

# Vermont Department of Labor Legislative and Regulatory Update



# 2012

# Workers' Compensation 2012 Update

## Legislation that passed:

- **Volunteer firefighters §44 of Act 155 (S.106)**
- <http://www.leg.state.vt.us/DOCS/2012/ACTS/ACT155.PDF>
- Sec. 44. 21 V.S.A. § 601 is amended to read:
- § 601.DEFINITIONS
- Unless the context otherwise requires, words and phrases used in this chapter shall be construed as follows:
- (12) "Public employment" means the following:
- (K) other municipal workers, including volunteer firefighters and rescue and ambulance squads while acting in any capacity under the direction and control of the fire department or rescue and ambulance squads;
- (L) members of any regularly organized private volunteer fire department while acting any capacity under the direction and control of the fire department
- (M) members of any regularly organized private volunteer rescue or ambulance squad while acting any capacity under the direction and control of the rescue or ambulance squad;

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## Legislation that passed:

- **Vocational Rehabilitation Clarification: Act 133 (S.136)**
- <http://www.leg.state.vt.us/DOCS/2012/ACTS/ACT133.PDF>
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- It is hereby enacted by the General Assembly of the State of Vermont:
- Sec. 1. 21 V.S.A. § 641 is amended to read:
- § 641. VOCATIONAL REHABILITATION
- (a) When as a result of an injury covered by this chapter, an employee is unable to perform work for which the employee has previous training or experience, the employee shall be entitled to vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore the employee to suitable employment. Vocational rehabilitation services shall be provided as follows:
- (3) The commissioner shall adopt rules to assure that a worker who requests services or who has been out of work for more than 90 days is timely and cost-effectively screened for benefits under this section. The rules shall:

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## Legislation that passed:

- **Vocational Rehabilitation Summer Study: Act 133 (S.136) continued**
- <http://www.leg.state.vt.us/DOCS/2012/ACTS/ACT133.PDF>
- Sec. 2. STUDY
- (a) The department of labor in consultation with the department of disabilities, aging, and independent living and other interested parties including vocational rehabilitation counselors shall study the following:
  - (1) what performance standards should apply to vocational rehabilitation counselors;
  - (2) whether the department of disabilities, aging, and independent living should be allowed to provide workers' compensation vocational rehabilitation services and charge the fees for those services to insurance companies and whether providing services to state employees would represent a conflict of interest;
  - (3) whether injured workers receiving vocational rehabilitation services are receiving those services in a timely manner; and
  - (4) whether the current vocational rehabilitation screening process is effective and whether entities other than the department of disabilities, aging, and independent living should be permitted to provide screening to avoid conflicts of interest.
- (b) The department of labor shall report its findings as well as any recommendations by January 15, 2013, to the house committee on commerce and economic development and the senate committee on economic development, housing and general affairs

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## Legislation that passed:

- **Dependent child definition : Act 133 (S.136) continued**
- <http://www.leg.state.vt.us/DOCS/2012/ACTS/ACT133.PDF>
- Sec. 3. 21 V.S.A. § 601 is amended to read:
- § 601. DEFINITIONS
- Unless the context otherwise requires, words and phrases used in this chapter shall be construed as follows:
- (2) “Child” includes a stepchild, adopted child, posthumous child, grandchild, and a child for whom parentage has been established pursuant to 15 V.S.A. chapter 5, but does not include a married child unless the child is a dependent.

# Workers' Compensation 2012 Update

## Legislation that passed:

- **W.C. Compliance and Misclassification investigator positions extended an additional 3 years (in “Big Bill”) Act No. 162 (H.778)**
- <http://www.leg.state.vt.us/DOCS/2012/ACTS/ACT162.PDF> (§E-401 *et seq.*)

# Workers' Compensation 2012 Update

And some legislation that didn't pass but will most likely be back again :

- **Sole contractor authorization process** – H.762 unanimously passed House
- <http://www.leg.state.vt.us/docs/2012/bills/House/H-762.pdf>
- This bill also had a number of provisions supported by the department so I expect some or all of it to be offered again next session

# **Workers' Compensation Enforcement Priorities: Compliance / Misclassification**

- Compliance and proper classification remain a high priority
- It is likely that the number of Debarments for non-compliance and misclassification and the penalties assessed will grow.
- We are working with other state agencies to identify and pursue violators, including, tax, AHS and various licensing agencies, including nursing home licensing, Liquor control, and the Department of Health
- We are also pursuing a cooperative information sharing agreement with USDOL.



# Workers' Compensation Regulatory Agenda

- **Medical fee rule** – I anticipate starting the rulemaking process in early August. Proposed fees will increase in 3 phases to lessen any immediate rate shock.
- **W.C. Rules re-write** anticipate starting the rulemaking process in early September or October.

# Recent Vermont Supreme Court Decisions on Workers' Compensation Law



- This case involves a workers' compensation retaliation claim against the Agency of Transportation. The Vermont Supreme Court vacated judgment versus the state and remanded case to determine whether the retaliation claim was precluded by a September 2003 Stipulation and Agreement signed by Hall and AOT releasing the State from liability for any and all claims associated in any way with Hall's reclassification and transfer stemming from hostile work environment allegations against him
- To make out a prima facie case of retaliation for filing a worker's compensation claim, a plaintiff must show, among other things, that "he suffered adverse employment decisions, and ... there was a causal connection between the protected activity and the adverse employment decision[s]." *Murray v. St. Michael's Coll.*, [164 Vt. 205](#), 210, [667 A.2d 294](#), 299 (1995). In *Burlington Northern*, the Supreme Court held that a plaintiff bringing a retaliation claim under Title VII need show only that "a reasonable employee [in the employee's situation] would have found the challenged action materially adverse," meaning that it well might have dissuaded a reasonable employee from engaging in the protected activity. 548 U.S. at 68.
- The Vermont Supreme Court concluded that videotaping a W.C. claimant in connection with the workers' compensation claim, cannot, in and of itself, support a retaliation claim, but may be evidence of a larger pattern of retaliation

*Marcum v. State of Vermont Agency of Human Services*, 38 A.3d 1177,  
2012 VT 3 (Vt. 2012) January 6, 2012

- The issue in this case was whether the Agency of Human Services was claimant's "statutory employer" for workers' compensation purposes because it paid her, through the Medicaid program, for nursing services provided to a Medicaid eligible child. The Court determined that AHS was not the employer.
- Paragraphs 8 – 15 of the decision contain a good discussion of the "statutory employer" provision and the "nature of the business" test used in W.C.

# Vermont Unemployment Law Update



**2012**

## Changes to the Unemployment Insurance Program effective as of July 2012.

- Return of the Waiting Week
- Change in Calculating Partial Benefits
- Imposition of a 15% Fraud Penalty
- No Limitation on Overpayment Offset
- Short-Time Compensation Changes
- Phase-out of the \$1,000 Wage “Disregard”

## Waiting Week – 21 VSA 1343(a)(4)

- Phased out in 1999, revived as of July 1, 2012.
- Requires all *new* claimants to file for one week prior to actually receiving benefits.
- Disqualifications for vacation pay or WILON can not be served concurrently with the waiting week.

# Change in calculating partial benefits

## 21 VSA 1338a

- Claimants may earn partial benefits in any week they work less than 35 hours, but otherwise work all the hours available to them.
- Intended to encourage part time work while claimant is seeking full time work.
- As of July 1, 2012, partial benefits will be based on disregarded earnings of \$40.00 or 30% of the claimant's weekly wage.



# Example of partial benefit calculation

Claimant works 20 hours for \$10 an hour, earning \$200.

Claimant has a weekly benefit amount of \$425

30% of \$200 = \$60 – these are the “disregarded” earnings

$$\$200 - \$60 = \$140$$

Subtract the reduced weekly wage from the weekly benefit amount to get the partial benefit:

$$\$425 - \$140 = \underline{\$285 \text{ Partial Benefit}}$$

# Enhanced Fraud Penalties

## 21 VSA 1347(c),(e)

- Overpaid benefits due to intentional nondisclosure or misrepresentation subject to an additional 15% penalty.
- NO statute of limitations on the recovery of overpaid benefits.

# Short Time Compensation

## 21 VSA 1451 et seq.

- The STC program is designed to allow employers to reduce hours for all or some of their employees as a means of avoiding temporary layoffs.
- If the Department approves an STC program, the employees working reduced hours will receive a partial STC unemployment benefit.

# New STC Restrictions as of 2012

- Employer cannot owe UI tax.
- Employer cannot be a “negative balance” employer.
- Employer must notify department of any layoffs while in STC status
- Workweek reduction must be applied consistently throughout STC period.

\$1,000 wage “disregard” expires July 1, 2012

21 VSA 1325(a)(5)

- Intent of law was to allow employers to hire employees for brief trial period, and not suffer tax rate consequences if employee proved unsuitable.
- There was insufficient feedback from employers to advocate for extending or making permanent the exception.

# Recent Vermont Supreme Court Decisions on Unemployment Law



## Blue v. Dept of Labor, 2011 VT 84

(when a “leave of absence” does not result in a return to work, burden is on the employer to show claimant did not intend to return to her job)

Quote: . . . the court observed that the “existence and effect of a genuine ‘leave of absence’ is not dependent upon a ‘guarantee’ by the employer . . . that the employee may or shall return to work at the expiration of the leave.”

## St. Martin v. Dept of Labor, 2012 VT 8

(a voluntary quit can be “for cause” even when predicated on a future event, if such event is both imminent and reasonably foreseeable)

Quote: This is not a case in which a claimant has quit based on a future prediction or speculative personal reasons; rather, claimant faced the present reality that she would not be paid for her work.



## Karr v. Dept of Labor, Docket No. 2012-039

(voluntary quit was not for cause when employee did not attempt to resolve his grievance prior to quitting)

- **Quote:** Prior to leaving employment, an employee has a duty to attempt to resolve any workplace grievance or demonstrate that such an effort would be unavailing.. . Claimant worked another month with his coworker and in that time did not notify his employer of his ongoing problem with his coworker. Even at the time of his quitting, claimant fabricated an alternate reason for leaving his job. Therefore, claimant failed to give his employer an opportunity to resolve the situation.