

# Worker's Compensation CLAIMS BRIEF



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## Worker's Compensation Issues Police Secondary Employment - Illegally Employed Minors

By Sherri Butler

Although LGIT does not provide Workers' Compensation coverage, our members often call upon us to assist them with Workers' Compensation issues. We thought all of our members might benefit from some recent inquiries.

### **Is a local government liable for workers compensation benefits paid to a police officer who is injured while working off-duty for a private secondary employer?**

Possibly. Absent an agreement between the employers, a local government could be jointly liable for workers' compensation benefits awarded for the off-duty injury of a police officer.

Workers Compensation benefits are based upon the average weekly wage ("AWW") of an employee. To determine the AWW of an employee with two jobs concurrently, generally only the wages of the injury-causing job are considered.<sup>1</sup> For example, if a town police officer sustained a back injury while attempting to apprehend a shoplifter who was fleeing from Nails-R-Us, and that injury prohibited him from working both jobs during a disability period, the officer would receive temporary total ("TT") disability benefits of two-thirds of his AWW for the store. If, over a 13-week period, he averaged earnings of \$300 per week, his TT benefits would be \$200 per week. Undoubtedly, this would be a financial hardship for the officer if he exhausted the disability and vacation leave he may have accrued with his principal employer.

However, for the purposes of workers' compensation, security related work for private employers and police related activities might be concurrent. Based upon the TT benefits of the example, it is clearly in the officer's best interest to attribute the injury to both employers and file a claim with the Workers' Compensation Commission ("WCC") naming both employers as liable. Benefits would then be calculated on the higher AWW of the officer. In *Lovelace v. Anderson*, 366 Md. 690 (2001), the Court of Appeals recently re-affirmed a settled principle of Maryland law that "[a] worker may simultaneously be the employee of two employers."<sup>2</sup> Remember, the Workers'

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Compensation Act is a remedial statute, which is construed liberally in favor of an employee. Consequently, although an injury may have occurred during an officer's off-duty work for a secondary employer, the Commission might, based upon the facts of the occurrence, determine that the secondary employer and the local government are co-employers of the injured officer. In that case, both employers would be jointly liable for the benefits awarded by the Commission.

Workers' compensation insurance rates are expensive and correlate to the claims experience of the employer. If your local government does not want to share responsibility for claims of off-duty police officers who are injured while working for a private employer, the secondary employer should be required to execute an agreement that indemnifies the local government for these injuries. Last year, the Court of Appeals addressed the liability of co-employers to pay benefits ordered by the WCC and instructed the Commission to interpret and apply any contracts or agreements between co-employers that validly affect the payment of compensation benefits. *Temporary Staffing, Inc. v. J.J. Haines & Co.*, 362 Md. 388 (2001).<sup>3</sup> As a result of that decision, if the Commission finds that a local government and a secondary employer are co-employers of an injured officer, it will order the secondary employer to pay the award, if that employer has, by agreement or contract, accepted responsibility for the benefits. The local government employer would provide excess coverage only in the event the secondary employer was unable to meet its obligation to pay benefits. The following recommendations will help insulate you from liability for injuries to police officers who are injured while working for a secondary employer:

- Adopt reasonable written police regulations requiring approval for secondary employment
- Adopt the policy properly as authorized by charter
- Require the police officer and secondary employer to complete a written application form
- Require secondary employer to execute a Secondary Employment Agreement
  - Secondary employer should accept responsibility for payment of wages
  - Secondary employer should accept financial responsibility for injuries and liability

*Policy guidelines as well as sample Application Forms and Agreements were distributed to our members during LGIT's Police Secondary Employment Liability Workshops held March 27<sup>th</sup> and April 8<sup>th</sup>. If you would like a copy of these forms, contact Sherri Butler or Elisabeth Beekman at 1-800-673-8231.*

<sup>1</sup> *Md. Code Ann. Labor and Employment, Art., §9-602.* However, one exception applies to the AWW calculation of an employee with more than one employer. If an employee sustains a serious permanent partial disability equal to 250 weeks compensation or sustains a permanent total disability and is unable to work at any employment the employee was engaged in at the time of the accidental injury, then the AWW will be calculated on the employment where the employee earned the highest wages. Examples of 250 compensation injuries are loss of a hand, foot or eye.

<sup>2</sup> *Lovelace* involved an off-duty Baltimore City police officer that was working, in plain clothes, as a security guard at a Baltimore County hotel. Officer Anderson fired during a gun battle with two armed robbers in the hotel lobby injuring a hotel guest. Additionally, Anderson lost three fingers of his left hand in the gun battle. Although *Lovelace* decided a liability claim against Anderson's secondary employer, the Court of Appeals noted that the Workers' Compensation Commission determined that Baltimore City and the private employer hotel were co-employers of Anderson.

<sup>3</sup> *Haines* involved an injury claim of an employee who worked for a company that supplied temporary day laborers to businesses. When the employee was injured during his temporary assignment, the Commission found that the corporation and the temporary employment company were co-employers and jointly liable, in equal shares, for the compensation benefits. The corporation argued that, by contract, the staffing company had agreed to pay for benefits.

## **Is a claim involving a minor who is employed illegally covered by worker's compensation or general liability insurance?**

Yes, not only is the member liable for worker's compensation, but the member could be responsible for double compensation as a penalty for employing the minor in an activity that is prohibited to minors.

A member recently reported that last summer the town hired some minors to work for the town in conjunction with a summer work program. In violation of state law, one minor had been injured while operating machinery.<sup>1</sup> After the minor employee filed a workers' compensation claim, the town received a notice that the minor employee was seeking double compensation. When the town's compensation carrier informed them that this was not covered by workers' compensation insurance it turned to LGIT for an explanation and possible coverage.

Unfortunately for the town, the Commission may double the amount of compensation awarded to a minor employee who is illegally employed at the time of the compensable injury. Most importantly, if the Commission awards double compensation, the employer of the minor is solely liable for the increased amount of compensation and an "insurance policy cannot pay for the increased award." *Md. Code Ann. Labor and Employment Art., §9-606*. Consequently, although the initial award would be covered by the member's workers' compensation insurance, the increased amount over the initial award cannot be covered by any insurance. The legislature clearly intended this to be a punitive measure to discourage employers from allowing minors to engage in dangerous or illegal employment.

LGIT's liability coverage does not cover injuries to employees for the following reasons. The Workers' Compensation Act specifically states that an injured employee's exclusive remedy against an employer is worker's compensation benefits. Accordingly, an employee may not sue an employer for negligence. Although Maryland law does allow tort claims between co-employees, the Local Government Tort Claims Act specifically prohibits fellow employee suits between local government employees. Consequently, even if the minor employee had a claim for negligence against the employee who allowed the illegal employment and contributed to the injury, the minor, by state law, is precluded from making a liability claim against that employee.

Summer is just around the corner and many local governments will be providing employment opportunities for area youth. Take this time to train employees who may be supervising or working with young employees about the proper working conditions and activities for minors.

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