

S.345

AN ACT RELATING TO LOWERING THE COST OF WORKERS'  
COMPENSATION INSURANCE

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. FINDINGS AND PURPOSE

(a) The general assembly finds the following:

(1) The workers' compensation program was established in 1915 to dispense with the concept of negligence by providing compensation to any employee who is injured on the job and to limit employers' exposure to lawsuits for negligence in the workplace. In addition, this program removed the need for injured employees to rely on tax-funded public assistance programs.

(2) The National Council on Compensation Insurance, NCCI, the nation's largest provider of workers' compensation and employee injury data, recommends to the Vermont department of banking, insurance, securities, and health care administration proposed workers' compensation voluntary market loss costs and assigned risk market rates by classification codes.

(3) In March 2008, the department of banking, insurance, securities, and health care administration approved an average 4.2 percent decrease in both the voluntary market loss costs and assigned risk market rates, representing the largest decrease in a decade. This decrease provided many Vermont

employers, including sawmill, logging, and carpentry operations, hospitals, restaurants, and ski areas, with a modest decrease in their workers' compensation premiums. Other Vermont employers with good safety records may enjoy even higher premium rate reductions.

(4) The decrease is attributed mainly to a decline in workplace injuries. Two major cost drivers of workers' compensation premiums are the frequency of claims and the seriousness of claims. Another cost driver is medical costs which are increasing more rapidly than the rate of inflation. The duration of claims also adds to workers' compensation costs.

(5) Despite recent stability in workers' compensation rates, the comparatively high cost of workers' compensation insurance in Vermont remains an issue of great concern to many Vermont employers.

(6) The increased implementation of safety training programs and measures by Vermont employers has reduced the frequency of workplace injuries, which is the most effective way to reduce workers' compensation costs.

(7) The fact that only 8.5 percent of the Vermont employers are in the residual market validates that workers' compensation insurers perceive that the Vermont workers' compensation program is working effectively. The residual market is less than half the size it was five years ago, indicating that many employers have found appropriate coverage in the voluntary market, in which

employers can benefit from competition between carriers. The lack of competition among carriers for certain industries such as dairy farming presents a disadvantage for those industries.

(8) Workers' compensation premiums for farmers are increasing while premiums for most other employer categories are going down. Farming is inherently more hazardous than many other industries, and the pool of farmers to spread the risk is small. Agricultural workers have a higher frequency and suffer more serious work injuries than other workers, particularly those working on farms with hooved animals.

(9) It is important to provide incentives to improve farm safety through comprehensive training programs. Extensive outreach and safety education will go a long way toward reducing workers' compensation premium rates for farmers. The Vermont farm bureau, the agency of agriculture, food and markets, the U.S. Department of Agriculture, the University of Vermont extension service, and other organizations are working to develop enhanced farm safety training programs.

(10) A significant number of employers are improperly classifying employees as "independent contractors" either due to a lack of understanding or knowingly to avoid legal obligations under federal and state labor and tax laws governing payment of wages, unemployment insurance, workers' compensation, and income and social security taxation.

(11) Misclassification of employees as “independent contractors” adversely impacts the Vermont economy because it deprives workers of legal protections and benefits; reduces compliance with employment and safety standards; gives employers who misclassify an improper financial competitive advantage over law-abiding businesses; deprives the state of substantial revenue; and imposes indirect costs from decreased legitimate business activity and increased demand for social services. A recent survey of workers’ compensation insurers conducted in compliance with No. 57 of the Acts of 2007 reveals that misclassification is a significant problem that may add 10 to 20 percent or more to the cost of workers’ compensation.

(12) Historically, compliance and enforcement have been divided among various governmental entities, which reduce efficiency and effectiveness. Improved cooperation, sharing information, and joint enforcement of serious violations would be effective approaches to reducing employer misclassification.

(13) While a reduction in workers’ compensation benefits would lower workers’ compensation premiums across all class codes, this reduction would be at the expense of injured workers and provide little incentive for improving safety.

(14) Significant delays in scheduling a hearing and issuing a decision after formal hearing in contested workers’ compensation cases have an adverse

impact on injured workers, who are often without necessary medical benefits or income for up to two years; on health care providers, who do not receive timely payment of medical bills; and on insurers, who must maintain reserves on open and unresolved claims.

(b) Therefore, it is the purpose of this act to address the problems of employee misclassification and miscoding, improve farm safety, and make other positive changes to the workers' compensation laws that are intended to improve the efficiency of dispute resolution and reduce the cost of workers' compensation.

## Sec. 2. DEFINITIONS

For the purposes of this act:

(1) "Misclassification" means improperly classifying employees as independent contractors for the purposes of workers' compensation insurance or unemployment insurance, as the context dictates.

(2) "Miscoding" means the improper categorization of employees under the National Council on Compensation Insurance (NCCI) worker classification codes, which account for varying levels of risk attributable to different job types for the purposes of determining workers' compensation insurance premiums.

\* \* \* Fraud and Misclassification \* \* \*

Sec. 3. 8 V.S.A. § 4750(b) is amended to read:

(b) The commissioner may require an insurer to file annually its anti-fraud plan with the department and an annual summary of the insurer's anti-fraud activities and results, including misclassification and miscoding. A workers' compensation insurer shall file an anti-fraud plan with the department of labor, including information about fraud investigations, referrals, or prosecutions involving Vermont workers' compensation claims, misclassifications, and miscoding, if requested by the commissioner of labor. Information regarding fraud investigations and referrals shall not be public unless the commissioner of labor or the attorney general commences administrative or criminal proceedings.

Sec. 4. 13 V.S.A. § 2031 is amended to read:

§ 2031. INSURANCE FRAUD

(a) Definitions. As used in this section:

\* \* \*

(2) "Insurance policy" has the same meaning as in 8 V.S.A. § 4722(3) and includes a workers' compensation policy issued pursuant to chapter 9 of Title 21.

(3) "Insurer" has the same meaning as in 8 V.S.A. § 4901(2) and includes a workers' compensation insurer pursuant to chapter 9 of Title 21.

~~(4) "Person" means a natural person, company, corporation, unincorporated association, partnership, professional corporation, agency of government, or any other entity.~~

\* \* \*

~~(g) This section shall not apply to workers' compensation fraud. Cases involving workers' compensation fraud shall be prosecuted under section 2024 of this title.~~

~~(h) The public policy of this state is that the standards of this section shall not apply or be introduced into evidence in any civil or administrative proceeding, whether to argue public policy, materiality, or for any other purpose.~~

Sec. 5. WORKERS' COMPENSATION EMPLOYEE CLASSIFICATION,  
CODING, AND FRAUD ENFORCEMENT TASK FORCE

(a) There is created a workers' compensation employee classification, coding, and fraud enforcement task force to be composed of ten members to include the following:

(1) The commissioner of labor or designee.

(2) The commissioner of banking, insurance, securities, and health care administration or designee.

(3) The attorney general or designee.

(4) Two members of the house to be appointed by the speaker.

(5) Two members of the senate to be appointed by the committee on committees.

(6) A member from the insurance industry appointed by the American Insurance Association.

(7) Two members appointed by the employer and employee members of the department of labor advisory council established in 21 V.S.A. § 1306 as follows:

(A) One member who represents labor.

(B) One member who represents management.

(b) The task force shall meet as needed, and the legislative council shall provide administrative support.

(c) For attendance at a meeting when the general assembly is not in session, the legislative members shall be entitled to the same per diem compensation and reimbursement of necessary expenses as provided to members of standing committees under 2 V.S.A. § 406.

(d) The task force shall:

(1) Investigate and analyze misclassification and miscoding of employees and occurrences of fraud in the workers' compensation program and offer recommendations to address the following:

(A) Coordination, speed, and efficiency of communication among appropriate governmental entities and law enforcement organizations in the

prevention, investigation, and enforcement of actual and suspected fraud and employee misclassification and miscoding.

(B) Ways to improve outreach to and public education for businesses and labor to promote wider understanding of and compliance with the requirements for classifying and coding employees. This outreach and education shall identify costs associated with misclassification and miscoding, help businesses identify incidents of misclassification and miscoding, and encourage filing of complaints and identification of potential violators.

(C) In consultation with the Vermont trial lawyers association and the Vermont bar association, ways to improve the effectiveness and enforcement of the current fraud statutes, including specific recommendations for improving enforcement, stimulating interagency cooperation, including information sharing, prosecution and creating a fraud unit with proposals for staffing, reporting, structure, and funding.

(2) Issue a progress report on or before February 15, 2009, and a final report on November 15, 2009. Both reports shall be provided to the house committee on commerce and the senate committee on economic development, housing and general affairs. The progress report shall outline the progress of the investigation, and the final report shall outline the task force's findings and recommendations regarding the following:

(A) A description of progress made by state government to reduce workers' compensation fraud and the frequency of employee misclassification and miscoding, including the number of employers cited for violations, a description of the types of fraud, misclassification and miscoding cited, the approximate number of employees affected, and the amount of wages, premiums, taxes, and other payments or penalties collected.

(B) Administrative, legislative, or regulatory changes designed to reduce fraud and employee misclassification and miscoding by improving public and business education, sharing information, and increasing the cooperation and efficiency of enforcement of employee misclassification.

(C) A consistent, workable, and fair method for determining independent contractor status both in regard to workers' compensation and unemployment compensation.

(D) Any other issue relevant to reducing the incidences of workers' compensation fraud and employee misclassification and miscoding, including a recommendation as to whether the task force should continue meeting and, if so, for how long.

\* \* \* Evaluation of Permanent Impairment \* \* \*

Sec. 6. 21 V.S.A. § 648(b) is amended to read:

(b) Any determination of the existence and degree of permanent partial impairment shall be made only in accordance with the whole person

determinations as set out in the ~~most recent~~ fifth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. In order to utilize any subsequent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment or any other appropriate guides to the evaluation of permanent impairment, the commissioner, in consultation with the department of labor advisory council, shall adopt a rule. The commissioner shall adopt a supplementary schedule for injuries that are not rated by the ~~most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment~~ impairment guide authorized for use by the department to determine permanent disability.

\* \* \* Safety Incentives \* \* \*

Sec. 7. WORKERS' COMPENSATION DISCOUNTS; IMPROVED

EFFICIENCY AND SAFETY; STUDY; DEPARTMENT OF LABOR;  
DEPARTMENT OF BANKING, INSURANCE, SECURITIES, AND  
HEALTH CARE ADMINISTRATION

(a) The department of labor and the department of banking, insurance, securities, and health care administration in consultation with the department of labor advisory council established in 21 V.S.A. § 1306 shall investigate and, as appropriate, propose specific legislation and administrative rules that effect the following:

(1) Providing workers' compensation premium discounts for employers whose employees have demonstrated the successful implementation and effectiveness of a workplace safety certification program.

(2) Providing rate reductions for employers who implement an effective return-to-work program or a drug and alcohol prevention program, or both.

(3) Reviewing the fairness of the distribution of workers' compensation liability for preexisting conditions.

(4) Surveying other state workplace safety discount programs to evaluate their effectiveness in improving workplace safety as well as their impact on premiums paid by nonparticipants.

(5) Improving the rate of return to employment for claimants receiving permanent disability benefits by examining best practices for returning injured employees to work that have been used successfully by providers, employers, and relevant programs in Vermont and other jurisdictions.

(6) Assuring the application of best practices to the vocational rehabilitation system in order to improve its functionality and effectiveness in increasing employability.

(7) Identifying and facilitating the implementation of industry best practices and other methods designed to increase substantially workplace safety.

(8) Impact on injured workers' and workers' compensation premiums of reducing the maximum weekly wage from 150 percent to 125 percent of the average weekly wage.

(b) The department of labor shall issue a progress report on September 15, 2009, and a final report on February 1, 2010. Both reports shall be provided to the governor, the house committee on commerce, and the senate committee on economic development, housing and general affairs. The progress report shall outline the department of labor's advancement in its study, and the final report shall contain a comprehensive outline of the study, as well as suggestions for legislation and administrative rulemaking.

\* \* \* First-Aid-Only Injuries and Deductible Policies \* \* \*

Sec. 8. 21 V.S.A. § 640(e) is added to read:

(e) In the case of a work-related, first-aid-only injury, the employer shall file the first report of injury with the department of labor. The employer shall file the first report of injury with the workers' compensation insurance carrier or pay the medical bill within 30 days. If the employer contests a claim, a first report of injury shall be forwarded to the department of labor and the insurer within five days of notice. If additional treatment or medical visits are required or if the employee loses more than one day of work, the claim shall be promptly reported to the workers' compensation insurer, which shall adjust the claim. "Work-related, first-aid-only-treatment" means any one-time treatment

that generates a bill for less than \$750.00 and for which the employee loses no time from work except for the time for medical treatment and recovery not to exceed one day of absence from work.

Sec. 9. 21 V.S.A. § 687(e) is added to read:

(e) All insurance carriers authorized to write workers' compensation insurance coverage in Vermont shall make available, at the written request of the employer, a workers' compensation insurance rate that contains a deductible provision that binds the employer to reimburse the workers' compensation insurer for at least the first \$500.00 of benefits, medical or indemnity, due to an injured employee. Claims shall be adjusted and paid by the insurer, and the employer shall reimburse the insurer for the amount of the deductible.

\* \* \* Workers' Compensation Dispute Mediation \* \* \*

Sec. 10. 21 V.S.A. §663a is added to read:

§ 663a. WORKERS' COMPENSATION DISPUTE MEDIATION

(a) The commissioner shall require mediation in certain workers' compensation disputes. In each case, after a request for formal hearing has been filed, in accordance with the rule, the commissioner may determine whether the disputed issue and the parties are appropriate for mediation prior to a formal hearing and whether mediation would speed resolution of the dispute without the time and expense of a hearing. If the commissioner

determines that mediation is appropriate, the commissioner shall order the parties to attend at least one mediation session prior to a scheduled hearing. Referring a case to mediation shall not cause a delay in setting a date for the formal hearing. The commissioner shall, by rule, determine the procedures by which cases are selected and scheduled for mediation.

(b) The costs of mediation shall be divided evenly between the claimant and the employer, unless the parties agree otherwise. The cost of the mediation, up to the amount set by rule, shall be a cost recoverable by the claimant pursuant to section 678 of this Title.

(c) The commissioner shall select or make available a list of qualified individuals to act as mediators, which may include non-attorneys provided they are experienced in workers' compensation, including former department employees and insurance adjusters. The mediators shall be compensated at rates set by rule of the commissioner.

(d) Prior to implementing this section, the commissioner shall consult with the department of labor advisory council established by 21 V.S.A. § 1306, the worker compensation committees of the Vermont Bar Association and the Vermont Trial Lawyers Association, representatives of insurers who provide workers' compensation coverage in Vermont, and with other appropriate parties.

\* \* \* Hearing Decisions \* \* \*

Sec. 11. 21 V.S.A. § 663 is amended to read:

§ 663. HEARINGS, WHERE HELD; DECISION

(a) If the compensation is not fixed by agreement, either party may apply to the commissioner for hearing and award in the premises who shall set a time and place for hearing and give at least six days' notice thereof to the parties. ~~Such~~ The hearing shall be held at a place designated by the commissioner. No proposed findings of fact shall be required from the parties unless ordered by the commissioner. If ordered, the proposed findings of fact shall be submitted within 30 days after conclusion of the hearing.

(b) The decision may include abbreviated findings of fact or conclusions of law, or both, when appropriate.

\* \* \* Computation of Average Weekly Wage and COLA Adjustment \* \* \*

Sec. 12. 21 V.S.A. § 650(a) and (d) are amended to read:

(a) Average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the ~~12~~ 26 weeks preceding an injury; but where, by reason of the shortness of the time during which the worker has been in the employment, or the casual nature of the employment, or the terms of the employment, it is impracticable to compute the rate of remuneration, average weekly wages of the injured worker may be based on the average weekly earnings during the ~~12~~ 26 weeks previous

to the injury earned by a person in the same grade employed at the same or similar work by the employer of the injured worker, or if there is no comparable employee, by a person in the same grade employed in the same class of employment and in the same district. If during the period of ~~12~~ 26 weeks an injured employee has been absent from employment on account of sickness or suspension of work by the employer, then only the time during which the employee was able to work shall be used to determine the employee's average weekly wage. If the injured employee is employed in the concurrent service of more than one insured employer or self-insurer the total earnings from the several insured employers and self-insurers shall be combined in determining the employee's average weekly wages, but insurance liability shall be exclusively upon the employer in whose employ the injury occurred. The average weekly wage of a volunteer firefighter, volunteer rescue or ambulance worker, volunteer reserve police officer, or volunteer as set forth in subdivision 1101(b)(4) of Title 3, who is injured in the discharge of duties as a firefighter, rescue or ambulance worker, police officer, or state agency volunteer, shall be the employee's average weekly wage in the employee's regular employment or vocation but the provisions of section 642 of this title relative to maximum weekly compensation and weekly net income rates, shall apply. For the purpose of calculating permanent total or permanent partial disability compensation, the provisions relating to the maximum and

minimum weekly compensation rate shall apply. In any event, if a worker at the time of the injury is regularly employed at a higher wage rate or in a higher grade of work than formerly during the ~~12~~ 26 weeks preceding the injury and with larger regular wages, only the larger wages shall be taken into consideration in computing the worker's average weekly wages.

(d) Compensation computed pursuant to this section shall be adjusted annually on July 1, so that such compensation continues to bear the same percentage relationship to the average weekly wage in the state as computed under this chapter as it did at the time of injury. Temporary total or temporary partial compensation shall first be adjusted on the first July 1 following the receipt of 26 weeks of benefits.

\* \* \* Temporary Total Two-Year Review \* \* \*

Sec. 13. 21 V.S.A. § 642a is added to read:

§ 642a. TEMPORARY TOTAL; INSURER REVIEW

The employer shall review every claim for temporary total disability benefits that continues for more than 104 weeks. No later than 30 days after 104 weeks of continuous temporary total disability benefits have been paid, the employer shall file with the department and the claimant a medical report from a physician that evaluates the medical status of the claimant, the expected duration of the disability, and when or if the claimant is expected to return to

work. If the evaluating physician concludes that the claimant has reached a medical end result, the employer shall file a notice to discontinue.

\* \* \* Vocational Rehabilitation \* \* \*

Sec. 14. 21 V.S.A. § 641(a)(1) and (c) are amended to read:

(1) The employer shall designate a vocational rehabilitation provider from a list provided by the commissioner to initially provide services. Thereafter, absent good cause, the employee may have only one opportunity to select another vocational rehabilitation provider from a list provided by the commissioner upon giving the employer written notice of the employee's reasons for dissatisfaction with the designated provider and the name and address of the provider selected by the employee.

(c) Any vocational rehabilitation plan for a claimant presented to the employer shall be deemed valid if the employer was provided an opportunity to participate in the development of the plan and has made no objections or changes within 21 days after submission.

(d) The commissioner may adopt rules necessary to carry out the purpose of this section.

Sec. 15. VOCATIONAL REHABILITATION; DEPARTMENT OF LABOR

(a) The commissioner of labor shall consult with the department of labor advisory council established in 21 V.S.A. § 1306 to review current practices and activities in the following areas:

(1) Insurance carriers providing timely notification to the department of labor of all claimants who have been out of work for 90 consecutive days and requiring the department to provide immediate administrative enforcement for any failure to provide that notification.

(2) Ensuring that all lost-time claimants receive simple, understandable notices of their rights to and how to request vocational rehabilitation services no later than their receipt of their first workers' compensation indemnity benefits.

(3) Enabling timely review and resolution of insurance coverage and payment issues and other disputes arising in the development and implementation of vocational rehabilitation services.

(4) Developing performance standards to measure the success of vocational rehabilitation plans and other appropriate approaches to increase the number of injured workers returning to suitable employment.

(b) The department shall issue a written report to the house committee on commerce and the senate committee on economic development, housing and general affairs on or before November 15, 2009. The report shall outline any deficiencies discovered under subsection (a) of this section and any rules to be adopted to solve the deficiencies.

\* \* \* Attorney Fees \* \* \*

Sec. 16. 21 V.S.A. § 678 is amended to read:

§ 678. COSTS; ATTORNEY FEES

\* \* \*

(b) In appeals to the superior or supreme courts, if the claimant, if he or she prevails, he or she shall be entitled to reasonable attorney's attorney fees as approved by the court, and interest at the rate of 12 percent per annum on that portion of any award the payment of which is contested. Interest shall be computed from the date of the award of the commissioner.

\* \* \*

(d) In cases for which a formal hearing is requested and the case is resolved prior to formal hearing, the commissioner may award reasonable attorney fees if the claimant retained an attorney in response to an actual or effective denial of a claim and thereafter payments were made to the claimant as a result of the attorney's efforts.

(e) An attorney representing a claimant shall submit a claim for attorney fees and costs within 30 days following a decision in which the claimant prevails.

\* \* \* Assistance to Claimants \* \* \*

Sec. 17. ASSISTANCE TO CLAIMANT; BARGAINING AGENT;  
RULEMAKING; DEPARTMENT OF LABOR

The department of labor shall adopt a rule that permits a representative of the claimant's bargaining unit to provide informal assistance to a workers' compensation claimant in regard to any claim for workers' compensation benefits in all aspects except at a formal hearing.

\* \* \* Farm Safety Programs \* \* \*

Sec. 18. FARM SAFETY PROGRAMS; AGENCY OF AGRICULTURE,  
FOOD AND MARKETS

The secretary of agriculture, food and markets in collaboration with the department of labor and the University of Vermont extension service shall continue the important work being done in relation to the following:

(1) In collaboration with farm organizations and other relevant organizations develop farm safety and occupational health best management practices for the protection of farm workers and shall develop educational programs that will enable farm workers to understand and comply with those best management practices.

(2) In collaboration with the department of banking, insurance, securities, and health care administration and representatives of the insurance industry investigate the feasibility of developing a safety certification program

for farms. The investigation shall consider approaches to providing a premium reduction for farmers certified under such a safety certification program.

(3) In collaboration with the University of Vermont extension service rural and agricultural vocational rehabilitation program (RAVR) develop rural and agricultural vocational rehabilitation best management practices for use by vocational rehabilitation counselors.

Sec. 19. SAFETY STANDARDS FOR FORESTRY AND FOREST  
PRODUCTS INDUSTRIES

(a) The general assembly finds that workers' compensation insurance rates for the forestry and forest products industries are significantly higher than rates for those industries in neighboring states and significantly higher than those of the vast majority of other industries within the state.

(b) The general assembly encourages the forestry and forest products industry associations to take immediate and effective action to reduce safety and health risks and thereby reduce costs by the following:

(1) In consultation with the departments of labor and of banking, insurance, securities and health care administration, providing education and awareness programs concerning workers' compensation rates, experience modification, and steps that may be taken to reduce premium costs.

(2) In consultation with existing department of labor programs like project worksafe, VOSHA, and project road safe, developing safety and health

awareness forestry and forestry product industry programs that address  
compliance with existing safety and health standards and best work practices.

Sec. 20. EFFECTIVE DATE

The act shall take effect on July 1, 2008, except this section and Secs. 10, 7,  
15, 16, 17, and 18 which shall take effect on passage.