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ALFA International Webinar Series

The Interplay of Occupational Accident Insurance, Workers' Compensation, and the Statutory Employee

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Occupational Accident Statistics

- The International Labor Organization provides these worldwide statistics:
- 2.3 million people die each year from work-related accidents and injuries.
- There are 340 million work-related injuries each year.
- There are 160 million work-related illnesses each year.

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What is Occupational Accident Insurance?

An occupational accident insurance policy is designed to offer benefits to independent contractors and employees who are not covered under a workers compensation policy.

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What is Occupational Accident Insurance?

- Benefits are not mandated by law
- Occupational accident is designed to cover:
  - Medical Expenses
  - Lost Wages
  - Death Benefit
  - Disability
  - Some offer defense fees as part of the plan
- The limits can vary dramatically
- The Policy will generally have per-accident deductible and annual maximum payable amount

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What is Occupational Accident Insurance?

- Your coverage choices can include the following options:
  - Accidental death benefit
  - Survivors benefit
  - Accidental dismemberment
  - Accident medical expense
  - Temporary total disability
  - Permanent total disability
  - Non-occupational accident benefit
  - Chiropractic benefit
  - Passenger accident benefit
- You can design a policy suited to your companies needs and budget
- In essence it covers eligible on-the-job accidents in which owner-operators or contract drivers are involved while under dispatch

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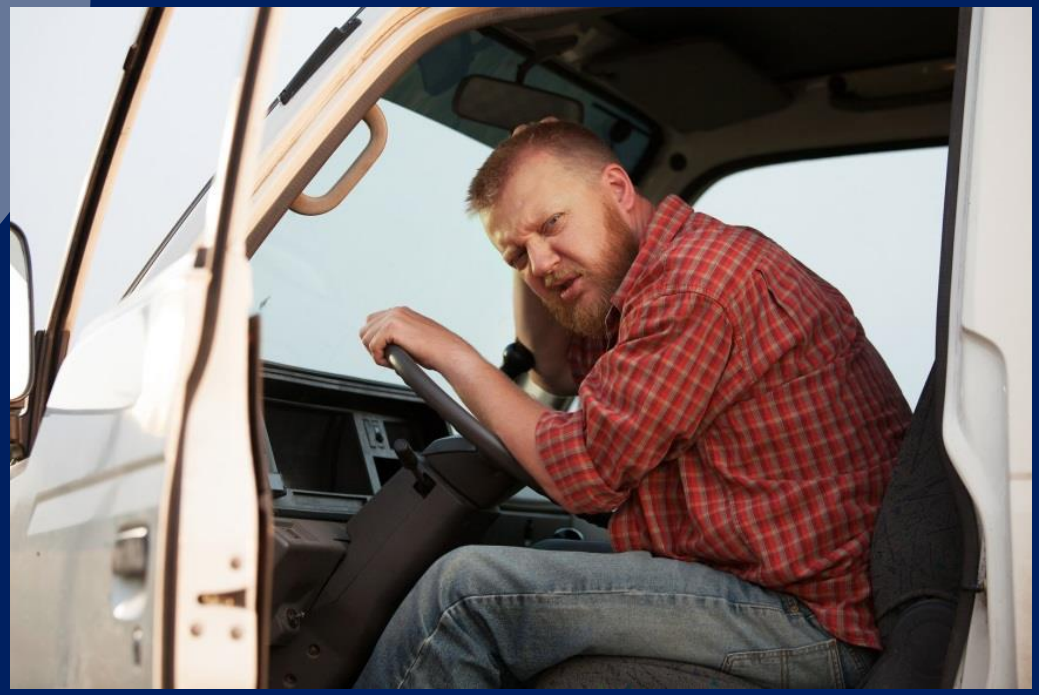
Are defense costs included?

- Many occupational accident policies do not include any coverage for legal expenses in the event of suit
- If there is no legal expenses coverage, company will have to incur those costs



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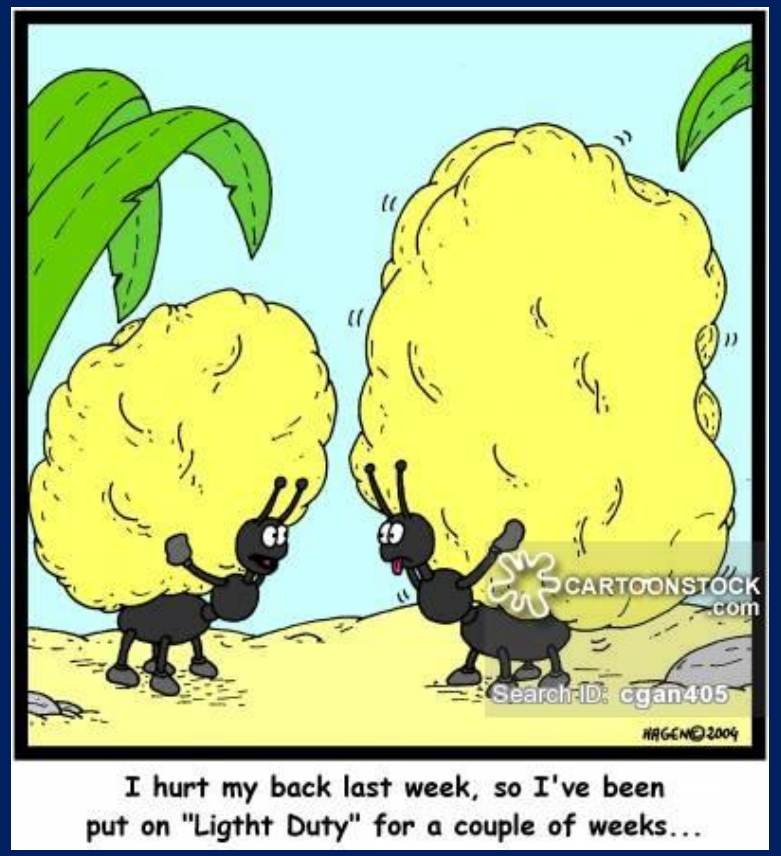
Occupational Insurance

- With a workers compensation policy, you get statutory benefits, but with an occupational accident insurance policy, you must make the following choices:
  - The limit of liability to carry per accident
  - The deductible to assume per accident
  - The level of disability coverage to provide
  - The level of death benefit to provide



I hurt my back last week, so I've been put on "Ligtht Duty" for a couple of weeks...

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WHY OCCUPATIONAL ACCIDENT INSURANCE?

- Occupational accident fills a much needed space in the insurance world
- Many employers are pinched by expenses and need some sort of affordable alternative to the Workers' Comp options available
- Good way to provide benefits to owner-operators
  - In some circumstances owner-operators may be deemed to have become employees or assert they are and file a claim for benefits against employer
- In some states, an employer can choose to opt out of their state's workers compensation law
  - However, the employer still has the same legal obligation to employees who suffer injury or death on the job
  - An occupational accident insurance policy gives the employer the means to fund most or all of this obligation at a lower cost than a workers compensation policy.

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WHY OCCUPATIONAL ACCIDENT INSURANCE?

- You will be able to offer benefits to your owner-operators for injuries they suffer on the job while under contract to you
- You will have protection in the occasional case when, after an accident, an owner-operator tries to make a workers compensation claim against you if there are no other benefits available
- Owner-operators may be more likely to contract with you if this benefit is available
- You will reduce the likelihood of having a lawsuit filed against you if owner-operators are able to obtain compensation for illnesses and injuries

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Workers' Compensation Statutes

- Designed to protect business owner as much as the employee
- Each state's laws are in place to ensure the worker is properly cared for in the event of injury or death
- Statutory limits cap business owners' damages (depending on the state)

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SOUTH CAROLINA—EXCLUSIVE REMEDY

The rights and remedies provided in the South Carolina Workers' Compensation statutory framework is the sole and exclusive remedy for an employee to recover from his or her employer following a workplace injury. S.C. Code Ann. § 42-1-540.

The South Carolina Workers' Compensation Act prohibits an employee from suing his or her employer at common law for personal injury, which is defined as injury by accident arising out of and in the course of employment. Decisions applying South Carolina law have strictly construed this definition. Our supreme court has held the intentional infliction of emotional distress constitutes a personal injury that falls within the scope of the act. Loges v. Mack Trucks, Inc., 308 S.C. 134, 137, 417 S.E.2d 538, 540 (1992). This was recently upheld in the case of McClain v. Pactiv Corp., 360 S.C. 480, 602 S.E.2d 87 (Ct. App. 2004). The McClain court noted that only when the tortfeasor/co-employee is the "alter ego" of the employer that the liability falls outside the scope of the Act, and that only "dominant corporate owners and officers" constitute "alter egos." Otherwise, the claimant's exclusive remedy is under Workers' Compensation.

There has generally been strict adherence to the "exclusive remedy" doctrine in South Carolina, but there has also been "moderate" erosion by court rulings. The key to determining whether the exclusive remedy provision of the South Carolina Workers' Compensation Act applies to exclude all other remedies is not whether the employer chooses to assert a claim for benefits under the Act, but whether both the employee and employer are subject to the Act, and actual coverage exists.

SOUTH CAROLINA: COVERED EMPLOYEES

- S.C. Code Ann. § 42-1-130 defines "employee" to mean every person "engaged in employment under any appointment, contract of hire or apprenticeship, express or implied, oral or written . . . but **exclud[ing] a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer . . . .**" A claimant bears the burden to prove by a preponderance of the evidence that an employment relationship exists. Porter v. Labor Depot, 372 S.C. 560, 643 S.E.2d 96 (Ct. App. 2007).
- The Act specifically excludes a number of other workers from coverage. These include railway express company employees, federal, casual employees, agricultural employees and certain prisoners. **Most recently, independent owner-operators of trucks were added to the list of excluded workers. S.C. Code Ann. § 42-1-360(9) (1985 & Supp. 2007).**
- In addition, the Act allows private employers and employees to elect to remain outside of the Act. **Lastly, independent contractors are not within the scope of the Act unless they are deemed to be statutory employees of the owner**. S.C. Code Ann. § 42-1-130.

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SOUTH CAROLINA: COVERED EMPLOYEES

To meet this statutory exemption for independent owner-operators, the following requirements must be met:

1) Driver must **own** a tractor trailer, tractor, or other vehicle**, OR**
2) Driver must be under a bona fide lease-purchase or installment-purchase agreement a tractor trailer, tractor, or other vehicle, AND
3) Both are under a valid independent contractor contract which provides the vehicle and the individual's services as a driver to a motor carrier.

Note: Any lease-purchase or installment-purchase may not be between the individual and the motor carrier—but it may be between the individual and a an affiliate, subsidiary, or related entity or person of the motor carrier, or any other lessor or seller
S.C. Code Ann. § 42-1-360(9)

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SOUTH CAROLINA: COVERED EMPLOYEES

The vehicle acquisition or financing transaction must be on terms equal to terms available in customary and usual retail transactions generally available in the State.

This individual is considered an independent contractor and not an employee of the motor carrier under this title.

The individual and the motor carrier to whom the individual contracts or leases the vehicle mutually may agree that the individual or worker, or both, is covered under the motor carrier's workers' compensation policy or authorized self-insurance if the individual agrees to pay the contract amounts requested by the motor carrier.

Under any such agreement, the independent contractor or workers, or both, must be considered an employee of the motor carrier only for the purposes of this title and for no other purposes.

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SOUTH CAROLINA: INDEPENDENT CONTRACTORS

Under the law, only an employee can seek workers' compensation benefits, and an independent contractor is not an employee. However, employers are not able to disavow coverage for workers simply by calling them "independent contractors." Rather, the courts consider whether the alleged employer has "the right and authority to control and direct the particular work or undertaking as to the manner or means of its accomplishment." It is not the actual control that matters; rather, the issue is whether the alleged Employer had the authority to control. See Porter v. Labor Depot, 372 SC 560, 643 S.E.2d 96 (Ct. App. 2007). There are four factors to consider in this determination:

1. **Direct evidence of the right to or exercise of control.**
2. **The method of payment.**
3. **The furnishing of equipment, and**
4. **The right to fire.**

Of note, the court also stated that, while the employer/employee relationship is contractual in nature, no formality is required. If the acts of the parties suggest a recognition of the employer/employee relationship, then the courts will respect that relationship and find injuries to be compensable.

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SOUTH CAROLINA:INDEPENDENT CONTRACTORS

In Wilkinson v. Palmetto State Transportation Co., 382 S.C. 295, 676 S.E.2d 700 (2009), the Supreme Court of South Carolina significantly changed its approach to the determination of whether a claimant is an employee or an independent contractor for purposes of workers' compensation coverage.

The claimant in that case, a truck driver, entered a contract with the employer that specifically provided that the claimant was an independent contractor, and not an employee. The contract also made the claimant responsible for the majority of business expenses, and required the claimant to purchase an occupational accident insurance policy. The parties' conduct followed the terms of the contract in every material respect.

The Supreme Court held that each of the four factors must be weighed "with equal force" in consideration of whether an employer/employee relationship existed. (Previously, if a claimant was able to prove single factor, the existence of just one element was "not merely indicative of, but, in practice, virtually proof of, the employment relation.")

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SOUTH CAROLINA: INDEPENDENT CONTRACTORS

While the court noted that workers' compensation laws are to be construed in favor of coverage, it recognized that this principle **"does not go so far as to justify an analytical framework that preordains the result."**

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SOUTH CAROLINA: INDEPENDENT CONTRACTORS

Are there any specific provisions for "independent contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

Historically, truck drivers fell under the standard test for independent contractors outlined above and generally were held to be employees covered under the Act. However, for injuries occurring on or after July 1, 2007, S.C. Code Ann. § 42-1-360 provides that, as discussed previously that owner operators, along with drivers operating under a lease-purchase or installment-purchase agreement under a valid independent contractor agreement are excluded from coverage under the Act.

The South Carolina Supreme Court clarified that a motor carrier's requirement that its carrier lessee's adhere to the federal trucking regulations, as well as the motor carrier's own compliance with these regulations with regard to its relationship with a carrier lessee, *should not affect a determination on employment status* by a state court applying the common law test of control in a workers' compensation claim. See Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009), with guidance from Pennsylvania case law in Universal Am-Can, Ltd. v. Workers' Comp. Appeal Board, 762 A.2d 328 (Pa. 2000).

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SOUTH CAROLINA: STATUTORY EMPLOYER

S.C. Code Ann. § 42-1-400 is the statutory employer provision in the Act. This provision has been interpreted in Carter v. Florentine Corp., 310 S.C. 228, 423 S.E.2d 112 (1992) which provides a three-part test in determining whether the employee of a subcontractor is the statutory employee of the owner. The test is as follows:

A. Is the activity an important part of the owner's business?

B. Is the activity a necessary, essential and an integral part of the business?

C. Has the identical activity been performed by employees of the principal employer?

If each part of the test is satisfied, then the injured employee is deemed to be a statutory employee of the owner.

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SOUTH CAROLINA: STATUTORY EMPLOYER

Case Analysis: Olmstead v. Shakespeare, 348 S.C. 436, 559 S.E.2d 370 (Ct. App. 2002)

Olmstead was an owner-operator of a truck-trailer combination who had entered into a contractual agreement with Hot Shot (carrier) to lease his equipment and services, was dispatched to the defendant's (Shakespeare) premises by Hot Shot. While on the defendant's premises, the plaintiff was injured. Subsequently, the plaintiff filed a negligence action against the defendant (Shakespeare). The defendant alleged as an affirmative defense that the plaintiff was a statutory employee of the defendant, and, thus, the defendant was immune from tort liability under the exclusive remedy provision of the Workers' Compensation Act.

The Court of Appeals held that the plaintiff, at the time of his accident, was transporting finished product away from the defendant's manufacturing plant to a customer. The Court also noted that the defendant did not "own or operate any receiving or delivery trucks," and that the material, which arrived at and leaves the defendant's plant did so "by common carrier." As a result, the Court concluded, that the plaintiff, as an employee of a common carrier involved only in the transportation of goods, "was not part of the general trade, business, or occupation" of the defendant so as to render the plaintiff a statutory employee.

GEORGIA: EXCLUSIVE REMEDY

Employers enjoy virtually absolute immunity from suit in tort under the exclusive remedy doctrine of Georgia's Workers' Compensation Act. *See* O.C.G.A. § 34-9-11.

Immunity also extends to statutory employers, co-employees, alter-egos, and the employer's insurer. See, *e.g.*, Warden v. Hoar Constr. Co., 269 Ga. 715, 716, 507 S.E.2d 428 (1998) (statutory employers); Doss v. Food Lion, Inc., 267 Ga. 312, 312, 477 S.E. 2d 577 (1996) (co-employees); Drury v. VPS Case Mgmt. Servs., 200 Ga. App. 540, 541, 408 S.E.2d 809 (1991) (employer's alter-ego); Coker v. Great Am. Ins. Co., 290 Ga. App. 342, 344, 659 S.E.2d 625 (2008) (employer's insurer).

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GEORGIA: COVERED EMPLOYEES

An "**employee**" is broadly defined as any person under the employ of another, under any contract of hire or apprenticeship, written or implied, except for a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer. O.C.G.A. § 34-9-1. The fact that an employee is not paid for services rendered does not, in and of itself, prohibit that person from being an employee. If the employer retains the right to control the time, manner, and method of performing the work and receives valuable services from the worker, the worker can still be an employee. Housing Auth., City of Cartersville v. Jackson, 226 Ga. App. 182, 183-84, 486 S.E.2d 54 (1997); MCG Health, Inc. v. Nelson, 270 Ga. App. 409, 413, 606 S.E.2d 576 (2004).

The **exclusions** from coverage under the Act are codified in O.C.G.A. § 34-9-2. Generally, the following categories of employment are excluded from coverage: **(i) rail common carriers engaged in interstate or intrastate commerce (O.C.G.A. § 34-9-2(a)(2)-(3)**); (ii) farm laborers (which term has been given a very broad interpretation; see Glen Oak's Turf, Inc. v. Butler, 191 Ga. App. 840, 383 S.E.2d 203 (1989)); (iii) domestic servants: (iv) licensed real estate salespeople or associate brokers; and **(v) independent contractors who fall under the statutory definition of O.C.G.A. § 34-9-2(c). Employees and their employers can voluntarily accept the provisions of the Act, despite any statutory exemption.**

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GEORGIA—INDEPENDENT CONTRACTORS

Independent contractors are not covered under Georgia's Workers' Compensation Act.

The chief test, though not an all-inclusive one, to be applied in determining whether a worker is an independent contractor or an employee is whether the employer has the right to assume control of the manner, method, and time of his work. Golosh v. Cherokee Cab Co., 226 Ga. 636, 176 S.E.2d 925 (1970); Rapid Group, Inc. v. Yellow Cab of Columbus, Inc., 253 Ga. App. 43, 46, 557 S.E.2d 420, 424 (2001); O.C.G.A. § 34-9-2(e).

An employer may bring an independent contractor under the purview of workers' compensation by providing workers' compensation insurance for him. O.C.G.A. § 34-9-124(b).

When an employer of an independent contractor provides workers' compensation insurance to him, the employer is estopped from denying coverage for a compensable claim even though the employer was not required to provide coverage in the first place. Murph v. Maynard Fixturecraft, Inc., 252 Ga. App. 483, 555 S.E.2d 845 (2001).

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GEORGIA: INDEPENDENT CONTRACTORS

Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

Yes. An owner-operator, defined as an equipment lessor who leases vehicular equipment with a driver to a carrier, is deemed an independent contractor and not covered under the Workers' Compensation Act. O.C.G.A. §§ 40-2-87(19), 34-9-1(2).

A federal law governing interstate motor carriers does not preempt clear Georgia law embodied in the statute deeming the owner-operator of a tractor trailer an independent contractor for workers' compensation purposes. Upshaw v. Hale Intermodal Transp. Co., 224 Ga. App. 239, 480 S.E.2d 277 (1997). The exclusion for owner-operators does not apply, however, to the owner-operator's employees. C. Brown Trucking, Inc. v. Rushing, 265 Ga. App. 676, 595 S.E.2d 346 (2004).

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GEORGIA: STATUTORY EMPLOYER

- O.C.G.A. § 34-9-8. Generally, the issue arises in the context of construction contractors. If the immediate employer does not regularly have three employees, then the claim may be presented to the intermediate or principal contractor. The intermediate or principal contractor also must meet the numerical qualification. Bradshaw v. Glass, 252 Ga. 429, 431, 314 S.E.2d 233 (1984); G & M Quality Builders, Inc. v. Dennison, 256 Ga. 617, 618, 351 S.E.2d 622 (1987).

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ILLINOIS
Illinois: Exclusive Remedy

- The Worker's Compensation Act is the exclusive remedy as to the employee. 820 ILCS 305/5. However, this is an affirmative defense that must be asserted by the employer.
- Exceptions (intentional acts, contractual waiver, “dual capacity,” etc.)
  - The exclusivity provisions will not bar a common law cause of action against an employer for injuries which the employer or its alter ego intentionally inflicts upon an employee or which were commanded or expressly authorized by the employer. Meerby v. Marshall Field and Co., 564 N.E.2d 1222, 1226 (Ill. 1990).
  - The dual capacity doctrine exposes an employer to tort liability where it operates in a second capacity that creates obligations distinct from those owed as an employer. The plaintiff must show that: (1) the second capacity creates obligations that are unrelated to those created by the first capacity – employer; and (2) the employer acted as a legal persona distinct from the employer.
  - Acts of co-employees are compensable if the injury arose out of and in the course of the employment. However, if an assault by the co-employee arises out of a personal conflict, the injury caused by the co-employee is not compensable. Additionally, if the injured employee is found to be the aggressor in the assault, benefits should be denied.

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Illinois: Exclusive Remedy

- Minors have the same rights and obligations as adults, except that illegally employed minors may reject the Act within six months after an accident, and may then sue at common law
- An employer can be held liable on a third party action seeking contribution pursuant to the Joint Tortfeasors Contributions Act up to the employer's relative degree of culpability, but not to exceed the employer's maximum liability under the Illinois Workers' Compensation Act. Kotecki v. Cyclops Welding Corp., 146 Ill. 2d 155 (1991), where the Illinois Supreme Court held that an employer's liability to a third party plaintiff is limited to the amount of workers' compensation benefits paid to the injured employee. This position is an affirmative defense and must be affirmatively plead or it will be deemed waived. It can also be contractually waived by entering into an agreement with another entity waiving the protection for contribution to an employee's injury. Braye v. Archer Daniels Midland, 175 Ill. 2d 201 (1997).

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Illinois: Covered Employees

- Every person in the service of another under any contract of hire and all employees whose contract of hire is in the state or if hired outside the state, where their principal place of business is in the state. 820 ILCS 305/1(b)(2).
- Employees of a business that has elected to be covered by the Worker's Compensation Act are covered.
- There is a long list of businesses declared to be “extra-hazardous” with all employees covered automatically by law. This includes construction, trucking, mining, warehousing, working with molten metal, explosives and sharp tools, bar employees, restaurant employees if they cut food, haircutting, surveying and gas station employees. 820 ILCS 305(3).
- Exempted are real estate brokers/salespeople on commission and farmers. Jurors are not to be considered “employees” of the jury commission for purposes of the workers’ compensation act. Jaskoviak v. Industrial Commission, 337 Ill. App. 3d 269, 272 (3 Dist. 2003).

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Illinois: Independent Contractors

- Independent contractors are not considered employees covered by the Act.
- Multiple factors are considered, although the primary one is the right to control the work. An independent contractor represents the will of the owner only as to the result, not the means by which it was accomplished.
  - In this regard, Illinois courts look for anything to distinguish the owner-operator from a regular employee of the employer. The ability to pick and choose when you want to drive, and to accept or reject a particular load, is a freedom usually enjoyed by independent contractors, but not by employees.

Illinois: Independent Contractors

- The Illinois Supreme Court has identified a number of other factors to assist in determining whether a person is an employee or independent contractor. Among the factors cited are: whether the employer dictates the person's schedule; the method of payment; the right to terminate at will; the responsibility for maintenance and insurance costs; the right of the owner-operator to drive for other companies; and the furnishing of tools, equipment and materials. Esquinca v. I.W.C.C., 51 N.E.3d 5 (1st Dist. 2016).
- The label the parties place on their relationship is also a consideration, although it is a factor of "lesser weight."
- No single factor is determinative, and the significance of these factors rests on the totality of the circumstances.
- Are there any specific provisions for "Independent Contractor" pertaining to owner-operator of trucks or other vehicles for driving or delivery of people or property?
  - No

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Illinois: Statutory Employer

- Where a subcontractor is uninsured, the employee of that subcontractor may recover compensation under the Act from the general contractor or from the individual or entity, if any, that engaged the services of the general contractor. The subcontractor is then liable for indemnification. 820 ILCS 305/1(a)(3).

NORTH CAROLINA: EXCLUSIVE REMEDY

The compensation remedy is exclusive. N.C. Gen. Stat. §§97-9, 97-10.1.

The courts have created an exception for intentional acts by the employer, including intentionally engaging in misconduct known to be substantially certain to cause serious injury. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991). Co-employees are also protected by the exclusivity provision for negligent acts but may be liable in tort for willful, wanton or reckless acts or omissions. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

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NORTH CAROLINA—COVERED EMPLOYEES

"**Employment**" is generally defined as employment by the state and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which three or more employees are regularly employed in the same business or establishment. N.C. Gen. Stat. §97-2(1) (2003).

An "**employee**," in turn, is generally defined as any person engaged in employment under any employment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his or her employer. N.C. Gen. Stat. §97-2(2).

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NORTH CAROLINA: INDEPENDENT CONTRACTORS

An “independent contractor” is “one who exercises an independent employment and contracts to do certain work without being subject to his employer except as to the result of his work.” Hicks v. Guilford Co., 267 N.C. 364, 148 S.E.2d 240 (1966).

The North Carolina Supreme Court has established eight factors to consider in determining whether a worker is an employee or an independent contractor, and an independent contractor

(1) is engaged in an independent business, calling, or occupation;

(2) is to have the independent use of his or her skill, knowledge, or training in the execution of the work;

(3) is doing a specific piece of work at a fixed price, or for a lump sum or upon a quantitative basis;

(4) is not subject to discharge because he or she adopts one method of doing the work rather than another;

(5) is not in the regular employ of the other contracting party;

(6) is free to use such assistants as he or she thinks proper;

(7) has full control over such assistants; and (

8) selects his or her own time.

Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944).

The presence of no one of these indicia is controlling, nor is the presence of all required, but the dominant factor is whether the employer has authority to control how the person hired accomplishes the task to be done. Id.; Youngblood v. North State Food Truck Sales, 87 N.C. App. 35, 359 S.E.2d 256 (1987)

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NORTH CAROLINA: INDEPENDENT CONTRACTORS

Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

Yes. Motor carriers who contract with independent contractors are liable to the independent contractor and his employees unless insurance has been secured by the independent contractor. *See* N.C. Gen. Stat. § 97-19.1.

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NORTH CAROLINA—STATUTORY EMPLOYERS

A contractor is deemed an employer of the employees of its subcontractors, unless the contractor obtains from the subcontractor a certificate of insurance issued by a workers' compensation carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor. *See* N.C. Gen. Stat. §97-19. **Additionally, motor carriers who contract with independent contractors are liable to the independent contractor and his employees unless insurance has been secured by the independent contractor. *See* N.C. Gen. Stat.§97-19.1.**

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TENNESSEE: EXCLUSIVE REMEDY

A. Scope of immunity.

The compensation remedy is exclusive and protects employers maintaining proper coverage, co-employees for unintentional acts, and workers' compensation insurers.

T.C.A. § 50-6-108(a).

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

An exception exists where the employer has actual intent to injure. Valencia v. Freeland and Lemm Const. Co., 108 S.W.3d 239 (Tenn. 2003). Gross or criminal negligence or violation of safety laws is insufficient to establish requisite and actual intent to injure. Gonzales v. Alman Const. Co., 857 S.W.2d 42 (Tenn. Ct. App. 1993).

Discrimination claims are intentional in nature and therefore not barred by the exclusive remedy provision.

Although fraud is an intentional tort in Tennessee, a fraud claim is not necessarily an exception to the exclusive remedy provision.

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TENNESSEE: EXCLUSIVE REMEDY

Third party indemnity actions against an employer are not precluded when an employer has expressly contracted to indemnify the third party. T.C.A. § 50-6-108(c).

Exclusive remedy provision under Tenn. Code Ann. § 50-6-108(a) does not bar a claim for unemployment benefits. *See* Bates v. Neeley, 2007 WL 789519 (Tenn. Ct. App. 2007).

Tennessee at this time rejects the dual capacity doctrine.

As of July 1, 2014, no employer who fails to secure compensation as required shall be permitted to defend a suit brought by a covered employee or the dependents of a covered employee to recover damages for personal injury or death on any of the following grounds:

1. The employee was negligent;
2. The injury was caused by the negligence of a fellow servant or fellow employee; or
3. The employee had assumed the risk of the injury.

TENNESSEE: COVERED EMPLOYEES

A covered employee is every person under contract of hire or apprenticeship, written or implied, including a paid corporate officer. T.C.A. § 50-6-102(11)(A). It also includes a sole proprietor or a partner, if he or she properly elects. T.C.A. § 50-6-102(11)(B).

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TENNESSEE: INDEPENDENT CONTRACTORS

Independent contractors are excluded from coverage. *See* T.C.A. § 50-6-102(10)(A). However, the Tennessee Supreme Court has emphasized it is the Court's duty to give the law a liberal construction in favor of employee status. *See* Wooten Transport, Inc. v. Hunter, 535 S.W.2d 858 (Tenn. 1976).

The following relevant factors will be used to determine if an employee is an independent contractor:

(1) the right to control conduct of the work;

(2) the right of termination;

(3) the method of payment;

(4) the freedom to select and hire helpers;

(5) the furnishing of tools and equipment;

(6) self-scheduling of working hours; and

(7) the freedom to offer services to other entities.

See T.C.A. §50-6-102(10)(D)(2013).

The right of the employer to control details of the work is the most important consideration and will be given the greatest weight. *See* Lindsey v. Smith & Johnson, Inc., 601 S.W.2d 923 (Tenn. 1980).

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TENNESSEE: INDEPENDENT CONTRACTORS

Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

The workers' compensation laws do not apply to common carriers engaged in interstate commerce. *See* T.C.A. § 50-6-106(1)(A). An owner-operator of a motor vehicle under contract to a common carrier may elect to be covered under any policy of workers' compensation insurance. *See* T.C.A. § 50-6-106(B).

There are no special provisions for owner-operators of trucks that deliver property or transport people.

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TENNESSEE: STATUTORY EMPLOYER

T. C. A. § 50-6-113

(a) A principal contractor, intermediate contractor or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal contractor, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

(b) Any principal contractor, intermediate contractor or subcontractor who pays independently of this section, would have been liable to pay compensation to the injured employee, or from any intermediate contractor.

(c) Every claim for compensation under this section shall be in the first instance presented to and instituted against the immediate employer, but the proceedings shall not constitute a waiver of the employee's rights to recover compensation under this chapter from the principal contractor or intermediate contractor; provided, that the collection of full compensation from one (1) employer shall bar recovery by the employee against any others, nor shall the employee collect from all a total compensation in excess of the amount for which any of the contractors is liable.

(d) This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or that are otherwise under the principal contractor's control or management.

(e) A subcontractor under contract to a general contractor may elect to be covered under any policy of workers' compensation insurance insuring the contractor upon written agreement of the contractor, by filing written notice of the election, on a form prescribed by the administrator, with the division. It is the responsibility of the general contractor to file the written notice with the division. Failure of the general contractor to file the written notice shall not operate to relieve or alter the obligation of an insurance company to provide coverage to a subcontractor when the subcontractor can produce evidence of payment of premiums to the insurance company for the coverage. The election shall in no way terminate or affect the independent contractor status of the subcontractor for any other purpose than to permit workers' compensation coverage. The election of coverage may be terminated by the subcontractor or general contractor by providing written notice of the termination to the division and to all other parties consenting to the prior election. The termination shall be effective thirty (30) days from the date of the notice to all other parties consenting to the prior election and to the division.

MISSOURI
Missouri: Exclusive Remedy

- Rights and remedies under the Act shall exclude all other rights of the employee, their spouses, parents, dependents, heirs, and legal representatives, etc. on account of the accident or death, except as such rights are not provided under the Act. R.S.Mo. 287.120(2).
- Exceptions (intentional acts, contractual waiver, "dual capacity," etc.)
  - "Intentional injury inflicted by the employer in person on his employee may be made the subject of a common-law action for damages on the theory that, in such an action, the employer will not be heard to say that his intentional act was an 'accidental' injury and so under the exclusive provisions of the compensation act. . . . We believe that when an employer acts intentionally and is substantially certain that injury to an employee will result, the employer has a specific purpose to inflict injury." *Speck v. Union Elec. Co.*, 741 S.W.2d 280, 283 (Mo. Ct. App. 1987).
  - To date, the dual capacity doctrine has not been formally adopted in Missouri. In Re Complaint of American Milling Co., No. 4:98CV575SNL, 2008 WL 2727257, at *9 (E.D. Mo. July 10, 2008).

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Missouri: Covered Employees

- Any person in the service of an employer under contract of hire, appointment or election, including officers of corporations but excluding owner/operators of leased trucks in interstate commerce. R.S.Mo. § 287.020.
- Excludes farm labor, domestic servants, family chauffeurs and licensed real estate agents. Also excludes inmates, volunteers of tax-exempt organizations, sports officials, and direct sellers. R.S.Mo. § 287.090.

Missouri: Independent Contractors

- Independent contractors are by definition not employees; however Missouri will ignore a contract asserting such a relationship if the circumstances show a statutory employee instead.
- Ceradsky v. Mid-America Dairymen, Inc., 583 S.W.2d 193 (Mo.App. W.D. 1979) said that control was relevant but not the only test. They applied the Restatement of Law, Agency 2d, Section 220, and held that just as important was the length of time the parties worked together, if the relationship was continuous, whether the business of the alleged independent contractor was distinct from the business of the alleged employer, the way the alleged independent contractor was paid, and whether special equipment or tools were needed and used.

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Missouri: Independent Contractors

- **Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?**
  - Yes. The definition of employee excludes the owner and operator of a motor vehicle which is leased or contracted with a driver to a for-hire common or contract motor vehicle carrier operating within a commercial zone as defined in Sections 390.020 or 390.041, or operating under a certificate issued by the transportation division of the department of economic development or by the Interstate Commerce Commission. 287.020 (1). An unpublished opinion held that this exemption did not apply to the driver who was an employee of the owner/operator; it only applied to the owner/operator himself.

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Missouri: Statutory Employer

- A person who has work done which is 1) under contract, 2) on his premises, and 3) part of his usual business is a statutory employer of contractor/subcontractor's employees. Exempts owner of premises having improvements done. R.S.Mo. § 287.040.

Virginia: Exclusive Remedy

A. Scope of immunity.

- The employee's rights under the Act preclude all other rights or remedies of such employee, his or her heirs and assigns, on account of the injury and/or death. VA. CODE ANN. § 65.2-307(A).

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

- The Act is the exclusive remedy for occupational diseases even in the case of intentional torts. However, in a situation involving an accident, where the employer's actions were committed with the intent to injure, there can be no accident and thus an employee's action for intentional infliction of emotional distress was not barred by the exclusivity provisions of the Act.
- An executive officer may reject coverage for injury or death by accident, but not with respect to occupational diseases. If such rejection is elected, the executive officer may proceed at common law against the employer to recover damages for personal injury or death. VA. CODE ANN. § 65.2-300.

Virginia: Covered Employees

- Effective January 1, 2004, an *Employee* is defined as "[e]very person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed, except one whose employment is not within the usual course of the trade, business, occupation or profession of the employer..." VA. CODE ANN. § 65.2-101.

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Virginia: Independent Contractors

Independent contractors are not considered employees under the Virginia Worker's Compensation Act. However, an independent contractor of any employer may fall under the inclusion of the Act at the election of such employer provided (1) the independent contractor agrees to such inclusion and (2) unless the employer is self-insured, the employer's insurer agrees in writing to such inclusion. All or part of the cost of the insurance coverage of the independent contractor may be borne by the independent contractor. VA. CODE ANN. § 65.2-101.

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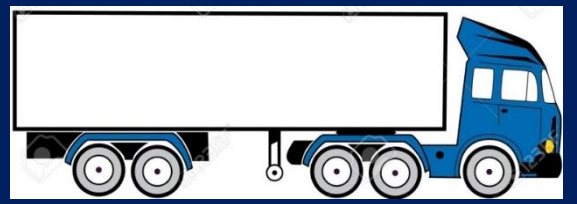
Virginia: Independent Contractors

- If an independent contractor undertakes to perform or execute any work which is part of his trade, business, or occupation and contracts with any other person for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him. The purpose of this provision is to expand the definition of employer in order to bring independent contractors and subcontractors who are engaged in work that is part of the trade, business, or occupation of the owner within the scope of the Act. Thus, the employees of independent contractors and subcontractors may fall within the scope of the Act and become statutory employees of the owner if the work being done is part of the owner's general business. VA. CODE ANN. § 65.2-302.
- A worker may recover compensation from a subcontractor or the principal contractor, but the worker may not collect from both. VA. CODE ANN. § 65.2-303. When sued by a worker of a subcontractor, a principal contractor shall have the right to join that subcontractor or any intermediate contractor as a party. VA. CODE ANN. § 65.2-304.

Virginia: Independent Contractors



Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

No. However, a fairly recent Virginia Circuit Court case held that, because a grocery delivery truck driver was still in the process of completing a delivery at the time of his alleged injury and therefore still engaged in the trade, business, or occupation of the grocery store at the time of his accident, the exclusive remedy was under the Virginia Workers' Compensation Act. Walls v. Food Lion, L.L.C., 66 Va. Cir. 26 (2004).

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Virginia: Statutory Employer

- "When any person...undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person...for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken [,]...the [person] shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him." VA. CODE ANN. § 65.2-302.
- This section only applies in cases where there are at least “four persons in interest” – (1) an owner or other person who is having work executed for himself; (2) an independent contractor who has undertaken to execute the work for the person first mentioned; (3) a subcontractor, between whom and the independent contractor there is a contract for the execution by or under the subcontractor of the whole or some part of the work; and (4) a workman employed in the work. *See* Bamber v. City of Norfolk, 138 Va. 26, 121 S.E. 564 (1924).

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Transportation and WC in California

- All employers in California are obligated to provide their employees with workers' compensation coverage, and failure to do so is a crime
  - An employer is "Every person including any public service corporation, which has any natural person in service." (All references are to the California Labor Code "LC") LC §3300
  - An employee is "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed . . ." LC §3351

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Transportation and WC in California

- At the same time, the law acknowledges that work may be performed by an independent contractor who is not an employee requiring workers' compensation coverage.
  - "Independent contractor means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means. . ." LC 3353

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Transportation and WC in California

- California over the years has principally used two methods interpreting means of control:
  - Statute: There is a rebuttable presumption that a worker performing services for which a license is required . . .or who is working for a person required to obtain such a license is an employee rather than an independent contractor. LC 2750.5
  - Supreme Court decision: in S. G. Borello & Sons, Inc. the California Supreme Court set out the various indices of control to be considered.

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Transportation and WC in California

- On April 30, 2018, the Supreme Court greatly narrowed the classification of independent contractors in Dynamex Operations West, Inc.
  - Dynamex, a nationwide same-day courier and delivery service, reclassified its drivers from employees to independent contractors.
  - Drivers provided their own vehicles, paid for all transportation expenses, including fuel, tolls, vehicle maintenance, and insurance, as well as all taxes and workers' compensation insurance

Transportation and WC in California

- Drivers set their own schedule but notified Dynamex of the days they intended to work.
- Drivers were permitted to hire others to make deliveries, and were permitted to make deliveries for other delivery companies.

- Dynamex emphasized the driver's right of control to argue for their independent contractor status.
- Plaintiffs argued a higher burden applies when dealing with social welfare benefits, like workers' compensation.

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Transportation and WC in California

- Court held, Dynamex failed the ABC standard:
  - Under the ABC standard, the worker is an employee unless the hiring entity establishes all of three designated factors: (a) that the worker is free from control and direction over performance of the work, both under the contract and in fact; (b) that the work provided is outside the usual course of the business for which the work is performed; and (c) that the worker is customarily engaged in an independently established trade, occupation or business.

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Transportation and WC in California

- Some transport companies seek to avoid California's workers' compensation system by eschewing California residents.
  - However, an employee hired or working in California may obtain its work comp benefits, even if the injury occurs outside of the state. LC 3600.5
  - Hired in the state means "agrees to work" while within the state, regardless of the origin of the offer.

Transportation and WC in California

- Even those hired and based outside of California may be entitled to its workers' compensation benefits if:
  - There is significant business contact with California
  - The claimant is not a professional athlete
  - The employee is covered by workers' compensation in another state
  - The other state recognizes the extraterritorial provisions of California law.

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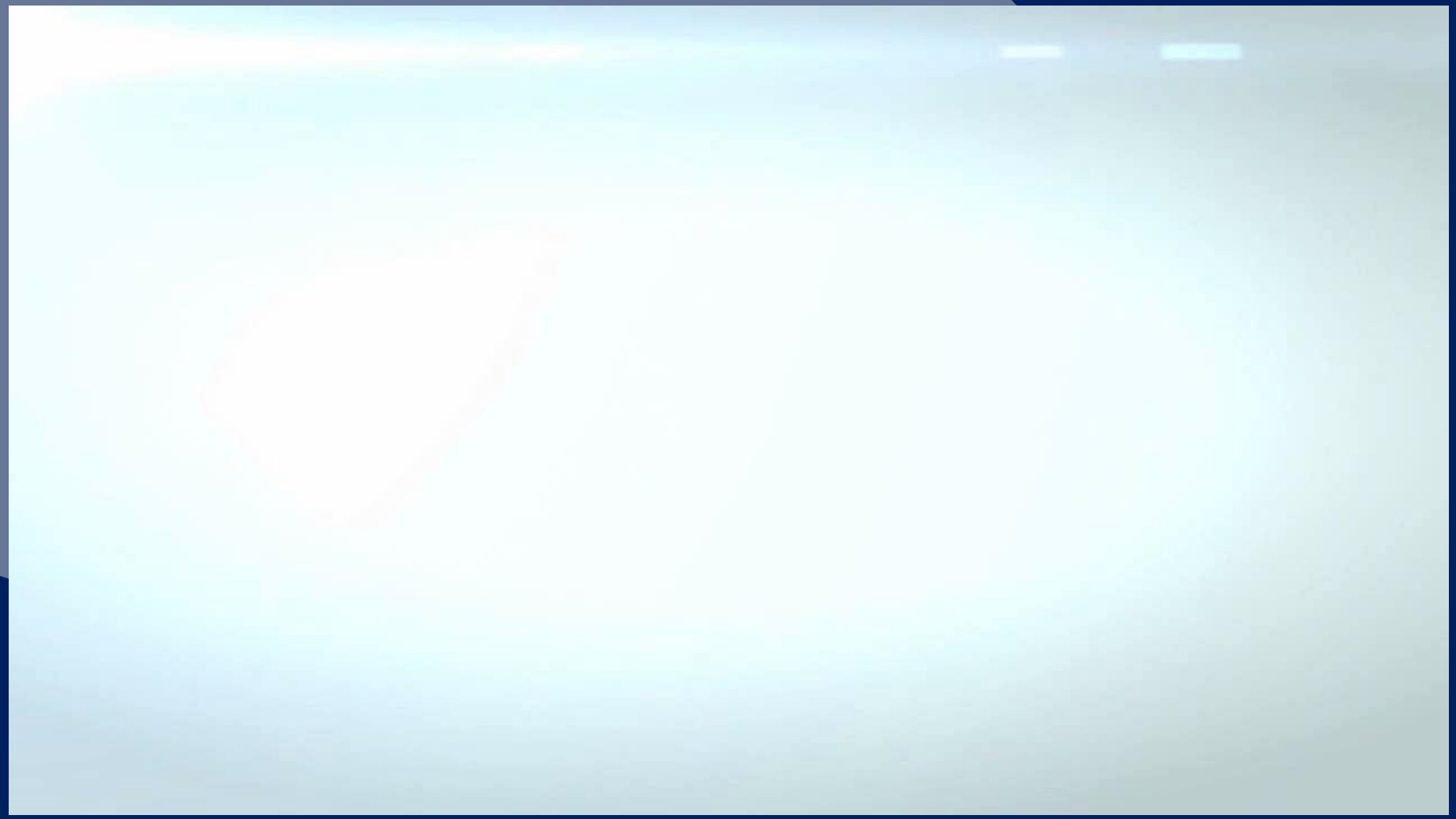
Transportation and WC in California

- While California work comp law does not treat owner-operators differently than other employers, properly organized businesses may waive employee status for its owner.
- A corporate officer may waive employee status if:
  - The officer owns at least 10 percent of the corporate stock, and
  - The officer is covered by a health insurance policy, and the company insurance company accepts a written waiver of rights;
  - Or, the officer owns 100% of the company stock

Transportation and WC in California

- A similar provision exists for the managing partner of a limited liability partnership or limited liability company.
- Even where an owner-operator contracts to provide services to a transportation company, the company may not impose the cost of workers' compensation insurance on the operator.
  - "Requiring the independent contractor who makes an election under [the] Labor Code . . .to bear the entire burden of obtaining compensation thwarts the reciprocal nature of the system." Albillo v. Intermodal Container Services, Inc.



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PRICE DIFFERENTIAL

The cost of Occupational Accident Insurance can be 50% or less than the cost of Workers Comp with similar coverage limits.

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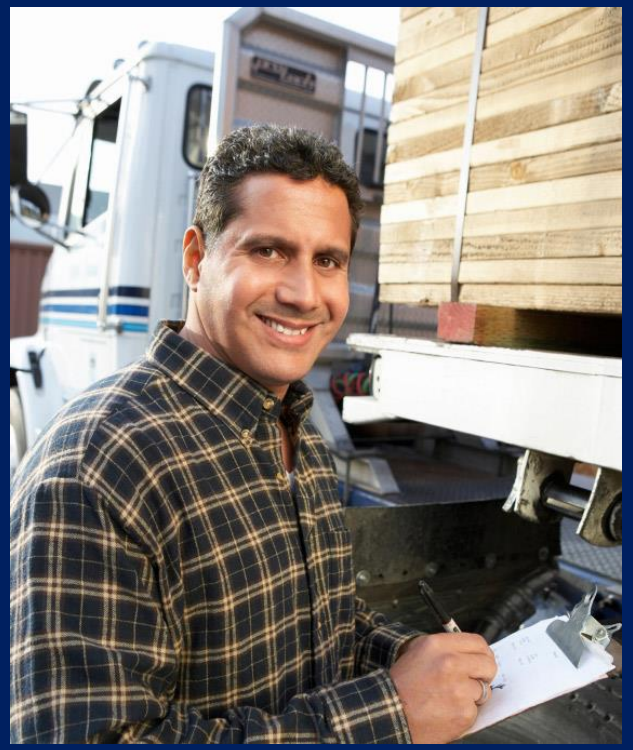
TRENDS

Larger companies are requiring owner operators to purchase their own insurance

- Example:
  - Employee falling under workers compensation statute: $2,500 a month for statutory coverage
  - Owner-operator occupational accident insurance:
    - $160 a month for basic medical coverage



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TAKEAWAYS

Always ensure to follow and abide by each state's statutory requirements

Always ensure your drivers are insured

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