

1 ENGROSSED SENATE AMENDMENT
TO

2 ENGROSSED HOUSE
3 BILL NO. 2155

By: Steele of the House

and

Bingman of the Senate

(benefits for employee injury - Oklahoma Employee
Injury Benefit Act - legislative intent -
codification -

effective date)

11 AUTHOR: Add the following Senate Coauthor: Brecheen

12 AMENDMENT NO. 1. Page 1, strike the stricken title, enacting clause
and entire bill and insert

14 "An Act relating to benefits for employee injury;
15 creating the Oklahoma Employee Injury Benefit Act;
16 providing short title; construing provisions; stating
legislative findings; stating legislative intent;
17 defining terms; authorizing voluntary exemption from
certain act; requiring certain notice to Workers'
18 Compensation Court; requiring payment of certain fee;
establishing responsibilities of certain
19 Commissioner; requiring certain notice to employees;
stating requirements for certain notice; authorizing
20 adoption of certain rules; requiring adoption of
certain plan by certain employers; establishing
21 schedule of benefits for certain plans; establishing
requirements for implementation of certain plans;
22 requiring employers to provide certain insurance
coverage in specified amounts; requiring bond under
23 certain circumstances; specifying authorized usage of
certain bond; specifying liability of employers under
24 certain plans; establishing exceptions to certain
liability; establishing responsibilities of employers
under certain plans; limiting attorney fees under

1 certain circumstances; specifying means of dispute
2 resolution; prohibiting promulgation of certain
3 rules; construing provisions; stating effects of
4 certain challenges; amending 85 O.S. 2011, Section
5 311, which relates to applicability of Workers'
6 Compensation Code; adding certain exception;
7 providing for codification; providing for
8 noncodification; and providing an effective date.

9 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

10 SECTION 1. NEW LAW A new section of law not to be
11 codified in the Oklahoma Statutes reads as follows:

12 A. Provisions of this act shall be strictly construed without
13 favoritism to any party.

14 B. The Legislature finds that certain employers, by virtue of
15 the nature and type of the work undertaken by their employees, are
16 experiencing significant costs associated with claims for
17 occupational injuries subject to the Workers' Compensation Code.
18 The Legislature has determined that the inability on the part of
19 those employers to effectively and efficiently manage these claims
20 has contributed to the increased costs associated with such claims
21 and has resulted in reduced efficiency in the treatment of injured
22 employees. In an effort to provide more efficient management of
23 such claims, to help provide employees with better managed medical
24 care and to assist this state in the attraction and retention of new
employers, the Legislature hereby adopts this act. The exceptions
to application of the Workers' Compensation Code provided for in

1 subsection A of Section 4 of this act are in addition to exceptions
2 provided for in Section 311 of Title 85 of the Oklahoma Statutes.
3 The Legislature has determined that the distinctions between certain
4 categories of employers and employees, based on the criterion set
5 forth in subsection A of Section 4 of this act, are warranted due to
6 either or both the employer's "workers' compensation experience
7 modifier", and its "total annual incurred claims" history. Each of
8 these factors bear on the ability and need for an employer to create
9 and maintain a benefit plan as described in this act. Further,
10 because an employer's status under the criteria set forth in
11 subsection A of Section 4 of this act affects its stability and
12 ability to hire, maintain, and promote employees, these same factors
13 affect its employees. Thus, there is a rational basis for the
14 exceptions to the application of the Workers' Compensation Code that
15 are provided in this act.

16 C. Accordingly, it is the specific purpose and intent of the
17 Legislature that this act:

- 18 1. Provide a fair and balanced alternative to the Workers'
19 Compensation Code for providing benefits to injured employees;
- 20 2. Encourage the prompt medical care for and payment of
21 compensation to injured workers;
- 22 3. Promote the efficient resolution of occupational injuries;

23
24

1 4. Provide employers with a more efficient and effective system
2 to manage the medical care and treatment of their injured employees;
3 and

4 5. Assist the state in attracting and retaining business,
5 thereby contributing to the overall economic development and well-
6 being of its citizens.

7 SECTION 2. NEW LAW A new section of law to be codified
8 in the Oklahoma Statutes as Section 311.1 of Title 85, unless there
9 is created a duplication in numbering, reads as follows:

10 This act shall be known and may be cited as the "Oklahoma
11 Employee Injury Benefit Act".

12 SECTION 3. NEW LAW A new section of law to be codified
13 in the Oklahoma Statutes as Section 311.2 of Title 85, unless there
14 is created a duplication in numbering, reads as follows:

15 As used in the Oklahoma Employee Injury Benefit Act:

16 1. "Benefit plan" means a plan established by a qualified
17 employer under the requirements of Section 5 of this act;

18 2. "Bona fide association" means an association that:

19 a. has been formed and maintained in good faith for
20 purposes other than obtaining insurance, and

21 b. does not make insurance described in this act and
22 offered through the bona fide association available
23 other than in connection with a member of the bona
24 fide association;

1 3. "Commissioner" means the Insurance Commissioner of the
2 Oklahoma Insurance Department;

3 4. "Court" means the Oklahoma Workers' Compensation Court or
4 any successor, unless otherwise stated;

5 5. "Covered employee" means an employee whose employment with a
6 qualified employer is principally located within the state;

7 6. "Employee" means any person engaged in the employment of an
8 employer and receives his or her pay by means of a salary, wage, or
9 commission directly from the employer and for whom an employer files
10 a Form W-2 with the Internal Revenue Service. "Employee" does not
11 include an independent contractor or third-party agent;

12 7. "Employer", except when otherwise expressly stated, means a
13 person, partnership, association, limited liability company,
14 corporation, and the legal representatives of a deceased employer,
15 or the receiver or trustee of a person, partnership, association,
16 corporation, or limited liability company, employing a person
17 included within the term employee as defined in this act;

18 8. "Occupational injury" means an injury, including death, or
19 occupational illness, causing internal or external harm to the body,
20 which arises out of and in the course of employment;

21 9. "Pre-injury pay" means:

22 a. for salaried covered employees, regular periodic
23 salary from a qualified employer at the time of the
24 occupational injury,

1 b. for hourly covered employees, the average earnings
2 from a qualified employer for the six consecutive pay
3 periods immediately preceding the date of the
4 occupational injury; provided, however, that if the
5 covered employee has worked for a qualified employer
6 for less than six consecutive pay periods, or if his
7 or her earnings as of such date cannot be reasonably
8 determined, such six-pay-period-average will be based
9 on the earnings received over such period by a similar
10 covered employee of the qualified employer.

11 Pre-injury pay shall include pay for overtime and employee
12 contributions, through salary reduction or otherwise, to a 401(k) or
13 similar arrangement, cafeteria plan, or other pre-tax salary
14 deferral employee benefit plan. Pre-injury pay shall not include
15 any bonuses, employer-paid benefits that include but are not limited
16 to contributions to any employee benefit plans or matching
17 contributions to a retirement plan, or other extraordinary
18 remuneration;

19 10. "Surviving Spouse" means a spouse who was married to the
20 deceased covered employee.

21 11. "Qualified employer" means an employer otherwise subject to
22 the Workers' Compensation Code that voluntarily elects to be exempt
23 from the Workers' Compensation Code by satisfying the requirements
24 under this act.

1 SECTION 4. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 311.3 of Title 85, unless there
3 is created a duplication in numbering, reads as follows:

4 A. Any employer may voluntarily elect to be exempt from the
5 Workers' Compensation Code and become a qualified employer if the
6 employer:

- 7 1. a. has a workers' compensation experience modifier, as
8 reported by the National Council of Compensation
9 Insurers (NCCI), greater than one (1.00) for the
10 preceding Oklahoma workers' compensation insurance
11 policy year, or
12 b. has total annual incurred claims, as reflected in an
13 NCCI workers' compensation experience modifier
14 worksheet or their workers' compensation carrier loss
15 runs, greater than Fifty Thousand Dollars (\$50,000.00)
16 in at least one of the preceding three (3) Oklahoma
17 workers' compensation insurance policy years;

18 For purposes of the requirements of paragraph 1 of this
19 subsection, the principles of Internal Revenue Code Section 414
20 shall apply such that all employees of all corporations which are
21 members of a controlled group of corporations shall be treated as
22 employed by a single employer, all employees of trades or
23 businesses, whether or not incorporated, which are under common
24 control shall be treated as employed by a single employer, and all

1 employees of the members of an affiliated service group shall be
2 treated as employed by a single employer; and all employees of the
3 members of a multiple employer welfare arrangement licensed under
4 the laws of this state shall be treated as employed by a single
5 employer.

6 Qualification criterion established in this subsection shall
7 apply only as of the date the employer elects to become a qualified
8 employer;

9 2. Is in compliance with the notice requirements in subsections
10 B and H of this section; and

11 3. Has established a written benefit plan as described in
12 Section 5 of this act.

13 B. An employer that has elected to become a qualified employer
14 by satisfying the requirements of this section shall notify the
15 Court and the Commissioner in writing of the election and the date
16 that the election is to become effective, which may not be sooner
17 than the date that the qualified employer satisfies the employee
18 notice requirements in this section. Such qualified employer shall
19 pay to the Commissioner an annual nonrefundable fee of One Thousand
20 Five Hundred Dollars (\$1,500.00) which shall accompany the filing of
21 the written notice.

22 C. The Commissioner shall collect and maintain the information
23 required under this section and shall monitor compliance with the
24 requirements of this section. The Commissioner may also require an

1 employer to confirm its qualified employer status. Subject to
2 subsection D of this section, the Commissioner shall adopt rules
3 designating the methods and procedures for confirming whether an
4 employer is a qualified employer, notifying an employer of any
5 qualifying deficiencies, and the consequences thereof. The
6 Commissioner shall record the date and time each notice of qualified
7 employer status is received and the effective date of qualified
8 employer election. The Commissioner shall maintain a list on its
9 official website accessible by the public of all qualified employers
10 and the date and time such exemption became effective.

11 D. The Oklahoma Workers' Compensation Court, the state courts
12 of Oklahoma, the Commissioner, and all other Oklahoma administrative
13 agencies, shall not promulgate rules, regulations or any procedures
14 related to design, documentation, implementation, administration or
15 funding of a qualified employer's benefit plan. Provided, however,
16 that the Commissioner may promulgate rules, regulations and
17 procedures related to (1) bona fide association plans for a
18 particular trade, business, profession or industry; and, (2) the
19 insurance, bonding, and other security approved under subsection H
20 of Section 5 of this act to support payment of the benefits
21 described in subsection B of Section 5 of this act.

22 E. The Commissioner may designate an information collection
23 agent, implement an electronic reporting and public information
24

1 access program, and adopt rules as necessary to implement the
2 information collection requirements of this section.

3 F. The Commissioner may prescribe forms to be used for the
4 qualified employer notification and shall require the qualified
5 employer to provide its name, address, contact person and phone
6 number, federal tax identification number, claim administration
7 contact information, and a listing of all covered business locations
8 in the state. The Commissioner shall notify the Oklahoma
9 Commissioner of Labor of all qualified employer notifications. The
10 Department of Labor shall provide such notifications to other
11 governmental agencies as the Department deems necessary.

12 G. The Commissioner may contract with the Oklahoma Employment
13 Security Commission, the State Treasurer, or the Oklahoma Department
14 of Labor for assistance in collecting the notification required
15 under this section. Those agencies shall cooperate with the
16 Commissioner in enforcing this section.

17 H. A qualified employer shall notify each of its employees in
18 the manner provided in this section that it is a qualified employer,
19 that it does not carry workers' compensation insurance coverage and
20 that such coverage has terminated or been cancelled.

21 I. A bona fide association may, through such insurance carriers
22 and products approved by the Commissioner, offer benefit plans and
23 insurance coverage described in this act to a particular trade,
24 business, profession or industry or their subsidiaries.

1 J. The qualified employer shall provide written notification to
2 employees as required by this section at the time the employee is
3 hired or at the time of designation as a qualified employer.

4 K. The qualified employer shall post the employee notification
5 required by this section at conspicuous locations at the qualified
6 employer's places of business as necessary to provide reasonable
7 notice to all employees.

8 L. The Commissioner may adopt rules relating to the form,
9 content, and method of delivery of the employee notification
10 required by this section.

11 SECTION 5. NEW LAW A new section of law to be codified
12 in the Oklahoma Statutes as Section 311.4 of Title 85, unless there
13 is created a duplication in numbering, reads as follows:

14 A. An employer voluntarily electing to become a qualified
15 employer shall adopt a written benefit plan that complies with the
16 requirements of this section. Qualified employer status is optional
17 for eligible employers, and no benefit plan shall be considered to
18 be maintained solely for the purpose of complying with the workers'
19 compensation laws of this state, provided that the benefit plan is
20 otherwise subject to the Employee Retirement Income Security Act of
21 1974, as amended ("ERISA"). The benefit plan shall not become
22 effective until the date that the qualified employer first satisfies
23 the notice requirements in Section 4 of this act.

24

1 B. The benefit plan shall provide for payment of medical,
2 disability, permanent bodily impairment, death and dismemberment
3 benefits as a result of an occupational injury, in amounts not less
4 than the following:

5 1. One hundred percent (100%) of occupational injury medical
6 expenses, subject to subsection C of this section, with no other
7 maximum dollar or duration limits for all medical expenses combined
8 per occurrence. Medical necessity must be directly related to the
9 occupational injury and confirmed by objective medical evidence. In
10 no event shall an employee be charged any premium, co-pay or
11 deductible under this act;

12 2. For temporary inability to work in either a covered
13 employee's own occupation or any alternative work offered by the
14 employer, eighty percent (80%) of the covered employee's pre-injury
15 pay, less other related post-injury income, starting from the first
16 scheduled working day of disability, for one hundred fifty-six (156)
17 weeks, with a maximum weekly benefit of one hundred percent (100%)
18 of the Oklahoma state average weekly wage;

19 3. For permanent inability to work as a result of the
20 occupational injury in the employee's previously held position, any
21 occupation and any alternative work offered by the employer and
22 following payment of all temporary wage replacement under paragraph
23 2 of this subsection, eighty percent (80%) of the covered employee's
24 pre-injury pay, less other related post-injury income, until the

1 later of eligibility for one hundred percent (100%) Social Security
2 Disability or fifteen (15) years, with a maximum weekly benefit of
3 one hundred percent (100%) of the Oklahoma state average weekly
4 wage, and vocational rehabilitation services provided by a
5 technology center school, a public or private vocational skills
6 center or public secondary school offering vocational-technical
7 education courses, or a member institution of The Oklahoma State
8 System of Higher Education, which shall include retraining and job
9 placement so as to restore the employee to gainful employment.
10 Vocational rehabilitation services or training shall not extend for
11 a period of more than fifty-two (52) weeks;

12 4. Following payment of temporary wage replacement under
13 paragraph 2 of this subsection, if:

- 14 a. future medical expense will be incurred and payable on
15 the injury claim, and
- 16 b. the covered employee is unable to return to the pre-
17 injury or equivalent job position,
18 eighty percent (80%) of the covered employee's pre-injury pay for
19 five (5) weeks for each percentage point of whole person impairment
20 determined under the Fourth edition of the American Medical
21 Association's "Guides to the Evaluation of Permanent Impairment" for
22 objective loss of function or impairment, with a minimum weekly
23 benefit of One Hundred Fifty Dollars (\$150.00) and a maximum weekly
24 benefit of fifty percent (50%) of the Oklahoma state average weekly

1 wage; provided, however, that the number of weeks for certain
2 scheduled injuries shall be subject to the following minimum number
3 of weeks for complete loss or loss of use:

4	Scheduled Member	Weeks
5	Arm or Leg	275
6	Hand or Foot	220
7	Thumb	66
8	First Finger	39
9	Second Finger	33
10	Third Finger	22
11	Fourth Finger	17
12	Great Toe	33
13	Other Toes	11
14	One Ear	110
15	Two Ears	330
16	Eye	275

17 A partial loss or loss of use of such a scheduled member of the
18 body may result in payment for the number of weeks which the
19 percentage of loss bears to the above number of weeks. Payments
20 need not be made for both loss of fingers and loss of the same hand,
21 or for loss of toes and loss of the same foot. All above impairment
22 income benefits combined shall not exceed one hundred percent (100%)
23 whole person impairment or five hundred (500) weeks. A covered
24 employee shall be entitled to benefits described in this paragraph

1 for serious and permanent disfigurement without regard to
2 satisfaction of the conditions in subparagraphs a and b of this
3 paragraph. Such an award for disfigurement shall not be in excess
4 of Fifty Thousand Dollars (\$50,000.00) and shall not be made for a
5 part of the body for which another impairment benefit is granted;
6 and; and

7 5. Death benefits equal to:

- 8 a. Two Hundred Thousand Dollars (\$200,000.00),
- 9 b. funeral benefits in an amount not to exceed Ten
10 Thousand Dollars (\$10,000.00), and
- 11 c. weekly benefits equal to eighty percent (80%) of the
12 covered employee's pre-injury pay up to one hundred
13 percent (100%) of the Oklahoma state average weekly
14 wage to the surviving spouse until the earlier of re-
15 marriage or two hundred and sixty (260) weeks. If
16 there is no surviving spouse, but minor children, then
17 each minor child will receive a pro-rata portion of
18 the (i) Two Hundred Thousand Dollars (\$200,000.00) and
19 (ii) weekly benefits until the earlier of reaching the
20 age of majority or two hundred and sixty (260) weeks.

21 In all other cases, beneficiaries for any death benefit payment
22 shall be determined by the provisions of the benefit plan.

23 C. The benefit plan may provide for lump sum payouts that are,
24 as reasonably determined by the administrator of such plan appointed

1 by the qualified employer in accordance with ERISA, actuarially
2 equivalent to expected future payments. The benefit plan may also
3 provide for settlement agreements; provided, however, any settlement
4 agreement by a covered employee shall be voluntary, entered into not
5 earlier than the tenth business day after the date of the initial
6 report of injury, and signed after the covered employee has received
7 a medical evaluation from a nonemergency care doctor, with any
8 waiver of rights being conspicuous and on the face of the agreement.
9 The benefit plan may specify conditions and limitations on benefits,
10 including but not limited to additional criteria for covered and
11 non-covered injuries and medical charges, and continuation,
12 suspension and termination of benefits; provided, however, the
13 benefit plan shall pay benefits without regard to whether the
14 covered employee, the qualified employer, or a third party caused
15 the occupational injury; and, provided further, that the benefit
16 plan must provide eligibility to participate for and provide the
17 same forms and levels of benefits to all Oklahoma employees of the
18 qualified employer. None of the provisions of the Workers'
19 Compensation Code shall define, restrict, expand or otherwise apply
20 to a benefit plan.

21 D. The benefit plan shall comply with and shall be subject to
22 the employee benefit plan requirements of ERISA. Such compliance is
23 required in order for a qualified employer to be protected by both
24 ERISA and the exclusive remedy protection contained in subsection A

1 of Section 6 of this act. Such a benefit plan shall be governed by
2 and subject to ERISA. A violation of ERISA if timely cured shall
3 not act to deny qualified employer status to an employer that
4 otherwise meets the requirements for a qualified employer.

5 E. No fee or cost to an employee shall apply to a qualified
6 employer's benefit plan. Authority over penalties and enforcement
7 of the provisions of the benefit plan and ERISA shall be vested in
8 the benefit plan administrator, employees covered by the benefit
9 plan, the U.S. Department of Labor, and the federal courts as
10 provided by ERISA.

11 F. The qualified employer shall provide to the Commissioner and
12 covered employees notice of the name, title, address, and telephone
13 number for the person to contact for injury benefit claims
14 administration, whether in-house at the qualified employer or a
15 third-party administrator.

16 G. A qualified employer may self-fund or insure benefits
17 payable under the benefit plan, employers liability under this act,
18 and any other insurable risk related to its status as a qualified
19 employer with any insurance carrier authorized to do business in
20 this state.

21 H. Insurance coverage or surety bond obtained by a qualified
22 employer shall be from an admitted or surplus lines insurer with an
23 AM Best Rating of A- or better. A qualified employer shall obtain
24 either:

1 1. Accidental insurance coverage in an amount of at least Two
2 Million Dollars (\$2,000,000) per occurrence, with sublimits in at
3 least the following amounts:

- 4 a. Five Hundred Thousand Dollars (\$500,000.00) per person
5 for medical expenses and coverage for at least one
6 hundred fifty-six (156) weeks,
- 7 b. eighty percent (80%) of the covered employee's pre-
8 injury pay for not less than one hundred fifty-six
9 (156) weeks of wage replacement for inability to work,
10 with a \$500 maximum weekly benefit, and
- 11 c. Two Hundred Thousand Dollars (\$200,000.00) per person
12 for accidental death;

13 2. A bond, letter of credit, or excess insurance determined as
14 follows:

- 15 a. The Commissioner, pursuant to rules adopted by the
16 Commissioner for an individual self-insured employer,
17 shall require an employer to:
 - 18 (1) secure a surety bond payable to the state, or an
19 irrevocable letter of credit, in an amount no
20 less than Three Hundred Thousand Dollars
21 (\$300,000.00) or such additional amount as
22 determined by the Commissioner, or
 - 23 (2) provide proof of excess coverage with such terms
24 and conditions as is commensurate with their

1 ability to pay the benefits required by the
2 provisions of this act.

3 The Commissioner may waive the requirements of this
4 paragraph in an amount which is commensurate with the
5 ability of the employer to pay the benefits required
6 by the provisions of this act. Irrevocable letters of
7 credit required by this subsection shall contain such
8 terms as may be prescribed by the Commissioner and
9 shall be issued for the benefit of the state by a
10 financial institution whose deposits are insured by
11 the Federal Deposit Insurance Corporation.

12 An employer whose permit to self-insure is revoked,
13 denied for renewal or surrendered is not relieved of
14 the obligation for compensation to an employee for a
15 compensable injury that occurred during the period of
16 self-insurance. The security required under this
17 section, including any interest thereon, shall be
18 maintained by the Commissioner as provided in this act
19 until each claim for benefits is paid, settled, or
20 lapses under this act, and costs of administration of
21 such claims are paid.

- 22 b. Any bond shall be filed and held by the Commissioner
23 and shall be for the exclusive benefit of any covered
24 employee of a qualified employer.

1 c. Any security held by the Commissioner may be used to
2 make a payment to or on behalf of a covered employee
3 provided the following requirements are met:

4 (1) the covered employee sustained an occupational
5 injury that is covered by the qualified
6 employer's benefit plan,

7 (2) the covered employee's claim for payment of a
8 specific medical or wage replacement benefit
9 amount has been accepted by the plan
10 administrator of the benefit plan or acknowledged
11 in a final judgment or court order assessing a
12 specific dollar figure for benefits payable under
13 the benefit plan,

14 (3) the covered employee is unable to receive payment
15 from the benefit plan or collect on such judgment
16 or court order because the qualified employer has
17 filed for bankruptcy or the benefit plan has
18 become insolvent, and

19 (4) the covered employee is listed as an unsecured
20 creditor of the qualified employer because of the
21 acceptance of such claim by the plan
22 administrator of the benefit plan or judgment or
23 court order assessing a specific dollar figure
24 for benefits payable under the benefit plan.

1 d. The Commissioner shall promulgate rules to carry out
2 the provisions of this section including those
3 establishing the procedure by which a covered employee
4 may request and receive payment from the security held
5 by the Commissioner; or

6 3. Any other security as may be approved by the Commissioner.

7 I. The benefit plan shall provide some level of benefits for
8 sickness, injury or death not due to an occupational injury.

9 SECTION 6. NEW LAW A new section of law to be codified
10 in the Oklahoma Statutes as Section 311.5 of Title 85, unless there
11 is created a duplication in numbering, reads as follows:

12 A. A qualified employer's liability under the benefit plan and
13 otherwise prescribed in this act shall be exclusive and in place of
14 all other liability of the qualified employer and any of its
15 employees at common law or otherwise, for a covered employee's
16 occupational injury or loss of services, to the covered employee, or
17 the spouse, personal representative, parents, or dependents of the
18 covered employee, or any other person. The exclusive remedy
19 protections provided by this subsection shall be as broad as the
20 exclusive remedy protections of Section 302 of Title 85 of the
21 Oklahoma Statutes, and thus preclude a covered employee's claim
22 against a qualified employer for negligence or other causes of
23 action.

1 B. Except as otherwise provided by its benefit plan, ERISA or
2 applicable federal law, a qualified employer is only subject to
3 liability in any action brought by a covered employee or his or her
4 dependent family members for injury resulting from an occupational
5 injury if the injury is the result of an intentional tort on the
6 part of the qualified employer. An intentional tort shall exist
7 only when the covered employee is injured because of willful,
8 deliberate, specific intent of the qualified employer to cause such
9 injury. Allegations or proof that the qualified employer had
10 knowledge that such injury was substantially certain to result from
11 its conduct shall not constitute an intentional tort. The issue of
12 whether an act is an intentional tort shall be a question of law for
13 the court or the duly appointed arbitrator, as applicable.

14 C. An employee's positive test for intoxication or use of an
15 illegal controlled substance shall create a rebuttable presumption
16 that the covered employee's intoxication or use of an illegally
17 controlled substance caused the covered employee's injury or death.

18 D. Any benefits paid under a qualified employer's benefit plan
19 will offset any other award against such qualified employer under
20 Section 6 of this act.

21 E. Other than an action brought to enforce the provisions of
22 the benefit plan, any action brought by a covered employee or his or
23 her spouse, personal representative, parents, or dependents based on
24 a claim against a qualified employer arising out of any occupational

1 injury shall be filed no later than two (2) years from the date of
2 the injury or death giving rise to such action.

3 F. Enforcement of a limitation on available causes of action,
4 damages, or attorney fees with respect to a covered employee against
5 a qualified employer in accordance with this act shall not be an
6 appealable error.

7 SECTION 7. NEW LAW A new section of law to be codified
8 in the Oklahoma Statutes as Section 311.6 of Title 85, unless there
9 is created a duplication in numbering, reads as follows:

10 A. A qualified employer or its insurers or other payment
11 sources shall be responsible for:

12 1. Compliance with federal law regarding the administration of
13 the plan and claims for benefits under such plan;

14 2. Any damage awarded against the qualified employer for
15 intentional tort under Section 8 of this act, including any pre- and
16 post-judgment interest on the award and reasonable court costs as
17 may be lawfully awarded in the action; and

18 3. Reasonable attorney fees awarded against the qualified
19 employer under Section 8 of this act; provided, however, that an
20 employee's attorney fees that are contingent upon a recovery under
21 the terms of the benefit plan in paragraph 1 of this subparagraph
22 shall be payable by a qualified employer as part of and not in
23 addition to such recovery. An award of attorney fees in favor of a
24 covered employee against a qualified employer on a claim for

1 intentional tort, excluding death, shall be limited to no more than
2 twenty percent (20%) of any lost earnings awarded to the covered
3 employee or his or her spouse, personal representative, parents, or
4 dependents of the covered employee under the benefit plan and such
5 award. Nothing in this paragraph shall be construed to restrict an
6 award of fees and costs made under federal law.

7 B. An employer who is not a qualified employer shall comply
8 with the Workers' Compensation Code.

9 SECTION 8. NEW LAW A new section of law to be codified
10 in the Oklahoma Statutes as Section 311.7 of Title 85, unless there
11 is created a duplication in numbering, reads as follows:

12 A covered employee and a qualified employer shall resolve:

13 1. All occupational injury benefit disputes in accordance with
14 the terms of the qualified employer's benefit plan and ERISA; and

15 2. All intentional tort or other employers' liability claims
16 through the appropriate state or federal courts of Oklahoma,
17 mediation, arbitration, or any other form of alternative dispute
18 resolution or settlement process available by law.

19 SECTION 9. NEW LAW A new section of law to be codified
20 in the Oklahoma Statutes as Section 311.8 of Title 85, unless there
21 is created a duplication in numbering, reads as follows:

22 This act shall be liberally construed to give the fullest effect
23 of its provisions and is adopted as part of the public policy of the
24

1 State of Oklahoma. Any conflict between this act and any other law
2 shall be resolved in favor of the operation of this act.

3 SECTION 10. NEW LAW A new section of law to be codified
4 in the Oklahoma Statutes as Section 311.9 of Title 85, unless there
5 is created a duplication in numbering, reads as follows:

6 A. In any action brought to challenge, in whole or in part, the
7 constitutionality of this act, any party to such action may take a
8 direct appeal from the decision of any lower court to the Supreme
9 Court and the Supreme Court shall retain the appeal. The Supreme
10 Court on an expedited basis shall consider any such appeal.

11 B. To the extent this act, or any part thereof, is declared to
12 be unconstitutional or unenforceable, it is specifically intended
13 that:

14 1. Any employer that became a qualified employer under this act
15 shall not be deemed to have failed to secure workers compensation
16 insurance;

17 2. The rights and obligations of a qualified employer and its
18 employees shall be subject to the exclusive remedies provisions of
19 Section 314 of Title 85 of the Oklahoma Statutes and a qualified
20 employer shall be entitled to the immunity provided under Section
21 302 of Title 85 of the Oklahoma Statutes, and an employer that
22 became a qualified employer under this act shall be liable for
23 injury to employees only to the extent to which an employer that
24 complied with the provisions of Section 351 of Title 85 of the

1 Oklahoma Statutes would be liable to employees in compensation for
2 such injuries under the Workers' Compensation Code; and

3 3. A qualified employer shall have ninety (90) days from any
4 final decision declaring this act or any part thereof
5 unconstitutional to secure compliance with the Workers' Compensation
6 Code.

7 SECTION 11. AMENDATORY 85 O.S. 2011, Section 311, is
8 amended to read as follows:

9 Section 311. The Workers' Compensation Code shall not apply to
10 the following employees:

11 1. Any person for whom an employer is liable under any Act of
12 Congress for providing compensation to employees for injuries,
13 disease or death arising out of and in the course of employment
14 including, but not limited to, the Federal Employees' Compensation
15 Act, the Federal Employers' Liability Act, the Longshoremen's and
16 Harbor Workers' Act and the Jones Act, to the extent his or her
17 employees are subject to such acts;

18 2. Any person who is employed in agriculture or horticulture by
19 an employer who had a gross annual payroll in the preceding calendar
20 year of less than One Hundred Thousand Dollars (\$100,000.00) wages
21 for agricultural or horticultural workers, or any person who is
22 employed in agriculture or horticulture who is not engaged in
23 operation of motorized machines;

24

1 3. Any person who is a licensed real estate sales associate or
2 broker, paid on a commission basis;

3 4. Any person who is providing services in a medical care or
4 social services program, or who is a participant in a work or
5 training program, administered by the Department of Human Services,
6 unless the Department is required by federal law or regulations to
7 provide workers' compensation for such person. This paragraph shall
8 not be construed to include nursing homes;

9 5. Any person employed by an employer with five or less total
10 employees, all of whom are related by blood or marriage to the
11 employer, if the employer is a natural person or a general or
12 limited partnership, or an incorporator of a corporation if the
13 corporation is the employer;

14 6. Any person employed by an employer which is a youth sports
15 league which qualifies for exemption from federal income taxation
16 pursuant to federal law;

17 7. Sole proprietors, members of a partnership, individuals who
18 are party to a franchise agreement as set out by the Federal Trade
19 Commission franchise disclosure rule, 16 CFR 436.1 through 436.11,
20 members of a limited liability company who own at least ten percent
21 (10%) of the capital of the limited liability company or any
22 stockholder-employees of a corporation who own ten percent (10%) or
23 more stock in the corporation, unless they elect to be covered by a
24

1 policy of insurance covering benefits under the Workers'
2 Compensation Code;

3 8. Any person providing or performing voluntary service who
4 receives no wages for the services other than meals, drug or alcohol
5 rehabilitative therapy, transportation, lodging or reimbursement for
6 incidental expenses;

7 9. A person, commonly referred to as an owner-operator, who
8 owns or leases a truck-tractor or truck for hire, if the owner-
9 operator actually operates the truck-tractor or truck and if the
10 person contracting with the owner-operator is not the lessor of the
11 truck-tractor or truck. Provided, however, an owner-operator shall
12 not be precluded from workers' compensation coverage under the
13 Workers' Compensation Code if the owner-operator elects to
14 participate as a sole proprietor;

15 10. A person referred to as a drive-away owner-operator who
16 privately owns and utilizes a tow vehicle in drive-away operations
17 and operates independently for hire, if the drive-away owner-
18 operator actually utilizes the tow vehicle and if the person
19 contracting with the drive-away owner-operator is not the lessor of
20 the tow vehicle. Provided, however, a drive-away owner-operator
21 shall not be precluded from workers' compensation coverage under the
22 Workers' Compensation Code if the drive-away owner-operator elects
23 to participate as a sole proprietor; and

24

1 11. Any person who is employed as a domestic servant or as a
2 casual worker in and about a private home or household, which
3 private home or household had a gross annual payroll in the
4 preceding calendar year of less than Ten Thousand Dollars
5 (\$10,000.00) for such workers; and

6 12. A qualified employer with an employee benefit plan as
7 provided in Sections 2 through 10 of this act.

8 SECTION 12. This act shall become effective November 1, 2012."
9 Passed the Senate the 18th day of April, 2012.

10
11 _____
12 Presiding Officer of the Senate

13 Passed the House of Representatives the ____ day of _____,
14 2012.

15
16 _____
17 Presiding Officer of the House
18 of Representatives