

WORKERS' COMPENSATION WAIVER AMENDMENTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Karen Mayne

House Sponsor: Todd E. Kiser

LONG TITLE

General Description:

This bill modifies the Utah Labor Code to correct language regarding the issuance of waivers.

Highlighted Provisions:

This bill:

- ▶ removes incorrect language regarding insurers issuing workers' compensation coverage waivers; and
- ▶ makes technical and conforming amendments.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

34A-2-103, as last amended by Laws of Utah 2011, Third Special Session, Chapter 4

34A-2-104, as last amended by Laws of Utah 2011, Chapter 328

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **34A-2-103** is amended to read:

34A-2-103. Employers enumerated and defined -- Regularly employed --



28 **Statutory employers.**

29 (1) (a) The state, and each county, city, town, and school district in the state are
30 considered employers under this chapter and Chapter 3, Utah Occupational Disease Act.

31 (b) For the purposes of the exclusive remedy in this chapter and Chapter 3, Utah
32 Occupational Disease Act prescribed in Sections 34A-2-105 and 34A-3-102, the state is
33 considered to be a single employer and includes any office, department, agency, authority,
34 commission, board, institution, hospital, college, university, or other instrumentality of the
35 state.

36 (2) (a) Except as provided in Subsection (4), each person, including each public utility
37 and each independent contractor, who regularly employs one or more workers or operatives in
38 the same business, or in or about the same establishment, under any contract of hire, express or
39 implied, oral or written, is considered an employer under this chapter and Chapter 3, Utah
40 Occupational Disease Act.

41 (b) As used in this Subsection (2):

42 (i) "Independent contractor" means any person engaged in the performance of any work
43 for another who, while so engaged, is:

44 (A) independent of the employer in all that pertains to the execution of the work;

45 (B) not subject to the routine rule or control of the employer;

46 (C) engaged only in the performance of a definite job or piece of work; and

47 (D) subordinate to the employer only in effecting a result in accordance with the
48 employer's design.

49 (ii) "Regularly" includes all employments in the usual course of the trade, business,
50 profession, or occupation of the employer, whether continuous throughout the year or for only a
51 portion of the year.

52 (3) (a) The client under a professional employer organization agreement regulated
53 under Title 31A, Chapter 40, Professional Employer Organization Licensing Act:

54 (i) is considered the employer of a covered employee; and

55 (ii) subject to Section 31A-40-209, shall secure workers' compensation benefits for a
56 covered employee by complying with Subsection 34A-2-201(1) or (2) and commission rules.

57 (b) The division shall promptly inform the Insurance Department if the division has
58 reason to believe that a professional employer organization is not in compliance with

59 Subsection 34A-2-201(1) or (2) and commission rules.

60 (4) A domestic employer who does not employ one employee or more than one
61 employee at least 40 hours per week is not considered an employer under this chapter and
62 Chapter 3, Utah Occupational Disease Act.

63 (5) (a) As used in this Subsection (5):

64 (i) (A) "agricultural employer" means a person who employs agricultural labor as
65 defined in Subsections 35A-4-206(1) and (2) and does not include employment as provided in
66 Subsection 35A-4-206(3); and

67 (B) notwithstanding Subsection (5)(a)(i)(A), only for purposes of determining who is a
68 member of the employer's immediate family under Subsection (5)(a)(ii), if the agricultural
69 employer is a corporation, partnership, or other business entity, "agricultural employer" means
70 an officer, director, or partner of the business entity;

71 (ii) "employer's immediate family" means:

72 (A) an agricultural employer's:

73 (I) spouse;

74 (II) grandparent;

75 (III) parent;

76 (IV) sibling;

77 (V) child;

78 (VI) grandchild;

79 (VII) nephew; or

80 (VIII) niece;

81 (B) a spouse of any person provided in Subsection (5)(a)(ii)(A)(II) through (VIII); or

82 (C) an individual who is similar to those listed in ~~[Subsections]~~ Subsection

83 (5)(a)(ii)(A) or (B) as defined by rules of the commission; and

84 (iii) "nonimmediate family" means a person who is not a member of the employer's
85 immediate family.

86 (b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
87 agricultural employer is not considered an employer of a member of the employer's immediate
88 family.

89 (c) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an

90 agricultural employer is not considered an employer of a nonimmediate family employee if:

91 (i) for the previous calendar year the agricultural employer's total annual payroll for all
92 nonimmediate family employees was less than \$8,000; or

93 (ii) (A) for the previous calendar year the agricultural employer's total annual payroll
94 for all nonimmediate family employees was equal to or greater than \$8,000 but less than
95 \$50,000; and

96 (B) the agricultural employer maintains insurance that covers job-related injuries of the
97 employer's nonimmediate family employees in at least the following amounts:

98 (I) \$300,000 liability insurance, as defined in Section 31A-1-301; and

99 (II) \$5,000 for health care benefits similar to benefits under health care insurance as
100 defined in Section 31A-1-301.

101 (d) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
102 agricultural employer is considered an employer of a nonimmediate family employee if:

103 (i) for the previous calendar year the agricultural employer's total annual payroll for all
104 nonimmediate family employees is equal to or greater than \$50,000; or

105 (ii) (A) for the previous year the agricultural employer's total payroll for nonimmediate
106 family employees was equal to or exceeds \$8,000 but is less than \$50,000; and

107 (B) the agricultural employer fails to maintain the insurance required under Subsection
108 (5)(c)(ii)(B).

109 (6) An employer of agricultural laborers or domestic servants who is not considered an
110 employer under this chapter and Chapter 3, Utah Occupational Disease Act, may come under
111 this chapter and Chapter 3, Utah Occupational Disease Act, by complying with:

112 (a) this chapter and Chapter 3, Utah Occupational Disease Act; and

113 (b) the rules of the commission.

114 (7) (a) (i) As used in this Subsection (7)(a), "employer" includes any of the following
115 persons that procures work to be done by a contractor notwithstanding whether or not the
116 person directly employs a person:

117 (A) a sole proprietorship;

118 (B) a corporation;

119 (C) a partnership;

120 (D) a limited liability company; or

121 (E) a person similar to one described in Subsections (7)(a)(i)(A) through (D).

122 (ii) If an employer procures any work to be done wholly or in part for the employer by
123 a contractor over whose work the employer retains supervision or control, and this work is a
124 part or process in the trade or business of the employer, the contractor, all persons employed by
125 the contractor, all subcontractors under the contractor, and all persons employed by any of
126 these subcontractors, are considered employees of the original employer for the purposes of
127 this chapter and Chapter 3, Utah Occupational Disease Act.

128 (b) Any person who is engaged in constructing, improving, repairing, or remodelling a
129 residence that the person owns or is in the process of acquiring as the person's personal
130 residence may not be considered an employee or employer solely by operation of Subsection
131 (7)(a).

132 (c) A partner in a partnership or an owner of a sole proprietorship is not considered an
133 employee under Subsection (7)(a) if the employer who procures work to be done by the
134 partnership or sole proprietorship obtains and relies on either:

135 (i) a valid certification of the partnership's or sole proprietorship's compliance with
136 Section 34A-2-201 indicating that the partnership or sole proprietorship secured the payment of
137 workers' compensation benefits pursuant to Section 34A-2-201; or

138 (ii) if a partnership or sole proprietorship with no employees other than a partner of the
139 partnership or owner of the sole proprietorship, a workers' compensation coverage waiver
140 issued ~~[by an insurer]~~ pursuant to Part 10, Workers' Compensation Coverage Waivers Act,
141 stating that:

142 (A) the partnership or sole proprietorship is customarily engaged in an independently
143 established trade, occupation, profession, or business; and

144 (B) the partner or owner personally waives the partner's or owner's entitlement to the
145 benefits of this chapter and Chapter 3, Utah Occupational Disease Act, in the operation of the
146 partnership or sole proprietorship.

147 (d) A director or officer of a corporation is not considered an employee under
148 Subsection (7)(a) if the director or officer is excluded from coverage under Subsection
149 34A-2-104(4).

150 (e) A contractor or subcontractor is not an employee of the employer under Subsection
151 (7)(a), if the employer who procures work to be done by the contractor or subcontractor obtains

152 and relies on either:

153 (i) a valid certification of the contractor's or subcontractor's compliance with Section
154 34A-2-201; or

155 (ii) if a partnership, corporation, or sole proprietorship with no employees other than a
156 partner of the partnership, officer of the corporation, or owner of the sole proprietorship, a
157 workers' compensation coverage waiver issued [~~by an insurer~~] pursuant to Part 10, Workers'
158 Compensation Coverage Waivers Act, stating that:

159 (A) the partnership, corporation, or sole proprietorship is customarily engaged in an
160 independently established trade, occupation, profession, or business; and

161 (B) the partner, corporate officer, or owner personally waives the partner's, corporate
162 officer's, or owner's entitlement to the benefits of this chapter and Chapter 3, Utah
163 Occupational Disease Act, in the operation of the partnership's, corporation's, or sole
164 proprietorship's enterprise under a contract of hire for services.

165 (f) (i) For purposes of this Subsection (7)(f), "eligible employer" means a person who:

166 (A) is an employer; and

167 (B) procures work to be done wholly or in part for the employer by a contractor,
168 including:

169 (I) all persons employed by the contractor;

170 (II) all subcontractors under the contractor; and

171 (III) all persons employed by any of these subcontractors.

172 (ii) Notwithstanding the other provisions in this Subsection (7), if the conditions of
173 Subsection (7)(f)(iii) are met, an eligible employer is considered an employer for purposes of
174 Section 34A-2-105 of the contractor, subcontractor, and all persons employed by the contractor
175 or subcontractor described in Subsection (7)(f)(i)(B).

176 (iii) Subsection (7)(f)(ii) applies if the eligible employer:

177 (A) under Subsection (7)(a) is liable for and pays workers' compensation benefits as an
178 original employer under Subsection (7)(a) because the contractor or subcontractor fails to
179 comply with Section 34A-2-201;

180 (B) (I) secures the payment of workers' compensation benefits for the contractor or
181 subcontractor pursuant to Section 34A-2-201;

182 (II) procures work to be done that is part or process of the trade or business of the

183 eligible employer; and
184 (III) does the following with regard to a written workplace accident and injury
185 reduction program that meets the requirements of Subsection 34A-2-111(3)(d):
186 (Aa) adopts the workplace accident and injury reduction program;
187 (Bb) posts the workplace accident and injury reduction program at the work site at
188 which the eligible employer procures work; and
189 (Cc) enforces the workplace accident and injury reduction program according to the
190 terms of the workplace accident and injury reduction program; or
191 (C) (I) obtains and relies on:
192 (Aa) a valid certification described in Subsection (7)(c)(i) or (7)(e)(i);
193 (Bb) a workers' compensation coverage waiver described in Subsection (7)(c)(ii) or
194 (7)(e)(ii); or
195 (Cc) proof that a director or officer is excluded from coverage under Subsection
196 34A-2-104(4);
197 (II) is liable under Subsection (7)(a) for the payment of workers' compensation benefits
198 if the contractor or subcontractor fails to comply with Section 34A-2-201;
199 (III) procures work to be done that is part or process in the trade or business of the
200 eligible employer; and
201 (IV) does the following with regard to a written workplace accident and injury
202 reduction program that meets the requirements of Subsection 34A-2-111(3)(d):
203 (Aa) adopts the workplace accident and injury reduction program;
204 (Bb) posts the workplace accident and injury reduction program at the work site at
205 which the eligible employer procures work; and
206 (Cc) enforces the workplace accident and injury reduction program according to the
207 terms of the workplace accident and injury reduction program.
208 (8) (a) For purposes of this Subsection (8), "unincorporated entity" means an entity
209 organized or doing business in the state that is not:
210 (i) an individual;
211 (ii) a corporation; or
212 (iii) publicly traded.
213 (b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an

214 unincorporated entity that is required to be licensed under Title 58, Chapter 55, Utah
 215 Construction Trades Licensing Act, is presumed to be the employer of each individual who
 216 holds, directly or indirectly, an ownership interest in the unincorporated entity.
 217 Notwithstanding Subsection (7)(c) and Subsection 34A-2-104(3), the unincorporated entity
 218 shall provide the individual who holds the ownership interest workers' compensation coverage
 219 under this chapter and Chapter 3, Utah Occupational Disease Act, unless the presumption is
 220 rebutted under Subsection (8)(c).

221 (c) Pursuant to rules made by the commission in accordance with Title 63G, Chapter 3,
 222 Utah Administrative Rulemaking Act, an unincorporated entity may rebut the presumption
 223 under Subsection (8)(b) for an individual by establishing by clear and convincing evidence that
 224 the individual:

- 225 (i) is an active manager of the unincorporated entity;
- 226 (ii) directly or indirectly holds at least an 8% ownership interest in the unincorporated
 227 entity; or

228 (iii) is not subject to supervision or control in the performance of work by:

- 229 (A) the unincorporated entity; or
- 230 (B) a person with whom the unincorporated entity contracts.

231 (d) As part of the rules made under Subsection (8)(c), the commission may define:

- 232 (i) "active manager";
- 233 (ii) "directly or indirectly holds at least an 8% ownership interest"; and
- 234 (iii) "subject to supervision or control in the performance of work."

235 Section 2. Section **34A-2-104** is amended to read:

236 **34A-2-104. "Employee," "worker," and "operative" defined -- Specific**
 237 **circumstances -- Exemptions.**

238 (1) As used in this chapter and Chapter 3, Utah Occupational Disease Act, "employee,"
 239 "worker," and "operative" mean:

- 240 (a) (i) an elective or appointive officer and any other person:
- 241 (A) in the service of:
- 242 (I) the state;
- 243 (II) a county, city, or town within the state; or
- 244 (III) a school district within the state;

245 (B) serving the state, or any county, city, town, or school district under:
246 (I) an election;
247 (II) appointment; or
248 (III) any contract of hire, express or implied, written or oral; and
249 (ii) including:
250 (A) an officer or employee of the state institutions of learning; and
251 (B) a member of the National Guard while on state active duty; and
252 (b) a person in the service of any employer, as defined in Section 34A-2-103, who
253 employs one or more workers or operatives regularly in the same business, or in or about the
254 same establishment:

255 (i) under any contract of hire:
256 (A) express or implied; and
257 (B) oral or written;
258 (ii) including aliens and minors, whether legally or illegally working for hire; and
259 (iii) not including any person whose employment:
260 (A) is casual; and
261 (B) not in the usual course of the trade, business, or occupation of the employee's
262 employer.

263 (2) (a) Unless a lessee provides coverage as an employer under this chapter and
264 Chapter 3, Utah Occupational Disease Act, any lessee in mines or of mining property and each
265 employee and sublessee of the lessee shall be:

266 (i) covered for compensation by the lessor under this chapter and Chapter 3, Utah
267 Occupational Disease Act;
268 (ii) subject to this chapter and Chapter 3, Utah Occupational Disease Act; and
269 (iii) entitled to the benefits of this chapter and Chapter 3, Utah Occupational Disease
270 Act, to the same extent as if the lessee, employee, or sublessee were employees of the lessor
271 drawing the wages paid employees for substantially similar work.

272 (b) The lessor may deduct from the proceeds of ores mined by the lessees an amount
273 equal to the insurance premium for that type of work.

274 (3) (a) A partnership or sole proprietorship may elect to include any partner of the
275 partnership or owner of the sole proprietorship as an employee of the partnership or sole

276 proprietorship under this chapter and Chapter 3, Utah Occupational Disease Act.

277 (b) If a partnership or sole proprietorship makes an election under Subsection (3)(a),
278 the partnership or sole proprietorship shall serve written notice upon its insurance carrier
279 naming the persons to be covered.

280 (c) A partner of a partnership or owner of a sole proprietorship may not be considered
281 an employee of the partner's partnership or the owner's sole proprietorship under this chapter or
282 Chapter 3, Utah Occupational Disease Act, until the notice described in Subsection (3)(b) is
283 given.

284 (d) For premium rate making, the insurance carrier shall assume the salary or wage of
285 the partner or sole proprietor electing coverage under Subsection (3)(a) to be 100% of the
286 state's average weekly wage.

287 (4) (a) A corporation may elect not to include any director or officer of the corporation
288 as an employee under this chapter and Chapter 3, Utah Occupational Disease Act.

289 (b) If a corporation makes an election under Subsection (4)(a), the corporation shall
290 serve written notice upon its insurance carrier naming the persons to be excluded from
291 coverage.

292 (c) A director or officer of a corporation is considered an employee under this chapter
293 and Chapter 3, Utah Occupational Disease Act, until the notice described in Subsection (4)(b)
294 is given.

295 (5) As used in this chapter and Chapter 3, Utah Occupational Disease Act, "employee,"
296 "worker," and "operative" do not include:

297 (a) a sales agent or associate broker, as defined in Section 61-2f-102, who performs
298 services in that capacity for a principal broker if:

299 (i) substantially all of the sales agent's or associate broker's income for services is from
300 real estate commissions; and

301 (ii) the sales agent's or associate broker's services are performed under a written
302 contract that provides that:

303 (A) the real estate agent is an independent contractor; and

304 (B) the sales agent or associate broker is not to be treated as an employee for federal
305 income tax purposes;

306 (b) an offender performing labor under Section 64-13-16 or 64-13-19, except as

307 required by federal statute or regulation;

308 (c) an individual who for an insurance producer, as defined in Section 31A-1-301,
309 solicits, negotiates, places or procures insurance if:

310 (i) substantially all of the individual's income from those services is from insurance
311 commissions; and

312 (ii) the services of the individual are performed under a written contract that states that
313 the individual:

314 (A) is an independent contractor;

315 (B) is not to be treated as an employee for federal income tax purposes; and

316 (C) can derive income from more than one insurance company;

317 (d) notwithstanding Subsection 34A-2-103(4), an individual who provides domestic
318 work for a person if:

319 (i) the person for whom the domestic work is being provided receives or is eligible to
320 receive the domestic work under a state or federal program designed to pay the costs of
321 domestic work to prevent the person from being placed in:

322 (A) an institution; or

323 (B) a more restrictive placement than where that person resides at the time the person
324 receives the domestic work;

325 (ii) the individual is paid by a person designated by the Secretary of the Treasury in
326 accordance with Section 3504, Internal Revenue Code, as a fiduciary, agent, or other person
327 that has the control, receipt, custody, or disposal of, or pays the wages of the individual; and

328 (iii) the domestic work is performed under a written contract that notifies the
329 individual that the individual is not an employee under this chapter or Chapter 3, Utah
330 Occupational Disease Act; or

331 (e) subject to Subsections (6) and (7), an individual who:

332 (i) (A) owns a motor vehicle; or

333 (B) leases a motor vehicle to a motor carrier;

334 (ii) personally operates the motor vehicle described in Subsection (5)(e)(i);

335 (iii) operates the motor vehicle described in Subsection (5)(e)(i) under a written
336 agreement with the motor carrier that states that the individual operates the motor vehicle as an
337 independent contractor; and

338 (iv) (A) provides to the motor carrier at the time the written agreement described in
339 Subsection (5)(e)(iii) is executed or as soon after the execution as provided by [~~an insurer: (A)~~]
340 the commission, a copy of a workers' compensation coverage waiver issued pursuant to Part
341 10, Workers' Compensation Coverage Waivers Act, [~~by an insurer~~] to the individual; and

342 (B) provides to the motor carrier at the time the written agreement described in
343 Subsection (5)(e)(iii) is executed or as soon after the execution as provided by an insurer, proof
344 that the individual is covered by occupational accident related insurance.

345 (6) An individual described in Subsection (5)(d) or (e) may become an employee under
346 this chapter and Chapter 3, Utah Occupational Disease Act if the employer of the individual
347 complies with:

- 348 (a) this chapter and Chapter 3, Utah Occupational Disease Act; and
- 349 (b) commission rules.

350 (7) For purposes of Subsection (5)(e):

351 (a) "Motor carrier" means a person engaged in the business of transporting freight,
352 merchandise, or other property by a commercial vehicle on a highway within this state.

353 (b) "Motor vehicle" means a self-propelled vehicle intended primarily for use and
354 operation on the highways, including a trailer or semitrailer designed for use with another
355 motorized vehicle.

356 (c) "Occupational accident related insurance" means insurance that provides the
357 following coverage for an injury sustained in the course of working under a written agreement
358 described in Subsection (5)(e)(iii):

- 359 (i) disability benefits;
- 360 (ii) death benefits;
- 361 (iii) medical expense benefits, which include:
 - 362 (A) hospital coverage;
 - 363 (B) surgical coverage;
 - 364 (C) prescription drug coverage; and
 - 365 (D) dental coverage.

Legislative Review Note
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Office of Legislative Research and General Counsel