



MATTHIESEN, WICKERT & LEHRER, S.C.
ATTORNEYS AT LAW

MATTHIESEN, WICKERT & LEHRER, S.C.
Hartford, WI ❖ New Orleans, LA ❖ Orange County, CA
❖ Austin, TX ❖ Jacksonville, FL ❖ Boston, MA
Phone: (800) 637-9176
gwickert@mw-law.com
www.mw-law.com

WORKERS' COMPENSATION SUBROGATION IN ALL 50 STATES

State	Main Statute	Can Carrier Sue Third Party Directly	Right to Intervene	Recovery From UM/UIM Benefits	Subro Against Med Mal	Subro Against Legal Mal	Recovery Allocation/Equitable Limitations	Employer Contribution Employer Negligence	Attorney's Fees/Costs	Future Credit	Auto No-Fault	PI SOL
Alabama	Ala. Stat. § 25-5-11	Yes, 6 months after SOL.	Yes, if shown it could make substantial contribution.	No	Yes	No	(1) Carrier Reimbursed, Less Attorney's Fees. (2) Balance to Plaintiff.	No, employer immune even if intentional.	Pro-Rata. <i>Fitch</i> Formula. Carrier can recover fees if it files suit.	Yes, but not if lump sum award or "unknown or incalculable" future medical. Carrier owes fees on value of future benefits. Use <i>Miller</i> Formula.	No	2 Yrs.
Alaska	Alaska Stat. § 23.30.015	Yes, after 1 year.	Yes	Undecided	Undecided	Yes	(1) Litigation Costs (2) Employer Reimbursed (3) Balance to Plaintiff	No, employer reimbursement reduced by % of fault.	<i>Cooper</i> Rule. Pro-Rata. Past and Future. Active vs. Passive <i>English</i> Rule	Yes, reduced by employer's negligence.	No	2 Yrs.
Arizona	A.R.S. § 23-1023(D)	Yes, after 1 year.	Yes	No	Yes	No	(1) Litigation Costs (2) Employer Reimbursed (3) Balance to Plaintiff	No, contribution lien reduced by % of employer's fault determined by jury (trial, not settlement).	No, lien not subject to reduction for atty's fees.	Yes, also reduced by employer's % of fault.	No	2 Yrs.
Arkansas	A.C.A. § 11-9-410	Yes, party must give 3 days' notice of settling.	Must Intervene in reasonable time after notice.	Employer's Policy Only	Undecided	Undecided	(1) Costs/Fees (2) 1/3 to Worker (3) 2/3 to Carrier (4) Balance to Plaintiff Made Whole Applies	No	Pro-Rata	Yes	No	3 Yrs.
California	Labor Code § 3852	Yes, with notice by certified mail.	Yes	No	No	Undecided	(1) Costs/Fees Based on Services by Both (2) Carrier Reimbursed (3) Balance to Plaintiff	Proportional Only if Verdict	Apportion, if carrier actively participates.	Yes, in amount of employee's net recovery. Should file petition with W.C.A.B.	No	2 Yrs.

State	Main Statute	Can Carrier Sue Third Party Directly	Right to Intervene	Recovery From UM/UIM Benefits	Subro Against Med Mal	Subro Against Legal Mal	Recovery Allocation/Equitable Limitations	Employer Contribution Employer Negligence	Attorney's Fees/Costs	Future Credit	Auto No-Fault	PI SOL
Colorado	C.R.S. § 8-41-203	Yes	Yes, even after SOL runs.	No	Yes	No?	Economic Damages Only. No recovery from non-economic damages.	No	Pro-Rata	Yes	Not after 7/1/03	2 Yrs. 3 Yrs. if auto.
Connecticut	C.G.S.A. § 31-293	Employer can bring suit. C.G.S.A. § 31-293. Carrier can bring suit and automatically loses 1/3 of its lien if it waits for employee to file suit.	Must intervene or give notice of lien within 30 days after notice of filing suit.	No	Yes	No	(1) Fees, Expenses (2) 1/3 to Employee (if employee filed. No credit) (3) Carrier Reimbursed (4) Balance to Plaintiff If suit brought by carrier, may be subject to equitable defenses, including Made Whole Doctrine.	No	Lien Automatically Reduced By 1/3 if P files suit, unless ER is state or city. Most likely, suit must be filed to get attorneys' fees. If suit brought by carrier, may be subject to equitable defenses, including Common Fund Doctrine.	Yes	No	2 Yrs.
Delaware	19 Del. C. § 2363	Yes, if no plaintiff suit by 260 days. 30 days' notice by all.	Yes	No	Yes	No	(1) Fees, Expenses (2) Carrier Reimbursed, Less Pro-Rata Fees (3) Balance to Plaintiff	No	Pro-Rata	Yes	No	2 Yrs.
District of Columbia	D.C. Code Ann. § 32-1535	6 months after award.	Carrier must intervene if plaintiff files suit.	No	Yes	Undecided	Formula applies when carrier files suit. Otherwise, carrier has only equitable lien.	No	If employee files third-party suit; costs of litigation and fees shared pro-rata based on amount each received in the total recovery.	Yes, may recover in third-party suit directly if carrier files.	Yes	3 Yrs.
Florida	F.S.A. § 440.39	Year: 1: Plaintiff 2: Carrier 3: Plaintiff	No, MUST file Notice of Lien.	No	Yes	No	Carrier gets lien, less pro-rata fees, unless plaintiff shows <i>Manfredo</i> Formula.	No	Pro-Rata	Yes, may recover in third-party suit if carrier files.	Yes	4 Yrs.
Georgia	O.C.G.A. § 34-9-11.1	Yes, after 1 year.	Yes	No	Undecided	Undecided	Made Whole Doctrine codified. No lien against non-economic damages.	Plaintiff's recovery reduced by employer's negligence.	Apportion based on services by carrier and plaintiff atty.	No	No	2 Yrs.
Hawaii	Haw. Rev. Stat. § 386-8	Yes, after 9 months.	Yes	No?	Undecided	Undecided	(1) Fees, Expenses (2) Carrier Reimbursed, Less Pro-Rata Fees (3) Balance to Plaintiff	No	Apportion based on activity of each.	Yes, with approval of Dept. of Labor	Yes	2 Yrs. Longer if auto accident.
Idaho	Idaho Code § 72-223	Yes	Yes	Undecided	Yes	Undecided	Carrier gets first money dollar-for-dollar.	No subro when employer is comparatively negligent.	Apportion based on activity of each.	Yes, carrier reimbursed atty's fees on each payment.	No	2 Yrs.

State	Main Statute	Can Carrier Sue Third Party Directly	Right to Intervene	Recovery From UM/UIB Benefits	Subro Against Med Mal	Subro Against Legal Mal	Recovery Allocation/Equitable Limitations	Employer Contribution Employer Negligence	Attorney's Fees/Costs	Future Credit	Auto No-Fault	PI SOL
Illinois	820 I.L.C.S. § 305/5(b)	Yes, 3 months before SOL.	Yes	No	Yes	No	Carrier gets first money off top, less atty's fees.	No. <i>Kotecki</i> Contribution only, up to <i>Kotecki</i> cap.	Pro-Rata. Limited to 25%	Yes, 25% of future benefits owed as atty's fees.	No	2 Yrs.
Indiana	I.C. § 22-3-2-13	Yes, 1 year after SOL.	Yes	Employer's UM policy only, unless exclusion.	Yes	Undecided	Carrier paid first, less fees. Lien Reduction Stat. §34-51-2-19 may apply.	No	Pro-Rata 25% and 1/3. Past and future benefits.	Future obligations end with any third-party recovery.	No	2 Yrs.
Iowa	I.C.A. § 85.22	Yes, carrier must give 90 days' notice. Plaintiff must give notice 10 days before trial.	Must intervene or file Notice of Lien within 30 days of receiving employer's notice or lose subro rights.	No	No	No	First money – past and future. § 85.35. Settlement of comp claim bars subro.	No	Pro-Rata. Future fees paid back as benefits paid.	Yes, may also recover in third-party suit.	No	2 Yrs.
Kansas	K.S.A. § 44-504	Yes, after 1 year; 18 months if death.	Yes	Possibly only to substituted payment.	Yes	Undecided	Lien extends only to damages that duplicate medical and lost wages.	Yes. <i>Brabander</i> Formula.	Apportion, If active. No fee if gerrymandering.	Yes, reduced by employer's negligence.	Yes	2 Yrs.
Kentucky	K.R.S. § 342.700	Yes, but only if employee has not filed suit.	Must Intervene	No	Yes	Undecided	No reimbursement from non-economic damages. Modified Made Whole Doctrine applies.	Yes, third-party can seek contribution from employer, which reduces plaintiff's recovery, lien, and credit.	Lien reduced by a pro rata-share of plaintiff's attorney's fees and costs.	Yes, lien must exceed plaintiff's atty's fees and costs or there's no credit. Credit is reduced by % of employee's and employer's fault.	Yes	1 Yr. 2 Yrs. For Auto
Louisiana	La. R.S. § 23:1101, et. seq.	Yes, with notice. Carrier must consent to settlement.	Must Intervene	Policy only, unless UM policy excludes benefits to WC carrier.	Yes	No	First money reimbursed. Reduced by plaintiff's contributory negligence. If settled, carrier can recover max of 50% of lien.	Yes, lien reduced by employer's % of fault.	<i>Moody</i> Fees. Pro-Rata based on atty's activity.	Yes	No	1 Yr.
Maine	39-A M.R.S.A. § 107	Yes, after 30-day demand.	Yes.	Employer Policy: Yes Employee Policy: ?	Yes?	Undecided	Carrier gets first money, less fees and costs.	No	Pro-Rata, if plaintiff files.	Yes	No	6 Yrs.
Maryland	Md. Lab. & Empl. § 9-901-903	Exclusive right for 2 mths after first award of comp. Joint right to file after 2 mths.	Yes	No	Yes, if mal-practice aggravates injury.	Undecided	Carrier gets first money, less fees and costs.	No	Pro-Rata, unless intervention is necessary.	Yes	No	3 Yrs.

State	Main Statute	Can Carrier Sue Third Party Directly	Right to Intervene	Recovery From UM/UIM Benefits	Subro Against Med Mal	Subro Against Legal Mal	Recovery Allocation/Equitable Limitations	Employer Contribution Employer Negligence	Attorney's Fees/Costs	Future Credit	Auto No-Fault	PI SOL
Massachusetts	M.G.L.A. 152 § 15	Yes, after 7 months.	No	No	Yes	Undecided	Carrier gets first money, less fees and costs. Subro possibly not allowed against pain and suffering (<i>Curry</i> Allocation) or against loss of consortium (<i>Eisner</i> Allocation).	No	Apportion, depending on activity.	<i>Hunter</i> offset. Pays only fraction of future benefits.	Yes	3 Yrs.
Michigan	M.C.L.A. § 418.827	Yes, after 1 year.	Yes	UM – Yes UIM - No	Yes	NO	Carrier gets first money, less fees and costs. Subrogated to economic damages only if no-fault involved. No Subro for Med Expense if No-Fault.	No	Pro-Rata	<i>Fringes</i> Formula	Yes	3 Yrs.
Minnesota	M.S.A. § 176.061	Yes	Yes, can also actively participate.	No	Yes	Yes	(1) Fees, Expenses (2) 1/3 to Plaintiff (3) Carrier Reimbursed, Less Pro-Rata Fees (4) Balance to Plaintiff As (Credit). <i>Naig</i> Settlement	<i>Lambertson</i> Contribution/Reduction	Pro-Rata. Court has discretion to determine reasonable fees. Carrier can't get fees.	Yes, carrier pays % of future benefits because of reduction for costs/fees.	Yes	6 Yrs.
Mississippi	M.C.A. § 71-3-71	Yes, with reasonable notice.	Must intervene unless there is reimbursement agreement or the carrier files.	No	Yes, but not as to past medical or lost wages.	Undecided	(1) Fees, Expenses (2) Carrier Reimbursed Fully - No Fees (3) Balance to Plaintiff	No	No	Yes	No	3 Yrs.
Missouri	Mo. Rev. Stat. § 287.150	Yes	Yes, but not required.	UM - No UIM – Employee: No Employer: Undecided	Yes	No	<i>Ruediger</i> Formula	No	Pro-Rata	Yes	No	5 Yrs.
Montana	Mont. Stat. § 39-71-412	Yes, after 1 year. Plaintiff must give notice.	Yes?	Yes	Undecided	Undecided	First money lien, subject to Made Whole Doctrine.	No	Pro-Rata, unless carrier waives 50%.	Future Credit Stat. repealed in 2005.	No	3 Yrs.
Nebraska	Neb. Rev. Stat. §§ 48-118; 48-118.01; 48-118.04	Yes	Yes, equal voice.	Yes. Possibly Employer's Policy Only	Yes	Undecided	(1) Fees, Expenses (2) Carrier Reimbursed (3) Balance to Plaintiff Division must be agreed to or court approved as fair and equitable.	No, only if contractual indemnity.	Fees/costs recoverable and allocated if carrier is active. If not, pro-rata deduction.	Yes	No	4 Yrs.

State	Main Statute	Can Carrier Sue Third Party Directly	Right to Intervene	Recovery From UM/UIM Benefits	Subro Against Med Mal	Subro Against Legal Mal	Recovery Allocation/Equitable Limitations	Employer Contribution Employer Negligence	Attorney's Fees/Costs	Future Credit	Auto No-Fault	PI SOL
Nevada	N.R.S. § 616C.215	Yes	Possibly	Employer's Policy Only	Yes	Undecided	Lien may be limited to economic damages.	No	Breen Formula	Yes. Credit arguably limited to economic damages and reduced by personal living expenses. No credit for non-economic damages.	No	2 Yrs.
New Hampshire	N.H. Rev. Stat. Ann. § 281-A:13	Yes, after 9 months.	Yes	Yes	Undecided	Undecided	Lien reimbursed off the top, less any fees owed.	No	"As Justice May Require". Carrier may recover fees. Fees/costs owed on past and future benefits.	Yes	No	3 Yrs.
New Jersey	N.J.S.A. § 34:15-40	Yes, after 1 year.	No	Yes	Yes	Yes	Carrier reimbursed, less pro-rata share of fees/costs.	No	Pro-rata of 1/3 fees and up to \$750 in costs.	Yes	Yes	2 Yrs.
New Mexico	N.M.S.A. § 52-5-17	No. Reimbursement Only	Yes	Employer's Policy Only	Yes?	Undecided	Hybrid Made Whole Doctrine: Subrogable Elements Allocation Required. Employee has burden of proof. Court looks at percentage of each damage element recovered.	Yes, reimbursement reduced by % of fault.	Pro-rata, up to discretion of court.	Yes	No	3 Yrs.
New York	N.Y. Work Comp § 29	Yes, 30 days' notice.	Depends	No	Yes	Yes	(1) Fees, Expenses (2) Carrier Fully Reimbursed (3) Net to Plaintiff	"Grave Injury" Contribution	Kelly Formula	Yes	Yes	3 Yrs.
North Carolina	N.C.G.S.A. § 97-10.2	Yes, joint right after 1 year, ending 60 days before SOL.	Yes	Yes, for policies after 10/1/99.	Undecided	No	(1) Fees, Expenses (2) Carrier Fully Reimbursed (3) Net to Plaintiff "Discretionary Reduction"	Yes N.C.G.S.A. § 97-10.2(e)	Pro-Rata. Plaintiff Must Apply	No, must recover in third-party suit.	No	3 Yrs.
North Dakota	N.D.C.C. § 65-01-09	Yes, after 60 days.	Yes	Undecided	Yes	No	Up to 50% of Third-Party Recovery	No	25% / 1/3%	Yes	Yes	6 Yrs.
Ohio	Ohio Rev. Code Ann. § 4123.931	Yes	Yes	Yes	Probably	Probably	Statutory allocation formulas for trials and settlements.	No	Yes	Yes, but trust set up in amount of futures.	No	2 Yrs.

State	Main Statute	Can Carrier Sue Third Party Directly	Right to Intervene	Recovery From UM/UIIM Benefits	Subro Against Med Mal	Subro Against Legal Mal	Recovery Allocation/Equitable Limitations	Employer Contribution Employer Negligence	Attorney's Fees/Costs	Future Credit	Auto No-Fault	PI SOL
Oklahoma	85 O.S. § 348 Accident Prior to 2/1/14	Yes	Yes	No	Yes	Yes	(1) Fees - costs off top. (2) If recovery is compromise settlement approval of court is needed. Balance apportioned as parties may agree. If no agreement, court can equitably apportion. (3) If recovery is not "compromise settlement, <i>Prettyman</i> formula allowed.	No	No	Only if recovery is more than lien.	No	2 Yrs.
	85 O.S. § 43 Accident After 2/1/14	Yes	Must	Yes	Yes?	Yes?	(1) Fees – costs off top. (2) Carrier receives 2/3 of net recovery or its entire lien, whichever is less. (3) Balance to plaintiff.	No	No	No, must recover future payments in third-party recovery.	No	2 Yrs.
Oregon	O.R.S. § 656.593	Yes, 90 days after election.	No	No	Yes?	Yes	(1) Fees, Expenses (2) Carrier Reimbursed Fully for Past and Future Benefits (3) Carrier Reimbursed Fully (4) Balance to P-Credit Possible "Just and Reasonable" Allocation	No	No Off the Top	No, must recover in third-party suit. Credit if recovery made before benefits paid.	No	2 Yrs.
Pennsylvania	77 P.S. § 671	No	Yes	<u>Employer:</u> Yes <u>Employee:</u> No <u>Other Person:</u> Yes	Causes of action prior to 3/20/03	Yes	None	None. First Money Reimbursed	Pro-Rata	Yes, but as to indemnity benefits only.	Yes	2 Yrs.
Rhode Island	R.I.G.L. § 28-35-58	Yes, if notice given 26 weeks before 2 years, 8 months anniversary of accident, can sue after 2 years, 8 months date.	Yes	No	Yes	Undecided	None	None. First Money Reimbursed	Pro-Rata	Yes	No	3 Yrs.
South Carolina	S.C. Code Ann. § 42-1-560	Yes, after 1 year. Twenty (20) days assignment notice to employee required. Can sue 90 days after that.	Yes	No.	Yes	Undecided	First money less fees; but equitable reduction.	No	Set by Commission F2 1/3	Yes	No	3 Yrs.

State	Main Statute	Can Carrier Sue Third Party Directly	Right to Intervene	Recovery From UM/UIIM Benefits	Subro Against Med Mal	Subro Against Legal Mal	Recovery Allocation/Equitable Limitations	Employer Contribution Employer Negligence	Attorney's Fees/Costs	Future Credit	Auto No-Fault	PI SOL
South Dakota	S.D.C.L. § 62-4-38, 39, 40	Yes	Yes	Employer's Policy Only	Undecided	Undecided	Subro limited to "like damages" (economic v. non-economic). Below is "Zoss Formula": (1) Allocate recovery into "like damages" (hearing); (2) Determine amount of "like damages" paid by carrier; (3) Subtract pro-rata fees/costs (ratio of lien to gross recovery); and (4) Balance paid to carrier.	No	Pro-rata, up to 35%. Allocated between worker and carrier.	Yes, recovery and credit limited to "like damages".	No	3 Yrs.
Tennessee	T.C.A. § 50-6-112	Yes, after 1 year. Carrier has additional 6 months to file for a total of 18 months.	Yes	No	Yes	Undecided	No Special Formula First Money	No, defendant can introduce evidence to show employer cause in fact.	Pro-rata if no active participation by carrier.	Yes, but no credit against unknown or incalculable future medical benefits, unless carrier proves likelihood and amount of future medicals.	No	1 Yr.
Texas	V.T.C.A. Labor Code §§ 417.001-417.004	Yes	Yes	Employer's Policy Only	Yes	Yes	Carrier has first money right of recovery.	After 1/1/03 proportional reduction.	Apportionment	Yes, may recover in third-party suit if carrier sues alone.	No	2 Yrs.
Utah	U.C.A. § 34 A-2-106	Yes	Yes	No	Yes	Undecided	(1) Fees, Expenses (2) Carrier Reimbursed Fully, Less Pro-Rata Fees/Costs. (3) Net to Plaintiff	40% Rule	Pro-Rata	Yes	Yes	4 Yrs.
Vermont	Vt. Stat. Ann. Tit. 21 § 624	Yes, after 1 year.	Yes	Only If Plaintiff Is Made Whole	Undecided	Undecided	First dollar reimbursed to carrier, less pro-rata fees.	No	Pro-Rata	Yes	No	3 Yrs.
Virginia	Va. St. § 65.2-309	Yes	Probably	Employer's Policy Only	Yes	Undecided	First dollar reimbursed to carrier, less pro-rata fees.	No	Pro-Rata	Yes, carrier reimbursed attorney's fees on each payment.	No	2 Yrs.
Washington	R.C.W.A. § 51.24.030	Yes	Yes	Yes. Possibly Employer's Policy Only	Yes?	Yes	(1) Fees, Expenses (2) 25% to Plaintiff (3) Carrier Reimbursed Fully, Less Pro-Rata Fees/Costs. (4) Net to Plaintiff No recovery from pain and suffering damages.	No	Pro-Rata	Yes	No	3 Yrs.

State	Main Statute	Can Carrier Sue Third Party Directly	Right to Intervene	Recovery From UM/UIM Benefits	Subro Against Med Mal	Subro Against Legal Mal	Recovery Allocation/Equitable Limitations	Employer Contribution Employer Negligence	Attorney's Fees/Costs	Future Credit	Auto No-Fault	PI SOL
West Virginia	W.Va. Code § 23-2A-1	Undecided	Yes	<u>Employee Policy</u> : No <u>Employer Policy</u> : Undecided	Yes?	Undecided	First dollar recovery after 2003 Amendment.	No	Statutory Reduction. W.Va. Code § 23-2A-1(b)	No	No	2 Yrs.
Wisconsin	Wis. Stat. § 102.29	Yes	Yes	No	Yes	No	(1) Atty's Fees/Costs (2) 1/3 Balance to Plaintiff (3) Carrier Reimbursed Fully (4) Balance to Plaintiff's Credit	No	No	Yes, carrier can recover futures if prosecutes third-party case.	No	3 Yrs.
Wyoming	Wyo. Stat. § 27-14-105	Yes, 15 days' notice.	Yes	Undecided	Undecided	Undecided	First money right of recovery.	No	No	No, must recover in third-party suit.	No	4 Yrs.

These materials and other materials promulgated by Matthiesen, Wickert & Lehrer, S.C. may become outdated or superseded as time goes by. If you should have questions regarding the current applicability of any topics contained in this publication or any of the publications distributed by Matthiesen, Wickert & Lehrer, S.C., please contact Gary Wickert at gwickert@mwl-law.com. This publication is intended for the clients and friends of Matthiesen, Wickert & Lehrer, S.C. This information should not be construed as legal advice concerning any factual situation and representation of insurance companies and/or individuals by Matthiesen, Wickert & Lehrer, S.C. on specific facts disclosed within the attorney\client relationship. These materials should not be used in lieu thereof in anyway.