

## Workers Compensation Legislation 2011 Legislative Session

### **SB40 / HB205 Labor Law: Base period calculation excludes temporary total disability.**

This bill excludes periods of temporary total disability under the Workers' Compensation Law from the calculation of "base period" for purposes of unemployment compensation. Under present law, a person receiving unemployment benefits receives between \$256 and \$275 per week, depending on the average total wages for insured work paid to the person in the two calendar quarters in the individual's base period in which the total wages are highest. "Base period" means, with respect to each claimant:

- (1) The first four of the last five completed calendar quarters; or
- (2) If using the method described in (1) the claimant doesn't have sufficient wages to qualify for unemployment benefits, then the last four completed calendar quarters immediately preceding the first day of the claimant's benefit year.

This bill specifies that for the purposes of establishing a base period in cases involving persons receiving workers' compensation benefits for temporary total disability, the department of labor and workforce development must exclude periods of such disability from the base period and determine the base period from the last four completed quarters of work before any such disability.

Enacted as Public Chapter 0376 effective 07/01/2011.

### **SB 932/HB 1503 - This bill makes various changes to present law concerning the relationship between employers and employees as follows:**

(1) The bill authorizes the parties to a workers' compensation settlement to compromise the issue of future medical treatment on any claim, based on a finding by the judge or specialist who approves the settlement, that based on clear and convincing evidence, compensability is a contested issue and has been raised in good faith as a potentially valid defense by the employer. Also states that that nothing in present law regarding workers' compensations settlements prohibits the parties from compromising and settling at any time the issue of future medical benefits; This bill removes the three-year waiting period that is required by present law for settlement of future medical treatment for certain workers' compensation claims;

(2) Under present law, if the parties mutually agree to a compromise and settlement on the issue of future medical benefits, the parties must submit the agreement for approval to the proper court, the commissioner or the commissioner's designee. The bill specifies that such agreement must "include specific findings that Medicare and TennCare liability and consequences to the claimant have been addressed specifically in the order approving the settlement";;

(3) Under present law, whenever there is a dispute between the parties as to whether or not a claim is compensable, or a dispute as to the amount of compensation due, the parties may settle the matter without regard to whether the employee is substantially receiving worker's compensation benefits. However, the settlement paid to the employee may not exceed 50 times the minimum weekly benefit rate as of the date of the claimed injury. The bill removes the requirement that the settlement may not exceed

50 times the minimum weekly benefit rate in order for the parties to settle the matter without regard to whether the employee is substantially receiving worker's compensation benefits;

(4) Under present law, if the parties settle the matter as described in (3), the employee is not entitled to any future medical benefits and no settlement agreement between the parties may be approved by either the court or the commissioner or the commissioner's designee, if the settlement agreement contains an amount of money designated or allocated for future medical benefits. The bill removes this provision;

(5) Under present law, the employer or the employer's agent must furnish free of charge to the employee such medical care and treatment made reasonably necessary by accident, including medical and surgical treatment, medical and surgical supplies, hospitalization, nursing services, psychological services, dental services, crutches, artificial members, and prescription eyeglasses or eyewear. This bill rewrites this provision to instead require the employer or the employer's agent to furnish free of charge to the employee such medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members, and other reasonable and necessary apparatus, including prescription eyeglasses and eye wear, such nursing services or psychological services as ordered by the attending physician and hospitalization, including such dental work made reasonably necessary by accident;

(6) Under present law, there is no implied covenant of confidentiality, prohibition against ex parte communications or privacy of medical records in the custody of authorized treating physicians with respect to case managers, employers, or insurance companies, or their attorneys, if these persons provide reasonable access to any employee's medical information pursuant to present law. This bill makes this provision subject to the condition that the employee or employee's attorney is provided copies of any and all written memorandum or visual or recorded materials, including e-mails or other written materials provided to the employee's authorized treating physician by case managers, employers, insurance companies, or their attorneys or received from employee's authorized treating physician no later than 10 days in advance of a deposition of the authorized treating physician taken for any purpose or the appearance of the authorized treating physician for testimony;

(7) Any employee claiming workers' compensation benefits, or the employee's attorney, is entitled to obtain medical information, opinions, records or reports from, or communicate in writing or in person with, any medical provider that has treated or provided medical care to the employee. No medical provider will incur any liability as a result of providing such professional opinions;

(8) Under present law, an occupational disease arising out of and in the course of employment that causes either disablement or death of the employee is generally compensable. The bill modifies this principle to instead specify that the opinion of the physician selected by the employee from the employer's designated panel of physicians would be presumed correct on the issue of causation and would only be defeated by a preponderance of the evidence to the contrary; and

(9) The bill specifies that hearing loss, carpal tunnel syndrome, and other repetitive motion injuries are not an occupational disease unless such condition arose primarily out of and in the course and scope of employment. The opinion of the physician selected by the employee from the employer's designated panel of physicians would be presumed correct on the issue of causation and would only be defeated by a preponderance of the evidence to the contrary.

(10) (A) Under the bill, service performed by an individual who provides services as a leased-operator or an owner-operator of a motor vehicle or vehicles under contract to a common carrier doing an interstate business while engaged in interstate commerce is deemed to be an excluded service for purposes of the definition of the definition of employment under present employment security law, regardless of whether the common law relationship of master and servant exists, and regardless of whether the individual satisfies the requirements for included service;

(B) Specifies that the above provisions would not apply to services performed by an individual:

(i) After December 31, 1971 and prior to January 1, 1978, in the employ of this state or any of its instrumentalities for a hospital or institution of higher education located in this state, if such service is excluded from "employment" under federal law and does not constitute "excluded employment" under

present state law;

(ii) After December 31, 1977, in the employ of this state or any of its instrumentalities or any political subdivision of the state or any of its instrumentalities, if the service is excluded from "employment" under federal law and does not constitute "excluded employment" under present state law; and

(iii) After December 31, 1977, in the employ of a religious, charitable, educational or other organization, but only if such service is excluded from "employment" under federal law and the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks within either the current or preceding calendar year, regardless of whether they were employed at the same point in time

Signed by the Governor and effective 06/06/2011. Applies to injuries occurring on and after that date.

**SB 1785/HB 2047 – Rebutting the presumption that drugs or alcohol were the proximate cause of a workplace injury.**

Under present workers' compensation law, where an employer has implemented a drug-free workplace, if the injured employee has, at the time of the injury, a blood alcohol concentration level equal to or greater than 0.08 percent for non-safety sensitive positions, or 0.04 percent for safety-sensitive positions, as determined by blood or breath testing, or if the injured employee has a positive confirmation of a drug, then it is presumed that the drug or alcohol was the proximate cause of the injury. This presumption may be rebutted by a preponderance of the evidence that the drug or alcohol was not the proximate cause of injury. If the injured worker refuses to submit to a drug test, it is presumed, in the absence of a preponderance of the evidence to the contrary, that the proximate cause of the injury was the influence of drugs.

This bill increases the standard of proof required under the provisions described above to require "clear and convincing evidence" instead of "a preponderance of the evidence."

Generally, "a preponderance of the evidence" is evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it; evidence that as a whole shows that the fact sought to be proved is more probable than not. "Clear and convincing evidence" means proof that results in a reasonable certainty of the truth of the ultimate facts in controversy; proof that requires more than a preponderance of the evidence. Generally, clear and convincing proof will be shown where the truth of the facts asserted is highly probable.

Enacted as Public Chapter 0203 effective 07/01/2011.

**SB 1550/ HB2030 - Revises various provisions of present workers' compensation law regarding construction services providers, as follows:**

- (1) Revises the exemptions to the general requirement that all construction services providers carry workers' compensation insurance on themselves;
- (2) Revises who may apply for such an exemption;
- (3) Revises when a general contractor, intermediate contractor or subcontractor is liable for compensation to any employee injured while in the employ of any such contractor;
- (4) Requires, instead of authorizes, the secretary of state to revoke a workers' compensation exemption upon certain conditions and revises such conditions; and
- (5) Revises who must proceed with a suit to recover damages for a workers' compensation injury pursuant to common law.

WORKERS' COMPENSATION EXEMPTIONS

Generally, present law requires all construction services providers to carry workers' compensation insurance on themselves, regardless of whether or not the provider employs fewer than five employees. However, there are several exemptions from this general requirement, including if the provider:

- (1) Is a sole proprietor or partner engaged in the construction industry doing work directly for the owner of the property; or
- (2) Is a sole proprietor or partner building a dwelling or other structure, or performing maintenance, repairs, or making additions to structures, on the sole proprietor or partner's own property for the sole proprietor or partner's own use and for which the sole proprietor or partner receives no compensation.

This bill revises (1) to instead specify that a provider would be exempt from this requirement if the provider is a construction services provider performing work directly for the owner of the property and the construction services provider, if acting as a general or intermediate contractor, does not subcontract any of the work contracted to be performed for the owner. This bill revises (2) to instead specify that a provider would be exempt from this requirement if the provider is a construction services provider building a dwelling or other structure, or performing maintenance, repairs, or making additions to structures, on the construction service provider's own property.

#### APPLYING FOR AN EXEMPTION

Under present law, any construction services provider who meets one of the following criteria may apply for such an exemption:

- (1) An officer of a corporation who is engaged in the construction industry, except that no more than three officers of one corporation may be eligible for an exemption;
- (2) A member of a limited liability company who is engaged in the construction industry if such member owns at least 30 percent of such company;
- (3) A partner in a limited partnership, limited liability partnership or a general partnership who is engaged in the construction industry if such partner owns at least 30 percent of such partnership;
- (4) A sole proprietor engaged in the construction industry; or
- (5) An owner of any business entity listed in (1)-(3) that is family-owned, except that no more than three owners of one family-owned business may be exempt.

This bill revises (1) to specify that no more than "five", instead of "three", officers of a corporation may be eligible for an exemption. This bill revises (2) and (3) to allow any such member or partner who is engaged in the construction industry to apply for an exemption, if such member or partner owns at least "20 percent", instead of "30 percent" of such limited liability company or partnership.

Under present law, if a construction services provider is exempt as an officer of a corporation, a member of a limited liability company, or a partner in a limited partnership, limited liability partnership or a general partnership, then no construction services provider of an affiliate of such an exempted provider may be eligible to apply for or receive an exemption. A construction services provider would only be eligible for and may only utilize one exemption, regardless of the number of business entities with which the provider may be associated. This amendment removes these provisions.

This bill instead specifies that a construction services provider may be eligible for and may utilize multiple exemptions if the construction services provider meets the requirements for each such exemption, and applies for each exemption in which the construction services provider seeks to obtain. A construction services provider applying for a second or subsequent exemption would not be required to pay the \$100 fee for issuance of a construction services provider registration to providers who have not been issued a license by the board or the \$100 fee for issuance of an exemption, but would instead pay the following fees:

- (1) \$20.00 per registration for the issuance of a second or subsequent construction services provider workers' compensation exemption registration; and
- (2) \$20.00 per renewal for the filing of a second or subsequent construction services provider workers' compensation exemption renewal.

Under present worker's compensation law regarding construction service providers, "engaged in the

construction industry" means any person or entity assigned to the contracting group as those classifications are designated by the rate service organization designated by the commissioner of commerce and insurance pursuant to present law. This bill clarifies that where more than one classification applies, then the governing classification, as that term is defined by the rate service organization designated by the commissioner, would be used to determine whether the person or entity is engaged in the construction industry.

## LIABILITY OF GENERAL CONTRACTORS, INTERMEDIATE CONTRACTORS, AND SUBCONTRACTORS

Under present law, a general contractor, intermediate contractor or subcontractor is liable for compensation to any employee injured while in the employ of any of the subcontractors of the general contractor, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer. However, a general contractor, intermediate contractor or subcontractor is not liable for workers' compensation to a construction services provider listed on the exemption registry. No more than three construction services providers who are performing direct labor on a commercial construction project may be exempt from such liability. The three construction services providers would be the first three construction services providers listed on the registry who sign a contract to provide services on a commercial construction project. It is the responsibility of the general contractor to provide notice to any construction services provider who provides services to such general contractor and who is listed on the registry that such provider is not eligible for an exemption while working on the general contractor's commercial construction project.

This bill specifies that the three construction services providers who would be exempt from such liability would "be selected by the general contractor" instead of "be the first three construction services providers listed on the registry who sign a contract to provide services on a commercial construction project". This bill clarifies that this limit would apply to three individuals listed on the registry as having a workers' compensation exemption and working in the service of a business entity through which the construction services provider obtained such an exemption.

This bill replaces the present law requirement that the general contractor provide notice to any construction services provider who provides services to such general contractor and who is listed on the registry that such provider is not eligible for the exemption while working on the general contractor's commercial construction project. This bill instead specifies that if a general contractor allows a construction services provider to provide services on a commercial construction project while such provider is utilizing an exemption, the general contractor must:

- (1) Notify each such construction services provider in writing that the provider has been chosen by the general contractor as one of the three construction services providers performing direct labor who have a workers' compensation exemption; and
- (2) Maintain a record identifying each such construction services provider. The general contractor must make the record available for inspection upon request by the general contractor's insurance provider, the department of labor and workforce development, and the department of commerce and insurance.

## REVOCATION OF AN EXEMPTION

Present law authorizes the secretary of state to revoke any workers' compensation exemption upon:

- (1) Notification from the state board for licensing contractors that the board has revoked or suspended any license issued to the construction services provider by the board;
- (2) Notification from the department of labor and workforce development of any violations of present law regarding noncompliance with worker's compensation insurance requirements by the construction services provider;
- (3) A determination by the secretary of state that the construction services provider no longer meets the requirements for an exemption; or
- (4) A determination by the secretary of state that the construction services provider failed to renew prior to the expiration date of such exemption or the provider failed to pay any fees required to be paid.

This bill revises these provisions to "require", instead of "authorize" the secretary of state to revoke a workers' compensation exemption upon any of the (1) - (4). Specifies that (1) and (2) would include licenses issued or violations against a business entity through which the construction services provider obtained such an exemption. Specifies that for purposes of (1), if a construction services provider's license is revoked, whether or not such license is in the provider's individual name or in the name of a business entity through which the provider obtained an exemption, then any exemption obtained through such business entity would be revoked. For purposes of (2) if a construction services provider has violated such present law, whether or not such violation was committed by the individual or a business entity through which the provider obtained an exemption, then any exemption obtained through such business entity would be subject to revocation.

#### ACTIONS TO RECOVER DAMAGES FOR INJURY AT COMMON LAW

Under present worker's compensation law, any action to recover damages for injury by a construction services provider who was on the registry at the time of such injury, who was not covered under a policy of workers' compensation insurance maintained by the person or entity for whom the provider was providing services at the time of such injury, and was a provider who was eligible for an exemption at the time of such injury, must proceed as at common law, and the defendant in the suit may make use of all common law defenses. However, such construction services provider must forego the right to sue to establish or reestablish workers' compensation coverage for any injuries that occurred while the construction services provider was listed on the exemption registry.

This bill specifies that any construction services provider may proceed at common law to recover such damages if, at the time of the injury, the construction services provider was:

- (1) Listed on the registry as having a workers' compensation exemption and working in the service of a business entity through which the construction services provider obtained such an exemption;
- (2) Not covered under a policy of workers' compensation insurance maintained by the person or entity for whom the provider was providing services at the time of such injury; and
- (3) Eligible for an exemption at the time of such injury.

This bill specifies that any construction services provider proceeding at common law as described in (1) - (3) would forego the right to sue to establish or reestablish workers' compensation coverage.

#### OTHER PROVISIONS

The bill specifies that if any policyholder cancels a policy of insurance prior to February 1, 2012, as a result of obtaining an exemption, then the policy of insurance would be canceled as if the insured were retiring from the business in which the policy of insurance was required.

For purposes of the secretary of state making necessary provisions for the implementation of this bill, the bill takes effect on 06/06/2011. For all other purposes, the bill takes effect on October 1, 2011.