Virginia Workers' Compensation Commission

Employer Guide to Virginia Workers' Compensation

What is Workers' Compensation?

Workers' Compensation is a mandatory insurance requirement for most employers. It provides statutory benefits to covered workers who are injured in their employment. It benefits employers by limiting liability and, in most cases, shields covered employers from a civil lawsuit related to a work injury.

Virginia Workers' Compensation Requirements

Virginia law requires every employer who regularly employs three or more employees (including part-time employees), as well as every operator of underground coal mines, to maintain workers' compensation insurance. Employers with fewer than three employees may voluntarily come under the Workers' Compensation Act by taking out a workers' compensation policy or qualifying as a self insurer.

How to Obtain Insurance

The options for methods to insure for workers' compensation liability in Virginia are:

1. Purchase and maintain a policy from a company licensed in Virginia;
2. Apply to the Virginia Workers' Compensation Commission for self-insurance;
3. Become a member of a group self-insurance association licensed by the Virginia State Corporation Commission; or
4. Enter into an agreement with a Virginia registered professional employer organization.

An insurance agent can assist an employer in obtaining Virginia Workers' Compensation coverage. If coverage is not readily available in the regular or voluntary market, contact the National Council on Compensation Insurance (NCCI) at (561) 893-1000 for additional assistance in obtaining coverage.

Proof of Workers' Compensation Insurance

Virginia law requires that Virginia be listed in section 3A of the workers' compensation insurance policy. Virginia listing under section 3C of the policy is not sufficient.

Who is an Employee?

As a general rule, almost everyone working for another under a contract of hire is an employee, including apprentices and aliens, whether lawfully or unlawfully employed. Employees can include all of the following:

- Family members
- Minors
- Part-time workers
- Corporate officers
- Managers of LLC's (limited liability company)
- Members of: Virginia National Guard, Virginia State Defense Force, and US Defense Corps of Virginia
- Volunteer police, rescue workers and firefighters, if coverage is extended to them by the governing body for which they work or the volunteer unit itself.
- Employees of state and local governments including police, firefighters, Sheriffs, deputies, Commissioners of Tax and Revenue, Commonwealth's attorneys, Circuit Court Clerks and their employees.
- A sole proprietor, a shareholder of a stock corporation having only one shareholder, a member of a limited liability company having only one member, or all partners of a business if they elect to be included as employees under the workers' compensation policy for the business.

Information for Certain Business Entities

Sole proprietors and partners are not covered by workers' compensation, unless they:

1) Elect to be covered under the insurance policy for the business; and

2) Give notice to the insurer of such election.

The same is true for the shareholder of a stock corporation having only one shareholder and the member of a limited liability company having only one member.

Note: Virginia does *not* provide a waiver form or any form that identifies an individual as being "exempt" from workers' compensation requirements under the Workers' Compensation Act.

Limited Liability Companies (LLC's)

A "Manager" of a LLC is treated as an employee under the Act, unless the manager rejects coverage as set forth below. A LLC may have one or more managers as elected or appointed in accordance with the articles of organization or operating agreement.

A "Member" of a LLC is not viewed as an employee under the Act solely due to their capacity as a member. If the LLC has only one member, the member can elect to be included under an existing policy for the business. The distinction between manager and member is important because managers usually are considered employees, while members are not usually considered employees.

Employee Exceptions

Virginia law exempts some workers from being considered employees. The list includes:

- Domestic workers (hired primarily for the performance of household chores, home maintenance, or the care, comfort, and convenience of household members)
- Casual workers (who do not perform work in the usual course of the employer's trade, business, occupation, or profession)
- Railroad workers working for common carriers in interstate commerce
- Licensed real estate persons whose income is substantially commission-based and who work under a written contract specifying they are independent contractors and are not treated as employees for federal income tax purposes
- Non-compensated employees, officers, and directors of non-profit corporations exempt from taxation pursuant to Title 26, §501(c)(3) of the U.S. Code
- Elected state and local officials
- Employees of federal agencies
- Taxi and executive sedan drivers, if excluded from federal unemployment tax
- Farm and horticultural laborers, unless the employer regularly has in service more than three full-time persons

Coverage Exclusion

Corporate officers and managers of an LLC are considered employees under the Workers' Compensation Act. They may file to reject coverage for accidents, *but not for occupational diseases*. To file for exclusion they must file a "Notice of Rejection" with the insurer and with the Virginia Workers' Compensation Commission. If they are paid wages on a regular basis at an agreed upon amount they are still counted as employees, even though they have rejected coverage. In order to reject coverage, insurance coverage must be in force at the time of the rejection.

Guidelines for Contractors and Subcontractors

Note: The Virginia Workers' Compensation Commission cannot provide legal advice on individual contractor/subcontractor situations. The status of an independent contractor, a subcontractor, and an employee must be determined based upon the facts of each case. The following are general guidelines only:

1. **Employee vs. independent contractor**: Under the Virginia Workers' Compensation Act, an employee is a person who is under written or implied contract of hire "except one whose employment is not in the usual course of the trade, business, occupation or profession of the employer."

   In distinguishing between an employee and an independent contractor, some important considerations are (1) the right to hire, (2) the power to dismiss, (3) the obligation to pay wages, and, most importantly (4) the power to control the means and methods by which the work is done.

2. **Independent contractors are not automatically eligible for workers' compensation.** Sole proprietors or partners are not required to purchase coverage for themselves, and are not, themselves, "statutory employees" of the general contractor. Many contractors will require all subcontractors to maintain insurance, because the general contactor has potential liability as a statutory employer and its carrier will assess an additional premium for payments the contractor makes to uninsured subcontractors.

3. **Employees of independent contractors are often eligible for workers' compensation:** The employees of an independent contractor are entitled to workers' compensation benefits, so long as the independent contractor has three or more employees regularly in service; or if the employee is considered a "statutory employee," as explained below.

4. **"Statutory Employer" - Same Trade or Business:** When a subcontractor contracts to perform work or provide services that are part of the same trade, business, or occupation of the employer contractor, the contractor becomes the statutory employer of the employees of the subcontractor.

5. **"Statutory Employer" - Fulfillment of a Contract:** When a contractor hires a subcontractor to perform work in order to fulfill a contract, then the contractor is the statutory employer of the employees of the subcontractor – even when the contractor does not normally perform that type of work through his direct employees.

6. **Effects on statutory employer:** The subcontractor's employees are considered employees of the contractor for determining whether the general contractor has three or more employees and for liability purposes. The contractor must therefore provide workers' compensation coverage under Virginia law if there are three or more employees when counting both the direct employees and statutory employees.

7. **Subcontractors and Audits**. Since a potential statutory employer relationship exists for any job done through subcontractors, and since the insurance carrier does not have the right to inspect the subcontractors' records, carriers tend to assess a premium on contractors based on their payments to subcontractors.

8. **Coverage and Cost.** Contractors often require subcontractors to provide proof of workers' compensation or withhold a portion of the contract to offset the potential cost of insurance premiums. The fact that a contractor withholds a percentage of the contract cost does not afford any coverage to the subcontractor.

9. **Workers' Compensation Required.** A workers' compensation insurance requirement is not fulfilled by carrying general liability or other insurance coverage other than workers' compensation insurance.

Insurance Underwriting Questions? Contact The Bureau of Insurance

Matters that involve Virginia workers' compensation underwriting are under the jurisdiction of the Bureau of Insurance within the State Corporation Commission. The Bureau handles matters that involve:

- Audits or audit disputes
- Premiums
- Rates
- Classification codes

To contact the Bureau of Insurance

Email: bureauofinsurance@scc.virginia.gov
Phone: 804-371-9741

Employer Duties

1. Maintain workers' compensation insurance if required under the Workers' Compensation Act.
2. Post prominently a Workers' Compensation Notice (VWC Form 1) or similar notice. The posting is required by Virginia Workers' Compensation Commission Rule 7.2 and the notice is available on the VWC website (www.workcomp.virginia.gov). It is available in English and Spanish.
3. Be aware that it is unlawful to deduct any cost of workers' compensation insurance from employee wages.
4. Provide employees 30 days notice if your workers' compensation insurance coverage cancels or does not renew.

In the event of worker injury:

5. Report each accident to your insurance carrier on the "Employer's Accident Report" (EAR). The carrier will then report it to the Virginia Workers' Compensation Commission in proper format. (Note: OSHA accepts the EAR as supplemental to the OSHA log.)
6. Provide the injured employee with a panel of three physicians to select a physician. In an emergency, the injured employee may treat in any hospital or emergency care facility.
7. File an agreement for payment of compensation (by employer when self-insured or carrier when insured) in accepted claims.

Note: The injured worker's rights are not protected until an agreement is filed and an award issued by the Commission. If no award is issued, the injured worker must file a claim with the Commission within two years of the date of accident.

Penalty: Employers who refuse or neglect to obtain workers' compensation insurance can be assessed a civil penalty of up to $5,000. Continued failure to obtain workers' compensation coverage can result in an order prohibiting an employer from operating and subject the employer to criminal prosecution. Uninsured employers are at risk of suit by employees for damages resulting from work injuries.

Reduce Workers' Compensation Costs

There are several things a business owner can do proactively and even after a work injury occurs, to reduce workers' compensation costs.

- Work safely and establish a Safety Program
- Use free on-site VOSH or insurance consulting services to identify or eliminate hazards
- Maintain good communications with employees
- Provide prompt medical treatment with a previously identified panel of medical providers
- Provide a Return-to-Work program for employees who are restricted to light duty

Contact the Virginia Workers' Compensation Commission

For additional questions about the Virginia Workers' Compensation Commission or about insurance coverage requirements, you may contact us as follows:o

E-mail the Commission at:	Questions@workcomp.virginia.gov
Telephone the Insurance Unit:	804-205-3586
Fax the Insurance Unit:	804-367-2239
Telephone VWC Toll Free:	1-877-664-2566

Virginia Code and Additional Information
This informational guide is provided pursuant to Virginia Code § 65.2-800 and is not intended and may not be considered as providing legal advice. The Virginia Workers' Compensation Act is available on the Commission web site at www.workcomp.virginia.gov , at public libraries, or may be purchased online at: www.lexisnexis.com keyword search: Virginia Workers' Compensation Act.

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