

WISCONSIN WORKERS' COMPENSATION SUBROGATION AND EMPLOYER LIABILITY AT A GLANCE

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1. **Third-party situations.**

Every time a worker is injured at work, there are at least two parties, namely, the worker and the employer, for purposes of workers' compensation litigation. However, when the worker is injured through the fault or negligence of someone who is not an agent of his employer, issues of workers' compensation subrogation and employer liability arises as a result of claims that may be brought against the negligent third party. These situations typically arise in automobile accidents, construction accidents, product liability accidents, premises accidents, and medical malpractice claims.

2. **Workers' compensation subrogation.**

The employer by statute has an opportunity to separately pursue reimbursement of workers' compensation benefits paid and payable or let the injured worker do so before the statute of limitations runs. Wis. Stat. § 102.29. If either the injured worker or the employer bring suit, they must provide "reasonable notice" to the other and presumably this is done by naming and serving the suit on the other as an involuntary plaintiff. *See*, Wis. Stat. § 803.03; *Anderson v. Garber*, 466 N.W.2d 721 (Wis. App. 1991); *Employers Mut. Liability Ins. Co. of Wisconsin*, 388 N.W.2d 658 (Wis. App. 1986).

3. **Workers' compensation as an exclusive remedy.**

Under Wis. Stat. § 102.03(2), an injured worker cannot sue his employer for anything other than workers' compensation benefits unless the employer has independent liability under a collective bargaining agreement, a local ordinance, or something similar to the dual capacity doctrine. *See*, Wis. Stat. § 102.03(2); *Houlihan v. ABC Ins. Co.*, 542 N.W.2d 178 (Wis. App. 1995), *review denied*, 546 N.W.2d 470 (Wis. 1995). Similarly, an injured worker cannot sue a co-worker unless that co-worker committed "an assault intended to cause bodily harm," was negligently operating "a vehicle not owned or leased by the employer" or has breached some independent duty to the coworker. *See*, Wis. Stat. § 102.03(2); *Ortman v. Jensen & Johnson*, 225 N.W.2d 635 (Wis. 1975); *Luppovici v. Hunzinger Construction Co.*, 255 N.W.2d 590 (Wis. 1997). In a loaned servant situation, an injured worker is precluded from pursuing claims against either the special or borrowing employer or the general or lending employer. *See*, *Braun v. Jewett*, 85 N.W.2d 364 (Wis. 1957).

4. **No Employer liability or Coverage B exposure.**

In *Anderson v. Garber*, 466 N.W.2d 721 (Wis. App. 1991), the Wisconsin courts confirmed that they are unwilling to recognize any employer liability under the exclusive remedy provisions cited above. However, an employer can be liable to a third-party tortfeasor if they have contractually agreed to indemnify them.

5. **Statutory distribution under Wis. Stat. § 102.29**

Upon recovery from a third-party tortfeasor, either by way of trial or settlement, generally, the worker's attorney takes the first third or contingent fee agreed, and then the employee receives one third of the settlement or verdict amount received by the injured worker. Out of the remaining two thirds, the employer is paid 100% of their lien less and the remainder is then given back to the worker and is available as a credit against future workers' compensation benefits. The employer has no discount for the cost of

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collection on past or future benefits. This statutory distribution is required unless the parties consent to do otherwise. *See, Nelson v. Rothering*, 496 N.W.2d 87 (Wis. 1993); *Skirowski v. Employers Mut. Cas.*, 462 N.W.2d 245 (Wis. 1990) *review denied*, 465 N.W.2d 656 (Wis. 1990); *Huck v. Chicago, St. Paul, M&O Ry. Co.*, 111 N.W.2d 434 (Wis. 1963). The court is allowed to deviate to some degree or at least exclude portions of a settlement from the formula distribution in circumstances that involve a spouse's loss of consortium claim, a wrongful death claim where some next of kin are not workers' compensation beneficiaries. *See generally, Brewer v. Auto-Owners Ins. Co.*, 418 N.W.2d 841 (Wis. App. 1987).

6. Uninsured and underinsured motor vehicle.

The employer has no right to recover workers' compensation paid and payable from an underinsured or uninsured motor vehicle policy. *Berna; Mork v. Jones*, 498 N.W.2d 221 (Wis. 1993).

7. Statutes of Limitations and Repose (Generally).

TYPE OF CLAIM	APPLICABLE LAW	TIME PERIOD
Personal injury	Wis. Stat. § 893.54	Three years
Wrongful death	Wis. Stat. § 893.54	Three years
Contract	Wis. Stat. § 893.43	Six years
Medical malpractice	Wis. Stat. § 893.54 Wis. Stat. § 893.80(1)(m)	Three years, however, notice of injury must be given within 180 days of discovery
Statute of Repose	Wis. Stat. § 893.89	Ten years for improvements to real property

8. Helpful Internet Links:

NAME/SUBJECT	WEB ADDRESS TO LINKS	NOTE
Wisconsin State Legislature, Statutes and Legislative History	http://www.legis.state.wi.us/RSB/STATS.HTML	Workers' Compensation Statute: Chapter 102; Subrogation § 102.29.
Wisconsin Department of Workforce Development	http://www.dwd.state.wi.us/wc/	General Information. Advisory Council
Workers' Compensation Office of the Commissioner of Insurance	http://oci.wi.gov/workcomp.html	
State Bar of Wisconsin	http://www.wisbar.org	

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