

WISCONSIN



DWD

Fall 2023 Legal Update

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Division of Worker's Compensation

Administrative Rule Update

- The permanent rule covering the calculation of wage for part-time employees (CR 22-072) became effective on June 1, 2023. (Prior to this, Emergency Rule 2212 had been in effect.)
- This allows us to administer the new laws from the WC Agreed Upon Bill for 2022. 2021 Wis. Act 232 became effective on April 10, 2022.
 - Wage expansion for part-time employees is limited to part-time employees who are employed by another employer or who have been employed part-time less than 12 months before the injury. (Repeal of s. 102.11 (1) (am) and (f) 1. and creation of s. 102.11 (1) (ap))



Administrative Rule Update (cont.)

- New calculation: For injuries on or after April 10, 2022, AWW for part-time is to be greater of 1. actual average weekly earnings for 52 calendar weeks before injury or 2. hourly earnings on DOI multiplied by average number of HOURS worked in 52 weeks prior to injury. Weeks with no work not considered.
- Updated ss. DWD 80.02, 80.49, and 80.51
 - DWD 80.02 (2) (dm) In addition to self restriction statement ([WKC-12698](#)) may also provide an employment application indicating an hour or shift preference, or other evidence to show the employee chose to work less than full-time.



Direction of Care

§102.42(2) CHOICE OF PRACTITIONER IS specific and straightforward:

- The injured worker has the right to choose their treating provider.
- A referral from the treating provider counts the same as the first choice of doctor.
- Directing an employee to a specific practitioner may count as an examination directed by an employer or WC insurer under s. 102.13 (1), Wis. Stats.



Direction of Care (cont.)

- An injured employee has the right to select treatment from any physician, chiropractor, psychologist, dentist, physician assistant, advance practice nurse prescriber, or podiatrist who is licensed in and practicing in Wisconsin.
- In case of an emergency, an employer has the right to select an employee's treating practitioner. After the emergency has passed, the employee may choose the treating practitioner at the earliest opportunity.



Independent Contractors

- The distinction between employees and independent contractors is very important, especially with the growth of companies like DoorDash, Uber, Lyft, and InstaCart.
- Section 102.07(8) of the Act sets out the nine-point test to distinguish if an individual is an employee – covered by the WC Act – or an independent contractor.
- To be considered an independent contractor, and therefore not covered by the WC Act, all nine points must be met.



Independent Contractors (cont.)

Independent contractors must:

1. Maintain a separate business, **and**;
2. Either have a FEIN* from the IRS **or** have filed federal business or self-employment tax returns for work in the previous year, **and**;
3. Operate under specific contracts, **and**;
4. Be responsible for operating expenses under those contracts, **and**;

* This must be a FEIN, not a Social Security Number.



Independent Contractors (cont.)

5. Be responsible for satisfactory performance of the work under the contracts, **and**;
6. Be paid per contract, per job, by commission, or by competitive bid, **and**;
7. Be subject to profit or loss in performing the work under the contract, **and**;
8. Have recurring business liabilities and obligations, **and**;
9. Be in a position to succeed or fail if business expense exceeds income.



Other Topics



Essential Elements of a Denial Letter

1. Full claim denial vs. denial as of specific date
2. Basis for Denial
 - a. Factual
 - b. Failure to follow recommended treatment
 - c. Opinion of IME doctor
3. Appeal Rights
 - DWD WC Division contact information
PO Box 7901, Madison, WI 53717
Phone: 608-266-1304



Questions?

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Important Contact Information

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