

Keys to Workers' Compensation Immunity

The liability of an employer [to an employee] prescribed in § 44.10 **shall be exclusive and in place of all other liability**...FLA. STAT. § 440.11(1) (2020).

- **Applies to Employees**, not independent contractors (unless independent contractor on construction site).

■ **Is Plaintiff Contesting Employment Status?**

“[t]he ‘extent of control has been recognized as the ‘most important factor in determining whether a person is an independent contractor or an employee . . . it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee.’” *Buncy v. Certified Grocers*, 592 So. 2d 336 (Fla. 1st DCA 1992); FLA. STAT. § 440.02(15)(a).

■ **Exceptions to Immunity:**

(1) Failure to secure payment of compensation:

- Obtaining a WC policy that covers the employee is enough. *Tu-Lane Investments, Inc. v. Orr*, 889 So. 2d 961 (Fla. 1st DCA 2004).

(2) Employer commits an “intentional tort” against employee (defined as):

- o Deliberate intent of employer to injure employee; OR
- o Conduct on the part of the employer that is **virtually certain** to result in injury or death to an employee.
 - The danger must have been **known to the employer** as a result of **prior similar accidents** and/or **explicit warnings**;
 - The employee was not aware of the risk because the danger was not apparent; and
 - The employer deliberately concealed or misrepresented the danger to prevent the employee from exercising informed judgment regarding the task.
 - o *Ramsey v. Dewitt Excavating, Inc.*, 248 So. 3d 1270 (Fla. 5th DCA 2018).
- o “Virtual Certainty” means that “the plaintiff must show that a given danger will result in an accident *every – or almost every – time.*” *Vallejos v. Lan Cargo, S.A.*, 116 So. 3d 545 (Fla. 3d DCA 2013).
- o Burden of Proof: “Clear and Convincing Evidence”

■ **Fellow Employees Also Enjoy Immunity, UNLESS:**

(1) The fellow employee acts with willful and wanton disregard or unprovoked physical aggression towards the injured employee; OR

(2) The fellow employee acts with gross negligence which proximately causes injury or death.
FLA. STAT. § 440.11(b)(2).

■ **Vertical & Horizontal Immunity**

Vertical Immunity:

- Prevents tort claims between employee and employer.
- Prevents tort claims between subcontractor and general contractor.
- Exceptions: same as “Exceptions to Immunity” above

Horizontal Immunity:

- Prevents tort claims between fellow employees.
- Prevents claims between an injured employee of one subcontractor against another subcontractor.
- Exceptions: “Gross negligence.” FLA. STAT. § 440.10(e).
 - o the conduct “would probably and most likely result in injury;” (look for history of injuries)
 - o Knowledge or awareness of the imminent danger on the part of the tortfeasor; **and**
 - o An act or omission that evince a conscious disregard of the consequences.

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■ Exempt Employers can “Opt In” to the Workers’ Compensation System

- The Statute allows an otherwise exempt employer to “opt in” to the workers’ compensation structure by securing workers’ compensation insurance for its employees. In doing so, the employer may take advantage of workers’ compensation immunity. FLA. STAT. § 440.04(2). *Allen v. Carmen’s Estate*, 281 So. 2d 317 (Fla. 1973).

■ Temporary Employees Are Treated Like Any Other Employee FLA. STAT. § 440.11(2)

- Employers who utilize workers from a “help supply services company” (i.e. borrowed servants) enjoy the same immunity from tort suits.
- This immunity extends to the employer’s other employees.
- The “borrowed” employee is treated like any other employee so long as WC benefits are provided to him.

■ Construction Material Suppliers are Not Included in Vertical/Horizontal Immunity

- Contractors and subcontractors are not immune from suit against employees of a material supplier who may be injured on the jobsite. *Adams Homes of Northwest Florida, Inc. v. Cranfill*, 7 So. 3d 611 (Fla. 5th DCA 2009).

Manfredo Formula: Recovering Work Comp Payments from Tort Cases

■ When employee is injured by the negligence of a third-party FLA. STAT. § 440.39

- o The employee may obtain workers’ compensation benefits **and** “may pursue his or her remedy by action at law or otherwise against such third-party tortfeasor.” FLA. STAT. § 440.39(1).
- o Employer/Carrier may file a “Notice of Payment of Compensation and Medical Benefits” which “shall constitute a lien upon any judgment or settlement recovered...” FLA. STAT. § 440.39(3)(a)

■ Calculating the Workers’ Compensation Lien

- **“Manfredo Formula”**: Formula used to calculate the amount of the workers’ compensation lien when benefits are provided by the employer/carrier prior to the employee’s legal action against a third-party. *Manfredo v. Employer’s Casualty Insurance Company*, 560 So. 2d 1162 (Fla. 1990).

$$\text{Plaintiff's Net Recovery} \div \text{Full Case Value} = \text{Percentage of Recovery}$$

Step 1: File Notice of Payment of Compensation of Medical Benefits in tort case. FLA. STAT. § 440.39(3)(a)

Step 2: Determine the amount of the lien: medical bills, wage loss, etc. (e.g. \$100,000)

Step 3: Determine net recovery to the Plaintiff: judgment/settlement less fees & costs.

- \$250,000 (gross recovery) – \$135,000 (fees & costs) = \$115,000 (net recovery)

Step 4: Divide net recovery by the “full value” of the claim to determine percentage of lien amount the carrier is entitled to (e.g. \$1,000,000 claim).

- \$115,000 (net recovery) ÷ \$1,000,000 (**full case value***) = 11.5%

Step 5: Carrier recovers 11.5% of its \$100,000 lien amount = **\$11,500 recovery for carrier.**
(or negotiate the amount of the recovery with Plaintiff’s counsel)

*Key variable that impacts amount of recovery.

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