

## **Important Information About The Birth-Injury Program's Wage Benefit**

### **What is the wage benefit?**

When a participant in the Program becomes 18 years of age they are eligible for the wage benefit. This benefit is intended to cover expenses not otherwise covered by the Program. According to the law (see below) the payment is 50 percent of the average weekly wage as calculated by the Virginia Employment Commission. The parent/guardian is required to establish a trust account and select a conservator to receive and manage the funds. The following explains the wage benefit in detail and outlines the responsibilities of both the parent/guardian and the Program.

According to Virginia Code 38.2-5009(A)(2) “

“Loss of earnings from the age of 18 are to be paid in regular installments beginning on the eighteenth birthday of the infant. An infant found to have sustained a birth-related neurological injury shall be conclusively presumed to have been able to earn income from work from the age of 18 through the age of 65, if he had not been injured, in the amount of 50 percent of the average weekly wage in the Commonwealth of workers in the private non-farm sector. The provisions of 65.2-531 shall apply to any benefits awarded under this provision.”

### **Who decides the amount?**

The amount of the benefit is determined annually through a request to the Virginia Employment Commission (VEC) by the Program. The VEC compiles information on wages for the preceding year and calculates the average annual and then average weekly wage. This calculation excludes federal, state, and local government employees since this statute refers to workers in the “private, nonfarm sector.” For example, the average weekly wage for 2005 was \$807; the benefit paid to the participant would be \$403.50 per week. This information is generally available in June for the prior year.

The wage benefit is a direct payment rather than a reimbursement for incurred expenses. Since the program participant, by definition, is “permanently in need of assistance in all activities of daily living” and therefore, incapable of managing the benefit, the payment should be made to a third party. *The participant's parent/guardian must have the Circuit Court, located where the participant resides, determine the participant to be incapacitated and appoint a conservator, pursuant to Virginia Code §§ 37.2-1001, and those following.* The participant's parent/guardian must decide who the participant's conservator of the benefit will be. If the claimant's parent/guardian cannot decide on a conservator, the Program will hold the funds until the family settles the issue. ***Each family should seek their own legal advice to establish the participant's incapacity and the conservatorship for managing the wage benefit.***

**Does receiving the wage benefit alter other Birth-Injury Program Benefits?**

The wage benefit will not alter the benefits currently received by the participant from the Program. However, according to the Program's legal advisors the wage benefit may alter the benefits the participant is receiving from Social Security. This would depend on the amount of the total benefit and will vary depending on the pertinent facts. *Each family should seek their own legal advice to determine how the wage benefit affects their individual situation.*

**Is this benefit taxable?**

Since the payments of the wage benefit are for "loss of earnings" they are taxable according to federal income tax law and are treated as gross earnings. Virginia follows federal law on this issue so the payment is taxable under Virginia law as well. The Program will report these payments as a miscellaneous item to the participant and provide a Form 1099 to the participant, U. S. Internal Revenue Service (IRS), and Virginia Department of Taxation.

***You will be required to file income tax returns if the wage benefit exceeds the threshold for filing. The Internal Revenue Code does not require tax withholding for the wage benefit payment; the Program will not withhold any taxes from the payments. Each family should seek their own tax advice to determine how the wage benefit affects their individual situation.***

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The following is information and advice received by the Program from legal counsel.  
***Each family should seek their own legal advice to determine how the wage benefit affects their individual situation.***

**Question 1: Will the payment of the wage benefit alter the benefit(s) currently received by (or on behalf of) the beneficiary from the Program?**

**Answer:** It should not. Nothing in Va. Code 38.2-5009 or any other statutes concerning the Program indicate that the wage benefit payment is intended to be in lieu of, or replace, any benefit the beneficiary currently may receive from the Program. In fact, Va. Code 38.2-5009(A) is drafted to indicate that the benefits in subparagraphs (1), (2) and (3) are cumulative.

**Question 2: Will the payment of the wage benefit alter Medicaid benefits currently received by (or on behalf of) the beneficiary?**

**Answer:** It should not. In 1989, shortly after the Birth Injury Program statutes were enacted by the Virginia General Assembly, the Virginia Attorney General issued a formal

Opinion that the Virginia Department of Medical Assistance Services (the state agency that administers the Medicaid program) is not authorized to recover from the Birth Injury Fund any funds expended for Medicaid coverage when a Medicaid-eligible infant receiving Medicaid benefits subsequently is determined to be eligible for benefits from the Program. *See* 1989 Op. Atty. Gen Va. 247. We understand that the Medicaid program has operated in accordance with this Opinion since it was issued and, therefore, has not attempted to recover previously paid Medicaid benefits from Program beneficiaries or the Program itself. There is nothing in Va. Code 38.2-5009(A)(2) pertaining to the payment of the wage benefit that would alter the reasoning of the Opinion.

**Question 3: Will the payment of the wage benefit alter the benefits the beneficiary may be receiving from social security?**

**Answer:** It may. The federal Social Security Act provides for a reduction in disability benefits in certain circumstances upon the receipt of workers' compensation benefits or "periodic benefits...under any other law or plan of ... a State..." *See* 42 U.S.C. 424a (2005). This federal statute's application further depends on the amount of the total benefit received and, therefore, will vary depending on the pertinent facts.

**Question 4: Will the Program pay for having a conservator appointed and setting up the bank account?**

**Answer:** According to the Birth Injury statute the expense for appointing a conservator and/or setting up a bank account is not be reimbursable, however the funds received by the participant for the wage benefit may be used to pay this expense.

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**Following is a listing of general responsibilities for both the Program and individual families.**

**Program Responsibility:**

- The Program will pay the benefit in monthly installments; a third party will receive the payments for the benefit of the participant.
- Annually, in June, the Program will request from VEC the average weekly wage for the prior year. Historically the average weekly wage increases each year. Adjustments to payments will be made accordingly.
- Each year the Program will report these payments as a miscellaneous item to the participant and provide a Form 1099 to the participant, IRS, and Virginia Department of Taxation.

**Parent or Guardian's Responsibility:**

- *Seek their own legal and tax advice to determine how to establish the conservatorship and how the wage benefit affects their individual situation.*
- Contact the Program approximately six months prior to the participants 18<sup>th</sup> birthday to begin the process.
- *Have the Circuit Court, located where the participant resides, determine the participant to be incapacitated and appoint a conservator, pursuant to Virginia Code §§ 37.2-1001*
- The conservator must sign a letter of agreement with the Program. This letter is provided by the Program and stipulates how the payments will be made.
- Set up a bank account, titled in the name of the conservator, in trust for the participant, attached to the participant's social security number. Send a voided check from the account to the Program to verify the bank information. The checking account may not be used for unrelated purposes.
- Ensure the funds are used for the benefit of the participant. The wage benefit is a payment for "loss of earnings". It is intended for the purpose of supporting the participant and covering expenses that the Program does not otherwise reimburse.
- File income tax returns and pay taxes, if necessary.
- Complete all necessary legal requirements to allow payment of the wage benefit to the participant.

*December 2006*