The Exclusive Remedy Provision
State-by-State Survey
By
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The following survey is provided in summary fashion and was compiled by the author in cooperation with the member firms of The National Workers’ Compensation Defense Network. For more details on the law of a particular state please contact the appropriate member firm by visiting the NWCDN website at www.nwcdn.com and clicking on the “find a firm” page.

**Alabama**
The exclusive remedy doctrine still exists. If the employer is acting in a “dual capacity” (such as also acting as the manufacturer of a defective part), a direct tort action may be allowed. There is a direct tort action for wrongful termination if an employee is terminated solely because he or she filed a compensation claim. If a supervisory employee intentionally commits an act or omission that causes injury, a direct tort action may exist.

**Alaska**
The exclusive remedy doctrine is alive and well. There is an intentional tort exception and the court has held that an employer's violation of safety standards constitutes an intentional tort if the employer knowingly subjects an employee to a dangerous process with knowledge that harm to the employee will be a substantial certainty.

**Arizona**
As long as the employer secures workers’ compensation coverage, either through an insurance policy or by self-insured status, the employer and all co-employees are immune from suit. The only exceptions to immunity arise where the employee elects to reject coverage before any injury (the election
must be in writing), the employer fails to secure coverage, the employer fails to post the proper notices regarding coverage, or the injury arises from the willful misconduct of the employer/co-employee. The willful misconduct exception is strictly construed to require a showing that the conduct was undertaken with the deliberate attempt to cause the resultant injury. Even if one of those exceptions is met, the exclusivity of the Act remains if the employee accepts any benefit under the Act following an injury.

<table>
<thead>
<tr>
<th>Arkansas</th>
<th>The exclusive remedy doctrine applies with a fairly strong intentional tort exception.</th>
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<tbody>
<tr>
<td>California</td>
<td>Generally, the exclusive remedy provision applies when an individual sustains an injury arising out of and in the course of his or her employment. Actions for intentional torts may be pursued outside of the workers’ compensation system if, for example, the employer engages in conduct that cannot be considered a normal part of the employment relationship.</td>
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<td>Canada</td>
<td>The exclusive remedy principle applies in Canada to injuries that occur by accident in the course of employment or occupational diseases developing due to the nature of the employment. There are limited exceptions that differ from province to province. For example, in Ontario, a worker may have a cause of action against an employer other than his or her own employer, if the other employer has supplied a vehicle, machinery, or equipment without an operator that causes injury. An employer would face potential liability in tort for any deliberate harm inflicted on a worker as such an event would not be considered an &quot;accident&quot;.</td>
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<tr>
<td>Colorado</td>
<td>The exclusive remedy provision is strong. If a court wishes to allow a tort action against an employer (i.e., for sexual harassment), it will make findings that the injury is not covered by workers' compensation.</td>
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</tbody>
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Connecticut

The exclusive remedy provision exists, and is typically interpreted quite broadly. There is a recognized exception in situations where an employer intentionally causes an injury.

Delaware

Employees in Delaware injured in the course and scope of their employment may only claim workers’ compensation benefits from their employer, but may also bring a claim against a third party tortfeasor if applicable. The workers’ compensation carrier or the employer has a direct right of subrogation for any third party recovery and may also bring a direct claim against the third party tortfeasor in subrogation if the employee does not bring such a claim.

District of Columbia

The District of Columbia Workers’ Compensation Act provides the exclusive remedy for an injured employee. There are recognized exceptions in cases where the employer fails to secure workers’ compensation insurance, or when the employer has specific intent to injure or kill an employee.

Florida

Florida recognizes the exclusive remedy provision, subject to certain exceptions. For example, a direct tort action can be filed if the employer acts with intent to cause injury.

Georgia

The exclusive remedy provision exists. Despite some activity trying to circumvent this provision, there has been little success in attempting to avoid exclusivity to bring a direct tort action.

Hawaii

The exclusive remedy doctrine applies. There is a statutory exception for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto. There must be a finding of sexual harassment or assault in order to prevail on the infliction of emotional distress claim and avoid the exclusive remedy provision.
Idaho

Idaho law provides that workers' compensation benefits are the exclusive remedy against the employer for workplace injuries. Idaho Code §72-223. In a February 2007 opinion, the Idaho Supreme Court referred to section 72-201, which “declares that all phases of the [common law system governing the remedy of workmen against employers for injuries] are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided . . . to the exclusion of every other remedy, . . . and to that end all civil actions civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished.” It is unclear to the author if there is an “intentional tort” exception in Idaho.

Illinois

There are notable exceptions to the general exclusive remedy provision. For example, it does not bar tort actions for deliberately intentional conduct, cases arising under the dual capacity doctrine, or retaliatory discharge actions.

Indiana

In order to defeat the exclusive remedy provision, the employee must show that the employer acted with deliberate intent to inflict an injury, or with actual knowledge that an injury is certain to occur. The employer itself must harbor deliberate intent, not merely a supervisor, manager, or foreman.

Iowa

When an employee is injured and entitled to workers’ compensation benefits, that employer is immune from other liability for that injury. Even intentional torts may be outside the scope of remedies available under the Act as the Iowa Supreme Court has held that the exclusive remedy provision bars claims against an employer for intentional acts of supervisory personnel where those acts were not commanded or expressly
authorized by the employer. Exclusivity precludes consortium claims.

Injured workers can sue co-employees if they are "grossly negligent amounting to wanton neglect for the safety of another." The injured worker must show that the co-employee knew or should have known of the peril to be apprehended, and that the injury was a probable, not just possible, result of the danger. Finally, the injured worker must show that the co-employee consciously failed to avoid the peril.

**Kansas**

The exclusive remedy remains strong, with limited exceptions in cases involving: 1) intentional acts by the employer to injure or kill an employee; 2) the dual capacity doctrine; and 3) retaliatory discharge.

**Kentucky**

According to K.R.S. § 342.690, workers’ compensation is the exclusive remedy for workplace injuries. There are exceptions, such as cases where the injury or death is caused by the willful and unprovoked physical aggression of a co-employee.

**Louisiana**

The exclusive remedy provision in Louisiana remains fairly strong. Statutory exceptions where tort suits can proceed against the employer include: 1) willful intent to injure; 2) intoxication; and 3) the physical aggressor in an unprovoked altercation.

**Maine**

The exclusive remedy provision applies in Maine, and has been held applicable even in the case of an employer’s intentional conduct that leads to the death of an employee. However, both the Maine Supreme Court and the First Circuit have held that intentional torts that do not “arise out of and in the course of employment” will not be subject to the exclusivity provision. As an example, if the employee has conclusively established the work-relatedness of the injury, the employer or insurer’s subsequent intentional conduct leading to the employee’s
emotional distress will not be covered by the exclusivity provision. As well, surveillance that invades the employee’s expectation of privacy may not be covered by the exclusivity provision and may lead to tort liability for the insurer.

Maryland

There are three primary exceptions to the exclusive remedy provision. A separate tort action may be allowed if the employer fails to procure workers’ compensation insurance, if there is deliberate intent by the employer to injure or kill an employee, or if exclusivity has been contractually bargained away. The exclusive remedy provision is rarely challenged.

Massachusetts

Exclusive remedy provisions remain solid, though there are exceptions in cases involving intentional injuries resulting from serious and willful misconduct. In those exceptional cases there is a doubling of compensation benefits, both indemnity and medical, which, although payable by the insurer in the first instance, will ultimately be the responsibility of the employer. The adjudication of these claims remains under the exclusive jurisdiction of the Department of Industrial Accidents.

Michigan

The exclusive remedy provision applies. There are few exceptions, such as cases where the injury resulted from an intentional tort and where the employee can prove a retaliatory discharge resulting from his/her exercising a right under the act. For an intentional tort to exist, the employee must prove that the employer knew a dangerous condition existed and an injury is certain to occur.

Minnesota

The exclusive remedy provision remains quite strong in Minnesota. A separate tort action may be pursued under limited circumstances, including situations
where an intentional injury was inflicted by a co-employee.

**Mississippi**

Intentional acts of the employer (actual intent to injure, and not gross negligence) are exceptions to the exclusivity doctrine. If an employer fails to secure payment of compensation, the employee may elect to pursue workers’ compensation remedies or file a separate tort action against the employer for damages. In that type of action, the employer may not plead as a defense that the injury resulted from a co-worker’s negligence, contributory negligence, or any assumption of the risk of employment.

**Missouri**

Workers’ compensation is the exclusive remedy for an injured employee. Intentional injuries are an exception. For an injury to be considered intentional, the employer must act intentionally and with substantial certainty that injury will result. The exclusive remedy provision does not apply in situations where co-workers or supervisors commit affirmative acts of negligence that exceed the responsibility to provide a safe workplace.

**Montana**

There are certain notable exceptions to the exclusive remedy doctrine, including injuries that result from an intentional tort. Montana also recognizes the dual capacity doctrine.

**Nebraska**

Based on §§ 48-111 and §§ 48-112, if an injury arises out of and in the course of employment, the Nebraska Workers’ Compensation Act is the injured employee’s exclusive remedy against his or her employer.

**Nevada**

Not available at press time.

**New Hampshire**

Not available at press time.

**New Jersey**

The exclusive remedy provision is solid, and it is extremely difficult for an employee to maintain a
direct lawsuit against the employer. In order to overcome the provision, there must be proof of intentional harm, meaning that the employer must act “with substantial certainty of harm.” Gross negligence or disregard for safety is insufficient. Claims of workplace harassment against an employer are not barred because of the New Jersey Law against Discrimination.

New Mexico

Not available at press time.

New York

The exclusive remedy provision remains quite strong, and efforts to pierce exclusivity have generally been rare and unsuccessful. Statutory exceptions are cases involving intentional torts and failure to insure.

North Carolina

The exclusive remedy provision remains strong in North Carolina. There is a limited exception if the employer is engaging in conduct that is substantially certain to result in death or serious bodily injury. In addition, an employee can sue a co-worker for intentional torts.

North Dakota

There is an exclusive remedy provision but there is an exception for intentional torts. The North Dakota Court recently stated: “…the North Dakota Workers' Compensation Act does not preclude recovery for true intentional injuries and an employee can pursue a civil cause of action against his employer for a true intentional injury. An employer is deemed to have intended to injure if the injury was certain to occur and willfully disregarded that knowledge…”

Ohio

There has been a large hole in the workers’ compensation exclusive remedy doctrine in Ohio since the 1982 case of Blankenship v. Cincinnati Milicicn (1982) 69 Ohio St. 2d 608, which held that “intentional injuries” occur outside the course and scope of employment, and, therefore, are not covered by
workers’ compensation immunity. “Intentional injury” was later defined in *Fyffe v. Jeno’s, Inc.* (1991) 59 Ohio St. 3d 115 as working with a dangerous process or condition whereby injury or death was a “substantial certainty” to occur, together with employer knowledge of the foregoing. Many Ohio trial judges take a liberal view of the evidentiary record on motions for summary judgment in such cases, and find issues of fact calling for the jury to decide.

The State legislature has tried four times to reign in this Ohio employer liability, but the first three attempts have been found unconstitutional or otherwise invalid by the Ohio Supreme Court. The fourth such attempt, O.R.C. § 2725.01 (limiting a workplace intentional injury suit to a specific intent to injure), is currently under review by the Ohio Supreme Court in *Kiminski v. Metal & Wire Products Co.* A decision is expected sometime in early 2009.

**Oklahoma**

The exclusive remedy provisions exists with certain exceptions as described under 85 O.S. § 12

**Oregon**

Oregon recognizes the exclusive remedy provision, with an exception in cases where a worker is injured due to the deliberate intent of the employer. There is an additional caveat evidenced by the case of *Smothers v Gresham Transfer*, 332 Or 83 (2001). In short, if an injury is determined not to be the “major contributing cause” of a claimant’s condition, the claimant can file a suit in civil court after losing his or her workers’ compensation case. *Id* at 87.

**Pennsylvania**

There are exceptions to the general exclusivity doctrine, such as instances where an employer is uninsured, an employee is alleging wrongful termination or retaliatory discharge, or if the injury is caused by the employer’s intentional acts.
Rhode Island

The exclusive remedy provision provides that benefits under the Workers’ Compensation act are the exclusive remedy for an individual injured in the course of his or her employment.

South Carolina

The exclusive remedy provision is strong in South Carolina. Specifically, the provision bars an employee, his personal representative, and/or his next-of-kin, from suing the employer, a statutory employer, and/or co-employees conducting the employer’s business, under common law. See S.C. CODE ANN § 42-1-540. The employee may bring an action against certain third party tortfeasors. See S.C. CODE ANN § 42-1-540.

South Dakota

The only recognized exception for the exclusive remedy provision is for rights and remedies arising from intentional tort. The intentional tort exception is quite strict. Only when the employee can show that an ordinary, reasonable and prudent person would believe an injury was substantially certain to result from the employer’s conduct can that worker bring suit against the employer at common law. There must be: (1) actual knowledge by the employer of the dangerous condition; (2) substantial certainty that injury was to occur; and (3) the employer still required the employee to perform the task.

Tennessee

The exclusive remedy provision exists. Pursuant to Valencia v Freeland and Lemm Const Co, 108 SW3d 239 (Tenn 2003), there is an exception if the employer has “actual intent” to injure the employee.

Texas

The exclusive remedy provision exists with certain exceptions. For example, if the employer intentionally causes injury to the employee. In terms of defining intent, Texas adheres to the standard that an employer must at least be “substantially certain” that its acts will result in injury.
**Utah**  
The exclusive remedy provision bars all tort actions against an employer unless the case involves a situation with “intent to injure.” Neither the state wrongful death statute nor violations of safety statutes or regulations supersede the exclusive remedy statute.

**Vermont**  
The exclusive remedy provision remains strong. Vermont does allow a separate tort action where a strict intentional harm standard can be met.

**Virginia**  
The exclusive remedy provision exists, even with respect to intentional torts, if the injury arises out of and in the course of the employment. However, victims of sexual assault have the option of electing to pursue an action-at-law against the attacker, regardless of whether the attacker is the employer or co-employee of the victim.

**Washington**  
The exclusive remedy provision exists, with the common exception of cases where the employer deliberately intends to injure an employee.

**West Virginia**  
The exclusive remedy provision may be avoided if the employer acts with deliberate intent to cause injury.

**Wisconsin**  
There are limited exceptions to the exclusive remedy provision. A direct tort action may be pursued if the injury resulted from use of an automobile not owned or leased by the employer, or if there is an intentional assault and battery. Wisconsin also recognizes the dual persona doctrine – for example, if an employer is also the manufacturer of the machine that causes an injury.

**Wyoming**  
There is an exclusive remedy provision in the law with an intentional tort exception.