

# MEMORANDUM

TO: Workers' Compensation Attorneys  
FROM: John W. Valente, Esq.  
Kelly A. Smith, Esq.  
DATE: June 13, 2008  
RE: Legislative Update: S.345  
Summary of "An Act Relating to Lowering the Cost of Workers' Compensation Insurance"

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In the last few months of the 2007- 2008 legislative session Senators Racine, Carris, Miller and Mullin, sponsored bill S.345, "AN ACT RELATING TO LOWERING THE COST OF WORKERS' COMPENSATION INSURANCE." The original bill was subject to a number of amendments resulting in a final version that although arguably expands workers' compensation benefits does not expand them to the extent proposed in the original bill and does address the concerns over rising costs of workers' compensation insurance in Vermont.

A significant amendment to S.345 is the addition of Sec. 1 "Findings and Purpose." Recently it has become the practice of the legislature to include a "findings and purpose" section setting forth the reasoning behind enacting a law. Such sections have been used by the Vermont Supreme Court to assist in analysis of legislative history when there is a question involving statutory interpretation, particularly when there is an issue as to whether an administrative body is appropriately applying the law. Summarily this section highlights the purpose of workers' compensation benefits in Vermont and the States concern with reducing the costs of workers' compensation insurance in Vermont.

The Sections of S.345 are summarized below. A majority of the sections become effective as of July 1, 2008. However, Sections 7,10, 15, 16, 17 & 18 become effective immediately upon passage.

**Sec. 2 Definitions:** Misclassification and Miscoding are defined in regards to classifying employees as independent contractors for purposes of this title and for coding employees for risk analysis by the National Council on Compensation Insurance.

**Sec. 3 Anti-Fraud Plans: 8 V.S.A. 4750(b)** is amended in that the anti-fraud plans and annual summaries the Commissioner may require workers' compensation insurer to file now include the activities of misclassification and miscoding. Additionally, the Commissioner could require that anti-fraud plans include information about fraud investigations, referrals, or prosecutions involving Vermont workers' compensation claims, misclassifications, and miscoding. The information regarding fraud

investigations and referrals would not be made public unless the Commissioner or State Attorney General commences administrative or criminal proceedings.

**Sec. 4. Insurance Fraud:** Definitions relating to insurance fraud found in 13 V.S.A. § 2031 are amended to include workers' compensation insurance policies as insurance policies identified in Title 13 and includes workers' compensation insurers as an insurer defined in Title 13. Workers' compensation insurance therefore is now under the purview of laws pertaining to insurance fraud.

**Sec. 5 Employee Classification Task Force:** A 10 member task force comprising various commissioners, the attorney general, members of the house and senate, "a member from the insurance industry appointed by the American Insurance Association," and "two members appointed by the employer and employee members the department of labor advisory counsel," shall meet to investigate the misclassification and miscoding of employees and occurrence of fraud in the workers' compensation program. An interim report to the Committee will be due by February 15, 2009 and a final report on November 15, 2009. The reports shall describe: (1) efforts to reduce employee misclassification; (2) proposed administrative, legislative or regulatory changes to reduce misclassification and miscoding of employees; and, (3) a "consistent, workable, and fair method for determining independent contractor status."

**Sec. 6 Evaluation of Permanent Impairment; AMA Guides:** The AMA Guides 5<sup>th</sup> Edition shall remain in effect for determining permanent impairment in Vermont. Before another edition can be used the Commissioner along with the Department of Labor Advisory Counsel shall adopt a rule. 21 V.S.A. 648(b).

**Sec. 7 Safety Incentives:** Department of Labor, BISHCA and the advisory counsel created under laws pertaining to unemployment compensation, shall study: (1) premium discounts for employers with safety certification programs; (2) rate reductions for effective return-to-work programs and/or substance abuse prevention programs; (3) distribution of liability for preexisting conditions; (4) other state workplace safety discount programs; (5) reemployment of Claimants receiving permanent disability benefits; (6) application of best practices for vocational services; (7) best practices relating to workplace safety; and, (8) impact on Claimants and employers of reducing maximum weekly wage from 150% to 125% of average weekly wage. A progress report is due from the Department of Labor on September 15, 2009 with a final report on February 1, 2010 and include suggestions for legislation and rulemaking.

**Sec. 8. First-Aid-Only Injuries:** If a work-related injury is first-aid-only, an employer "shall file a first report of injury with the Department." The employer shall file the report with the carrier or pay the medical bills within 30 days. If the employer contests the claim, the first report of injury "shall" be forwarded to both the Department and the carrier within 5 days of notice. If the injury requires more than one medical treatment or more than one day of work is lost, the employer "shall promptly" report the claim to the carrier, which shall adjust the claim. "First-aid-only treatment" is a single treatment

resulting in a bill less than \$750.00 and no lost time from work by the employee, except for time required for the treatment. Added as 21 V.S.A. § 640(e).

**Sec. 9. Deductible Policies:** Upon request of an employer a carrier must make available a rate that contains a deductible provision binding the employer to reimburse the carrier for at least \$500.00 of benefits, medical or indemnity. The claim shall remain adjusted and paid by the carrier with the employer reimbursing the carrier the amount of the deductible. Added as 21 V.S.A. § 687(e).

**Sec. 10 Dispute Mediation:** After a request for a formal hearing is made the Commissioner may determine whether the disputed issues and parties are appropriate for mediation prior to the formal hearing. The Commissioner shall establish rules by which cases are selected and scheduled for mediation. If mediation is ordered at least one mediation session must be attended by the parties. A list of mediators shall be made available by the Commissioner and may include non-attorneys who are experienced in workers' compensation. Costs of mediation shall be divided equally between the parties unless otherwise agreed. The cost of mediation shall be set by rule and be a cost recoverable by the claimant under 21 V.S.A. 678. Mediation shall not cause a delay in setting a date for formal hearing. Prior to implementation of this section the Commissioner shall consult with the Department of Labor Advisory Counsel, the workers' compensation committees of the Vermont Bar Association and Vermont Trial Lawyers Association, representatives of insurers who provide workers' compensation coverage in Vermont and other appropriate parties. Added as 21 V.S.A. 663a.

**Sec. 11. Proposed Findings:** 21 V.S.A. 663(a) is amended in that no proposed findings of fact shall be required unless ordered by the Commissioner. If ordered, the findings shall be submitted within 30 days after conclusion of the hearing. Abbreviated findings of fact or conclusions of law may be included in decisions.

**Sec. 12 Computation of Average Weekly Wages and COLA Increases:** A look back period of Claimant's wages is extended from 12 weeks to 26 weeks. Additionally, if at the time of injury the claimant is employed at "a higher wage rate" or higher grade within the 26 weeks the larger wages are to be used. Temporary disability benefits are first increased on the first July 1 "following the receipt of 26 weeks of benefits." 21 V.S.A. § 650(a) and (d).

**Sec. 13 Temporary Total Disability Benefits:** When an employee receives 104 weeks of continuous TTD benefits the employer/carrier is required to file within 30 days a medical report from "a physician" evaluating Claimant's medical status, expected return to work date and medical end result. If at medical end result a notice of discontinuance shall be filed. This additional section would be 21 V.S.A. § 642a.

**Sec. 14 Selection of Vocational Rehabilitation Counselors and Return to Work Plans:** 21 V.S.A. § 641(a)(1) is amended to permit that following selection of a

vocational counselor by a carrier/employer, absent good cause, an employee only has “one opportunity” to select another vocational rehabilitation counselor. 21 V.S.A. § 641(c) is amended to read that an employer, who had the opportunity to participate in development of a vocational rehabilitation plan, must object to the plan or make changes within 21 days after submission or such plan “shall be deemed valid.” Former subsection (c) would become subsection (d).

**Sec. 15 Review of Common Practices in Vocational Rehabilitation:** The Commissioner of Labor and the advisory counsel established under the laws relating to unemployment compensation shall address: (1) notification to claimants of vocational rehabilitation rights after 90 days out of work and immediate administrative enforcement for any failure to provide notification; (2) ensuring simple notice is provided to claimants regarding vocational rehabilitation services and enforcement by the Department for failure to provide such; (4) timely resolution of issues regarding vocational rehabilitation services and developing standards to address the success of vocational rehabilitation plans. A report is due by the Department of Labor on November 15, 2009.

**Sec. 16 Attorney Fees:** 21 V.S.A. § 678 is amended adding section (d) allowing for attorney fees in instances where claims that are actually or effectively denied by a carrier and a hearing is requested are paid prior to a formal hearing as a result of the attorney’s efforts. This allows for attorney fees even when matters settle prior to a formal hearing. Subsection (e) is added requiring attorneys representing claimants to submit a claim for attorney fees and costs within 30 days following a decision in which a claimant prevails.

**Sec. 17 Non-legal Assistance from Bargaining Units:** The Department shall adopt a rule that permits a representative of the claimant’s bargaining unit to provide informal assistance in workers’ compensation matters in all aspects except at a formal hearing.

**Sec. 18. Farm Safety Programs:** The Secretary of Agriculture, food and markets along with the Department with Labor and University of Vermont shall develop plans for the protection of farm workers, including educational programs. Carriers along with BISHCA shall investigate the feasibility of safety certification programs for farms evaluating possible premium reductions. Best practice management practices relating to agricultural vocational rehabilitation shall be developed.

**Sec. 19 Safety Standards for Forestry and Forest Products Industries:** The forest industries are encouraged to take immediate and effective action to reduce safety and health risks and reduce costs of workers’ compensation insurance by consulting with the Department of Labor, BISHCA, and VOSHA and other labor programs for education and awareness programs that address existing safety and health standards and best work practices.