Tips and Tactics for Employers in the Frustrating World of Louisiana Workers' Compensation

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PARKER & LANDRY

DEDICATION

The attorneys of Parker & Landry, LLC would take this opportunity to express their eternal gratitude to the men and women in the photographs used in these materials. The tireless works of these men and women, both in peace and wartime, and many whose names and individual efforts are likely lost to history, are all owed our thanks.

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The information provided in this book does not, and is not intended to, constitute legal advice. All information and content available in this book are for general informational purposes only. Information in this book may not constitute the most up-to-date legal or other information. You should contact your attorney to obtain advice with respect to any particular legal matter. No reader of this book should act or refrain from acting on the basis of information in this book without first seeking legal advice from counsel. Only your individual attorney can provide assurances that the information contained herein – and your interpretation of it – is applicable or appropriate to your particular situation. Use of this book does not create an attorney-client relationship between the reader and Parker & Landry, LLC and/or its attorneys.

Please free to contact us should you have any questions related to any information provided herein or encounter any Louisiana workers' compensation issues for which you require assistance.

INTRODUCTION

As attorneys who specialize in workers' compensation, we have experienced the myriad of ways in which employers make mistakes in managing the claims of their injured employees. It is due to no fault of their own. While you may be specialists in your individual fields, how to best manage these claims is occasionally provided to you after the mistakes have been made and rarely as part of a comprehensive plan on installing best practices…until now.

But, from where do these best practices come?

Our attorneys will have read dozens of legal opinions issued by the appellate courts in Louisiana or the Louisiana Supreme Court in any given week. Within those opinions are examples of successful arguments offered on behalf of employers and those that were not successful. In addition, our attorneys regularly discuss the problems they meet in their cases, and we often try to create **novel** arguments to prevent our clients from being penalized. Some of these ideas work, and some do not. Some of these arguments work before some judges, while the same arguments do not work in front of others. Arguments that provide you no benefit are quickly discarded, and those that are successful form the basis of what we recommend to you in the future. Further, as part of any legal practice, our attorneys work to take an unsuccessful argument used in the past and turn it into a **successful defense** by clever manipulation of the argument to match your case's specific facts.

All these tips, tactics, and clever arguments are incorporated into these training methods, so we can provide you with the most effective recommendations to manage your compensation claims. These materials will be updated as recent problems are identified, and solutions are created.

Remember, this is **your** document. Your contributions and insights are vital to making this valuable document for everyone. While we can supply recommendations from the perspective of a defense firm, we do not know if those recommendations can be converted into a valuable policy for your business. If you know of a better or more

efficient method of incorporating our recommendations, we will consider it. If you know of another best practice or tip, we have not considered, share it. Other readers of this document will appreciate it, as they contributed some of these same tips that we are offering to you.

And, if answers to your questions cannot be found here, **you are always free to contact us directly**. Our contact information is provided at the end of these materials.

What you should take away from these materials

There are a few things that you should remember as you review these materials. You **will** make mistakes in the handling of a claim. Get over it. It is **going** to happen. There is nothing we can teach you to remove that risk altogether. However, it would help if you always took the opportunity to **gain experience from your mistakes**. If it is pointed out to you by the adjuster, attorney, or court that you should have done something differently, faster, or better in managing a claim, incorporate those lessons into the way you manage claims in the future. **Always** strive to be better.

We recognize it is incredibly frustrating for you to pay a $2,000 penalty for an error in the handling of a claim, especially if the mistake is one you committed. But it is excruciating to have to learn that lesson again if you did not put practices in place to ensure it was not repeated. Also, depending upon the size of your company, do not allow that lesson to exist solely in your memory. Create practices and methods by which you can avoid this risk that can be provided to future individuals in your position to ensure that the company and its employees do not make this mistake six months or six years into the future. It does little for your company if you learn this valuable lesson individually.

These suggestions are **not** perfect and may not even be the best method for resolving your problems. They are certainly not a complete strategy for defending against every eventuality. The materials are the product of **decades** of watching the same mistakes being made repeatedly, and it is an attempt to give to you – the employers – the same training we provide to the adjusters who handle your claims. After all, compensation

claims are frustrating to everyone; and while it may only be our frustration, it is often your money.

These strategies are our attempts to address the problems and ensure they do not occur again, as opposed to pointless, often colorful, expressions of your frustrations about the state of the compensation system here in Louisiana. These practices consider issues that have arisen in various cases and are suggestions for how best to fix what the courts have found were a problem. As with any procedure, **never assume** what you have or do is good enough. **Always** strive to improve. We can guarantee that attorneys who represent your injured employees are working on new ways to find fault with your policies and procedures for which they will necessarily build a penalty claim.

Your adjuster and your attorney are **not** "part of the problem." When offering suggestions to our clients, especially out-of-state clients, their frustrations with the Louisiana workers' compensation system are applied with a broad brush to everyone involved in the process, your adjuster and your attorney are hired to protect your interests in the case. The insurer, and perhaps this particular adjuster and particular attorney, maybe the ones with whom you work on future claims. We share your frustrations, and while you may only have one or two active compensation claims, your adjuster and attorney often have hundreds. We have learned and accepted, often begrudgingly, that if we cannot change the system to make it more advantageous to you, we can understand the best ways to work within the system to protect your interests.

And finally, **we do not like to lose**. If you follow these rules, you might increase our chances of calling you with the court's judgment following a trial that can be expressed by only a single zero rather than a number with a bunch of zeros behind it.

The Most Important Consideration

Take care of your injured employee(s). Not everyone who gets hurt on the job is a liar, a malingerer, or someone simply looking for a free ride. **Forget** that these employees may not live up to your expectations about someone's dedication to a job or of your beliefs about how someone should work with utter disregard for their ailments. Your

employees **will** get hurt, and there will be questions raised about whether the accident occurred, the severity of the injury, or the true nature of their limitations. This will happen in almost every case. And while you may be frustrated with the system or how much money you spend on compensation insurance, your first priority must always be to care for your injured employees. We **guarantee** that the court will notice or be made to notice by the other side if you do not show sufficient concern or prematurely judge the employee.

Now, we will admit that some claims are more believable than others. We are **not** recommending that you accept every claim as compensable but never come to your examination of an accident with any preconceptions. Treat each claim on its **own merits** and make your decisions based upon a critical analysis of the facts. It is not uncommon for us to hear from employers that they do not believe an employee's story of having an accident because they are a terrible employee. You must accept that even bad people often have actual accidents. You need to investigate all accidents and only question or challenge those you have a legitimate basis. Remember, even if you do not accept the claimant's accident or question their honesty, your thoughts or beliefs are **not** evidence. Because your thoughts and beliefs may have a basis, in fact, you **must** collaborate with us to give us the best chance of proving your concerns correct.

The Employer/Carrier Relationship

One of the most frustrating things we hear from our clients when asked a question about why they did or did not do something is "that's the insurance company's job" or "ask the adjuster." Unless you routinely, as a company, give money to a third party without taking any interest in how they spend it, then you need to pay attention to these recommendations. Quite often, how the insurance company, and later, your attorney, can defend and protect your interests is based upon the information you supply or that you have obtained early in the life of the file.

The best possible defense for your claim is founded upon the information obtained from the moments after the accident occurred. Waiting to begin your investigation until after your employee has retained an attorney often means that you have let valuable information slip from your fingers, with that a lesson often to be learned in $2,000

increments.[1] And let us be honest, workers' compensation claims can be expensive. Why give the claimant and their attorney **more** money?

[1] For those of you lucky enough to never have paid a penalty, under LSA-R.S. 23:1201(F), each individual penalty is capped at $2,000, and penalties with time delays are calculated at $50 per day up to that $2,000 cap. The maximum number of penalties that can be awarded by a court atany trial on the merits is $8,000. There are other penalties that may be applied, but they are almost always based upon actions taken by the adjuster, and they are beyond the scope of this presentation. Further, an award of a penalty will also come with an award of an attorney's fee to the claimant's attorney.

WHAT'S NEW?
We've added a few things since the last issue

To improve the usefulness of these materials, we have added a table of contents (p.3).

As this may be more of a common issue in the future, we have added a discussion of medical marijuana and how it fits within the Louisiana Workers' Compensation system (p.13).

We have also offered a discussion of the penalty associated with not filing a First Report of Injury (p.32).

A discussion of whether the doctor's approval is necessary for a bona fide job offer. Hint, it is not (p.40).

Remember, these materials are for the benefit of all employers, so always feel free to send us any ideas or tips you may have or find useful.

CHAPTER ONE
General Employment Considerations

You will find it odd when we tell you that some of our best defenses to a compensation claim arise from actions you took even **before** the employee was injured. It is true, as we will illustrate below.

Craft practical and workable reporting requirements

Every employer needs to have a proper set of instructions and guidelines for an employee to report a work-related accident. This information should be provided to the employee at the time of hire. With employees previously hired, you should consider providing this information regularly. For example, at the same time, these employees must make annual changes to beneficiary or tax forms, remind them of these policies. If your company does not have such documents to be executed annually, nothing prevents you from providing these forms with their paycheck or by simply having such information circulated by managers or supervisors. Regardless of when this information is provided, **each set of reporting requirements should have a signature sheet for the employee to complete.** It is common for employees to claim no recollection of these requirements or policies. Having written proof that this information was supplied is **invaluable**.

> **Rule in practice:** A common argument from employees is that they notified "someone" about their accident, but that person – according to thecompany – was not person to whom the accidentshould have been reported. The courts do not commonly hold the employee to these strict reporting requirements. Denying the claimant treatment because they did not report the accident properly is almost always going to be aineffective, defense. However, the claimant's failure to follow the strict reporting requirements, taken in conjunction with other facts, could help to build a solid defense to the claim especially in one where the accident was unwitnessed.

Steps should always be taken to ensure that your employees are made aware of the people or persons to whom they need to report an accident. That person will usually be more knowledgeable about taking the steps necessary to get the claimant treatment and begin the investigation process.

Ensure the reporting requirements and contact information are kept up-to-date and displayed throughout your facility to supply detailed information to the employees.

Rule in practice: If the contact information is notdisplayed, the claimant will argue they tried to follow the reporting procedures but were not able to comply, because the contact informationwas not available. Being able to show the information was up to date and made available to all employees, we will be able to challenge the claimant's arguments and perhaps challenge his credibility.

Various industries require daily safety meetings, turnover meetings, JSA meetings, toolbox meetings, etc. Almost all these meetings require some form to be produced and that the attendees sign or acknowledge their attendance. Unless that form restricts the use of added questions, perhaps insert into a question asking whether any employee suffered a work-related accident or injury that day or the day prior. You might also go one step further and ask these employees if any co-worker mentioned having suffered a work-related accident or injury or if they saw a co-worker suffering an accident. Should an employee claim an unreported accident at some time in the past for which you have no prior information, you can use this to challenge that story.

In addition to providing written instructions, it would likely be in your best interest to discuss with your employee at the time of hiring what actions they could expect whenever they suffer a work-related accident. **Written instructions would be an improvement over a speech the employee will later deny occurred.** You would want to discuss what happens when an accident is reported, what forms they will have to complete, and how the matter will be managed by the insurance company. You may also want to discuss how you, as a team, will **work together to ensure they get necessary medical treatment and any work restrictions under which they are placed are respected**.

If, when they suffer an accident, the employee already knows what to expect, the employee may feel less inclined to obtain legal counsel. While some injured employees see an accident as a money-making opportunity, you can do nothing to change their opinion. But, for those employees who have legitimate accidents, if you do not take the time to work **with** them, they will find an attorney who will be more than happy to answer all their questions and actively work **against** you. Always work **with** your employees. In working with attorneys who handle claimants' claims, it is universally given that the most often heard complaint by the employees who hire them is that they felt that their employer did not care about them after their accident.

The obtaining of legal counsel by the injured employee **always** comes with an increase in

the exposure of the claim. **Anything** you can do to delay your employee seeking counsel will be of benefit to you, even if it is nothing more than calling your employee to check on them.

Drug and Alcohol Policy

A **written** alcohol and drug policy is necessary for an intoxication defense under Louisiana Revised Statute 23:1081(8). **Without a written and circulated alcohol and drug policy, you will not be able to claim the defense that your employee was intoxicated.** Provide accident reporting requirements and your alcohol and drug policy at the same time and have the employee sign for receipt of each after reviewing them.

In addition, your policy should warn your employees about taking prescription medications that they were not prescribed. Under Louisiana Revised Statute 23:1081(5), taking narcotic prescription medication that was not prescribed is considered illegal. Your employees should be warned of the effect of taking medication that they were not medically prescribed.

Since Louisiana recently expanded those conditions for which medical marijuana could be legally prescribed, your drug and alcohol should be updated to address your company's preference for how it intends to address this issue. Although medical marijuana may be a legal prescription for a drug screen, Louisiana law expressly **excludes** medical marijuana as a prescription that must be paid by your or your carrier under the Workers' Compensation Act.

Rule in practice: It is not uncommon for a claimant, against whom we have alleged intoxication as a defense, to argue they was not aware of the drug and alcohol policies. Althoughthe law requires that the policy be "promulgated," you do not want to face a situation, where we cannot prove the claimant ever received a copy. Having the employee sign a copy of the drug and alcohol policy annually will supply the same defense, as above, that the claimant was aware of this policy.

Workers' Compensation posted notice

Under Section 911 of the safety requirements chapter of the Workers' Compensation Administrative Rules, a notice must be posted around your facilities supplying each employee information necessary to protect their rights following an accident. **These materials include a copy of a blank version of the required notice**. It has been modified from the version provided in the rules to make it easier to read. Additional helpful information has been incorporated. For example, a notice that any employee reporting an accident will be subject to a drug screen is included. You will note that you

are to supply information to the employee about the contact for accident reporting. This offers further notice to the employee and can help challenge the claimant, arguing they were made aware of the requirements to report an accident or to whom such a report must be provided. Also, there is a section about your insurance company. The rule specifically requires this, and it supplies an added avenue for the employee to report their accident if they do not feel comfortable reporting it to you. This will be our argument if an employee claims they did not timely report the accident because they did not feel comfortable reporting it to you.

This form should be kept as up to date as possible, and it should be posted in multiple locations throughout your facilities. Once again, there is no such thing as **too much** notice.

Part-time/PRN/Seasonal employment acknowledgment

A part-time employee will rarely be considered a part-time employee for the calculation of their Average Weekly Wage for the payment of compensation, unless you have written documentation in their file that supports that they were aware they had accepted a part-time position or are working a reduced hour position at their choice. This would also likely apply to a PRN ("as needed") or seasonal employee.

Under Louisiana Revised Statutes 23:1021(11), a "part-time employee" is one:

> …who as a condition of his hiring knowingly accepts employment that
> (a) customarily provides for less than forty hours per workweek, and
> (b) that is classified by the employer as a part-time position.

A PRN employee, as someone who works as needed and who has the choice to choose to work a shift or not, that employee falls under a different provision. Under Louisiana Revised Statutes 23:1021(12)(a)(ii), if any employee is paid on an hourly basis, but the employee chooses to work less, they cannot avail themselves of the 40-hour presumption. This applies to a PRN ("as needed") employee.

> (ii) If the employee is paid on an hourly basis and the employee was offered employment for forty hours or more but regularly, and at his discretion, works less than forty hours per week for whatever reason, then the average of his total earnings per week for the four full weeks preceding the date of the accident.

While you may believe **your** classification of the employee as a part-time employee is

sufficient, the courts routinely focus on the requirement that the employee "knowingly accepts" that designation. This also applies to a PRN employee, although the law is not as developed with this employment classification.

In the past, courts addressing the part-time argument have refused to accept the employer's argument that (1) the claimant only worked part-time hours, (2) that they were hired for a part-time position, or (3) that they only applied for part-time work. Recognizing they can get a higher compensation rate, if they argue they were a full-time employee, you should **not** expect your employee to admit they were a part-time or PRN employee and subject themselves to the lesser of two possible compensation rates. Simply as an example, if you have a part-time/PRN employee earning $10.00 an hour, and they work twenty hours a week, their Average Weekly Wage will be $200.00 a week. Without a part-time/PRN acknowledgment, the employee's Average Weekly Wage will be calculated using the "40-hour presumption." Using the presumption, their hourly wage will be multiplied by 40 hours. So, using the example above, that part-time employee will have their Average Weekly Wage calculated to be $400.00 (40 hours x $10.00/hr.). Since that employee's compensation rate would be $266.68 a week, they will make more in compensation payments than their actual wages before the accident. Now, ask yourself how easy it will be to put that employee back to work? **Get that acknowledgment!**

Rule in practice: Claimants often try to challenge this part-time/PRN/seasonal acknowledgment by claiming that their circumstances had changed since hiring, and they now consider themselves to be full-time employees. Having multiple acknowledgments will strengthen our defense that the claimant knowingly accepted and worked a non-full-time position.

Rule in practice: It may well be that your adjuster conducts their recorded interview withthe claimant before they must start indemnity benefits. It is not uncommon for the employee, even one who is part-time, to tell the adjuster that they are a full-time employee to increase their compensation rate. **Be sure to inform your adjuster promptly upon reporting the accident that the employee is a part-time, PRN, seasonal employee.** Not only will your adjuster be prepared to calculate benefits based upon part-time employment, but the adjuster may also be able to phrase their questions in such a way that the claimant misrepresents their employment status.

With Louisiana's agricultural and seafood industries, seasonal employees are not

uncommon. Seasonal employment wage calculations are overly complicated and will not be discussed here, but having an injured employee recognized by the court as a seasonal employee prevents you from paying the employee wages as a full-time employee.

Therefore, it is recommended at the time of hiring; your **part-time/PRN/seasonal employees should complete the forms attached acknowledging they are knowingly accepting a part-time, PRN, or seasonal employment.** You might also want to consider having your employees complete this form annually to have multiple acknowledgments. You may be thinking that the employee should know their employment classification. In the case of *Jeffers v. Kentucky Fried Chicken*, 2008-1380 (La. App. 3 Cir. 4/1/09), 7 So.3d 813, the Third Circuit Court of Appeals found the employer was in in the best position to calculate the employee's wages correctly. The employer did not communicate to the insurer the lack of information necessary to calculate the wages correctly based upon part-time employment. In that case, the court recognized the employer must supply the insurer the correct information to calculate the claimant's Average Weekly Wage, and it awarded wages based upon full-time employment and awarded penalties and attorneys' fees. Simply telling your adjuster the employee was part-time without supplying information to the adjuster to allow them to evaluate the outcome of such an argument could well subject you to a $2,000 penalty for miscalculation of Average Weekly Wage and a separate penalty for underpayment of indemnity. It will be **your** burden to prove the employee was a part-time employee, rather than the employee's burden to prove they were a full-time employee.

Second Injury Board Post-Hire/Conditional Job Offer Knowledge Questionnaire and fraud under LSA-R.S. 23:1208.1

The Louisiana Second Injury fund exists to encourage the hiring of employees with disabilities. What disabilities apply are not what you would initially believe, given how we use the word in common usage. Permanent Partial Disabilities that qualify include conditions such as asthma and arthritis. While these may not be the kind of condition that can be aggravated by a work-related accident, "Ruptured/Herniated Disc" is the most helpful condition, as will be discussed shortly.

If you **knowingly** hire or continue to employ an employee with a qualifying disability, and that employee suffers a work-related accident with the new injury merging with the earlier disability and creating a more significant disability, the Louisiana Second Injury Fund will reimburse you for any workers' compensation benefits paid to that employee.

To recover from the Second Injury Fund, the party applying for reimbursement must show that the employee possesses a disability. Suppose your employee has one of the listed Permanent Partial Disabilities on the form. In that case, the presumption does away with any obligation for you to prove how the condition limits their employment. Suppose the disability is not a presumed Permanent Partial Disability condition. In that case, you will also have to satisfy in your application for reimbursement how this other condition poses a hindrance to employment. In addition to this condition, the employer **must** prove that they were aware of this condition at the time of hire or learned of it before the accident if already employed. But, if you cannot prove the knowledge requirement, the claim for reimbursement is **doomed**.

If you can satisfy the knowledge requirement **and** the pre-existing disability requirement, if your employee suffers a work-related accident that causes an injury that **merges** with the earlier disabling condition, **and** creates a greater level of disability, then you will receive reimbursement from the Second Injury Fund for compensation benefits paid as a result. It is usually your carrier (or a separate agent that they hire) or your attorney who will support the other requirements for the application.

The knowledge requirement can be satisfied in one of two ways. The most common way is by using the Louisiana Workers' Compensation Second Injury Board Post-Hire/Conditional Job Offer Knowledge Questionnaire; a copy of the most recent version is attached to these materials executed by the employee before their accident. This new form states explicitly that **only** this form can be used for this purpose. You may also be able to satisfy the knowledge requirement by producing an affidavit of a supervisor with higher/fire authority who can say under oath that they had knowledge of the employee's prior permanent, partial disability and continued to employ that the employee with documented accommodations for the disability. Remember, where the law speaks of documented accommodations, the best evidence we can have is something **in writing**. So, if you hire an employee for which an accommodation is made, or you continue to employ someone who suffers injury, work-related to not, that limits their work ability, put any accommodations **in writing,** and these accommodations should be preserved in

their employee file. To protect your employee's privacy, these forms you should not be easily read by employees not involved in this process.

If you have the Louisiana Workers' Compensation Second Injury Board Post-Hire/Conditional Job Offer Knowledge Questionnaire form properly completed, or you can satisfy the knowledge requirement later by the production of this affidavit, and your employee suffers an injury to the same body part that merges with the original disability (documented on the questionnaire) to create a more significant disability, **immediately** give the form to your adjuster. With that information, and after reviewing the relevant medical records, they can decide whether the claim can be submitted to the Second Injury Fund for reimbursement. Also, the law allows an employer to recover from the Second Injury Fund for subsequent injuries suffered during employment. For example, if an employee suffers a herniated disc while employed by you, treats for that condition (regardless of whether it is work-related), and is returned to work, and then later suffers an aggravation to the same body part making it more disabling, you can apply for recovery under the Second Injury Fund. **Attached for your use is the Louisiana Workers' Compensation Second Injury Board Post-Hire/Conditional Job Offer Knowledge Questionnaire promulgated by the Louisiana Workforce Commission.**

Recognizing that the failure to disclose this medical history would prejudice the employer's right to recover from the Second Injury Fund, Louisiana Revised Statute 23:1208.1 was created by the Louisiana Legislature. This provision provides,

> Nothing in [Workers' Compensation Act] shall prohibit an employer from inquiring about previous injuries, disabilities, or other medical conditions and the employee shall answer truthfully; failure to answer truthfully shall result in the employee's forfeiture of benefits under this Chapter, provided said failure to respond directly relates to the medical condition for which a claim for benefits is made or affects the employer's ability to receive reimbursement from the second injury fund. This Section shall not be enforceable unless the written form on which the inquiries about previous medical conditions are made contains a notice advising the employee that his failure to answer truthfully may result in his forfeiture of worker's compensation benefits under R.S. 23:1208.1. Such notice shall be

prominently displayed in bold-faced block lettering of no less than ten-point type (emphasis added).

Further, how the **court** will view a question that the claimant did not answer is difficult to predict. While we would interpret a blank answer favorably to our fraud defense, the claimant will likely argue that they simply missed the question. If accepted, the court may not grant our fraud defense. **Every** question must be answered fully, and we recommend the employee use "N/A" in response to any question that does not apply to this individual employee.

Rule in practice: Nothing prevents you from having the employee complete these forms on a regular basis. We have clients who have these Second Injury Fund forms, and the Part Time Acknowledgment forms, completed annually. The form is only effective from the date the form is executed. With regards to Second Injury Fund recovery, if the condition appears on a later execution of the form, then you also need to document any accommodations that you have made for the new condition, as the Second Injury Fund will need proof of an accommodation made. Plus, if an employee does not disclose their medical history, and you have a failure to disclose across multiple forms, you can use that to also attack your employee's credibility.

At the bottom of the Louisiana Workers' Compensation Second Injury Board, Post-Hire/Conditional Job Offer Knowledge Questionnaire is a signature line for a witness. The form should be completed **in front** of the witness. Otherwise, a claimant who does not disclose a medical history will argue that someone else executed the form. **Never underestimate** an employee's ability to lie to get out of being caught lying earlier.

Rule in practice: If an employee returns to work under restrictions, you may want to consider having the employee review and acknowledge receipt of those policies. Unfortunately, many employees working under work restrictions following a work-related accident believe that their restrictions prevent them from being firedfor violation of behavior or attendance policies.

With this form in which the employee does not disclose their disability that costs you your claim for reimbursement, you can seek fraud under Louisiana Revised Statute 23:1208.1, but **only** if you used the form with the appropriate warning language. The affidavit mentioned above, or the form, can be used to obtain Second Injury Fund recovery. Still, the employee's failure to disclose their history on the form above is the only way you can seek this particular type of fraud. The number of employees who do not disclose their medical history that later costs the employer their attempt at Second Injury Fund recovery is remarkable. Used properly, this may well be the most effective form of fraud.

Necessary notices and warnings

If your company has policies in effect regarding termination for excessive tardiness, inappropriate behavior, etc., those **policies should be in writing, with each employee acknowledging, in writing, the receipt of those policies**. If your basis for the termination were the violation of a policy prohibiting such behavior, the affected employee would argue they were not aware of the policy. Getting the employee's signature on such a form will seriously weaken if not outright destroy any allegation that they were not mindful of the penalty to their actions.

Parting declarations

One of the most frustrating types of claims are those that arise after a claimant has been terminated or has left your employment. It is not uncommon for an employee terminated to seek his revenge by claiming that they suffered an accident for which his employer took no action. Since you did not know about this accident, you are often left to prove a negative – that an accident did not occur.

Why not plan for your own protection? Whenever an employee is terminated or resigns, you might want to have a written form asking the employee to report any accidents that may have occurred during their employment. If the employee denies any accident, it will be much more difficult for them to raise a claim later. However, it is a Catch-22, as any accident or injuries mentioned may also obligate you to provide benefits. If an employee mentions a past accident, get with your adjuster, as there are time delays for reporting an accident, and payment will restart that time delay.

CHAPTER TWO
The Handling of an Accident

Provide necessary treatment

As offered above, **take care of your employee!** Provide your employee medical care. It is better that the complaints of ten liars should get treated; then, one legitimately injured employee does not get the care they require.

Preserve useful information

The clock begins ticking for your investigation as soon as the accident occurs or is claimed to have occurred. **Every** minute you delay preserving useful information increases the likelihood that helpful information will be lost. Remember, your memories and the memory of co-workers, supervisors, etc., will suffer over time. Oddly, the claimant's memory almost always **improves** with time. Unless the accident is severe, it will be just another day for witnesses, and their memory will quickly fade. The employee, whether honestly injured or not, will strive to remember every beneficial detail, usually with the assistance of an attorney.

You, or your supervised subordinates, should **immediately** begin to inquire about the details of the accident. Conversations should be had with the employee. The employee's supervisors' and co-workers' statements must be **immediately** taken from those with helpful information and those in the area who have no information of note. That these employees do not remember any accident may well be critical later.

All statements, including that of the employee, should be handwritten, and the persons supplying the statements should be allowed to complete their own rather than providing them a pre-written statement; each **statement should be dated, and the employee should provide their signature, printed name, address, and a good phone number.** The statement should also be written clearly enough to be understandable to anyone reviewing the information later.

Rule in practice: On occasion, co-workers or witnesses who knew nothing about the accident at the time, may suddenly become star witnesses after the passage of time with near perfect recollection of the accident. Having a written statement from the individual on the day of the accident, or shortly thereafter, where their memory would presumably have been at their best,that they saw nothing or were told nothing, will allow us to attack that witness' credibility.

Regarding the statements taken from the employee, the employee should be made to **go into as much detail as possible** regarding how the accident occurred and the injuries claimed. The more detailed information you obtain at this time, the greater the likelihood we can prevent the claimant from expanding the details of their accident or the scope of the injury later. Again, the employee's memory will only improve over time, but how far the employee can expand the story will be limited, to a great degree, by what is contained in this detailed statement.

As to the statements taken of the witnesses, we will likely want to discuss what is provided in the statement with the witnesses. Unfortunately, we may not receive statements for weeks or months after the accident. **Any** individuals on a particular crew or part of a group who would presumably be in the area where the employee claims to have suffered their accident, even individuals who saw **nothing**, heard **nothing**, or know **nothing**, should also provide a statement.

Rule in practice: It is unfortunate that sometimes your witnesses must be terminated for cause for reasons unrelated to the accident. You have a business to run, and that should be your foremost consideration. Often, that individual's testimony will not be available after the termination. Should you feel that the individual's testimony is useful, and you would like to have it preserved, we can take the statement under oath before termination. While having the statement may not prevent the witness from changing their story, the possession of the statement will usually keep them honest and can be used to challenge their credibility at trial.

While the witness may have been employed by you at the time of the accident or seemed otherwise available to you, by the time we become involved, that witness may have moved on, quit, or been fired. Without the contact information, we may not be able to find them, especially if the employee did not work for you directly. If you have an employee, whom you believe has helpful information, but who will likely not be available in the future, you might want to get with your attorney. We can have that individual's statement taken under oath.

It is not uncommon for information to come to light later – a statement by a coworker

that the accident did not happen as alleged, the information provided by a coworker that the claimant had been discussing faking an accident, etc. In that situation, it may be beneficial for you to have your attorney meet with the witness to get information. **The information will be protected by the "attorney/client privilege" and the protections afforded to information "obtained in anticipation of litigation," which is not subject to disclosure to the other side.** If your attorney is not involved in the taking or recording of the statement, that information is subject to discovery by the other side.

Rule in practice: Information that is protected byattorney/client privilege or which was "prepared in anticipation of litigation" is not discoverable by the claimant, or his attorney, if that information stays between your attorney, your insurance company, and you. **Involving any other third-party – an investigator, a doctor, etc. – waives that privilege.** Information protected from discovery is useful because, when we take the deposition of the claimant, questions about this information will be posed to him. If the information is protected, the claimant may not be aware we have this knowledge.

Sometimes, a paper trail can be counterproductive. When you receive information that you believe may completely change the nature of the case, you should bring it to your attorney's attention **at once**. Your attorney can best recommend how to use the information and protect its existence. The court will take a very dim view of your having such information that was not acted upon. At best, it may merely be a penalty imposed. At worst, it may destroy the company's credibility in the eyes of the court.

If the accident results in the employee's death, or if there is potential to bring a claim against the owner or manufacturer of a piece of equipment used in the accident, you might want to take the opportunity to conduct a more detailed investigation. As with any investigation, it should begin as quickly as possible after the accident. You should also consider involving your company's attorney or our firm to manage the protection and preservation of all evidence and information necessary for your defense in this and any third-party claim.

Timely reporting of an accident

As soon as you get information that one of your employees has had an accident, you must report it to your adjuster. While I understand this may seem like an overreaction,

given the effect those reportable accidents have on your experience modifier, it is not uncommon in our experience for what seems like a simple accident, from your initial viewpoint become a massive claim later.

All the information below, which are strategies to ultimately help you save money on the defense of your claims, is predicated upon the **timely** reporting of the accident. Simply waiting until the injury becomes concerning enough to report to your adjuster can diminish your best opportunity for achieving a favorable result. Waiting will allow a litigious claimant to obtain doctors favorable to employees and will enable the employee to build up a better case. Witnesses who may have had helpful information initially may no longer recall that information months or years later when we speak to them or may no longer be able to find that witness. Waiting could well result in one or more penalty claims arising for the late payment of indemnity benefits, the late payment of medical benefits, or a myriad of other penalties that could be imposed and avoided simply by your prompt attention the claims of an injured employee.

Ultimately, **waiting to report or investigate an accident only benefits the employee.** Without being placed under the scrutiny of the adjuster and your detailed investigation, your employee will have time to discuss their claim with an attorney who may help them overcome some of the problems with this case. Your delay will give the employee time to perfect their story, obtain favorable witnesses, obtain good medical evidence, and overcome the problems with their case. **The only thing you will gain by waiting is regret and greater exposure.**

Waiting to report an accident only favors the employee (and any future attorney they hire).

Choice of physician

Under Louisiana Revised Statute 23:1121, an employee can treat with a physician in any field or specialty. Although there are some limitations beyond the scope of these materials, the employee does have that initial choice to provide treatment.

Your employee should also be notified that they can choose their initial physician. While you may select an occupational medicine clinic to evaluate the employee at your expense, this does not supplant the claimant's ability to make their own choice of physician.

It is recommended that you supply the employee the attached LWC-WC-1121 Choice of Physician form before receiving treatment, if possible, to inform them of their right to their choice of physician. Completing the form before seeking treatment is not a defense to the failure to supply care. This form lets them know of their right and can be used to prevent "doctor shopping" (or shopping around for a doctor who tells the employee what they want to hear). If, after treating with your choice of doctor/clinic, the employee decides to continue treating with that physician, they should complete this form choosing the doctor, but only after the first examination.

Understand that any medical **specialist** to whom you, or the clinic to which you directed the claimant, refer the claimant – even if only verbally – will be considered your choice of physician in that specialty and may limit our ability to select an additional doctor within that same specialty for our Second Medical Opinion physician later. Therefore, it is recommended that the choice of initial specialist, if one is necessary, following the accident be left up to the employee to select. **Please ensure that any urgent care clinic to whom you direct your employee be made aware that they may refer the employee to a specialty, but never to a specific doctor by name.**

If, after completing this form choosing a doctor, the employee wishes to select another physician, you should notify your adjuster of this request, and they will determine, under the circumstances, if it is advisable to allow them to be examined by, or treated with, this other physician.

The intoxication defense

Under Louisiana Revised Statute 23:1081(1)(b), **no** compensation benefits will be owed to an employee who was intoxicated at the time of the injury.

In this context, "intoxication" includes both alcohol and drug usage. A separate subsection, subparagraph (6), and interpretive case law have established that **the intoxication must also be a cause of or a major contributing factor leading to the injury**. Simply said, if the employee had been injured in that accident, regardless of whether they were intoxicated or not, the court would be unlikely to find the intoxication a bar to the recovery of benefits. However, **if it can be shown that the intoxication either contributed to or caused the accident, then the claimant can lose all benefits**. For example, if an employee who meets the requirements for intoxication walks down a hallway and a ladder falls on top of them, the intoxication makes no difference to the accident. The employee would have been struck by the ladder regardless of the intoxication. But, if the employee was standing on that ladder, the intoxication could have contributed to the accident, as intoxication can cause unfortunate effects on a person's equilibrium. One thing you should take away from this paragraph is that **you** are the best person to preserve this helpful information. Whether by statements of witnesses or internal security video showing the circumstances of the accident, this information **must** be preserved by you as quickly as possible.

Rule in practice: Since "promulgated" is one of those words in the law that lends itself to interpretation, when the dictionary would suggest that it is not open to interpretation, you need to ensure the notice given to your employees goes beyond the minimum required. It is recommended that you present the drug and alcohol policy to the employee annually and obtain a signature upon review of the policy. You might even go so far as to post around your facility that you have a zero-tolerance drug policy that applies to alcohol, illegal substances, and prescription medications for which the employee lacks a doctor's excuse. This notice should also notify the claimant will be subject to a post-accident drug screen.

Further, as said above, the law requires that you **must** have a written and promulgated substance abuse policy under Louisiana Revised Statute 23:1081(8). The statute's wording makes the requirement for this policy an absolute necessity as you will by the law – **no** policy, **no** intoxication defense.

> (8) In order to support a finding of intoxication due to drug use, and a presumption of causation due to such intoxication, the employer must prove the employee's use of the controlled substance only by a preponderance of the evidence. In meeting this burden, the results of employer-administered tests **shall** be considered admissible evidence when those tests are the result of the testing for drug usage done by the employer pursuant to a **written and promulgated substance abuse rule or policy** established by the employer (emphasis added)

To make this requirement clear and ensure there is **no** misunderstanding, if you do not have a written drug and alcohol policy, even if your employee is drunk enough that they cannot even stand up, **you have no intoxication defense.**

In addition, the law recognizes the effects of intoxication will dissipate over time. Therefore, **the drug screen must be performed as soon after the accident as possible**. Although there is no bright-line rule regarding how long you must have to perform the test, any delay of more than an hour will likely put even favorable results at risk for use at trial. Therefore, make sure your employees and supervisors know the importance of getting the claimant tested **quickly**.

Since the law recognizes a presumption in favor of intoxication, when the employee refuses to take the drug screen, it is recommended that you take a **written statement** of the employee or supervisor who received the claimant's refusal to undergo the drug screen. You do not want to deal with the situation later, where that sole individual can no longer be found or contacted to corroborate the claimant's refusal.

The law requires the initial testing sample to be confirmed by a second confirmatory test. Most occupational medicine clinics are aware of this obligation and will routinely preserve the sample and send it out for confirmatory testing. In our experience, hospitals are rarely so diligent. If you become aware the claimant's sample performed at a hospital was positive, you should request, **in writing**, that the facility place a "litigation hold" on the sample and preserve it for additional testing. You should then reach out to your adjuster or attorney to make arrangements to have the sample properly transported to a facility to confirm the positive finding. As the law requires a formal chain of custody, this is not an obligation that you can perform on your own. You **must** have to have a recognized medical transportation company make the transfer.

One of the most frustrating issues about the intoxication defense is that the claimant must be impaired. Therefore, not only do you need to establish the existence of a written and promulgated drug and alcohol policy, show the claimant was intoxicated with results of a drug screen, prove the intoxication was a contributing factor to the accident, perform a confirmatory test, and perform the test at a time close enough to the accident

to be useful, but you will also need to support that the claimant was impaired.

Perhaps recognizing our culture in Louisiana leads us to have a higher level of tolerance for alcohol generally; the courts **require** that you prove the claimant was impaired. Although "impaired" is never defined with any helpful precision, it is usually accepted that the employee must exhibit some outward signs of impairment or intoxication. If you cannot show evidence the claimant was impaired, you will not be able to support the defense of intoxication, even if you possess all other requirements. *See* *Vaughn v. Dis-Tran Steel, LLC*, 2017-689 (La. App. 3 Cir. 2/7/18), 239 So.3d 893. In the case of *Young v. Supplier Services, LLC*, 2013-670 (La. App. 3 Cir. 4/21/14), 141 So.3d 288, the Third Circuit Court of Appeal provided that an employer must show "some evidence other than the mere happening of the accident, such as behavior that would demonstrate the employee's intoxication and resulting impairment or loss of control…At the very least, the employer must show 'that the accident was of a sort that would not ordinarily happen absent intoxication.'" Again, **you** are the best person to **obtain** and **preserve** this information for later use.

Therefore, it is recommended that once you have proven a possibility of intoxication, you should speak with **every** employee who interacted with the employee that day to see if any actions would suggest impairment. Suppose you obtain information to support the claimant was exhibiting signs of impairment or intoxication. In that case, their testimony **must** be preserved as with any other favorable testimony discussed elsewhere in these materials. At a minimum, you should have the information recorded along with the necessary contact information for your attorney to use later. To best preserve your defense, the statement of these individuals should be taken under oath. In addition, should the location where the accident occurred have security cameras, you should also at once preserve those cameras and view them for any employee actions that may support the impairment.

Failure to use safety devices or follow procedures

One of the claims we regularly encounter are suggestions by our clients are that benefits should not be owed to the employee because they did not follow proper safety practices, or they failed to use safety devices provided to them that would have presumably

protected them from harm. Unfortunately, the law is not so understanding. The employee's **failure** to use such safety devices or safety procedures, known as the "failure to use guard," will **not** provide you any defense to a claim or the obligation to give that employee benefits. Unfortunately, this issue is well settled in Louisiana law. However, the employee's failure to use a safety device or follow a safety rule may be used in conjunction with other facts to challenge whether it was a legitimate accident.

CHAPTER THREE
Initial Reporting of an Accident

As soon as you have information about the possibility of a work-related accident, you should at once report the accident to your compensation carrier. **Under no circumstances should you attempt to manage a compensation claim on your own**. While it may seem an attractive idea, to reduce the effect of yet one more reportable accident on your experience modifier, we have yet to see an employer manage a compensation claim on their own that has worked out favorably for them. In almost every situation in which this was attempted, the results were **disastrous**. Once you report the accident to your carrier, you need to supply **all** the information your adjuster may request. Even if your adjuster does not say that these issues are urgent, treat the request as critical. It will ultimately work out to your benefit if you get the adjuster all the information they request as quickly as possible.

Again, provide your adjuster with all the information requested as soon as possible. Further, upon obtaining any documentation from your employee, no matter how inconsequential it may appear, send it to your adjuster **at once**. We always prefer that the adjuster be supplied a **complete** copy of the claimant's employee file and any separate accident file you keep. Without having looked through your employee files, we cannot determine what information contained within would be significant. But your adjuster, upon receiving this file, will review it, and there may be information in which they find helpful for the protection of your interests. If that adjuster does not have the file or receives it late, defenses that may have been available initially may no longer be an option. More importantly, your adjuster may be forced to make decisions based upon incomplete information.

Make yourself available to help the adjuster in these critical first steps, and ensure any requests or recommendations provided by the adjuster are complied with **as quickly as possible**. In many penalty situations, one of the factors considered by the court is the speed at which certain actions were taken. As these are generally subject to a "reasonableness" test, there is often no specific deadline for compliance; however, under those circumstances, the speed at which certain requirements are met will always be a consideration for the court in its examination.

Once you report an accident, it is going to increase your experience modifier, and it will probably cause you numerous headaches. Unfortunately, that is the cost of doing business in an industry where your employees may get hurt. But, as mentioned above, your employee is **not** your enemy. Treating your injured employees as the enemy will undoubtedly lead to problems that will complicate the defense of the claim.

For those employees legitimately hurt, they are often scared about their medical condition. They are frightened about a possible loss of income, and many employees fear they will be fired for bringing a compensation claim. In this situation, a little empathy is not only the right thing to do, but it may also well pay huge dividends later. As mentioned earlier, when pressed for why they filed suit later, a significant number of employees claim that it was because they felt that their employer no longer cared about them or started treating them as the enemy after they suffered an accident. If you do not show your employee that you care about them, they will likely find an attorney to make you care about that employee.

Take the opportunity to learn about your employee and take an interest in their recovery. Have you called to check on them? Did you see if they needed anything? Your employee may feel more comfortable talking to you about a concern than the adjuster. If the issue is important, bring it to the adjuster's attention. It will ultimately be much cheaper than if an attorney must bring it to the adjuster's attention.

Simply handing your employee off to what they may see as the "big, bad, insurance company" **never** works to your advantage. Your injured employee will see themselves being part of your company's family one day and treated as an enemy on the next. Take advantage of the employment relationship that you have built up for weeks, months, or years. Be a liaison between the adjuster and your employee until your employee is comfortable communicating with the adjuster. Remember, if you create a situation where your employee feels abandoned, there are numerous claimants' attorneys who are more than happy to comfort them in their time of need.

Formal reporting of the accident with the State

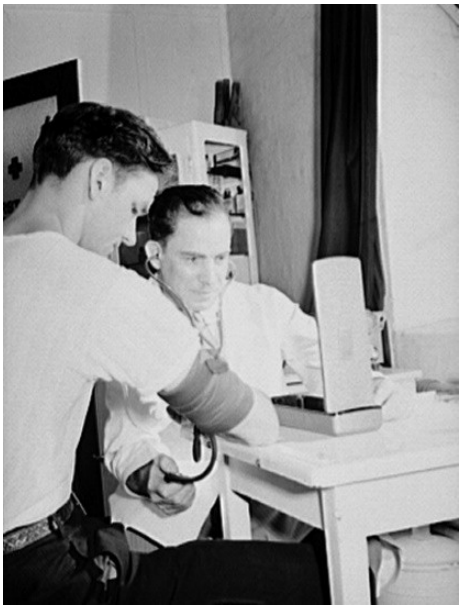
Under Louisiana Revised Statutes 23:1306, you **must** file a First Report of Injury (LWC-WC-IA) form within ten (10) days of actual knowledge of an injury suffered by an employee resulting in lost time more than seven (7) days. This rule applies whether you accepted the occurrence of the accident or not. Under the Workers' Compensation Administrative Rules, part 1, section 109, there is a penalty not to exceed $500.00.

CHAPTER FOUR
Assisting in the Management of the Claim

Once your adjuster has opened the claim up, they will begin the investigation process. This is a team effort, and under **no** circumstances should you simply rely upon the adjuster to manage everything. The best investigations and most robust defenses are always conducted as part of a team effort.

Providing documentation and valuable information

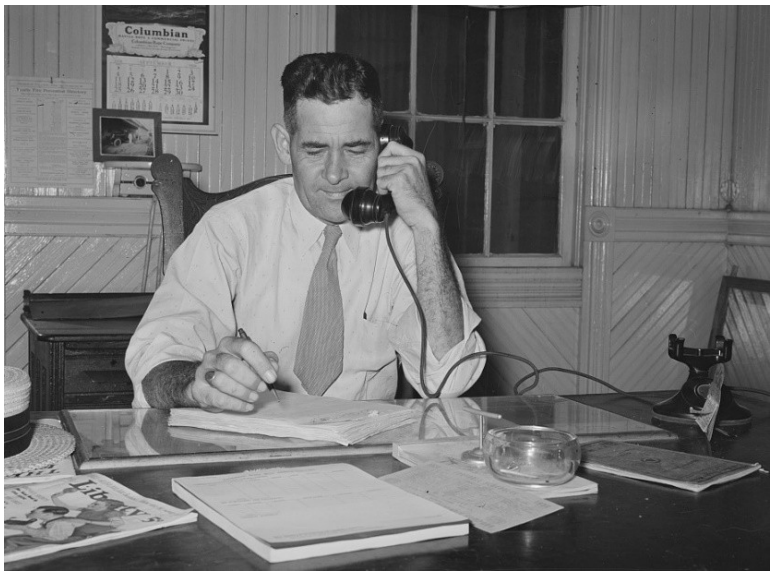
During this time, you need to make yourself available to the adjuster to supply any information they may require. Since you may not be aware of pending deadlines, **you should consider any request of an emergency nature**.



If you have not already done so, this is the time in which to provide the adjuster any information to determine whether you may be able to recover from the Second Injury Fund, any information related to the claimant's disability, any medical records received (or the names of any providers where you know the claimant received treatment), any witness statements, etc.

Quite often, there is information had by the employer which would never come to the attention of the adjuster or the attorney during the normal claims handling process. On occasion, this information can be beneficial. For example, in one case, during a meeting with the claimant's supervisor, the supervisor pointed out that the employee liked to ride in rodeos. The investigator previously tried surveillance twice without any useful result. Once provided with that information, which we would never have obtained otherwise (and it was curiously not mentioned in the deposition), we found an upcoming rodeo and assigned surveillance to that event. Needless to say, the employee was videotaped riding horses over two days when she was describing extreme pain to her doctor, for which he was recommending surgery. After filing our fraud claim, the lawsuit was dismissed without any settlement money paid. While we did eventually obtain the information, and we were able to get a very favorable result, had the adjuster known about it earlier, the adjuster could have directed surveillance earlier and perhaps

had the basis for terminating indemnity benefits sooner than when the information was first provided to us.



Be sure to **preserve any information which may benefit your defense** that comes into your possession. For example, if the area in which the claimant was injured is under video surveillance, preserve that video **at once**, as it is likely the video will be written over at some point in the future. In addition, if you are a retail establishment, preserve receipts for any sales the employee may have made. For example, if the claimant is arguing that they hurt their low back because they moved a 50-pound bag of dog food, would it not be wonderful to have all the receipts for the day to show that they did not sell any dog food? What if you learn the employee had been offering complaints prior to the accident?

If you are not aware of any complaints, is it because you are not aware of any or because you did not ask the injured employee's co-workers if any complaints were offered by the employee? These may be apparent issues, but while the information you learn does not always seem at once useful, if you do not provide it to your adjuster or attorney, no one will ever know if it will be useful. Further, there may be a claim that you question, which, upon reviewing the security video, shows the accident occurred as alleged. You can then take proper steps given this information that the accident happened as claimed.

Providing wage information

One of the situations most prone to problems is the calculation of the Average Weekly Wage. Although the Louisiana "1002 Safe Harbor process," or one of its many other titles, may supply some defenses, it is **always** in your best interest to ensure the adjuster calculates the claimant's Average Weekly Wage **correctly** at the onset of any claim. And when we use the word "correctly," it might as well be substituted with the word "perfectly." The calculation of the Average Weekly Wage in Louisiana is essentially a zero-sum game. **The calculation on the Average Weekly Wage is either perfect, or it is wrong**. When it is calculated wrong by an adjuster with incomplete information, it could entitle the claimant to a $2,000 penalty for improper calculation of the Average Weekly

Wage. A miscalculation as minor as $.03 is still considered wrong, and a penalty is almost guaranteed to be award. As any payment of indemnity based upon this calculation would result, more often than not, in an underpayment, that could give rise to a separate penalty for $2,000 for underpayment of indemnity benefits. Now, let us say that you delay in providing this information to the adjuster, as the adjuster has fourteen (14) days in which to make the first payment of indemnity after the notice of the injury under Louisiana Revised Statute 23:1201(B), a third penalty begins to accrue on the fifteenth day at the rate of $50 per day up to the maximum of $2,000.

Let that sink in for a moment. Ignoring the adjuster's requests for complete information puts you and the adjuster at risk for improperly calculating the Average Weekly Wage could, in the space of 55 days, leave you exposed for $4,000 in penalties and a companion attorney's fee of likely a similar amount.

Now that we have your attention let us go through what is needed…

Regardless of what your adjuster may ask for to allow them to calculate the claimant's Average Weekly Wage, it is in your best interest to supply **complete** information, even if it is not requested. The various requirements for information are as follows:

Full-time employee – (1) the employee's hourly wage at the time of the accident and (2) the employee's gross earnings for the four **full** weeks prior to the accident. The partial week in which the accident occurred is **not** considered. Further, **do not** supply two pay periods if your employees are paid every two weeks. Supplying two, two-week pay period numbers are not the same as the numbers arrived at from the claimant's four full weeks prior to the accident. You **must** always supply your adjuster with the employee's hourly wage. In Louisiana, full-time employees are subject to the "40-hour presumption." Employees are paid the **greater** of the hourly wage multiplied by 40 hours **or** the average of the gross earnings in the four full weeks prior to the accident. If you do not give your adjuster the claimant's hourly wage, they cannot correctly conduct these calculations. If, in those four full weeks, there is a week in which the claimant was unable to work because of situations outside of their control – plant closure, power failure, adverse weather, etc. – provide that information to your adjuster, as they may have to credit the employee for those hours.

PRN or "as needed" employee – Although not titled as a separate classification, it is common in the medical field, and it would seem to fit the definition under Louisiana Revised Statue 23:1021(12)(a)(ii). You will need to supply your adjuster the employee's gross earnings for the four, full weeks prior to the accident. Also, it would be a perfect

time to give your adjuster the part-time/PRN acknowledgment provided at the end of these materials.

Part-Time employee – The employee's gross earnings for the four, full weeks prior to the accident. Also, it would be a suitable time to provide your adjuster with the part-time acknowledgment/PRN recommended above.

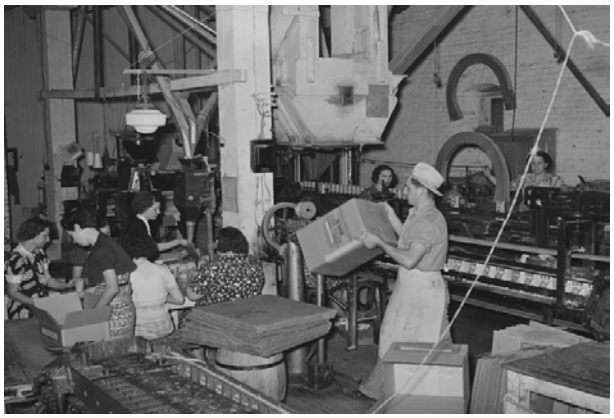
Monthly employee – The employee's monthly earnings should be supplied for calculation. The adjuster will adjust it to a weekly value.

Annual employee (salaried) – The employee's annual salary should be provided, and the adjuster will make the same adjustments to a weekly value.

Other (commission, piecemeal, etc.) employee – The employee's gross earnings for the 26 full weeks prior to the accident along with an accounting of the days actually worked during that period along with the average number of days worked per week during that same 26-week time period.

Rule in practice: It is not entirely unheard of for an employee with prior compensation claims to know the effect of having high earnings and the four, full weeks prior to the accident. So, you might want to consider supplying the adjuster twice the number of weeks as may be required. This will allow the adjuster to decide if there is a pattern in the wage records to show that the employee increased their hours on the eve of the accident. This may be very telling, and a sign of the claimant's credibility problems or prior planning of an accident, if there is no other explanation or justification of this sudden increase in earnings.

You **must** also provide to the adjuster any fringe benefits supplied to the employee. You must give the amount paid by you (in lieu of wages paid to the employee), and which are taxable to the employee. You must also inform the adjuster which of those fringe benefits are voluntary or which are mandated by the terms of the employment. Voluntary benefits are treated differently from those that are automatically included. Do not supply the amounts paid by the employee, as the applicable statute requires that the adjuster calculate the amount you paid (which otherwise would have been paid directly to the employee) into the Average Weekly Wage calculation. Also, supply the adjuster with the frequency of the benefit – paid monthly, paid annually, etc. If you are unsure what may be included, contact your adjuster. We often develop close relationships with the adjusters with whom we work, and they can reach



out to us for clarification if needed. Always feel free to reach out to us for clarification or if you have any questions.

Should the employee have been supplied any bonuses during the 26 weeks prior to the accident, you should also provide that information to the adjuster, and they can determine whether such bonuses need to be included in the Average Weekly Wage calculation.

Rule in practice: Almost inevitably, an injured employee will claim that his manager required him to work duties outside of his doctor's restrictions. You might want to consider having the claimant's supervisor acknowledge, in writing, the need to abide by the doctor's work restrictions. You might also want to provide the employee with a good contact number for the person to whom they are to report any attempt to require them to perform job duties outside oftheir restrictions by any person in a supervisory position. It will be harder for the claimant to argue they quit their position because they werebeing forced to work jobs outside of the doctor's restrictions if we can show that the employee did not avail themselves of the opportunity to complain to management of these actions.

Employment status information

You should also keep your adjuster apprised of any changes to the employee's employment status. If they leave your employment, that could affect their entitlement to certain indemnity benefits. Likewise, if they are terminated for cause, that could also restrict their entitlement to certain benefits. The information should be supplied immediately, as it would seriously impact whether the employee is entitled to benefits.

Handling the return to work

Finally, one of the forms of benefits paid to an injured employee is called Supplemental Earnings Benefits (also known as "SEB's"). This form of benefit reflects the claimant's loss of earning potential following their return to some level of work **ability**. As the adjuster will have to maintain reserves on the file properly, they will need to know the employee's ability to return to work with you to evaluate future SEB exposure properly.

For example, if you can accommodate the claimant's restrictions and take them back to work without any wage loss, there will be no SEB exposure. If you take them back with a reduced earning capacity, then SEB's may be owed, and the availability of the job will allow the adjuster to calculate SEB's correctly. If you cannot accommodate the work restrictions, then the adjuster can reserve the file to obtain vocational rehabilitation. The adjuster will recognize this will come with an attendant cost, and SEB's will have to be paid until a wage-earning capacity can be established. The adjuster will be able to

maintain proper reserves on a file for these various scenarios, but only if they are made aware early on of any changes to the claimant's employment with your company.

Rule in practice: Often, claimants will argue the job to which they were returned was not within their doctor's restrictions. It is best to supply the employee, where available, a job duty description upon their return to work. Most claimants do not understand that a heavy-duty job, a medium-duty job, a light-duty job or a sedentary duty job represent specific limitations.It is not uncommon for a claimant working in a job that would normally be described by the Department of Labor as a light-duty job, to complain that the job to which they were returned was not light duty. They oftentimes view "light duty," as lighter duty than that which they were performing before.

To avoid risk, you **must** instruct the employee's supervisors are made aware of the need to consider the claimant's work restrictions and restrictions of the job offered. For example, if you offer the employee a light-duty job, make sure the claimant and their supervisor know the claimant is only to perform job duties within those restrictions. This recommendation is intended **any** time your employee is returned to work with work restrictions, and an accommodation is to be made; the restrictions and the job to be made available should be provided to the employee in writing. However, this is less than the bona fide job offer mentioned to cover those situations where the claimant may return to work shortly after the accident. **Every accommodation you make for the employee should be documented and provided to the employee in writing.** It would benefit you now, and if you continue to employ the employee, it will benefit you with any future Second Injury Fund claim if that employee suffers an additional injury.

The Bona Fide Job Offer/Return to Work Letter

In almost every claim, there will come a time in which the employee will be able to return to work in some capacity following a period in which they were out of work due to their injury. If the employee is still employed by your company, you will be asked by the adjuster to submit a "bona fide job offer." This is a **much** more difficult task to conduct successfully than the name would imply. Simply telling the employee, "Come back to work, we'll figure it out," is essentially an invitation to pay a penalty. As discussed earlier, when an employee is returned to work in some capacity, their disability benefits are converted to Supplemental Earnings Benefits (SEB's). If you and the adjuster can establish a wage-earning capacity, that capacity can be used as a monthly credit (compared to the employee's pre-accident average monthly wage) to reduce your future SEB exposure. To

take that credit, you **must** supply support for the availability of a job within the claimant's restrictions and within a reasonable geographical area.

Should the employee still be employed by your company, **you can supply a bona fide job offer to take the employee back to work at a position that will accommodate their restrictions**. This is the preferred method, as the claimant can keep the benefits they have already accrued with your company, such as seniority, a supervisory position, etc.

At a time in which you are asked to extend a bona fide job offer to the employee, there are rigorous requirements that **must be met** for the bona fide job offer to have effect.

If **correctly** performed, you are allowed to take a credit for those wages which the job would have made available to the claimant if the employee does **not** accept the position offered by you. If you do not follow these recommended steps, the court may find your bona fide job offer insufficient and, if your adjuster has taken a credit based upon this flawed bona fide job offer, the improper reduction may entitle the claimant to a penalty along with any benefits they should have been paid.

At a **minimum**, the bona fide job offer/letter requires the following items. A sample bona fide job offer - the product of a survey of all the deficiencies found by the courts over the years - is attached to these materials, or you can incorporate these items into any form you prefer to utilize (contact us for a Word version if needed):

(1) Identification by name/title of the job to be provided to the employee;
(2) Either a separate formal job duty description outlining the physical requirements of the job, or a description of those exact requirements must be put into the body of the letter if there is no separate formal job duty description for the position offered;
(3) A description of the work schedule for this position, the expected hours to be made available, and the hourly wage to be paid. This is an **absolute** requirement. The amount of credit you may take for this job offer is determined by the earnings established in this letter. For example, if your job offer will make available to the claimant 40 hours at $10.00 per hour, you will later be able to take a $400.00 per week credit;
(4) Include a copy of the doctor's work restrictions or the Functional Capacity

Examination (FCE) results, upon which you are basing this bona fide job offer. It is not uncommon for the claimant to make the argument that they were not aware their doctor had returned them back to work, and that is why they ignored the offer; and

(5) A time limit by which the employee should accept the job, with it being clearly noted that you would consider the claimant's position with your company to be considered as voluntarily abandoned should the employee not return by a specific date provided in the letter. It is recommended that the date supplied be **no sooner** than two weeks from the date the letter is mailed. To prevent any misunderstanding, you should provide the specific date by which the claimant is to either return or communicate with you their intention to return. Should the claimant not return to work by that date or communicate with you to seek an extension, that is the date upon which you can consider the employee to have voluntarily resigned their position, and the adjuster can move to apply for the credit; and

(6) The name and contact information of the person to whom the employee is to complain if asked to work beyond their restriction. Experience has taught us that many claimants will later claim that they were directed to work outside of their restrictions and did not know to whom to complain or that their complaints were ignored – having a designated individual to whom the claimant was directed to complain will serve as a defense to the employee's story later.

(7) Their doctor's approval is nice, but it is not mandatory. However, the burden is on **you** to prove the job is appropriate under the doctor's restrictions.

To ensure that the letter was mailed and appropriately received, the letter should be sent by certified mail by the United States Post Office. Certified mail from the United States Post Office is always **required** as it allows for a tracking method accepted by the government. Make sure you also save the mailing and return certificates (the "green card)" and supply them to the adjuster. A copy of this letter should also be sent to your adjuster, your attorney, and the claimant's attorney. The letter to the claimant's attorney should also be sent by certified mail.

Rule in practice: For any communication to an injured employee for which you may later need to prove was received, certified mail should always be utilized.

Wages following return to work

The amount of the credit to be taken if the employee returns to work is based upon their post-accident monthly wages. The claimant must send to the insurance company an LWC-WC-1020 form monthly describing the wages they have earned. But it is not

uncommon to hear the argument that, as the employer would have the actual wage information, the adjuster should be able to obtain that information directly from you. In a situation where SEB's are being paid, you should collaborate with your adjuster to determine how you should be providing wage information to allow them to apply for any credit. Further, providing the adjuster with the wage information will enable them to decide whether the employee is being honest with the earnings they put on the LWC-WC-1020 form.

Post-return to work drug screen

Most companies do not know that Louisiana has a handy "post return to work" drug screen ability. Under Louisiana Revised Statute 23:1221(3)(g), if your company requires – in your written and promulgated substance abuse policy – those employees returning to work are required to take a drug screen, and the employee fails that drug screen and is unable to qualify for that position because of the failure, you do **not** owe Supplemental Earnings Benefits, but you will continue to owe reasonable and necessary medical benefits. The failure cannot consider prescription medications prescribed by a physician. Be sure to let your adjuster know of any such failed drug screen or of the employee's refusal to submit to that drug screen.

What to do with an injured employee that you keep?

It will come as a shock to many, but the Second Injury Fund reimbursement is available to employers who decide to keep employees who suffer an on-the-job accident or a non-work-related injury. The requirements addressed above remain the same, but an added requirement is imposed if the employer learns of the disabling condition after hire. In that situation, you will have to find an individual, or individuals, with "hire or fire authority" who learned of the condition prior to the subsequent accident, and that an accommodation was made for the employee for this disabling condition. The law will **require** that this individual with such authority and knowledge complete a separate affidavit for the application. This individual will have to have known of the condition before any later work-related accident and of the accommodation made

at the time of the subsequent accident, with the accommodation remaining in effect at the time of that subsequent injury. Also, the original disabling condition does **not** need to be work-related.

For example, let us say that you have an employee who has no disabling conditions at the time of hire. In time, this employee suffers a non-work-related automobile accident that results in a low back disc herniation. The condition is not surgical, and after a short run of physical therapy, the employee is released back to work with permanent lifting restrictions.

If you decide to keep that employee despite their injury, and based upon the doctor's recommendations, you impose restrictions that the employee is not to perform certain lifting activities. Those restrictions are provided to the employee, and they are documented and kept in their employee file. That employee continues to work for a while under those restrictions. And, as luck would have it, that employee suffers a work-related accident that worsens that specific disc herniation. Now, the condition is surgical. You can then apply for reimbursement under the Second Injury Fund despite having no knowledge of the disabling condition at the time of hire. You will be able to satisfy the knowledge requirement was acquired later (the affidavit of the employee with "hire and fire" authority) and the added requirement of a documented accommodation (in the employee file) prior to the accident. If it can be supported that the alleged accident merged with that earlier disability to create a greater disability, you will be able to apply for, and likely **receive**, reimbursement from the Second Injury Fund.

Now, think about what to do with an employee who suffers a work-related accident that you wish to keep. Some employers require a voluntary resignation after that employee settles their compensation claim. However, some employers do not require this resignation, or there are certain employees who are kept when they would have otherwise required a voluntary resignation. The Second Injury Fund covers these employees who are retained on the job as long as you can support that an individual with "hire and fire authority" who – (1) has a position that is integral to the business, (2) who worked closely with the employee and was familiar with their job duties and (3) who has significant input into the hiring, retention and firing decisions of employees such as the claimant. This employee will also need to be able to support that

they were aware of the disability and that an accommodation was made, and the accommodation was in place at the time of the later accident, if that employee later suffers an aggravation of their earlier work-related accident, you can apply for Second Injury Fund recovery. If performed correctly, the risk that an employee you decide to keep aggravates their previous work-related injury can be financially lessened, as you should be able to receive reimbursement from the Louisiana Second Injury Fund. The only risk is that any later injury may not allow you to satisfy all the requirements for reimbursement from the Fund. But, for employers who keep employees who settle their compensation claims, they **should make sure** that the necessary protections are put in place to allow them to seek Second Injury Fund reimbursement in those situations where it would be appropriate.

Termination for cause

In 99.9% of the claims where an employee with a compensation claim is terminated for cause, either the employee or their attorney will argue that the termination was simply a pretext to avoid the payment of benefits. In every situation where you have terminated for cause an employee who has an ongoing compensation claim, your handling of the termination will be put under extreme scrutiny. While it may seem attractive to fire someone who is asserting a compensation claim, terminating that employee simply because they have asserted a claim will always work to your disadvantage. Working within the system is your best defense to the headaches that go with a compensation claim; terminating an employee because they filed a compensation claim is perhaps the worst defense. However, an injured employee is still held to the **exact** requirements for conduct and attendance to which all other employees are held, and if their violation would result in an injured employee being terminated, then an injured employee should suffer the same repercussions. It often comes as a shock to many injured employees who see a compensation claim as a shield from being terminated because of their actions.

At the time of the preparation of this presentation, there is an ongoing dispute among the trial court/courts of appeal as to whether an employee terminated "for cause" is entitled to Supplemental Earnings Benefits (SEB's). That ongoing legal dispute is beyond the scope of this presentation, but we can say with certainty that the fight is far from over.

The proper handling of a termination for cause that may affect the compensation claim of an employee is of the utmost importance and well within the bounds of our

discussion. However, if you are going to argue that your employee was terminated for cause, and that termination should serve as a bar to any Supplemental Earnings Benefits (SEB's), then you **need to document in detail** the basis for your termination. It should be well documented, and all the incidents and issues that form the basis for the termination should be described and recorded in detail.

Further, if your termination is based upon a violation of some policy within your company, that policy should have been written and notice previously given to the employee of that policy. Terminating an employee for breach of a rule, of which the employee was not aware, or will claim not to be aware, will almost certainly appear to the court to have been your targeting of an employee who asserted their rights to compensation. In addition, a termination for cause, while usually a bar to Supplemental Earnings Benefits (SEB's), courts are rarely willing to accept your word alone. One method of supporting your position at your disposal is to dispute your claimant's attempt to obtain unemployment benefits from the State. Your ex-employee may file a claim with the Louisiana Workforce Commission seeking unemployment benefits. While this presentation is not intended to provide a detailed description as to how to handle such disputes for unemployment benefits, if you have an employee who was terminated for cause while receiving compensation benefits, it is crucial that you take the opportunity to defend your position in any later claims by the employee for unemployment benefits at the hearing and/or appeal process under Louisiana Revised Statute 23:1625.1. When you receive documentation to aid the administrator in the determination of the unemployment claim, you need to provide all requested information and complete all forms timely.

Rule in Practice: It is quite common for an employee terminated for cause for inappropriate conduct or attendance issues to claim that he was targeted for termination, because he had asserted his right to compensation. To later support that the termination was proper and made with good cause, you should take every opportunity to document each, and every, incident that contributed to the decision to terminate that individual. Each incident should be documented in writing and saved in their file. Nothing is more frustrating thanhearing that an employee was terminated for cause, because of a bad attitude, with the employer later not having any support for this position or having only vague claims to justify their actions.

If you do not provide this information in compliance with the notice you receive, the administrator will accept that you have **waived** your appeal rights, and the decision as to whether the employee is entitled to unemployment benefits will essentially be based upon the employee's version of events. In that situation, while we may be arguing to the compensation trial court that the claimant was terminated for cause, the claimant may

have a designation by the Louisiana Workforce Commission that the termination was not for cause. The claimant will likely argue at trial that the termination for cause was not genuine, citing the lack of effort on your part to fight their claim for unemployment benefits. The determination by the administrator is not binding upon the judge in a compensation matter, but it may well prove persuasive when read in conjunction with other facts in your case.

Communicating with the injured employee

When a matter becomes litigated, the parties will engage in discovery. Any communication between yourself and the adjuster, where your attorney is not a party to such communication and any privileges are not otherwise waived, such communication will be discoverable, and any negative comment on the claimant or the Louisiana Worker's Compensation system will become known to opposing counsel. You can almost certainly accept that any negative commentary will find its way to the judge. While it may not have any direct relevance on the employee's claim, we have seen such correspondence used to support the argument that the termination of the employee was simply a sham to get rid of an employee who is asserting their compensation rights, that the actions of the insured and/or adjuster were arbitrary and capricious in a claim for penalties and simply to color the judge's views about the employer, etc. Further, if you vent your frustrations about the employee to the adjuster in writing, it may **negatively** impact any good working relationship you had with the employee.

While we certainly respect you may be annoyed with the system, do not leave a paper trail where those frustrations are given voice.

Working with your adjuster and attorney

In every claim, you should take an **active** interest. Your adjuster and attorney should take the opportunity to involve you in the decision-making process. You should receive the initial review of the file from your attorney, and they will be required to provide you

periodic updates with recommendations for future handling. If you do not receive it, you need to **demand** it. If you have a question or suggestion, reach out to your adjuster or attorney, and they will help answer your questions and allay any concerns. If you learn anything of use about your claim, such as learning about activities the claimant is engaged in that may not match what they are telling their physicians, provide that information to your attorney as quickly as possible.

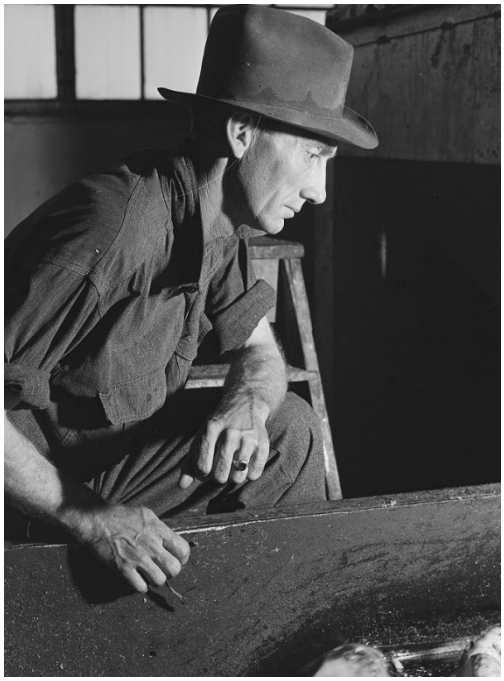
Your responsiveness to questions or inquiries posed by your attorney should be given no less attention than that which you gave to the queries of the adjuster. Depending upon the facts, time may be an issue. For example, there are specific delays for our answering certain forms of written discovery, and information which we need may only be available from you.

Ultimately, there will come the point in a claim where we will advise you of the trial or that the matter has reached a point where settlement may be an option. If you have apprised of the state of the claim, you will be able to take part and provide whatever is needed in a timely fashion.

CHAPTER FIVE
The Litigation Process

You have been sued

The form that is used to file a workers' compensation lawsuit in Louisiana is technically known as the LWC-WC-1008 Disputed Claim for Compensation. Colloquially you may hear it referred to as the "1008" ("ten-oh-eight") or the "disputed claim." Make **no** mistake, this is a lawsuit in every sense of the word, and from the moment that you receive a copy, you have been put on notice, and there are severe time delays in which you must respond to the lawsuit. Technically speaking, every business entity operating in Louisiana will designate an "agent for service of process." Any lawsuit filed must be served on this agent. For a variety of reasons, it is, unfortunately, very common for the lawsuit to be served on one of your local facilities rather than your designated agent for service. While service on someone other than the agent for service of process is technically incorrect, courts are somewhat lenient with regards to service being made in strict compliance with the law. Service upon a local facility, even when there is a separately designated agent, may satisfy service in the eyes of many of the courts.



This means that whoever receives the lawsuit **must** be unaware of its purpose and that there are delays already running about our ability to answer the suit timely.

The lawsuit will come with a document – a redacted copy is attached at the end of these materials – with the word "**CITATION**" written across the top. The caption naming the specific parties and the docket number will follow before the name of the entity to whom this citation is directed is given. This will be followed by the phrase "**YOU HAVE BEEN SUED**." The rest of the citation will generally discuss the deadlines, and to whom the answer must be filed. As this may be served on persons at your local offices or facilities, your employees who may receive such citations **must** be trained in how to manage them. It is not uncommon for these citations to be provided to someone in

Human Resources who mistakenly believes that it also found its way to the appropriate parties. As any responsive pleading must be filed within a very specific period of time from the service of the citation, your company could find itself in a world of trouble, if the employee who receives it simply puts it in a file or in a stack of papers for them to handle later. These employees who may receive these citations should be instructed that they should **stop** whatever they are doing when handed a citation with a clear designation for who the citation should be supplied if received.

Nevertheless, the second page of the citation will be entitled "LOUISIANA WORKFORCE COMMISSION Workers Compensation Claim/Petition Answer." This page will present a series of 12 questions and a space for any affirmative defenses that operate as your Answer to the lawsuit of the claimant. **Under no circumstances should this form ever be completed by anyone other than your designated attorney.** Certain defenses can be lost if they are not raised in a proper manner before, or with, the filing of the Answer by your attorney. In addition, the questions are written in a basic fashion, but the words that are used have separate and critical, legal meanings making it impossible to choose between the form's "Admit / Deny" options for responding. **Again, this Answer form should never, ever be used.** Only your designated attorney should ever answer a suit or complete this form.

Once you have been sued, the litigation process has begun. While a workers' compensation proceeding may be different from a liability suit, the process is essentially the same and should not be given any less respect on your part. Below is a very rough description of the process, but it serves as a general outline of what to expect as we defend your claim.

The Disputed Claim for Compensation

In this pleading, the claimant, alternatively referred to as the plaintiff, lists out the basic facts of the claim to support why they are entitled to workers' compensation benefits. This pleading will also list the specific items in dispute. Examples include that medical benefits have not been paid or that the Average Weekly Wage was miscalculated. Within the deadlines set by the court, the claimant may add more items by amending their claim.

The Answer and responsive pleadings

Your attorney will then prepare an Answer in which our defenses to the claim are pled. Should the Disputed Claim for Compensation have certain flaws, your attorney may file an exception prior to, or with, the Answer. These exceptions are usually resolved well in advance of the claim itself, and on occasion, it may see the suit be dismissed entirely. Once the Answer is filed, the litigation is joined, and the discovery process can begin. We are likewise allowed to amend our Answer to add new defenses that may arise.

The discovery process

The discovery process is where the parties learn as much as possible about each other's case/claim. Written questions will be exchanged, known as interrogatories. Requests for documents will be made in the aptly named requests for production of documents. Depositions will be scheduled where we will question the claimant, and we will depose any doctors or witnesses whose testimony we believe will support our defense(s). On occasion, the claimant may seek to depose the adjuster, a company representative, or conduct a deposition of your company itself known as a "corporate deposition" or a "1442 deposition" after the Code of Civil Procedure that allows for such a deposition. Your attorney will prepare whichever of your personnel may be deposed or who may have to appear at the corporate deposition.

We will also use subpoena power - only granted once the matter is litigation - to obtain the claimant's medical records and, if necessary, records of their past employers or claims files from prior accidents. Our goal through discovery will be to poke holes in the claims of the claimant and to bolster our own defenses.

The discovery can take months, but our time to conduct discovery is not unlimited. The court will set a discovery cut-off, so our goal is to progress with discovery quickly to allow us to identify our defense sooner as possible and uncover new avenues to be explored as further information is discovered.

At each part of the process, your attorney will keep you advised of how the matter progresses and how our overall defense and strategy may have changed. **Always** feel free to make suggestions or ask questions of your attorney. You will feel more comfortable in your decisions when you know more about the processes involved.

Pre-trial Mediation

As part of the administrative process, the parties will be required to submit to a court-mandated pre-trial mediation with the court's mediator approximately 30 days prior to the trial date to try to resolve the matter. Nothing prevents the parties from hiring a third-party mediator who may be able to help bring the parties to a conclusion, and these mediators tend to be more successful.

Proceeding to trial

Usually, within nine months to a year, your case will go ahead to trial, assuming it has not been settled earlier. While this may seem like a lot of time, discovery never moves as quickly as we would hope, and it is not uncommon to be conducting discovery right up to the eve of trial if the courts allow it. Your attorney will give you and the adjuster an evaluation in advance of your chances of success.

CHAPTER SIX
Methods of Resolving your Claim

Settlement

There may come a time at which settlement of the claim becomes a possibility. In fact, most claims are ultimately resolved by way of settlement. On occasion, the attorneys may be able to resolve the matter among themselves, and when the claim is perhaps beyond their individual abilities, they may require the services of a mediator. Regardless of how the process of resolution occurs, **you must always take an interest in the resolution of the claim.** In most claims settled, we are ultimately dealing with your money. As with every recommendation supplied above, you need to be a contributing member of this conversation regarding the settlement. This is **not** the opportunity to hand everything off to your adjuster and expect them to manage everything on their own to your ultimate satisfaction.

Most attorneys resolving claims will tell you that one of the most difficult struggles to overcome is obtaining settlement authority from the insured employer. Either the employer has not been following the claim, and the potential exposure being resolved may come as a shock, or the employer has no interest in involving themselves in the process. Once again, the "that is the adjuster's job" mindset comes back to haunt us. Since no agreement to settle a claim fully and finally in Louisiana is binding upon the parties until it is approved by the court, the opportunity for the settlement to fall apart because of delay is always a concern. When your attorney or adjuster approaches you about a settlement, you should already **be prepared to enter a discussion regarding settlement authority.** The time delay in bringing you up to speed, if you are not already familiar with the claim, may be enough for the employee to change their mind about a settlement.

Prompt attention to the settlement authority request is always recommended. Moreover, **a full and final settlement in Louisiana, which is one that concludes the**

matter must have your written approval, even if you no longer have a financial stake in the claim, or it is a claim in which you have provided the insurer an amount with which they can settle without your pre-approval, occasionally known as "desktop authority." This requirement is **absolute** and **non-negotiable**. The court will **not** execute settlement documents that do not include an affidavit documenting your approval.

The Trial process

If a claim cannot be settled or defeated through other means, the matter will continue to trial. Your appearance at trial may be necessary, and it is **always** encouraged. We believe that it creates a good impression on the judge if the employer takes an interest in the claim and is willing to take time out of their busy schedule to appear at trial. Your judge may give more weight to our defenses if they see that you are eager to appear at trial to defend your actions, as opposed to simply leaving your attorney to do it.

As mentioned by one judge at a conference in which we presented this presentation, that judge takes notice when the employer makes a funny face, rolls their eyes, smirks, or makes some derisive comment during the testimony of the claimant or during the court's ruling. We suspect that you are going to be highly frustrated with the testimony of the employee, and you may well be unhappy with the ruling(s) of the court, but please **always** appear respectful and deferential to the court. As a separate judge mentioned, the case may well come down to a comparison between the impression that you made on the court and the impression of the employee. Since it is likely that the employee's counsel is not supplying their client the same advice, please ensure that you appear respectful at **all** times before the court. If these actions are going to be the determining factor in your case, let us make sure that it works in our favor.

On occasion, before trial, obviously, you may have your deposition taken, or you may have to testify at trial. Well, in advance, your attorney will make sure that you are properly prepared and ready for your appearance.

After the judge issues the judgment, we will then advise you on the best recommendations for going forward. As there are certain delays that come into play following the issuance of a judgment, if we are not successful, you need to ensure that

you give **priority** to any requests presented to you by the attorney regarding whether you wish to pay the judgment or seek an appeal. Our time delays are limited, and the penalties, should we not meet these delays, can be high, including the loss of our ability to appeal.

CHAPTER SEVEN
Conclusion and Parting Thoughts

These suggestions are based upon our experience handling these matters directly, discussing similar issues with attorneys in my firm, or in conducting legal research. We also took the opportunity to speak with adjusters to learn about their frustrations and poll them for valuable recommendations. Finally, we have dealt with employers for decades, and we have taken their frustrations and tried to craft some advice for how to ease their anxieties, fears, and concerns with regards to the workers' compensation process. These suggestions were not drafted in a vacuum, and they can be said to be based on actual, real-world experience.

While these rules cover a large amount of territory, they should not be considered a comprehensive list of all the things that you need to do to ensure the best result for your employee and company. Situations not covered by these materials may be arising at this very moment, and we can only hope that these suggestions provide you with some direction on how to approach them. It is always recommended that you properly document your file, avoid the need to express your irritation with the system and work **with** your adjuster, your attorney, your employee, and your employee's attorney.

Should you have any questions about anything provided in these materials, please let us know. These materials will be updated as soon as new solutions are found to new and old problems. If there is a particular recommendation **you** believe should be included that will benefit **everyone**, we are more than happy to include it. This is prepared as a tool that will benefit all and not a select few. Should you need more in-depth help, we are ready to perform on-site training or training via video teleconferencing.

Finally, should you have any questions about Louisiana Workers' Compensation in general, feel free to reach out to us, and we will be more than happy to provide you with an answer and assist you with resolving your problems. To prevent any potential conflict of interest issues until cleared, we ask that you do not give the name of the

claimant/employee, your company, or your carrier/third-party administrator. If we already handle your work, then you need only withhold the name of the individual claimant/employee.

Finally, if you do not already have a preference for your workers' compensation firm, you are always free to contact directly; please call the mainline and ask for a workers' compensation attorney.

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Questions regarding these materials, to offer your own suggestions or to schedule a private training session may be directed to patrickjohnson@parkerlandry.com.