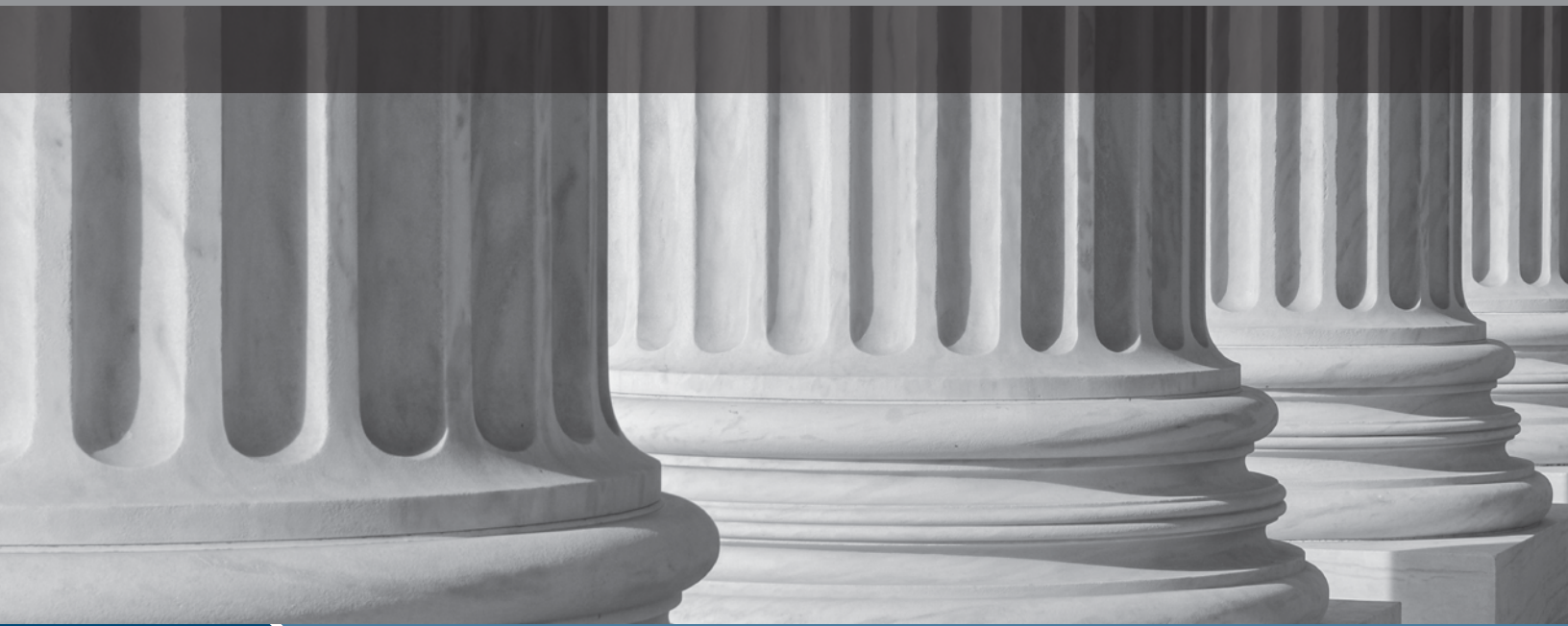


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# VIRGINIA Overview of Workers' Compensation

## **AN OVERVIEW OF VIRGINIA WORKERS' COMPENSATION LAW**

### **VIRGINIA WORKERS' COMPENSATION STATUTE**

#### **What is the citation for the state workers' compensation statute?**

Code of Virginia Title 65.2 (1950, as amended). The Virginia Workers' Compensation Act.

### **SCOPE OF COMPENSABILITY**

#### **Who are "covered employees" for purposes of workers' compensation?**

"Every person, including aliens and minors, in the service of another under contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed, except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer." Code of Virginia § 65.2-101(1)(a) (2012, as amended).

#### **Identify and describe any "statutory employer" provision.**

When an owner or contractor contracts with another person (subcontractor) to perform or execute work which is a part of the owner's trade, business or occupation, the owner shall be liable to pay any worker employed in the work any compensation he would have been due as if the worker had been immediately employed by the owner or contractor. Code of Virginia § 65.2-302 (1999, as amended).

#### **What type of injuries are covered and what is the standard of proof for each?**

A. Traumatic or "single occurrence" claims.

An injured employee must prove three elements by a preponderance of the evidence in order to recover benefits for a traumatic occurrence 1) an injury by accident 2) arising out of the employment and 3) in the course of the employment. The employee must experience a sudden mechanical change in the body resulting from a specific identifiable incident occurring at a reasonably definite time.

B. Occupational disease (including respiratory and repetitive use).

An employee may recover benefits for an occupational disease which arises out of and in the course of the employment. The employee must show by a preponderance of the evidence that the disease may be fairly traced to the

employment as the proximate cause. Code of Virginia § 65.2-400 (1997, as amended).

An ordinary disease of life is a condition to which the general public is exposed outside of the employment and is generally not compensable. However, an ordinary disease of life may be compensable as an occupational disease if the employee presents clear and convincing evidence, to a reasonable degree of medical certainty:

- 1) that the disease exists and arose out of and in the course of employment and did not result from causes outside the employment, and either
- 2) the disease follows as an incident of occupational disease, or
- 3) is an infectious or contagious disease contracted in the course of ones' employment in a hospital, sanitarium, laboratory or nursing home, or while otherwise engaged in the direct delivery of health care, or in the course of employment as emergency rescue personnel, or
- 4) is characteristic of the employment and was caused by conditions peculiar to the employment. Code of Virginia § 65.2-401 (1997, as amended).

Most repetitive trauma conditions are not compensable. However, the Virginia legislature amended Code of Virginia § 65.2-400 in 1997 to provide that carpal tunnel syndrome and hearing loss could be compensable as ordinary diseases of life if the criteria listed in § 65.2-401 were satisfied. However, the Virginia Supreme Court held that a florist's allergic contact dermatitis was not to be considered a repetitive motion condition, but was a compensable occupational disease within the meaning of the Act. *A New Leaf, Inc. v. Webb*, 257 Va. 190 (1999).

Respiratory conditions such as asbestosis, mesothelioma, silicosis and pneumoconiosis are generally considered occupational diseases.

### **What, if any injuries or claims are excluded?**

Along with the exceptions listed above, repetitive motion injuries are excluded from coverage. In addition, conditions of the neck, back and spinal column are specifically excluded from coverage as occupational diseases. Code of Virginia § 65.2-400(B)(4) (1997, as amended).

### **What psychiatric claims or treatments are compensable?**

A psychiatric or psychological claim may be compensable if it flows from some physical impact or injury. In the absence of physical impact or injury, it is necessary that the

psychological injury result from a sudden shock or fright which is out of the ordinary in terms of the employee's duties and so dramatic or frightening as to shock the conscience.

### **What are the applicable statutes of limitations?**

For an accidental injury, a claim must be filed with the Virginia Workers' Compensation Commission within 2 years of the date of accident. For occupational diseases, a claim must be filed within 2 years of the date of communication of the disease to the employee or within 5 years of the last injurious exposure, whichever comes first. For certain designated diseases such as byssinosis, pneumoconiosis, asbestosis and AIDS, section 406 sets forth specific limitations periods. Code of Virginia § 65.2-406 (2011, as amended). Effective July 1, 2005, the Virginia legislature extended the statute of limitations for employees suffering from diseases directly attributable to 9/11 rescue and search efforts. These employees may file a claim within two years after the employee first learns of the disease diagnosis.

### **What are the reporting and notice requirements for those alleging an injury?**

Written notice must be given to the employer within 30 days after the occurrence of the accident. However, if the employer has actual knowledge of the accident, the employee is relieved of the obligation to provide written notice. If notice is not given within 30 days, the employee must present a reasonable excuse, and the employer must prove that its interest was prejudiced by the late notice. The employee is not entitled to compensation or medical benefits which have accrued prior to the giving of notice to the employer, unless the employer has actual knowledge of the accident. Code of Virginia §65.2-600 (1997, as amended).

In cases of occupational disease, the worker must give notice within 60 days of the date the diagnosis is communicated to the worker. Code of Virginia §65.2-405 (1991, as amended).

### **Describe available defenses based on employee conduct:**

#### **A. Self-inflicted injury.**

No compensation is awarded to an employee for injury or death caused by intentional self-inflicted injury. Code of Virginia §65.2-306(A)(1) (2002, as amended).

#### **B. Willful misconduct, "horseplay", etc.**

No compensation is awarded to an employee for willful misconduct (violation of a safety rule) if the employer/carrier can prove 1) that the safety rule was reasonable 2) that the rule was known to the employee 3) that the rule was for the employee's benefit, and 4) that the employee intentionally engaged in the

forbidden behavior. Code of Virginia §65.2-306(A)(1), (4) and (5) (2002, as amended).

C. Injuries involving drugs and/or alcohol.

No compensation is awarded to an employee who is intoxicated or using non-prescribed controlled substances. The employer/carrier must establish that the intoxication/drug use was the actual, proximate cause of the injury or death. If the employee's blood alcohol level is greater than or equal to .08 percent or yields a positive test result for use of a non-prescribed controlled substance from a SAMSHA certified lab, the employer is entitled to a rebuttable presumption that the claimant was intoxicated due to alcohol or drugs. The employee can only overcome this presumption with clear and convincing evidence. This presumption is not available if employee dies as a result of injuries. Code of Virginia § 65.2-306(A)(3) and (6) (2002, as amended).

An employer wishing to raise any of these defenses must give notice to the Commission no less than 15 days prior to the hearing. Rule 1.10 of the Rules of the Virginia Workers' Compensation Commission.

**What if any penalties or remedies are available in claims involving fraud?**

Any person who knowingly makes or files a materially false, fictitious or fraudulent statement in connection with an award may be guilty of a Class 6 felony. Code of Virginia §65.2-312 (1994, as amended). While a claimant is receiving compensation, he has a duty to notify the employer/carrier of any incarceration, return to employment, increase in earnings, remarriage or change in status as a full-time student. If the Commission determines that any payments have been procured by fraud or misrepresentation, the employer/carrier may recover those amounts by way of a credit against future compensation due or an action at law. Code of Virginia §65.2-712 (1996, as amended).

**Is there any defense for falsification of employment records regarding medical history?**

If an employee makes a false statement or misrepresentation on an employment application, that employee will not receive workers' compensation benefits if the employer/carrier can prove 1) that the employee intentionally made a material false representation; 2) that the employer relied on that misrepresentation; 3) that the employer's reliance resulted in the consequent injury; and 4) that there is a causal relationship between the injury at issue and the misrepresentation. *Granados v. Windson Development Corp.*, 257 Va. 103 (1999).

**Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?**

An injury by accident does not include "any injury, disease or condition resulting from an employee's voluntary participation in employer-sponsored off-duty recreational activities which are not part of the employee's duties. Code of Virginia §65.2-101 (2012, as amended). In deciding whether the activity is a part of the employer's duties, the Commission considers such factors as whether the activity were an accepted and normal activity within the employment and the extent to which the employer expects or requires the employees to participate.

**Are injuries by co-employees compensable?**

If an injury arose from "horseplay," it is generally compensable if the victim did not instigate the horseplay. Compensation is generally awarded if a claimant's injury comes as a result of an attack or assault by virtue of the claimant's position and status as an employee.

**Are acts by third parties unrelated to work, but committed on the premises, compensable? (i.e. irate paramour claims)?**

No. If the attack is of a personal nature and not directed against the worker as an employee, compensation will not be awarded.

**BENEFITS**

**What criterion is used for calculating the average weekly wage?**

The claimant's average weekly wage is calculated using the prior 52 weeks of wages. If the employee has been promoted with an attendant change in responsibilities within the previous 52 weeks, the average weekly wage is based on the average wage since the promotion.

**How is the rate for temporary/lost time benefits calculated including minimum and maximum rates?**

The compensation rate for all forms of compensation is 2/3 of the claimant's average weekly wage. The minimum and maximum rates are set by the Virginia's General Assembly, and take effect July 1 of each year.

<u>Year</u>	<u>Minimum</u>	<u>Maximum</u>
2023	\$335.75	\$1,343.00
2022	\$322.50	\$1,290.00
2021	\$298.75	\$1,195.00
2020	\$284.25	\$1,137.00

2019	\$275.50	\$1,102.00
2018	\$270.50	\$1,082.00
2017	\$260.75	\$1,043.00
2016	\$249.00	\$996.00
2015	\$243.75	\$975.00
2014	\$241.75	\$967.00
2013	\$238.75	\$955.00
2012	\$233.75	\$935.00
2011	\$226.25	\$905.00
2010	\$221.25	\$885.00
2009	\$223.75	\$895.00

**How long does the employer/insurer have to begin temporary benefits from the date disability begins?**

While the claim is being investigated and until the claimant is on an open award, payment must be made within a "reasonable" time. When the claimant is on an open award (i.e., an Agreement to Pay Benefits has been signed by both parties and filed with the Commission) the claimant may request a 20 percent penalty for payment of compensation more than 14 days in arrears.

**What is the waiting or retroactive period for temporary benefits? (e.g. must be out \_\_\_ days before recovering benefits for the first \_\_\_ days)?**

An employee must be out 21 days before recovering benefits for the first 7 days.

**What is the standard/procedure for terminating temporary benefits?**

If both parties agree to the termination, a Termination of Wage Loss Award (TWLA) form must be signed by both parties and filed with the Commission. If the claimant refuses to sign the TWLA, the carrier must file an Application for Hearing along with an allegation and evidence to support suspension of benefits.

**Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?**

Prior to 1991, a claimant could receive a maximum of 500 weeks of compensation, encompassing benefits for temporary total, temporary partial and permanent partial disability. For accidents between July 1, 1991 and June 30, 1997 permanency benefits were payable on top of the 500 weeks. As of July 1, 1997 the total amount of all compensation (TTD, TPD and PPD) may not exceed 500 weeks or the amount obtained by multiplying the average weekly wage at the time of the accident by 500.

**What disfigurement benefits are available and how are they calculated?**

A claimant may receive benefits for severely marked disfigurement unless he has already received permanent partial disability benefits for the same body part. No more than 60 weeks is awardable for severely marked disfigurement. Disfigurement is assessed by the Commission either on the basis of a photograph or by personal viewing by a Deputy Commissioner. Code of Virginia § 65.2-503(B)(16) (2000, as amended).

**How are permanent partial disability benefits calculated including the minimum and maximum rates?**

A. How many weeks are available for scheduled member/parts, and the standard for recovery.

Thumb	60 weeks
1 <sup>st</sup> finger (index finger)	35 weeks
2 <sup>nd</sup> finger	30 weeks
3 <sup>rd</sup> finger	20 weeks
4 <sup>th</sup> finger (little finger)	15 weeks
1 <sup>st</sup> phalanx of thumb/finger	one half compensation for entire thumb/finger
More than 1 phalanx	loss of entire thumb/finger
Loss of multiple fingers	not to exceed PPD for loss of hand
Great toe	30 weeks
Other toe	10 weeks
1 <sup>st</sup> phalanx of any toe	one-half compensation for entire toe
More than 1 phalanx	loss of entire toe
Hand	150 weeks
Arm	200 weeks
Foot	125 weeks
Leg	175 weeks
Total vision loss (1 eye)	100 weeks
Total hearing loss (1 ear)	50 weeks
Disfigurement	maximum 60 weeks
Pneumoconiosis, including but not limited to silicosis and asbestosis, medically determined to be in the:	
First Stage	50 weeks
Second Stage	100 weeks
Third Stage	300 weeks
Byssinosis	50 weeks
Permanent and total loss	Life

To obtain permanency benefits, a claimant must establish a quantifiable functional loss of capacity (a medical rating) and that he has reached maximum medical improvement.

B. Number of weeks for "whole person" and standard for recovery

Not applicable.



**Are there any requirements/ benefits for vocational rehabilitation, and what is the standard for recovery?**

The Commission may direct that the employer/carrier provide reasonable and necessary vocational rehabilitation services including vocational evaluation, counseling, job coaching, job development, job placement, on the job training, education and retraining. Code of Virginia §65.2-603(A)(3) (2011, as amended).

**How are permanent total disability benefits calculated including the minimum and maximum rates?**

Permanent total disability benefits are awarded for the loss of any two body parts in the same accident, injury resulting in total paralysis, or severe brain injury rendering the employee permanently unemployable in gainful employment. See above for minimum and maximum rates. Permanent total disability benefits continue for the lifetime of the claimant.

**How are death benefits calculated including the minimum and maximum rates?**

A. Funeral expenses.

The employer shall reimburse burial expenses not exceeding \$10,000 and transportation expenses not exceeding \$1000.

B. Dependency claims.

Death benefits are calculated based on 2/3 of the claimant's average weekly wage subject to the same minimum and maximum rates as listed above. If an employee dies as a result of a compensable accident, death benefits are payable only if a claim has been filed within 2 years from the date of accident and the claim for death benefits is filed within 2 years from the date of death. Code of Virginia § 65.2-601 (1991, as amended). The Commission conclusively presume the following persons to be wholly dependent: husband/wife living with the decedent at the time of the accident; a child under age 18; a child under age 23 who is enrolled as a full-time student; a child over age 18 if physically or mentally incapacitated from earning a living; parents in destitute circumstances in the absence of other dependents.

**What are the criteria for establishing a "second injury" fund recovery?**

An employer/carrier may establish recovery from the Second Injury Fund if the employee has a prior loss of at least 20 percent to the arm, hand, leg, foot, eye finger, toe or any

combination of 2 or more; and the employee has suffered an additional loss of use of any of the same members of at least 20 percent; the combination of impairments has rendered the worker totally or partially incapacitated for work; the employer has paid indemnity, medical and permanency benefits; and further compensation is due which has been paid by the employer/carrier. Code of Virginia §65.2-1103 (1991, as amended).

**What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?**

To re-open a claim, the claimant must file a change in condition application within 2 years of the date compensation was last paid pursuant to an award. A claim for permanency benefits must be filed within 3 years from the date for which compensation was last paid pursuant to an Award or within three years of the date of accident when no compensation has been paid. Code of Virginia § 65.2-708 (1991, as amended).

**What situation would place responsibility on the employer to pay an employee's attorney fees?**

An attorney's fee may be assessed if the Commission determined that proceedings are brought or defended by the employer/carrier without reasonable grounds; if an employer/carrier has delayed payment without reasonable grounds; or if the Commission finds that an employer/carrier has filed an application in bad faith. Code of Virginia §65.2-713 (1997, as amended).

**EXCLUSIVITY/TORT IMMUNITY**

**Is the compensation remedy exclusive?**

Yes. The rights of an employee under the Virginia Workers' Compensation Act exclude all other rights and remedies at common law. Code of Virginia § 65.2-307 (1999, as amended).

**Are there any penalties against the employer for unsafe working conditions?**

No.

**What is the penalty, if any for an injured minor?**

None.

**What is the potential exposure for bad faith or claims handling?**

None.

**What is the exposure for terminating an employee who has been injured?**

The Act prohibits termination of an employee solely because the employee intends to file or has filed a claim. Any such terminated employee has an action at law in circuit court against the employer. Code of Virginia §65.2-308 (1991, as amended).

### **THIRD PARTY ACTIONS**

#### **Can third parties be sued by the employee?**

Yes. An injured worker may bring an action at law against a negligent third party who is a stranger to the trade, occupation or business in which the employee was involved.

#### **Can co-employees be sued for work-related injuries?**

No.

#### **Is subrogation available?**

Yes. The Act provides that a claim against an employer shall create a lien on behalf of the employer against any verdict or settlement arising from the injured employee's right to recover damages against any third party. Code of Virginia §65.2-309 (2004, as amended).

### **MEDICALS**

#### **Is there a time limit for medical bills to be paid, and are penalties available for late payment?**

There are no penalties applicable to late payment of medical bills, however, if the delay is extraordinarily long with no reasonable excuse, attorney's fees may be assessed against the employer/carrier.

#### **What, if any, mechanisms are available to compel the production of medical information at the administrative level?**

Any health care provider attending an injured worker must provide a copy of medical reports upon request by the injured worker, employer, insurer or certified rehabilitation provider. A subpoena duces tecum may also be requested for the medical reports from any physician who has treated the claimant, provided the treatment is relevant to the case at bar. If the physician or medical facility is located outside the Commonwealth of Virginia, the Commission will compel the claimant to sign a medical records authorization for the carrier to obtain the desired records.

#### **What is the rule on choice of physician?**

A panel of three physicians must be offered to the injured worker by the employer or carrier as soon as possible. If the employer/carrier fails to offer a panel, the claimant may select his own physician. Code of Virginia § 65.2-603 (2011, as amended).

**What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?**

An employer/carrier must provide reasonable and necessary medical care for the lifetime of the injured worker. This care includes physical therapy and chiropractic care. Code of Virginia § 65.2-604 (2000, as amended).

**Which prosthetic devices are covered, and for how long?**

The employer/carrier is responsible for any prosthetic device necessary as the result of amputation or loss of use of an arm, hand, leg or foot or the enucleation of an eye or the loss of any natural teeth or loss of hearing. Code of Virginia § 65.2-603 (2011, as amended).

**Are vehicle and/or home modifications covered as medical expenses?**

The Commission may order the employer/carrier to provide vehicle and/or home modifications provided that the aggregate cost of all items and modifications required as a result of any one accident shall not exceed \$42,000. Code of Virginia § 65.2-603 (2011, as amended).

**Is there a medical fee guide or schedule or other provisions for cost containment?**

Yes. Virginia adopted a fee schedule covering treatment rendered January 1, 2018 and continuing. Code of Virginia § 65.2-605 (2017, as amended).

**What, if any, provisions or requirement are there for managed care?**

Whenever an employer provides a panel of physicians and the employer covers all or part of the cost of healthcare as a self-insured or under a group health insurance policy, the employer shall inform the employee whether each physician named is eligible to receive payment under the employee's health care coverage provided by the employer. Code of Virginia §65.2-603(E) (2011, as amended).

**PRACTICE/PROCEDURE**

**What is the procedure for contesting all or part of a claim?**

Once a claim has been filed by the claimant, the Commission will send its Orders for Information to the carrier. The carrier must advise the Commission if the claim will be accepted, or if any contested issues exist within twenty days.

### **What is the method of claim adjudication?**

A. Administrative level

Upon receipt of the carrier's completed Orders for Information, the Commission will schedule either an evidentiary hearing or on-the-record determination by a Deputy Commissioner. There are twenty-two (22) Deputy Commissioners who hear cases in specified locations throughout the Commonwealth of Virginia.

B. Trial court

The Deputy Commissioner level described above is the "trial-level" of any claim in Virginia. No jury trials are held.

C. Appellate

If either party is dissatisfied with the Deputy Commissioner's decision, the party may file a Request for Review with the Full Virginia Workers' Compensation Commission within thirty (30) days. The Full Commission is a panel of three Commissioners who sit at Richmond, Virginia and hear cases mainly on the basis of Written Statements or briefs. After the Full Commission level, a party may make an appeal of right to the Court of Appeals of Virginia. Parties may petition for writ of certiorari to the Supreme Court of Virginia, although these will be granted only if involving an issue of significant precedential value.

### **What are the requirements for stipulations or settlements?**

Compromise settlements are allowed so long as the amount of compensation and the time and manner of payment are approved by the Commission. An agreement which does not resolve outstanding issues may be memorialized in an Award Agreement and or Termination of Wage Loss Award form signed by both parties. Code of Virginia § 65.2-701 (1997, as amended).

### **Are full and final settlements with closed medicals available?**

Yes.

### **Must stipulations and/or settlements be approved by the state administrative body?**

Yes.

## **RISK/FINANCE FOR WORKERS' COMPENSATION**

**What insurance is required and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?**

Employers covered by the Act have a duty to insure the payment of compensation by purchasing a workers' compensation insurance policy issued through a private insurer, being certified by the Commission as an individual self-insurer, or by becoming a member of a group self-insurance association licensed by the State Corporation Commission. Code of Virginia § 65.2-801 (2009, as amended).

**What are the provisions/requirements for self-insurance?**

A. For individual entities.

Individual entities may be certified as self-insurers by providing proof of solvency, financial ability to meet obligations and the ability to pay the compensation in the amount and manner and when due as provided under the Act. The Workers' Compensation Commission may establish other reasonable requirements and standards for approval of an employer as a self-insurer.

B. For groups or "pools" of private entities.

Groups or employers seeking to become licensed by the State Corporation Commission must provide proof of solvency, the financial ability of each to meet his obligations as a member and the ability of the group to pay or cause to be paid the compensation in the amount and manner and when due. Code of Virginia § 65.2-802 (1994, as amended).

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