HOUSE OF REPRESENTATIVES - FLOOR VERSION

STATE OF OKLAHOMA

2nd Session of the 53rd Legislature (2012)

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 2155 By: Steele of the House

and

Bingman of the Senate

COMMITTEE SUBSTITUTE

An Act relating to benefits for employee injury; creating the Oklahoma Employee Injury Benefit Act; providing short title; construing provisions; stating legislative findings; stating legislative intent; defining terms; authorizing voluntary exemption from certain act; requiring certain notice to Workers' Compensation Court; requiring payment of certain fee; establishing responsibilities of certain Commissioner; requiring certain notice to employees; stating requirements for certain notice; authorizing adoption of certain rules; requiring adoption of certain plan by certain employers; establishing schedule of benefits for certain plans; establishing requirements for implementation of certain plans; requiring employers to provide certain insurance coverage in specified amounts; specifying liability of employers under certain plans; establishing exceptions to certain liability; establishing responsibilities of employers under certain plans; limiting attorney fees under certain circumstances; specifying means of dispute resolution; prohibiting promulgation of certain rules; construing provisions; stating effects of certain challenges; providing for codification; and providing an effective date.

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BOLD FACE CAPITALIZED language denotes Committee Amendments.
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BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.1 of Title 85, unless there is created a duplication in numbering, reads as follows:

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

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.2 of Title 85, unless there is created a duplication in numbering, reads as follows:

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

B. The Legislature finds that certain employers, by virtue of the number of employees employed by the employers or the nature and type of the work undertaken by their employees, are experiencing significant costs associated with occupational injuries subject to the Workers' Compensation Code. The Legislature further has determined that the inability on the part of those employers to effectively and efficiently manage those claims has contributed to the increased costs associated with those claims and has also resulted in reduced efficiency in the treatment of injured employees. In an effort to provide more efficient management of those claims, to help provide employees with better managed medical care and to assist this state in the attraction and retention of new

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employers the Legislature hereby adopts this act. The exceptions to application of the Workers' Compensation Code which are provided for in subsection A of Section 4 of this act are ones which are added to the already existing extensive exceptions provided for in Section 311 of Title 85 of the Oklahoma Statutes. The Legislature has determined that the distinctions between certain categories of employers and employees, based on the criteria set forth in subsection A of Section 4 of this act, are warranted due to the size of the employer's workforce, as well as an employer's "workers' compensation experience modifier", or its "total annual incurred claims" history, or both an employer's "workers' compensation experience modifier" and its "total annual incurred claims" history. Each of these factors bears on the ability and need for an employer to create and maintain a benefit plan as described herein. Further, because an employer's status under the criteria set forth in subsection A of Section 4 of this act affects its stability and ability to hire, maintain, and promote employees, these same factors affect its employees. Thus, there are rational grounds for the exceptions to the application of the Workers' Compensation Code that are provided herein. The Legislature hereby adopts this act.

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

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1. Provide a fair and balanced alternative to the Workers' Compensation Code for providing benefits to injured employees;

2. Encourage the prompt medical care for and payment of compensation to injured workers;

3. Promote the efficient resolution of occupational injuries;

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

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

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

As used in the Oklahoma Employee Injury Benefit Act:

1. "Accidental death and dismemberment" means any benefit provided under Section 5 of this act;

2. "Commissioner" means the Insurance Commissioner of the Insurance Department of the State of Oklahoma;

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

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

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

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

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

8. "Occupational injury" means an injury, including death, or occupational illness, causing internal or external harm to the body, which is incurred in the course and scope of employment;

9. "Pre-injury pay" means:

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

b. for hourly covered employees, the average earnings from a qualified employer for the six consecutive pay periods immediately preceding the date of the

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occupational injury; provided, however, that if the covered employee has worked for a qualified employer for less than six consecutive pay periods, or if his or her earnings as of such date cannot be reasonably determined, the six-pay-period-average will be based on the earnings received over the period by a similar covered employee of the qualified employer.

Pre-injury pay shall include pay for overtime and employee contributions, through salary reduction or otherwise, to a 401(k) or similar arrangement, cafeteria plan, or other pre-tax salary deferral employee benefit plan. Pre-injury pay shall not include any bonuses, benefits, including but not limited to employer contributions to any employee benefit plans or matching contributions to a retirement plan, or other extraordinary remuneration; and

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

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.4 of Title 85, unless there is created a duplication in numbering, reads as follows:

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A. Any employer may voluntarily elect to be exempt from the Workers' Compensation Code and become a qualified employer if, on the date the employer elects to become a qualified employer, the employer:

1. Employed fifty or more employees as of the end of the preceding calendar year, and either:

a. has a workers' compensation experience modifier, as reported by the National Council of Compensation Insurers (NCCI), greater than one (1.00) for the preceding Oklahoma workers' compensation insurance policy year, or

b. has total annual incurred claims, as reflected in an NCCI workers' compensation experience modifier worksheet or their workers' compensation carrier loss runs, greater than Fifty Thousand Dollars ($50,000.00) in at least one of the preceding three (3) Oklahoma workers' compensation insurance policy years.

For purposes of the above fifty-employee requirement, the principles of Section 414 of the Internal Revenue Code shall apply such that all employees of all corporations which are members of a controlled group of corporations shall be treated as employed by a single employer, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as

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employed by a single employer, and all employees of the members of an affiliated service group shall be treated as employed by a single employer; and all employees of the members of a multiple employer welfare arrangement licensed under Oklahoma law shall be treated as employed by a single employer.

The qualification criteria in this subsection shall apply only as of the date the employer elects to become a qualified employer;

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

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

B. An employer that has elected to become a qualified employer by satisfying the requirements of this section shall notify the Court and the Commissioner in writing of the election and the date that the election is to become effective, which may not be sooner than the date that the qualified employer satisfies the employee notice requirements in this section. The qualified employer shall pay to the Commissioner an annual nonrefundable fee of Two Thousand Five Hundred Dollars ($2,500.00) which shall accompany the filing of the written notice.

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

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

D. The Oklahoma Workers' Compensation Court, the state courts of Oklahoma, the Commissioner, and all other Oklahoma administrative agencies, shall not promulgate rules, regulations or any procedures related to design, documentation, implementation, administration or funding of a qualified employer's benefit plan.

E. The Commissioner may designate an information collection agent, implement an electronic reporting and public information access program, and adopt rules as necessary to implement the information collection requirements of this section.

F. The Commissioner may prescribe forms to be used for the qualified employer notification and shall require the qualified employer to provide its name, address, contact person and phone, federal tax identification number, claim administration contact

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information, and a listing of all covered business locations in the state. The Commissioner shall also notify the Oklahoma Commissioner of Labor of all qualified employer notifications.

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

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

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

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

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

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SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.5 of Title 85, unless there is created a duplication in numbering, reads as follows:

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

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

1. One hundred percent (100%) of covered medical expenses as defined in the plan, with, subject to subsection C of this section, no maximum dollar or duration limits for all medical expenses combined per occurrence;

2. For temporary inability to work in either a covered employee's own occupation or any alternative work offered by the

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employer, eighty percent (80%) of the covered employee's pre-injury pay, less other related post-injury income, starting from the first scheduled working day of disability, for one hundred fifty-six (156) weeks, with a maximum weekly benefit of eighty percent (80%) of the Oklahoma state average weekly wage;

3. For permanent inability to work in either any occupation or any alternative work offered by the employer following payment of all temporary wage replacement under paragraph 2 of this subsection, eighty percent (80%) of the covered employee's pre-injury pay, less other related post-injury income, until the later of eligibility for one hundred percent (100%) Social Security retirement or fifteen (15) years, with a maximum weekly benefit of one hundred percent (100%) of the Oklahoma state average weekly wage;

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

a. future medical expense will be incurred and payable on the injury claim, and

b. the covered employee is unable to return to the pre-injury or equivalent job position,

eighty percent (80%) of the covered employee's pre-injury pay for five (5) weeks for each percentage point of whole-person impairment determined under the fourth edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" for

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objective loss of function, with a minimum weekly benefit of One Hundred Fifty Dollars ($150.00) and a maximum weekly benefit of fifty percent (50%) of the Oklahoma state average weekly wage; provided, however, that the number of weeks for certain scheduled injuries shall be subject to the following minimum number of weeks for complete loss or loss of use:

Scheduled Member	Weeks
Arms or Legs	275
Hands or Feet	220
Thumb	66
First Finger	39
Second Finger	33
Third Finger	22
Fourth Finger	17
Great Toe	33
Other Toes	11
One Ear	110
Two Ears	330
Eye	275

A partial loss or loss of use of a scheduled member of the body may result in payment for the number of weeks which the percentage of loss bears to the above number of weeks. Payments need not be made for both loss of fingers and loss of the same hand, or for loss

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of toes and loss of the same foot. All above impairment income benefits combined shall not exceed one hundred percent (100%) whole-person impairment or five hundred (500) weeks; and

5. Death benefits equal to the lesser of:

a. ten times the covered employee's base annual earnings, or

b. Two Hundred Thousand Dollars ($200,000.00).

Beneficiaries for any death benefit payment shall be determined by the provisions of the benefit plan.

C. The benefit plan may provide for lump-sum payouts that are, as reasonably determined by the administrator of such plan appointed by the qualified employer in accordance with ERISA, actuarially equivalent to expected future payments. The benefit plan may also provide for settlement agreements; provided, that any such settlement agreement by a covered employee shall be voluntary, entered into not earlier than the tenth business day after the date of the initial report of injury, and signed after the covered employee has received a medical evaluation from a non-emergency-care doctor, with any waiver of rights being conspicuous and on the face of the agreement. The benefit plan may also specify further conditions and limitations on benefits under this section, including but not limited to further criteria for covered and noncovered injuries and medical charges, and continuation, suspension and

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termination of benefits; provided, however, that the benefit plan must pay benefits without regard to whether the covered employee, the qualified employer, or a third party caused the occupational injury. None of the provisions of the Workers' Compensation Code shall define, restrict, expand or otherwise apply to a benefit plan.

D. The benefit plan shall comply with and shall be subject to the requirements of ERISA applicable to an employee benefit plan. Such compliance is required in order for a qualified employer to be protected by both ERISA and the exclusive remedy protection contained in subsection A of Section 6 of this act. Such a benefit plan shall be governed by and subject to ERISA. A violation of ERISA if timely cured shall not act to deny qualified employer status to an employer that otherwise meets the requirements for a qualified employer.

E. No fee or cost shall apply with respect to a qualified employer's benefit plan, except as specifically provided for in this section or ERISA. All authority over penalties and enforcement of the provisions of the benefit plan and ERISA shall be vested in the benefit plan administrator, employees covered by the benefit plan, the U.S. Department of Labor, and the federal courts as provided by ERISA.

F. The qualified employer shall provide to the Commissioner and all covered employees notice of the name, title, address, and

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telephone number for the person to contact for injury benefit claims administration, whether in-house at the qualified employer or a third-party administrator.

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

H. A qualified employer shall either obtain accident insurance coverage described in paragraph 1 of this subsection, obtain a surety bond described in paragraph 2 of this subsection, or meet the requirements of paragraph 3 of this subsection. Such insurance coverage or bond shall be obtained from an admitted or surplus lines insurer with an AM Best Rating of A- or better.

1. Accidental insurance coverage shall be on a guaranteed-cost or deductible basis (not self-insured retention) in at least the following amounts:

a. Three Hundred Thousand Dollars ($300,000.00) for medical expenses and coverage for at least one hundred fifty-six (156) weeks,

b. eighty percent (80%) of the covered employee's pre-injury pay for not less than one hundred fifty-six (156) weeks of wage replacement for inability to work, with a five-hundred-dollar-maximum weekly benefit, and

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c. One Hundred Thousand Dollars ($100,000.00) for accidental death and dismemberment.

2. A bond shall be in an amount equal to Three Hundred Thousand Dollars ($300,000.00).

a. The bond shall be filed and held by the Commissioner and shall be conditioned to run solely and directly for the benefit of any covered employee of a qualified employer.

b. The bond held by the Commissioner may be used to make a payment to or on behalf of a covered employee provided the following requirements are met:

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

(2) the covered employee's claim for payment of a specific medical or wage-replacement benefit amount or both a specific medical and wage-replacement benefit amount has been accepted by the plan administrator of the benefit plan or acknowledged in a final judgment or court order assessing a specific dollar figure for benefits payable under the benefit plan,

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

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

c. The Commissioner shall promulgate, by rule, the procedure by which a covered employee may request and receive payment from the security held by the administrator.

3. Such other security as may be acceptable to the Commissioner.

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

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.6 of Title 85, unless there is created a duplication in numbering, reads as follows:

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

B. Except as otherwise provided by its benefit plan, the Employee Retirement Income Security Act (ERISA) or applicable federal law, a qualified employer is only subject to liability in any action brought by a covered employee or his or her family members for injury resulting from an occupational injury if the injury is the result of an intentional tort on the part of the qualified employer. An intentional tort shall exist only when the covered employee is injured because of willful, deliberate, specific intent of the qualified employer to cause such injury. Allegations or proof that the qualified employer had knowledge that such injury was substantially certain to result from its conduct shall not

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constitute an intentional tort. The issue of whether an act is an intentional tort shall be a question of law for the court or the duly appointed arbitrator, as applicable.

C. In a qualified employer's defense of any intentional tort or death claim brought by or with respect to an injured covered employee, such employee's positive test for intoxication or use of an illegal controlled substance shall create a rebuttable presumption that the covered employee's intoxication or use of an illegally controlled substance caused the covered employee's injury or death.

D. To prevent a double recovery, any benefits paid under a qualified employer's benefit plan shall offset any other award against such qualified employer under subsection B of this section.

E. Other than an action brought to enforce the provisions of the benefit plan, any action brought by a covered employee or his or her spouse, personal representative, parents, or dependents based on a claim against a qualified employer arising out of any occupational injury shall be filed no later than two (2) years from the date of the injury or death giving rise to such action or be barred.

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

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SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.7 of Title 85, unless there is created a duplication in numbering, reads as follows:

A. A qualified employer or its insurers (or other payment sources) shall be responsible for:

1. Complying with federal law regarding the administration of the plan and claims for benefits thereunder;

2. Any damage awarded against the qualified employer for intentional tort under Section 6 of this act, including any pre- and post-judgment interest on the award and reasonable court costs as may be lawfully awarded in the action; and

3. Reasonable attorney fees awarded against the qualified employer under Section 6 of this act; provided, however, that an employee's attorney fees that are contingent upon a recovery under the terms of the benefit plan in paragraph 1 of this subsection shall be payable by a qualified employer as part of and not in addition to such recovery; provided, an award of attorney fees in favor of a covered employee against a qualified employer on a claim for intentional tort, excluding death, shall be limited to no more than twenty percent (20%) of any lost earnings awarded to the covered employee or his or her spouse, personal representative, parents, or dependents of the covered employee under the benefit

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plan and such award. However, nothing in this subsection shall restrict an award of fees and costs made under federal law.

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

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.8 of Title 85, unless there is created a duplication in numbering, reads as follows:

A covered employee and a qualified employer shall resolve:

1. All occupational injury benefit disputes in accordance with the terms of the qualified employer's benefit plan and the Employee Retirement Income Security Act (ERISA); and

2. All intentional tort or death claims through the appropriate state or federal courts of Oklahoma, mediation, arbitration, or any other form of alternative dispute resolution or settlement process available by law.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.9 of Title 85, unless there is created a duplication in numbering, reads as follows:

A qualified employer may elect to adopt and provide notice to employees, as a condition of employment or continued employment, a requirement for voluntary or mandatory mediation, or voluntary or mandatory final and binding arbitration for resolution of

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intentional tort claims. A mandatory final and binding arbitration requirement shall:

1. Not waive any substantive legal right of the covered employee or the spouse, personal representative, parents, or dependents of the employee other than any right to jury trial and appeal through the court system;

2. Not create any unfair procedural advantages for the qualified employer; and

3. Have been disclosed to the covered employee before the date of an occupational injury.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.10 of Title 85, unless there is created a duplication in numbering, reads as follows:

This act shall be liberally construed to give the fullest effect of its provisions and is adopted as part of the public policy of the State of Oklahoma. Any conflict between this act and any other law shall be resolved in favor of the operation of this act.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 311.11 of Title 85, unless there is created a duplication in numbering, reads as follows:

A. In any action brought to challenge, in whole or in part, the constitutionality of this act, any party to such action may take a direct appeal from the decision of any lower court to the Supreme

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Court and the Supreme Court shall retain the appeal. The Supreme Court on an expedited basis shall consider any such appeal.

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

1. Any employer that became a qualified employer under this act shall not be deemed to have failed to secure workers' compensation insurance and instead shall be treated as if it complied with Section 351 of Title 85 of the Oklahoma Statutes and secured compensation to employees as provided thereunder;

2. The rights and obligations of a qualified employer and its employees shall be subject to the exclusive remedies provisions of Section 314 of Title 85 of the Oklahoma Statutes and a qualified employer shall be entitled to the immunity provided under Section 302 of Title 85 of the Oklahoma Statutes, and an employer that became a qualified employer under this act shall be liable for injury to employees only to the extent to which an employer that complied with the provisions of Section 351 of Title 85 of the Oklahoma Statutes would be liable to employees in compensation for such injuries under the Workers' Compensation Code; and

3. A qualified employer shall have ninety (90) days from any final decision declaring this act or any part thereof

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unconstitutional to secure compliance with the Workers' Compensation Code.

SECTION 12. This act shall become effective November 1, 2012.

COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY, dated 02/28/2012 - DO PASS, As Amended and Coauthored.

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