

SOLE PROPRIETORS UNDER THE WISCONSIN WORKER'S COMPENSATION ACT

1. What is a sole proprietorship?

Answer: A form of business organization that is unincorporated and has only one owner.

2. When is an employer required to have a worker's compensation policy under the Wisconsin Worker's Compensation Act?

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

- 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 1 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 4 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.

3. Who is considered an employee and covered by the Act?

Answer: Nearly all private and public employees in Wisconsin are considered employees and covered under the Act, including; family members (except for certain relatives of farmers), minors, part-time employees and corporate officers.

4. What about a sole-proprietor?

Answer: Sole proprietors, including owner-operators, are exempt from coverage under the Act, but may elect to cover themselves. The employees of sole proprietorships are covered by the Act.

All worker's compensation policies exclude sole proprietors unless specifically endorsed to include them. Sole proprietors may voluntarily purchase worker's compensation insurance to cover his or her 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 as a covered employee.

5. What about independent contractors?

Answer: Under s. 102.07(8) of the Act, a person is required to meet a 9-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.

To be considered an independent contractor and not an employee, an individual must meet and maintain all 9 of the following requirements: 1) Maintain a separate business; 2) Obtain a Federal Employer Identification Number (FEIN) 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), Wis. Stats.*); 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; and 9) Be in a position to succeed or fail if business expense exceeds income.

Any sub-contractor or independent contractor who does not meet all 9 parts of the test and who is not an employer themselves, is an employee of the employer they are working under in Wisconsin.

6. What if a sole proprietor doesn't have any employees?

Answer: Under the Act, a sole proprietor who does not have any employees working in Wisconsin is not required to carry worker's compensation insurance.

7. Can a sole proprietor be required under a contract to have a worker's compensation policy even though he or she is not required to have a policy under the Act?

Answer: Yes, a contract may require a sole proprietor to have worker's compensation insurance policy even though he or she is not required to have a policy under the Act. Contracts often stipulate that sub-contractors (sole proprietor) have worker's compensation insurance and require a Certificate of Insurance as proof that the coverage is in place. The Worker's Compensation Division has no jurisdiction over contract stipulations that require worker's compensation insurance.

8. What are the options available to a sole proprietor that is offered a contract that requires him or her to have a worker's compensation insurance policy?

Answer: There are 3 options available to a sole proprietor that is offered a contract that requires him or her to have a worker's compensation insurance policy.

- 1) The sole proprietor may voluntarily purchase a worker's compensation insurance policy to cover his or her own work-related injuries and illnesses. It is necessary to have the policy endorsed to name the sole proprietor as a covered employee. All worker's compensation policies exclude the sole proprietor unless specifically endorsed to include them. Premium is determined by using the payroll for individuals/partners given in the most recent rate revision circular.
- 2) The sole proprietor may purchase a "minimum-minimum premium policy". A minimum-minimum premium policy covers any potential exposure (employees) a sole proprietor may have, but it does not cover the sole proprietor. The maximum cost of minimum-minimum premium policy is currently \$900 (based on the type of business being insured, the cost may be less).

Under the Wisconsin Insurance Basic Manual Rules, if the designated minimum policy premium is greater than 20% of the earned payroll, the minimum premium is 20% of the earned payroll, but not less than the policy expense constant (the expense constant is the cost of producing and servicing the policy).

When a policy is audited, if there has been no earned payroll (no employees) during the policy year (since 20% of \$0 is \$0), the actual minimum charge for the policy is \$220 (the expense constant). The sole proprietor will receive a refund of any premium amount paid in excess of the \$220. Example: \$900 (initial premium), minus \$220 (expense constant) = \$680 premium refund.

- 3) Do not accept the contract.

9. Does a "minimum-minimum" premium policy provide coverage for a sole proprietor's work-related injury or illness?

Answer: No, a minimum-minimum premium policy does not provide coverage for a sole proprietor's work-related injury or illness. A minimum-minimum premium policy covers only employees of the sole proprietor. A sole proprietor is not eligible for worker's compensation benefits under a minimum-minimum premium policy.

10. What does a minimum-minimum premium policy provide to a sole proprietor?

Answer:

- 1) The policy provides the sole proprietor with a Certificate of Insurance that he or she can provide as proof of a worker's compensation policy on his or her business.
- 2) The policy provides coverage for any person working under the sole proprietor if he or she is found to be an employee at the time of injury.
- 3) The policy protects the sole proprietor from most lawsuits brought by an employee or independent contractor because of a work-related illness or injury. 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 or independent contractor who is injured while at work. An employer who does not have worker's compensation insurance policy at a time, when under the Act he or she is required to have a policy, is subject to monetary penalties. 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.

11. Rather than purchasing a policy, can a sole proprietor simply waive his or her right to worker's compensation?

Answer: No. No agreement to waive the right to compensation is valid under s. 102.16(5), of the Act. Even if a sole proprietor signs a waiver, it is not valid and would have no affect on the validity of a worker's compensation claim.

12. What if a sole proprietor or owner-operator has a disability insurance policy?

Answer: Disability insurance is not worker's compensation insurance and does not meet the legal burden of a contract stipulating worker's compensation insurance. Disability insurance is a form of health insurance that pays the policyholder in place of his or her usual income if the policyholder cannot work because of illness or accident. Worker's compensation insurance is liability insurance that pays benefits for wage loss, reasonable and necessary medical costs, benefits for permanent disability, vocational rehabilitation benefits to employees for on-the-job injuries, and benefits to dependents of employees killed by occupational accidents.

13. Why would a contractor require sub-contractors to have a worker's compensation policy?

Answer: The principal reason a contractor requires a sole proprietor to provide proof of worker's compensation is to eliminate the potential for an audit premium dispute with the contractor's insurance carrier over the sole proprietor's earnings.

Worker's compensation policy premium costs are based on the employer's payroll during the policy period. Worker's compensation policies are audited by the insurance carrier to determine the employer's actual payroll during the policy period. When a contractor's policy is audited by his or her insurance carrier, the carrier will identify the monies being paid to the sole proprietor or independent contractor. When informed the monies were paid to a sole proprietor or independent contractor, the carrier requests evidence the sole proprietor or independent contractor meets the 9-part independent contractor test or proof of his or her worker's compensation insurance coverage. The proof requested is usually a Certificate of Insurance.

If the sole proprietor or independent contractor does not meet the 9-part independent contractor test or does not have a policy, the insurance carrier will charge audit premium on the monies paid to the sole proprietor or independent contractor while working for the contractor during the policy period.

To avoid any potential audit premium disputes, many contractors simply stipulate in the contract that a sole proprietor or independent contractor must have worker's compensation insurance and require him or her to provide a Certificate of Insurance as proof of coverage before doing any work specified in the contract.

14. Why are insurance carriers concerned about the status of a sole proprietor's worker's compensation insurance coverage?

Answer: If a sole proprietor or independent contractor is injured, he or she may file a worker's compensation claim against the contractor.

Although the contractor and insurance carrier would likely dispute any claim based on their belief the person is a sole proprietor or independent contractor and not an employee, and therefore not covered under the contractor's policy, the case would be determined according to the facts and circumstances at the time of injury. Any worker's compensation claim filed by an individual injured while performing services is determined on a case-by-case basis according to the facts and circumstances at the time of injury.

A valid worker's compensation policy held by a contractor in a case of this type, covers any person, including a sole proprietor or independent contractor, working under the contractor if the person is found to be an employee of the contractor at the time of an injury.

An insurance carrier must pay worker's compensation benefits to anyone found to be an employee of a contractor for whom the carrier is providing worker's compensation insurance. Premium is charged based on the money paid to any alleged sole proprietor or independent contractor who is found to be an employee.

Due to the insurance carrier's potential exposure when a sole proprietor or independent contractor does not have a policy, carriers, quite properly, want to have the policy premium identified and paid up-front. If an uninsured sole proprietor or independent contractor is injured while working for an insured contractor, there is a possibility the carrier will have to pay the claim. Insurance carriers want premium paid on all potential exposure.

15. What if an employer disagrees with an insurance carrier's audit findings?

Answer: The Worker's Compensation Division has no authority over the application of premium charges, billings, audits, classifications or rates for worker's compensation policies. The Wisconsin Compensation Rating Bureau (WCRB) has jurisdiction over these matters for the State of Wisconsin. The WCRB is regulated by the State of Wisconsin Office of the Commissioner of Insurance (OCI). The WCRB is located at 20700 W. Swenson Drive, Suite 100, Waukesha, WI 53186. For more information, call (262) 796-4540 or visit the WCRB website at: www.wcrb.org

Any employer who believes that the rules for premium charges, billings, audits, classifications or rates of the worker's compensation system have not been properly applied can request the WCRB's assistance in resolving the dispute.

- The employer should first work with his or her insurance carrier to resolve the dispute. If those efforts are unsuccessful, the employer should contact the WCRB, providing the details of all the issues in dispute.
- The WCRB will research each area of concern and provide an explanation regarding the correct application of the rule or classification in dispute and order corrections as appropriate.
- If the WCRB is unable to obtain the resolution desired by the employer, the WCRB will notify the employer of applicable grievance procedures.

16. How do I file a complaint with the Office of the Commissioner of Insurance?

Answer: The OCI regulates the insurance industry in Wisconsin and provides assistance to consumers in resolving problems with insurance companies and agents, including policy audit issues. If an employer believes his or her insurance company acted improperly, the employer may file a complaint with OCI and seek remedial action. Contact OCI to obtain an Insurance Complaint Form. The OCI is located in the GEF-3 State Office Building, 2nd Floor, 125 S. Webster Street, Madison, Wisconsin 53702. Call these phone numbers for assistance: General Inquiries, (608) 266-3585 or the Complaint Line, (800) 236-8517. Find information online at: http://oci.wi.gov/oci_home.htm

When filing a complaint, an employer should describe the problem in detail, include copies of pertinent papers, letters, or other information related to the issue and indicate how the he or she thinks the problem should be resolved. OCI will investigate the complaint and notify the employer of its determination.

17. 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 State of Wisconsin Division of Hearing 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

Any worker's compensation claim filed by an individual injured while performing services is also determined 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 and claims administration expense 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 therefore, are not required to carry worker's compensation insurance, may be sued in a civil action for damages by an employee who is injured while working.

18. How do I obtain worker's compensation insurance?

Answer: To obtain worker's compensation insurance, contact an insurance company or its agent and ask whether the company writes worker's compensation insurance for Wisconsin. If you have or know an insurance agent, you may contact him or her. If you are refused insurance coverage by an agent or insurance company, you may obtain coverage from the WCRB through the Worker's Compensation Insurance Pool upon prepayment of premium. The WCRB is located at 20700 Swenson Drive, Suite 100, Waukesha, Wisconsin. For more information, call (262) 796-4540 or visit the WCRB website at: www.wcrb.org.

19. 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.

20. What are some 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.