABOR CODE ANN. § 408.182

A dependent is one who receives a regular or recurring economic benefit that contributes substantially to the individual's livelihood and welfare. To be a "dependent," an individual must be entitled to receive a distribution of benefits under Ch. 408 of the Act relating to death and burial benefits. TEX. LAB. CODE ANN. § 401.011(14).

The Act defines an eligible spouse as a surviving spouse of the deceased employee unless the spouse had abandoned the deceased employee for more than one year immediately preceding the employee's death without good cause. An eligible child is a child of the deceased employee who is: (1) a minor; (2) enrolled as a full-time student in an accredited educational institution and less than 25 years of age; or (3) a dependent of the deceased employee at the time of the employee's death. An eligible grandchild is one whose parent is not an eligible child yet who is a

dependent of the deceased employee. An eligible parent means the deceased employee's mother or father, including an adoptive parent or a stepparent, who receives burial benefits under § 408.186. A mother or father whose parental rights have been terminated is not eligible. TEX. LAB. CODE ANN. § 408.182(f).

Where there are no eligible children or grandchildren, all benefits are paid to the eligible spouse. If eligible children and/or grandchildren exist, one-half of the benefits are paid to the eligible spouse and the other half are distributed equally to the eligible children (eligible grandchildren only receive distribution when their parent, who was an eligible child, is deceased). The spouse receives death benefits until death or remarriage. However, upon remarriage, the spouse receives a lump-sum payment of 104 weeks of death benefits. TEX. LAB. CODE ANN. § 408.183(B). Death benefits are paid at a rate of 75% of the employee's average weekly wage, up to 100% of the state average weekly wage. TEX. LAB. CODE ANN. §§ 408.182, 408.181, 408.061(d).

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

The Act provides for the payment of Subsequent Injury Fund benefits where an employee receives a subsequent compensable injury which, when coupled with the effects of a previous injury, results in a condition entitling the employee to lifetime income benefits. An employee is entitled to such benefits only to the extent that the subsequent injury would have entitled the employee to benefits had the previous injury not existed. TEX. LAB. CODE ANN. § 408.162.

27. What are the provisions for reopening a claim for worsening of condition, including applications periods?

The statute does not contain any such provision. However, see Answer 18 providing for accrual of benefits on the eighth day after disability begins and Answer 22 regarding delayed eligibility for supplemental income benefits. Also, in judicial review actions, the Act allows consideration of new evidence if the court finds that there has been a substantial change of condition based on certain specified circumstances. TEX. LAB. CODE ANN. § 410.307.

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

The Act does not provide for any situation when the *employer* must pay the employee's attorney's fees. However, in proceedings before the Division regarding supplemental income benefits, if an employee prevails on a disputed insurance claim with an insurance carrier following the Division's determination that the employee is entitled to supplemental income benefits or the amount of supplemental income benefits due, the insurance carrier is liable for reasonable and necessary attorney's fees incurred by the employee as a result of the dispute. TEX. LAB. CODE ANN. § 408.147(c); but see § 408.221 (attorney's fees normally paid from claimant's recovery).

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

A recovery under the Act is the exclusive remedy for a work-related injury in lieu of a common law claim against the covered employer and/or co-workers. TEX. LAB. CODE ANN. § 408.001(a). If an employee works for a temporary employment agency and is assigned to work for a client of the agency, and both the agency and the client have workers compensation insurance coverage, the employee's only remedy is workers compensation benefits under the coverage available to one or the other of the agency or the client. The employee can not bring a common law claim for injury against either the agency or the client for any injury sustained while performing duties for either of them. *Garza v Exel Logistics, Inc.*, 161 S.W.3d 473 (Tex. 2005)

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

Common law claims for intentional injuries are not precluded or covered by the Act. An employee may retain his common law right of action to recover damages for personal injury or death by written notification to the employer of the employee's waiver of coverage under the Act and retention of his common law rights within five days of beginning employment (or within five days of receipt of notice from the employer that the employer has obtained workers' compensation coverage if the employer is not a covered employer at the time of the employee's original employment). TEX. LAB. CODE ANN. § 406.034. Otherwise, an agreement by an employee to waive workers' compensation benefits is void. TEX. LAB. CODE ANN. § 406.035.

Exemplary damages may be recovered from the employer by the surviving spouse or heirs of a deceased employee when the employee's death was caused by the intentional act or omission or the gross negligence of the employer. TEX. LAB. CODE ANN. § 408.001(b). No exception to immunity is made for gross negligence when the injury does not result in the employee's death. *Arnold v. Renken & Kuentz Trans. Co.*, 936 S.W.2d 57, 59 (Tex. App. – San Antonio 1996, no writ).

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

The former Texas Hazardous Employer Program, TEX. LAB. CODE ANN. § 41.041(b) that called for the designation of hazardous private employers was preempted by the federal Occupational Safety and Health Act (OSHA), 29 U.S.C.S. § 651 *et. seq.*, because the Program implicitly regulated workplace safety issues, thereby subjecting employers to duplicative regulation. Because the Program effectively obligated private employers, under penalty of being publicly labeled as hazardous, to take action to reduce workplace injuries, it essentially regulated occupational safety and health issues addressed by federal law. *Skilled Craftmen of Tex., Inc. v. Tex. Workers' Comp. Comm'n*, 158 S.W.3d 89 (Tex. App. – Austin 2005, writ dismissed).

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

None. A guardian of the minor may exercise the rights and privileges granted to the minor employee under the Act on his or her behalf. TEX. LAB. CODE ANN. § 406.093.

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

Insurers' actions taken pursuant to an order of the Division or recommendations of a benefit review officer are not subject to such claims. TEX. LAB. CODE ANN. § 416.001. The Texas Supreme

Court has eliminated a cause of action based on the alleged breach of a worker's compensation carrier's common law duty of good faith and fair dealing owed to injured workers in handling their claims for benefits. *See Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012). Texas Insurance Code Ch. 541 provides for recovery of actual damages caused by certain unfair acts or practices, including unfair claims handling, which damages may be trebled upon a finding of a knowing violation. The statute also provides for recovery of attorneys' fees. TEX. INS. CODE ANN. §§ 541.060, 541.152. The Texas Supreme court also held in *Ruttiger* that a workers compensation claimant can not assert a cause of action against a workers compensation insurer under this statute.

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

No employee may be discharged or discriminated against because he or she has in good faith filed a claim for workers' compensation benefits, hired an attorney in such a claim, instituted or caused to be instituted any proceeding under the Act, or has testified or is about to testify in any proceeding under the Act. TEX. LAB. CODE ANN. § 451.001. An employer who wrongfully discriminates against an employee (including discharge) for filing a claim shall be liable for the reasonable damages suffered by the employee as a result of the discrimination. In addition, if the employee was discharge, he/she is entitled to be reinstated to his or her former position. TEX. LAB. CODE ANN. § 451.002. Punitive damages may be assessed for such wrongful discharge if the plaintiff can demonstrate "actual malice" by the employer. *Cont'l Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 454 (Tex. 1996).

THIRD-PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. However, the insurance carrier that has paid benefits is granted a lien against any recovery of damages by the injured employee. TEX. LAB. CODE ANN. § 417.001.

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

No, except when the injury was intentional or in no way connected with an act performed or committed in the co-employee's capacity of employer or servant. *Medina v. Herrera*, 927 S.W.2d 597 (Tex. 1996); *Brown v. Hopkins*, 921 S.W.2d 306 (Tex. App. – Corpus Christi 1996, no writ); *Dickson v. Silva*, 880 S.W.2d 785 (Tex. App. – Houston [1st Dist] 1993, writ denied); *Ward v. Wright*, 490 S.W.2d 223 (Tex. Civ. App. – Fort Worth 1973, no writ); *Mobley v. Moulas*, 468 S.W.2d 116 (Tex. Civ. App. – El Paso 1971, writ ref'd n.r.e.).

36. Is subrogation available?

The insurance carrier is subrogated to the rights of the injured employee and may enforce the liability of the third party in the name of the injured employee or the legal beneficiary. TEX. LAB. CODE ANN. § 417.001(b).

MEDICALS

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

Yes. An insurance carrier must take final action on a medical bill by the 45th day after receipt of the complete medical bill. Final action includes paying the bill, disputing a charge, requesting reimbursement for an overpayment, or any combination thereof. 28 TEX. ADMIN. CODE § 133.240. Interest accrues on unpaid medical bills from the 60th day after receipt of the bill. TEX. LAB. CODE ANN. § 413.019.

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

A. Health Care Providers Reportign Requirements

The Rules of the Division mandate that healthcare providers shall prepare written reports and shall submit them to the carrier and the injured worker, or his/her representative. Tex. Adm. Code §§ 42.30, 42.33, 42.35, 42.40, 42.55, and 42.60

B. Pre-hearing conference.

Parties must exchange all available medical information promptly after the expiration of six weeks disability or earlier upon written request of either party. Thereafter, all medical information will be exchanged promptly upon receipt. If received less than seven days prior to a prehearing conference, it shall be brought to the prehearing conference for exchange. 28 TEX. ADMIN. CODE § 61.35.

C. Benefit review conference/contested case hearing.

Parties must exchange all medical records and reports, witness statements, photographs or other pertinent evidence to be utilized at a benefit review conference or contested case hearing respectively, not later than 14 days before the conference, or not later than five days before an expedited conference. 28 TEX. ADMIN. CODE §§ 141.4, 142.13; TEX. LAB. CODE ANN. § 410.158. Pertinent information that becomes available thereafter shall be brought to the conference in sufficient copies for filing and exchange. The benefit review officer may reschedule a conference upon a determination that pertinent information has not been submitted or exchanged. No later than 15 days after the benefit review conference, parties shall exchange documentary evidence in their possession not previously exchanged, before requesting additional discovery by interrogatory or deposition. If the evidence is not produced voluntarily, the party may request a subpoena. 28 TEX. ADMIN. CODE § 142.13. If a party fails to disclose the documents, information, or expert witness report known to the party or documents that are in the party's possession, custody, or control within the prescribed time limits, the party may not introduce the evidence or expert testimony at any subsequent proceeding before the Division or in court on the claim unless good cause is shown. TEX. LAB. CODE ANN. § 410.161.

D. Authorization.

The Texas Labor Code does not discuss the necessity to execute a medical authorization, but if a case is litigated, a claimant may provide an authorization in lieu of producing medical records and

bills. TEX. R. CIV. P. § 194.2(j), (k). However, hearing officers may issue subpoenas. 28 TEX. ADMIN. CODE §§ 142.2, 142.12.

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

A. Claimant's choice of a physician.

Except in an emergency, an injured employee, who lives in the network service area, may choose a treating doctor from the list of doctors maintained by the network. If an injured employee does not make an initial choice within 14 days, the network will assign a treating doctor to the injured employee. An injured employee who does not live within the network's service area would continue to choose a treating doctor from the Division's Approved Doctor's List (ADL). TEX. INS. CODE ANN. § 1305.103. If an injured employee is dissatisfied with his or her initial choice of a treating doctor, the injured employee is entitled to select another treating doctor from the network's list of doctors. A network cannot deny an injured employee's initial request to change treating doctors. However, any subsequent requests by an injured employee to change treating doctors are subject to network approval. If the employee becomes dissatisfied with a first choice, he or she may request authority to select an alternate. TEX. INS. CODE ANN. § 1305.104. The Division has prescribed certain criteria which govern whether the employee will be granted authority to select an alternate. A change of doctor may not be made to secure a new impairment rating or medical report. TEX. LAB. CODE ANN. § 408.022.

An injured employee may request that his or her primary care provider under a group health HMO plan also serve as his treating doctor if the primary care provider agrees to abide by the network requirements. TEX. INS. CODE ANN. § 1305.105.

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

The Act does not expressly state whether an employer is entitled to a second opinion or an independent medical examination. However, an insurer is entitled to at least one IME every 180-day period to resolve any question about the appropriateness of health care received by the employee. TEX. LAB. CODE ANN. § 408.004(b). A carrier may also request a medical examination when a certification of maximum medical improvement has not been made or an impairment rating has not been assigned. Additionally, if there is a dispute concerning an existing impairment rating, the Division shall direct the employee to be examined by a designated doctor. TEX. LAB. CODE ANN. § 408.151. Further, the Division may contract with a health care provider for medical consulting services, including independent medical examinations. TEX. LAB. CODE ANN. § 413.051(d).

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

Covered treatment includes all health care which is reasonably required by the nature of the compensable injury as and when needed. TEX. LAB. CODE ANN. § 408.021. Health care which is reasonably required is health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices. TEX. LAB. CODE ANN. § 401.011(22-a). Specifically, the employee is entitled to care that enhances the ability to return to or retain employment, promotes recovery, or cures or relieves the effects that naturally result

from a compensable injury. TEX. LAB. CODE ANN. § 408.021. “Health care” includes all reasonable and necessary medical aid, medical examinations, medical treatments, medical diagnoses, medical evaluations, and medical services. The term includes medical, surgical, chiropractic, podiatric, optometric, dental, nursing, psychological, and physical and occupational therapy services. However, the term does not include vocational rehabilitation. TEX. LAB. CODE ANN. § 401.011(19). An insurer’s liability for medical benefits may not be limited or terminated by agreement or settlement. TEX. LAB. CODE ANN. § 408.021(d).

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

Health care has been defined to include medical and surgical supplies, appliances, braces, artificial members, and prostheses, including training in their use. TEX. LAB. CODE ANN. § 401.011(19)(F). A prosthetic device is included in covered treatment where it cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. §§ 401.011, 408.021.

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

The Act does not expressly indicate whether vehicle and/or home modifications are covered medical expenses. However, the employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).

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

The Division is required to create guidelines for medical fees that are fair and reasonable and designed to ensure both quality medical care and effective cost control. In determining appropriate fees, the commissioner shall take into account economic indicators in health care. TEX. LAB. CODE ANN. § 413.011(b). The guidelines may not provide for payment of a fee in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual or by someone acting on that individual's behalf. TEX. LAB. CODE ANN. § 413.011(d).

The commissioner by rule shall adopt treatment guidelines and return-to-work guidelines and may adopt individual treatment protocols. Treatment guidelines and protocols must be evidence-based, scientifically valid, and outcome-focused and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Treatment may not be denied solely on the basis that the treatment for the compensable injury in question is not specifically addressed by the treatment guidelines. TEX. LAB. CODE ANN. § 413.011(e). The commissioner may also adopt disability management rules, including the use of treatment plans, for non-network claims. TEX. LAB. CODE ANN. § 413.011(g). Additionally, the Division shall examine whether injured employees have reasonable access to surgically implanted, inserted, or otherwise applied devices or tissues and investigate whether reimbursement rates or any other barriers exist that reduce the ability of an injured employee to access those medical needs. The Division shall also recommend to the legislature any statutory changes necessary to ensure appropriate access to those medical needs.

TEX. LAB. CODE ANN. § 413.011(i). The Division also has the authority to identify areas of this state in which access to health care providers is less available and to adopt appropriate standards, guidelines, and rules regarding the delivery of health care in those areas. TEX. LAB. CODE ANN. § 408.0252.

Fee guidelines shall be reviewed and revised at least every two years to reflect medical treatment or ranges of treatment that are reasonable or necessary at the time the review and revision is conducted. TEX. LAB. CODE ANN. § 413.012. The Division must also create a division of medical review to monitor compliance with those rules and implement the policies adopted by it. TEX. LAB. CODE ANN. § 413.002.

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

Workers' compensation insurance carriers, certified self-insurers, groups of self-insurers and governmental entities that self-insure may elect to contract with or establish health care networks certified by the Texas Department of Insurance in accordance with Chapter 1305 of the Texas Insurance Code. TEX. INS. CODE ANN. § 1305.005.

PRACTICE/PROCEDURE

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

The insurer must contest compensability on or before the 60th day after the date on which it is notified of an injury by notifying the Division of its refusal to pay benefits, specifically stating the grounds for refusal. If the insurer fails to do so within the 60-day period, it waives its right to contest compensability. But, the initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period, and an insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. Additionally, the insurer must advise the employee of his right to request a benefit review conference and the means to obtain additional information from the Division. Otherwise, the insurer commits an administrative violation. TEX. LAB. CODE ANN. §§ 409.021, 409.022.

46. What is the method of claim adjudication?

A. Administrative level – Division of Workers Compensation.

On receipt of a request from a party or on its own motion, the Division may direct the parties to a disputed workers' compensation claim to meet in a Benefit Review Conference to attempt to reach agreement on disputed issues involved in the claim. TEX. LAB. CODE ANN. § 410.023(a). The Division shall require the party requesting the benefit review conference to provide documentation of efforts made to resolve the disputed issues before the request was submitted. TEX. LAB. CODE ANN. § 410.023(b). During the Conference, the parties explain their positions, delineate the disputed issue(s), and resolve the disputed issue(s) by agreement, if possible. TEX. LAB. CODE ANN. § 410.021. Where the dispute is not resolved, the benefit review officer must prepare a report that enumerates each issue remaining to be resolved. TEX. LAB. CODE ANN. § 410.031. In the event the

dispute is not completely resolved at the Conference, the parties must then go forward with a Contested Case Hearing no later than 60 days after the Benefit Review Conference or make an election to proceed with arbitration. TEX. LAB. CODE ANN. §§ 410.025(b), 410.104. The parties to a disputed compensation claim are not entitled to a Contested Case Hearing or arbitration on the claim unless a Benefit Review Conference is conducted. TEX. LAB. CODE ANN. § 410.024.

Arbitration is chosen by mutual agreement, and such election cancels any scheduled Contested Case Hearing. The parties must file such election no later than the 20th day after the last day of the Conference. An election of arbitration is irrevocable and binding for the resolution of all disputes in the claim. TEX. LAB. CODE ANN. § 410.104.

If arbitration is not chosen, the parties proceed to a Contested Case Hearing. An issue that was not raised at a Benefit Review Conference or that was resolved at a Benefit Review Conference may not be considered, unless the parties consent or if the issue was not raised, the Division determines that good cause existed for not raising the issue at the conference. TEX. LAB. CODE ANN. § 410.151. At a Contested Case Hearing, the hearing officer acts as the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. TEX. LAB. CODE ANN. § 410.165. The proceedings must be recorded electronically. TEX. LAB. CODE ANN. § 410.164. Oral and written stipulations entered into the record are final and binding. TEX. LAB. CODE ANN. § 410.166. The decision includes findings of fact, conclusions of law, and an award of benefits, if due. TEX. LAB. CODE ANN. § 410.168. Conformity to the rules of evidence is not required. TEX. LAB. CODE ANN. § 410.165. A decision of a hearing officer regarding benefits is final in the absence of a timely appeal by a party and is binding during the pendency of an appeal to the appeals panel. TEX. LAB. CODE ANN. § 410.169.

An aggrieved party may file a written request for an appeal with the appeals panel no later than the 15 days after the decision of the hearing officer and must serve a copy of the request on the other party. The respondent party must file a written response with the panel within 15 days after the request for appeal is served. TEX. LAB. CODE ANN. § 410.202. In reviewing a Contested Case Hearing decision, the appeals panel must consider the record developed at the hearing and the written request for review and response thereto. Thereafter, the appeals panel either affirms the decision of the hearing officer, reverses the decision and renders a new decision, or reverses the decision and remands the case back to the hearing officer for further consideration and development of the evidence. An appeals panel may not remand a case more than once. TEX. LAB. CODE ANN. § 410.203. A decision of the appeals panel regarding benefits is final in the absence of a timely appeal for judicial review. TEX. LAB. CODE ANN. § 410.205. Upon judicial review, the record of the contested case hearing is admissible in accordance with the Texas Rules of Evidence. *Nat'l Liability v. Allen*, 15 S.W.3d 525, 529 (Tex. 2000).

B. Trial court.

After a party has exhausted all administrative remedies and remains aggrieved by a final decision of the appeals panel, that party may seek judicial review of the appeals panel decision. TEX. LAB. CODE ANN. § 410.251. Judicial review is obtained by filing suit in the district court no later than 40 days after the decision of the appeals panel was filed with the Division. TEX. LAB. CODE ANN.

§ 410.252. A trial will be limited to those issues decided by the Division appeals panel and upon which judicial review is sought. The pleadings must specifically enumerate the determinations of the appeals panel by which the party is aggrieved. TEX. LAB. CODE ANN. § 410.302(b). The burden of proof is upon the party seeking judicial review of the particular issue. TEX. LAB. CODE ANN. § 410.303.

C. Appellate.

The parties may appeal the district court decision to the Texas Court of Appeals, as a matter of right, based on errors of law. Appeal of the decision of the Court of Appeals is only by discretionary petition for review to the Texas Supreme Court.

47. What are the requirements for stipulations or settlements?

Settlements may not provide for payment of benefits in a lump sum except as specifically provided within the Act. TEX. LAB. CODE ANN. §§ 408.005(a), 408.128. An employee's right to medical benefits must not be limited or terminated. TEX. LAB. CODE ANN. §§ 408.005(b), 408.021. A settlement or agreement resolving an issue of impairment may not be made before the employee reaches maximum medical improvement and must adopt an impairment rating using the impairment rating guidelines described within the Act. TEX. LAB. CODE ANN. §§ 408.005(c), 408.124. All settlements must be signed by the commissioner and all parties to the dispute. TEX. LAB. CODE ANN. § 408.005(d). The commissioner shall approve a settlement if the commissioner is satisfied that it accurately reflects the agreement between the parties, it reflects adherence to all appropriate provisions of law and the policies of the division, and based on the law and facts, it is in the best interest of the claimant. TEX. LAB. CODE ANN. § 408.005(e).

If a settlement is reached at a Benefit Review Conference, the benefit review officer must reduce the settlement to writing. The settlement will not be effective unless it is approved by the commissioner. TEX. LAB. CODE ANN. §§ 408.005, 410.029. Those not approved or rejected before the 16th day after submission of the settlement to the commissioner are deemed approved. TEX. LAB. CODE ANN. § 408.005.

After a party has sought judicial review of an appeals panel decision, but before the entry of judgment by the trial court, a settlement may be reached, but such a settlement must be approved by the trial court. In order for the trial court to approve the settlement, it must find that the settlement: (1) accurately reflects the agreement between the parties; (2) is consistent with law; and (3) is in the employee's best interest. Further, a party proposing a settlement before judgment is entered by the trial court may petition the court orally or in writing for approval of the settlement. TEX. LAB. CODE ANN. § 410.256.

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

No. Settlements may only be reached regarding impairment income benefits, e.g. as to the employee's degree of impairment and then only if (1) the employee has reached maximum medical improvement, and (2) the percentage of impairment agreed upon is one adopted using the impairment rating guidelines prescribed by statute. TEX. LAB. CODE ANN. § 408.005. See answer 47.

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

Yes, or by the court in the case of judicial review. See answer 47.

RISK FINANCE FOR WORKERS' COMPENSATION

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

An employer may elect whether or not to obtain workers' compensation insurance coverage, except in the case of public employers and those otherwise provided by law. TEX. LAB. CODE ANN. § 406.002. The employer may obtain coverage through a licensed insurer or through self-insurance as provided under the Act. TEX. LAB. CODE ANN. § 406.003. An employer who does not obtain workers' compensation insurance coverage shall notify the Division in writing that the employer elects not to obtain coverage. TEX. LAB. CODE ANN. § 406.004. Also, the employer must notify each employee whether or not the employer has workers' compensation insurance coverage. TEX. LAB. CODE ANN. § 406.005.

The insurer of last resort is the Texas Mutual Insurance Company. Specifically, if an applicant to the company would be rejected for workers' compensation insurance under the company's underwriting standards, the risk may not be rejected, but shall be insured at a higher premium as provided by the company's requirements. TEX. INS. CODE ANN. § 2054.351.

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

A. For individual entities.

In order to self insure, an employer must submit an application to the Division for a certificate of authority. The application must be submitted on a form adopted by the commissioner and accompanied by a \$1,000.00 nonrefundable application fee. Within 60 days after the application is received, the commissioner shall approve or deny the application. TEX. LAB. CODE ANN. § 407.041. With the approval of the Texas Certified Self-Insurer Guaranty Association, the commissioner shall issue a certificate of authority to self-insure to an applicant who meets the certification requirements and pays the required fee. TEX. LAB. CODE ANN. § 407.042. A certificate of authority to self-insure is valid for one year after the date of issuance. TEX. LAB. CODE ANN. § 407.044.

To be eligible for a certificate of authority, the applicant must present evidence satisfactory to the commissioner and the association of sufficient financial strength and liquidity, under standards adopted by the commissioner, to ensure that all workers' compensation obligations incurred by the applicant are met promptly. Specifically, the applicant must, among other things, present a plan for claim administration that is acceptable to the commissioner and that designates a qualified claims servicing contractor, demonstrate the existence of an effective safety program for each of its work locations, establish a minimum amount of total unmodified workers' compensation insurance premiums for prior years, and meet extensive security requirements for incurred liabilities for compensation and for terminated surety bonds and excess policies. TEX. LAB. CODE ANN. §§ 407.061-407.065. Each applicant shall obtain excess insurance or reinsurance to

cover liability for losses not paid by the self-insurer in an amount not less than the amount required by the commissioner. A certified self-insurer shall notify the Division not later than the 10th day after the date on which the certified self-insurer has notice of the cancellation or termination of excess insurance or reinsurance coverage required under this section. TEX. LAB. CODE ANN. § 407.067.

Each certified self-insurer shall file an annual report with the Division. The commissioner shall prescribe the form of the report and shall furnish blank forms for the preparation of the report to each certified self-insurer. The report must include, among other things, payroll information, the number of injuries sustained in the three preceding calendar years, and the amount paid during each year for income benefits, medical benefits, death benefits, burial benefits, and other proper expenses related to worker injuries. TEX. LAB. CODE ANN. § 407.081. Each certified self-insurer shall maintain the books, records, and payroll information necessary to compile the annual report and any other information reasonably required by the commissioner. TEX. LAB. CODE ANN. § 407.082.

Each certified self-insurer shall pay an annual fee to cover the administrative costs incurred by the Division and shall base its fee on the total amount of income benefit payments made in the preceding calendar year. The Division shall assess each certified self-insurer a pro rata share based on the ratio that the total amount of income benefit payments made by that certified self-insurer bears to the total amount of income benefit payments made by all certified self-insurers. TEX. LAB. CODE ANN. § 407.102. Each certified self-insurer shall also pay a self-insurer maintenance tax for the administration of the Division and the office of injured employee counsel and to support the prosecution of workers' compensation insurance fraud in this state. Not more than two percent of the total tax base of all certified self-insurers may be assessed for a maintenance tax under this section. TEX. LAB. CODE ANN. § 407.103. These regulatory fees imposed are due on the 60th day after the issuance of a certificate of authority to self-insure and on the 60th day after each annual renewal date. TEX. LAB. CODE ANN. § 407.104.

A certified self-insurer may withdraw from self-insurance at any time with the approval of the commissioner. The commissioner shall approve the withdrawal if the certified self-insurer shows to the satisfaction of the commissioner that the certified self-insurer has established an adequate program to pay all incurred losses, including unreported losses, that arise out of accidents or occupational diseases first distinctly manifested during the period of operation as a certified self-insurer. TEX. LAB. CODE ANN. § 407.045.

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

With the exception of public employees or governmental entities, an unincorporated association or business trust composed of five or more private employers may establish a workers' compensation self-insurance group under this chapter if the employers are: (1) engaged in the same or a similar type of business; (2) are members of a *bona fide* trade or professional association that has been in existence in this state for purposes other than insurance for at least five years before the establishment of the group; and (3) enter into agreements to pool their liabilities for workers' compensation benefits and employers' liability in this state. TEX. LAB. CODE ANN. § 407A.002. Subject to the approval of the commissioner, a group may merge with another group

engaged in the same or a similar type of business if the resulting group assumes in full all obligations of the merging groups. The commissioner may conduct a hearing on a proposed merger and shall conduct a hearing if any party, including a member of either group, requests a hearing. TEX. LAB. CODE ANN. § 407A.003.

Each group shall be operated by a board of trustees composed of at least five persons whom the members of the group elect for stated terms of office. The trustees must be employees, officers, or directors of employers who are members of the group. Each board member shall be a resident of this state or an officer of a corporation authorized to do business in this state. An administrator or service company of the group, or owner, officer, employee of, or any other person affiliated with the administrator or service company, may not serve on the board of trustees. TEX. LAB. CODE ANN. § 407A.151.

An association of employers may not act as a workers' compensation self-insurance group unless it has been issued a certificate of approval by the commissioner. TEX. LAB. CODE ANN. § 407A.005. A group that is issued a certificate of approval by the commissioner is not an insurer based on that certificate and is not subject to the insurance laws and rules of this state, except as otherwise provided. TEX. LAB. CODE ANN. § 407A.004. Each group shall be deemed to have appointed the commissioner as its attorney to receive service of legal process issued against the group in this state. The appointment of the commissioner is irrevocable, binds any successor in interest, and remains in effect as long as any obligation or liability of the group for workers' compensation benefits exists in this state. TEX. LAB. CODE ANN. § 407A.006.

An association of employers that proposes to organize as a workers' compensation self-insurance group shall file with the department an application for a certificate of approval. TEX. LAB. CODE ANN. § 407A.051(a). The application must include, among other things, the name of the group, the date of organization of the group, the name and address of each employer that is a member of the group, and any other information reasonably required by the commissioner. TEX. LAB. CODE ANN. § 407A.051(b). The application must be accompanied by, among other things, a \$1,000.00 nonrefundable filing fee, and proof of compliance with the financial and excess insurance requirements. TEX. LAB. CODE ANN. § 407A.051(c). Additionally, a group shall notify the commissioner of any change in the abovementioned information not later than the 30th day after the effective date of the change. TEX. LAB. CODE ANN. § 407A.051(d). The commissioner shall evaluate the financial information provided with the application as necessary to ensure that the funding is sufficient to cover expected losses and expenses and that the funds necessary to pay workers' compensation benefits will be available on a timely basis. TEX. LAB. CODE ANN. § 407A.051(e). The commissioner shall act on a complete application for a certificate of approval not later than the 90th day after the date on which the application is filed with the department. If, because of the number of applications, the commissioner is unable to act on an application in a timely manner, the commissioner may extend the period for an additional 30 days. TEX. LAB. CODE ANN. § 407A.051(f).

Each group must have an estimated premium subject to experience modifier of at least \$250,000.00 during the group's first year of operation. Thereafter, the annual standard premium must be at least \$500,000.00. TEX. LAB. CODE ANN. § 407A.055. An indemnity agreement must

jointly and severally bind the group and each employer who is a member of the group to meet the workers' compensation obligations of each member. The indemnity agreement must be in the form prescribed by the commissioner and must include minimum uniform substantive provisions as prescribed by the commissioner. Subject to the commissioner's approval, a group may add other provisions necessary because of that group's particular circumstances. TEX. LAB. CODE ANN. § 407A.056. The commissioner may also require a service company providing claim services to furnish a performance bond of \$250,000.00 in the form prescribed by the commissioner. However, in lieu of a performance bond, a security deposit of cash or securities acceptable to the commissioner may be deposited with the commissioner to be held in the state treasury. TEX. LAB. CODE ANN. § 407A.057. Furthermore, each group shall pay a self-insurance group maintenance tax and a premium tax. TEX. LAB. CODE ANN. §§ 407A.301-407A.304.

A certificate of approval remains in effect until terminated at the request of the group or revoked by the commissioner. The commissioner may not grant the request of any group to terminate its certificate of approval unless the group has insured or reinsured all incurred workers' compensation obligations with an authorized insurer under an agreement filed with and approved in writing by the commissioner. Those obligations include known claims and expenses associated with those claims and incurred but not reported claims and expenses associated with those claims. TEX. LAB. CODE ANN. § 407A.101.

52. Are "illegal aliens" entitled to workers' compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of "employee"?

Yes. An alien is a person who is not a citizen of the United States. TEX. LAB. CODE ANN. § 401.011(4). A nonresident alien employee or legal beneficiary is entitled to compensation under the Act. A nonresident alien employee or legal beneficiary, at the election of the employee or legal beneficiary, may be represented officially by a consular officer of the country of which the employee or legal beneficiary is a citizen. That officer may receive benefit payments for distribution to the employee or legal beneficiary. The receipt of the payments constitutes full discharge of the insurance carrier's liability for those payments. TEX. LAB. CODE ANN. § 406.092. A person residing in this State whose entry may be contrary to the immigration laws is not barred, by that reason alone, from receiving workmen's compensation benefits. *Commercial Standard Fire & Marine Co., v. Galindo*, 484 S.W.2d 635, 637 (Tex. Civ. App. – El Paso 1972, writ ref. n.r.e.).

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

The Act does not specifically mention terrorist acts or injuries. Injuries caused by the actions of third parties, and intended to injure the employees because of personal reasons, are not compensable. TEX. LAB. CODE ANN. § 406.032. However, injuries caused by criminal acts of third persons, where the employee is at risk because of his employment, are compensable. See *Walls Reg'l Hosp. v. Bomar*, 9 S.W.3d 805, 807 (Tex. 1999).

54. Are there any state specific requirements which must be satisfied in light of the obligation of the

parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?

Under Medicare regulations, Medicare is a secondary payer to the payment of workers' compensation by a workers' compensation carrier or self-insured employer. 42 C.F.R. §§ 411.40, 411.46; *see* 42 C.F.R. §§ 411.32, 411.33. The obligation to pay medical expenses for a compensable condition cannot be shifted to Medicare. 42 C.F.R. § 411.46.

Nothing in the Act relieves the carrier of its obligation to pay compensable medical expenses because of the potential availability of Medicare. Medicare payments made to or on behalf of injured workers are subject to Medicare's superior lien. If the claimant receives a payment from a third party, Medicare must be reimbursed within 60 days. 42 U.S.C. § 1395y(b)(2)(A); 42 C.F.R. § 411.24(h).

Medicare has several options and sanctions, but the enforcement varies for geographical regions of the country. Consult your ALFA lawyer for the current practice in your state for this evolving area of the law.

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

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

Nothing in the Act relieves the carrier of its obligation to pay compensable medical expenses because of the potential applicability of Medicare, Medicaid, or health insurance. Income or death benefits are subject to subrogation interests created under the Act after attorney's fees and court-ordered child support has been paid. TEX. LAB. CODE ANN. § 408.203. If a benefit is claimed by an injured employee, the insurance carrier is subrogated to the rights of the employee. Upon recovery from a third party, the carrier must pay the injured employee after reimbursing itself and paying costs. TEX. LAB. CODE ANN. § 417.001.

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

HIPAA provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. 45 C.F.R. § 164.512(l).

Information contained or derived from a worker's compensation file is confidential and may not be disclosed by the Division, notwithstanding certain exceptions created under the Act. TEX. LAB. CODE ANN. § 402.083(a). Information concerning an employee who has been finally adjudicated of

wrongfully obtaining payment is not confidential. TEX. LAB. CODE ANN. § 402.083(b). While a claim is either pending before the Division, being appealed, or is the subject of a subsequent suit, information may be released to the employee or the employee's legal beneficiary, the employee's or the legal beneficiary's representative, the employer at the time of the injury, the insurance carrier, or third-party litigants in lawsuit arising out of the injury. TEX. LAB. CODE ANN. § 402.084. The Division is required to release claim information, in certain instances, to various government agencies, regulatory bodies, and public officials. In other situations, the release of this information is discretionary. TEX. LAB. CODE ANN. § 402.085.

Prospective employers may obtain information about prior injuries of an applicant for employment upon receipt of written authorization from the applicant. TEX. LAB. CODE ANN. § 402.087. However, employers are prohibited from making pre-offer inquiries about applicants' workers' compensation history. TEX. Att'y Gen. Op. No. DM-124 (June 9, 1992). Employers are not prohibited from providing prospective employers with information regarding a former employee, provided the information was obtained legally. TEX. LAB. CODE ANN. § 402.086.

The Act's provisions regarding confidentiality of records does not currently mention HIPAA, but it is expected that to the extent of any conflict HIPAA, as the prevailing federal law, would control.

57. What are the provisions for "independent contractors"?

An independent contractor is not an employee under the Act. TEX. LAB. CODE ANN. § 401.012. An independent contractor is a person who contracts to perform work or provide a service for the benefit of another and who ordinarily: (1) acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship; (2) is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee; (3) is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and (4) possesses the skills required for the specific work or service. TEX. LAB. CODE ANN. § 406.121(2).

The Act has specific provisions for building and construction independent contractors, TEX. LAB. CODE ANN. §§ 406.141-146, and farm and ranch employees, TEX. LAB. CODE ANN. § 406.165.

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

Professional employer services do not include independent contractors. TEX. LAB. CODE ANN. § 91.001(14). For purposes of the section on staff leasing services in the Texas Labor Code, an independent contractor is a person who contracts to perform work or provide a service for the benefit of another and who: (1) is paid by the job, not by a time-measured basis; (2) is free to hire as many helpers as the person desires and to determine what each helper will be paid; and (3) is free to work for other contractors, or to send helpers to work for other contractors, while under contract to the hiring employer. TEX. LAB. CODE ANN. § 91.001(10).

A certificate of insurance coverage showing that either a license holder or client maintains compensation insurance coverage constitutes proof of workers' compensation insurance

coverage for the license holder and the client with respect to all covered employees of the license holder and to the client. TEX. LAB. CODE ANN. § 91.006(a).

59. Are there any specific provisions for “independent contractors” pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

Under the Act, an owner operator is a person who provides transportation services under contract for a motor carrier. An owner operator is an independent contractor. TEX. LAB. CODE ANN. § 406.121(4). An owner operator and the owner operator's employees are not employees of a motor carrier under the Act if the owner operator has entered into a written agreement with the motor carrier that evidences a relationship in which the owner operator assumes the responsibilities of an employer for the performance of work. TEX. LAB. CODE ANN. § 406.122(c).

A motor carrier and an owner operator may enter into a written agreement under which the motor carrier provides workers' compensation insurance coverage to the owner operator and the employees of the owner operator. Such an agreement makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws. If a general contractor or a motor carrier elects to provide coverage, then the actual premiums, based on payroll, that are paid or incurred by the general contractor or motor carrier for the coverage may be deducted from the contract price or other amount owed to the subcontractor or owner operator by the general contractor or motor carrier. TEX. LAB. CODE ANN. § 406.123.

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.

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

61. 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?

Nothing in the Act relieves the carrier of its obligation to pay compensable medical expenses because of the potential applicability of Medicare, Medicaid, or health insurance. Moreover, an insurance carrier in Texas can not settle an employee's right to medical treatment. The carrier

must pay for all medical expenses that are reasonable and necessary for the treatment of the injury. In the event an injured employee recovers damages from a third party as a result of the compensable injury, the carrier is entitled to reimbursement for the amounts it has paid for medical care received by the injured employee. In addition, the carrier is entitled to a credit for the medical expense and lost wage damages recovered from the third party.