

CONSTRUCTION  
TRIALS  
REAL ESTATE  
CORPORATE  
ENERGY  
EMPLOYMENT  
BANKRUPTCY

# The Legal Life of an Employee Injury

Presented by  
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# An Employee Gets Injured



**OSHA**



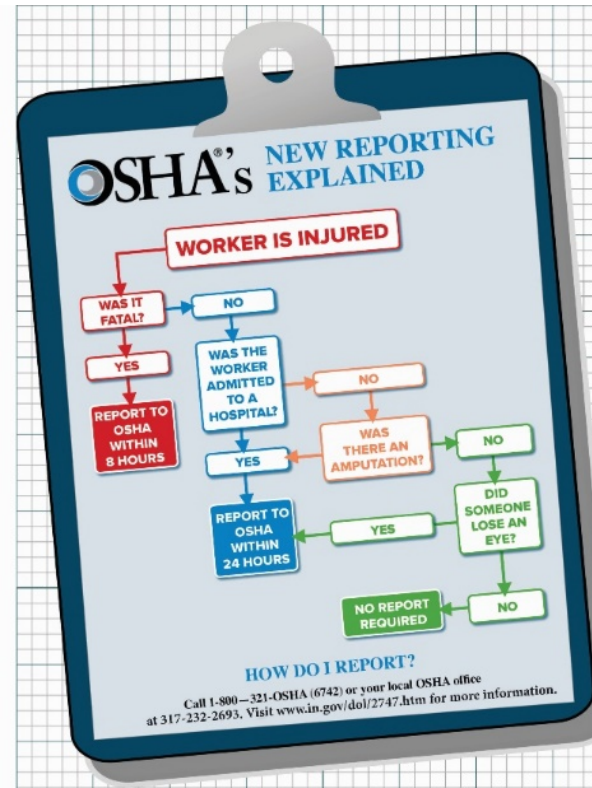
# OSHA

- Do we have to report the injury?



# What Injuries Need to be Reported to OSHA?

- As of January 1, 2015, all employers must report:
  - All work-related fatalities within 8 hours.
  - All work-related inpatient hospitalizations, all amputations and all losses of an eye within 24 hours.



# What is In-patient Hospitalization?

OSHA defines in-patient hospitalization as a formal admission to the in-patient service of a hospital or clinic for care or treatment



OSHA's Form 300 (Rev. 01/2004)  
**Log of Work-Related Injuries and Illnesses**

Year 2010



**U.S. Department of Labor**  
Occupational Safety and Health Administration

Establishment name	Carter & Carter Construction, LLC		
City	Auburn	State	AL

[illegible]

Be sure to transfer these totals to the Summary page (Form 300A) before you post it.

Public reporting burden for this collection of information is estimated to average 14 minutes per response, including time to review the instruction, search existing data sources, gather the data needed, and complete and review the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. If you have any comments about these estimates or any aspects of this data collection, contact: US Department of Labor, OSHA Office of Statistics, Room N-3644, 200 Constitution Ave. NW, Washington, DC 20210. Do not send the collected forms to this office.

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# OSHA Recordables

- Death
- Days away from work
- Restricted work or transfer to another job
- Medical treatment beyond first aid
- Loss of consciousness
- Significant injury or illness diagnosed by physician or other licensed health care professional

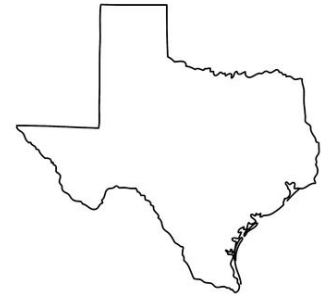


# **Worker's Compensation**

# Worker's Compensation

Employers who have Worker's Compensation coverage generally cannot be sued by employees as a result of the employee's injury.





## Exception in Texas

Gross negligence in cases where employee dies as a result of the injuries sustained.





# Exceptions in Louisiana



- Employer does not maintain workers' compensation or other insurance that covers the employee's injury.
- **Intentional Acts.**
  - Workers' compensation does affect liability of actor—an employer or any officer, employee, etc.—resulting from its or his intentional act.
  - Louisiana courts have defined intentional act to mean that person who acts either (1) consciously desires the physical result of his act; or (2) knows that the result is substantially certain to follow from his conduct.
  - Mere knowledge and appreciation of risk does *not* constitute intent. Neither does reckless or wanton conduct.



# Exceptions in Louisiana



- When employer intentionally and arbitrarily refuses to pay for medical benefits necessary to treat compensable injury or disease, knowing that death to the employee is substantially certain to result from the refusal.

# Without Workers' Comp in Texas? Employees Can Sue You.

And, no contributory negligence:

- If 1% negligent, you are in for 100% of liability and damage.

# Louisiana Employer without Workers' Comp?

- Employee first obtains judgment with Office of Workers' Compensation.
- If employer does *not* pay judgment and no other insurance pays the benefits, then employee has right to sue employer for all legal damages available under tort (e.g., actual damages, medical expenses, and lost wages).
- Trial court will be permitted to base damages on Office of Workers' Compensation judgment—which does **not** reduce benefits in proportion to the degree of negligence attributable to the employee.



# Louisiana Employer without Workers' Comp?

- In addition, employer may be assessed penalties and fines.
  - Civil penalties of \$250 per employee, up to a total amount of \$10,000, for a first offense; and \$500 per employee for a second or subsequent offense.
  - The amount of weekly compensation owed to injured employee (i.e., earnings benefits paid to employees who are unable to earn at least 90% of pre-injury wage) is increased by 50%.
  - Willful failure to secure compensation can result in *criminal* penalties, including a fine of up to \$250 per day coverage is not provided, and imprisonment for up to one year.

# Worker's Compensation Retaliation

- Retaliation in Louisiana includes firing or deciding not to hire.
  - Retaliation does *not* include the discharge of employees who are no longer able to perform their duties of employment due to injury.
- Retaliation in Texas is broader, and includes firing *or otherwise discriminating*. More on this later.

# Indemnity

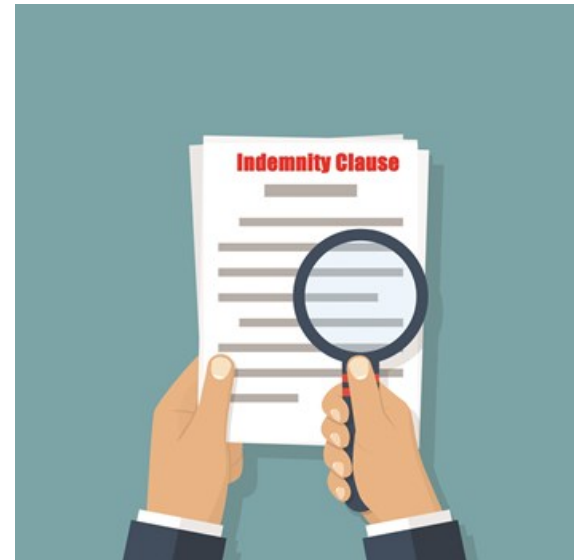
# Entirely Off the Hook with Workers' Compensation?

- Even if employees cannot sue you due to workers' compensation, they can sue general contractor and owner—and your contracts likely have indemnity obligations.



# Indemnity Clauses

- What are your responsibilities if employee sues owner/general contractor?



# Indemnity Provisions for Bodily Injury/Death of Employees

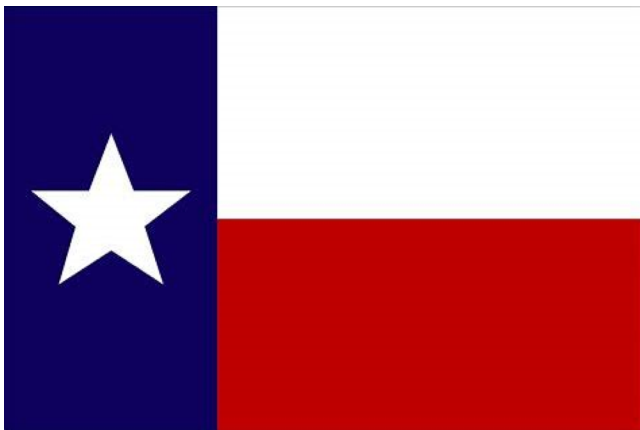
## **TEXAS**

**Fair Notice Requirements:** In order to assign liability for the death or injury of an employee, the indemnity must meet some strict requirements:

- **Express:** The language must be “express,” i.e. it clearly defines its obligations. For example, if it purports to require the subcontractor to indemnify a GC *even for acts the GC may have caused*, it must say so. There are no implied indemnities; and it must be
- **Conspicuous:** **THE INDEMNITY NEEDS TO CALL ATTENTION TO ITSELF AND STAND OUT FROM THE REST OF THE AGREEMENT.**

# Texas

- Express language means what it says, but also what it doesn't.
  - If you specify sole negligence, you exclude partial negligence *unless you also say* the indemnity covers partial negligence.



# Indemnity Terminology

## ***Broad Form Indemnity:***

The person giving indemnity assumes an unqualified obligation to hold the person receiving indemnity harmless from all liability—regardless of which party was actually at fault, even when the loss results from the sole negligence of the person receiving indemnity.

# Texas

- **In Construction Contracts:** Texas law prohibits “broad form” indemnity agreements in construction contracts, with few exceptions.
- However, broad form indemnity for employee injury/death claims is permitted.

# Indemnity Provisions for Bodily Injury/Death of Employees

## **LOUISIANA**

- Like Texas, Louisiana generally prohibits broad-form indemnity provisions in construction contracts.
- Unlike Texas, Louisiana does **not** have a bodily injury/death exception to its broad-form prohibition.
- As a result, provisions purporting to indemnify for bodily injury/death caused by person receiving indemnity are generally invalid in construction contracts.





- There is, however, an **insurance exception**.
  - An otherwise invalid indemnity clause can be saved if the contract (1) requires the person giving indemnity to obtain insurance to insure the obligation to indemnify and (2) there is evidence that the person giving indemnity recovered the cost of the required insurance in the contract price.
- Louisiana requires that an indemnity be *clear* if the intent is to require indemnity for your own negligence. It does not have the same specific Fair Notice requirements as Texas.

**Light Duty?**

Light duty not  
*required* but  
helps with wage  
replacement  
under workers'  
comp.



If offered to those *not* injured on the job, must offer it to those injured on the job who are in similar circumstances

*Or else possible retaliation claim in Texas*

You Do NOT have to create a  
“make work” job if light duty  
is unavailable, however...



Work must be in line with  
restrictions issued by  
medical provider



If they come back and do not adequately perform a light duty job within their restrictions— discipline



# **Does the Employee Need Vocational Counseling?**



# Vocational Counseling

- When a Louisiana employee suffers an injury which keeps the employee from earning the same wages as he did before, the employee is entitled to a job rehabilitation counselor / job training for up to 26 weeks.
- This may be initiated by an insurer or the employer.
- Where such counseling / training is refused, helps reduce weekly compensation (including supplemental wage benefits) by fifty percent for each week.

# **Does the Employee Need Leave?**

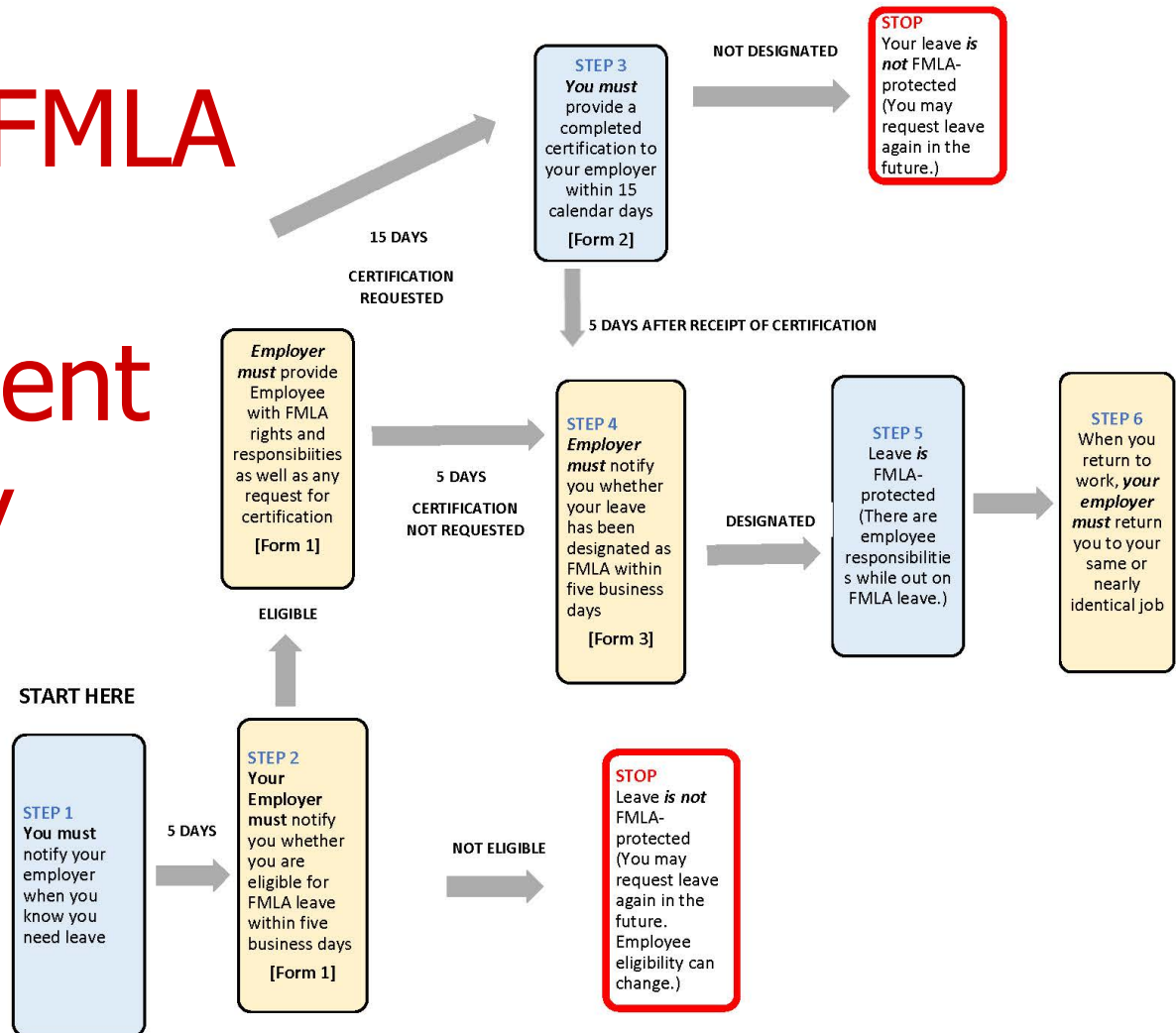
# FMLA

FMLA for employers with 50 or more employees – 12 weeks of unpaid leave;

But make sure employee individually qualifies:

- 1 year of employment
- 1250 hours over the last 12 months
- 75 mile rule

# Follow the FMLA Notice Requirement Closely



# FMLA

Avoid employees' "stacking" leave: Enforce a Company-wide policy to use PTO concurrently with unpaid FMLA leave.



# What if they need more than 12 weeks FMLA leave?

Certification of Health Care Provider for  
Employee's Serious Health Condition  
(Family and Medical Leave Act)

U.S. Department of Labor  
Wage and Hour Division



DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT

OMB Control Number: 1235-0003  
Expires: 8/31/2021

**SECTION I: For Completion by the EMPLOYER**

**INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: \_\_\_\_\_

Employee's job title: \_\_\_\_\_ Regular work schedule: \_\_\_\_\_

Employee's essential job functions: \_\_\_\_\_

Check if job description is attached: \_\_\_\_\_

# FMLA Protection Expires...

- But do you have to accommodate under the ADA by providing more leave?



# Do You Have a Neutral Attendance Policy?

- The idea is to set an outside limit on the overall amount of absenteeism that an employee can have before being subject to being replaced due to unavailability for work.





# Discussion

*Presented by*

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