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**WORKERS' COMPENSATION BENEFITS -  
SOCIAL SECURITY OFFSET**

2010 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Wayne A. Harper**

Senate Sponsor: Karen Mayne

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**LONG TITLE**

**General Description:**

This bill modifies the Workers' Compensation Act to remove a reduction in workers' compensation benefits on the basis of the receipt of Social Security retirement benefits.

**Highlighted Provisions:**

This bill:

- ▶ repeals the reduction in workers' compensation benefits on the basis of the receipt of Social Security retirement benefits;
- ▶ provides intent language;
- ▶ requires the Labor Commission to report to the Business and Labor Interim Committee; and
- ▶ makes technical amendments.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

This bill provides for retrospective operation to correspond to the date a Utah Supreme Court case addressing the reduction in benefits was issued.

**Utah Code Sections Affected:**

AMENDS:

**34A-2-413**, as last amended by Laws of Utah 2009, Chapter 158



28 **Uncodified Material Affected:**  
29 ENACTS UNCODIFIED MATERIAL



30  
31 *Be it enacted by the Legislature of the state of Utah:*

32 Section 1. Section **34A-2-413** is amended to read:

33 **34A-2-413. Permanent total disability -- Amount of payments -- Rehabilitation.**

34 (1) (a) In the case of a permanent total disability resulting from an industrial accident  
35 or occupational disease, the employee shall receive compensation as outlined in this section.

36 (b) To establish entitlement to permanent total disability compensation, the employee  
37 must prove by a preponderance of evidence that:

38 (i) the employee sustained a significant impairment or combination of impairments as a  
39 result of the industrial accident or occupational disease that gives rise to the permanent total  
40 disability entitlement;

41 (ii) the employee is permanently totally disabled; and

42 (iii) the industrial accident or occupational disease is the direct cause of the employee's  
43 permanent total disability.

44 (c) To establish that an employee is permanently totally disabled the employee must  
45 prove by a preponderance of the evidence that:

46 (i) the employee is not gainfully employed;

47 (ii) the employee has an impairment or combination of impairments that limit the  
48 employee's ability to do basic work activities;

49 (iii) the industrial or occupationally caused impairment or combination of impairments  
50 prevent the employee from performing the essential functions of the work activities for which  
51 the employee has been qualified until the time of the industrial accident or occupational disease  
52 that is the basis for the employee's permanent total disability claim; and

53 (iv) the employee cannot perform other work reasonably available, taking into  
54 consideration the employee's:

55 (A) age;

56 (B) education;

57 (C) past work experience;

58 (D) medical capacity; and

- 59 (E) residual functional capacity.
- 60 (d) Evidence of an employee's entitlement to disability benefits other than those  
61 provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant:
- 62 (i) may be presented to the commission;
- 63 (ii) is not binding; and
- 64 (iii) creates no presumption of an entitlement under this chapter and Chapter 3, Utah  
65 Occupational Disease Act.
- 66 (e) In determining under Subsections (1)(b) and (c) whether an employee cannot  
67 perform other work reasonably available, the following may not be considered:
- 68 (i) whether the employee is incarcerated in a facility operated by or contracting with a  
69 federal, state, county, or municipal government to house a criminal offender in either a secure  
70 or nonsecure setting; or
- 71 (ii) whether the employee is not legally eligible to be employed because of a reason  
72 unrelated to the impairment or combination of impairments.
- 73 (2) For permanent total disability compensation during the initial 312-week  
74 entitlement, compensation is 66-2/3% of the employee's average weekly wage at the time of the  
75 injury, limited as follows:
- 76 (a) compensation per week may not be more than 85% of the state average weekly  
77 wage at the time of the injury;
- 78 (b) (i) subject to Subsection (2)(b)(ii), compensation per week may not be less than the  
79 sum of \$45 per week and:
- 80 (A) \$5 for a dependent spouse; and
- 81 (B) \$5 for each dependent child under the age of 18 years, up to a maximum of four  
82 dependent minor children; and
- 83 (ii) the amount calculated under Subsection (2)(b)(i) may not exceed:
- 84 (A) the maximum established in Subsection (2)(a); or
- 85 (B) the average weekly wage of the employee at the time of the injury; and
- 86 (c) after the initial 312 weeks, the minimum weekly compensation rate under  
87 Subsection (2)(b) is 36% of the current state average weekly wage, rounded to the nearest  
88 dollar.
- 89 (3) This Subsection (3) applies to claims resulting from an accident or disease arising

90 out of and in the course of the employee's employment on or before June 30, 1994.

91 (a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent  
92 total disability compensation except as outlined in Section 34A-2-703 as in effect on the date  
93 of injury.

94 (b) The employer or its insurance carrier may not be required to pay compensation for  
95 any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410  
96 through 34A-2-412 and Part 5, Industrial Noise, in excess of the amount of compensation  
97 payable over the initial 312 weeks at the applicable permanent total disability compensation  
98 rate under Subsection (2).

99 (c) The Employers' Reinsurance Fund shall for an overpayment of compensation  
100 described in Subsection (3)(b), reimburse the overpayment:

101 (i) to the employer or its insurance carrier; and

102 (ii) out of the Employers' Reinsurance Fund's liability to the employee.

103 (d) After an employee receives compensation from the employee's employer, its  
104 insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities  
105 amounting to 312 weeks of compensation at the applicable permanent total disability  
106 compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total  
107 disability compensation.

108 (e) Employers' Reinsurance Fund payments shall commence immediately after the  
109 employer or its insurance carrier satisfies its liability under this Subsection (3) or Section  
110 34A-2-703.

111 (4) This Subsection (4) applies to claims resulting from an accident or disease arising  
112 out of and in the course of the employee's employment on or after July 1, 1994.

113 (a) The employer or its insurance carrier is liable for permanent total disability  
114 compensation.

115 (b) The employer or its insurance carrier may not be required to pay compensation for  
116 any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410  
117 through 34A-2-412 and Part 5, Industrial Noise, in excess of the amount of compensation  
118 payable over the initial 312 weeks at the applicable permanent total disability compensation  
119 rate under Subsection (2).

120 (c) The employer or its insurance carrier may recoup the overpayment of compensation

121 described in Subsection (4) by reasonably offsetting the overpayment against future liability  
122 paid before or after the initial 312 weeks.

123 ~~[(5) (a) Subject to Subsection (5)(b) and notwithstanding the minimum rate established~~  
124 ~~in Subsection (2), an employer, its insurance carrier, or the Employers' Reinsurance Fund, after~~  
125 ~~an employee receives compensation from the employer or the employer's insurance carrier for~~  
126 ~~any combination of disabilities amounting to 312 weeks of compensation at the applicable total~~  
127 ~~disability compensation rate, shall reduce the compensation payable:]~~

128 ~~[(i) to the extent allowable by law;]~~

129 ~~[(ii) by the dollar amount of 50% of the Social Security retirement benefits the~~  
130 ~~employee is eligible to receive for a four week period as of the first day the employee is eligible~~  
131 ~~to receive a Social Security retirement benefit; and]~~

132 ~~[(iii) that the employee receives during the same period as the Social Security~~  
133 ~~retirement benefits.]~~

134 ~~[(b) (i) An employer, its insurance carrier, or the Employers' Reinsurance Fund may~~  
135 ~~not reduce compensation payable under this section on or after May 5, 2008, to an employee by~~  
136 ~~an amount related to a cost-of-living increase to the Social Security retirement benefit that the~~  
137 ~~employee is first eligible to receive for a four week period, notwithstanding whether the~~  
138 ~~employee is injured on or before May 4, 2008.]~~

139 ~~[(ii) For purposes of an employee whose compensation payable is reduced under this~~  
140 ~~Subsection (5) on or before May 4, 2008, the reduction is limited to the amount of the~~  
141 ~~reduction as of May 4, 2008.]~~

142 ~~[(6)] (5) (a) A finding by the commission of permanent total disability is not final,~~  
143 ~~unless otherwise agreed to by the parties, until:~~

144 (i) an administrative law judge reviews a summary of reemployment activities  
145 undertaken pursuant to Chapter 8a, Utah Injured Worker Reemployment Act;

146 (ii) the employer or its insurance carrier submits to the administrative law judge:

147 (A) a reemployment plan as prepared by a qualified rehabilitation provider reasonably  
148 designed to return the employee to gainful employment; or

149 (B) notice that the employer or its insurance carrier will not submit a plan; and

150 (iii) the administrative law judge, after notice to the parties, holds a hearing, unless  
151 otherwise stipulated, to:

- 152 (A) consider evidence regarding rehabilitation; and
- 153 (B) review any reemployment plan submitted by the employer or its insurance carrier
- 154 under Subsection [~~(6)~~] (5)(a)(ii).
- 155 (b) Before commencing the procedure required by Subsection [~~(6)~~] (5)(a), the
- 156 administrative law judge shall order:
- 157 (i) the initiation of permanent total disability compensation payments to provide for the
- 158 employee's subsistence; and
- 159 (ii) the payment of any undisputed disability or medical benefits due the employee.
- 160 (c) Notwithstanding Subsection [~~(6)~~] (5)(a), an order for payment of benefits described
- 161 in Subsection [~~(6)~~] (5)(b) is considered a final order for purposes of Section 34A-2-212.
- 162 (d) The employer or its insurance carrier shall be given credit for any disability
- 163 payments made under Subsection [~~(6)~~] (5)(b) against its ultimate disability compensation
- 164 liability under this chapter or Chapter 3, Utah Occupational Disease Act.
- 165 (e) An employer or its insurance carrier may not be ordered to submit a reemployment
- 166 plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to
- 167 Subsections [~~(6)~~] (5)(e)(i) through (iii).
- 168 (i) The plan may include, but not require an employee to pay for:
- 169 (A) retraining;
- 170 (B) education;
- 171 (C) medical and disability compensation benefits;
- 172 (D) job placement services; or
- 173 (E) incentives calculated to facilitate reemployment.
- 174 (ii) The plan shall include payment of reasonable disability compensation to provide
- 175 for the employee's subsistence during the rehabilitation process.
- 176 (iii) The employer or its insurance carrier shall diligently pursue the reemployment
- 177 plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan
- 178 is cause for the administrative law judge on the administrative law judge's own motion to make
- 179 a final decision of permanent total disability.
- 180 (f) If a preponderance of the evidence shows that successful rehabilitation is not
- 181 possible, the administrative law judge shall order that the employee be paid weekly permanent
- 182 total disability compensation benefits.

183 (g) If a preponderance of the evidence shows that pursuant to a reemployment plan, as  
184 prepared by a qualified rehabilitation provider and presented under Subsection [~~(6)~~] (5)(e), an  
185 employee could immediately or without unreasonable delay return to work but for the  
186 following, an administrative law judge shall order that the employee be denied the payment of  
187 weekly permanent total disability compensation benefits:

188 (i) incarceration in a facility operated by or contracting with a federal, state, county, or  
189 municipal government to house a criminal offender in either a secure or nonsecure setting; or

190 (ii) not being legally eligible to be employed because of a reason unrelated to the  
191 impairment or combination of impairments.

192 [~~(7)~~] (6) (a) The period of benefits commences on the date the employee became  
193 permanently totally disabled, as determined by a final order of the commission based on the  
194 facts and evidence, and ends:

195 (i) with the death of the employee; or

196 (ii) when the employee is capable of returning to regular, steady work.

197 (b) An employer or its insurance carrier may provide or locate for a permanently totally  
198 disabled employee reasonable, medically appropriate, part-time work in a job earning at least  
199 minimum wage, except that the employee may not be required to accept the work to the extent  
200 that it would disqualify the employee from Social Security disability benefits.

201 (c) An employee shall:

202 (i) fully cooperate in the placement and employment process; and

203 (ii) accept the reasonable, medically appropriate, part-time work.

204 (d) In a consecutive four-week period when an employee's gross income from the work  
205 provided under Subsection [~~(7)~~] (6)(b) exceeds \$500, the employer or insurance carrier may  
206 reduce the employee's permanent total disability compensation by 50% of the employee's  
207 income in excess of \$500.

208 (e) If a work opportunity is not provided by the employer or its insurance carrier, a  
209 permanently totally disabled employee may obtain medically appropriate, part-time work  
210 subject to the offset provisions of Subsection [~~(7)~~] (6)(d).

211 (f) (i) The commission shall establish rules regarding the part-time work and offset.

212 (ii) The adjudication of disputes arising under this Subsection [~~(7)~~] (6) is governed by  
213 Part 8, Adjudication.

214 (g) The employer or its insurance carrier has the burden of proof to show that  
215 medically appropriate part-time work is available.

216 (h) The administrative law judge may:

217 (i) excuse an employee from participation in any work:

218 (A) that would require the employee to undertake work exceeding the employee's:

219 (I) medical capacity; or

220 (II) residual functional capacity; or

221 (B) for good cause; or

222 (ii) allow the employer or its insurance carrier to reduce permanent total disability  
223 benefits as provided in Subsection [~~(7)~~] (6)(d) when reasonable, medically appropriate,  
224 part-time work is offered, but the employee fails to fully cooperate.

225 [~~(8)~~] (7) When an employee is rehabilitated or the employee's rehabilitation is possible  
226 but the employee has some loss of bodily function, the award shall be for permanent partial  
227 disability.

228 [~~(9)~~] (8) As determined by an administrative law judge, an employee is not entitled to  
229 disability compensation, unless the employee fully cooperates with any evaluation or  
230 reemployment plan under this chapter or Chapter 3, Utah Occupational Disease Act. The  
231 administrative law judge shall dismiss without prejudice the claim for benefits of an employee  
232 if the administrative law judge finds that the employee fails to fully cooperate, unless the  
233 administrative law judge states specific findings on the record justifying dismissal with  
234 prejudice.

235 [~~(10)~~] (9) (a) The loss or permanent and complete loss of the use of the following  
236 constitutes total and permanent disability that is compensated according to this section:

237 (i) both hands;

238 (ii) both arms;

239 (iii) both feet;

240 (iv) both legs;

241 (v) both eyes; or

242 (vi) any combination of two body members described in this Subsection [~~(10)~~] (9)(a).

243 (b) A finding of permanent total disability pursuant to Subsection [~~(10)~~] (9)(a) is final.

244 [~~(11)~~] (10) (a) An insurer or self-insured employer may periodically reexamine a



245 permanent total disability claim, except those based on Subsection [~~(10)~~] (9), for which the  
246 insurer or self-insured employer had or has payment responsibility to determine whether the  
247 employee remains permanently totally disabled.

248 (b) Reexamination may be conducted no more than once every three years after an  
249 award is final, unless good cause is shown by the employer or its insurance carrier to allow  
250 more frequent reexaminations.

251 (c) The reexamination may include:

252 (i) the review of medical records;

253 (ii) employee submission to one or more reasonable medical evaluations;

254 (iii) employee submission to one or more reasonable rehabilitation evaluations and  
255 retraining efforts;

256 (iv) employee disclosure of Federal Income Tax Returns;

257 (v) employee certification of compliance with Section 34A-2-110; and

258 (vi) employee completion of one or more sworn affidavits or questionnaires approved  
259 by the division.

260 (d) The insurer or self-insured employer shall pay for the cost of a reexamination with  
261 appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per  
262 diem as well as reasonable expert witness fees incurred by the employee in supporting the  
263 employee's claim for permanent total disability benefits at the time of reexamination.

264 (e) If an employee fails to fully cooperate in the reasonable reexamination of a  
265 permanent total disability finding, an administrative law judge may order the suspension of the  
266 employee's permanent total disability benefits until the employee cooperates with the  
267 reexamination.

268 (f) (i) If the reexamination of a permanent total disability finding reveals evidence that  
269 reasonably raises the issue of an employee's continued entitlement to permanent total disability  
270 compensation benefits, an insurer or self-insured employer may petition the Division of  
271 Adjudication for a rehearing on that issue. The insurer or self-insured employer shall include  
272 with the petition, documentation supporting the insurer's or self-insured employer's belief that  
273 the employee is no longer permanently totally disabled.

274 (ii) If the petition under Subsection [~~(11)~~] (10)(f)(i) demonstrates good cause, as  
275 determined by the Division of Adjudication, an administrative law judge shall adjudicate the

276 issue at a hearing.

277 (iii) Evidence of an employee's participation in medically appropriate, part-time work  
278 may not be the sole basis for termination of an employee's permanent total disability  
279 entitlement, but the evidence of the employee's participation in medically appropriate, part-time  
280 work under Subsection [~~(7)~~] (6) may be considered in the reexamination or hearing with other  
281 evidence relating to the employee's status and condition.

282 (g) In accordance with Section 34A-1-309, the administrative law judge may award  
283 reasonable attorney fees to an attorney retained by an employee to represent the employee's  
284 interests with respect to reexamination of the permanent total disability finding, except if the  
285 employee does not prevail, the attorney fees shall be set at \$1,000. The attorney fees awarded  
286 shall be paid by the employer or its insurance carrier in addition to the permanent total  
287 disability compensation benefits due.

288 (h) During the period of reexamination or adjudication, if the employee fully  
289 cooperates, each insurer, self-insured employer, or the Employers' Reinsurance Fund shall  
290 continue to pay the permanent total disability compensation benefits due the employee.

291 [~~(12)~~] (11) If any provision of this section, or the application of any provision to any  
292 person or circumstance, is held invalid, the remainder of this section is given effect without the  
293 invalid provision or application.

294 **Section 2. Intent language -- Reporting by the Labor Commission.**

295 (1) In passing this H.B. 188, it is the intent of the Legislature to address only the repeal  
296 of the reduction of permanent total disability compensation by 50% of the Social Security  
297 retirement benefits that an employee is also eligible to receive, which was found to be a  
298 constitutional violation by the Utah Supreme Court in Merrill v. Utah Labor Commission,  
299 2009 UT 26 (April 24, 2009). The Legislature does not intend for the passage of this bill to be  
300 construed as a determination by the Legislature that a reduction or offset on the basis of the  
301 receipt of Social Security benefits is against public policy under other circumstances.

302 (2) The Labor Commission shall report to the Business and Labor Interim Committee  
303 by no later than the November 2010 interim meeting regarding:

304 (a) the status of cases for which the Employers' Reinsurance Fund pays permanent total  
305 disability compensation;

306 (b) the process the Labor Commission follows to facilitate the implementation of the

307 Merrill decision by the Workers' Compensation Fund and private insurers;  
308 (c) the effect, if any, of implementing the Merrill decision on:  
309 (i) the Employers' Reinsurance Fund;  
310 (ii) assessments related to workers' compensation under Sections 34A-2-202 and  
311 59-9-101; and  
312 (iii) premiums for workers' compensation insurance;  
313 (d) the status and nature of disputes, if any, that may arise in the implementation of the  
314 Merrill decision; and  
315 (e) the need, if any, for further legislative action.  
316 Section 3. **Retrospective operation.**  
317 This bill has retrospective operation to a payment of workers' compensation benefits  
318 under Title 34A, Chapter 2, Workers' Compensation Act, or Chapter 3, Utah Occupational  
319 Disease Act, made on or after April 24, 2009.

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**Legislative Review Note**  
**as of 1-27-10 6:26 PM**

**Office of Legislative Research and General Counsel**