Senate Bill 50A

2003
Workers' Compensation Reform Act
Summary

Florida
Department of Financial Services
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Senate Bill 50-A Summary

Senate Bill 50-A passed during the first special session of the Legislature in 2003, making changes to the workers' compensation system designed to reduce litigation, provide greater compliance and enforcement authority for the Department of Financial Services to combat fraud, revise certain indemnity benefits for injured workers, increase medical reimbursements for physicians and for surgical procedures, and increase availability and affordability of coverage. Some provisions of the bill became effective on July 15, 2003, when Governor Bush signed the bill; most provisions will become effective on October 1, 2003; other provisions of the bill will go into effect on January 1, 2004.

Here is a summary of the major law changes included in the bill.

Definitions: s. 440.02, F.S.

The following amendments are effective July 15, 2003:

- An injury or disease caused by exposure to a toxic substance, including fungus or mold, is not an injury by accident unless there is clear and convincing evidence of exposure to a specific substance at levels that can cause the injury.
- The provisions stating that corporate officer, partner, and sole proprietor exemptions do not apply to commercial construction projects valued at $250,000 or more are repealed.
- The definition of catastrophic injury is repealed.
- The term "statement" must include the exact fraud language in s. 440.105(7), F.S.
- The specificity requirements for a Petition for Benefits are defined in more detail.

The following amendments will be effective January 1, 2004:

- "Construction industry" does not include homeowners' acts of construction on their own premises if the owner does not intend to sell, resell, or lease the premises within one year after construction begins.

- "Employee" means any person who receives remuneration from an employer for performing any work or service.
- Up to three corporate officers of a corporation or any group of affiliated corporations in the construction industry may elect to be exempt. Each officer must be a shareholder owning at least 10 percent of the stock of the corporation and must be listed as an officer with the Division of Corporations.
- "Employee" includes an independent contractor working or performing services in the construction industry; a sole proprietor or partner engaged in the construction industry; all persons being paid by a construction contractor, unless the subcontractor has a valid exemption.
- Independent contractor status applies only to individuals not engaged in the construction industry. Independent contractor status applies only if the individual meets at least four of the six listed criteria defining an independent contractor. An individual who does not meet at least four of the criteria defining an independent contractor may still be presumed to be an independent contractor by meeting any one of seven listed conditions.
- An individual claiming to be an independent contractor has the burden of proving that he or she is an independent contractor.
- The term "employer" includes employment agencies and employee leasing companies and similar agents who provide employees to other persons.

Election and Revocation of Exemption: s. 440.05, F.S.

The following amendments will be effective January 1, 2004:

- A corporate officer in the construction industry must include a copy of the stock certificate showing the officer has at least a 10 percent owner interest in the corporation when applying for an exemption.
- Certificates of election to be exempt only apply to the corporate officer named on the exemption and apply only within the scope of the business or trade listed on the exemption. The department shall revoke an exemption if it determines that the officer no longer meets the requirements for exemption.
- Exempt officers may not recover workers' compensation benefits and the carriers may not consider the exempt officer as an employee for determining premium.
- A corporate officer is not eligible for an exemption if he or she is "affiliated" with a person who is delinquent in paying a stop-work order or penalty assessment. "Affiliated Person" is defined.

Coverage: s. 440.09, F.S.

The following amendments become effective October 1, 2003:

- "Major Contributing Cause" is defined as the cause that is more than 50 percent responsible for the injury as compared to all other causes.
- "Major Contributing Cause" must be demonstrated by medical evidence only.
  Pain or other subjective complaints alone, in the absence of objective relevant medical findings, are not compensable.

Mental and Nervous Injuries: s. 440.093, F.S.

The following amendments become effective October 1, 2003:

- A compensable mental or nervous injury shall be demonstrated by clear and convincing medical evidence from a licensed psychiatrist. It must meet criteria in the most recent edition of the diagnostic and statistical manual of mental disorders published by the American Psychiatric Association.
- A mental or nervous injury is not compensable unless the physical injury is and remains the major contributing cause of the mental injury, and the physical injury must be at least 50 percent responsible for the mental injury.
- Temporary benefits for a compensable mental or nervous injury are limited to no more than 6 months after the date of maximum medical improvement for the physical injury and shall be included in the 104 weeks for temporary benefits.

Liability for Compensation: s. 440.10, F.S.

The following amendments become effective October 1, 2003:

- A contractor is required to request evidence of workers' compensation insurance or a valid exemption from all subcontractors.
- A subcontractor is not liable for the payment of compensation to the employees of another subcontractor or a contractor and is protected by the exclusiveness-of-liability provisions only if the subcontractor or contractor has secured coverage for the subcontractor's employees and if the subcontractor's own gross negligence was not the major contributing cause of the accident.

- All construction employers must obtain a Florida endorsement or purchase a Florida workers' compensation policy for its employees. The coverage must utilize Florida class codes, rates, rules, and manuals. Failure to do so constitutes a second-degree felony.

Employer workplace safety program: s. 440.1025, F.S.

The following amendments become effective October 1, 2003:

- Private employers are eligible for premium discounts for establishing workplace safety programs.
- The division must publicize safety program resources on its website.

Building Permits: s. 440.103, F.S.

The following amendment becomes effective October 1, 2003:

- Every employer, when applying for and receiving a building permit, must show proof and certify to the permit issuer that it has secured coverage.

Prohibited activities and penalties: s. 440.105, F.S.

The following amendments become effective October 1, 2003:

- All employers must update an application for coverage within 7 days of any change information.
- Any employer that knowingly employs any person who has used false, fraudulent, or misleading oral or written statements as evidence of identity commits a first degree misdemeanor.
- A violation of a stop-work order constitutes insurance fraud.
- An injured employee or any other party claiming benefits must personally sign a document attesting that he or she has reviewed, understands, and acknowledges the required fraud statement. If the injured employee or party refuses to sign the document, benefits shall be suspended until the signature is obtained.

Department powers to enforce employer compliance with coverage requirements: s. 440.107, F.S.

The following amendments become effective October 1, 2003:

- In addition to not obtaining coverage, failure to secure the payment of compensation also includes materially understating or concealing payroll; materially misrepresenting or concealing employee duties to avoid proper premium classification; and materially misrepresenting or concealing information pertinent to the computation of an experience modification factor.
- The department's powers to ensure compliance are defined.
- The department is granted rulemaking authority to determine the business records employers must maintain and produce.
- A stop-work order is effective upon all work sites for an employer.
- The department may require any employer who has been found non-compliant to file periodic reports with the department for two years.
- Stop-work orders and penalty assessment orders shall be in effect against any successor corporation or business entity with the same principals or officers.
- A $1,000 penalty shall be assessed against an employer for each day the employer conducts business operations that are in violation of a stop-work order. In addition, the non-compliant employer shall pay 1.5 times the manual premium the employer would have paid during the period of non-compliance or $1,000, whichever is greater.
- Any subsequent violation of compliance by the employer within 5 years after the most recent violation shall constitute insurance fraud.
  The division may impute payroll for penalty calculation purposes.

Exclusiveness of liability: s. 440.11, F.S.

The following amendment becomes effective October 1, 2003:

- An employer's actions shall be deemed to constitute an intentional tort and not an accident only when the employee proves, by clear and convincing evidence that the employer deliberately intended to injure the employee; or the employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings identifying a known danger, was virtually certain to result in the employee's injury or death, and the employee was not aware of the risk because the danger was not apparent, and the employer deliberately concealed or misrepresented the danger.

Medical services: s. 440.13, F.S.

The following amendments become effective October 1, 2003:

- Medical services in excess of established practice parameters and protocols of treatment constitute over utilization.
- The maximum number of chiropractic treatments allowed is increased from 18 to 24 treatments, and the number of weeks of treatment is increased from 8 to 12 weeks.
- Attendant care requirements: The carrier or employer is not responsible for providing attendant care until it receives a prescription for such care from the physician. The prescription shall specify the time periods for such care, the level of care required, and the type of assistance required. Attendant care shall not be prescribed retroactively.
- An employee may seek his or her own medical care at the carrier's expense if the carrier fails to provide the initial care within a reasonable time after the initial care is requested.
- A carrier must authorize a change of physician within five days after receiving the request. If the carrier fails to respond within five days, the employee may select the physician, and that physician becomes authorized. When a new physician becomes authorized, the original physician becomes deauthorized. If the carrier fails to timely comply with a request for a change of physician, the carrier is subject to penalties as provided in s 440.525, F.S.
- Health care providers can charge no more than $0.50 per page for producing copies of medical records.
- An employee who reports an injury or illness waives any physician-patient privilege. A release of medical information by a health care provider does not require authorization from the employee. If the health care provider is not subject to the jurisdiction of Florida Law, the injured employee shall sign an authorization allowing for the carrier to obtain the medical records from the health care provider.
- The employee and the employer/carrier are each entitled to only one independent medical examination per accident and not one per medical specialty. The party requesting and selecting the independent medical examination is responsible for all costs related to the examination. If the employee prevails in a medical dispute as determined by a judge of compensation claims, or if benefits are paid or treatment is provided based on the independent medical examination, the carrier must pay for the examination.
- Each party is bound by the opinions of his or her selected independent medical examiner.
- Upon mutual agreement of the parties, a "consensus independent medical examination" may be requested to resolve a medical dispute. A mutually agreed upon physician specializing in the diagnosis and treatment of the medical condition at issue will conduct the examination. The

findings and conclusions of the consensus independent medical examiner are binding on the parties and constitute a resolution of the medical dispute. Agreeing to a "consensus independent medical examination" does not affect the parties' entitlement to their one-per-accident, independent medical examination.

- Utilization review shall include an evaluation of compliance with practice parameters and protocols of treatment.
- Reports of over utilization to the Agency for Health Care Administration (AHCA) shall include reports of non-compliance with the practice parameters and protocols of treatment.
- AHCA must contract with a provider of expert medical advisors (EMA).
- The party requesting an EMA examination is responsible for paying the costs. If the employee requests the EMA examination, and prevails based on the findings of the examination, the carrier is responsible for the costs. If a judge of compensation claims orders an EMA examination on his or her own motion, the carrier is responsible for the costs.
- Outpatient observation status shall not exceed 23 hours.
- Deviations from the established fee schedules are allowed when carriers enter into written agreements with a physician or health care provider to provide enhanced services or care to injured workers.
- Practice parameters and protocols shall be those adopted by the U.S. Agency for Healthcare Research and Quality in effect on January 1, 2003.
- Medical standards of care and treatment are established.
- Failure to comply with section 440.13, F.S. is subject to penalties in section 440.525, F.S.
- The reimbursement amount for prescription medication is reduced to the wholesale price plus $4.18 for the dispensing fee, except if the carrier has contracted for a lower amount.

The following amendments become effective January 1, 2004:

- Payments for outpatient physical, occupational, and speech therapy by hospitals are limited to the amount allowed to non-hospital providers.
- Payments for scheduled outpatient, non-emergency radiological and laboratory services that are not provided in conjunction with a surgical procedure are limited to the amount allowed to non-hospital providers.
- Payments for outpatient, scheduled surgeries are reduced from 75 percent to 60 percent of charges.
- Maximum reimbursements for physicians and osteopaths are increased to 110 percent of the amount allowed by Medicare if greater than the Florida medical fee schedule.

- Maximum reimbursements for surgical procedures are increased to 140 percent of the amount allowed by Medicare if greater than the Florida medical fee schedule.

Workers' Compensation Managed Care Arrangement: s. 440.134, F.S.

The following amendments become effective October 1, 2003:

- A "grievance" is a written complaint, other than a Petition for Benefits, filed by an injured worker pursuant to the requirements of the managed care arrangement.
- Chiropractors and podiatrists may serve as medical care coordinators.
- A managed care plan must allow the employee to obtain an independent medical examination as provided in s. 440.13(5), F.S. The carrier shall pay for the cost of an IME, if the physician selected is in the carrier's managed care arrangement. The independent medical examination, requested by the claimant and paid by the carrier, shall constitute the claimant's one IME per accident under s. 440.13(5), F.S.
- Medical treatment obtained outside the managed care arrangement is not compensable, regardless of the purpose of the treatment.

Determination of pay: s. 440.14, F.S.

The following amendments become effective October 1, 2003:

- Average weekly wage is determined based on the accident date.
- In defining average weekly wage, "substantially the whole of 13 weeks" is defined as the 13 calendar weeks before the accident, excluding the week during which the accident occurred and shall be not less than 75 percent of the total customary hours of employment.

Compensation for disability: s. 440.15, F.S.

The following amendments become effective for accidents occurring on or after October 1, 2003:

- No compensation for permanent total disability is payable if the employee is engaged in, or is physically capable of engaging in at least sedentary employment.
- An employee is presumed to be permanently and totally disabled if the employee has one of the following injuries, unless the employer or carrier establishes that the employee is physically

capable of engaging in at least sedentary employment within a 50 mile radius of the employee's residence:

Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk;

Amputation of an arm, hand, foot, or leg;

Severe brain or closed-head injury;

2nd or 3rd degree burns of 25 percent or more of the total body surface;

3rd degree burns of five percent or more of the face and hands; or

Total or industrial blindness.

In all other cases, permanent total disability may be awarded if the employee is not able to engage in at least sedentary employment within a 50-mile radius of the employee's residence, due to his or her physical limitation.

- Permanent total disability benefits end at age 75, unless the employee is not eligible for Social Security benefits because the employee's injuries prevented working sufficient quarters to become eligible.
- If the employee is age 70 or older when the accident occurs, permanent total disability benefits are payable for no more than five years.
- Permanent total supplemental benefits are not payable after the employee reaches age 62, regardless of whether the employee has applied for or is eligible for Social Security benefits, unless the employee is not eligible for Social Security benefits because the employee's injuries prevented working sufficient quarters to become eligible.
- An employee is not eligible for "catastrophic" temporary total disability benefits if the employee is eligible for, entitled to, or is collecting permanent total disability benefits.
- Permanent impairment benefits are paid bi-weekly rather than weekly.
- Permanent impairment benefits increase from 50 percent to 75 percent of the temporary total disability benefit amount.
- Permanent impairment benefits are reduced by 50 percent for each week in which the employee earned income equal to or in excess of the employee's average weekly wage.
- Permanent impairment benefits for psychiatric impairment are limited to one percentage point in the permanent impairment rating.
- The duration of permanent impairment benefits is as follows:

  Two weeks for each percentage point from 1 to 10 percent;

  Three weeks for each percentage point of impairment from 11 to 15 percent;

  Four weeks for each percentage point of impairment from 16 to 20 percent;

  Six weeks for each percentage point of impairment from 21 percent or higher.
- The timing of payments for temporary partial disability benefits is defined.
- Permanent impairment supplemental benefits are repealed.

- Temporary partial disability benefits are not payable if the employee is terminated for misconduct.
- If the employee has suffered a previous injury, only the disability or need for medical care associated with the compensable injury is compensable. The degree of disability, or medical condition for preexisting conditions is to be excluded from the impairment rating. Impairment ratings must apportion out the preexisting condition. Medical benefits shall be paid apportioning out the percentage attributable to the preexisting condition.
- If a judge of compensation claims determines that an employee, receiving temporary partial disability benefits, left his or her employment without just cause, temporary partial benefits are payable for those weeks based on deemed earnings of the employee as if she or he had remained employed.
- The obligation to rehire provision is repealed.

Occupational disease: s. 440.151, F.S.

The following amendments become effective October 1, 2003:

- The nature of employment must be the major contributing cause of the occupational disease. Major contributing cause must be shown by medical evidence only. Both causation and sufficient exposure to a specific, harmful substance shall be proven by clear and convincing evidence.
- Occupational diseases are diseases for which there are epidemiological studies showing that exposure to the specific substance, at the levels of actual exposure, may cause the precise disease sustained by the employee.

Compensation for death: s. 440.16, F.S.

The following amendments become effective October 1, 2003:

- Maximum funeral benefits increase from $5,000 to $7,500.
- Maximum death benefits increase from $100,000 to $150,000.

Notice of injury or death: s. 440.185, F.S.

The following amendments become effective October 1, 2003:

- The maximum penalty assessed against the employer for late reporting of any form, report, or notice increases from $500 to $1,000 for each failure.
- If the employer fails to timely report to the carrier more than 10 percent of its notices of injury or death, within a calendar year, the employer shall be subject to a maximum penalty of $2,000 for each late report.
- Upon receiving a notice of injury for an employee, the employer or carrier shall provide the employee with a written notice describing the availability of services from the Employee Assistance Office.

Procedure for resolving benefit disputes: s. 440.192, F.S.

The following amendments become effective October 1, 2003:

- A Petition for Benefits may be filed only for benefits that are ripe, due, and owing, and it must meet the specificity requirements defined in s. 440.02, F.S.
- A copy of the physician's request, authorization, or recommendation for requested treatment, care, or attendance must accompany the Petition for Benefits.
- Only those claims that are ripe, due, and owing when the petition is filed and that have undergone mediation can be considered for adjudication by a judge of compensation claims.

Alternate dispute resolution; claim arbitration: s. 440.1926, F.S.

The following amendment becomes effective October 1, 2003:

- The parties, upon consent of a judge of compensation claims, may resolve all issues in dispute regarding an injury through binding arbitration in lieu of any other remedy. The Florida Arbitration Code governs arbitration under this section.

Time for payment of compensation and medical bills: s. 440.20, F.S.

The following amendment becomes effective October 1, 2003:

- The carrier must make the first payment for total disability or death or deny compensability within 14 calendar days after the employer receives notification of the injury or death, when the disability is immediate and continuous for eight or more calendar days. If the first seven days

of disability are non-consecutive, the first payment is due on the sixth day after the first eight calendar days of disability.

- Medical, dental, pharmacy, or hospital bills must be paid, disallowed, or denied within 45 days after receipt.
- The carrier must provide all benefits or compensation while it commences an investigation of the employee's entitlement to benefits.
- All medical bills for services performed on or after January 1, 2004, must be paid or denied within 45 days after the carrier's receipt. Carriers who fall below the timely performance standard will be assessed the following penalties:

  $25.00 for each bill falling between 90 percent and 95 percent timely performance standard;

  $50.00 for each bill falling below a 90 percent timely performance standard.
- A 95 percent timely performance standard must be met for the payment of compensation. Carriers who fall below the timely performance standard will be assessed the following penalties:

  $50.00 for each late installment of compensation falling between the 90 percent and 95 percent timely performance standard;

  $100.00 for each late installment falling below the 90 percent timely performance standard.

<u>Procedures for mediations and hearings: s. 440.25, F.S.</u>

The following amendments become effective October 1, 2003:

- A judge of compensation claims must notify the parties within 40 days after a Petition for Benefits is filed that a mediation conference has been scheduled, unless the parties have notified the judge that a private mediation has been scheduled. A public or private mediation must be held within 130 days after a Petition for Benefits is filed.
- A judge of compensation claims (JCC) must consolidate multiple pending petitions, including petitions filed after the mediation is scheduled, into one mediation.
- The requirement that the parties submit any applicable motions to the judge of compensation claims no later than three days before the mediation is repealed.
- The requirement that the parties complete the pretrial stipulation at the conclusion of the mediation is also repealed.

Attorney fees: s. 440.34, F.S.

The following amendments become effective October 1, 2003:

- The attorney fee for benefits secured is limited to the current 20 percent of the first $5,000 of benefits secured, 15 percent of the next $5,000 of benefits secured, 10 percent of the remaining amount of benefits secured to be provided during the first 10 years after the claim is filed, and 5 percent of the benefits secured after 10 years. Judges of compensation claims may not award attorney fees that exceed the schedule.
- At least 30 days prior to the final hearing, if the carrier provides a written settlement offer addressing each pending issue and the injured employee refuses the offer, attorney fees paid by the carrier will be calculated only on the amount secured above those specified in the offer to settle.
- As an alternative to the contingency fee schedule, a judge of compensation claims may, for medical only cases, approve an attorney's fee not to exceed $1,500, only once per accident, based on a maximum rate of $150 per hour if the JCC determines that the fee schedule, based on benefits secured, fails to fairly compensate the attorney.
- Attorneys are not entitled to any remuneration for pursuing issues that were ripe, due, and owing and that reasonably could have been addressed but were not addressed during the pendency of other issues for the same injury.

Security for compensation: s. 440.38, F.S.

The following amendment becomes effective October 1, 2003:

- An employer who has a policy of insurance issued outside the state must maintain the required coverage under a Florida endorsement using Florida rates and rules pursuant to payroll reporting that reflects the work performed in this state by such employees.

Applications for coverage: s. 440.381, F.S.

The following amendments become effective October 1, 2003:

- Submitting false, misleading, or incomplete information on a workers' compensation application for coverage with the purpose of avoiding or reducing the amount of premium constitutes a second-degree felony.

- If the department determines that an employer has provided materially incorrect workers' compensation coverage information to avoid proper premium calculations, the department must immediately inform the employer's insurance carrier which then must commence an on-site audit of the employer within 30 days. If the carrier fails to commence the audit, the department may contract with an auditor to conduct the audit at the carrier's expense. The carrier is not required to conduct the on-site audit if the carrier gives written notice of cancellation to the employer within 30 days after receiving notification from the department and an audit is conducted in conjunction with the cancellation.

Insurance policies: s. 440.42, F.S.

The following amendment becomes effective October 1, 2003:

- Notice of policy cancellation for non-payment of premium must precede cancellation by ten days.

Reemployment of injured workers: s. 440.491, F.S.

The following amendments become effective October 1, 2003:

- Injured workers capable of earning at least 80 percent of the compensation rate are ineligible for training and education benefits.
- Benefits for training and education authorized by the Department of Education and funded by the Workers' Compensation Administration Trust Fund may include payment to attend community college or a vocational-technical school. Securing a G.E.D. is included within "appropriate training and education" when necessary to retrain an injured worker.
- Temporary total benefits paid during authorized training and education are restricted to, and not added to, the maximum 104 weeks provided for temporary total benefits.
- An employee who refuses to accept training and education forfeits any additional training and education and any additional compensation.

Examination and investigation of carriers and
claims-handling entities: s. 440. 525, F.S.

The following amendments become effective October 1, 2003:

- Third party administrators, servicing agents, and other claims-handling entities are added to insurers as parties that may be subject to examination or investigation to ensure compliance with the requirements of the law.
- If, upon examination or investigation, the department finds the claims-handling entity has engaged in patterns or practices that violate the law, the department may impose penalties not to exceed $2,500 for each pattern or practice constituting a non-willful violation, not to exceed an aggregate amount of $10,000 for all non-willful violations arising out of the same action. Administrative penalties imposed for a non-willful violation cannot duplicate any administrative penalty previously imposed.
- The department may also impose an administrative penalty for patterns or practices constituting a willful violation in an amount not to exceed $20,000 for each willful practice or pattern. Such fines cannot exceed $100,000 for all violations arising out of the same action.

Other provisions

The following amendments become effective October 1, 2003:

- Carriers must submit an annual report to the department detailing specified data with respect to the operation of their anti-fraud investigative unit; failure to submit the report will result in penalties.
- Certain violations of Chapter 440, F.S., are incorporated in the Offense Severity Ranking Chart to assist in the prosecution and sentencing of workers' compensation fraud by establishing rankings for these violations.
- The Bureau of Workers' Compensation Fraud and the Division of Workers' Compensation of the Department of Financial Services must produce a joint annual report with specifically defined content to provide greater accountability regarding compliance and enforcement activities.
- *At least every other year the Financial Services Commission is required to hire a contractor to conduct an independent actuarial review of any workers' compensation rating organization.*
- A Joint Select Committee on Workers' Compensation Rating Reform consisting of three senators and three representatives must submit a report by December 1, 2003.
- Effective July 26, 2003, an additional sub-plan (sub-plan D) was added to the Florida Workers' Compensation Joint Underwriting Association (JUA). The premiums for employers in the new sub-plan with 15 or fewer employees and an experience modification of 1.10 or less will be capped at 125 percent of the voluntary market manual rate. Premiums for charitable organizations meeting certain criteria with an experience modification factor of 1.10 or less will

be capped at 110 percent of the voluntary market rate. Any deficits for the plan will be assessed against members of sub-plan D.

- The composition of the JUA Board of Governors will change.
- The JUA Board of Governors is required to submit a report by January 1, 2005. The report is to include, among other things, an evaluation of the effectiveness of the bill with regard to increasing availability of coverage and an independent actuarial review of all rates under the plan.