

THE EMPLOYER'S LIABILITY LAW – THE “ORIGINAL” WORKER'S COMPENSATION

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I A Little History

In 1911, before the birth of Oregon workers compensation, the voters passed an initiative adopting the Employers' Liability Law (ELL). It provided a comprehensive system to protect workers engaged in hazardous employment and required employers to “use every care, device and precaution which it is practicable to use for the protection and safety of life and limb, and limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.” 1911 Or Laws, Ch 3, section 1.

With mandatory workers compensation and its attendant employer immunity, the ELL has evolved primarily into a statutory remedy for recovery for injuries caused by dangerous practices of others at the work site.

Every work site accident has the potential for an ELL claim. It is incumbent on the worker's attorney, especially the workers compensation attorney, to carefully consider the ELL in order to obtain complete recovery for the client.

II What is the Employer Liability Law?

Most, but not all, ELL cases involve construction accidents in which an injured worker sues a general contractor or sub contractor other than his or her direct employer for causing or permitting an unsafe condition to exist at the site.

The Employer Liability Law essentially has two working parts. The first, ORS 654.305, addresses general employer liability and remains virtually unchanged since 1911:

“Generally, all owners, contractors or subcontractors and other persons having charge of, or responsibility for, any work involving a risk or danger to the employees or the public shall use every device, care and precaution that is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and

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without regard to the additional cost of suitable material or safety appliance and devices.”

The second, ORS 654.310, deals with the violation of workplace safety regulations:

“All owners, contractors, subcontractors, or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all places of employment are in compliance with every applicable order, decision, direction, standard, rule or regulation made or prescribed by the Department of Consumer and Business Services pursuant to ORS 654.001 to 654.295 and 654.750 to 654.780.”

III Who is covered by the ELL?

Workers engaged in work involving “risk or danger” for general employer liability under ORS 654.305 and workers engaged in the activities described in ORS 654.310 (which covers just about anything) are covered by the ELL.

The primary limitation is that the worker must be an employee of someone. Thus, an independent contractor is not an employee and is not covered. *Groves v. Max J. Kuney Co.*, 303 Or 468, 737 P2d 1240 (1987). Likewise, a manager or superintendent who is in charge of the work may not recover. ORS 654.315.

IV Who is subject to the ELL?

While ELL cases mostly involve construction site injuries, other places can give rise to these claims. To be subject to the ELL an indirect employer must “have charge of” work involving risk or danger.

To be considered plaintiff’s indirect employer, one of three situations must exist. These are clearly set forth in the case of *Sacher v. Bohemia, Inc.* 302 Or 477, 481, 731 P2d 434 (1987):

- a. Common enterprise: Defendant and plaintiff’s employer are simultaneously engaged in carrying out work on a common enterprise.
- b. Retained right to control: The defendant retains the right to control the manner or method in which the risk producing activity is performed.
- c. Actual exercise of control: The defendant actually exercises control as to the manner or method in which the risk producing activity is performed.

Sometimes all three of the conditions exist, but only one is needed. The actual work being performed may be jointly occurring with employees of both plaintiff's direct employer and defendant's employees.

Retained right to control often is contractual. An owner or general may require a subcontractor to perform work activities according to defendant's direction. More likely, though, contracts will state that subcontractors are hired to perform their "specialty" and will attempt to isolate the defendant from the manner, method or means of performing the subcontractor's work.

Actual exercise of control is more often what occurs on a jobsite, independent of contractual terms. *Woodbury v. CH2MHill, Inc.* 335 OR 154, 61, P3d 918 (2003) substantially broadened the concept of the "risk producing activity" regarding which an indirect employer may be actually exercising control. The court held that the general contractor exercised actual control over safety, and the work which required plaintiff to be at a dangerous height; and failed to provide fall protection training or supervision. Thus, the general became plaintiff's indirect employer.

In certain situations there is a nondelegable duty on the part of the general contractor to provide a safe work site. This situation usually arises in contracts receiving federal funds and establishes the right to control as a matter of law. *George v. Myers*, 169 Or App 472, 10 P3d 265 (2000).

V Making the ELL Case Work for You.

We all need to remember that many "third party cases" may also have Employer Liability Law claims. If the work involves risk or danger and there is common enterprise, retained or actual control over the "risk producing activity" by the defendant, an ELL claim exists.

An ELL claim is a negligence claim. However, it has many advantages over a common law negligence claim.

- The standard of care on the defendant is much greater under the ELL than under common law negligence. The statutory requirement that defendant "shall use every device, care and precaution" without regard to cost, is a killer for defendants.
- A higher standard also exists under the "safety regulations" section of the ELL. Each section of the ELL can be alleged as alternative counts or may stand alone. Although ORS 654.310 more likely will involve construction sites, or places of employment subject to Or-OSHA or other DCBS rules, regulations, etc., if a violation of a rule or regulation occurred, there has thus been a violation of the Employer Liability Law. Most helpful in this arena is the Uniform Civil Jury Instruction No. 55.07 which says exactly that.
- ELL cases are unique in that "subsequent remedial measures" are admissible. *Rich v. Tite-Knot Pine Mill*, 245 Or 185, 421, P2d 370 (1966). If they did it correctly after an injury, it is evidence of what could have been done if "every device, care and precaution" had been used for the protection and safety of life and limb.
- The defendant may not join the plaintiff's direct employer and, due to workers compensation immunity, is very limited in its ability to shift any of the blame for the accident to the direct employer. ORS 31.600(2)(a). See *Lyons v. Lyons v. Walsh & Sons Trucking Co., Ltd.*, 183

Or App 76, 51 P3d 625 (2002), *affirmed on other grounds*, 337 Or 319 (2004).

- Unlike actions under the Wrongful Death Act, ORS 30.020, the ELL permits recovery “without any limit as to the amount of damages which may be awarded.” ORS 654.325.
- As with other third party actions, ELL cases receive precedence over all other civil cases on the docket. ORS 656.595(1). This will not get you too far but is good ammunition to defeat the defendant’s multiple requests for continuance.

By bringing alternative counts alleging violation of both sections of the Employer Liability Law, and by alleging as many of the three ways to make the defendant an indirect employer, your success at this trial will be maximized. Use all of the ELL to expand your evidence and to broaden the scope of discovery. Before closing you always drop weaker allegations. But, for example, without alleging “right to control” you may have a problem introducing the contracts as evidence.

A knowledge of the state and federal regulations governing your plaintiff’s area of employment is essential. Most federal regulations are incorporated by reference into the Or OSHA regulations and these form the basis of your claims under ORS 654.310.

The subject of discovery under the Employer Liability Law is best left for a more comprehensive discussion. However, the paradox created by the laws of safety and the profit motive can make discovery fun. Almost always, defendants’ own safety materials will be your biggest sword. Arm yourselves accordingly and enjoy using one of the truly “plaintiff-friendly” tort laws available to us in Oregon.