

**PRECOMPENSATION AND NONCOMPENSATION LAW---INTRODUCTION TO FEDERAL COMPENSATION AND WORKERS' COMPENSATION (WC) AND EMPLOYER'S LIABILITY (EL) INSURANCE (34-1)**

EOs 1 + 2. **AN EMPLOYER'S LIABILITY UNDER COMMON LAW** was based on a finding of negligence. **The four elements of common law negligence:** (*Know cold!*)

1. a legal duty,
2. breach of that duty, and
3. damages,
4. caused by that breach.

**Simply: Breached duty caused damage.**

**The five common law duties of an employer:**

1. **Provide a safe workplace**--Inspect the workplace, make needed repairs, and comply with applicable safety regulations.
2. **Provide enough competent fellow employees.**
3. **Provide safe tools and equipment**--such as safety goggles and hard hats.
4. **Warn employees of inherent work dangers**--especially nonobvious dangers such as radioactivity and chemical exposure.
5. **Establish and enforce safety rules.**

**The three common law defenses of an employer:**

1. **Assumption of risk**--If an employee is aware of a risk and its danger and voluntarily exposes himself to that danger, the employer is *not* liable. **Examples:** not wearing a safety belt when washing windows above the 12th floor (working with an obvious danger) and driving a car with a reported, but unrepaired, brake malfunction (with knowledge of an employer's breach).
2. **Contributory negligence**--If an employee fails to exercise reasonable care for his own safety (if he negligently contributes to his injury) and that failure contributes in *any* way to the accident, the employee is barred from *any* recover. (**Note:** Contributory negligence has been replaced by comparative negligence.

**Modified comparative negligence** prevents recovery if the employee's negligence exceeds the employer's negligence. **Pure comparative negligence** allows the employee to recover his actual damages reduced by his percentage of fault.)

3. **Negligence of a fellow worker**--If a worker's injury was caused by the negligence of a **fellow worker** of the *same or lower rank*, that fellow worker--*not* the employer--is liable. This is an exception to doctrine of **respondeat superior** (Latin, "let the higher one respond") that imputes negligence to the employer for acts of employees acting in the scope of their duties. The employer remains liable for negligence of its employees' supervisors or of other members of management who are responsible for meeting the employer's common law duties.

Those common law duties and defenses *still apply* to claims for workplace injuries that fall *outside* the scope of covered workers' compensation injuries. **Workers' compensation** pays lost wages and medical expenses of workers suffering employment-related injuries and diseases.

Workers' compensation awards are paid *without* regard to the employer's negligence or fault.

EO 3. **THE GOALS OF WORKERS' COMPENSATION LAWS:**

1. **Pay promptly**--standard benefits to injured employees,
2. **avoid the costs and delays of litigation,**
3. **guarantee payments through insurance,**
4. **increase workplace safety, and**
5. **pay medical service providers.**

EO 4. **COMMON FEATURES OF COMPENSATION LAWS:**

1. **Choice of law**--Laws apply from the states where the employee was hired *or* where the employment occurs *or* where the employee was injured.  
**The employee can select the state with the most generous benefits.**
2. **Persons and employments covered**--Originally, only 'hazardous' employment (involving exposure to great danger) was covered.  
Today, statutes apply to most public and private employees--except domestic and farm workers. Statutes apply *only* to employees, *not* independent contractors.
3. **Injuries and diseases covered**--include **occupational injury** (bodily injury caused by an accident arising out of and during work) and **occupational disease** (defined by statute as normally resulting from the employment and requiring actual workplace exposure to the hazard).
4. **Benefits provided:**
  - a. **Indemnity payments**--for lost wages are paid to disabled workers after a **waiting period** (of no coverage ranging from three to seven days).  
**Temporary total disability payments** are paid to workers who cannot work but are expected to recover.  
**Permanent total disability payments** are paid to workers who cannot work and are not expected to recover due to their injuries.
  - b. **Payments for medical services**--100% of necessary medical expenses--to physicians, hospitals, and other medical care providers.
  - c. **Rehabilitation services**--including benefits for both physical and vocational rehabilitation, thus reducing the insurer's loss and the cost of workers' compensation and, more importantly, boosting the employee's self-esteem and self-reliance by helping him to again become a productive member of society.
  - d. **Death benefits**--may be limited in time or adjusted for the cost of living.  
Every state allows a burial allowance.
5. **Methods of financing benefits**--As of 2001, 5 states had **monopolistic state funds** (in which the state acts as the sole insurer), 20 states had **competitive state funds** (in which the state competes with private insurers), and the rest used only **private insurers**.  
**Assigned risk plans** provide insurance to firms that do not meet the underwriting criteria of private insurers. Most states let qualified employers retain their exposures (**'self-insure'**) and buy **excess insurance** to cover catastrophic losses.
6. **Procedure for obtaining benefits**--The injured worker must notify the employer of the injury or accident within a specific period (often 30 days).  
Failure to give timely notice may be excused if the employer had reason to know of the injury *or* if the late notice does not prejudice the employer's right to investigate the accident.  
Workers' compensation laws contain a **statute of limitations** period (often one year).  
Failure to file a claim within the statute of limitations makes the claim unenforceable.
7. **Administration**--Most jurisdictions administer compensation law through a quasi-judicial body called the **workers' compensation board** or the **industrial accident commission**.  
Some states use courts to administer claims. Courts decide questions of law in all states.

EOs 5 + 6. **FEDERAL COMPENSATION LAWS:**

1. **The Longshore and Harbor Workers' Compensation Act (LHWCA)**--covers nongovernment workers involved in longshoring and maritime operations, including ship repairing and building.  
**The situs test** requires that the injury occur upon navigable waters or in an adjoining area used to load, unload, repair, or build vessels. **The status test** requires that the injury occur while the worker is engaged in longshoring or maritime operations.  
When the act overlaps with state compensation laws, the injured employee may choose the more favorable law.

2. **The Outer Continental Shelf Lands Act (OCSLA)**--extends the LHWCA to workers exploring for natural resources on the outer continental shelf of the US.
3. **Nonappropriated Fund Instrumentalities Act (NFIA)**--extends the LHWCA to civilian employees of the US whose salary is paid with funds generated from government operations.
4. **The Defense Base Act (DBA)**--extends the LHWCA to civilian employees of federal contractors at overseas bases or working at overseas locations for US government agencies.
5. **War Hazards Compensation Act (WHCA)**--supplements the DBA and shifts the costs of workers' compensation to the US government for workers injured by a war-risk hazard.
6. **Federal employer's liability act (FELA)**--protects employees of interstate railroads. It applies comparative negligence and eliminates the assumption of risk and fellow employee defenses.
7. **Migrant and Seasonal Agricultural Workers Protection Act**--requires employers to register and provide information to migrant workers about the job and insurance and gives workers the right to sue for occupational injury or disease. If workers are covered by state workers' compensation laws, workers' compensation becomes the exclusive remedy.
8. **Federal employees' compensation act**--provides compensation benefits for nonmilitary federal employees. The federal government self-insures.
9. **General maritime law (common law of the sea)**--entitles a sailor to recover damages from the vessel itself for any injury or illness caused by unseaworthiness of the ship (the implied warranty of seaworthiness). **Each sailor is entitled to wages, transportation to his home port, maintenance (food and lodging until the end of the voyage and expenses during any medical treatment), and cure (medical treatment).**  
**The Merchant Marine Act of 1920 (Jones Act)** amended the General Maritime Law to allow direct action against the owner of the vessel and to create an action for wrongful death.
10. **Death on the High Seas Act (DOHSA)**--allows recovery for death caused by wrongful acts or negligence that occurring more than a marine league from the shore of any state.

EO 7. **EIGHT EXCEPTIONS TO THE EXCLUSIVE REMEDY DOCTRINE:**

1. **Intentional acts**--An employer is liable for its intentional torts, such as bad faith claims handling, wrongful discharge, sexual harassment, and intentional violations of safety regulations.
2. **Loss of consortium**--Most courts reject claims by the spouse of an injured employee for damages resulting from **loss of consortium** (loss of the three S's: spousal sex, society, and services).
3. **Dual capacity doctrine**--A worker may sue his employer in a capacity other than as an employer (eg, as product manufacturer). Most courts reject this doctrine.
4. **Subsidiary employees**--Some states let the injured employee of a subsidiary company sue the parent company in tort, depending on the companies' existence as separate legal entities and the basis of the parent's alleged negligence.
5. **Third-party-over actions**--An injured worker, entitled to WC benefits, might sue a third party for its negligence. The third party alleges that the employer's negligence was jointly or solely responsible for the injury and '**joins**' the employer to the employee's suit. **Example:** A claim between employee, employer, and the manufacturer of machinery who alleges the employer altered the machinery. Courts do **not** hold the employer jointly liable, but the third party may recover if it has an independent right of indemnity (usually contractual) against the employer.
6. **Failure to provide benefits**--An injured employee can sue in tort if his employer violates WC statutes by failing to provide WC benefits.
7. **Title VII or ADA claims**--Workers' compensation coverage does **not** cover violations of the **Americans with Disabilities Act (ADA)** (which prohibits discrimination against disabled persons) or **Title VII of the Civil Rights Act of 1964** (which prohibits discrimination based on race, color, religion, national origin, or sex).
8. **Fellow worker actions**--Several states allow suits against fellow workers under narrow exceptions such as intentional torts, wanton and willful acts, and gross negligence.