Chapter 22

INDUSTRIAL INSURANCE AND WORKPLACE SAFETY

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22.1 INTRODUCTION

The federal government as well as the State of Washington has a comprehensive system to provide coverage in the event of workplace injuries as well as a set of laws governing workplace safety. The former is known as “Industrial Insurance” to provide benefits to workers injured on the job or suffering from work-related illnesses; the latter is known as the Occupational Safety & Health Act (OSHA) with its state equivalent of the Washington Industrial Safety & Health Act (WISHA). This chapter will provide a brief overview of both Industrial Insurance and WISHA requirements for employers doing business in Washington.

22.2 INDUSTRIAL INSURANCE

22.2.1 Coverage and Immunity

Industrial Insurance, also known as workers’ compensation, is designed to provide workers with coverage for injuries or illnesses arising out of the course of employment. Employers doing business in Washington may participate in the state program which is administered by the Washington Department of Labor & Industries, or, if large enough, may be eligible to self-insure. If the former, the business must register with the Department of Labor & Industries and must pay the appropriate quarterly premiums along with the premiums for workers mandatorily covered. The exact premium amounts depend on the nature of the business. RCW 51.32 et seq. and WAC 296-17 et seq. Employers electing to be covered under the state industrial insurance system may be eligible to join other companies in retrospective rating pools which may result in lower premiums and a significant savings. Otherwise future premium rates are set based on the company’s own history of accident rates and claims. One of the key benefits of the Industrial Insurance Act is that in exchange for paying premiums, the employer receives almost complete immunity from lawsuits by injured workers unless the employer intentionally injures the worker.

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22.2.2 Scope of Coverage

Industrial Insurance only covers those injuries or illnesses arising out of the course of employment; in other words, the employee must be acting at the employer’s direction or in furtherance of the employer’s business. Industrial Insurance coverage does not include traveling to or from work unless the employer provides the means of transportation, reimburses for transportation costs or receives some benefit as a result of the commute. If any of these are the case, the employee may have workers’ compensation coverage for any injuries occurring during his or her commute. A covered “industrial injury” is the result of a tangible work-related occurrence and generally excludes conditions developing gradually over time. However, covered occupational illnesses may develop over time as long as they arise proximately out of employment.

22.2.3 Claims

Covered employees file claims with the Department of Labor & Industry and copies are provided to their employers. Employers should carefully review the entire claim form and determine whether the employee accurately reported the pay rate, marital status, dependents, how and where the accident occurred, and whether there were any similar prior injuries. Workers’ compensation claims forms are available in doctors’ offices and are generally filled out on the initial visit after a workplace injury. The claims are administered by the Department of Labor & Industries and are adjudicated by either the self-insured employer’s service company or the Department claims managers. Deadlines are critical and an employer typically has from 15 to 60 days to object after it receives an order or letter from the Department regarding the alleged workplace injury. Failure to respond can foreclose the employer from challenging issues which may have a major impact on the outcome and costs of the claim as well as other, possibly related, litigation. When in doubt, protest in order to preserve employer rights.

If a workplace injury or illness is determined to be a temporary disability, the employee may be paid for the time they lose from work, which is commonly known as “time loss.” Employees with permanent disabilities are paid a pension and medical and surgical expenses are borne by the Department.

22.2.4 Appeal Rights

Employers and employees both have the right to appeal the determinations by the Department to an entity known as the “Board of Industrial Insurance Appeals.” The Board is a quasi-judicial agency which operates in the same manner as a court and applies the same rules of civil procedure and evidence. Witnesses are sworn in, exhibits may be submitted and, for the most part, testimony is taken live. Once an appeal has been filed and the matter assigned a case number, it is normally scheduled for mediation and, if the matter is not settled through mediation, the case will be assigned to a hearings judge. Hearings usually occur between four to six months after the initial scheduling conference. The affected employer, employee or the Department has a right of appeal from the Board’s Decision and Order to the Superior Court. The Superior Court “trial” is limited to the record developed before the Board of Industrial Insurance Appeals and, in the case of a jury trial, the record is literally read to the jury word-for-
word. After the Superior Court trial, the matter is appealable to the Court of Appeals and, ultimately, the Washington Supreme Court, as any other Superior Court judgment.

22.2.5 Light Duty

Regardless of whether or not the employer chooses to agree or appeal the determination, the employer should consider creation of light duty work for the employee subject to recovery. The scope of the light duty work must be determined in conjunction with the claims manager from the Department as well as the treating physician. Light duty work may speed up the return of the employee and reduce the employer’s time loss.

22.2.6 Retaliation Protection

It is important for employers not to discriminate or retaliate against workers who file Industrial Insurance claims. There is an express state law providing a cause of action for employer retaliation. In addition, there is no “fault” under workers’ compensation law.

22.2.7 FMLA Overlap

Employers should also recognize and take advantage of the potential overlap of Industrial Insurance law and the Family Medical Leave Act (FMLA). The latter allows employees to take time off up to 12 weeks within any calendar year and return to work to the same or similar position. However, the 12-week period does not automatically begin to run when a worker suffers a workplace injury. Employers should notify the employee who is filing a workers’ compensation claim and taking time off, that this time off also counts toward any family medical leave benefit.

22.3 WORKPLACE SAFETY

In addition to the duty to provide a safe workplace under the Industrial Insurance system, employers also have a statutory duty under both the federal OSHA as well as the state equivalent WISHA. The federal statute can be found at 29 USC § 651 et seq. and the regulations appear in Title 29 of the Code of Federal Regulations. The state law can be found at RCW 49.17 and the regulations published in the Washington Administrative Code (WAC) at Title 296. WISHA is administered by the Washington Department of Labor & Industries. The statutory requirements are numerous and a brief synopsis of the employer requirements are as follows.

22.3.1 General Safety and Health Standards

The most pervasive employer requirements are contained in Ch. 296-24 WAC, the General Safety and Health Standards. These include a general duty to establish and supervise a “safe and healthful working environment.” WAC 296-24-020. Employers must also have a written accident prevention program pursuant to WAC 296-24-040 and safety committees pursuant to WAC 296-24-045 as well as training programs in the field of occupational safety and health. WAC 296-24-020.
22.3.2 Recordkeeping and Reporting

Under both OSHA and WISHA, regulations require employers to keep accurate records of work-related deaths, injuries, and illnesses, maintain records that deal with workers’ exposure to toxic substances and harmful physical agents, and preserve employee medical records, including employee exposures to potentially harmful conditions or substances, occupational noises, ionizing radiation, asbestos, lead, cotton dust and blood-borne pathogens.

22.3.3 General Occupational Health Standards

Chapter 296-62 WAC sets forth the occupational health standards applying to all employers which deal with such subjects as access to employee exposure and medical records, hazard communication, respiratory protection, exposure to asbestos, biological agents, lighting and other workplace hazards.

22.3.4 Hazard Communication Standard

WISHA requires all employers to identify hazardous chemicals in the workplace and obtain a Material Safety Data Sheet on each for the identified chemicals. In addition, all employees exposed or potentially exposed to a hazardous chemical must be trained concerning the physical and health hazards of the chemicals.

22.3.5 Compliance and Enforcement

WISHA inspectors have the power to issue citations and determine whether WISHA/OSHA violations are serious enough to warrant civil penalties. The Department has the right to carry out compliance inspections to determine whether or not WISHA is being complied with. The right to inspect workplaces is extremely broad and is set forth in RCW 49.17.070. As with the Industrial Insurance Act, employers have the right to appeal citations and the appellate process is extremely similar to the Industrial Insurance process with an internal determination and then the opportunity to appeal to the Board of Industrial Insurance and ultimately to Superior Court.

22.4 ADDITIONAL INFORMATION

The Department of Labor & Industries has numerous websites and toll-free telephone numbers in the event employers have questions. The telephone number is 1-800-423-7233 (“4BE-SAFE”). The starting point for the web search regarding statutes and regulations can be found at http://www.lni.wa.gov or http://www.osha.gov.