

WORKERS' COMPENSATION REVISIONS

2021 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Timothy D. Hawkes

Senate Sponsor: Kirk A. Cullimore

LONG TITLE

General Description:

This bill amends provisions of the Workers' Compensation Act.

Highlighted Provisions:

This bill:

- ▶ amends provisions related to an eligible employer;
- ▶ amends third parties against whom an action may be brought for the injury or death of an employee; and
- ▶ makes technical and conforming 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 2017, Chapter 363

34A-2-106, as last amended by Laws of Utah 2008, Chapter 3

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 --
Statutory employers -- Exceptions.**

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) Subject to the other provisions of this section, each person, including each
37 public utility and each independent contractor, who regularly employs one or more workers or
38 operatives in the same business, or in or about the same establishment, under any contract of
39 hire, express or implied, oral or written, is considered an employer under this chapter and
40 Chapter 3, Utah 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) 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) 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).

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 Subsections (5)(a)(ii)(A)(II) through (VIII); or

82 (C) an individual who is similar to those listed in Subsection (5)(a)(ii)(A) or (B) as

83 defined by rules of the commission.

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 remodeling 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 pursuant to Part 10, Workers' Compensation Coverage Waivers Act, stating that:

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

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

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

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

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

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

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

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

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

165 (A) is an employer; and

166 (B) procures work to be done wholly or in part for the employer by a contractor,

167 including:

168 (I) all persons employed by the contractor;

169 (II) all subcontractors under the contractor; and

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

171 (ii) Notwithstanding the other provisions in this Subsection (7), if the conditions of

172 Subsection (7)(f)(iii) are met, an eligible employer is considered an employer for purposes of

173 Section 34A-2-105 of the contractor, subcontractor, and all persons employed by the contractor

174 or subcontractor described in Subsection (7)(f)(i)(B).

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

176 (A) under Subsection (7)(a) is liable for and pays workers' compensation benefits as an

177 original employer under Subsection (7)(a) because the contractor or subcontractor fails to

178 comply with Section 34A-2-201;

179 (B) (I) secures, in accordance with Section 34A-2-201, the payment of workers'

180 compensation [~~benefits~~] coverage for the contractor or subcontractor [~~pursuant to Section~~

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

- 239 (i) respite care;
- 240 (ii) skilled nursing;
- 241 (iii) nursing assistant services;
- 242 (iv) home health aide services;
- 243 (v) personal care and attendant services;
- 244 (vi) other in-home care, such as support for the daily activities of the individual with a

245 disability;

246 (vii) specialized in-home training for the individual with a disability or a family
247 member of the individual with a disability;

248 (viii) specialized in-home support, coordination, and other supported living services;
249 and

250 (ix) other home and community based services unique to the individual with a
251 disability or the family of the individual with a disability that help prevent the individual with a
252 disability from being placed in a more restrictive setting.

253 (b) Notwithstanding Subsection (4) and subject to Subsection (9)(c), an individual with
254 a disability or designated representative of the individual with a disability is considered an
255 employer under this chapter and Chapter 3, Utah Occupational Disease Act, of an individual
256 who provides home and community based services if the individual with a disability or
257 designated representative of the individual with a disability:

258 (i) employs the individual to provide home and community based services for seven
259 hours per week or more; and

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

267 (c) The state and federal money received by an individual with a disability or
268 designated representative of an individual with a disability shall include the cost of the workers'
269 compensation coverage required by this Subsection (9) in addition to the money necessary to
270 fund the home and community based services that the individual with a disability or family of
271 the individual with a disability is eligible to receive so that the home and community based

272 services are not reduced in order to pay for the workers' compensation coverage required by
273 this Subsection (9).

274 (10) (a) For purposes of this Subsection (10), "federal executive agency" means an
275 executive agency, as defined in 5 U.S.C. Sec. 105, of the federal government.

276 (b) For purposes of determining whether two or more persons are considered joint
277 employers under this chapter or Chapter 3, Utah Occupational Disease Act, an administrative
278 ruling of a federal executive agency may not be considered a generally applicable law unless
279 that administrative ruling is determined to be generally applicable by a court of law, or adopted
280 by statute or rule.

281 (11) (a) As used in this Subsection (11):

282 (i) "Franchise" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

283 (ii) "Franchisee" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

284 (iii) "Franchisor" means the same as that term is defined in 16 C.F.R. Sec. 436.1.

285 (b) For purposes of this chapter, a franchisor is not considered to be an employer of:

286 (i) a franchisee; or

287 (ii) a franchisee's employee.

288 (c) With respect to a specific claim for relief under this chapter made by a franchisee or
289 a franchisee's employee, this Subsection (11) does not apply to a franchisor under a franchise
290 that exercises a type or degree of control over the franchisee or the franchisee's employee not
291 customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks
292 and brand.

293 Section 2. Section **34A-2-106** is amended to read:

294 **34A-2-106. Injuries or death caused by wrongful acts of persons other than**
295 **employer, officer, agent, or employee of employer -- Rights of employer or insurance**
296 **carrier in cause of action -- Maintenance of action -- Notice of intention to proceed**
297 **against third party -- Right to maintain action not involving employee-employer**
298 **relationship -- Disbursement of proceeds of recovery -- Exclusive remedy.**

299 (1) When any injury or death for which compensation is payable under this chapter or
300 Chapter 3, Utah Occupational Disease Act is caused by the wrongful act or neglect of a person
301 other than an employer, officer, agent, or employee of the employer:

302 (a) the injured employee, or in case of death, the employee's dependents, may claim
303 compensation; and

304 (b) the injured employee or the employee's heirs or personal representative may have
305 an action for damages against the third person.

306 (2) (a) If compensation is claimed and the employer or insurance carrier becomes
307 obligated to pay compensation, the employer or insurance carrier:

308 (i) shall become trustee of the cause of action against the third party; and

309 (ii) may bring and maintain the action either in ~~[it]~~ the employer or insurance carrier's
310 own name or in the name of the injured employee, or the employee's heirs or the personal
311 representative of the deceased.

312 (b) Notwithstanding Subsection (2)(a), an employer or insurance carrier may not settle
313 and release a cause of action of which ~~it~~ the employer or insurance carrier is a trustee under
314 Subsection (2)(a) without the consent of the commission.

315 (3) (a) Before proceeding against a third party, to give a person described in
316 Subsections (3)(a)(i) and (ii) a reasonable opportunity to enter an appearance in the proceeding,
317 the injured employee or, in case of death, the employee's heirs, shall give written notice of the
318 intention to bring an action against the third party to:

319 (i) the carrier; and

320 (ii) any other person obligated for the compensation payments.

321 (b) The injured employee, or, in case of death, the employee's heirs, shall give written
322 notice to the carrier and other person obligated for the compensation payments of any known
323 attempt to attribute fault to the employer, officer, agent, or employee of the employer:

324 (i) by way of settlement; or

325 (ii) in a proceeding brought by the injured employee, or, in case of death, the

326 employee's heirs.

327 (4) For the purposes of this section and [~~notwithstanding~~] subject to Section
328 [34A-2-103](#), the injured employee or the employee's heirs or personal representative may also
329 maintain an action for damages against any of the following persons who do not occupy an
330 employee-employer relationship with the injured or deceased employee at the time of the
331 employee's injury or death and who are not considered eligible employers under Section
332 [34A-2-103](#):

- 333 (a) a subcontractor;
- 334 (b) a general contractor;
- 335 (c) an independent contractor;
- 336 (d) a property owner; or
- 337 (e) a lessee or assignee of a property owner.

338 (5) If any recovery is obtained against a third person, it shall be disbursed in
339 accordance with Subsections (5)(a) through (c).

340 (a) (i) The reasonable expense of the action, including attorney fees, shall be paid and
341 charged proportionately against the parties as their interests may appear.

342 (ii) Any fee chargeable to the employer or carrier is to be a credit upon any fee payable
343 by the injured employee or, in the case of death, by the dependents, for any recovery had
344 against the third party.

345 (b) The person liable for compensation payments shall be reimbursed, less the
346 proportionate share of costs and attorney fees provided for in Subsection (5)(a), for the
347 payments made as follows:

348 (i) without reduction based on fault attributed to the employer, officer, agent, or
349 employee of the employer in the action against the third party if the combined percentage of
350 fault attributed to persons immune from suit is determined to be less than 40% prior to any
351 reallocation of fault under Subsection [78B-5-819\(2\)](#); or

352 (ii) less the amount of payments made multiplied by the percentage of fault attributed

353 to the employer, officer, agent, or employee of the employer in the action against the third party
354 if the combined percentage of fault attributed to persons immune from suit is determined to be
355 40% or more prior to any reallocation of fault under Subsection 78B-5-819(2).

356 (c) The balance shall be paid to the injured employee, or the employee's heirs in case of
357 death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the
358 person liable for compensation.

359 (6) (a) The apportionment of fault to the employer in a civil action against a third party
360 is not an action at law and does not impose any liability on the employer.

361 (b) The apportionment of fault does not alter or diminish the exclusiveness of the
362 remedy provided to ~~[employees, their]~~ an employee, the employee's heirs, or the employee's
363 personal representatives, or the immunity provided [employers] an employer pursuant to
364 Section 34A-2-105 or 34A-3-102 for injuries sustained by an employee, whether resulting in
365 death or not.

366 (c) Any court in which a civil action is pending shall issue a partial summary judgment
367 to an employer with respect to the employer's immunity as provided in Section 34A-2-105 or
368 34A-3-102, even though the conduct of the employer may be considered in allocating fault to
369 the employer in a ~~[third-party]~~ third-party action in the manner provided in Sections 78B-5-817
370 through 78B-5-823.