Second Injury Funds: the benefit in hiring injured workers

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Through the establishment of Second Injury Funds, employers are encouraged to re-hire injured workers. In the United States, at least 30 states still have active Second Injury Funds, which benefit both the employee and employer. For the employee, Second Injury Funds serve as additional anti-discriminatory support for those with disabilities seeking employment. For the employer, Second Injury Funds can serve as a limitation in liability if the employee is subsequently injured.

Second Injury Funds date back to the early 1900s and expanded after World War II. They were specifically created to incentivize the re-hiring of injured workers.

Under the Americans with Disabilities Act, it is illegal to ask a candidate whether they suffer from a pre-existing injury or condition, as it may require a candidate to disclose a disability. After a conditional offer has been made, an employer can then request the employee undergo a pre-employment physical or answer a medical questionnaire. But, for what? For the purpose of a Second Injury Fund.

Second Injury Funds date back to the early 1900s and expanded after World War II. They were specifically created to incentivize the re-hiring of injured workers. These funds are typically designed so that when a worker has a pre-existing permanent partial disability and subsequently sustains a more disabling second injury, the statutory fund will assume some portion of the liability for both wage and medical benefits.

Second Injury Funds are funded by insurance companies that have paid workers' compensation benefits. In Louisiana, the Second Injury Fund Board determines the amount of the assessment, which is a percentage of the total benefits paid, for the preceding calendar year.

Unfortunately, Second Injury Funds are — if not already — being abolished or slowly phased out. At least 20 states have abolished or began phasing out their funds due to the overlap with the Americans with Disabilities Act or because of fiscal and bureaucratic issues. Even New York, the first state with a Second Injury Fund in 1916, has abolished its fund. For those states that still have funds, employers are not discouraged from hiring injured workers, which is to the benefit of both the employee and employer.

Today's Second Injury Funds

At least 30 states have active Second Injury Funds. Louisiana, Montana, and Tennessee illustrate how the requirements vary state by state:

Louisiana

Of the states that still have a Second Injury Fund, Louisiana's has been considered one of the most generous in the nation.

Before reimbursement is made, however, four prerequisites must be met:

(1) The employee must have a pre-existing permanent partial disability that is an obstacle or hindrance in obtaining employment.

(2) The employer must establish that they had actual knowledge of the employee's pre-existing permanent partial disability prior to the subsequent injury.

(3) The employee must sustain a subsequent (occupational) injury that results in liability for workers' compensation and:

  (a) The subsequent injury would not have occurred but for the pre-existing permanent partial disability; or

  (b) The disability is greater than would have resulted had the pre-existing permanent partial disability not been present and the employer has been required to pay compensation for the greater disability.

(4) The employer or, if insured his insurer, must file a Notice of Claim within 52 weeks after the first payment of any benefits (indemnity or medical) by mailing the Notice to the Second Injury Fund.

Louisiana's Second Injury Board has even made the "knowledge" aspect of the prerequisites easy by creating a "post-hire/conditional job offer knowledge questionnaire." While completion of this questionnaire does not affect the benefits owed to an employee if they are injured, if answered untruthfully and/or incorrectly, forfeiture of an employee's compensation may result.

If all prerequisites are met, the employer or insurance carrier will be reimbursed for all weekly compensation payments payable after the first 104 weeks of payments, or, in death cases, all compensation

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paid and payable after the first 104 weeks of payments; and 100% of all reasonable and necessary medical expenses actually paid and payable, which exceed $25,000.

Montana

Montana's Subsequent Injury Fund is like Louisiana's fund. Established in 1973, Montana's Subsequent Injury Fund assists persons with disabilities to become employed by offering a financial incentive to employers who hire certified workers.

With the help of Second Injury Funds, it's no longer taboo to re-hire an injured worker. Rather, it's encouraged through a limitation in liability.

To be considered a "person with a disability," an employee must become certified with the Subsequent Injury Fund. This is done by completing an application for certification with a physician who has given the employee permanent work restrictions because of a permanent impairment. The application is then reviewed by the Subsequent Injury Fund's department, and once approved, the employee receives a card, identifying them as certified by the Fund. Once the employee is certified, he or she is certified for life.

Certification benefits the employee in that they are more likely to be hired because there is a limit on their employer's workers' compensation liability if the employee becomes injured or reinjured. Liability of the employer, or its insurer, is limited to 104 weeks of benefits. From there, employers or insurers are reimbursed for the medical and indemnity benefits paid on the claim.

Tennessee

Tennessee's Subsequent Injury Fund is slightly different than Louisiana's and Montana's funds, and it's less generous to the employer. Tennessee's Subsequent Injury Fund *pays a percentage of the employee's permanent total disability benefits, which are only awarded when the injury totally incapacitates the employee from earning an income from any job*.

To receive reimbursement under the Fund, the following prerequisites must be met:

(1) The employee must have previously sustained a permanent physical disability, and the employer must have known about the disability.

(2) The employer must have workers' compensation insurance coverage.

(3) The employee's new work-related injury must render the employee permanently and totally disabled.

What about all other benefits, including temporary disability benefits, medical expenses, and permanent benefits, paid by the employer or insurer? Well, those are on the employer or insurer.

Taking it a step further — the Special Fund

Established in 1927 through the enaction of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), the Special Fund pays certain types of claims and expenses authorized by the LHWCA. Despite being a federal act, the Special Fund is not paid by the government. Rather, the Fund is financed through annual assessments charged to employer and insurance carriers, along with penalties and fines levied against employers and insurance carriers. Like the various states' funds, the Special Fund pays the remainder of benefits due after an employer or insurer carriers pays benefits for a certain number of weeks.

Conclusion

With the help of Second Injury Funds, it's no longer taboo to re-hire an injured worker. Rather, it's encouraged through a limitation in liability. As always, employers and their insurance carriers should be knowledgeable of their state's laws to determine whether limitation of liability under a Second Injury Fund is possible and what prerequisites must be fulfilled before reimbursement is made.

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