

1 STATE OF OKLAHOMA

2 2nd Session of the 53rd Legislature (2012)

3 SENATE BILL 1378

By: Bingman

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5
6 AS INTRODUCED

7 An Act relating to benefits for employee injury;
8 creating the Oklahoma Employee Injury Benefit Act;
9 providing short title; construing provisions; stating
10 legislative findings; stating legislative intent;
11 defining terms; authorizing voluntary exemption from
12 certain act; requiring certain notice to Workers'
13 Compensation Court; requiring payment of certain fee;
14 establishing responsibilities of certain
15 Administrator; requiring certain notice to employees;
16 stating requirements for certain notice; authorizing
17 adoption of certain rules; requiring adoption of
18 certain plan by certain employers; establishing
19 schedule of benefits for certain plans; establishing
20 requirements for implementation of certain plans;
21 requiring employers to provide certain insurance
22 coverage in specified amounts; specifying liability
23 of employers under certain plans; establishing
24 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.

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 711 of Title 40, unless there is
created a duplication in numbering, reads as follows:

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

3 SECTION 2. NEW LAW A new section of law to be codified
4 in the Oklahoma Statutes as Section 712 of Title 40, unless there is
5 created a duplication in numbering, reads as follows:

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

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

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

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

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

3 3. Promote the efficient resolution of occupational injuries;

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

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

10 SECTION 3. NEW LAW A new section of law to be codified
11 in the Oklahoma Statutes as Section 713 of Title 40, unless there is
12 created a duplication in numbering, reads as follows:

13 As used in the Oklahoma Employee Injury Benefit Act:

14 1. "Accidental death and dismemberment" means any benefit
15 provided under Section 6 of this act;

16 2. "Administrator" means the Insurance Commissioner of the
17 Oklahoma Insurance Department;

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

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

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

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

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

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

15 9. "Pre-injury pay" means:

- 16 a. for salaried covered employees, regular periodic
17 salary from a qualified employer at the time of the
18 occupational injury,
- 19 b. for hourly covered employees, the average earnings
20 from a qualified employer for the six consecutive pay
21 periods immediately preceding the date of the
22 occupational injury; provided, however, that if the
23 covered employee has worked for a qualified employer
24 for less than six consecutive pay periods, or if his

1 or her earnings as of such date cannot be reasonably
2 determined, such six-pay-period-average will be based
3 on the earnings received over such period by a similar
4 covered employee of the qualified employer.

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

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

17 SECTION 4. NEW LAW A new section of law to be codified
18 in the Oklahoma Statutes as Section 714 of Title 40, unless there is
19 created a duplication in numbering, reads as follows:

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

1 1. Employed fifty (50) or more employees as of the end of the
2 preceding calendar year; and either:

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

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

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

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

18 B. An employer that has elected to become a qualified employer
19 by satisfying the requirements of this section shall notify the
20 Court and the Administrator in writing of the election and the date
21 that the election is to become effective, which may not be sooner
22 than the date that the qualified employer satisfies the employee
23 notice requirements in this section. Such qualified employer shall
24 pay to the Administrator an annual nonrefundable fee of Two Thousand

1 Five Hundred Dollars (\$2,500.00) which shall accompany the filing of
2 the written notice.

3 C. The Administrator shall collect and maintain the information
4 required under this section and shall monitor compliance with the
5 requirements of this section. The Administrator may also require an
6 employer to confirm its qualified employer status. Subject to
7 subsection D of this section, the Administrator shall adopt rules
8 designating the methods and procedures for confirming whether an
9 employer is a qualified employer, notifying an employer of any
10 qualifying deficiencies, and the consequences thereof. The
11 Administrator shall record the date and time each notice of
12 qualified employer status is received and the effective date of
13 qualified employer election. The Administrator shall maintain a
14 list on its official website accessible by the public of all
15 qualified employers and the date and time such exemption became
16 effective.

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

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

3 F. The Administrator 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 federal tax identification number, claim administration contact
7 information, and a listing of all covered business locations in the
8 state.

9 G. The Administrator may contract with the Oklahoma Employment
10 Security Commission or the State Treasurer for assistance in
11 collecting the notification required under this section. Those
12 agencies shall cooperate with the Administrator in enforcing this
13 section.

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

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

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

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

6 SECTION 5. NEW LAW A new section of law to be codified
7 in the Oklahoma Statutes as Section 715 of Title 40, unless there is
8 created a duplication in numbering, reads as follows:

9 A. An employer voluntarily electing to become a qualified
10 employer shall adopt a written benefit plan that complies with the
11 requirements of this section. Qualified employer status is entirely
12 optional for eligible employers, and no such benefit plan shall be
13 considered to be maintained solely for the purpose of complying with
14 Oklahoma workers' compensation laws. The benefit plan shall not
15 become effective until the date that the qualified employer first
16 satisfies the notice requirements in Section 4 of this act.

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

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

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

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

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

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

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

22 eighty percent (80%) of the covered employee's pre-injury pay for
23 five (5) weeks for each percentage point of whole person impairment
24 determined under the fourth edition of the American Medical

1 Association's "Guides to the Evaluation of Permanent Impairment" for
2 objective loss of function, with a minimum weekly benefit of One
3 Hundred Fifty Dollars (\$150.00) and a maximum weekly benefit of
4 fifty percent (50%) of the Oklahoma state average weekly wage;
5 provided, however, that the number of weeks for certain scheduled
6 injuries shall be subject to the following minimum number of weeks
7 for complete loss or loss of use:

8	Scheduled Member	Weeks
9	Arms or Legs	275
10	Hands or Feet	220
11	Thumb	66
12	First Finger	39
13	Second Finger	33
14	Third Finger	22
15	Fourth Finger	17
16	Great Toe	33
17	Other Toes	11
18	One Ear	110
19	Two Ears	330
20	Eye	275

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

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

4 5. Death benefits equal to the lesser of:

5 a. ten (10) times the covered employee's base annual
6 earnings, or

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

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

10 C. The benefit plan may provide for lump sum payouts that are,
11 as reasonably determined by the administrator of such plan appointed
12 by the qualified employer in accordance with the Employee Retirement
13 Income Security Act of 1974, as amended ("ERISA"), actuarially
14 equivalent to expected future payments. The benefit plan may also
15 provide for settlement agreements, provided that any such settlement
16 agreement by a covered employee must be voluntary, entered into not
17 earlier than the tenth business day after the date of the initial
18 report of injury, and signed after the covered employee has received
19 a medical evaluation from a nonemergency care doctor, with any
20 waiver of rights being conspicuous and on the face of the agreement.
21 The benefit plan may also specify further conditions and limitations
22 on benefits under Section 5 of this act, including but not limited
23 to further criteria for covered and non-covered injuries and medical
24 charges, and continuation, suspension and termination of benefits;

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

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

15 E. The qualified employer's benefit plan administrator,
16 designated per ERISA, shall be solely responsible for interpreting
17 and applying the provisions of such benefit plan and the related
18 provisions of this act. No fee or cost shall apply with respect to
19 a qualified employer's benefit plan, except as specifically provided
20 for in this section or ERISA. All authority over penalties and
21 enforcement of the provisions of the benefit plan and ERISA shall be
22 vested in the benefit plan Administrator, employees covered by the
23 benefit plan, the U.S. Department of Labor, and the federal courts
24 as provided by ERISA.

1 F. The qualified employer shall provide to the Administrator
2 and all covered employees notice of the name, title, address, and
3 telephone number for the person to contact for injury benefit claims
4 administration, whether in-house at the qualified employer or a
5 third-party administrator.

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

10 SECTION 6. NEW LAW A new section of law to be codified
11 in the Oklahoma Statutes as Section 716 of Title 40, unless there is
12 created a duplication in numbering, reads as follows:

13 A. A qualified employer's liability under the benefit plan and
14 otherwise prescribed in this act shall, in all cases except death,
15 be exclusive and in place of all other liability of the qualified
16 employer and any of its employees at common law or otherwise, for a
17 covered employee's occupational injury or loss of services, to the
18 covered employee, or the spouse, personal representative, parents,
19 or dependents of the covered employee, or any other person. The
20 exclusive remedy protections provided by this subsection shall be as
21 broad as the exclusive remedy protections of Section 302 of Title 85
22 of the Oklahoma Statutes, and thus preclude a covered employee's
23 claim against a qualified employer for negligence or other causes of
24 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 family members for injury resulting from an occupational injury if
5 the injury is the result of an intentional tort on the part of the
6 qualified employer. An intentional tort shall exist only when the
7 covered employee is injured because of willful, deliberate, specific
8 intent of the qualified employer to cause such injury. Allegations
9 or proof that the qualified employer had knowledge that such injury
10 was substantially certain to result from its conduct shall not
11 constitute an intentional tort. The issue of whether an act is an
12 intentional tort shall be a question of law for the court or the
13 duly appointed arbitrator, as applicable.

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

21 D. To prevent a double recovery, any benefits paid under a
22 qualified employer's benefit plan will offset any other award
23 against such qualified employer under subsection B of Section 6 of
24 this act.

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

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

11 SECTION 7. NEW LAW A new section of law to be codified
12 in the Oklahoma Statutes as Section 717 of Title 40, unless there is
13 created a duplication in numbering, reads as follows:

14 A. A qualified employer or its insurers shall be responsible
15 for:

16 1. All benefits payable under the terms of its benefit plan;

17 2. Any damage awarded against the qualified employer for
18 intentional tort or claims due to the death of a covered employee
19 under Section 8 of this act, including any pre- and post-judgment
20 interest on the award and reasonable court costs as may be lawfully
21 awarded in the action; and

22 3. Reasonable attorney fees awarded against the qualified
23 employer under Section 8 of this act; provided, however, that an
24 employee's attorney fees that are contingent upon a recovery under

1 the terms of the benefit plan in paragraph 1 of this subparagraph
2 shall be payable by a qualified employer as part of and not in
3 addition to such recovery; provided, an award of attorney fees in
4 favor of a covered employee against a qualified employer on a claim
5 for intentional tort, excluding death, shall be limited to no more
6 than twenty percent (20%) of any lost earnings awarded to the
7 covered employee or his or her spouse, personal representative,
8 parents, or dependents of the covered employee under the benefit
9 plan and such award.

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

12 SECTION 8. NEW LAW A new section of law to be codified
13 in the Oklahoma Statutes as Section 718 of Title 40, unless there is
14 created a duplication in numbering, reads as follows:

15 A covered employee and a qualified employer shall resolve:

16 1. All occupational injury benefit disputes in accordance with
17 the terms of the qualified employer's Benefit Plan and ERISA; and

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

22 SECTION 9. NEW LAW A new section of law to be codified
23 in the Oklahoma Statutes as Section 719 of Title 40, unless there is
24 created a duplication in numbering, reads as follows:

1 A qualified employer may elect to adopt and publish to employees
2 as a condition of continued employment, a requirement for voluntary
3 or mandatory mediation, or voluntary or mandatory, final and binding
4 arbitration for resolution of intentional tort or death claims. A
5 mandatory, final and binding arbitration requirement shall:

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

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

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

14 SECTION 10. NEW LAW A new section of law to be codified
15 in the Oklahoma Statutes as Section 720 of Title 40, unless there is
16 created a duplication in numbering, reads as follows:

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

21 SECTION 11. NEW LAW A new section of law to be codified
22 in the Oklahoma Statutes as Section 721 of Title 40, unless there is
23 created a duplication in numbering, reads as follows:

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

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

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

14 2. The rights and obligations of a qualified employer and its
15 employees shall be subject to the exclusive remedies provisions of
16 Section 314 of Title 85 of the Oklahoma Statutes and a qualified
17 employer shall be entitled to the immunity provided under Section
18 302 of Title 85 of the Oklahoma Statutes, and an employer that
19 became a qualified employer under this act shall be liable for
20 injury to employees only to the extent to which an employer that
21 complied with the provisions of Section 351 of Title 85 of the
22 Oklahoma Statutes would be liable to employees in compensation for
23 such injuries under the Workers' Compensation Code; and

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

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

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