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Workers' Compensation Coverage Explained

Workers' compensation is a statutory scheme in each state that establishes the liability of employers when employees are injured in the course of employment, limits recovery against such employers to payment of workers' compensation benefits (with limited exceptions), and outlines the covered losses and expenses an employee is entitled to receive when injured. For most employers in most states, the risk of a workers' compensation claim is transferred to an insurance company, which pays claims under the policy in accordance with the applicable state's statutory requirements in exchange for the employer's premiums. Workers' compensation applies based on where an employee resides and would receive benefits in the event of an injury. However, if an employee is temporarily working in another state, i.e., visiting a project site they may be able to claim benefits in the home or temporary state and often choose based upon the state that has the better paying benefits. Below we address when to add a state to your workers' compensation policy.

Workers' compensation policies have two coverage parts:

- Part One (often referred as coverage A) provides workers' compensation coverage. This provides medical and indemnity (lost time) benefits for an injured employee.
- Part Two (often referred as coverage B) provides employers liability coverage. This coverage is for claims from workers who have suffered a job-related injury or illness not covered by workers' compensation coverage. Part Two or B also covers damages to an employee's spouse, parent, or child as a result of the employee's injury, i.e., loss of consortium

A common coverage feature, and frequent contractual requirement in the construction industry, is for workers' compensation insurers to "waive subrogation" against specified parties. When an insurer, like a workers' compensation insurer, pays a loss to an insured, the insurer is "subrogated" to the rights of the insured. As a result, the insurer can pursue other potentially responsible persons or entities to recover the insurer's loss payment. Most insurers will agree to waive this right pre-loss, often on a "blanket" basis where required in an insured's contract. Because monopolistic jurisdictions (see sidebar on next page) insure workers' compensation losses with state funds, these states do not permit waiver of subrogation with respect to claims paid in those states. New Jersey, though not monopolistic, also does not permit waiver of subrogation. Therefore, it is important to explain when agreeing to contracts with employees performing work in these states to not agree to waiver of subrogation, or clearly tie meeting such a requirement to what is legally permitted by using a phrase like "where permitted by applicable law."

Just like traditional workers' compensation insurance, timing of purchasing monopolistic workers' compensation coverage is tied to when payroll is reported to the state. In every state, schemes for unemployment insurance and workers' compensation will eventually align, so that if one is in place, they will be looking for the other. Many states also have reciprocity with other states so that if an employee has to work away from their state of residence for a short period of time, you do not need to add a new state's coverage immediately – and this also applies when someone moves, so the addition is not often immediately required. There are exceptions to this, however, such as in New York where it is expected that coverage is put into place immediately. You should become familiar with the workers' compensation laws in states in which your employees frequently visit to determine if you need to add coverage to your policy on an "If Any" basis even if no permanent employee resides in the state. Greyling recommends that if an employee is in a state for longer than 30 days, either consecutively or cumulatively during a year, that you should discuss adding coverage for that state. For the monopolistic states, we can assist you with getting coverage started, but it is the employer's responsibility to directly place and maintain coverage with the state.

Monopolistic Jurisdictions

In four states – North Dakota, Ohio, Washington, and Wyoming – an employer cannot buy workers' compensation from any insurer other than a state-sponsored insurance fund. Because of this state-created monopoly in these four states for workers' compensation insurance, they are referred to as monopolistic jurisdictions. In these monopolistic states, workers compensation policies do not include coverage for employers' liability coverage (i.e., Part Two or B). To receive employers' liability coverage, which is often required by contract, an endorsement amending the policy can be attached to an "All Other States" workers' compensation policy or commercial general liability policy if you do not have employees in states other than the monopolistic states.

Below are the links where you can purchase coverage for these states:

North Dakota – North Dakota Workforce Safety & Insurance
https://www.workforcesafety.com/

Ohio – Ohio Bureau of Workers Compensation
https://info.bwc.ohio.gov/

Wyoming – Wyoming Department of Workforce Services
https://dws.wyo.gov/dws-division/workers-compensation/ng

Washington – Washington State Department of Labor and Industries
https://www.lni.wa.gov/

It is important that you manage your potential workers' compensation exposure through subcontractors you hire, which can be companies and individuals (like 1099 independent contractors). Most likely, a company will have workers' compensation, but you still need to collect certificates evidencing coverage as this is not always the case. If a company is small, such as a couple employees or even one, a number of states do not require the company to purchase workers' compensation as an owner can elect out of having the coverage. If a company does not have workers' compensation, an insurer will charge you for the exposure at audit unless the company is not required to have the coverage and has provided written documentation stating an election to not carry and rejecting coverage you provide on their behalf. Most independent contractors do not have workers' compensation and should be given the same treatment. However, you may elect to provide them the coverage, especially if they are acting as a supplement to your employees and the state may even require it.

If an employee is traveling outside of the US either on a business trip or for an extended period of time, Greyling recommends securing a foreign package policy that provides the casualty coverages that you are used to domestically, including commercial general liability, commercial auto (primary or excess), and workers' compensation along with some enhanced benefits such as repatriation and accidental death & dismemberment (AD&D) benefits. A US workers' compensation policy can extend the extraterritorial rights of an employee's state of hire internationally, but since the minimum premium of a foreign package can be as low as $1,500, we typically recommend the latter.

Workers' Compensation Claim Reporting Lag Time *(by Michelle Miller)*

When an employee reports an on-the-job injury, the employer's swift response often has a dramatic impact on the outcome of the claim. From the outset, it is important to be mindful of the variance of workers' compensation laws from state to state. For example, in some jurisdictions, even an offhand complaint of pain by an employee obligates the employer to fully investigate whether the complaint is work-related. Upon notice of a claim, the first priority should be reporting the claim to the carrier to eliminate any potential coverage problems, and so that there can be a discussion about available treatment options, investigation, and general defense strategy. From there, the employer's investigation should commence as soon as possible, to include an interview and/or written statement from the employee claiming an injury, statements from other employees who may have been involved or witnessed the incident, and review of any video footage available. Delays in gathering this information can often result in a weaker recollection of events, which could compromise the investigation. Ultimately, the employer's ability to minimize the impact of an on-the-job injury claim often depends on how quickly the employer takes action once the claim is reported.

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Let's Talk

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