

**WORKERS' COMPENSATION AND HOME AND COMMUNITY
BASED SERVICES**

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Rebecca P. Edwards

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This bill modifies the Workers' Compensation Act to address home and community based services.

Highlighted Provisions:

This bill:

- ▶ modifies the definition of employer for purposes of home and community based services;
- ▶ removes the exemption of certain workers from the definition of employee; and
- ▶ makes technical changes.

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 2012, Chapter 346

34A-2-104, as last amended by Laws of Utah 2013, Chapter 58

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



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

29 **34A-2-103. Employers enumerated and defined -- Regularly employed --**
30 **Statutory employers.**

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

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

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

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

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

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

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

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

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

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

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

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

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

59 (b) The division shall promptly inform the Insurance Department if the division has
60 reason to believe that a professional employer organization is not in compliance with
61 Subsection 34A-2-201(1) or (2) and commission rules.

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

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

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

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

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

74 (A) an agricultural employer's:

75 (I) spouse;

76 (II) grandparent;

77 (III) parent;

78 (IV) sibling;

79 (V) child;

80 (VI) grandchild;

81 (VII) nephew; or

82 (VIII) niece;

83 (B) a spouse of any person provided in ~~Subsection~~ Subsections (5)(a)(ii)(A)(II)
84 through (VIII); or

85 (C) an individual who is similar to those listed in Subsection (5)(a)(ii)(A) or (B) as
86 defined by rules of the commission; and

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

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

90 agricultural employer is not considered an employer of a member of the employer's immediate
91 family.

92 (c) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an
93 agricultural employer is not considered an employer of a nonimmediate family employee if:

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

96 (ii) (A) for the previous calendar year the agricultural employer's total annual payroll
97 for all nonimmediate family employees was equal to or greater than \$8,000 but less than
98 \$50,000; and

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

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

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

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

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

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

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

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

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

116 (b) the rules of the commission.

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

120 (A) a sole proprietorship;

- 121 (B) a corporation;
- 122 (C) a partnership;
- 123 (D) a limited liability company; or
- 124 (E) a person similar to one described in Subsections (7)(a)(i)(A) through (D).

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

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

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

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

141 (ii) if a partnership or sole proprietorship with no employees other than a partner of the
142 partnership or owner of the sole proprietorship, a workers' compensation coverage waiver
143 issued pursuant to Part 10, Workers' Compensation Coverage Waivers Act, stating that:

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

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

149 (d) A director or officer of a corporation is not considered an employee under
150 Subsection (7)(a) if the director or officer is excluded from coverage under Subsection
151 34A-2-104(4).

152 (e) A contractor or subcontractor is not an employee of the employer under Subsection
153 (7)(a), if the employer who procures work to be done by the contractor or subcontractor obtains
154 and relies on either:

155 (i) a valid certification of the contractor's or subcontractor's compliance with Section
156 34A-2-201; or

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

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

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

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

168 (A) is an employer; and

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

171 (I) all persons employed by the contractor;

172 (II) all subcontractors under the contractor; and

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

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

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

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

182 (B) (I) secures the payment of workers' compensation benefits for the contractor or

183 subcontractor pursuant to Section 34A-2-201;

184 (II) procures work to be done that is part or process of the trade or business of the
185 eligible employer; and

186 (III) does the following with regard to a written workplace accident and injury
187 reduction program that meets the requirements of Subsection 34A-2-111(3)(d):

188 (Aa) adopts the workplace accident and injury reduction program;

189 (Bb) posts the workplace accident and injury reduction program at the work site at
190 which the eligible employer procures work; and

191 (Cc) enforces the workplace accident and injury reduction program according to the
192 terms of the workplace accident and injury reduction program; or

193 (C) (I) obtains and relies on:

194 (Aa) a valid certification described in Subsection (7)(c)(i) or (7)(e)(i);

195 (Bb) a workers' compensation coverage waiver described in Subsection (7)(c)(ii) or
196 (7)(e)(ii); or

197 (Cc) proof that a director or officer is excluded from coverage under Subsection
198 34A-2-104(4);

199 (II) is liable under Subsection (7)(a) for the payment of workers' compensation benefits
200 if the contractor or subcontractor fails to comply with Section 34A-2-201;

201 (III) procures work to be done that is part or process in the trade or business of the
202 eligible employer; and

203 (IV) does the following with regard to a written workplace accident and injury
204 reduction program that meets the requirements of Subsection 34A-2-111(3)(d):

205 (Aa) adopts the workplace accident and injury reduction program;

206 (Bb) posts the workplace accident and injury reduction program at the work site at
207 which the eligible employer procures work; and

208 (Cc) enforces the workplace accident and injury reduction program according to the
209 terms of the workplace accident and injury reduction program.

210 (8) (a) For purposes of this Subsection (8), "unincorporated entity" means an entity
211 organized or doing business in the state that is not:

212 (i) an individual;

213 (ii) a corporation; or

214 (iii) publicly traded.

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

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

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

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

231 (A) the unincorporated entity; or
232 (B) a person with whom the unincorporated entity contracts.

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

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

237 (9) (a) As used in this Subsection (9), "home and community based services" means
238 one or more of the following services provided to an individual with a disability or to the
239 individual's family that helps prevent the individual with a disability from being placed in a
240 more restrictive setting:

241 (i) respite care;
242 (ii) skilled nursing;
243 (iii) nursing assistant services;
244 (iv) home health aide services;

- 245 (v) personal care and attendant services;
- 246 (vi) other in-home care, such as support for the daily activities of the individual with a
- 247 disability;
- 248 (vii) specialized in-home training for the individual with a disability or a family
- 249 member of the individual with a disability;
- 250 (viii) specialized in-home support, coordination, and other supported living services;
- 251 and
- 252 (ix) other home and community based services unique to the individual with a
- 253 disability or the family of the individual with a disability that help prevent the individual with a
- 254 disability from being placed in a more restrictive setting.

255 (b) Notwithstanding Subsection (4), an individual with a disability or designated
 256 representative of the individual with a disability is considered an employer under this chapter
 257 and Chapter 3, Utah Occupational Disease Act, of an individual who provides home and
 258 community based services if the individual with a disability or designated representative of the
 259 individual with a disability:

- 260 (i) employs the individual to provide home and community based services for five
- 261 hours per week or more; and
- 262 (ii) pays the individual providing the home and community based services from state or
- 263 federal money received by the person to fund home and community based services, including
- 264 through a person designated by the Secretary of the Treasury in accordance with Section 3504,
- 265 Internal Revenue Code, as a fiduciary, agent, or other person who has the control, receipt,
- 266 custody, or disposal of, or pays the wages of, the individual providing the home and
- 267 community based services.

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

269 **34A-2-104. "Employee," "worker," and "operative" defined -- Specific**
 270 **circumstances -- Exemptions.**

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

- 273 (a) (i) an elective or appointive officer and any other person:
- 274 (A) in the service of:
- 275 (I) the state;

276 (II) a county, city, or town within the state; or
277 (III) a school district within the state;
278 (B) serving the state, or any county, city, town, or school district under:
279 (I) an election;
280 (II) appointment; or
281 (III) any contract of hire, express or implied, written or oral; and
282 (ii) including:
283 (A) an officer or employee of the state institutions of learning; and
284 (B) a member of the National Guard while on state active duty; and
285 (b) a person in the service of any employer, as defined in Section 34A-2-103, who
286 employs one or more workers or operatives regularly in the same business, or in or about the
287 same establishment:
288 (i) under any contract of hire:
289 (A) express or implied; and
290 (B) oral or written;
291 (ii) including aliens and minors, whether legally or illegally working for hire; and
292 (iii) not including any person whose employment:
293 (A) is casual; and
294 (B) not in the usual course of the trade, business, or occupation of the employee's
295 employer.
296 (2) (a) Unless a lessee provides coverage as an employer under this chapter and
297 Chapter 3, Utah Occupational Disease Act, any lessee in mines or of mining property and each
298 employee and sublessee of the lessee shall be:
299 (i) covered for compensation by the lessor under this chapter and Chapter 3, Utah
300 Occupational Disease Act;
301 (ii) subject to this chapter and Chapter 3, Utah Occupational Disease Act; and
302 (iii) entitled to the benefits of this chapter and Chapter 3, Utah Occupational Disease
303 Act, to the same extent as if the lessee, employee, or sublessee were employees of the lessor
304 drawing the wages paid employees for substantially similar work.
305 (b) The lessor may deduct from the proceeds of ores mined by the lessees an amount
306 equal to the insurance premium for that type of work.

307 (3) (a) A partnership or sole proprietorship may elect to include any partner of the
308 partnership or owner of the sole proprietorship as an employee of the partnership or sole
309 proprietorship under this chapter and Chapter 3, Utah Occupational Disease Act.

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

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

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

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

322 (b) If a corporation makes an election under Subsection (4)(a), the corporation shall
323 serve written notice naming the individuals who are directors or officers to be excluded from
324 coverage:

325 (i) upon its insurance carrier, if any; or

326 (ii) upon the commission if the corporation is self-insured or has no employee other
327 than the one or more directors or officers being excluded.

328 (c) A corporation may exclude no more than five individuals who are directors or
329 officers under Subsection (4)(b)(ii).

330 (d) An exclusion under this Subsection (4) is subject to Subsection [34A-2-103\(7\)\(d\)](#).

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

334 (f) The commission may make rules, in accordance with Title 63G, Chapter 3, Utah
335 Administrative Rulemaking Act, regarding the form of the notice described in Subsection
336 (4)(b)(ii), including a requirement to provide documentation, if any.

337 (5) As used in this chapter and Chapter 3, Utah Occupational Disease Act, "employee,"

338 "worker," and "operative" do not include:

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

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

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

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

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

348 (b) an offender performing labor under Section 64-13-16 or 64-13-19, except as
349 required by federal statute or regulation;

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

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

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

356 (A) is an independent contractor;

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

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

359 [~~(d) notwithstanding Subsection 34A-2-103(4), an individual who provides domestic
360 work for a person if:]~~

361 [~~(i) the person for whom the domestic work is being provided receives or is eligible to
362 receive the domestic work under a state or federal program designed to pay the costs of
363 domestic work to prevent the person from being placed in:]~~

364 [~~(A) an institution; or]~~

365 [~~(B) a more restrictive placement than where that person resides at the time the person
366 receives the domestic work;]~~

367 [~~(ii) the individual is paid by a person designated by the Secretary of the Treasury in
368 accordance with Section 3504, Internal Revenue Code, as a fiduciary, agent, or other person~~

369 that has the control, receipt, custody, or disposal of, or pays the wages of the individual; and]

370 [(iii) the domestic work is performed under a written contract that notifies the

371 individual that the individual is not an employee under this chapter or Chapter 3, Utah

372 Occupational Disease Act; or]

373 [(e)] (d) subject to Subsections (6), (7), and (8), an individual who:

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

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

376 (ii) personally operates the motor vehicle described in Subsection (5)[(e)](d)(i);

377 (iii) operates the motor vehicle described in Subsection (5)[(e)](d)(i) under a written

378 agreement with the motor carrier that states that the individual operates the motor vehicle as an

379 independent contractor; and

380 (iv) (A) provides to the motor carrier at the time the written agreement described in

381 Subsection (5)[(e)](d)(iii) is executed or as soon after the execution as provided by the

382 commission, a copy of a workers' compensation coverage waiver issued pursuant to Part 10,

383 Workers' Compensation Coverage Waivers Act, to the individual; and

384 (B) provides to the motor carrier at the time the written agreement described in

385 Subsection (5)[(e)](d)(iii) is executed or as soon after the execution as provided by an insurer,

386 proof that the individual is covered by occupational accident related insurance with the

387 coverage and benefit limits listed in Subsection (7)(c).

388 (6) An individual described in Subsection (5)(d) [or (e)] may become an employee

389 under this chapter and Chapter 3, Utah Occupational Disease Act, if the employer of the

390 individual complies with:

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

392 (b) commission rules.

393 (7) For purposes of Subsection (5)[(e)](d):

394 (a) "Motor carrier" means a person engaged in the business of transporting freight,

395 merchandise, or other property by a commercial vehicle on a highway within this state.

396 (b) "Motor vehicle" means a self-propelled vehicle intended primarily for use and

397 operation on the highways, including a trailer or semitrailer designed for use with another

398 motorized vehicle.

399 (c) "Occupational accident related insurance" means insurance that provides the

400 following coverage at a minimum aggregate policy limit of \$1,000,000 for all benefits paid,
401 including medical expense benefits, for an injury sustained in the course of working under a
402 written agreement described in Subsection (5)~~(e)~~(d)(iii):

- 403 (i) disability benefits;
- 404 (ii) death benefits; and
- 405 (iii) medical expense benefits, which include:
 - 406 (A) hospital coverage;
 - 407 (B) surgical coverage;
 - 408 (C) prescription drug coverage; and
 - 409 (D) dental coverage.

410 (8) For an individual described in Subsection (5)~~(e)~~(d), the commission shall verify
411 the existence of occupational accident insurance coverage with the coverage and benefit limits
412 listed in Subsection (7)(c) before the commission may issue a workers' compensation coverage
413 waiver to the individual pursuant to Part 10, Workers' Compensation Coverage Waivers Act.

Legislative Review Note
as of 1-30-14 5:22 PM

Office of Legislative Research and General Counsel