

EMPLOYER'S GUIDE TO WORKERS' COMPENSATION CLAIMS IN GEORGIA



Atkins David LLC

Attorneys at Law

WORKERS' COMPENSATION IN GEORGIA

In Georgia, workers' compensation is largely controlled by statutes passed by the Legislature and rules and regulations established by the State Board of Workers' Compensation, an administrative agency. There are many laws and rules which establish deadlines and particular forms which must be completed.

The workplace is changing and there is new information in this edition that focuses on telecommuting, what we call "remote working." It is not just a question of whether certain accidents outside the traditional plant or office building are compensable but how, as an employer, you investigate and manage these claims since you do not "see" your employees regularly. In these pages, you will not only see how remote working impacts investigation of accidents, but also how it impacts medical treatment – including the panel of physicians and telemedicine – and light duty work. It can even impact jurisdiction, meaning whether an accident occurring at someone's home office in another state will be covered in Georgia. We also continue our focus on two key post-accident areas: the panel of physicians and return to work procedures as who is the doctor and whether you can get an employee back to work are two of the biggest cost drivers.

We hope that you will find this handbook useful as a roadmap in addressing issues that arise from on-the-job injuries. This reference guide is not a comprehensive discussion on each and every aspect of workers' compensation, but is an overview of a system that affects nearly every employer and employee in this State. The information in this booklet should not be construed as legal advice or opinion on specific facts. You should consult your attorney for any legal advice on particular claims. ■

Kenneth A. David

404.446.4482

ken.david@atkinsdavid.com

August 2022

Atkins David LLC

650 Ponce De Leon Ave

Ste. 300 #2972

Atlanta, GA 30308

404-446-4488 Main

404-446-4499 Fax

www.atkinsdavid.com

TABLE OF CONTENTS

Georgia Insurance Requirements.....1

Types of Employees.....3

Safety.....5

Medical Treatment and the Panel of Physicians.....6

Investigation of Accidents.....8

Out-of-State Accidents.....11

Workers' Compensation Benefits.....12

Returning the Injured Employee to Work.....14

Going to Court.....16

Workers' Compensation and Other Employment Benefits:
*Unemployment, Employer-funded Disability Plans, APA, and
FMLA.....18*

Federal Workers' Compensation for Non-Government Employees:
Longshore and Defense Base Act Claims.....20

Subrogation.....22

Settlement.....23

Appendix

A: Post-Hire Medical Questionnaire.....25

B: Sample Panel of Physicians.....28

GEORGIA INSURANCE REQUIREMENTS

Required Workers' Compensation Coverage

Most employers in Georgia are required to obtain workers' compensation insurance or be a qualified self-insured employer. One of the more common exceptions is when an employer has fewer than three employees within the same business in Georgia. If so, the workers' compensation laws may not apply, and no insurance would be required. Other exceptions include certain common carriers, railroad employees, farm laborers, domestic servants and certain licensed real estate persons or associate brokers. An employer, who otherwise would not come within the workers' compensation law based on one of the above exceptions, can choose to be bound by the laws of the workers' compensation and purchase workers' compensation insurance. The Georgia State Board of Workers' Compensation website (www.sbwc.georgia.gov) contains more detailed information on the requirements for workers' compensation insurance coverage in Georgia. ■

Change of Insurance Companies

Under many circumstances, a change in insurance companies will have no effect on a workers' compensation claim. The date of accident controls workers' compensation benefits. Therefore, if the accident occurred during the policy period with the first insurance company, then the first insurance company will remain responsible for workers' compensation benefits. However, during the policy period with the second (subsequent) insurer, it is possible the employee might have a new "legal accident," even if the employee does not re-injure himself. This frequently occurs when an employee is injured during the first policy period, but does not miss any time from work until the second policy period begins. The State Board of Workers' Compensation may consider the date the employee stops working as a new "legal accident" in addition to the date the employee was initially injured. Benefits due for the second "legal accident" may be different than benefits due for the initial accident. In these instances, you should always notify both insurance companies of the situation, so they can make a decision regarding which insurer will be responsible for the claim. ■

Statutory Employer

Under the Georgia Statutory Employer Law, a claimant may have a right to workers' compensation benefits from a second employer or principal employer for a compensable injury if the claimant's actual employer did not have insurance. This situation usually arises when a subcontractor's employee is injured and the subcontractor does not have workers' compensation insurance because they are either not required (because they have less than three employees) or they simply failed to obtain the required insurance. In this situation, the general contractor, or principle employer may be responsible for paying the injured workers' benefits.

There are four prerequisites for statutory employment to exist under Georgia Law:

- 1. There must be a “contractor” relationship between the claimant’s immediate employer and the alleged statutory employer; this means there must be some contract, written or oral, in place between the immediate employer and the general contractor;**
- 2. The alleged statutory employer must be subject to the Workers’ Compensation Act; have three or more employees;**
- 3. The claimant’s injury must have occurred on the premises where the contractor has undertaken to execute the work; and**
- 4. The claimant must, himself, have employee (of the contractor) status; this means the injured employee cannot be an independent contractor of the subcontractor. ■**

TYPES OF EMPLOYEES

Covered Employees

All persons whose employment is in the usual “course of the trade, business, occupation or profession of the employer” are considered employees for the purposes of workers’ compensation. The Courts generally interpret the term “employee” broadly to ensure that the worker has a source of payment for medical bills and any lost time. However, your insurance policy may state what types of employees are covered under the policy and whether there is coverage in Georgia if you do business in several states. ■

Independent Contractors Are Not Covered

Generally, in Georgia, an employee can recover workers’ compensation benefits while an independent contractor cannot. While Courts look to a variety of factors, most Courts agree that three factors must be met for an independent contractor relationship to exist:

1. A contract exists – whether oral or written;
2. The contractor has the right to control the time, manner, and method of the work to be performed by him or her; and
3. The contractor is paid a set amount per job (on a per unit basis), rather than being paid hourly or salary.

While the above three factors will be most important in determining whether an independent contractor relationship exists, the Courts also tend to look to the following factors:

- Whether the individual performed work for a short period of time rather than a long period of time.
- The agreement contemplates a definite beginning, continuance and end.
- The contractor furnishes his own tools or equipment.
- Work being performed requires a significant level of skill.
- The contractor sets his or her own hours.
- The employer withholds no taxes from monies paid to the contractor.
- The contractor is free to work for other individuals. ■

Unpaid Volunteers and Interns Are Generally Not Covered

In Georgia, an employee is a person who is paid for their services to the employer. Therefore, an unpaid volunteer or unpaid intern is generally not considered an “employee” for the purposes of workers’ compensation. However, the determination whether the claimant was an employee does not stop with whether or not they were paid, but rather the Court will look to the facts of the claimant’s relationship with the employer. When the employer receives valuable services from the claimant, controls the time, manner, means and method of executing the work and retains the right to terminate the employment, an employer/employee relationship may have been established. ■

Undocumented Workers

There is no specific Georgia statute which addresses undocumented workers. Instead, the Georgia Courts have examined the issue in terms of legal precedent in this State and the impact of Federal legislation, including the Federal Immigration Reform and Control Act of 1986 (IRCA). In general, Georgia Courts have held undocumented workers are entitled to workers’ compensation benefits after an accident. However, once the undocumented worker is released to return to some type of work, future income benefits may be denied if the workers’ unemployed status is not due to the injury, but instead due to his undocumented status. ■

SAFETY

Using the Hiring Process to Reduce the Potential Exposure of Workers' Compensation Claims

There are several steps you can take to reduce your exposure for workers' compensation claims. Generally, you cannot ask the prospective employee questions about his medical history or prior accidents; however, you can have a new hire complete a post-offer of employment medical questionnaire asking questions about his medical history. An example of the post-offer employment medical questionnaire is attached to this document as Appendix A. The post-offer questionnaire may provide you with helpful information if the employee is injured while working for your company as it may show pre-existing injuries. Another preventative measure likely to result in fewer accidents is a comprehensive orientation in which safety is emphasized. ■

Safety Programs

First and foremost, a safety program will demonstrate to your employees the company's emphasis on maintaining a safe work environment. Most workplace accidents can be avoided. A safety-conscious work force is more likely to report safety issues before such issues become a serious problem and result in accidents. Furthermore, if an employee is injured, it is less likely there will be communication problems which could decrease productivity and increase costs.

As a part of any safety program, regularly scheduled safety meetings should be instituted. You also will want to inform all new employees of what to do in the event they are injured on the job, including reporting the incident and using the posted panel of physicians. Finally, inform employees you may be able to make light duty work available following an accident, if necessary. ■

Drug and Alcohol Policies

You may qualify for a premium discount under your workers' compensation policy if you have a drug and alcohol policy. To qualify, employers must meet the requirements of the Drug Free Workplace Program which include: 1) a written policy statement; 2) substance abuse testing; 3) resources available to employees through an Employee Assistance Provider; 4) employee education; and 5) supervisor training.

Your insurance agent and insurance company can provide you more information on how to qualify. Drug and alcohol testing following a workplace accident may also provide a defense against a workers' compensation claim in the event the employee tests positive for drugs or alcohol following an accident. ■

MEDICAL TREATMENT AND THE PANEL OF PHYSICIANS

The Panel of Physicians

The panel of physicians is a list of doctors and/or facilities authorized to treat an employee following a workplace accident. The employer, usually in consultation with the insurer, selects the doctors on the panel. If an employee is injured, he must choose a physician from the panel, unless he needs emergency care. This list allows employers and insurance companies to have some control over who will be treating their employees and allows employers to become familiar with the medical providers near the workplace. If the panel is not valid, the employee can choose any doctor at the expense of the employer and insurance company. ■

The Requirements of the Panel of Physicians

In Georgia, the most traditional panel is a list of six physicians* or clinics. On this type of panel, there must be:

1. At least one physician who specializes in orthopedic surgery;
2. No more than two industrial clinics; and
3. At least one “minority” physician, which generally is based on race or gender.

An example of a panel of physicians is enclosed in this document as Appendix B. ■

**Before July 1, 2015, the physicians had to be “unaffiliated.”*

Inform Employees of Panel

At employee orientation, during safety meetings, and certainly following any accident, you should explain to your employees that after an accident, they are entitled to choose a physician from the panel of physicians who will become the employee’s “authorized treating physician.” That physician is permitted to make referrals to other physicians for specialized care. The injured employee is also allowed to make a change from one physician to another on the panel without authorization from the State Board of Workers’ Compensation. After exercising his right to choose another doctor on the panel, any additional change of doctor must be by agreement with the employer and insurance company or by order of the State Board of Workers’ Compensation. ■

The “Posting” Requirement

An employer is required to post the panel of physicians in “prominent places” within the business. Good locations for the panel include the employee breakroom and other areas where the employee notices are posted. An additional place to consider putting the panel is on the employer intranet. The employer is also required to ensure the employee understands the purposes and function of the panel, that is, his right to choose a physician from the panel and make a one-time change from one physician to another from the panel without prior approval from the State Board of Workers’ Compensation. ■

Have the Injured Worker Circle Selected Physician and Sign Panel of Physicians

In many cases, an injured worker may claim they were never given the opportunity to select a physician from the panel of physicians. To prevent this, it is a good idea to have the injured employee circle their selected physician and sign a copy of the panel of physicians. This will also give the employer an opportunity to verify that the panel of physicians is still “valid” or meets the three requirements listed in the “The Requirements of the Panel of Physicians” section, above. Making the panel available on the company intranet, although not a substitute for the posting requirement, is an excellent way to make sure all employees have access to the panel no matter where they are. ■

Panels for Employees Who Work Remotely

There are unique challenges to address when you have employees who work from home. They may be far from the company plant so your traditional panel may not have doctors “reasonably accessible” to the employee. You are not likely to “post” the panel at the employee’s home office, which might be a dining room table. There are some solutions which vary in their usefulness depending on how many employees work remotely and where they live.

1. At the time the employee goes “remote,” send them your traditional panel so they have their personal copy. Some companies already have the panel on their Intranet where any employee can access the panel.
2. For those in Georgia but not working close to the company place of business, provide a regional panel that will have doctors within 50 miles of where they live. Our firm has regional panels available that cover every area of the state.
3. For those living and working outside of Georgia, it is still important that they have access to a Georgia panel, so as to meet the technical requirements of the law. However, it should be made clear to these employees that at the time of accidents, treatments will be arranged for them at the time they report the accident. You want to avoid the situation where an employee begins treatment on their own without input or direction.

INVESTIGATION OF ACCIDENTS

Covered Accidents

Generally, any accident which both “arises out of” and occurs “within the course of” the employee’s employment is covered under workers’ compensation. In most cases, this means not only must the accident occur while the employee is working, but there must be some connection between the work performed and the injury.

Although each situation will vary, an aggravation of an injury while on the job, even if the initial injury occurred outside of work, may be covered by workers’ compensation. Injuries due to the negligence of the injured employee or other employees are also covered because the workers’ compensation system is a “no fault” system. Even situations where an employee is walking from the employer parking lot into the place of work, but has not yet clocked in, can be found to be work-related.

On the other hand, an employee who is on a regularly scheduled lunch break and not performing any work on behalf of the employer when injured will not likely be entitled to workers’ compensation benefits. Also, employees engaged in horseplay resulting in an injury, or an injury resultant because an employee was under the influence of alcohol or drugs, may be denied workers’ compensation benefits.

Accidents do not need to occur at the workplace to be considered work-related. Employees who are “on call,” or who fall within the category of “continuous employment” (an off-duty police officer, possibly), may be covered if injured. Every situation is unique. If you have questions regarding the circumstances of a particular accident, please consult with your insurance company or attorney. ■

Pre-Existing Injuries

If an employment injury aggravates a pre-existing injury to the point where medical treatment is required, or if the employment aggravation of a pre-existing injury disables the employee from working, the employee will be entitled to workers’ compensation benefits. However, he is only entitled to workers’ compensation benefits as long as the employment aggravation continues. Therefore, a medical opinion from the treating physician that the employment aggravation has subsided and the employee has returned to his baseline or pre-aggravation condition may relieve you of responsibility for any further workers’ compensation benefits. ■

Employee’s Notice

From a legal standpoint, the employee is required to notify the employer of an accident within thirty days of its occurrence. If the employer is already aware of the accident, no additional notice from the employee is necessary. The employee is not required to provide specific notice

of a work-related accident; the notice need only provide the employer with enough information so that it can conduct an investigation to determine if the injury is work-related. ■

First Report of Injury, WC-1

Employers should complete a First Report of Injury (WC-1) any time an employee seeks medical treatment for an injury on the job or misses work as a result of an injury. Also, if an employee claims he was injured on the job, but you dispute that contention, you should still complete a First Report and send it to your insurance company. If you have any doubt as to whether you should complete a First Report, contact your insurance company for direction. Disputing the occurrence of an accident does not relieve you of the responsibility of completing a First Report. Similarly, completing a First Report is never an admission that you agree the employee sustained an accident on the job, as it generally cannot be used in court. Once completed, send the First Report to your insurance company immediately. ■

Investigating an Accident

The supervisor should interview the injured employee to determine how, when, and why the accident occurred. At that point, the supervisor and other human resources employees can broaden the investigation by interviewing witnesses and taking a written statement from the employee and any witnesses. ■

Questions to Ask When Investigating an Accident:

1. When and where did the accident happen?
2. Were there any witnesses?
3. Who did you first tell about the accident?
4. How did you hurt yourself?
5. Did someone or something, like a machine, cause the accident?
6. What parts of your body did you injure?
7. Have you ever injured those body parts before?
8. Do you need medical treatment? If not, why not?

Make it clear to the employee that if he remembers anything else about the accident, needs medical treatment, or has any questions, he should contact you immediately. ■

Information for the Insurance Company or Third-Party Administrator

The employer's insurance carrier will need a lot of information as quickly as possible. There are deadlines which must be met by the insurer shortly after an accident or even an alleged accident. The insurance company will conduct its own investigation, but providing detailed information immediately following the accident will prevent delays in a decision about the claim's compensability. The insurance company will need copies of all written statements and accident reports. They will also want the names of all witnesses. You will also need to provide

your insurance company with the employee's payroll records, usually for the 13 weeks before the accident date.

It is important to continue providing the insurance company with information as long as the employee has an open workers' compensation claim. If you have or obtain any of the following information, report it to the insurance company immediately:

- Information suggesting the employee was not injured on the job
- Information suggesting the employee is not disabled as a result of the alleged work injury
- Information the employee is involved in activity inconsistent with the alleged disability
- Information the employee is receiving income from other sources
- Information the employee has returned to work
- Employee's employment is about to be terminated
- Employee had or has disciplinary problems
- Employee was or is "disgruntled" or upset about some other issue unrelated to the alleged work injury
- Difficulty communicating with the employee following an alleged work injury. ■

Investigating Accidents of Remote Employees

Accidents that occur while employees are working remotely certainly can be covered by workers' comp. If the employee is performing work activities, the claim is compensable. However, an accident while the employee is walking from their home office to the kitchen for a snack can raise issues as to whether that accident is in the course of employment. And what if the employee is on the way to the washing machine to quickly check on the laundry?

OUT-OF-STATE ACCIDENTS

On occasion an employee that is injured outside of Georgia will file a workers' compensation claim in Georgia. When this happens, a question arises as to whether the employee can receive workers' compensation benefits in Georgia. In order for an employee to be eligible for Georgia benefits, three facts must exist: (1) the contract of employment (verbal or written) is made in Georgia; (2) either the employee's residence or the employer's place of business is in Georgia; and (3) the contract of employment is not for work exclusively outside of Georgia. For remote workers living outside of Georgia but whose employer resides in this state, there may be questions about where the contract was made.

Even if the employee is eligible to receive benefits in Georgia, he or she may also be eligible to receive benefits in another state for the same accident and injury. Generally, the combined benefit received cannot be more than the maximum amount the employee would get in the state with the higher benefit rate. Therefore, most of the time the employee chooses one state over another based on which state he or she can get more money from or which state is more convenient to file a claim in. ■

WORKERS' COMPENSATION BENEFITS

Types of Benefits

There are three different types of benefits. First, employees are entitled to medical treatment related to their accident. Second, employees are entitled to payment for lost time – temporary total or temporary partial disability benefits – if they miss more than seven days from work, with a doctor's excuse. Third, employees may be entitled to permanent partial disability benefits. ■

Medical Benefits

The employee is entitled to medical treatment for the injury or injuries sustained at work. In most cases, the physician or hospital will bill the insurance company directly. If you receive any medical bills, forward them immediately to your insurance company or claims administrator, so they can either pay the bill or file a denial. There are specific penalties for late payment of medical bills. Medical expenses include travel to and from medical appointments. The employee is entitled to reimbursement for mileage to and from the medical provider. The reimbursement amount is established by the State Board of Workers' Compensation. Many physicians can make use of telemedicine which makes appointments more convenient, timely, and potentially cheaper. The Georgia Fee Schedule now recognizes telemedicine. ■

Lost Time Benefits

The amount of weekly benefits – which is called temporary total or temporary partial disability benefits – depends on the employee's "average weekly wage." The average weekly wage is calculated by taking the average of the 13 weeks of pay prior to the injury. Two-thirds of the average weekly wage becomes the compensation rate, subject to a maximum amount. For accidents occurring on or after July 1, 2022, the maximum weekly amount of temporary total disability benefits is \$725.

An employee may be entitled to temporary total disability benefits when he is unable to work in any capacity or if he is released to light duty work but the employer cannot accommodate the work restrictions. Temporary partial disability benefits compensate the employee for a reduction in wages due to the injury. An employee is entitled to temporary partial disability benefits if the employee returns to work, but is required to work at a reduced pay or reduced hours because of his injury. The insurance company will calculate temporary partial benefits based on two-thirds of the difference between the pre-accident average weekly wage and the post-accident weekly wage. For accidents occurring on or after July 1, 2022, the maximum weekly amount of temporary partial disability benefits is \$483. ■

Permanent Partial Disability Benefits

The treating physician may assign an impairment rating by following certain medical guidelines. The impairment rating is a percentage indicating the degree to which an injury results in permanent impairment. The physicians consult the Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association. The physician then determines a rating which is used in an equation and results in a monetary payment to the employee. The payment is in addition to the weekly lost time benefits and may be owed even if the employee does not miss any time from work. Typically this additional payment is \$0 - \$15,000 depending on the body part injured and the severity although it can be higher for more serious injuries. ■

RETURNING THE INJURED EMPLOYEE TO WORK

Light-Duty Work

There is no requirement to offer an injured employee light-duty work following an accident. However, the ability to make light-duty work available will likely reduce the total payout in workers' compensation benefits. If an employee is on light-duty restrictions, but no light-duty work is available, he will continue to receive workers' compensation benefits. If the employee is given light-duty work, his workers' compensation benefits will be reduced based on the income from the light-duty work. Experience has shown the longer an employee remains out of work on workers' compensation, the less likely he is to return to work. ■

Procedure for Offering an Injured Employee a Light-Duty Job After an Accident (WC-240 Process)

In general, the procedure for offering an injured employee a light-duty job is as follows: 1) the treating physician indicates the employee can return to light duty and provides specific restrictions; 2) the employer prepares a job description for the light-duty position that accommodates the restrictions using the form WC-240(a) or similar document; 3) within 60 days of the physician's indication that the employee can return to light-duty work, the insurance company sends the job description to the treating physician to obtain his approval; 4) assuming the light-duty position is approved, the employee will be formally offered the position on a form called a WC-240; and 5) the employee must be given at least ten days written notice of the job availability. If he does not return to work, or does not attempt to work for at least one full work day or eight cumulative hours, whichever is greater, his lost time benefits may be suspended. This WC-240 process can be frustrating to employers as some employees will simply show up for one day then leave, claiming they cannot perform the light duty. However, if necessary, that issue can be litigated and a judge can issue an order. The reality is that if an employee does not voluntarily return to work, it is not likely that the WC-240 process or compelling that return will be successful. Nonetheless, it remains important for employers to demonstrate work is available that will lower the cost of a claim. ■

Before Terminating an Employee

Employers can offer light duty work to employees working remotely. In fact, employers can offer normally in-person employees light duty work at home. Your workers' comp administrator may even contract with a vendor to coordinate a sedentary, computer/phone based light duty job performing work for a third party.

Terminating an Employee Performing Light-Duty Work

An employer may terminate an employee performing light-duty work following an accident, but there may be significant ramifications. If an employee is terminated because of his injury, he will be entitled to income benefits. However, if the employee is terminated "for cause," then

the employee must prove to an administrative law judge he is entitled to income benefits. Often a terminated employee will claim he was terminated because of his work injury rather than “for cause.” Therefore, it is important to document all previous warnings prior to the decision to terminate. ■

GOING TO COURT

Courts in the Workers' Compensation System

Workers' compensation cases fall within the jurisdiction of the State Board of Workers' Compensation, an administrative agency. The main office is in Atlanta; however, there are numerous offices throughout the state. If the injured employee files a lawsuit against an employer seeking workers' compensation benefits, the case will be heard by an administrative law judge in or near the county of injury. There is no jury, but it otherwise is like any other trial. There is testimonial/documentary evidence submitted, and each side may cross-examine witnesses. Usually, the judge renders a decision within sixty days of the hearing. The administrative decision may be appealed to a three-judge panel within the State Board of Workers' Compensation known as the Appellate Division. Following an Appellate Division decision, claims may be appealed further to the appropriate Superior Court, but chances of reversing a decision diminish as the number of appeals increase. ■

What to Do If You Receive Notice the Injured Employee Has a Lawyer

Forward all written communications you receive either from the employee, his attorney, or the State Board of Workers' Compensation to the insurance company, especially if it does not appear as though it was already sent to your insurance company. There are certain deadlines that must be met, and you could jeopardize your case by not responding quickly. The most common communications you may receive from an attorney are the following: 1) a letter indicating the attorney is now representing the employee; 2) a notice of a claim and/or request for hearing; and 3) written discovery, which may include documents known as Requests for Admissions, Interrogatories, and Requests for Production of Documents. Do not talk about the case to the employee once he retains an attorney until the employee's attorney gives you permission to do so. ■

Discovery

Discovery is the process whereby each side attempts to find out information about the case from the other side by asking questions, either in written form or in person. In certain situations, you may receive Requests for Admissions, Interrogatories, and/or Requests for Production of Documents from the employee's attorney. These should immediately be forwarded to the insurance company. If it appears your insurance company has already received a copy of written discovery, contact the insurance company to be certain. Do not respond to any requests from the employee's attorney or communicate with the attorney in any way, without first checking with your insurance carrier or attorney.

The other common form of discovery is the deposition. In most workers' compensation cases in Georgia, the attorney representing both you and your insurance company will take the deposition of the employee at his attorney's office. Occasionally, the employee's attorney

might take the deposition of a witness or supervisor. Sometimes the parties will need to take a doctor's deposition to clarify various medical issues. ■

Documents Most Likely to Be Requested from You as Part of the Discovery Process

The employee's attorney may seek a copy of the employee's personnel file, payroll records, the posted Panel of Physicians, accident reports, medical notes, disability slips, and witness lists. You should not provide this information directly to the employee's attorney, but instead, forward it to your attorney, who will review it first. Your attorney might also request additional documents from you, which may include notes you have taken since the injury. In many situations, the employee's attorney will not be entitled to this information, but it may be helpful to your attorney to have this documentation in preparing to defend the case. ■

Employees Appearing in Court

Whether testimony of a company representative is needed often depends on the reason the case is in court. If there is a dispute regarding whether the incident actually occurred, the supervisor may need to testify regarding whether the alleged incident was ever witnessed or reported. Your attorney will speak with company witnesses before the hearing. If your testimony is required, the attorney representing you and the insurance company will work to ensure questions are limited to what is relevant to the accident and the employee's work history.

A hearing usually lasts one to three hours. Some cases are now heard via video (Zoom) but you should be prepared to physically go to court. Once the hearing is over, the parties submit written briefs arguing their legal position, which are essentially "closing arguments." The judge considers the evidence and issues an award with a decision. ■

**WORKERS' COMPENSATION AND OTHER BENEFITS:
UNEMPLOYMENT, EMPLOYER-FUNDED DISABILITY PLANS, APA, AND FMLA**

Workers' Compensation and Unemployment Benefits

An injured employee may be entitled to workers' compensation benefits and unemployment benefits simultaneously, but with limitations. An employer and its workers' compensation insurance carrier are entitled to a dollar-for-dollar credit for any unemployment benefits paid to an employee. For instance, if an employee is receiving workers' compensation benefits of \$550 per week, and subsequently receives unemployment benefits of \$330 per week, the workers' compensation insurance company is only obligated to pay the employee \$220 per week for every week the employee receives \$330 per week in unemployment benefits. As soon as you receive notice from the Department of Labor an employee is entitled to unemployment benefits, notify the claims adjuster, so a credit can be taken as soon as possible. ■

Workers' Compensation and Short or Long Term Disability Benefits

Similar to the situation where an employee is entitled to workers' compensation benefits and unemployment benefits, an injured employee may be entitled to both workers' compensation benefits and short or long term disability benefits, but with limitations. In the unemployment situation, the employer is entitled to a dollar-for-dollar credit. In the short or long term disability situation, the employer and insurance company are entitled to a credit to the extent the employer contributes to the premiums for the disability plan. For example, if the employer funds a company disability plan 100%, then the employer is entitled to a dollar-for-dollar credit just as in the unemployment example. However, if the employer only funds 50% of the premium for the disability plan and the employee is responsible for the remaining 50%, then the employer and insurance company can take a \$0.50 credit against workers' compensation benefits for each dollar the employee receives in disability benefits.

NOTE:

- Some short or long term disability plans may not pay any benefits if the employee is receiving workers' compensation benefits.
- Any applications for short term disability or long term disability should be forwarded to the insurance adjuster or your attorney, as they may contain information helpful in defending the claim. ■

The Americans with Disabilities Act (ADA) and Workers' Compensation

There is no direct effect of an ADA claim on a workers' compensation claim. An ADA claim is a federal action where the employee alleges discrimination on the basis of his disability. A workers' compensation claim is based on state law. An employee is entitled to simultaneously

file an ADA claim and a workers' compensation claim. However, there may be an overlap of issues. For instance, an employee may contend his employer fired him because of an injury he sustained on the job. He could pursue an ADA claim on the basis that the only reason he was fired was due to his injury. He could also file a workers' compensation claim seeking payment for lost time following his termination. It is possible an employer may win an ADA claim and lose the workers' compensation claim and vice versa. If an employer settles or loses an ADA claim, the employer and insurance carrier will not be able to credit the settlement payment or verdict against the workers' compensation benefits that may be owed. ■

FMLA and Workers' Compensation

The Family Medical Leave Act (FMLA) protects certain employees in certain situations from termination whether their injury occurred on the job or not. However, to qualify, an employee must work for a company that has at least 50 employees within a 75 mile radius and that employee must have worked at least 1250 hours for that employer in the last year. FMLA protection lasts 12 weeks but is unpaid. It can run concurrently with workers' comp benefits meaning an employee can receive weekly TTD while out of work on FMLA. After 12 weeks, an employer can terminate an employee. However, if that employee is receiving workers' comp TTD (not at full duty status), then TTD would continue even after termination. As such, even if an employer can terminate an employee after FMLA leave ends, an employer may want to keep the employee as being able to offer light duty can be a useful tool to reduce the cost of a workers' comp claim.

FEDERAL WORKERS' COMPENSATION FOR NON-GOVERNMENT EMPLOYEES

Longshore Benefits

The Longshore and Harbor Workers' Compensation Act (LHWCA) is a federal law that provides benefits to certain types of employees who are injured or killed on the navigable waters of the United States or an adjoining area customarily used in loading, unloading, repairing, or building a vessel. Employees covered include longshoremen, other employees in longshoring operations, and harbor workers such as ship repairmen, ship-builders, and ship-breakers. The captain and crew members of a vessel are not covered under the LHWCA.

In certain circumstances, an employee who is covered by the LHWCA may be able to file a concurrent claim in Georgia that would be heard by the Georgia State Board of Workers' Compensation. Claims filed under the LHWCA are filed in a longshore district office and heard by federal administrative judges.

An extension of the LHWCA, called The Non-Appropriated Fund Instrumentalities Act (NAFI), provides coverage to certain civilian employees working on military bases. Specifically, the NAFI provides workers' compensation coverage to employees of support organizations that are paid with non-appropriated funds. Such employees include those of the Army and Air Force Exchange Service, Navy Exchanges, Marine Corp exchanges, and Coast Guard Exchanges. ■

The Defense Base Act

An employee injured outside of the United States may be eligible to receive workers' compensation benefits in Georgia. Georgia law does not bar workers' compensation claims occurring in other countries. In general, an employee injured outside of the country may be covered under the Georgia Workers' Compensation Act if the facts of the case meet the three pronged test for out-of-state accidents outlined in the Out-of-State Accident section of this book.

However, some accidents outside the United States are covered under the Defense Base Act (DBA). The DBA is a federally mandated workers' compensation system for overseas government contractors. Like NAFI, the DBA is an extension of the Longshore and Harbor Workers' Compensation Act and claims are handled by federal administrative law judges. If an accident and injury is covered by the DBA, then the employee is prohibited from also filing a claim under the Georgia Workers' Compensation Act.

The DBA covers employees working overseas in the following scenarios:

- **at a military, air, or naval base acquired by the U.S. from any foreign government after January 1, 1940 (who are not covered by the NAFD);**
- **on lands occupied or used by U.S. for military or naval purposes in any Territory or possession outside the United States;**
- **while performing a contract for a “public work” outside of the U.S. (excluding employees of contractors and subcontractors who are engaged exclusively in furnishing materials or supplies);**
- **while performing work under a contract “approved and financed by the U.S.”; or**
- **while performing work with an American employer who is providing welfare or similar services for the benefit of the Armed forces under the authorization of the Secretary of Defense. ■**

SUBROGATION

Subrogation under workers' compensation laws gives the employer and insurer the right to recover money spent in workers' compensation claims when the claimant recovers money from a third-party lawsuit arising from the same accident. For example, when an employee is injured in a motor vehicle accident while on the job, the employee may have the right to recover workers' compensation benefits from the employer and insurer and recover money from the at-fault third-party driver who caused the accident in a separate lawsuit. In this situation, if the below requirements are met, the employer and insurer may recover the monies paid for workers' compensation benefits. The statutory requirements to pursue and recover workers' compensation subrogation are:

- 1. The injury or death for which workers' compensation is payable was caused by someone other than the employer or co-employee;**
- 2. Benefits, whether indemnity, medical, death or settlement have been paid under workers' compensation; and**
- 3. The employer and insurer's recovery is limited to the amount of benefits actually paid, if they prove the employee has been made whole, taking into consideration the benefits received under workers' compensation and the amount of recovery in the third-party claim for all economic and non-economic damages paid.**

It is important to note, however, that recovery under the subrogation laws of Georgia is extremely difficult – the issue is whether the claimant has, in fact, been “made whole” by the recovery from the third-party lawsuit. ■

SETTLEMENT

In many cases, the parties eventually decide settlement of the employee's workers' compensation claim is the best option. Settlement is frequently the only way to finally close the claim, especially when an employee continues to receive benefits. The parties will make the decision to settle or not settle the claim based upon the number of factors including: the chances of prevailing at the hearing, the chances of suspending the employee's disability benefits, the chances of being able to bring the employee back to work and the cost involved in litigating the claim further. Settlements frequently include an agreement for the employee's resignation to prevent further claims by the injured employee.

Often, the decision to settle also involves consideration as to whether the employee is currently a Medicare beneficiary, since employers and insurers must consider Medicare's interest and potential reimbursement rights when settling workers' compensation claims. This frequently requires including a Medicare Set-Aside arrangement (MSA) as part of the settlement, particularly if the employee is at least 60 or the employee has qualified for Social Security Disability for any reason. The insurance company usually handles obtaining the information needed for claims involving Medicare Set-Asides, but will need any information you may have concerning the claimant's age, whether the claimant is a Medicare recipient, whether you are aware of any other health problems for which the claimant has had treatment and whether the claimant is receiving or has applied for Social Security Disability benefits. ■

Appendix “A” and Appendix “B”

NOTE: The attached documents are examples only. Please consult your insurer or lawyer before using these examples.

POST - JOB OFFER MEDICAL QUESTIONNAIRE

Employee Name _____

Date of Birth ___/___/____ (month/day/year)

1. Have you ever had or been treated for any of the following:

	YES	NO		YES	NO
Epilepsy	<input type="checkbox"/>	<input type="checkbox"/>	Head injury	<input type="checkbox"/>	<input type="checkbox"/>
Diabetes	<input type="checkbox"/>	<input type="checkbox"/>	Back injury/pain		<input type="checkbox"/>
<input type="checkbox"/>					
Amputation of foot, leg, arm			Beck injury/pain		<input type="checkbox"/>
<input type="checkbox"/>					
or hand	<input type="checkbox"/>	<input type="checkbox"/>	Shoulder injury/pain	<input type="checkbox"/>	<input type="checkbox"/>
Loss of sight of one or both			Arm/elbow injury	<input type="checkbox"/>	<input type="checkbox"/>
eyes or a partial loss of un-			Hand injury	<input type="checkbox"/>	<input type="checkbox"/>
corrected vision of more than			Hernia	<input type="checkbox"/>	<input type="checkbox"/>
75%	<input type="checkbox"/>	<input type="checkbox"/>	Knee injury	<input type="checkbox"/>	<input type="checkbox"/>
Cerebral palsy	<input type="checkbox"/>	<input type="checkbox"/>	Herniated/slipped disc	<input type="checkbox"/>	<input type="checkbox"/>
Multiple Sclerosis	<input type="checkbox"/>	<input type="checkbox"/>	Neck surgery	<input type="checkbox"/>	<input type="checkbox"/>
Parkinson's disease	<input type="checkbox"/>	<input type="checkbox"/>	Back surgery	<input type="checkbox"/>	<input type="checkbox"/>
Cardiovascular disorders		<input type="checkbox"/>	Tuberculosis		<input type="checkbox"/>
<input type="checkbox"/>					
Carpal/cubital tunnel syndrome		<input type="checkbox"/>	Foot/ankle injury		<input type="checkbox"/>
<input type="checkbox"/>					
Asthma	<input type="checkbox"/>	<input type="checkbox"/>	Hearing loss	<input type="checkbox"/>	<input type="checkbox"/>
Hemophilia	<input type="checkbox"/>	<input type="checkbox"/>	Sickle cell anemia	<input type="checkbox"/>	<input type="checkbox"/>
Joint pain	<input type="checkbox"/>	<input type="checkbox"/>	Cancer	<input type="checkbox"/>	<input type="checkbox"/>
Pulmonary disease	<input type="checkbox"/>	<input type="checkbox"/>	Headaches/dizziness	<input type="checkbox"/>	<input type="checkbox"/>
Any other pre-existing disease, condition or impairment which is permanent in nature, OR for which your doctor has indicated physical limitations/restrictions indicate below	<input type="checkbox"/>	<input type="checkbox"/>			

2. If you answered "yes" to any of the above in question one, then for each please:

a. Identify the specific injury or condition and how it occurred:

b. If the condition or injury resulted in surgery, state the type of surgery performed and list the impairment rating given from your physician (if applicable):

c. State whether you have physician imposed physical restrictions OR personally imposed physical restrictions as a result of the injury or condition, and what those restrictions are:

3. Do you now or have you ever had any disability or physical or mental condition which limits you in any way?

YES NO

If yes, please explain:

4. Have you ever been turned down for any employment, medical, health or life insurance or military service because of your health or physical or mental condition?

YES NO

If yes, please explain:

5. Are you now on any prescription medication?

YES NO

If _____ so, _____ what _____ medication(s)?

For _____ what _____ condition(s) _____ was _____ the _____ medication(s) _____ prescribed?

By completing this form, I am verifying that the above named company has already presented a conditional job offer to me and no questions in the medical questionnaire were asked of me by anyone prior to my job offer. I hereby affirm that the answers to questionnaire are truthful.

X _____
Signature

Date

THIS FORM MUST BE SIGNED AND DATED

THIS IS A SAMPLE. DO NOT USE AS ACTUAL PANEL.

(This notice must be posted in a conspicuous place readily accessible to the employee at all times.)

OFFICIAL NOTICE

This business operates under the Georgia Workers' Compensation Law.

WORKERS MUST REPORT ALL ACCIDENTS IMMEDIATELY TO THE EMPLOYER BY ADVISING THE EMPLOYER PERSONALLY, AN AGENT, REPRESENTATIVE, BOSS, SUPERVISOR, OR FOREMAN.

If a worker is injured at work, the employer shall pay medical and rehabilitation expenses within the limits of the law. In some cases the employer will also pay a part of the worker's lost wages.

Work injuries and occupational diseases should be reported in writing whenever possible. The worker may lose the right to receive compensation if an accident is not reported within 30 days (see O.C.G.A. §34-9-80).

The employer will supply free of charge, upon request, a form for reporting accidents and will also furnish, free of charge, information about workers' compensation. The employer will also furnish to the employee, upon request, copies of board forms on file with the employer pertaining to an employee's claim.

A worker injured on the job must select a doctor from the list below. The minimum panel shall consist of at least six physicians, including an orthopedic surgeon with no more than two physicians from industrial clinics (see O.C.G.A. §34-9-201). Further, this panel shall include one minority physician, whenever feasible (see Rule 201 for definition of minority physician). The Board may grant exceptions to the required size of the panel where it is demonstrated that more than four physicians are not reasonably accessible. One change to another doctor from the list may be made without permission. Further changes require the permission of the employer or the State Board of Workers' Compensation.

State Board of Workers' Compensation

270 Peachtree Street, N.W.
Atlanta, Georgia 30303-1299
404-656-3818 or 1-800-533-0682
<http://www.sbwc.georgia.gov>

Clinic

Clinic

Orthopedics

name/address/phone

name/address/phone

name/address/phone

name/address/phone

name/address/phone

name/address/phone

The insurance company providing coverage for this business under the
Workers' Compensation Law is: _____

Employer: _____

For GA Claims, please call [Claims Office] at xxx-xxx-xxxx

**IF YOU HAVE QUESTIONS PLEASE CONTACT THE STATE BOARD OF WORKERS' COMPENSATION AT 404-656-3818 OR 1-800-533-0682
OR VISIT <http://www.sbwc.georgia.gov>**

Willfully making a false statement for the purpose of obtaining or denying benefits is a crime subject to penalties of up to \$10,000.00 per violation (O.C.G.A. §34-9-18 and §34-9-19)

ATKINS DAVID LLC

Atkins David LLC is devoted to representing employers, insurer, self-insured companies and third-party administrators in workers' compensation claims throughout Georgia. We are located at Peachtree Center in downtown Atlanta, across the street from the office of the State Board of Workers' Compensation. ■

Kenneth A. David
404.446.4482
ken.david@atkinsdavid.com

Wesley R. Moore
404.446.4471
wesley.moore@atkinsdavid.com

Alissa C. Atkins
404.446.4480
alissa.atkins@atkinsdavid.com

Chad McDonald
404.446.4484
chad.mcdonald@atkinsdavid.com

Vincent A. Toreno
404.446.4476
vince.toreno@atkinsdavid.com

Jamilah Lee
404.446.4471
jamilah.lee@atkinsdavid.com

Jennifer M. Smith
404.446.4481
jennifer.smith@atkinsdavid.com

James R. Gates
404.446.4490
james.gates@atkinsdavid.com

Camille Guzman
404.446.4480
camille.guzman@atkinsdavid.com

Atkins David LLC

650 Ponce De Leon Ave
Ste. 300 #2972
Atlanta, GA 30308
404-446-4488 Main
404-446-4499 Fax
www.atkinsdavid.com

Atkins David LLC
650 Ponce De Leon
Ste. 300 #2972
Atlanta, GA 30308
404-446-4488 MAIN
404-446-4499 FAX
WWW.ATKINSDAVID.COM



Atkins David LLC
Attorneys at Law