

Workers' Compensation



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Introduction

Workers' compensation is an insurance program designed primarily for the benefit of employees who are injured in the workplace. This memorandum will provide an overview of the workers' compensation system in South Dakota.

Regulatory Authority

The South Dakota Workers' Compensation Law¹ is codified in Title 62 of the South Dakota Codified Laws ("SDCL"). The title is organized into nine chapters containing definitions, procedures, remedies, and requirements applicable to employers and employees participating in the workers' compensation system. The Department of Labor and Regulation administers and enforces workers' compensation.²

In 1992, the Legislature created the Workers' Compensation Advisory Council, which assists the department by reviewing the system for adequacy and effectiveness.³ As part of its duties, the advisory council presents an annual report to the Governor and the Legislature.⁴

Employers and Employees

Every employer and employee in the state is presumed to have "accepted the provisions" of the workers' compensation law, meaning they are bound by those provisions.⁵ An "employer" includes the state or a locality, as well as any person "using

the service of another for pay."⁶ If an employer is not subject to workers' compensation, an employee may still elect to initiate legal action for personal injury against that employer under the workers' compensation system.⁷ An employer may not simply remove itself from the obligations of workers' compensation by agreement with an employee.⁸

For purposes of workers' compensation, an employee includes "any person, including a minor, in the services of another under any contract of employment, express or implied."⁹ The term excludes a person whose employment is "not in the usual course" of the employer's business, and excludes any official of the state or political subdivision within the state who is elected or appointed, unless the political subdivision opts to treat that official as an employee.¹⁰

Other persons within the definition of "employee" include certain county officers,¹¹ students who participate in a "work experience educational class" off-campus,¹² volunteer first responders,¹³ certain

¹ [§ 62-1-9.](#)

² [See § 62-2-5.](#)

³ [See § 62-2-10.](#) In 2019, the Advisory Council must report on the impact of the 2016 Session Laws, chapter 236, regarding persons with multiple concurrent employments.

⁴ [See § 62-2-10.1.](#)

⁵ [See § 62-3-3.](#)

⁶ [See § 62-1-2.](#)

⁷ [See § 62-3-11.](#)

⁸ [See § 62-3-18.](#)

⁹ [See § 62-1-3.](#)

¹⁰ [See § 62-1-3.](#)

¹¹ [See § 62-1-4.](#)

¹² [See § 62-1-4.1.](#)

¹³ [See § 62-1-5.](#)

volunteer workers of the state or locality,¹⁴ as well as certain volunteer firefighters,¹⁵ conservation officers,¹⁶ executive officers of corporations,¹⁷ and certain employees of subcontractors.¹⁸ By obtaining a certification as an independent contractor, an owner-operator of a licensed and registered truck may elect to participate in the system as a sole proprietor.¹⁹

The law excludes other employees from the system, including domestic servants, farm and agricultural laborers, and work activity participants.²⁰ Specific exemptions also apply to owners of certain agricultural work,²¹ employees “engaged in interstate or foreign commerce,”²² and executive officers of corporations who elect to reject inclusion as an employee.²³ Independent contractors may qualify for exemption from the system if they are not an employer or a general contractor.²⁴

Insurance Companies

The Division of Insurance regulates insurance companies offering workers’ compensation policies in South Dakota under SDCL chapter 58-20.²⁵ Policies inconsistent with the law or any regulation are void.²⁶ Regulations include restrictions on the determination of premiums,²⁷ which insurers may

issue a workers’ compensation policy,²⁸ prompt payment to the employee,²⁹ and the contents of the policy.³⁰ Insurance companies still must pay compensation to an employee even if the employer becomes insolvent or files for bankruptcy protection.³¹ Unless the insurance company first provides notice of an impending cancellation to an employer and to the Department of Labor and Regulation, the insurance company may not cancel a policy for nonpayment of premiums.³² The insurance company also is required to maintain a “reinsurance reserve” to cover outstanding losses.³³

Employer Requirements

To have “accepted the provisions” of the workers’ compensation law, an employer must secure a method of payment for compensation to an employee whose injury or death arises out of and in the course of employment.³⁴ The state, municipalities, and other political subdivisions may, but are not required to, comply with this requirement.³⁵ The law provides two alternative methods for securing payment: obtaining workers’ compensation insurance³⁶ or entering into a reciprocal or interinsurance exchange agreement

¹⁴ [See § 62-1-5.1.](#)

¹⁵ [See § 62-1-5.2.](#)

¹⁶ [See § 62-1-6.](#)

¹⁷ [See § 62-1-7.](#) The term “corporation” does not include charitable, religious, educational, or other nonprofit corporations; however, each of these forms of nonprofit corporation may opt to accept the provisions of the workers’ compensation title. [See § 62-1-8.](#) Group health insurance policies are required to extend health insurance coverage to executive officials who elect not to be covered under the workers’ compensation law. [See § 58-18-6.1.](#)

¹⁸ [See § 62-3-10.](#)

¹⁹ [See §§ 62-1-10 to 62-1-13.](#)

²⁰ [See § 62-3-15.](#) Although these employees are exempt from the system, their employers may voluntarily participate in the system. [See § 62-3-17.](#)

²¹ [See § 62-3-16.](#)

²² [See § 62-3-4.](#)

²³ [See § 62-3-5.1.](#)

²⁴ [See §§ 62-1-19 to 62-1-22.](#) False information provided on an affidavit of exempt status is a Class 2 misdemeanor. [See § 62-1-21.](#)

²⁵ [See § 58-20-2.](#)

²⁶ [See § 58-20-2.](#)

²⁷ [See § 58-20-3.1.](#)

²⁸ [See § 58-20-4.](#)

²⁹ [See § 58-20-6.](#)

³⁰ [See, e.g., §§ 58-20-9 and 58-20-10.](#)

³¹ [See § 58-20-11.](#)

³² [See § 58-20-14.](#)

³³ [See § 58-20-16.](#)

³⁴ [See § 62-3-5](#) (requiring employers to comply with §§ [62-5-1](#) to [62-5-5](#)).

³⁵ [See § 62-3-5.](#)

³⁶ [See § 62-5-2.](#) *See also* §§ [62-5-18](#) to [62-5-20](#) (allowing for reduction of insurance premium for employers who choose a policy that has a deductible).



with other employers.³⁷ An employer may opt to self-insure by proving its financial solvency to the Department of Labor and Regulation.³⁸ If an employer does not secure a payment method, the employer is deemed to have elected not to operate within the workers' compensation system, which would allow an injured employee to recover potential damages from the employer through other forms of civil action.³⁹

The workers' compensation system protects employers and employees, but also limits them to the rights and remedies granted under the law.⁴⁰ For instance, the amount of the employee's compensation as determined under statute limits the amount of an employer's potential liability to an employee who is injured or dies at the workplace.⁴¹

Employers must comply with regulations regarding workplace safety, including the placement of safety postings on their premises.⁴² Insurance companies that provide workers' compensation insurance policies may contract with employers to provide annual workplace safety services.⁴³

Employers may be liable to an employee who is wrongfully discharged or terminated in retaliation for filing a claim.⁴⁴ Employers also may not discriminate in hiring a person due to that person's preexisting injury if the injury does not affect that person's ability to perform the duties of the job.⁴⁵

Additionally, if a person has sustained an injury while previously employed elsewhere, and then subsequently sustains an injury while employed by a subsequent employer, the subsequent employer is required to pay "all medical and hospital expenses and compensation."⁴⁶ If the employee is already receiving compensation for the previous injury and is currently claiming compensation for the subsequent injury, the amount of compensation is apportioned between the injuries.⁴⁷

The department may inspect all records and payrolls of employers as necessary for the administration and enforcement of the workers' compensation law.⁴⁸ While the records must remain confidential with limited permissible release,⁴⁹ the department may assess a \$25 penalty per offense against an employer that fails to submit records for the department's inspection.⁵⁰

Employers must keep a record of each injury or death that occurs at the workplace for at least four years following the injury or death.⁵¹ For any injury that requires medical attention, the employer must file a written report with the department or the insurance company issuing the workers' compensation insurance,⁵² which then must file a report with the department.⁵³ If the insurance company denies coverage of the injury, the insurance company must notify the injured

³⁷ [See § 62-5-3.](#) "Reciprocal" insurance is defined as "an interexchange among persons, known as 'subscribers,' of reciprocal agreements of indemnity, the interexchange being effectuated through an 'attorney in fact' common to all such persons." [See § 58-34-1.](#)

³⁸ [See § 62-5-5.](#) *See also* §§ [62-5-10](#) to [62-5-16](#) (providing for surety of financial performance by the employer to the Department of Labor and Regulation). Self-insured employers must also provide medical services and health care for compensable injuries and diseases under a case management plan. [See § 62-5-21.](#) The regulations of self-insured employers also fall under the Division of Insurance. [See §§ 58-20-25](#) to [58-20-40.](#)

³⁹ [See § 62-5-7.](#)

⁴⁰ [See § 62-3-2.](#)

⁴¹ [See § 62-3-1.](#)

⁴² [See § 62-2-11.](#)

⁴³ [See § 58-20-21.](#)

⁴⁴ [See § 62-1-16.](#)

⁴⁵ [See § 62-1-17.](#)

⁴⁶ [See § 62-1-18.](#)

⁴⁷ [See §§ 62-4-29](#) and [62-4-29.1.](#)

⁴⁸ [See § 62-6-4.](#)

⁴⁹ [See § 62-6-5.](#)

⁵⁰ [See § 62-6-6.](#)

⁵¹ [See § 62-6-1.](#) A violation of the recordkeeping requirements is a Class 2 misdemeanor. *See id.*

⁵² [See § 62-6-2.](#) Failure to file a report is a Class 2 misdemeanor, and the employer may also be subject to an administrative fine of \$100. *See id.*

⁵³ [See § 62-6-3.](#)



employee and the department within twenty days or the company is subject to an administrative fine of \$100.⁵⁴ The insurance company must also notify the employee of the right to a hearing.⁵⁵

Compensation

Chapter 62-4 determines the amount of compensation due to an injured employee and the actual expenses an employer must cover. Compensation is categorized as temporary total disability,⁵⁶ temporary partial disability,⁵⁷ rehabilitation,⁵⁸ permanent total disability,⁵⁹ and permanent partial disability (injuries to certain body parts).⁶⁰ Temporary disability compensation does not apply unless an employee is incapacitated for at least seven days.⁶¹ Special compensation formulas are provided for employees who contract a disease or who lose their hearing as a result of employment.⁶² An employee with a permanent total disability may also recover moving expenses if the employee moves to another location to obtain suitable employment.⁶³ For injuries that result in death, the employee's next of kin is entitled to compensation along with other covered expenses such as burial and transportation.⁶⁴

An employee may not receive workers' compensation for injury or death resulting from the employee's own willful misconduct.⁶⁵ An employee may choose to recover damages from either the

employer or the third party who is liable for the employee's injury at the workplace, or both, with limitations.⁶⁶ But the employer may recover from a third party any compensation paid to an employee for injuries caused by that third party.⁶⁷

A calculation of an employee's wage determines the amount calculated for workers' compensation.⁶⁸ For those types of employment that are not calculable as "customary" or not calculable for a full year preceding an injury, the law provides other methods of calculating the employee's wages.⁶⁹

In 2015, the South Dakota Supreme Court addressed wage calculation when the court interpreted the definition of "earnings" to allow persons with multiple concurrent employments to aggregate all their wages from all their concurrent employments, even if an injury occurred only at one place of employment.⁷⁰ In response to the court's holding, the Legislature declared that only the wages earned at the place of employment where the injury occurred may be used to calculate workers' compensation.⁷¹

Employees who file a claim for workers' compensation must notify the employer of the injury "as soon thereafter as practical."⁷² Fraudulent claims

⁵⁴ [See § 62-6-3.](#)

⁵⁵ [See § 62-6-3.](#)

⁵⁶ [See § 62-4-3.](#)

⁵⁷ [See § 62-4-5.](#)

⁵⁸ [See § 62-4-5.1.](#)

⁵⁹ [See § 62-4-7.](#)

⁶⁰ [See § 62-4-6.](#)

⁶¹ [See § 62-4-2.](#)

⁶² *See generally* SDCL chapters [62-8](#) (Occupational Disease Disability) and [62-9](#) (Compensation for Permanent Loss of Hearing).

⁶³ [See §§ 62-4-52 to 62-4-55.](#)

⁶⁴ [See § 62-4-8.](#) *See also* [§ 62-4-8.1](#) and §§ [62-4-11](#) to [62-4-22](#).

⁶⁵ [See § 62-4-37.](#)

⁶⁶ [See § 62-4-38.](#)

⁶⁷ [See §§ 62-4-39](#) and [62-4-40](#).

⁶⁸ [See § 62-4-24.](#)

⁶⁹ [See §§ 62-4-25](#) to [62-4-28](#).

⁷⁰ [See *Wheeler v. Cinna Bakers LLC*, 864 N.W.2d 17, 24-25 \(S.D. 2015\).](#)

⁷¹ *See* 2016 S.D. Sess. LAWS, Ch. 236. As mentioned in note 3, the Workers' Compensation Advisory Council is scheduled to provide an update on the impact of this law for the 2019 Legislative Session.

⁷² [See § 62-7-10.](#)



for workers' compensation benefits are punishable as a Class 1 misdemeanor.⁷³

An employer must pay for medical services to an employee who is injured while at the workplace.⁷⁴ The Department of Labor and Regulation determines the fees for health services an employer must cover in accordance with the department's rulemaking authority.⁷⁵ Health care providers may not charge higher prices for treatment of employees who are eligible for workers' compensation or they are subject to a Class 1 misdemeanor.⁷⁶ The employee may choose a doctor at the employer's expense.⁷⁷ The employer must pay the medical bills incurred by the employee for injuries sustained at the workplace or the employer is subject to a \$500 administrative fine.⁷⁸

For an employee who is entitled to workers' compensation, the employer may require the employee to be examined by a doctor chosen by the employer and at the employer's expense.⁷⁹ This examination must be conducted in the presence of a medical practitioner employed by the employee.⁸⁰ If the employee refuses this examination, compensation is suspended.⁸¹

If an employer denies coverage of a claim, the injury is presumed to be nonwork-related for other insurance purposes.⁸² If the insurance agency denies coverage, the agency must provide a full explanation for the denial or the Division of Insurance may determine the denial to be an unfair practice.⁸³

Hearings

The employer and employee may agree to compensation and submit the memorandum of agreement to the Department of Labor and Regulation for approval.⁸⁴ If the employer and employee do not reach an agreement regarding compensation, either party may request a hearing⁸⁵ or mediation.⁸⁶ The department conducts the hearing or the mediation in a location convenient to the parties or, in the case of mediation, by telephone conference.⁸⁷ A hearing officer employed by the department who is an attorney licensed to practice law in South Dakota conducts the hearing,⁸⁸ which may include any inquiry or investigation deemed necessary by the department.⁸⁹ Either party may petition the department to review the decision issued by the hearing officer,⁹⁰ and may appeal the department's final decision to the circuit court.⁹¹

⁷³ [See § 62-4-51.](#)

⁷⁴ [See § 62-4-1.](#)

⁷⁵ [See § 62-7-8.](#)

⁷⁶ [See § 62-7-8.1.](#)

⁷⁷ [See § 62-4-1.](#) See also §§ [62-4-43](#) to [62-4-45](#).

⁷⁸ [See §§ 62-4-1.1](#) and [62-4-1.2](#).

⁷⁹ [See § 62-7-1.](#)

⁸⁰ [See § 62-7-2.](#)

⁸¹ [See § 62-7-3.](#)

⁸² [See § 62-1-1.3.](#)

⁸³ See *id.* An unfair practice is punishable under SDCL [Chapter 58-33](#).

⁸⁴ [See § 62-7-5.](#) The parties may also request to make the compensation payment in lump-sum, as approved by the department. See §§ [62-7-6](#) and [62-7-7](#).

⁸⁵ [See § 62-7-12.](#) In 2006, the Legislature authorized the department to create a separate small claims procedure for medical expenses that do not exceed \$8,000. See 2006 S.D. SESS. LAWS, Ch. 271, currently codified at §§ [62-2-12](#) to [62-2-22](#).

⁸⁶ [See § 62-7-37.](#)

⁸⁷ [See § 62-7-37.](#)

⁸⁸ [See § 62-7-12.1.](#)

⁸⁹ [See § 62-7-13.](#)

⁹⁰ [See § 62-7-16.](#)

⁹¹ [See §§ 62-7-17](#) to [62-7-19](#).



Conclusion

Workers' compensation is not intended to be life or health insurance, nor is it intended to replace general health and accident insurance. It is instead intended to be purely employment-related accident and occupational disease insurance, shifting the burden of costs attributed to these work-related issues from an employee to the employer. The primary goal of workers' compensation is to provide wage replacement for employees injured on the job, not to pay injured employees for their injuries. With very few exceptions, the vast majority of states require workers' compensation for both private and public employment. While the states vary with regard to specific types of employers and employees who are covered by workers' compensation, as well as specific types of injuries that qualify for compensation, South Dakota does not fall outside the typical range of most state workers' compensation laws.

This issue memorandum was written by Wenzel J. Cummings, Senior Legislative Attorney, on November 9, 2018, for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.