

## CHAPTER 32-46.2 ASBESTOS CIVIL ACTIONS

### 32-46.2-01. Definitions.

In this chapter, unless the context otherwise requires:

1. "AMA guides" means the "Guides to the Evaluation of Permanent Impairment", American medical association, (6<sup>th</sup> edition).
2. "Asbestos action" means the same as that term is defined in section 32-46.1-01.
3. "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.
4. "Board-certified in internal medicine" means a licensed physician who is certified by the American board of internal medicine or the American osteopathic board of internal medicine.
5. "Board-certified in occupational medicine" means a licensed physician who is certified in the specialty of occupational medicine by the American board of preventive medicine or the specialty of occupational/environmental medicine by the American osteopathic board of preventive medicine.
6. "Board-certified in oncology" means a licensed physician who is certified in the subspecialty of medical oncology by the American board of internal medicine or the American osteopathic board of internal medicine.
7. "Board-certified in pathology" means a licensed physician who holds primary certification in anatomic pathology or clinical pathology from the American board of pathology or the American osteopathic board of pathology and whose professional practice is principally in the field of pathology and involves regular evaluation of pathology materials obtained from surgical or postmortem specimens.
8. "Board-certified in pulmonary medicine" means a licensed physician who is certified in the specialty of pulmonary medicine by the American board of internal medicine or the American osteopathic board of internal medicine.
9. "Certified B-reader" means an individual who is certified as a national institute for occupational safety and health final or B-reader of x-rays under title 42, Code of Federal Regulations, part 37.51(b).
10. "Chest x-ray" means chest films taken in accordance with all applicable state and federal regulatory standards and taken in the posterior-anterior view.
11. "DLCO" means diffusing capacity of the lung for carbon monoxide, which is the measurement of carbon monoxide transfer from inspired gas to pulmonary capillary blood.
12. "Exposed individual" means an individual whose exposure to asbestos is the basis for an asbestos action.
13. "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.
14. "FEV1/FVC" means the ratio between the actual values for FEV1 over FVC.
15. "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration.
16. "ILO system" and "ILO scale" mean the radiological ratings and system for the classification of chest x-rays of the international labour office provided in "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses" (2011).
17. "Nonmalignant condition" means any condition that may be caused by asbestos other than a diagnosed cancer.
18. "Official statements of the American thoracic society" means the lung function testing standards set forth in the technical standards of the American thoracic society, including "Standardization of Spirometry" (2019), "Standardisation of the Measurement of Lung Volumes" (2005), "Standards for Single-breath Carbon Monoxide Uptake in the Lung" (2017), and "Interpretive Strategies for Lung Function Tests" (2005).
19. "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with

- any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies graded 1(B) or higher under the criteria published in "Asbestos-Associated Diseases", 106 Archive of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982).
20. "Plaintiff" means the same as that term is defined in section 32-46.1-01.
  21. "Plethysmography" means the test for determining lung volume in which the exposed individual is enclosed in a chamber equipped to measure pressure, flow, or volume change.
  22. "Predicted lower limit of normal" means the test value that is the calculated standard deviation lying at the fifth percentile, below the upper ninety-five percent of the reference population, based on age, height, and gender, according to the recommendations by the American thoracic society and as referenced in the AMA guides.
  23. "Product liability action" means the same as defined in section 28-01.3-01.
  24. "Pulmonary function test" means spirometry, lung volume testing, and diffusion capacity testing, including appropriate measurements, quality control data, and graphs, performed in accordance with the methods of calibration and techniques provided in the AMA guides and all standards provided in the official statements of the American thoracic society.
  25. "Qualified physician" means a licensed physician who is board-certified in internal medicine, pathology, pulmonary medicine, occupational medicine, or oncology, as may be appropriate to the diagnostic specialty in question, and who:
    - a. Conducted a physical examination of the exposed individual and has taken a detailed occupational, exposure, medical, smoking, and social history from the exposed individual, or if the exposed individual is deceased, has reviewed the pathology material and has taken a detailed history from the individual most knowledgeable about the information forming the basis of the asbestos action;
    - b. Treated or is treating the exposed individual, and has a doctor-patient relationship with the exposed individual at the time of the physical examination, or in the case of a board-certified pathologist, examined tissue samples or pathological slides of the exposed individual at the request of the treating physician;
    - c. Has not relied on any examinations, tests, radiographs, reports, or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, radiograph, or screening of the exposed individual in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which the examination, test, or screening was conducted; and
    - d. Prepared or directly supervised the preparation and final review of any medical report under this chapter.
  26. "Radiological evidence of asbestosis" means a quality 1 chest x-ray under the ILO system, or a quality 2 chest x-ray in a death case when no pathology or quality 1 chest x-ray is available, showing bilateral small, irregular opacities (s, t, or u) occurring primarily in the lower lung zones graded by a certified B-reader as at least 1/1 on the ILO scale.
  27. "Radiological evidence of diffuse bilateral pleural thickening" means a quality 1 chest x-ray under the ILO system, or a quality 2 chest x-ray in a death case when no pathology or quality 1 chest x-ray is available, showing diffuse bilateral pleural thickening of at least b2 on the ILO scale and blunting of at least one costophrenic angle as classified by a certified B-reader.
  28. "Spirometry" means a test of air capacity of the lung through a spirometer to measure the volume of air inspired and expired.
  29. "Supporting test results" means B-reading and B-reader reports, reports of x-ray examinations, diagnostic imaging of the chest, pathology reports, pulmonary function tests, and all other tests reviewed by the diagnosing physician or a qualified physician in reaching the physician's conclusions.
  30. "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and

insoluble gas for a specific time, and the concentration of that inert and insoluble gas in the lung is compared to the concentration of that type of gas in the spirometer.

31. "Total lung capacity" means the volume of gas contained in the lungs at the end of a maximal inspiration.

**32-46.2-02. Sworn information form requirement for asbestos action.**

1. In addition to any requirements for asbestos actions under chapter 32-46.1, a plaintiff in an asbestos action shall file, within forty-five days after any complaint is filed in an asbestos action, a sworn information form signed by the plaintiff and plaintiff's counsel specifying the evidence that provides the basis for each claim against each defendant. The sworn information form must include the following with specificity:
  - a. The name, address, date of birth, marital status, occupation, smoking history, current and past worksites, and current and past employers of the exposed individual, and any person through whom the exposed person was exposed to asbestos;
  - b. Each individual through whom the exposed individual was exposed to asbestos and the exposed individual's relationship to each individual;
  - c. Each asbestos-containing product to which the individual was exposed and each physical location at which the exposed individual was exposed, or if the plaintiff was exposed through another individual, to which that other individual was exposed;
  - d. The specific location and manner of each exposure, including for any individual through whom the exposed individual was exposed to asbestos;
  - e. The beginning and ending dates of each exposure, the frequency and length of each exposure, and the proximity of the asbestos-containing product or its use to the exposed person and any person through whom the exposed person was exposed to asbestos;
  - f. The identity of the manufacturer or seller of the specific asbestos product for each exposure;
  - g. The specific asbestos-related disease claimed to exist; and
  - h. Any supporting documentation relating to the information required under this section.
2. The plaintiff has a continuing duty to supplement the information required to be disclosed in subsection 1.
3. The court shall dismiss the asbestos action without prejudice as to any defendant whose product or premises is not identified in the required disclosures in subsection 1.
4. The court shall dismiss the asbestos action without prejudice as to all defendants if the plaintiff and plaintiff's counsel fail to comply with this section.

**32-46.2-03. Requirements for asbestos action.**

1. In addition to any requirements for asbestos actions under chapter 32-46.1 and the required sworn information form required by section 32-46.2-02, a plaintiff in an asbestos action shall include with any complaint a detailed narrative medical report, signed by a qualified physician and accompanied by supporting test results, which constitute prima facie evidence the exposed individual meets the requirements of this chapter. The report may not be prepared by a lawyer or other individual working for or on behalf of a lawyer or law firm.
2. A defendant shall have a reasonable opportunity to challenge the adequacy of the prima facie evidence. The court shall dismiss the action without prejudice if the plaintiff fails to comply with the requirements of this section or fails to make the prima facie showing required by this section.
3. Until a court enters an order determining the exposed individual has established prima facie evidence of impairment, an asbestos action is not subject to discovery, except discovery related to establishing or challenging the prima facie evidence.

#### **32-46.2-04. Elements of proof for asbestos action involving nonmalignant conditions.**

An asbestos action related to an alleged nonmalignant asbestos-related condition may not be brought or maintained in the absence of prima facie evidence the exposed individual has a physical impairment for which asbestos exposure was a substantial contributing factor. The prima facie showing must be made as to each defendant and include a detailed narrative medical report signed by a qualified physician that includes the following:

1. Radiological or pathological evidence of asbestosis or radiological evidence of diffuse bilateral pleural thickening or a high-resolution computed tomography scan showing evidence of asbestosis or diffuse pleural thickening;
2. A detailed occupational and exposure history from the exposed individual or, if the individual is deceased, from the individual most knowledgeable about the exposures that form the basis of the action, including identification of all of the exposed individual's places of employment and exposures to airborne contaminants and whether each place of employment involved exposures to airborne contaminants, including asbestos fibers or other disease-causing dusts, that may cause pulmonary impairment, and the nature, duration, and level of any exposure;
3. A detailed medical, social, and smoking history from the exposed individual or, if the individual is deceased, from the individual most knowledgeable, including a thorough review of the past and present medical problems of the exposed individual;
4. Evidence verifying at least fifteen years have elapsed between the exposed individual's date of first exposure to asbestos and the date of diagnosis;
5. Evidence from an individual medical examination and pulmonary function testing of the exposed individual or, if the exposed individual is deceased, based upon the individual's medical records, the exposed individual has or the deceased individual had a permanent respiratory impairment rating of at least class 2 as defined by the AMA guides or reported significant changes year to year in lung function for FVC, FEV1, or DLCO as defined by the American thoracic society's "Interpretative Strategies for Lung Function Tests", 26 European Respiratory Journal 948-68, 961-62, table 12 (2005);
6. Evidence that asbestosis or diffuse bilateral pleural thickening, rather than chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed individual's physical impairment, based on a determination the exposed individual has any of the following:
  - a. FVC below the predicted lower limit of normal and FEV1/FVC ratio (using twenty actual values) at or above the predicted lower limit of normal;
  - b. Total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal; or
  - c. A chest x-ray showing bilateral small, irregular opacities (s, t, or u) graded by a twenty-four certified B-reader as at least 2/1 on the ILO scale; and
7. A statement that the qualified physician signing the detailed narrative medical report has concluded exposure to asbestos was a substantial contributing factor to the exposed individual's physical impairment and not more probably the result of other causes. An opinion that the medical findings and impairment are consistent with or compatible with exposure to asbestos, or words to that effect, does not satisfy this subsection.

#### **32-46.2-05. Elements of proof for asbestos action involving malignant conditions.**

1. An asbestos action related to an alleged asbestos-related malignant condition may not be brought or maintained in the absence of prima facie evidence that the exposed individual has a malignant condition for which asbestos exposure was a substantial contributing factor. The prima facie showing must be made as to each defendant and include a detailed narrative medical report signed by a qualified physician that includes all of the following:
  - a. A diagnosis that the exposed person has a malignant asbestos-related condition; and
  - b. A statement that exposure to asbestos was a substantial contributing factor to the exposed individual's malignant condition and not more probably the result of

other causes, and a detailed explanation for that opinion. An opinion that the malignant condition is consistent with or compatible with exposure to asbestos, or words to that effect, does not satisfy this subdivision.

2. The court shall hold an evidentiary hearing and determine if the exposed person has established a prima facie showing of cancer to which exposure to asbestos was a substantial contributing factor.

**32-46.2-06. Evidence of physical impairment - Procedures - Limitation.**

1. Evidence relating to the prima facie showings required under this chapter does not create a presumption the exposed individual has an asbestos-related impairment and is not conclusive as to the liability of any defendant.
2. Evidence may not be offered at trial and the jury may not be informed of:
  - a. The grant or denial of a motion to dismiss an asbestos action under this chapter; or
  - b. The provisions of this chapter with respect to what constitutes a prima facie showing of asbestos impairment.
3. Evidence relating to physical impairment offered in an asbestos action governed by this chapter:
  - a. Must comply with the quality controls, equipment requirements, methods of calibration, and techniques set forth in the AMA guides and all standards set forth in the official statements of the American thoracic society; and
  - b. May not be obtained under the condition the plaintiff or exposed individual retains the legal services of an attorney or law firm.
4. In the absence of consent from all parties, a court may consolidate for trial only asbestos actions relating to the exposed individual and members of that individual's household.
5. A product liability defendant in an asbestos action may not be liable for exposures from a later-added asbestos-containing product made or sold by a third party.

**32-46.2-07. Statute of limitations.**

1. The period of limitations for an asbestos action that is not barred as of August 1, 2021, may not accrue, nor may the running of limitations commence, before the earlier of the date:
  - a. The exposed individual received a medical diagnosis of an asbestos-related impairment;
  - b. The exposed individual discovered facts that would have led a reasonable individual to obtain a medical diagnosis with respect to the existence of an asbestos-related impairment; or
  - c. The date of death of the exposed individual having an asbestos-related impairment.
2. This section does not revive or extend limitations with respect to any claim for asbestos-related impairment that was time-barred on August 1, 2021.