

EMPLOYEE COVERAGE EXCEPTIONS UNDER THE WISCONSIN WORKER'S COMPENSATION ACT

1. Who is an employee under the Worker's Compensation Act?

Answer: Under section 102.07(4)(a) of the Wisconsin Worker's Compensation Act (Act), an employee is defined as "[e]very person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees...but not including (1) domestic servants, (2) any person whose employment is not in the trade, business, profession or occupation of the employer,...unless the employer elects to cover them."

2. What is the definition of "...any contract of hire..."?

Answer: A contract of hire means that the person performs services for which he or she is compensated. Compensation is something of value and may be cash or in-kind. See Section 7 for wage information.

3. Who is a domestic servant?

Answer: Although neither the statutes nor the case law provide a definition of "domestic servant" as it is used in s. 102.07(4) of the Act, the department has consistently ruled that persons hired in a private home to perform general household services, such as nanny services, baby-sitting, cooking, cleaning, laundering, gardening, yard and maintenance work and other duties commonly associated with the meaning of domestic servant, meet the definition of domestic servant intended by the Act.

4. What is the definition of "...trade, business, profession or occupation of the employer..."?

Answer: *Cornelius v. Industrial Commission*, 242 Wis. 183, 185 (1943) defines a trade or business as an occupation or employment *habitually engaged in for livelihood or gain*. If a person's employment is in the trade, business, profession or occupation of the employer, he or she is an employee, no matter how casual or isolated the employer's trade, business, profession or occupation may be. For example, typically a homeowner who hires someone to mow his or her lawn is not an employer subject to the Act because being a homeowner is not associated with a trade, business, profession or occupation.

5. When is an employer required to have a worker's compensation policy under the Act?

Answer: Under s. 102.04(1) (b) of the Act, an employer becomes subject to the Act and must carry a worker's compensation insurance policy if:

- 1) The employer employs three or more full-time or part-time employees. This employer must get insurance on the day they employ the third person.
- 2) The employer has one or more full-time or part-time employees and has paid gross combined wages of \$500 or more in any calendar quarter for work done in Wisconsin. This employer must have insurance by the 10th day of the first month of the next calendar quarter. There are four calendar quarters in a calendar year: the 1st quarter is January through March; the 2nd quarter is April through June; the 3rd quarter is July through September; and, the 4th quarter is October through December.
- 3) The farm (farmer) employs 6 or more employees (at one or more locations) on the same day for 20 days (consecutive or non-consecutive) during a calendar year. A calendar year is January through December. This farmer must have insurance within 10 days after the 20th day of employment. Some relatives of the farmer are not counted towards the 6 employees, but will be covered under a policy if one is purchased. See Section 24 for farming information.

6. Has a court determined an employer is immediately subject to the Act when it has three or more employees?

Answer: *Stapleton Cheese Co. vs. Industrial. Comm.*, 249 Wis. 133 (1947) defines "usually employs 3 or more persons," as employment of 3 persons for a single moment. Even though some of these employees may have been only casual employees, this is sufficient to make the employer subject to the Act. Based on the holdings in *Stapleton*, an employer is subject to the Act immediately upon the employment of 3 or more employees.

7. What is the definition of wages?

Answer: Wages encompass almost anything of value received, accepted or expected as compensation by a worker in exchange for his or her services. If something of value is received, accepted or expected as compensation by a worker in exchange for his or her services, an employee-employer relationship exists. While compensation is a necessary part of an employee-employer relationship for worker's compensation purposes, compensation need not be money. Compensation is a broader term than salary or wages and may include almost anything of value. When things of value are received as wages, they are deemed a part of the earnings and computed at the value thereof to the employee. Things of value include: room and board, rent credits, training, tuition, discounts, certificates, credits, vouchers and any other type of credit or reimbursement.

8. Who is covered by the Act?

Answer: Nearly all employers in Wisconsin are covered by the broad requirements outlined in Section 5. This includes both public and private employers. Nearly all private and public employees in Wisconsin are employees covered under the Act, including employees who are family members (except for farmers in some cases), minors, part-time employees and corporate officers.

9. Are there any exceptions?

Answer: There are a few classes of workers who are covered by federal laws and are not covered by the Act. Employees of the federal government, such as postal workers, U.S. Department of Veterans Affairs hospital employees or members of the armed forces, are covered by federal laws. People who work on interstate railroads are covered by the Federal Employers Liability Act. Seamen on navigable waters are covered by the Merchant Marine Act of 1920, and people loading and unloading vessels are covered by the Longshoremen's and Harbor Worker's Compensation Act.

The only employee exceptions to the Act's insurance requirement are: (1) domestic servants; (2) any person whose employment is not in the trade, business, profession or occupation of the employer; (3) some farm employees; (4) volunteers, including volunteers of non-profit organizations that receive money or other things of value totaling not more than \$10.00 per week; (5) religious sect members that qualify and are certified for an exemption; (6) employees of Native American tribal enterprises (including casinos), unless the tribe elects to waive its sovereign immunity and voluntarily become subject to the Act; and, (7) real estate brokers, agents and salespersons that satisfy the two elements pursuant to s. 452.38, Wis. Stats. Virtually all other workers and employers are subject to the Act.

10. What about relatives?

Answer: A member of a family who works for the employer is considered an employee and is covered by the Act. With the exception of farmers, an employee's relationship to the owner has no bearing on the requirement to carry worker's compensation insurance. See Section 25 for farming information.

11. What about minors?

Answer: A minor is an employee and is covered by the Act. A person's age has no bearing on the requirement to carry worker's compensation insurance.

12. What about part-time employees?

Answer: A part-time employee is an employee and is covered by the Act. Whether an employee works part-time or full-time has no bearing on the requirement to carry worker's compensation insurance.

13. What about the owners of sole-proprietorships, partnerships and limited liability companies?

Answer: Sole proprietors, partners and members of limited liability companies are exempt from coverage under the Act, but may elect to cover themselves. The employees of sole proprietorships, partnerships and limited liability companies are covered by the Act.

All worker's compensation policies exclude the sole proprietor, partners and members of limited liability companies, unless specifically endorsed to include them. Sole proprietors, partners and members of limited liability companies may voluntarily purchase worker's compensation insurance to cover their own work-related injuries and illnesses. Employers who have an existing worker's compensation insurance policy may add themselves by endorsement to that policy by notifying their agent and paying the additional premiums. To be covered under the policy, the policy must be endorsed to name the sole proprietor, partner or member of limited liability companies as a covered employee. Premiums are determined by using the payroll for individuals/partners as specified in the most recent rate revision circular.

14. What about corporate officers?

Answer: A corporate officer is considered an employee and is covered by the Act. All worker's compensation policies covering corporations include corporate officers. However, in a closely-held corporation, such as a corporation with not more than 10 stockholders, 1 or 2 officers may exclude themselves from coverage. If the corporation has other employees or officers, an insurance policy is required and the exclusion for officers must be made by an endorsement on the corporation's worker's compensation policy. The name of each excluded officer must be specified on the policy. The exclusion will remain in effect for the policy period. An officer who elects to exclude himself or herself is still an employee of the corporation. An excluded officer is still counted as an employee and his or her wages are included for the purposes of determining whether the corporation has 3 or more employees or has paid gross combined wages of \$500 or more in a calendar quarter under s. 102.04(1)(b) of the Act.

If a closely held corporation has 1 or 2 corporate officers and has no other employees or officers, a worker's compensation policy is not required, if each officer elects not to be subject to the Act by filing the Notice of Corporate Officer Option with the Worker's Compensation Division. A corporation with more than 2 corporate officers or any other employee or employees is not eligible to file a Notice of Corporate Officer Option and must maintain a worker's compensation insurance policy.

15. What about shareholders?

Answer: The owner of one or more shares of stock in a corporation is a shareholder, also commonly called a "stockholder." A shareholder is not considered an employee of the corporation unless he or she performs work for the corporation customarily performed by an employee.

16. What about members of a board of directors?

Answer: A member of the governing board of a corporation or association elected at annual meetings of the shareholders or association's members is a member of the board of directors. A director who sits on a board is considered an employee if he or she receives any kind of pay, compensation, directors' fee or something of value for his or her services or if he or she performs work customarily performed by an employee.

17. Who is a volunteer?

Answer: Although the statutes do not provide a definition of “volunteer” as it is used in s. 102.07(11) of the Act, the department has consistently ruled that a person who provides services of his or her own free will or on behalf of an organization or entity, who neither receives nor expects to receive any kind of pay or compensation for his or her services, meets the definition of volunteer intended by the Act.

Volunteers cannot be covered under a worker’s compensation policy and cannot collect worker’s compensation benefits, if they incur an injury or illness during the course of their voluntary service.

The Act has no jurisdiction over any other form of relief that may be available to a volunteer.

18. When and how does a volunteer evolve into an employee?

Answer: The primary test in determining when, how and if a volunteer evolves into an employee is “does the worker receive or expect to receive compensation (almost anything of value including discounts, certificates, credits, vouchers or any other type of reimbursement) in exchange for his or her services?” If not, the worker is probably a volunteer. If the answer is yes, he or she is most likely an employee.

The situation gets murky when the volunteer worker is a member of an organization that receives compensation for providing the services of the volunteer worker. A general “rule of thumb” is, if nothing of value changes hands from the recipient of services to the worker (the provider or performer of services) this is probably a volunteer situation. However, if something of value is received, accepted or expected by the worker (the provider or performer of the services) or the organization in exchange for the work performed, an employee-employer relationship may exist. Any claim filed by a worker (the provider or performer of services) injured while performing services under these conditions is determined on a case-by-case basis, according to the facts and circumstances at the time of injury.

19. What about a volunteer working for a non-profit organization who receives money or other things of value totaling not more than \$10.00 per week?

Answer: Under s. 102.07(11m) of the Act, a volunteer for a non-profit organization that is exempt or eligible for exemption from federal income taxation under the Federal Internal Revenue Code, who receives nominal payments of money or other things of value totaling not more than \$10.00 per week, is not considered an employee of the non-profit organization under the Act unless the non-profit organization elects to cover the “nominally paid” volunteer under its policy.

20. What about a volunteer firefighter or a volunteer member of a rescue squad?

Answer: Under s. 102.07(7)(a) of the Act, a volunteer firefighter or member of a rescue squad is considered an employee and is covered by the Act. If the fire company, fire department or squad does not have a worker’s compensation insurance policy, the municipality or county within which the company, department or squad was organized is liable for worker’s compensation coverage.

Under s. 102.07(2) of the Act, any peace officer while engaged in the enforcement of peace or in the pursuit and capture of those charged with a crime is considered an employee and covered by the Act.

21. What about volunteer members of a non-profit organization's or non-profit association's board of directors?

Answer: Although the statutes do not provide a definition of "volunteer" as it is used in s. 102.07(11) of the Act, the department has consistently ruled that a volunteer director of a non-profit organization or non-profit association who provides services of his or her own free will to or on behalf of an organization or entity, who neither receives nor expects to receive any kind of pay or compensation for his or her services, meets the definition of volunteer intended by the Act.

Volunteers cannot be covered under a worker's compensation policy and cannot collect worker's compensation benefits, if they incur an injury or illness during the course of their voluntary service.

The Act has no jurisdiction over any other form of relief that may be available to a volunteer.

22. What about the religious sect exemption?

Answer: Employers may apply for an exemption from the duty to insure workers who belong to a religious sect, such as Amish or Mennonites, whose tenets and teachings oppose accepting benefits of any public or private insurance payments for death, disability, old age or retirement, or that makes payments towards the cost of medical care, including federal social security benefits.

The exemption is not automatic. It applies only if all the following occur: (1) the employer applies for an exemption; (2) the religious sect has a long standing history (25 years is presumed to be long-standing history) of providing its members who become dependent on the sect as a result of work-related injuries, with a standard of living and medical treatment that are reasonable when compared to the general standard of living and medical treatment for members of the religious sect; (3) the worker waives his or her rights to worker's compensation and requests an exemption; and, (4) the religious sect agrees to pay benefits at a reasonable standard of living and medical treatment when compared to the general standards for members of the sect. To qualify for this exemption, employers must apply to the Worker's Compensation Division.

23. What about Native American tribal enterprises and casinos?

Answer: Native American tribal enterprises (including casinos) are not required to comply with any of the provisions of the Act. Tribes are sovereign nations, covered by sovereign immunity. The Act does not apply to tribal enterprises. The Department has no jurisdiction over tribal enterprises, including whether or not a tribe covers its employees with worker's compensation insurance or pays worker's compensation benefits, unless a tribe elects to waive its sovereign immunity. The Department has long held that a tribal enterprise can waive its immunity by voluntarily purchasing a worker's compensation insurance policy. In that case, pursuant to s. 102.05(2) of the Act, the tribal enterprise, like any other enterprise that is not subject to the law, has elected to accept the provisions of the Act by voluntarily purchasing a policy.

If you have questions regarding tribal enterprises and injury claims not covered by the Act, you may contact the following offices: (1) United States Department of the Interior - Bureau of Indian Affairs, Great Lakes Agency at 615 Main Street, Ashland, WI 54806 or (715) 682-4527; or, (2) United States Department of the Interior - Bureau of Indian Affairs, Office of Public Affairs at 1849 C Street, NW, Washington, DC 20240-0001 or (202) 208-3711.

24. What about real estate brokers, agents and salespersons?

Answer: Under s. 452.38, Wis. Stats., a licensee, including a real estate broker, an agent or a salesperson is not considered an employee of a firm under the Act, if all of the following are satisfied:

(a) A written agreement has been entered into with the firm that provides that the licensee shall not be treated as an employee for federal and state tax purposes.

(b) Seventy-five percent (75%) or more of the compensation related to sales or other output, as measured on a calendar year basis, paid to the licensee pursuant to the written agreement referenced under par. (a) is directly related to the brokerage services¹ performed by the licensee on behalf of the firm.

Under s. 102.078 (1), Wis. Stats., a firm, as defined under s. 452.01 (4w), may elect to name as its employee for worker's compensation purposes a real estate broker, an agent or salesperson who is excluded under s. 452.38 by an endorsement on its worker's compensation insurance policy.

25. What about a farmer who employs relatives?

Answer: A farmer becomes subject to the Act and must carry a worker’s compensation insurance policy if the farmer employs 6 or more employees (at one or more locations) on the same day for 20 days (consecutive or non-consecutive) during a calendar year. A calendar year is January through December. The farmer must have insurance within 10 days after the 20th day of employment. Some relatives of the farmer are not counted as employees.

Eligibility for benefits. The most important thing to remember is that the special rules for relatives relate only to *counting*, not to *benefits* or insurance *premiums*. Put simply, these rules specify that certain relatives are not counted when deciding whether a farmer has crossed the 6-employee threshold.

However, once it is determined that a farmer is subject to the Act, at which time the farmer must obtain insurance, then *all* employees of the farmer (including *all* the relatives who were not counted for purposes of determining whether that insurance was required) are covered under that policy. This means that the farmer’s insurance premiums will be based on all wages paid by the farmer to all employees, including these relatives.

Counting toward the 6-employee threshold. When determining whether a farmer has 6 or more employees, the law says that certain direct ancestors and descendants of the farmer (“lineal” relatives) and certain more distant familial relatives and in-laws (“collateral” relatives) shall not be counted. The list in Table 1 applies to all farmers. For purposes of counting, these relatives are not employees.

Table 1-Farmers

Farmer’s Relatives That Are Not Counted as the Farmer’s Employees	
Parent	Spouse
Child	Sister-in-law or Brother-in-law
Brother	Daughter-in-law or Son-in-law
Sister	Mother-in-law or Father-in-law

If the farm operation is a *sole proprietorship*, the relatives of the owner listed in Table 1 are not counted when counting the number of employees.

If the farm operation is a *partnership*, the relatives of a partner listed in Table 1 are not counted when counting the number of employees.

If the farm operation is a *limited liability company*, the relatives of a member of the limited liability company listed in Table 1 are not counted when counting the number of employees.

If the farm is a *family farm corporation*,¹ relatives of a shareholder listed in Table 1 are not counted when counting the number of employees.

Important Note: If the farm is a *corporation* (where all shareholders are not related as lineal ancestors or descendants), all employees including the relatives of a shareholder listed in Table 1 are counted when counting the number of employees.

¹ A “family farm corporation” means a corporation engaged in farming **all** of whose shareholders are related as lineal ancestors or lineal descendants, or as spouses, brothers, sisters, uncles, aunts, cousins or in-laws (listed in Table 1) of such lineal ancestor or descendant. [s. 102.04(5)(c), Stats.]

26. What about independent contractors?

Answer: Under s. 102.07(8)² of the Act, a person is required to meet a nine-part test before he or she is considered an independent contractor rather than an employee. A person is not an independent contractor for worker's compensation purposes just because the person says they are, or because the contractor over them says so, or because they both say so, or even if other regulators (including the federal government and other state agencies) say so. The 9-part statutory test set forth under s. 102.07(8) of the Act, must be met before a person working under another person is considered not to be an employee.

The worker's compensation employment relationship will be determined, in each case, solely by the evidentiary facts relating to the 9-point statutory test. Any worker's compensation claim filed by an independent contractor injured while performing services under these conditions is determined on a case-by-case basis, according to the facts and circumstances at the time of injury. To be considered an independent contractor and not an employee, an individual must meet and maintain all nine of the following requirements:

1. Maintain a separate business.
2. Obtain a Federal Employer Identification number from the Federal Internal Revenue Service (IRS) or have filed business or self-employment income tax returns with the IRS based on the work or service in the previous year. A social security number cannot be substituted for a FEIN and does not meet the legal burden of s. 102.07(8) of the Act.
3. Operate under specific contracts.
4. Be responsible for operating expenses under the contracts.
5. Be responsible for satisfactory performance of the work under the contracts.
6. Be paid per contract, per job, by commission or by competitive bid.
7. Be subject to profit or loss in performing the work under the contracts.
8. Have recurring business liabilities and obligations.
9. Be in a position to succeed or fail, if business expenses exceed income.

² Except as provided in pars. (b) and (bm), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

(bm) A real estate broker or salesperson who is excluded under s. 452.38 is not an employee of a firm, as defined in s. 452.01 (4w), for whom the real estate broker or salesperson performs services unless the firm elects under s. 102.078 to name the real estate broker or salesperson as its employee.

(c) The division may not admit in evidence any state or federal law, regulation, or document granting operating authority, or license when determining whether an independent contractor meets the conditions specified in par. (b) 1. or 3.

27. What happens if a person is injured and there is a dispute as to whether or not the person is an employee covered by the Act?

Answer: Generally, if there is a dispute regarding worker's compensation insurance coverage, remuneration and/or benefits, it is adjudicated by the Wisconsin Department of Administration – Division of Hearings and Appeals, Office of Worker's Compensation Hearings on a case-by-case basis, according to the facts and circumstances at the time of injury.

If an employer has a worker's compensation policy in this situation, the policy will cover any person working under the employer, if he or she is found to be an employee at the time of injury.

An employer who does not have a worker's compensation insurance policy when he or she is subject to the Act, is subject to monetary penalties. The penalty for failure to carry worker's compensation insurance when required is twice the amount of premium not paid during an uninsured time period or \$750, whichever is greater. In addition, if an employee is injured while working for an illegally uninsured employer, the uninsured employer is personally liable for reimbursement to the Uninsured Employers Fund for benefit payments made by the Fund to the injured employee (or the employee's dependents). The penalties and reimbursements to the Fund are mandatory and non-negotiable.

Employers who are not subject to the Act and do not carry worker's compensation insurance may be sued in a civil action for damages by an employee who is injured while at work.

28. Can an employer voluntarily obtain worker's compensation insurance?

Answer: Yes, all employers may voluntarily elect coverage for their employees. However, the policy can not cover volunteers. In the event of a work injury, the employees are eligible for all medical, indemnity and other worker's compensation benefits, without regard to who was at fault in causing the injury. The voluntary purchase of a worker's compensation policy also protects the employer from most civil tort actions by employees related to the work injury. With few exceptions, where the employer has the worker's compensation insurance coverage in place, an injured worker is limited to the benefits to which he or she is legally entitled under the Act.

29. How can I get more information about coverage under the Act?

Answer: Contact the Wisconsin Department of Workforce Development - Worker's Compensation Division, Bureau of Insurance Programs in-person at GEF-1 State Office Building, Room C100, 201 E. Washington Avenue, Madison by mail at P.O. Box 7901, Madison, WI 53707-7901 or by phone at (608) 266-3046. The Division also offers information online at: <http://dwd.wisconsin.gov/wc>

DWD is an equal opportunity employer and service provider. If you have a disability and need assistance with this information, please dial 7-1-1 for Wisconsin Relay Service. Please contact the Worker's Compensation Division at (608) 266-1340 to request information in an alternate format, including translated to another language.

30. What are some of the key statutes regarding employer liability to carry worker's compensation insurance under the Wisconsin Worker's Compensation Act?

Chapter 102	Worker's Compensation
Wisconsin Statute 102.03	Conditions of liability.
Wisconsin Statute 102.03(2)	Exclusive remedy, prevents an injured employee from suing an employer who has the required insurance in force at the time a work-related injury occurs.
Wisconsin Statute 102.04	Definition of employer, when an employer becomes subject to the Act.
Wisconsin Statute 102.04(1)(c)	Definition of when a farmer becomes subject to the Act.
Wisconsin Statute 102.04(3)	Definition of farming.
Wisconsin Statute 102.05	Election by employer, withdrawal.
Wisconsin Statute 102.05(3)	Election by farmer, withdrawal.
Wisconsin Statute 102.07	Definition of an employee.
Wisconsin Statute 102.07(5)	Definition of a farm employee.
Wisconsin Statute 102.07(8)(b)	Definition of an independent contractor.
Wisconsin Statute 102.075	Election by sole proprietor, partner or member of limited liability company.
Wisconsin Statute 102.076	Election by corporate officer, corporate officer option under the Act.
Wisconsin Statute 102.28(2)	Required insurance, subject employers must be insured by an insurance company authorized to write worker's compensation in Wisconsin.
Wisconsin Statute 102.28(3)	Provision of Alternative Benefits, allows an exemption from the duty to insure religious sect members that qualify and are certified for an exemption.
Wisconsin Statute 102.28(4)	Closure Order, orders an employer to cease operations until the employer complies with s. 102.28(2)(a) by obtaining a worker's compensation insurance policy.
Wisconsin Statute 102.28(5)	Employer's liability.
Wisconsin Statute 102.31	Worker's compensation insurance; policy regulations.
Wisconsin Statute 102.80	Uninsured employers fund.
Wisconsin Statute 102.81	Compensation for injured employee of uninsured employer.
Wisconsin Statute 102.82(1)(2)(a) and (2)(ag)	Uninsured employer payments, reimbursement of the UEF for payments made under s. 102.81 and penalty assessed an uninsured employer for a lapse of worker's compensation insurance coverage.
Wisconsin Statute 102.83	Collection of uninsured employer payments.
Wisconsin Statute 102.835	Levy for delinquent payments.
Wisconsin Statute 102.85	Uninsured employers; penalties, penalties and forfeitures for uninsured employers who fail to comply with the Act.
DWD 80.62 (Administrative Code)	Uninsured employers fund.
DWD 80.65 (Administrative Code)	Notice of cancellation or termination.
Chapter 626	Rate regulation in worker's compensation insurance
Wisconsin Statute 626.03	Scope of application.
Wisconsin Statute 626.32	Development of rates by bureau.
Wisconsin Statute 626.35	Worker's compensation insurance contracts.