

Workers Compensation



Where everything checks out.

Created in 1914, the New York Workers' Compensation Law (WCL) ensures that in exchange for guaranteed medical coverage and compensation for lost earnings, employees cannot sue their employers in the event of an on-the-job injury. Essentially, New York's workers' compensation laws provide a system of insurance to the employee, at the employer's expense, for job-related injuries, including disability and death.

Under the workers' compensation system, the worker receives "coverage" for medical expenses and lost wages regardless of fault. In return, the employer is shielded from civil tort liability for injuries that occur on the job. This reduces the employer's exposure to costly lawsuits and provides benefits to injured workers. In this way, workers' compensation laws protect the interests of both employees and employers.

This chapter outlines the New York Workers' Compensation Law. The following are the relevant key players in the workers' compensation space:

- **Workers' Compensation Board.** The Workers' Compensation Board (the "Board") administers the programs and laws of New York State and is responsible for the adjudication of claims and for ensuring that employers provide the required coverage to employees.
- **State Insurance Department.** Directly responsible for authorizing insurance carriers to write New York State workers' compensation insurance policies and for administering the underwriting rules for workers' compensation insurance.
- **Compensation Insurance Rating Board.** Authorized to collect data and develop workers' compensation rates. The Compensation Insurance Rating Board (CIRB) analyzes the data and recommends annual reductions or increases in premium rates to the State Insurance Department.
- **Insurance Carriers.** Provide the coverage to employees for workers' compensation benefits. Employers may satisfy their insurance obligation by: (a) utilizing a private insurance carrier that is authorized by the State Insurance Department to provide workers' compensation coverage; (b) utilizing the State Insurance Fund (SIF), which was created by the WCL in 1914 to provide a guaranteed source of workers' compensation insurance coverage at the lowest possible cost to employers; and (c) qualifying as a self-insurer authorized by the chair of the Board as an individual self-insurer, a member of a self-insured group or a local government entity that has not obtained a workers' compensation insurance policy.

COVERAGE

Nearly all employers in New York State are required to provide workers' compensation coverage for their employees. An employer may be any person, corporation (including municipal corporations), association or partnership or a legal representative of a deceased employer. Employers with one employee or more must comply with the WCL's requirements. If there is an allegation that there are two or more potential employers of an employee at the time of an injury, which employer is responsible for the payment of benefits becomes a question of fact for the Board to resolve.

Under the WCL, “employee” is defined broadly and generally includes most individuals providing services for a for-profit business. The term “employee” generally includes day labor, leased employees, borrowed employees, part-time employees, unpaid volunteers (including family members) and most subcontractors. Notably, individuals who volunteer their services for a nonprofit organization and receive no compensation are not considered employees under the WCL.

Many factors are used to decide whether there is an employee-employer relationship under the WCL. Factors that are considered to determine whether an individual is an employee under the WCL and, thus, must be provided with worker's compensation insurance coverage include:

- the degree of direction and control the business exercises over the individual,
- whether the work being done is consistent with the primary work performed by the business,
- the method of paying the individual,
- whether the business provides equipment and/or materials, and
- whether the business retains the right to hire and fire the individual performing the work.

The WCL does not require an employer to provide workers' compensation for independent contractors.

Determining whether an individual is an independent contractor, or an employee is a fact-intensive process determined by a workers' compensation judge at a hearing following a work-related accident or illness. Generally, however, in order to be considered an independent

contractor and not an employee covered under the WCL, the individual must meet and maintain the following conditions:

- obtain a federal employer identification number from the Internal Revenue Service or have filed business or self-employment income tax returns
- maintain a separate business establishment from the hiring business
- perform work that is different than the primary work of the hiring business and perform work for other businesses
- operate under a specific contract, be responsible for satisfactory performance of work and subject to profit or loss in performing the specific work under such contract and be in a position to succeed or fail if the business's expenses exceed income
- obtain a liability insurance policy under its own legal business name and EIN
- have recurring business liabilities and obligations
- advertise its services or publicize itself and not another entity
- provide all equipment and materials necessary to fulfill the contract
- control the time and manner in which the work is to be done
- work under his or her own operating permit, contract or authority.

Whether some or all of these factors exist in any given situation is not controlling. The primary determinants are control over the work to be completed and the manner in which it is to be performed.

The existence of the right to control is significant, irrespective of whether that right to control is actually exercised.

Categories of workers for which employers are not required to provide workers' compensation include, but are not limited to:

- independent contractors
- clergy and members of religious orders performing religious duties
- teachers in a nonprofit religious, charitable or educational institution

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- members of supervised amateur athletic activities operated on a nonprofit basis, unless the employer participates in the athletic activity
 - people engaged in a nonmanual capacity in or for a nonprofit religious, charitable or educational institution
 - persons doing yard work or casual chores in and about a one-family, owner-occupied home (casual means irregular in this context; any casual worker with recurring employment would be eligible for workers' compensation benefits)
 - certain real estate salespersons
 - certain media sales representatives
 - certain insurance agents
 - domestic workers working less than 40 hours per week
 - farm workers who earned less than \$1,200 from their employer during the previous calendar year and farm workers who are the spouse or minor children of the farmer employer
 - sole proprietors, partners and certain one/two-person corporate officers with no other persons providing services integral to the business.

Whether a particular individual is covered or not under the WCL can be a complex determination. The WCL should be read very closely and legal counsel should be consulted before an employer decides not to provide workers' compensation benefits on the theory that the claimant is not covered by the law.

EMPLOYER RESPONSIBILITIES

Covered employers must ensure that their employees' workers' compensation claims will be paid at no expense to the employee. An employer satisfies this responsibility by obtaining workers' compensation coverage insurance, which may be obtained in one of the following ways.

Private Workers' Compensation Insurance

The employer pays the premiums to a licensed insurance carrier and the insurance company pays the employees' claims.

Self-insurance

The employer pays the employees' claims. The employer must secure the chair of the Board's approval to self-insure, individually or as a group. Among other things, the employer must demonstrate that it has the financial ability to pay any claims that may arise.

State Insurance Fund

The employer pays the premiums to and receives coverage through the State Insurance Fund (SIF). This is usually a last resort for employers who cannot get coverage elsewhere.

Regardless of which method the employer chooses, it is required by law to post, in a prominent and easily accessible place, at its primary place of business and at its sites of employment, a notice containing the name, address and telephone number of the appropriate party to address regarding workers' compensation claims or to request information. The required posting is often provided by the employer's insurance carrier. The Board also has a poster that is available on its website.

There are strict notice reporting and recordkeeping requirements that must be adhered to. For instance, an injured employee is required to file written notice of injury with the employer. Once the employer has been notified of an injury, the employer must file a formal notice of the injury (Form C-2F) with the Board within 10 days and provide this notice to the insurance carrier. As soon as possible after an employee is injured, the employer must also provide the worker with a Claimant Information Packet, available on the Board's website, and note on the C-2F form that the packet was given to the worker. The employer must also report any changes in an injured worker's pay or work status to the Board (Form C-11). Employers must also post a notice of compliance with the WCL (Form C-105) in a conspicuous place at the employer's place of business and it must include the name, address and phone number of the insurer and the policy number of the employer.

The employer must keep accurate payroll records of the number of employees, classifications, wages and accidents for their business for four years. An employer must also permanently keep

injury records for all reported injuries and comply with all requests for such information from the Board or the insurance carrier.

Employers who fail to abide by the WCL's notice reporting and recordkeeping requirements could face penalties ranging from monetary fines to criminal sanctions. The sole proprietor, partners or the president, secretary and treasurer of a corporation are personally liable for a business's failure to secure workers' compensation insurance.

INTRODUCTION TO PREMIUMS

The premium rate charged in New York for workers' compensation coverage is regulated by the New York State Insurance Department. The Board has the legal authority to require employers to provide coverage and can penalize those that do not. The Board does not, however, provide any insurance, pay claims, set rates or oversee the insurance carriers. Rather, when employers buy workers' compensation insurance, the insurance carrier is assuming the employer's statutory obligation to pay medical, indemnity and death benefits under the WCL. The workers' compensation premiums the insurance carriers charge reflect the employer's potential liability for claims based on many considerations. The most significant considerations include:

- the classification(s) assigned to the employer
- the insurance company offering the coverage
- the amount of payroll generated by the employer
- the past loss experience of the employer.

Employers are placed into a classification(s) with other similar types of businesses. The grouping of similar types of businesses attempts to ensure that the cost of the workers' compensation system is fairly distributed among employers. Each employer is assigned to a classification(s), which most accurately represents the nature of its business. In New York, there are over 500 different classifications that are used in workers' compensation insurance, each carrying a different "loss cost" for determining workers' compensation premiums. Without classifications, employers would be required to pay a single, average rate regardless of their true loss potential. Workers' compensation rates vary, sometimes significantly, by the classification.

Loss costs are the actual claim expenses (compensation and medical), for workers' compensation coverage, which are established by the New York Insurance Department and based on recommendations provided by the Compensation Insurance Rating Board (CIRB). The CIRB collects and aggregates industry data and submits the loss costs. Rates, which are subject

to the Insurance Department's approval, are determined by the CIRB using insurance carrier-specific loss cost multipliers that are filed by each carrier and reflect each carrier's individual underwriting skill and expense structure. Each of the over 500 classifications represented in New York is assigned its own loss cost based upon the contribution to total workers' compensation costs. The loss cost is based upon the average loss experience of all the members of the class taken as a whole, meaning the likelihood of injuries in that industry, not the accident history of the individual company.

Each carrier's rate is assigned a carrier's minimum premium, which is the lowest premium that an insurance company may accept to provide the workers' compensation insurance.

Insurance carriers will pass on workers' compensation assessments to employers by a surcharge on their annual premiums. These assessments include the Board's administrative costs and the costs of special programs that are paid by insurance carriers and self-insured employers. When an insurance company writes a policy for an employer, the classification rate and assessment are all used to calculate the premium. The premium is also based in part on payroll that is estimated at the beginning of the policy year and the premium could be more or less, depending on the actual payroll at the end of the policy year.

The CIRB develops experience-modification factors for employers who have annual premiums of \$5,000 or more. An experience modification factor adjusts an employer's premium to reflect the difference between the employer's loss experience and the average experience that is expected for its classification(s) and size. Therefore, if an employer has a better experience than is expected for an average employer in the same industry with similar payroll, the employer receives a premium credit. Conversely, if the employer's experience is worse than the comparable average, the employer receives a premium debit.

TYPES OF INJURIES THAT ARE COVERED

Any "injury" to an employee arising in the course of and related to employment is compensable. No technical definition of injury applies, and dictionary or common speech definition is adequate. An injury does not have to arise from an accident and can also encompass an illness or a disease. Thus, persons exposed through work to a serious risk of contracting a contagious disease have been injured for purposes of receiving compensation. Nor does an injury have to be pinpointed to a specific event or definable incident to be held to arise out of employment when there is a causal connection between the conditions required by the work and the resulting injury. Coverage begins on the date of hire.

Although the WCL does not define injury, it does distinguish between minor injuries and other injuries. An injury is minor if it requires two or fewer treatments by a person rendering first aid and with lost time of less than one day beyond the end of the working shift on which the accident occurred. In these situations, employers may choose to pay for the first aid treatment directly, and complete a report (Form C-2F) and maintain it in the file instead of sending it to the Board or the insurance carrier. All other injuries not fitting the criteria of a minor injury must be reported to the Board and the insurance carrier.

WHEN BENEFITS WILL NOT BE PAID

In certain cases when an employee is injured while on the job, an employer will not be responsible for payment of workers' compensation benefits. The following provide some examples of such instances:

- **Use of drugs and alcohol.** An employer is not responsible for workers' compensation benefits if an employee is impaired due to the illegal use of drugs. An injury or death caused by intoxication also may not be covered.
- **Self-inflicted injury.** No compensation is payable when an injury or death is intentionally self-inflicted.
- **Prior disability ratings.** Reduces any compensation for permanent disability by the percentage of the prior disability, so long as the same body part is affected, the employee was collecting compensation for the prior disability and compensation for the prior disability occurs at the same time as compensation is sought for the permanent disability.
- **Pre-existing injury.** An employer is not responsible for the aggravation of a pre-existing injury, except to the extent the on-the-job injury caused increased disability.

Employers are responsible for all medical treatment received for injuries sustained while the employee was on the job, even if there is no wage loss. This includes, among other things, surgical and medical services, services rendered by duly licensed practitioners, medicine and supplies, orthopedic appliances and prostheses. An employer who refuses to pay an employee's legitimate medical bills is subject to penalties for nonpayment.

There are several categories of wage loss benefits that an employee or the employee's survivors, may receive under the WCL. These wage loss benefits are termed "indemnity" benefits by most insurance carriers and will fall into **one or more** of the following categories:

- temporary partial disability
- temporary total disability
- permanent partial disability
- permanent total disability.

The amount of each of these payments is directly related to the amount the employee earned, or related to that person's earning capacity, at the time of the injury. This amount is referred to as the "average weekly wage." The amount paid is also related to the medical status of the claimant. The following general categorizations will apply, and the benefits will vary depending on the categorization.

- **Total disability.** This benefit is paid when the employee is either totally impaired from performing any and all occupations or is unable to perform the job held at the time of the injury. When an employee proves the inability to do the same type of work as at the time of the injury, the employer has the burden to prove that other work is available for which the employee is physically and vocationally fit.

An employee who is determined to be totally disabled, either permanently or temporarily, is eligible to receive two-thirds of the employee's average weekly wages, not to exceed the state average weekly maximum for the year of injury. The Commissioner of Labor determines the average weekly wage and notifies the Superintendent by March 31 of each year. The newly calculated weekly average applies to injuries occurring in the year beginning July 1. The benefit rate a claimant receives (determined by the date of injury) does not increase if new maximum benefits are adopted into law. There is a seven-day waiting period before benefits are paid, but if the disability continues for 14 days, then the employee is reimbursed for the waiting period as well.

- **Partial disability.** This benefit is paid when the employee returns to any employment at a wage less than the wage at the time of the injury and is paid until the wage loss no longer exists or until the benefit maximum is reached. An employee who is determined to be partially disabled is eligible to receive

two-thirds of the difference between the individual's average weekly wage before the injury and the employee's wage after the injury.

- **Death benefits.** If the worker dies from a compensable injury, the surviving spouse and/or minor children and, if no children, other dependents as defined by law, are entitled to weekly cash benefits. The amount is equal to two-thirds of the deceased worker's average weekly wage for the year before the accident. The weekly compensation may not exceed the weekly maximum, despite the number of dependents.
- **Disfigurement or specific loss benefits.** Compensation is payable for complete loss (amputation) or permanent loss of use of a part of the body, complete hearing loss in one or both ears, loss of vision in one or both eyes and disfigurement. Benefits are payable for the number of weeks specified in the law for each type of loss and the employee receives this benefit even if they return to work.

WHEN TO PAY WAGE LOSS BENEFITS

Employees must be disabled more than seven calendar days (including weekends) before workers' compensation payments are payable. Benefits for time lost from work are payable on the 14th day after injury, but no later than the 18th day. Thereafter, payments are made on a bi-weekly basis (although the Board may change the timing of payments to monthly or any other appropriate basis depending upon the circumstances of the case). Once an employee has been off work for 15 days or more (which need not be consecutive), the insurance company must pay retroactive payment for the first seven days. If the employee has been disabled for 14 days or less, there is no wage replacement required for the first seven days. In this case, the employer is only required to replace wages for the eighth up to the 14th day of disability.

If the employee reports the injury promptly, misses more than seven days of work and the claim is accepted by the insurance carrier, the injured employee should receive the first compensation check no later than 18 days after the first absence from work. After that, the employee will receive a check on a regular basis. The employer must notify the Board immediately of any change in the employee's status or return to work (Form C-11).

If the employer receives late notice of the disability from the employee, the employer has up to 10 days from the date of the late notice to make the first payment. The failure to make timely, voluntary payments, unless excused by the Board, subjects the employer or its insurance carrier to a penalty of 10% of the overdue amount of compensation. Late payment penalties are

mandatory and automatic. Compensation must be paid on the same periodic installment basis as the employee's wages were paid before the injury.

STOPPING WAGE LOSS BENEFITS

Wage loss benefits can be stopped by an employer/insurer who has evidence that the employee has returned to work at wages equal to or more than the earnings level prior to the injury and after providing a timely notice of that fact. In addition, if an employee is receiving temporary compensation benefits, the insurance carrier/employer may notify the employee that it is stopping benefits because it is not accepting the claim of a work-related injury. In addition, a Board judge may stop benefits after a hearing.

An employee may not suffer a loss of benefits or nonpayment because the employer, an insurance carrier or another party disagrees about who is liable to make the payments of compensation benefits. If any controversy arises as to who should be paying the employee, but there is no dispute that the employee is entitled to payment, the Board may direct that payment be made by any one or all of those potentially liable to pay. After the controversy is resolved, contribution or reimbursement, where appropriate, will be awarded by the Board.

HANDLING EMPLOYEES' MEDICAL CARE UNDER THE WCL

Injured employees should immediately tell their employers when, where and how they were injured and obtain medical treatment. Injured employees are free to choose their own doctors, although the treating healthcare provider must be authorized by the Board, except in an emergency situation. Information about authorization can be found on the Board's website. The employee must submit the written notice within 30 days to his or her employer.

Generally, employers may not direct their employees to a particular healthcare provider. Employers may recommend care providing they inform employees of their rights to choose providers of their choice (Form C-3.1). Self-insured employers, insurance carriers and the SIF are authorized to require employers to obtain diagnostic tests from a provider who is part of a network that the employer, insurance carrier and the SIF have contracted with to provide such services. Also, employers, carriers and the SIF may require employees to obtain prescriptions from a pharmacy with which they contract. In both situations, the employer must provide the employee with notice.

Within two days of the first medical treatment, a healthcare provider must complete a preliminary medical report and mail it to the appropriate workers' compensation district office

(Form C-4). Following continued treatments, the injured employee's doctor must periodically submit progress reports to the Board (Form C-4.2).

The employer should fully investigate all accidents to ensure that all the facts are gathered. But, any written contact with the employee's/claimant's healthcare provider should be copied to the claimant and the claimant's legal representative, if any. Any attempt to influence the healthcare provider may be considered interference with the claimant's treatment, which is a misdemeanor under New York law.

THE CLAIMS PROCESS

Once a job-related injury occurs, the employee is required to notify the employer of the injury in writing, as soon as possible, but within 30 days of the injury. The Board may excuse the lack of notice if notice could not be given, the employer had knowledge of the accident or if the employer is not harmed by lack of notice. The time for giving notice does not begin to run until the employee knows or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to employment. The employee may file a claim directly with the Board by filing the requisite form (Form C-3). The employee, however, must file the claim within two years of the accident or within two years after the employee knew or should have known that the injury was related to employment.

As soon as possible after an employee is injured due to a work-related accident or becomes ill due to exposure, the employer must provide the worker with a Claimant Information Packet.

Within 48 hours of the first medical treatment, the doctor must complete a preliminary medical report (Form C-4) and mail it to the appropriate workers' compensation district office. The doctor must also send copies of the preliminary report to the employer or its insurance carrier, the injured worker and his or her legal representative, if any.

Within 10 days of the accident, the employer should report the injury to the Board and the insurance carrier (Form C-2F). Within 14 days of its receipt of the report from the employer, the insurance carrier must provide the injured worker with a written statement of his or her rights under the law (Form C-430S). This notification by the insurance carrier must be done within 14 days after it receives the employer's accident report or it may be provided along with the employee's first compensation payment, whichever is earlier.

Within 15 days of the first medical treatment, the doctor must complete a 15-day report of the injury and treatment and mail it to the District Office (Form C-42). Within 18 days after the first day of disability or 10 days after the employer first has knowledge of an alleged accident or

within 10 days after the insurance carrier receives its initial accident report from the employer (Form C-2F), whichever period is longer, the insurer must begin compensation payments if the employee misses more than seven days of work.

If the employer or its insurance carrier disputes the claim, it must inform the Board with notice to the claimant and the claimant's representative, if any. If the claim is not disputed, but payment is not being made for specific reasons stated on the notice, the insurer must also notify all of the parties.

Once the Board has been notified of the claim, it will notify the employer or its insurance carrier that a workers' compensation case has been indexed against the employer. If the employer or insurance carrier disputes the claim, a notice of controversy form must be filed with the Board within 25 days of the mailing of the Board's notice of indexing. Failure to file the notice of controversy within the prescribed 25-day time limit could bar the employer and its carrier from pleading certain defenses to the claim.

If the insurer does not dispute the claim and decides to pay the benefits, the employee must receive compensation every two weeks. The insurer must notify the Board when compensation has begun, is stopped or is modified.

If the employer or insurance carrier decides to contest a workers' compensation claim, for example the injury was not related to work or the employee is not injured to the extent claimed, a hearing will be scheduled to give a judge an opportunity to hear the disputed issue. The Board may hold hearings before a WCL judge. The judge may take testimony order depositions, review medical and other evidence and will decide whether the claimant is entitled to benefits or not. After all evidence has been submitted, the WCL judge circulates a written decision to the parties setting forth the amount and duration of the compensation award, if any. Either party has 30 days from the date the decision is filed to seek Board review. The Board will assign a three-member panel to review the case. Appeals of Board Panel decisions may be taken to the Appellate Division, Third Department, of the Supreme Court of New York, within 30 days. The decision of the Appellate Division may be appealed to the Court of Appeals.

Alternatively, under the WCL, the parties may enter into a binding agreement to settle the matter and determine the compensation and other benefits due to the claimant. If the Board approves the settlement, it is binding on all parties and not subject to appeal.

ENFORCEMENT

The WCL authorized the Office of the Fraud Inspector General to investigate violations of the laws and regulations pertaining to the operation of the workers' compensation system. Any employee, employer, insurer, attorney or other person who engages in workers' compensation fraud to obtain or avoid insurance is subject to civil penalties and criminal prosecution (Class E felony). Any claim of suspected workers' compensation fraud should be referred to the Inspector General's office.

Employees have the right to make a good faith workers' compensation claim and cannot be fired, demoted or otherwise discriminated against for filing a good faith claim. They can bring a separate claim under the WCL asserting retaliation and can be ordered reinstated with back pay and benefits.

REQUIREMENT TO PROVIDE DISABILITY BENEFITS

New York is one of the states that, in addition to workers' compensation benefits, requires employers to provide disability benefits to employees who are injured off the job when the injury does not arise out of their employment. Therefore, the disability benefits are administered when the employee is not entitled to workers' compensation. The Workers' Compensation Board (Board), however, administers the disability law, which is included in the WCL.

All employers who have employed one or more employees in New York who have worked at least 30 days in any calendar year are considered covered employers and required to provide disability benefits. Notably, employers of personal or domestic employees in a private home are subject to the disability law if they employ at least one employee who works 40 hours or more hours per week for that one employer. Coverage for disability benefits can be obtained through a disability benefits insurance carrier who is authorized by the Board or an employer may seek authorization from the Board to self-insure.

The WCL does not require employers to provide disability benefits for the following:

- an employer's spouse or minor children
- employees who have not worked four consecutive weeks
- clergy

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- individuals who volunteer their services for, executive officers of and teachers or professionals in a nonprofit, religious, charitable, educational or charitable organization
 - students who work part-time
 - domestic workers who work less than 40 hours per week
 - independent contractors

Disability benefits are temporary cash benefits that are paid to an eligible employee, when he/she is disabled by an off-the-job injury or illness. The disability benefits law provides weekly cash benefits to replace, in part, the wages that were lost due to a nonemployment-related injury. Disability benefits are also paid to an unemployed worker (recently terminated) to replace unemployment insurance benefits that were lost because of illness or injury.

Medical care is the responsibility of the claimant/employee and is not paid for by the employer or the insurance carrier. Disability cash benefits are 50% of the claimant's average weekly wage, but no more than the maximum benefit allowed under the WCL. The benefits are paid for a maximum of 26 weeks of disability. For employed workers, there is a seven-day waiting period before any benefits can be paid. The right to obtain the benefits begins on the eighth consecutive day of disability.

An employer is allowed, but not required, to collect contributions from employees to offset the cost of providing disability benefits. If an employee contributes, however, his or her contribution is computed at one-half of 1% of his or her wages and no more than 60 cents a week. If an employee has more than one job at the same time, with combined wages of more than \$120 per week, the employee may request that each employer adjust the contributions proportionally, but the combined contributions may not exceed the 60 cents per week maximum employee contribution.

An employer must provide a worker who has been disabled more than seven (7) days with a Statement of Rights under the Disability Benefits Law (Form DB-271), within five days of learning that the worker is disabled. Covered employers must also post and maintain a Notice of Compliance (Form DB-120) stating the provisions that have been made for the payment of disability benefits for eligible employees. Both of these required forms may be obtained from the insurance carrier or the Board's website.

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