

THE EMPLOYER'S "WAIVE AND WALK" RIGHTS IN MINNESOTA

On August 1, 2000, a law was enacted that dramatically affected employer liability claims in Minnesota. Under this law, an employer involved in a work injury situation is entitled to waive its workers' compensation subrogation interest and, by doing so, avoid any contribution (employer) liability for its fault in causing the employee's injury. The commonly used phrase for this process is "waive and walk."

This law added Subdivision 11 to Minnesota Statute § 176.061, the Third Party Liability section of the Minnesota Workers' Compensation Act. This subdivision provides:

To the extent the employer has fault, separate from the fault of the injured employee to whom workers' compensation benefits are payable, any nonemployer third party who is liable has a right of contribution against the employer in an amount proportional to the employer's percentage of fault but not exceed the net amount the employer recovered pursuant to subdivision 6, paragraphs (c) and (d). The employer may avoid contribution exposure by affirmatively waiving, before selection of the jury, the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third-party.

The law codified existing industry practice to provide employers with a powerful clear statutory right to completely eliminate any exposure it might have for contribution liability, also known as "Lambertson" liability from the Minnesota Supreme Court's decision in *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977). Employers can even avoid circumstances where their actions primarily caused the employee's injury, or where they have an uninsured exposure for a *Lambertson* claim asserted against them.

Having the ability to waive and walk also allows employers and their workers' compensation insurers to aggressively pursue subrogation claims, obtain specialized "reverse-*Naig*" settlements with the direct defendants and, in the right circumstances, recover subrogation monies at trial, all without creating a *Lambertson* liability situation for the employer. The "waive and walk" rights allow for flexible and substantive defense investigation and collection of evidence without the risk of significant liability exposure impeding the investigation. In appropriate factual circumstances, subrogation can be initiated and the claim pursued against responsible parties. If evidence is later discovered indicating that the employer is at fault, the employer can exercise its waive and walk rights prior to jury selection to avoid any contribution exposure.

It is important to recognize that the employer's subrogation claim has no bearing on the employer's ability to waive subrogation in order to avoid contribution liability. Thus, in a situation where the initial investigation discloses that the employer is significantly at fault for causing the employee's injury, even an extremely weak subrogation claim can be waived for the purposes of eliminating the employer's contribution liability.

This important law makes it important for insurers and counsel in liability matters to consider the “waive and walk” rights of the employer-third party defendant as part of the strategic defense handling. In addition, in work injuries involving potential employer liability, insurers, claims administrators and defense counsel in the workers’ compensation claim should consider preserving the employer’s subrogation interest in workers’ compensation settlements, which will allow the employer the option to “waive and walk” from the liability case.

Please feel free to contact us should you have any questions or comments concerning these issues. Thank you.

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