

LEGAL UPDATES

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Service

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Missouri Legislature Moving to Correct Unintended Consequences from 2005 Changes to Workers' Compensation Law

On February 10, 2011, the Missouri House passed HB 162 seeking to overturn two recent cases that narrowed the exclusivity of remedy provisions of the Missouri workers' compensation law to allow civil claims against coworkers for their negligence, and to allow civil claims for damages for occupational diseases. A similar bill is pending before the Missouri Senate.

In 2005, the Republican-dominated Legislature passed, and Republican Governor Blunt signed into law, revisions to the Missouri workers' compensation law to modify how the law was to be interpreted, from "[A]ll provisions of the [Act] shall be liberally construed with a view to the public welfare" to "shall construe the provisions of this chapter strictly." After this change in the law, the Missouri Court of Appeals for the Western District held in *Robinson v. Hooker* that the long line of cases interpreting the workers' compensation law as covering workplace injuries brought about by the negligence of coworkers could not be sustained when the workers' compensation law was strictly construed. Therefore, the workers' compensation law was no longer the sole and exclusive remedy for such injuries, and the injured employee could pursue a tort claim against the negligent coworker.

Nothing in the *Robinson* opinion limited the protections afforded employers by the exclusive remedy provisions of the law. Nor did it deprive the injured employee of the right to receive workers' compensation benefits. All that it held was that a co-employee was not an employer, and therefore not immune from civil suit for negligence.

After the *Robinson* decision, there were a host of comments in legal publications that lawsuits by employees against their coworkers would have a substantial negative impact on the teamwork concept adopted by many employers. However, as a practical matter, there has not been a tidal wave of such litigation since *Robinson*, most likely because most fellow employees would not have insurance covering such claims. Homeowner policies typically exclude claims of bodily injury to a co-employee injured in the course of employment or injuries occurring in connection with a business without regard to whether the business is owned or operated by the insured. That said, we continue to see such claims filed against coworkers in situations involving significant injuries to the employee.

The effect of the *Robinson* holding was amplified by a recent ruling of a City of St. Louis Circuit Court Judge that a civil tort claim for damages due to a worker's death from asbestos exposure was not required to be filed as a workers' compensation claim (*Franklin v. CertainTeed Corp*). This ruling raised further concerns in the employer community, and gave further impetus to the legislation in the Missouri House to include language in the House Bill explicitly including occupational disease as being covered by the workers' compensation law.

The only decision reaching the issue of the impact of the 2005 law on occupational disease claims is a recent decision from the U.S. District Court for the Western District of Missouri, *Idekr v. PPG Industries, Inc*. In that case, the district court dismissed claims of work-related illness due to exposure to toxic chemicals as being precluded by the exclusivity provisions of the Missouri workers' compensation law. In so ruling, the judge rejected the employee's arguments that the 2005 amendments permitted claims in tort against the employer, and held that occupational diseases remained within the scope of the workers compensation law.

Both the House (HB 162) and the Senate (SB 8) contain provisions effectively voiding the decision in *Robinson* by restoring the workers' compensation law as the sole and exclusive remedy for claims of injury based on coworker negligence. Rulings to the contrary after the change to "strict construction" were clearly unintended consequences of the 2005 amendments.

There is a significant difference between the bills on the treatment of occupational diseases. Under the House Bill, all occupational disease claims would be covered by workers' compensation. The Senate bill explicitly excludes from the workers' compensation law, occupational diseases that are related to toxic exposure, defined as "any prolonged chemical, substance, or material exposure that can cause death, abnormalities, disease, mutations, cancer, deformities, or reproductive malfunctions in a human organism if consumed, inhaled, or absorbed by a human or when otherwise entering the human body in sufficient quantities to do so." Under the Senate Bill, a disease such as mesothelioma, a fatal lung disease brought on by prolonged asbestos exposure, would not be covered by workers' compensation.

The Senate Bill is being considered in March 2011. Differences in passed bills will have to be resolved before the legislation is sent to the Governor for signature or veto. Whether Governor Nixon will sign the bill into law will depend, of course, on the language in the final bill as passed by both the House and Senate.

What This Means to You

Lawsuits against coworkers for their acts of negligence remain viable under the *Robinson* decision until the legislature changes the law. There is no question employers remain protected against common law claims for death or personal injury by accident that arise out of and in the course of employment, including vicarious liability for torts committed by coworkers or supervisors. However, claims continue to be asserted against coworkers for damages beyond those available under the workers' compensation law where death or serious injury has occurred. These coworkers, if sued, are unlikely to be insured for such claims, and unlikely to have the means to aggressively defend such claims. They are also likely to come to the employer for assistance in defending these cases. Unless and until the law is amended, employers should discuss these claims with their general liability insurance carriers and evaluate whether the employer's interests would be best served by providing a defense to the coworker. Employers should also consider including language in releases settling significant workers compensation claims that releases all employees and supervisors from personal liability.

Given the absence of direct case law to the contrary, employers should rely on the reasoning in *Idekr* and continue to seek dismissal of occupational disease cases from court proceedings on the basis that the Missouri workers' compensation law is the sole and exclusive remedy for "an identifiable disease arising with or without human fault out of and in the course of employment."

Contact Info

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