



Chapter 7

Employers’ Immunity Under Workers’ Compensation Statutes: Deal or No Deal?

Thomas V. Flaherty

Christopher A. Brumley

Nathaniel K. Tawney

Flaherty, Sensabaugh & Bonasso PLLC

Charleston, West Virginia

Synopsis

§ 7.01.	Introduction.....	186
§ 7.02.	The Advent of Workers’ Compensation Statutes.....	187
	[1] — History	187
	[2] — General Features—The Rules of Every Game.....	188
§ 7.03.	Intentional Injury Exceptions to Employer Immunity	
	—The Game Is On!.....	189
	[1] — Theory Supporting Intentional Injury Suits	189
	[2] — Statutory and Common Law Exceptions	189
	[3] — Pure Subjective Intent	190
	[4] — The Best of Intentions: Constructive Definitions	
	of Intent	191
	[a] — <i>Mandolidis v. Elkins Industries</i> : The First	
	Departure from True Intent.....	192
	[b] — “Substantially Certain” Jurisdictions.....	192
	[5] — The Best of the Rest	195
	[a] — West Virginia	195
	[b] — Michigan	196
	[c] — California	197
	[d] — Washington	197
	[e] — Oregon.....	198
	[f] — Missouri.....	198
	[g] — New Mexico.....	198
§ 7.04.	When to Hold ’Em and When to Fold ’Em:	
	Evaluating Your Deal as an Employer	199
	[1] — Just Who Is the “Employer”?.....	199
	[2] — Election Options.....	200
	[3] — Borrowed Servants.....	201
	[4] — Employee Recovery Issues	201
	[a] — Offsets for Benefits Paid.....	201
	[b] — Benefits Adjustments in Lieu of Common	
	Law Damages	202

	[c] — Interaction with the Third Party Case	202
	[i] — Subrogation by Law or Right	202
	[ii] — Made Whole Rule	203
	[iii] — Differing Standards of Culpability	203
	[d] — Who Gets a Piece of the Pie?	204
	[5] — Who Is the Decision Maker?	205
	[a] — Administrative Determinations.	205
	[b] — Question for the Court	205
	[6] — Co-Employee Liability.....	205
	[7] — Exclusions for Employee Action.....	205
§ 7.05.	Issues in Litigating Intentional Injury Cases—	
	Play Your Hand Wisely	206
	[1] — Prior Injuries, Complaints and Citations:	
	Are They the Employee’s Only Aces?	206
	[2] — Supervisory Employees: Their Role	
	in the Defense	208
	[3] — Employer’s Accident Investigation and Reports.....	209
	[4] — Administrative Agency Investigation and Reports	210
	[a] — Occupational Safety and Health Administration..	211
	[b] — Mine Safety and Health Administration	212
	[5] — Training and Training Records.....	214
	[6] — Hazard Inspections	215
	[7] — Multiple Causes of Injury: Two Wrongs Don’t	
	Make a Right	216
§ 7.06.	Conclusion.....	217

§ 7.01. Introduction.

The sharp rise of industrial injuries in the United States at the turn of the 19th century resulted in the adoption of workers’ compensation statutes by every state. These now-familiar statutes allow employees to recover for on-the-job injuries regardless of fault—at the expense of employers. In exchange, employers are immune from suit and compensation benefits are the exclusive remedy for employees.

In the past 110 years of workers’ compensation law, the vast majority rule has been that employers enjoy immunity from suit unless the employer intentionally injures the employee. This majority rule considers “intentional” as actual subjective intent to cause harm, *i.e.*, an “intentional tort” such as assault or battery.

However, in the past 30 years, there has been increasing receptiveness to broadening the definition of “intentional” to accommodate a wide variety of scenarios where the facts suggest an employer’s acts are “just south” of intentional and, despite protestations to the contrary, more akin to gross negligence. Increased public scrutiny on modern industrial accidents, combined with a business culture already inundated with regulatory agencies and safety rules, creates a modern climate ripe for the continued erosion of employer immunity. This fact is evidenced by states like South Carolina, which this past year introduced legislation whittling away at employer immunity.¹

Evaluating the actual strength of one’s employer immunity in a given jurisdiction is an important consideration before commencing or continuing in any operations. Like high stakes poker games, there are many rule variations to the employer immunity “game” from state to state. As with any game, employers must know these rules, including the subtle nuances, to succeed. This chapter is intended to provide guidance in evaluating just how “immune” an employer is, examine modern trends in employee suits for workplace injuries, and also discuss methods to increase an employer’s chances of success in jurisdictions that tend to encourage employee suits.

§ 7.02. The Advent of Workers’ Compensation Statutes.

[1] — History.

The origins of workers’ compensation statutes in the United States stem from increasing industrial injuries in the late 19th century.² At that time, the common law duties of employers and the common law defenses to employers

¹ S.B. 390 and 386 proposed to create an exception to the exclusivity provision “for a willful, intentional, or reckless injury resulting from the violation of a statute or regulation . . . the intentional removal of a safety device or warning label . . .” Neither bill passed. Note also that Maine, a state that has for a long time not recognized any exceptions to immunity, introduced bills that, if passed, would have created significant “intentional” exceptions to employer immunity.

² Lex K. Larson & Arthur K. Larson, *Workers Compensation Law: Cases, Materials and Text* § 2:03 (3d ed. 2000).