WORKERS’ COMPENSATION ANALYSIS AND REFORM:
MEASURING THE EFFECTIVENESS OF TORT REFORM THROUGH
ANALYSIS OF WORKERS’ COMPENSATION

A Thesis
Submitted to the Faculty of the
Graduate School of Arts and Sciences
of Georgetown University
in partial fulfillment of the requirements for the
degree of
Masters of Arts
in Development Management and Policy

By Joseph Kamau Christopher Bey, B.S.

26 March 2013
WORKERS COMPENSATION ANALYSIS AND REFORM:
MEASURING THE EFFECTIVENESS OF TORT REFORM THROUGH
ANALYSIS OF WORKERS’ COMPENSATION

By Joseph Kamau Christopher Bey, B.S.

Thesis Advisor: Eric Langenbacher, Ph.D., Georgetown University

Abstract

This study investigates workers’ compensation schemes in the United States. First and foremost, the work highlights the lack of literature serving as a critical analysis of workers’ compensation from the perspective of the working class. This investigation comprises of three key components: a historical analysis, a legal analysis (analysis of statutory provisions, case law, and constitutional law), and a secondary empirical data analysis. In the historical analysis, this investigation examines the remarkable change in the labor force in the United States since the first workers’ compensation laws were introduced in 1902. In the legal analysis, this work explores the statutory provisions and case law used to clarify ambiguous statutory provisions. This study primarily focuses on the effectiveness of workers’ compensation, the adequacy of the benefits provided, and the goals and intent of the legislation. This investigation draws comparisons between various jurisdictions within the United States, primarily focusing on the 20 most populous states in the country. This investigation also uses a secondary empirical data analysis component in order to attempt to analyze the effectiveness of workers’ compensation schemes and occupational safety and health programs with the statistical data available. From the findings of this analysis, this work provides the most important conclusions and recommendations for reforms.
Executive Summary

This study analyzes workers’ compensation schemes in the United States. First and foremost, the work highlights the lack of literature serving as a critical analysis of workers’ compensation from the perspective of the working class. In a literary review of contemporary literature on workers’ compensation in the United States, this study finds that most literature, as well as empirical data, focuses on reducing costs for employers, and providing employers with strategic benefits, typically at the expenses of the working class. This investigation comprises of three key components: a historical analysis, a legal analysis (analysis of statutory provisions, case law, and constitutional law), and a secondary empirical data analysis. In the historical analysis, this work examines the remarkable change in the labor force in the United States since the first workers’ compensation laws were introduced in 1902. From the outset, this study questions the relevance of workers’ compensation schemes for workers in the contemporary labor force in the United States. In the legal analysis, the work explores the statutory provisions and case law used to clarify ambiguous statutory provisions. This study primarily focuses on the effectiveness of workers’ compensation, the adequacy of the benefits provided, and the goals and intent of the legislation, by drawing comparisons between various jurisdictions within the United States. This investigation draws comparisons between the statutory provisions and important judicial decisions in 20 most populous states in the country, as well as 5 additional states with significant departure from the norms. This analysis seeks to establish best practices and universal standards for the administration and reform of workers’ compensation in the United States. Using the statutory provisions and case law, the legal analysis explores:
(1) The provisions that establish workers’ compensation as the exclusive remedy for workers injured by accident arising out of and in the course of the employment, as well as the various meanings of the words “injury by accident arising out of and in the course of” the employment;

(2) The treatment of intentional tort and intentional misconduct of the employer or a co-worker that results in serious injury or death to an employee related, in some way, to work;

(3) The impact of workers’ compensation schemes on the basic constitutional rights of employees to pursue remedy for tort committed by employers and co-employees;

(4) The effectiveness of deterrence embodied in punitive damages against employers for violation of occupational safety and health regulations and for intentional tort and intentional misconduct in the workplace; and

(5) The empirical connection between strong penalties for employers in violation of occupational safety and health regulations, or principles forbidding intentional tort and intentional misconduct, and lower rates of fatal injury and serious injury in the workplace.

In the secondary empirical data analysis, this investigation attempts to analyze the effectiveness of workers’ compensation schemes and occupational safety and health programs. Data was primarily gathered from the United States Department of Labor, the United States Social Security Administration, the United States Census Bureau, and the National Academy of Social Insurance. This empirical data includes:
The three components of this analysis are used to establish a universal standard for workers’ compensation in the United States. In the comprehensive analysis, this work details the most pressing issues related to workers’ compensation. Key findings include:

1. There are a number of constitutional issues with the adjudication and interpretation of workers’ compensation schemes in the United States;

2. These constitutional issues arise because, at times, the exclusivity provisions of the workers’ compensation schemes bar employees from pursuing common law claims against employers while at the same time the workers’ compensation schemes fail to ensure adequate benefits for all injured employees subject to the coverage of the schemes;

3. There are also credible and significant concerns that benefits rates fail to provide employees with resources to care for themselves and their families, particularly in the event of serious injury, disabling injury, or death of the employee;

4. Unions, organized labor and public interests advocates have been an important force in promoting workers’ compensation reform; and
(5) The empirical data collected by the National Academy of Social Insurance and the United States Department of Labor is inadequate, unreliable, and lacks integrity and comparability.

In light of these findings, this study provides recommendation for public policy reform. Key Recommendations include:

(1) Reforms to eliminate ambiguous statutory provisions in the workers’ compensation schemes;

(2) Reforms to protect the rights of employees, promote the goals and intentions of occupational health and safety programs, and ensure that adequate benefits and remedies for employees are provided through the workers’ compensation schemes;

(3) Reforms to require the various jurisdictions to collect various types of empirical data to improve the measurement of the efficiency of the administration of workers’ compensation schemes, particularly certain data concerning litigation with a dispute as to the meaning and intent of the statutory provisions of the workers’ compensation schemes; and

(4) Union, organized labor and public interest advocacy for efforts to reform the Programs through statutory reform and litigation.
Acknowledgments

This work is the culmination of six years of my work in public advocacy for workers’ compensation reform. I would never have been able to finish this work without the support of numerous attorneys, labor rights advocates, and public interests groups. First and foremost, I want to thank Tanya L. Aquino-Tuzman with the Service Employees International Union for her extraordinary support and advice. Without her support, I would not have been able to finish this work. I would also like to specifically thank Victoria Johnston, former staffer for United States House of Representatives on the Committee for Science, Space, and Technology; Gerald A. Moore, Esq., with the United States Department of State; Sharon Bey-Christopher, Esq., with Legal Aid; Michael T. Vikitsreth, Esq., former legislative and policy advisor for the United States Congress and the Obama Presidential Campaign; and, Matthew Lewis, former community organizer and public servant for the City of Boston; for their dedication, guidance, advice, and time. Without their support, it would have been impossible for me to finish this work. I would also like to thank Luciano Andrenacci, Ph.D., and Gustavo Badia, Ph.D., both with the Escuela de Politica y Gobierno at the Universidad Nacional de San Martin in Buenos Aires, Argentina, for their review of my original proposal for research, and their thorough feedback. Their feedback helped me to design this investigation, and highlighted the need for a discussion of constitutional law for those not familiar with the system of governance in the United States. I also received invaluable support from others who proofread this work, whose assistance was also extremely important for this work. I would particularly like to thank Andrew Foote, Laura Duffie, Esq., Matthew Andrako, and J. Alexander Steinbaugh for proofreading this work. This work is dedicated to the working class in the United States. I hope that this investigation will improve the operation of the legal system for employees who experience tort at the hands of employers and co-workers in the workplace.

Many Thanks,

J. Christopher Bey
Table of Contents

I. Introduction ................................................................. 1

II. Constitutional and Statutory Framework of the Programs ........... 10
   A. General Framework of the Legal System ......................... 11
   B. Scope of Statutory Provisions .................................... 15
   C. Constitutional Challenges to Exclusivity Provisions .......... 29

III. Design of Investigation ..................................................... 38
   A. Purpose, Scope and Objectives .................................... 40
   B. Hypotheses of the Investigation .................................. 42
   C. Assumptions and Limitations ..................................... 44
   D. Data Sets and Data Elements ...................................... 48
   E. Methodology and Analytical Framework ........................ 52

IV. Empirical Data Analysis .................................................... 56
   A. Empirical Data Analysis of the Sample .......................... 57
   B. Historical Analysis of Empirical Data ............................ 60
   C. Analysis of Contemporary Empirical Data ....................... 66

V. Primary Case Law Analysis ................................................ 84
   A. California ............................................................. 85
   B. New York ............................................................. 94
   C. North Carolina ....................................................... 100
   D. Texas ................................................................. 112
   E. Pennsylvania ......................................................... 115

VI. Secondary Case Law Analysis .............................................. 119
   A. Illinois ............................................................... 120
   B. Ohio ..................................................................... 121
   C. Georgia and Tennessee ............................................... 122
   D. Massachusetts, Maine and Rhode Island ......................... 125
   E. Minnesota, Colorado and Delaware .............................. 129

(Table of Contents continued on the next page)
Appendix Three – Tables of Empirical Data ........................................... 172

Table A – Workers Compensation Law Citation, Exclusivity Provisions and Sample Designation for each Jurisdiction ....................................................... 173
Table B – Adjudication Authority and Available Public Resources for each Jurisdiction .......................................................... 177
Table C – General Statistics on Population, GDP, Labor Force, Program Coverage, and Program Coverage Wages by Jurisdiction .................................................. 184
Table D – General Statistics on Injury Rates, Benefits and Costs by Jurisdiction .......................................................... 187
Table E – General Statistics on Labor Market Sectors and Trade Union Density by Jurisdiction .................................................. 190

Appendix Four – Index of Cited Case Law ............................................. 193

Appendix Five – Legal Analysis of Statutory Framework ................. 198

A. Scope of Statutory Provisions ....................................................... 199
   i. Legislative Intent and Key Statutory Provisions ... 200
   ii. Classes and Definitions established by Statute ... 209
   iii. Causes of Action under Statute ................. 214
   iv. Jurisdiction for Claims .......................... 216
   v. Adjudicating Authority .......................... 218
B. Statutory Construction of Exclusivity Provisions ......................... 222
   i. Statutory Guidance for Adjudication .............. 224
   ii. Hybrid Guidance for Adjudication ............... 231
   iii. Case Law Guidance for Adjudication .......... 234
   iv. Absolute Bars to Common Law Claims ... 238
C. Constitutional Challenges to Exclusivity Provisions ................. 245
   i. Principles of Constitutional Law ................. 247
   ii. Exclusion of Common Law Defenses .......... 252
   iii. Exclusion of Common Law Remedy .......... 258
Appendix Six – Primary Case Law Analysis ........................................ 263

A. California ................................................................. 264
   i. Saala v. McFarland ............................................... 265
   ii. Johns-Manville Corp. v. Superior Court .......... 269
   iii. Cole v. Fair Oaks Fire Protection District ...... 272
   iv. Hendy v. Losse .................................................. 276
   v. Fermino v. Fedco, Inc. ........................................ 281

B. New York ............................................................... 290
   i. Actions Resulting from the Attica Prison Riot .... 291
   ii. Bardere v. Zafir .................................................. 302
   iii. Briggs v. Pymm .................................................. 305
   iv. Acevedo v. Consolidated Edison ................. 308
   v. Fucile v. Grand Union Company, Inc. .......... 311

C. North Carolina ......................................................... 312
   i. Brown v. Motor Inn ............................................. 313
   ii. Pleasant v. Johnson ........................................... 318
   iii. Woodson v. Rowland ........................................ 324
   iv. Johnson and Smith v. First Union ................. 341
   v. Cameron v. Merisel, Inc. ................................. 344

D. Texas ................................................................. 351

E. Pennsylvania ......................................................... 354

Appendix Seven – Secondary Case Law Analysis ......................... 365

A. Illinois ............................................................... 366

B. Ohio ................................................................. 380

C. Georgia and Tennessee .......................................... 386

D. Massachusetts, Maine and Rhode Island ............... 391

E. Minnesota, Colorado and Delaware ..................... 400

Works Cited ............................................................ 406

The last page in this work is page 418.
I. Introduction

This investigation will analyze the universally mandated insurance programs for wage earners for injuries or death in the workplace, or otherwise related to work, commonly referred to as “Workers Compensation” or “Industrial Insurance” (hereinafter referred to as the “Programs”). The Programs simplify means for employees to receive benefits in the event of injury, disability or death related to work. The Programs are administered through State and local law, though there are Programs administered by the federal government for less than 3% of the total workforce. Programs exist in every state, territory and jurisdiction within the United States.

---


2 Ibid. The statutory construction will be analyzed later in this work.

3 Ibid. See Appendix Two. There are 125 million workers covered by the Programs in the United States. Tables provide data on coverage of workers under the Programs.

4 Ibid. Include all 50 states, the District of Columbia, and the Territories of Puerto Rico, Guam, the United States Virgin Islands, the Northern Mariana Islands, American Samoa and the Navajo Nation.
The Programs were an important part of the labor movement, which started in Europe. In 1880, the Parliament of the United Kingdom passed the Employer’s Liability Act. Between 1855 and 1907, 28 states in the United States passed laws granting employees the right to sue employers for injury caused by negligence.

However, the common law judicial system in Great Britain experienced a rapid rise in the number of suits due to employees suing employers between 1880 and 1900. The rapid increase in workplace injury also overwhelmed the legal system in the United States with claims, in addition to complexities surrounding liability of the parties.

In the same period, Chancellor Otto von Bismark introduced the Sickness Bill of 1883 and the Accident Bill of 1884 in the German Empire, which provided the labor force with a comprehensive workplace insurance program. Great Britain introduced similar reforms with the Workmen’s Compensation Act of 1897 and the Workmen’s Compensation Act of 1906.

---


6 Ibid. Specifically see the discussion by Simon Deakins in “The Historical Process of Wage Formation” and the discussions by Simon Deakins and others in Governance, Industry and Labour Markets in Britain and France.

7 Ibid. Also see Lexis Nexis. Re The Employer’s Liability Cases. 207 U.S. 463 (1908).

8 Ibid. Specifically see the discussion by Simon Deakins in “The Historical Process of Wage Formation” and the discussions by Simon Deakins and others in Governance, Industry and Labour Markets in Britain and France.

9 Ibid. Also see Lexis Nexis. New York C. R. Co. v. White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917); Md. Code Ann., Lab. & Empl., § 9-101 et seq. It should be noted that issues of negligence and liability in the event of accidents have evolved over time, but that there continues to be controversy as to whether employers are liable at common law for accidental injuries of employees.

10 Ibid.

11 Ibid.
Legislative bodies in the United States introduced the Programs to replace common law claims with universal insurance programs, which were modeled after the legislation passed in Great Britain and Germany, to simplify and guarantee benefits for employees and control costs for employers. The State of Maryland was the first state to implement a Program in 1902, however participation by employers was voluntary. The State of New York implemented one of the first Programs with universal and compulsory coverage for all employees, which was challenged before the Supreme Court in 1917. Originally, the Programs were titled “Workmen’s” Compensation laws as a result of the nature of work and the labor force, because, at that time, a majority of the formal labor force were men, and hazardous employment was generally reserved only for men.

In the past century, the labor force in the United States has experienced a remarkable transformation, and the Programs are complex statutory schemes that are dominated by interests of the business community and the political establishment.

---

12 Ibid.
14 Ibid. Specifically see New York State Workers’ Compensation Law § 1 et seq. It should be noted that there are exceptions to the universal coverage of the Programs, which differ from State to State, and usually exclude farmers and other specific types of workers, but still generally covers over 90% of employees in each jurisdiction.
15 Ibid. Speaking in terms of formal employment, this also takes into account that “hazardous employment” was the primarily target of the Programs.
Recent reforms have primarily focused on cost effectiveness for business rather than preservation of workers’ rights and enhancing workers’ benefits.\(^\text{17}\) In addition, these powerful interests often assume that the Programs are efficient, effective, and adequate, and literature has primarily addressed the concerns of these powerful interests.\(^\text{18}\) For instance, the American Bar Association works closely with National Workers Compensation Defense Network to evaluate the advantages for employers who have Program coverage, but not advantages for employees.\(^\text{19}\) The National Academy of Social Insurance identifies numerous issues with Program coverage and benefits, but primarily focuses on Program costs to employers.\(^\text{20}\) In fact, the recent literature on Workers’ Compensation in the United States is completely devoid of a critical analysis from the perspective of the working class.\(^\text{21}\) Some critics note that politicians and important public advocacy groups, such as the American Civil Liberty’s Union, have abandoned the working class “\textit{in exchange for massive donations from}” corporate interests, while focusing on “\textit{high profile}” issues “\textit{at the expense of labor}.”\(^\text{22}\)

\(^{17}\) \textit{Ibid.} Particularly concerning is the United States General Accounting Office 1996 report that compared federal workers’ compensation benefits to state workers’ compensation in order to address concern that federal benefits are “too generous.” This statement is concerning in light of the finding in the National Academy of Social Insurance Report that benefits are generally inadequate for workers’ which is the most likely reason that workers’ fail to file claims, or use sick leave and disability benefits instead of Program benefits.

\(^{18}\) \textit{Ibid.} For instance, Thomason, as well as the United States General Accounting Office 2001 report both particularly focus on costs for employers, even while evaluating benefits for workers.

\(^{19}\) \textit{Ibid.} Specifically see the American Bar Association “Exclusive Remedy Provisions State-by-State Survey.” The language used in this survey will be explained later in this investigation, as the terminology for “exceptions,” “weak,” and “strong” refer to the laws which forbid employees from pursuing common law claims against employers.


\(^{21}\) \textit{Ibid.}

\(^{22}\) See Ames, Mark. “You hate ‘right to work’ laws more than you know. Here’s why.” NSFWCorp.
As such, it is necessary to look to the literature in other countries, such as Canada.

“Workers’ compensation, begun in the early 1900s to address some of the human costs of the Industrial Revolution, was the first of Canada’s social institutions. It aimed to redress social instability by reimbursing workers for their suffering while protecting companies from costly court cases. The need for its regulatory function did not diminish over the course of the century; indeed the need is just as significant today. Nevertheless, making workers’ compensation work in Canada at the end of the century is a difficult task. . . . Today employers feel overburdened and workers believe they are undercompensated. Litigation, which the system intended to avoid, has been increasing. Little-understood environmental illness, computer-related injuries, and lower-back pain are just some of the results of new work environments that make injury assessment a constant source of conflict. . . . [it is important to] explore the new breed of injuries, public versus private provision of compensation, the impact of workers’ compensation on the macro-economy, the nature of appeals litigation, and the efficacy of regulatory control and cost incentives in reducing work-related injuries. Policy makers, lawyers, and scholars will find [these recommendations] an irreplaceable tool for understanding workers’ compensation reform in the upcoming century.”

The purpose of this investigation is to prove that workers’ compensation in the United States today is not effective or efficient, and that benefits for employees are, at times, inadequate. This investigation performs a critical analysis of the Programs from the perspective of the employees. Based on the literary review performed in preparation for this investigation, outside of case law, there is little literature performing a critical analysis of workers’ compensation. This work seeks to contribute to the scholarly literature by providing a comprehensive, nuanced and balanced critical analysis.


23 See Hyatt, Doug, and Morley Gunderson (2000). Workers Compensation: Foundations for Reform. University of Toronto Press, Toronto. This work was chosen because it is highly critical of the construction and administration of the Programs in Canada, and Canada has a legal system and Programs construction similar to the United States.
Injuries related to work are generally termed “industrial accidents,” which are defined as “injury by accident arising out of and in the course of the employment.”

This investigation will analyze the meaning of this term, and the controversy surrounding this term.

“The few and seemingly simple words ‘arising out of and in the course of the employment’ have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favor, on whichever side he may be, the question in dispute.”

This study reveals that there are significant issues with the definition, adjudication and application of the Program statutes. This work also reveals that the various jurisdictions have given different treatment to similar causes of action. This investigation will analyze these differences, and attempt to reconcile these differences, where possible.

This study also examines significant issues with availability of empirical data for a comprehensive analysis. The National Academy of Social Insurance estimates that only half of all workplace injuries are reported, which presents issues for reliability of data and comparison of jurisdictions. Nonetheless, this study will use the available empirical data for a secondary analytical component, as well as analyze the empirical data that was not found. This work will also identify crucial empirical data that should be collected to better measure the performance of the Programs in the future.

---

This investigation will analyze the Programs in terms of the Constitutional framework within which all public policy rests in the United States, and the statutory framework of the Programs as both public policy and tort reform. The scope of this investigation is limited to the guarantee of the right to due process and the right of employees to sue their employers. This investigation will also closely analyze the most recent statutory reforms. In the analysis of these statutory reforms, this investigation will:

1. analyze the general construction, legislative intent, and statutory language of the Program statutes;
2. analyze the judicial decisions that have addressed ambiguity of the statutory provisions and application of the Programs;
3. analyze the impact of the reforms on the Constitutional and statutory framework of the Programs in consideration of significant changes to the Program administration and coverage;
4. analyze the judicial decisions that have addressed constitutional challenges to statutory reforms; and
5. identify areas where data and statistics are not available in order to assess compliance of statutory provisions of the Programs and reforms with the Constitutional framework.

Finally, this investigation will provide recommendations for the future reforms, and for the collection of data and statistics in the future. As the Programs rest within the judicial system, case law and statutes will be use directly for this analysis.
This central premise of this work posits that, like in Canada, "litigation, which the system intended to avoid, has been increasing," due to the fact that, in "new work environments" in the modern age, "injury assessment is a constant source of conflict" and the genesis of common injury today is difficult to identify. A majority of the work force in the United States today, much like in Canada, engages in sedentary work, and not manual labor. As a result, most injuries in the workplace, or at least alleged to have arisen in the workplace, are slow-onset, such as respiratory disease, back injuries, joint pain, and injury from meticulous and repetitive movements, such as typing or filing. These injuries take a significant amount of time to manifest, and are often exacerbated by actions or behavior outside of the workplace, such as smoking, drinking, poor physical health, and/or dangerous or hazardous voluntary physical activity. This is in stark contrast to the phenomenon which workers’ compensation was designed to address. At the turn of the century, a majority of injuries were rapid-onset and were easily attributed to an occurrence in work environments due to, typically, hazardous manual labor.

As a result, it is critical to examine the "new breed of injuries," as well as "the nature of appeal litigation," and the "cost incentives in reducing work-related injuries." Moreover, the complex insurance schemes for workers’ compensation are generally based on the profit-driven model. Critics claim that this profit-driven insurance model is failing in workers’ compensation, as well as health care and real estate. For the average worker, workers’ compensation is secondary to issues such as the rapid rise in the cost of living, the insurance crisis, the financial crisis, and the health care crisis. This investigation shows that these issues are interrelated, and the health care crisis is the leading cause of the workers’ compensation crisis.
This work is divided into nine (9) sections. After this section provides a basic introduction to workers’ compensation, Section II provides a detailed description of workers’ compensation laws in the United States. This discussion is highly technical and includes statutory provisions and case law. This section is designed to provide a firm foundation for understanding workers’ compensation laws, particularly considering that the legal system does not collect key empirical data for nationwide analysis. Due to the lack of critically important empirical data, case law will provide the only source for analyzing the increase in litigation and the reason for such increase.

Section III explains the design of this analysis in this investigation, and the central questions and hypotheses of this investigation. Section IV provides an overview of the empirical data available. The available empirical data estimates that a majority of workplace injuries are never reported. In addition, federal agency reports on workplace injury and death cite inconsistency in data collection between jurisdictions. Most importantly, no jurisdiction collects the empirical data necessary to assess the performance of the legal system in adjudication of common law claims. As a result, case law provided the only data source for analyzing the adjudication of workers’ compensation statutes. Section V provides an overview of the main legal issues. This section provides definitions and standards for workers’ compensation established by the courts. Section VI examines the recent reforms in the workers’ compensation laws around the country and the Constitutional implications of the most recent rulings. Section VII draws comparisons between the statutes, case law and jurisdictions in order to establish the best construction for workers’ compensation laws. Section VIII and Section IX provide recommendations and conclude this work.
II.  Constitutional and Statutory Framework of Programs

In order to provide the necessary background to understand the Programs, this section will provide the constitutional and statutory framework for the Programs.

First, basic information and general terms and definitions will be provided for an understanding of the legal system and Constitutional law within the United States. A thorough understanding of the legal system and Constitutional in the United States is not required in order to understand the basic concepts discussed in this investigation. However, certain characteristics of the legal system and Constitutional law are important to understand.

Next, the statutory framework will be introduced, and provide actual language of the statutory provisions. This section will be limited to the statutory provisions that are relevant to this investigation, and will assist in framing the argument and establishing the scope of this investigation. As a part of the statutory framework, the exclusivity provisions are central to this analysis. The exclusivity provisions are the basis of the data set, and are used to group jurisdictions for the purpose of investigative evaluation.

Finally, the data sets of case law and empirical data used for this investigation will be introduced. Case law will be the primary data used in the analysis in this investigation. The empirical data will also be introduced in order to further frame the argument. This empirical data will be presented in light of the lack of reliability and integrity of the data.
A. General Framework of the Legal System

The legal system in the United States maintains a number of traditions and customs adopted from the British during the colonial period. This section cannot be dedicated to providing an exhaustive history and description of the legal system and system of governance in the United States. However, this section will provide a brief overview and basic terminology that is required to understand the legal processes described and analyzed throughout this work. For clarity, a glossary of terms has been provided in the appendix of this work. All words that appear in the glossary are bold in this section.

The Constitution of the United States is designed to limit the power of the government, protect the basic civil and constitutional rights of the individual, and adequately distribute the limited powers of government into separate and independent branches.⁷⁷ Each of these three branches, legislative, executive and judicial, have distinct and important functions in the creation, execution, maintenance, reform and analysis of public policy, in order to balance such power.⁷⁸ The distinct powers reserved for the several States are established by the Constitution.⁷⁹ Generally, each of the several States has its own Constitution, or similar document, establishing basic civil and constitutional rights similar to the Bill of Rights established in the Constitution of the United States.

---

⁷⁸ Ibid. Specifically refer to the Articles of the Constitution of the United States, which establish the branches of government and explicit establish their powers.
⁷⁹ Ibid. See definition of “State” in Glossary. It should be noted that, for the purposes of this investigation, the term “State” is also used to refer to the 50 states of the United States of America, as well as the District of Columbia and the five territories with Programs (Puerto Rico, Guam, Northern Mariana Islands, United States Virgin Islands, and American Samoa), and the Navajo Nation. Also refer to Footnote 1 on Page 1 in the Introduction.
Generally, where the Constitution of the United States or federal law is silent, the States have domain to establish laws. However, State law cannot contradict federal law, and must comply with the Constitution.

The Constitution of the United States, and similar provisions in the Constitutions of the several States restrain public policy by placing limitations on the scope and breadth of public policy in order to protect the basic individual rights of the people, commonly referred to as civil and constitutional rights, no matter the will of the legislative bodies and policy makers, the public or special interests. The legislative bodies and policy makers are at liberty to create any public policy which they desire, but, by design of the system of governance, all public policy and official action of the government must comply with any relevant provisions of the Constitution of the United States and federal law. Individuals that believe a statute or official action of the government has violated their civil or constitutional rights can petition the judiciary for redress, and the judiciary must subject such policy or action to a rigorous test in order to assess if the policy or action exceed the limitations set forth in the Constitution. Public

---

30 Ibid. See definition of “Constitution” in Glossary. The Bill of Rights, the first ten amendments of the Constitution of the United States, are considered to be the most important amendments establishing basic rights, but the other amendments also establish basic rights, including the Fourteenth Amendment.

31 Ibid. Particularly, the Ninth and Tenth Amendments of the Constitution of the United States establish that the States and the people retain the rights not explicitly granted to the federal government.

32 Ibid. Specifically Article VI, Section 1 of the Constitution of the United States provides for the supremacy of the Constitution of the United States and federal law over state law. This section is commonly referred to as the “Supremacy Clause.”

33 Ibid. These protections are commonly referred to as the Bill of Rights, which are the first ten amendments of the Constitution of the United States, however, other important rights are provided by other amendments, particularly the Fourteenth Amendments.

34 Ibid. The Supremacy Clause and the powers granted to the federal judiciary in the Constitution of the United States are the basis of the power of the judiciary to subject public policy and official action to such a rigorous test.

35 Ibid. It should be noted that the Courts have prescribed a particular process for presenting a Constitutional challenge to a court of competent jurisdiction, which will be discussed further in this investigation.
policy that exceeds these limitations are said to be a “Constitutional violation.”\textsuperscript{36}

The judiciary is the only branch that submits policy to the rigorous test to ensure compliance with the relevant Constitutional provisions, which is typically referred to as a “Constitutional challenge.”\textsuperscript{37} Therefore, in the United States, one of the most important parts of the legislative process is the Constitutional challenge.\textsuperscript{38} If a public policy withstands a Constitutional challenge, then the policy is considered to be in compliance with the relevant Constitutional provisions, and thus appropriate for implementation.\textsuperscript{39}

The Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States provide all citizens in the United States with the right to due process in any question concerning life, liberty, limb, and property.\textsuperscript{40} Traditionally, due process is provided by the common law legal system in the United States.\textsuperscript{41} As such, employees previously pursued common law claims against employers in order to recover monetary award and other relief for material damages due to industrial accidents which qualified as negligent wrongs, commonly termed torts, and employers defended themselves using all available means at common law.\textsuperscript{42} The Program statutes revoke the right to common law claims in the event of an industrial accident suffered by an employee.\textsuperscript{43} Statutory reform that alters the common law system for adjudication of tort claims is called tort

\textsuperscript{36} Ibid. The meaning and implications of a Constitutional violation are discussed later in this work.
\textsuperscript{37} Ibid. These distinct and separate powers of the judiciary, which should not be infringed upon by the legislative or executive branches, are important to the basic principles of separation of powers in the system of governance in the United States. Also see the Federalist Papers.
\textsuperscript{38} Ibid. It should be noted that the legislative, executive and judicial branches all play distinct and important roles in public policy formulation and implementation. Also see the Federalist Papers.
\textsuperscript{39} Ibid. A discussion concerning the processes for judicial analysis of the constitutionality of a policy or official action is included later in this work.
\textsuperscript{40} Ibid. A more in-depth discussion about these two Constitutional Amendments and the principles of due process and equal protection is included later in this work.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid. New York C. R. Co. v. White discusses this issue later in this work.
\textsuperscript{43} The construction of the Program statutes are analyzed later in this work.
reform.\textsuperscript{44} This work will analyze the revocation of these rights under the Constitutional and statutory framework.

In addition, the interaction and conflict between federal law and state law, and federal interests and state interests, are complex and cannot be exhaustively analyzed in this section. Notwithstanding, there is a unique and complicated interaction between federal law and state law with respect to workers rights and industrial accidents that is important to discuss.\textsuperscript{45} The Constitution of the United States does not explicit address incidents of industrial accidents.\textsuperscript{46} Federal law has explicit statutes addressing industrial accidents, but only for very limited groups, including federal civil servant employees, military service members, veterans, harbor workers, merchant seaman, railroad employees, miners, and those exposed to radiation or other hazardous material in their work in the energy sector.\textsuperscript{47} Federal law also prescribed standards for workplace safety and health that apply to all 125 million workers in every jurisdiction; however, the federal government and the several States have worked in close coordination to improve workplace safety.\textsuperscript{48} Particularly with respect to Program coverage, State law provides coverage for most of the 125 million workers subject to the Program statutes for industrial accidents.\textsuperscript{49}

\textsuperscript{44} See the definition of tort reform in the Glossary
\textsuperscript{45} The relationships between occupation safety and health legislation, at both the federal and state level, and the Programs is included later in this work.
\textsuperscript{46} See the Constitution of the United States of America. Other than voting rights, the Constitution rarely explicitly addresses explicit rights in specific circumstances, but general rights and principles which can be applied to all public policy and official action.
\textsuperscript{47} See Appendix and Report from National Academy of Social Insurance. Also see Footnote 1 on Page 1 in the Introduction.
\textsuperscript{48} Of the total number of people in the labor force, 125 million are estimated to be covered by some form of workers’ compensation insurance. See Table C in Appendix Three for details.
\textsuperscript{49} An overwhelming majority of the 125 million workers subject to Program coverage are covered by State Programs established under State law. Also see Report from National Academy of Social Insurance and Table C in Appendix Three.
B. *Scope of Statutory Provisions*

For the purposes of the Programs, it is critical to define the relationship of employment, the parties to such a relationship, and the causes of action that fall under the jurisdiction of the programs. All of these provisions form the principles that underpin the Programs. Using these provisions, employees can determine if the Program provisions apply to a specific cause of action. For the purposes of this investigation, the most important provisions (1) establish the legislative intent and scope of the provisions, (2) define classes and key terms, such as employment and injury, subject to the provisions, (3) identify causes of action that are applicable to the Program provisions, (4) establish rules for jurisdiction, and (5) establish an executive branch administrative agency to act as an adjudicating authority. As the introduction of this work suggested, the Program statutes are not always explicitly or clearly interpreted by adjudicating authorities. As a result, the application of the Program for certain causes of action may be questionable, and these issues result in expensive and unnecessary litigation. This section will omit provisions with ambiguity. The analysis included later in this work will address issues of ambiguity.

The purpose of this section is to use the explicit statutory language in order to understand the very basic components of the Program, and the statutory framework for analysis and evaluation. Notwithstanding the omission of ambiguous provisions analyzed later in this work, the provisions detailed in this section will be analyzed within the context of the statutory and constitutional framework for the Programs as a whole. In addition, question of jurisdiction and adjudicating authority will examine the interaction between Programs in different jurisdictions.
The Programs reformed the legal system in order to provide due process for employees who suffer an industrial accident through means other than the common law legal system.\textsuperscript{50} In terms of tort reform, the legislative intent is to provide a certain level of predictability, efficiency and cost controls for employers and employees alike in the event an employee suffers an industrial accident.\textsuperscript{51} In exchange for the right to pursue common law claims against an employer, employees are guaranteed limited benefits in the event of an industrial accident, with limited rules concerning fault and negligence, and employers have relatively low and fixed costs for industrial accidents.\textsuperscript{52} In this sense, policy makers identified the inefficiency of the legal system to process common law claims of employees against employers in the legal system as the problem to be addressed by the Programs.\textsuperscript{53} The Programs were not designed to provide workers with new rights, privileges, benefits, obligations or duties through innovative public policy.\textsuperscript{54} The Programs are wholly distinct from public policy developed to provide workers with new benefits, such as unemployment insurance and the United States Social Security program, both wholly outside and independent of the legal system.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{51} Ibid.
\item \textsuperscript{52} Ibid. These benefits include monetary benefits to replace lost wages, medical benefits in order to address any needs for medical care arising out of the industrial accident, and vocational training in order to retool certain employees for positions with less demanding physical labor in order to be able to earn wages, as well as other benefits.
\item \textsuperscript{53} Ibid.
\item \textsuperscript{55} Ibid.
\end{itemize}
While the Programs were originally separate from workplace safety regulations and other labor regulations, such as those pertaining to illegal labor, some efforts have been made to integrate the Programs with workplace safety regulations and illegal labor regulations, but those public policies continue to exist as completely distinct, even if enforced together with these Programs.\textsuperscript{56} Notwithstanding, this joint effort, between the several states through administrative agencies for the Programs, and the federal government, has promoted workplace safety regulations.\textsuperscript{57} These regulations ensure employees are informed of their right to a safe workplace in full compliance of all relevant laws and statutes.\textsuperscript{58} Through these efforts, the federal government, and the several states, routinely collect data in order to assess progress.\textsuperscript{59} This data includes the number of fatal work injuries, the number of non-fatal injuries, and trends in the rate of injuries and deaths over time.\textsuperscript{60} The focus is to prevent accidents, injury and death in the workplace, thus reducing the need for employees to seek benefits through the Programs.\textsuperscript{61} It is important to note, however, that the focus of this investigation is on the operation of the Programs to provide benefits to injured workers.

\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid. It should be noted that the Federal agencies that focus on workplace safety are the United States Department of Labor and the United States Occupational Safety and Health Administration. It should also be noted that most states have agencies that also focus on workplace safety, such as the New York State Department of Labor, Division of Safety and Health, Workplace Safety and Loss Prevention Program; or the California Department of Industrial Relations, Division Occupational Safety and Health.
\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid. The federal government work closely with the several States to compile national statistics fr comparison of injury rates for each jurisdiction. It should be noted that it is believed that nearly 60% of injuries are not reported. In addition, there are only estimates of the costs of Program administration for the several States, as well as costs and benefits paid by employers. There are significant data gaps and issues with the integrity of the available data, which will be further discuss later in this work.
\textsuperscript{61} Ibid.
It is important to note that the scope of the Program application is limited to industrial accidents suffered by employees. If an employee sues an employer for a cause of action unrelated to an industrial accident, such as a failure to pay wages because of bankruptcy, or the employer sues an employee for any reason, such as for stealing from the company, the Program statutes do not apply.\textsuperscript{62}

There are five key elements of the Programs that are universal and incorporated in the statutory provisions in nearly every jurisdiction. These key elements are:

(1) employees are barred from pursuing common law claims against employers in the event of an industrial accident, in lieu of the benefits provided through the Programs;

(2) employees receive guaranteed limited benefits through the Programs for industrial accidents;

(3) the statutory provisions apply limitations for other expenses of employees, such as legal fees;

(4) depending on the jurisdiction, employers only have to pay wage reimbursements if the employee is unable to earn wages in the same or any other employment; and

(5) depending on the jurisdiction, employers are not required to pay any benefits if an employee asserts a claim, but the same employee, or another employee, are alleged to have committed an intentional tort, gross misconduct, gross negligence, malfeasance, or criminal activity.

First, all Programs include statutory provisions that forbid the employee from pursuing a common law claim against an employer when the employee falls under the

\textsuperscript{62} The application of the Programs will be discussed further later in this analysis
coverage of the universal insurance provided through the Programs (hereinafter referred to as the “exclusivity provisions”). The exclusivity provisions exclude all rights and remedies under the common law for employees, in exchange for swift, simple and guaranteed benefits through the Program.

Second, benefits provided through the Programs are limited and exclusive but are guaranteed (however the employer, under certain conditions, is not liable to pay benefits). In this sense, punitive damages, non-economic compensation and other types of consideration for material damages generally available in the common law system are forbidden within the statutory provisions of the Programs.

Third, the statutory provisions also apply limitations and requirements for other types of common expenses for litigation and legal disputes, particularly, legal fees. Many of the jurisdictions have limitations or special stipulations concerning legal fees for Plaintiffs who hire legal counsel for claims under the Programs. These conditions include percentage caps on legal fees payable in some instances, and in other instances legal counsel must get the approval of the adjudicating authority for the legal fees charged.

In certain jurisdictions, employers are only liable to pay wage replacement benefits if the employee is unable to secure employment “in the same or any other employment.” Under these statutory provisions, the employer can reassign an injured employee from manual labor to a sedentary job, and avoid paying wage replacement benefits. In addition, employers are not required to pay benefits to employees when employees are guilty of intentional tort, gross misconduct, gross negligence, malfeasance

63 *Ibid*. Also see Footnote 1.

64 For instance, see the North Carolina Workers’ Compensation Act, N.C. Gen. Stat. § 97-1 et seq.
or criminal activity. This exception, typically incorporated into the statutory provisions, protects employers from excess costs caused by grossly negligent conduct on the part of the employee, which causes injury or death to the same employee, or any other employee. In light of the general goals of the Programs, these exceptions embody the principle that all parties in the workplace have a legal responsibility to maintain good conduct and use their best good faith efforts to promote and maintain a safe workplace.

These principles are at the centerpiece of the legislative compromise embodied in the Programs. This investigation will examine the balance between the interests of the employers and the interests of the employees. The statutes generally provide more explicit language to ensure the interests of employers with respect to limiting costs are realized, as clearly shown. This investigation will examine how the interests of employees have, or have not been, explicitly addressed in the statutes, and, where necessary, employees have had to litigate and question the meaning and intent of the statutory provisions in order to ensure adequate protection. Employees have certain critically important interests with respect to the Programs. The most important issue is if, and when, employees can pursue a common law claim against an employer, particularly when the employee is ineligible for benefits through the Programs. Like employees, employers also have explicit legal responsibilities, as well as implicit duties to promote and maintain a safe workplace. The crucial question at the intersection of these five key statutory provisions concerns the rights of employees. When employers violate these general principles and, in bad faith, fail to promote and maintain a safe work environment, employees must be able to receive benefits, but, moreover, employers also should face additional punitive measures to deter such behavior in the future.
Within the legal system in the United States and in accordance with the legal tradition in the United States, a legal class is defined as a social group or classification that receives a special legal classification or treatment under the law. Legal classes are constitutional so long as the special legal classification and treatment under the law is rational and reasonable, and does not violate the Constitutional rights of the class.

The definitions above clearly differentiate between the five key classes applicable to the Programs as follows:

1. Employee, who are injured or killed by accident out of and in the course of employment;
2. Employer, who are the legal entity which employs the employee at the time of injury or death;
3. Management, the supervisory chain of command with direct control over the employee at the time of injury or death;
4. Co-employees, fellow employees employed with the same employer working with the employee at the time of injury or death; and
5. Third parties, a party that may be alleged to have fault and liability in the injury or death of an employee in the workplace, but is in no way involved in an employment or contractual relationship with the employee or employer.

These five classes form the basis of this analysis.

---


66 In New York C. R. Co. v. White, the Supreme Court notes that classification under the law for special legal treatment is constitutional as long as the classification is rational and reasonably justified.
The causes of action under statute for the Programs are injury or death of an employee by accident out of and in the course of employment. Therefore, the employment relationship between the parties is central to the application of the Program. In addition, the nature of the injury or death, time, place and circumstance, is also central to the application of the Program. There are five different levels of liability with respect to causes of action, which include:

1. a true accident;
2. negligence;
3. gross misconduct or gross negligence;
4. intentional misconduct; and
5. intentional tort.

These levels of liability will be further discussed later in this work. Any of the classes can be liable at any level for the injury or death of an employee, depending on the circumstances. For instance, with machinery malfunction, a third party may be alleged to have engaged in intentional misconduct (such as failure to comply with safety regulations), while the employer may be considered to be without fault (a true accident from the employer perspective and the employee perspective). This investigation will focus on the interaction between these classes and the liability of the employer, who ultimately bears responsibility for promoting and maintaining a safe and secure workplace, in the event of the injury or death of an employee in the workplace. Specific legal definitions of these levels of liability will be discussed later in this investigation.
It is important to note that causes of action that originate outside of the employment relationship are not subject to the Program provisions. But more importantly, claims inside the employment relationship, but do not involve an injury by accident to an employee in the workplace, are also outside of the jurisdiction of the Programs. For instance, if an employee steals from an employer, and the employer decides to sue the employee for civil relief and press criminal charges, the Program statutes have no application. This specific application for the Programs is logical. The employer only pays insurance for accidental injuries suffered by employees in the workplace. All other matters that fall outside of the purview of the insurance program are not affected by the Program statutes.

However, this investigation will show how employers use the Program statutes to bar common law claims by employees when the cause of action is in no way related to an industrial accident. The bar of common law claims is a Constitutional issue because the Program statutes only provide benefits for industrial accidents. If a common law claim of an employee is barred, but the cause of action was not an industrial accident, then the employee has no opportunity to recover for economic loss, even though the right to due process is guaranteed by the Constitution. All of these issues are discussed further later in this work.

This issue is at the center of this investigation. The rest of this investigation is framed around this issue and the confusion caused by the questions of application of the Programs.
Jurisdiction for claims is generally a simple question of the time and place of the cause of action. Typically, injuries or deaths of employees occur on the premises of the employer, and, therefore, the proper jurisdiction is the place of employment. However, at times, injuries or deaths of employees may occur within the scope of employment, but away from the premises of the employer, such as with traffic accidents or business engaged in transportation or logistics. Generally, since the employer secures insurance in order to pay benefits in the jurisdiction where the employer conducts business, the jurisdiction for the claim must be the jurisdiction wherein the employer conducts business and has secured insurance in order to guarantee payment of benefits.\(^{67}\)

Jurisdiction can be a complicated question in the modern economy with multinational corporations with operations across state lines, and employees that travel frequently for work across state lines and international borders. In one case, a flight attendant, working for American Airlines, and based in Puerto Rico, as well as a permanent resident of Puerto Rico, was injured while working a flight between Puerto Rico and Newark Liberty International Airport.\(^{68}\) American Airlines, one of the largest airlines in the United States, maintained workers’ compensation coverage under Florida law, and the flight attendant received benefits based on Florida law.\(^{69}\) After receiving benefits, the flight attendant sued American Airlines because, under Puerto Rico law, the flight attendant could have received better benefits.\(^{70}\) In addition, the flight attendant was

---

\(^{67}\) See the Legal Analysis of the Statutory Framework in Appendix Five for a more thorough discussion of the legislative intent and statutory provisions.


\(^{69}\) *Ibid.* Garcia continued to live in Puerto Rico and continued to work with the Airline. At no time did Garcia live in Florida.

\(^{70}\) *Ibid.* The statutory construction and differences between Puerto Rico law and other jurisdictions is discussed later in this work. In addition, empirical data on the rate of benefits for each jurisdiction is also discussed later in this work.
not in Florida when he was injured.\textsuperscript{71} The federal court ruled that the flight attendant could not sue the airline for more benefits under Puerto Rico law, and could not sue the airline under common law.\textsuperscript{72} Once the flight attendant accepted benefits under any law, those benefits were exclusive.\textsuperscript{73} Employees that travel frequently with work for employers that operate in multiple states present the most complex jurisdictional questions.\textsuperscript{74}

To a certain extent, Programs administered by the federal government, such as the Longshore and Harbor Workers’ Compensation Act, provide comprehensive coverage on a nationwide scale, eliminating the limited jurisdiction of state-by-state Programs.\textsuperscript{75} Similar Programs administered by the federal government provide coverage for coal workers, and certain federal employees.\textsuperscript{76} However, the scope of these Programs is limited, and most employees in the United States fall under the jurisdiction of a Program administered at the state level.\textsuperscript{77}

\textsuperscript{71} Ibid. This illustrates the important of the insurance coverage obtained by the employer as compared to the time and place of the injury of the employee.

\textsuperscript{72} Ibid. The principle of the exclusivity of the remedies provided by the Programs will be discussed in detail later in this work.

\textsuperscript{73} Ibid.

\textsuperscript{74} Ibid. Also see Southern Pacific Company v. Jensen, 244 U.S. 205 (1917) (where a truck driver with a Kentucky company was killed in an automotive accident in New York City); Magnolia Petroleum Co v. Hunt, 320 U.S. 430 (1943) (where a worker on oil wells who lived in Louisiana and was permanently stationed to work in Louisiana was injured while working for the employer in Texas); Industrial Commission of Wisconsin v. McCartin, 330 US 622 (1947) (where a resident of Illinois was injured while working on a temporary contracting construction job for his employer in Wisconsin); Thomas v. Washington Gas Light Co. et al.; 488 U.S. 261 (1980) (where a resident of the District of Columbia worked for a District of Columbia employer but also worked assignments in Virginia and Maryland and was injured in Virginia).

\textsuperscript{75} According to the National Academy of Social Insurance, of the 124 million workers covered by Workers’ Compensation Programs, only 3 million are federal employees. It should be noted that federal employees does not include private industry workers covered by special federal industrial insurance programs designed for those working in specific conditions, such as coal mines or harbor facilities.

\textsuperscript{76} Ibid. Programs also exists for certain employees in the energy section to provide medical care and wage replacement for exposure to radiation, hazardous materials in the testing of nuclear weapons, and other hazardous materials.

\textsuperscript{77} Ibid.
In each jurisdiction, executive branch administrative agencies act as “quasi-judicial” authorities, with appeal from the decisions of the authorities generally adjudicated by the common judicial appellate system. These authorities have different forms, but are generally judicial, legal and industry experts appointed by the executive branch of the government to adjudicate administrative claims, such as the adjudicating officials of the New York State Workers Compensation Board and the California Department of Industrial Relations Division of Workers Compensation.

This is a complex scheme that, at the surface, contravenes the principle of the separation of powers embodied in the Constitution, and the political ideology at the foundation of the United States. This issue is extremely important because this investigation will analyze disparities between the adjudication of various claims within the same jurisdiction, and critical questions of applicability of the statutes drawing comparisons on different jurisdictions.

---

78 Lexis Nexis. N.Y. Workers Comp. Law § 140 et seq. (Article 8). “Administration” and specifically N.Y. Workers Comp. Law § 140, entitled “Workmen’s Compensation Board.” Also see N.C. Gen. Stat. § 97-77, entitled “North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman,” and N.C. Gen. Stat. §97-78.1, entitled “Standards of judicial conduct to apply to commissioners and deputy commissioners.” See the Legal Analysis of the Statutory Framework in Appendix Five for a more thorough discussion of the legislative intent and statutory provisions.


80 The “Separation of Powers” doctrine requires that the powers of government be separated in three equal and independent branches and that one branch should not have the power granted to another branch to ensure a balance of power. See the Federalist Papers for in-depth discussion on the “Separation of Powers” doctrine. Also see section above on “General Framework of the Legal System” in this work.
The exclusivity provisions are the centerpiece of the Program statutes, and provide the compromise, which both secures universal coverage for employees, but forbids employees from pursuing common law claims against employers. 81 This legislative compromise of the Constitutional guarantee of due process is at the center of this investigation. 82 While the definitions and classifications under the statutes of the Program are similar and without much controversy, the specific provisions of the exclusivity provisions diverge further and are the center of controversy. 83 The exclusivity provisions establish the rights of the employee to sue an employer, management (personally and individually), co-employees, and third parties. 84 The exclusivity provisions also provide conditions in which an employer is not liable to pay benefits to an injured employee at all, for instance, if the employee engaged in intentional tort or gross misconduct that is the cause of the injury or death. 85

In analyzing the specific language of the exclusivity provisions, this investigation will group the several States into categories based on the similarities of exclusions. 86 The exclusivity provisions of the Programs in California, Texas, Florida and other jurisdictions provide for explicit statutory exceptions to the exclusivity provisions. These Programs provide extensive statutory guidance for adjudication. This group will be called “Statutory Guidance for Adjudication.”

81 Lexis Nexis. See U.S. Const. amend. V, XIV. Also see New York C. R. Co. v. White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917). In White, the question of the Constitutionality of the New York Workers’ Compensation Act revolved around the exclusion of common law remedies for the employer and the employee, but specifically focused on the denial of common law rights of the employer.
82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid. See the Appendix for tables with the Jurisdictions listed in order by population, and categorization of jurisdictions according to general construction of the exclusivity provisions.
The exclusivity provisions of the Programs in New York, Illinois, Pennsylvania and other jurisdictions provide for explicit statutory exceptions to the exclusivity provisions, but only in certain instances. In other instances, the adjudicating authority must rely on case law to guide adjudication. Hereinafter, this group will be called “Hybrid Guidance for Adjudication.” The exclusivity provisions of the Programs in North Carolina, Georgia and other jurisdictions do not provide any explicit statutory exceptions to the prohibition of common law claims by employees against employers. The adjudicating authority must rely on case law to guide adjudication. This group will be called “Case Law Guidance for Adjudication.”

The exclusivity provisions of the Programs in Massachusetts, Minnesota, Colorado, Maine, Delaware, Rhode Island, and other jurisdictions provide little or no exceptions to the exclusivity provisions. Due to ambiguous statutory provisions, or judicial decisions, it has been established that there are no or few exceptions. This group will be called “Complete Bar to Common Law Claims.”

This sample comprises of the twenty most populous jurisdictions in the United States, together with Minnesota, Colorado, Maine, Delaware and Rhode Island. The full legal analysis of the exclusivity provisions, tables and maps showing the geographic location of these jurisdictions are also provided in the Appendix.87

87 See the Legal Analysis of the Statutory Framework in Appendix Five for a more thorough discussion of the legislative intent and statutory provisions. Also see Table A in Appendix Three. Table A also provides the citation for the exclusivity provisions and classifications for each jurisdiction in the United States. However, additional detailed information for each jurisdiction is provided in Table B in Appendix Three as well as other tables in Appendix Three. Also see Map A in Appendix Two for the geographic location of the States within the Sample. Also see Map J in Appendix Two for classification of each jurisdiction in the United States. Note that both Map A and Map J in Appendix Two are derived from the data contained in Table A in Appendix Three.
C. Constitutional Challenges to Exclusivity Provisions

The exclusivity provisions raise a number of questions concerning the Constitutional rights of employers and employees.

For employers, generally, common law defenses are at their disposal to protect their interests. These defenses generally include contributory negligence, assumption of risk, and primary fault of the employee. Contributory negligence is a legal principle whereby the employer would argue that the employee was also negligent and that the negligence of the employee contributed more to the injury than any alleged negligence of the employer. Assumption of risk is a legal principle whereby the employee, either implicitly or explicitly, assumes the risks of employment simply by accepting the employment and the hazards generally associated with the tasks of the job. Primary fault of the employee is a legal principle whereby the employee engaged in grossly negligent conduct and this conduct results in injury, without any significant tort on the part of the employer.

While common law defenses are abandoned, the principles were not completely discarded. As previously illustrated, employees that commit an intentional tort, engage in conduct that is grossly negligent or intentionally malicious are liable at common law for the injury of a co-employee. In addition, employers generally are not required to provide benefits for employees that engaged in grossly negligent behavior if the behavior results in injury to the employees themselves. These statutory provisions are not simply measures to appease the interest of employers. The Programs must provide employers with due process, and the Program design aims to meet these requirements.
For employees, common law claims generally provide significantly higher monetary remedies, but, however, are difficult and costly to pursue. As previously illustrated, the Programs were developed at a time when few employees exercised their rights at law, and many workers bore the costs of injury in the workplace. Today, the general public, including employees, are far more educated, are well aware of their rights at law, and are far more likely to have at least minimal resources in order to exercise those rights. In addition, the rapid rise in the cost of living, and particularly health care costs, has created a necessity for the general public and employees to ensure that there are economic programs in place to adequately cover costs caused by accidents through insurance programs. At the same time, these costs also encourage the general public to aggressively pursue remedy for economic loss due to the fault of others. The rapid rise in the frequency of litigation did not occur until after 1960, and thus, most of the Constitutional challenges of employees to the exclusivity provisions did not occur until after 1960.

This section will provide the basic Constitutional challenges. These challenges raised questions concerning the application of the Programs for employers and employees. First, this section will analyze the 1917 United States Supreme Court case New York C. R. Co. v. White, the landmark case that established that the Programs are constitutional, with certain conditions. This section will also analyze more recent case law that addresses the rights of employees to pursue common law claims against employers.

---

The principles of “due process,” “rational basis,” and “equal protection,” will be briefly discussed in this section in order to provide context for the analysis contained in this investigation. Definitions for these three terms will primarily be provided in three important decisions rendered by the United States Supreme Court.\textsuperscript{90}

In \textit{New York C. R. Co. v. White}, in 1917, an employer argued that workers’ compensation violated his due process rights enshrined in the Fifth Amendment and Fourteenth Amendment by guaranteeing an injured employee without regard for fault or negligence.\textsuperscript{91} Due process, from a civil law perspective, is a principle, which provides every person with the right to a venue for adjudication of tort claims, and the opportunity to assert claims and present defenses.\textsuperscript{92} In 1966, the Supreme Court established that “[w]here rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.”\textsuperscript{93}

In \textit{Loving v. Virginia}, in 1967, the Supreme Court heard a challenge to a law forbidding interracial marriage.\textsuperscript{94} The Court noted that the prior major challenge to a law that forbid interracial marriage analyzed if two individuals of different races that married in a jurisdiction that forbids such a marriage received equal penalty for violation of the law.\textsuperscript{95} However, the Court ruled that, while this question is crucial, equally important is the question of whether interracial couples, as a class, are treated the same as same-race couples, a class with similar standing, under the law, a principle called “equal

\textsuperscript{90}See the Legal Analysis of the Statutory Framework in Appendix Five for a more thorough discussion of the legislative intent and statutory provisions.
\textsuperscript{92}Ibid.
\textsuperscript{95}Ibid.
protection”.96 If interracial couples are treated differently than same-race couples, then the differences must be reasonable and rational, a principle called “rational basis”.97

In *Brown v. Board of Education*, in 1954, the Court ruled that public education must be provided to all on an equal basis, and that the law must protect the basic rights to make sure there is equal access to basic rights and services, speaking more to the principle of “equal protection”.98 The Court noted that public education was virtually nonexistent at the time of the passage of the Fourteenth Amendment in 1868.99 As a result, there was little case law that addressed the meaning and effect of the Fourteenth Amendment on public school segregation in 1954.100

In *New York C. R. Co. v. White*, the United States Supreme Court held that the Programs are not a violation of the due process guarantees enshrined in the Fifth Amendment and Fourteenth Amendment of the Constitution, so long as the Programs provide an “reasonably just substitute” for the prohibited common law claims for civil remedy for personal injury or death by industrial accident in the workplace.101

Accordingly, the Supreme Court concluded that:

“...it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise . . . .”102
More recently, employees have challenged the use of the exclusivity provisions to bar all common law claims against employers as a violation of the Constitution. These challenges have primarily included:

1. the right of the employee to pursue a common law claims when the cause of the injury is the intentional tort, intentional misconduct, gross negligence, malfeasance, illegal activity, regulatory violation, willful neglect or similar behavior of the employer;

2. the application of the exclusivity provisions to bar the common law claim of an employee against an employer of when the cause of action is not an industrial accident (thus the employee is unable to collect benefits under the Program statutory provisions); and

3. the dismissal of common law claims pursued by an employee against an employer without consideration of the cause of action as an industrial accident, the application of the Program statutory provisions, or the eligibility of the employee to receive benefits under the Program statutory provisions.

Since the several States, districts, territories and dependencies all have different statutory approaches to the application of the Programs, this analysis is extremely complex. Due to this complexity, the analysis will use the groups established in the sample to analyze trends, and will cite case law that shows comparisons between jurisdictions considered by courts in interpreting the statutory provisions and the meaning and application of the exclusivity provisions.
There are three key court cases where the exclusivity provisions and immunity for employees have been challenged. Illinois attempted to implement one of the most sweeping tort reforms in history in 1995. The reforms provide employees with complete immunity in the event that the employer was partially at fault together with a third party liable at common law. In addition, the liability of employers was partially subsidized by third parties under a number of circumstances by design, and the liability of third parties was significantly reduced. The Illinois Supreme Court found the sweeping tort reform effort to be unconstitutional, because management, employers and third parties were immune from liability under certain conditions. The Pennsylvania Supreme Court has not only held that an employee can pursue a civil remedy under common law against a co-employee, but, where common law claims against the employer are questionable, a tort action cannot be dismissed until injury is found to be compensable under the Programs. The Ohio Supreme Court found that a statute barring common law claims for intentional tort against an employer to be unconstitutional by violation of due process and equal protection provisions where the bar was without an “adequate substitute.” These cases will be extensively analyzed later in this work. The specifics facts and liability of the parties involved will be discussed in these later sections.

104 Ibid.
105 Ibid.
106 Ibid.
In most jurisdictions, including 46 States, District of Columbia, Guam, Puerto Rico and U.S. Virgin Islands, the courts have ruled that the Programs only provides remedy for industrial accidents.\(^{109}\) Outside of this scope, the Programs have no application.\(^{110}\) This principle establishes that if cause of action is not injury which “arose” by accident in the workplace, the cause of action is not barred at common law by the exclusivity provisions.\(^{111}\) These cases will be extensively analyzed later in this work. The specifics facts and liability of the parties involved will be discussed in these later sections.


\(^{110}\) Ibid.

\(^{111}\) Ibid.
There are two contradicting legal theories behind the question of the impact of employer intentional tort or intentional misconduct in injuries or death suffered by employees in the workplace.\textsuperscript{112} It is important to note that the case law is only significant in interpreting the statutes where this debate is not explicitly addressed by the statutory provisions.\textsuperscript{113} First, some judicial decisions have held that an injury suffered by an employee caused by an intentional tort of an employer is not an injury “by accident” and thus the insurance obtained by the employer, as well as the legal protections provided by the exclusivity provisions, do not apply.\textsuperscript{114}

Other judicial decisions have held, however, that injury suffered by an employee caused by the intentional tort of an employer merits additional compensation for the employee and severe penalty for the employer.\textsuperscript{115} This additional compensation and severe penalty can be provided by granting the employee the right to pursue a common law claim.\textsuperscript{116} But this same consideration can be made by granting the employee additional benefits through the Program.\textsuperscript{117} In these jurisdictions, the statutes and case law consider injury suffered by an employee caused by an intentional tort of an employer to be an industrial accident.\textsuperscript{118}

\textsuperscript{112}Ibid. Note that the discussion in this section is simply introductory and the legal analysis and case law analysis to follow in this work will discuss these issues more in detail. The analysis will illustrate these differences and show how these differences impact workers in various jurisdictions.
\textsuperscript{113}Ibid.
\textsuperscript{114}Ibid. North Carolina is one such jurisdiction that has this rule for intentional tort.
\textsuperscript{115}Ibid. New York and Massachusetts are two such jurisdictions.
\textsuperscript{116}Ibid. New York allows common law claims.
\textsuperscript{117}Ibid. Massachusetts does not allow common law claims, but provides additional benefits in the case of intentional tort, thereby strictly regulating legal claims between employees and employers and ensuring administration processing of all claims involving injury of an employee in the workplace, even due to intentional tort of the employer or management.
\textsuperscript{118}Ibid. If the employee elects the Program benefits for intentional tort, the common law claim for intentional tort are completely barred.
Similarly, there are varying theories on the effect and meaning of intentional misconduct, gross misconduct and gross negligence of the employer when such conduct results in the injury or death of an employee in the workplace. First, it is important to note that it is difficult to define these terms from a legal perspective, and establish the legal threshold necessary in order to prove that the conduct of employers qualifies as “gross negligence.” In some jurisdictions, intentional misconduct is considered to be tantamount to intentional tort, and thus treated as intentional tort. In other jurisdictions, intentional tort of the employer is strictly defined as an act taken with specific intent to seriously injure or kill an employer, and intentional misconduct is still considered an industrial accident. As a result, there is inconsistency between jurisdictions, and in the treatment of “intention” to allow for common law claims and additional consideration for employees. The meaning of these terms as provided by the case law will be analyzed and compared in this investigation. This investigation will also analyze the justification of the exceptions from the exclusivity provisions, whether for criminal activity, safety code violations, intentional tort, or intentional misconduct.

119 Ibid.
120 Ibid.
121 Ibid. For example, in North Carolina, intentional misconduct is defined as “conduct which the employer knew, or should have known was substantially certain to cause serious injury or death to an employee”, which is not specifically intentional, but is certainly not simply negligent. This is called the “substantially certain” standard which is also used in other jurisdictions. However, in other jurisdictions, intentional misconduct and gross negligence and gross misconduct, even for a criminal offense committed by an employer, does not except the cause of action from the exclusive jurisdiction of the Program statutes. New York is one such jurisdiction that does not allow common law claims of employees against employers for injury due to the gross negligence or gross misconduct, or even intentional misconduct of the employer.
122 Ibid.
123 Ibid.
III. Design of Investigation

This investigation is designed to provide a comprehensive analysis from various complex dimensions. First and foremost, this analysis is complicated by the diversity of statutory constructions in the 57 jurisdictions in the United States. From a public policy perspective, this investigation has multiple components, including historical, empirical and legal perspectives. The primary purpose of this investigation is to analyze the compliance of the Program statutes with the rights guaranteed by the Constitution. The purpose will establish the core questions in this investigation, specify the scope, and establish the objectives. The purpose and objectives will frame the analysis through the scope, and provide context for the hypotheses. The hypotheses, assumptions and limitations are designed to ensure achievement of the objectives. In addition, this investigation is designed with the aim to produce credible and useful findings and recommendations, particularly for organized labor and public interests.

The most challenging aspect of this investigation is the diversity of statutory constructions. There are 50 states, 1 federal district, 5 territories and dependencies, and the federal jurisdiction that extends nationwide, making 57 different jurisdictions throughout the United States (the federal jurisdiction is considered one single jurisdiction in this calculation). As previously demonstrated, each jurisdiction has subtle nuances and unique constructions of key statutory provisions that pose challenges for comparison and correlation. Notwithstanding, analytical sample groups have been created based on the similarities between the statutory constructions in various jurisdictions. As a result of this complexity, the creation of these sample groups requires an analysis to determine the validity of characterization and possible limitations and issues with the groupings.
The public policy analysis is even more complex. The first component is the historical analysis, which examines the evolution of public policy, statutory construction, and case law from 1917 to the present. The historical component also requires an empirical analysis of the changes in the labor force in the United States between 1900 and the present. The historical empirical analysis also requires an examination of the number of injuries and deaths in the workplace, and efforts to reduce workplace injury and death.

The empirical analysis uses the findings of the historical analysis, as well as draws comparisons between the empirical data for the sample groups and each jurisdiction, in order to identify trends and correlations. In addition, the empirical analysis will analyze the integrity of the empirical data, and identify gaps in the availability of empirical data to measure certain aspects of the performance of the Programs.

Finally, the legal analysis has two components. The first component is an introductory analysis of the statutory provisions, which was performed in Section II of this work. The second component is a case law analysis, which will be the most intensive analytical tool used in this investigation. Through case law, the judicial system provides meaning, scope, and application of the Program statutes, particularly ambiguous statutory provisions. In addition, case law in one jurisdiction often draws comparisons between similar statutes in other jurisdictions. Accordingly, the case law analysis will be the most important component of this analysis, and will tie together all of the findings of this investigation.
A. Purpose, Scope and Objectives

The primary purpose of this investigation is to analyze the interaction between the Constitutional framework in the United States and statutory framework of the Programs. This investigation will analyze the rights of employees under the statutory provisions of the Programs within the context of the Constitutional provisions, and judicial interpretations as to the meaning and proper execution of the statutory provisions to ensure protection of due process and equal protection guarantees.

The scope of this investigation is limited to the rights of the employee to due process and equal protection with respect to the exclusivity provisions of the Programs. The empirical data concerning the effectiveness or performance of the Programs simply as public policy, such as the efficiency in adjudicating claims, comparisons of monetary benefits as compared to cost of living, effectiveness of reducing incidents of employee injury and death in the workplace, costs of Programs to employers and overall impact on the greater economy, are outside of the scope of this investigation. However, where empirical data can be used to evaluate the operation of the statutory provisions with respect to due process and equal protection rights, empirical data is used in this analysis. In addition, this investigation excludes the legislative process for designing the statutes from the analysis. This analysis is solely focused on the administration of the Programs through the legislation that is in full force and effect, and the judicial interpretations of the statutes in response to the significant challenges to the administration, meaning and interpretation of the Program exclusivity provisions. The scope includes all significant case law concerning the Programs, and all statutes that impact the relationship between employees and employers with respect to Program coverage.
The investigation has the primary objective of providing the general public with a guide to the Programs, as well as due process and equal protection considerations in light of the exclusivity provisions. While the language in this investigation will be highly technical and will involve statutory provisions and case law, this investigation is intended to provide the general public with the fundamental knowledge of the Programs in order to understand guaranteed Constitutional rights and make informed decisions. These objectives include:

(1) ensuring that the general public has basic knowledge of the proper venue to seek remedy in the event an employee wants to pursue a legal claim for damages against an employer;

(2) ensuring that the general public understands the basic Constitutional protections guaranteed to every citizen, and understand the procedures for asserting and defending those rights in the face of unconstitutional Program administration and statutory provisions;

(3) ensuring that the general public is informed of the most relevant judicial decisions concerning the exclusivity provisions and the scope and application of the Programs;

(4) ensuring that the general public is informed of the key source of information for the various workplace safety regulations and rules and Program administration; and

(5) ensuring that the general public understands crucial Constitutional principles that may not be addressed by relevant judicial decisions, but may be useful in defending employee rights in the future.
B. **Hypotheses of the Investigation**

The hypotheses of this investigation are as follows:

**Hypothesis Number One:** Employers and employees should, by and large, have equal treatment and the same legal protections of interests through the Programs. The Programs should include similar exceptions for intentional tort, intentional misconduct and gross negligence, and options of election, for both employers and employees.\(^{124}\) This hypothesis is framed by the principles of Constitutional law, “due process,” “rational basis,” and “equal protection.”\(^{125}\) These Constitutional guarantees will be analyzed in light of the statutory construction, particularly, the exclusivity provisions, the option of election and the election of remedy, as well as exceptions to the exclusivity provisions.\(^{126}\)

**Hypothesis Number Two:** Exclusivity provisions with explicit language concerning intentional tort, intentional misconduct, gross negligence and negligence of the employee or the employer are in the public interests and far more efficient and cost effective for administration, employees and employers.\(^{127}\) These statutory provisions reduce the need for litigation, and particularly for appellate review.\(^{128}\)

---

\(^{124}\) In consideration of the scope of this investigation, reference to the Programs particularly speaks to the exclusivity provisions, detailed in the section concerning the “Statutory Construction of the Exclusivity Provisions” in Section II, Subsection D.

\(^{125}\) Refer to the previous section concerning the “Principles of Constitutional Law” in Section II, Subsection E for the detailed discussion of these three constitutional principles.

\(^{126}\) The principle of “Option of Election,” which applies to Texas, Massachusetts and Rhode Island, is introduced in the section concerning the “Statutory Construction of the Exclusivity Provisions” in Section II, Subsection D. The principle of “Election of Remedy” will be introduced later in this work.

\(^{127}\) Refer to the previous section concerning the “Causes of Action Under Statute” in Section II, Subsection C. Also see the section concerning the “Statutory Construction of the Exclusivity Provisions” in Section II, Subsection D.

\(^{128}\) This aspect of the hypothesis will require an analysis of the empirical data.
Hypothesis Number Three: In order to ensure preservation of the Constitutional rights to due process, common law claims of employees against employers should not be dismissed until it is confirmed that the Programs apply to the cause of action, the employee is eligible for benefits under the Programs, and the Program benefits provide an adequate substitute to the common law remedy. All three of these conditions should be met in order to assure compliance with the decision of the Supreme Court in New York C. R. Co. v. White.

Hypothesis Number Four: Jurisdictions that provide statutory exceptions for employees to collect punitive damages against an employer for injury due to intentional tort or intentional misconduct of the employer have lower rates of fatal injury and severe permanent disability in the workplace, and higher trade union densities.

Hypothesis Number Five: Statutory provisions that provide robust, inclusive and encompassing definitions for classes are more efficient for adjudication of application of the Programs in the modern labor force.

Hypothesis Number Six: The protection of the rights of employees must be the centerpiece and primary focus of Program reforms. Reforms that focus only on reducing costs to employers could result in violations of the Constitutional rights of employees.

Each hypothesis is analyzed further in the case law analysis.

---

129 See the section concerning “Exclusion of Common Law Defenses” in Section II, Subsection E.
130 Ibid.
131 This hypothesis specifically refers to the statutory provisions concerning the classes and definitions. See the section concerning “Classes and Definitions established by Statute” in Section II, Subsection C.
132 This hypothesis specifically refers to the judicial decisions reviewing tort reform in Illinois and Ohio, as well as procedural due process challenges in Pennsylvania and other jurisdictions. This hypothesis will be discussed in detail later in this analysis.
C. Assumptions and Limitations

The hypotheses are predicated on numerous assumptions. The hypotheses should also be analyzed in light of a number of limitations.

It is assumed that statutes cannot be designed to anticipate any and every possible scenario that could occur in the workplace. A liberal interpretation of the statutory construction of the Programs is necessary for the courts to be able to ensure that the purpose, intent and goals of the Programs are realized and that the administration of the Programs is not in violation of the Constitutional rights guaranteed and retained by the people. As agreed in many jurisdictions, the statutes should be liberally construed as to effectuate their purpose and any ambiguity in the statutes should be liberally construed and interpreted to ensure that said purpose, intent and goals are realized.

It is assumed that the true and legitimate purpose of the Programs is to provide limited benefits for employees who suffer industrial accidents. When an employer engages in intentional tort, intentional misconduct, gross negligence, reckless acts, illegal conduct or other egregious behavior, and such conduct results in the injury of an employee, the injury is not an industrial accident, and, therefore, additional considerations must be made in order to penalize the employer for said actions, and to compensate the employee for damages above and beyond the standard limited benefits provided through the Programs for industrial accidents.

It is assumed that statutory language, explicit or ambiguous, and accompanying executive and judicial interpretation of same, that finds it appropriate for causes of action to fail to qualify for benefits under the Programs, but are, at the same time, barred at common law, are absolutely and unequivocally contrary to the holding of the Supreme
Court of the United States in *New York C. R. Co. v. White*, and an expressed and explicit violation of the Constitutional rights enshrined in the Fifth and Fourteenth Amendments of the Constitution of the United States of America. Employers should not have full immunity from common law suits against employers, and the Supreme Court has ruled that the bar must be replaced by “some reasonably just substitute.” An employee, who suffers an economic loss and/or industrial accident, and was not grossly negligent or egregiously at fault in conduct, cannot and should not bear the entire cost of such damages, injury or death simply because the event occurred in the workplace and not in another venue. Moreover, every person who asserts a civil wrong has been perpetrated against him must be able to have his day in court pursuant to the Fifth and Fourteenth Amendment, and to receive compensation in consideration thereof by award of the jury. Common law jury trials can be substituted for other forms of due process, however, a complete bar of venue for due process, and immunity for employers, is not in public interest, nor Constitutional.

It is assumed that the rights and protection of workers are critical and crucial issues, from political, economic and social perspectives, even with the decline of hazardous employment in the United States. It is in the public interest for the working class to have guarantees of medical care and monetary benefits to sustain a certain standard of living when injured by accident arising out of and in the course of employment, and it is in the public interest for the working class to have guarantees of monetary benefits for their family in the event of death by accident arising out of and in the course of employment. Particularly in terms of hazardous employment, which disproportionately has lower wages than service sector and professional sector wages,
this insurance provides security and peace of mind for employees and their families. This security and peace of mind translates to political, economic and social stability so that families are not detrimentally handicapped by the injury or death of a wage earner, and translates to the elimination a strong political constituency of injured and/or handicapped employees and the survivors of employees killed in the workplace without means to live or for medical care from the political spectrum.

It is assumed that, in order to truly provide for reduced costs, and effective and efficient administrative due process, the Programs should provide swift and expedient benefits, and simplification of said due process so that employees are able to navigate the process and receive benefits without legal counsel. Information about the details of the Programs should be readily and easily accessible for employees and their families. More importantly, performance of the Programs should be statistically measured with accurate information on the number of claims, speed of adjudication, the number of challenges to the eligibility of claims to benefits under the Program. In addition, statistics should be collected on the number of common law claims dismissed pursuant to the exclusivity provisions of the Programs, and the eligibility of those claims for benefits under the Programs should be closely tracked. The statutes and regulations should require each jurisdiction to collect data in order to provide an empirical basis for the legislature to craft policy in response to the real impact of the Programs. Moreover, the benefits paid to claimants should be analyzed for its effectiveness to provide the claimants with the ability to maintain dignity and an adequate standard of living. In addition, benefits paid through administrative due process for intentional torts and other claims in certain jurisdictions, which typically fall out of the coverage of the Program in other
jurisdictions, should be compared to compensation provided through common law claims in other jurisdictions.

There are also limitations to consider with respect to this investigation.

This investigation is limited because law is evolving and living. The case law and statutory reforms identified in this investigation may not be the most current, or the controlling precedents or statutory provisions. In the future, additional research will have to be performed in order to ensure that this investigation remains relevant and accurate. This investigation also is limited because case law may not provide reliable information for the observation of trends. Case law provides very limited samples of the cases heard by the adjudicating authorities acting as trial courts. Moreover, because of limited resources, only a small sample of case law could be evaluated for this investigation.

Additional limitations include questions concerning the integrity and comparability of the data because empirical data for the various jurisdictions may not be comparable because rules for benefits, disabilities, as well as difference in the structure of administration, may result in vast differences between the amounts and methods of the distribution of benefits. In addition, due to the variation within sample groups, and the difficulty in thoroughly analyzing the case law for every jurisdiction, the sample groups may not prove robust enough to show trends that truly encompass the universe for all jurisdictions. The preliminary analysis implicates that jurisdictions in the same geographic region have similar statutory constructions, but this assumption may prove to be false. The data analysis may also show false or spurious correlations between the empirical data and data sets used to test the hypotheses.
D. Data Sets and Data Elements

Due to the complexity of this investigation, there are a number of data sets that provide important data relevant for this analysis. These data sets include the jurisdictions, the statutes, the empirical data, and the case law.

The most important data set in this investigation is the sample of jurisdictions. The twenty most populous jurisdictions in the United States, by state, in order from most populous to least populous, are California, Texas, New York, Florida, Illinois, Pennsylvania, Ohio, Michigan, Georgia, North Carolina, New Jersey, Virginia, Washington, Massachusetts, Indiana, Arizona, Tennessee, Missouri, Maryland, and Wisconsin. These jurisdictions account for more than 74% of the national population (over 235 million of 315 million) and over 75% of the total GDP in the U.S. (over $11 trillion of the more than $15 trillion in nominal GDP). This investigation will also focus on Minnesota, Colorado, Maine, Delaware, and Rhode Island because of the unique statutory arrangement in those jurisdictions. These 25 jurisdictions make up the sample used in this investigation (hereinafter referred to as the “Sample”). The Sample has already been divided into four groups in the introductory parts in this work. These groups are Statutory Guidance Jurisdictions, Hybrid Guidance Jurisdictions, Case Law Jurisdictions, and Exceptional Jurisdictions. These groups will be used for evaluation and comparison throughout this investigation.

133 United States Department of Commerce Bureau of Economic Analysis. “Interactive Data.” http://www.bea.gov/itable/index.cfm; United States Department of Commerce Bureau of the Census. “2010 Demographic Profile.” http://www.census.gov/popfinder/. This data is also contained in Table A in Appendix Three. A map of these jurisdictions is provided in Map A in Appendix Two.

134 Ibid. This data is also contained in Table A in Appendix Three. A map of these jurisdictions is provided in Map A in Appendix Two.

135 See the Map A in Appendix Two and Table A in Appendix Three for details on the Sample and the groups used for analysis. Additional empirical data concerning the Sample is available on the other maps and tables provided in the Appendix Two and Appendix Three.
The second data set, which was introduced in the previous section, is comprised of the statutory provisions, particularly the exclusivity provisions, and statutory provisions that establish the classes and definitions for the Programs. The prior section introduced the statutory provisions for various jurisdictions within the Sample.

The third data set is comprised of empirical data. The primary sources for empirical data will be the United States Department of Labor (USDOL) (Bureau of Labor Statistics and the Occupational Safety and Health Administration), the United States Census Bureau, the United States Social Security Administration, and the National Academy of Social Insurance. In addition, data has been collected from various state agencies, including the New York State Workers’ Compensation Board, the New York Department of Labor Division of Safety and Health, the California Department of Industrial Relations Division of Workers’ Compensation, and the California Department of Industrial Relations Division of Occupational Safety and Health.

It is important to note that the USDOL maintains a close relationship with all of the state agencies that administer the Programs and manage programs in occupational safety and health. In this coordinated effort, the USDOL collect information from each jurisdiction and compiles the data into annual reports that provide standardized data for each jurisdiction.

---

136 All of the empirical data collected for this investigation are presented in tables in Appendix Three of this work. Each table has citations to provide information on the sources for the data.
137 Information collected from these state agencies will be presented later in this work.
138 The repositories for data shared between federal and state agencies are provided in the citations to the tables in Appendix Three.
139 This data includes the number of employees in the work force in each jurisdiction, the number of employees in each industry and sector in each jurisdiction, the number of workplace injuries within a given year in each jurisdiction, and the number of workplace deaths within a given year in each jurisdiction.
The last data set in this investigation is the case law. Case law is critically important for legal analysis because case law establishes the meaning, scope and application of the law, particularly ambiguous statutes. Accordingly, the legal analysis and case law analysis in this investigation will be designed according to the standards established in the legal field in order to ensure credibility and verifiability of the case law cited and arguments presented.  

The process for choosing the case law for this investigation was onerous and time consuming. Summaries, citations and annotations from more than 500 cases were read in order to identify the most pertinent cases. In addition, the Sheppardizing process was used to ensure that these cases were not questioned, overruled or overturned since their publication. This investigation cites more than 40 cases from 15 jurisdictions, and these cases also make mention and comparison of laws in more than 10 jurisdictions that are not represented in the case law sample. While these 25 jurisdictions represented in the case law sample are not identical to the jurisdictions in the Sample, it has been determined that case law representing 25 out of 57 jurisdictions provides a thorough and adequate sample for analytical purposes.

Once the cases were chosen, the case law excerpts were refined to eliminate unnecessary texts. Most of these cases exceed 20 to 25 pages, but have been analyzed within 2 to 3 pages in this investigation.

Examples of the standard formatting of a case law analysis and legal analysis can be found through various sources. For the purposes of providing examples, guidelines provided by the City University of New York, San Francisco State University and the University of Kentucky are used. See http://userwww.sfsu.edu/dlegates/URBS513/howtodox.htm; http://www.law.uky.edu/files/docs/case/clinical/legal_analysis.pdf; http://www.lib.jjay.cuny.edu/research/brief.html

Lexis Nexis provides a Shepard’s Citation service. http://www.lexis.com.

See the Index of Cited Case Law in Appendix Four for an itemized list of all cases cited in this investigation.

-50-
The standard for a case law analysis requires a structure similar to case law itself. First, the relevant statutes or law are stated and presented. The Program statutes were presented in Section II above. This presentation is not simply a paraphrasing, but a direct quote. This direct quotation is important to highlight controversial or ambiguous statutory provisions. Next, ambiguous or controversial statutory provisions are clarified using case law to solidify the meaning, scope and application of the law. The upcoming case law analysis will perform this tasks, addressing the true meaning of “an injury by accident which arises out of and in the course of the employment,” and the various levels of liability, such as intentional tort and intentional misconduct.

After stating the law, a case law analysis must state the facts of a specific case. In each of the following cases, the factual controversy at the center of the claim will be cited directly from the case law. For the purposes of this investigation, the statement of the facts not only provides context for the ruling, but also provides comparability between judicial decisions, based on the facts before the court that were considered.

Finally, the law has to be applied to the facts of the case. This is the most important component of a case law analysis. A powerful case law analysis must have a clear and firm grasp of the legal principles, and then properly apply the legal principles to the facts of the case. This analysis is clearly complicated by the comparison of statutes in 25 jurisdictions, as well as more than 40 cases from 15 jurisdictions. Notwithstanding, the basic principles of a case law analysis will be used to provide structure for this investigation.

143 See the Index of Cited Case Law in Appendix Four for an itemized list of all cases cited in this investigation. Also see the notes in the Index of Cited Case Law for information on formatting of case law citations.
E. Methodology and Analytical Framework

The methodology of this investigation has three phases, introductory phase, empirical data analysis phase, and the case law analysis phase. To conclude, the findings from these three phases will be compared, correlated, and summarized in the comprehensive analysis. The purpose of the comprehensive analysis is to tie together the distinct phases of the analysis. Generally, empirical data analysis is not performed simultaneously with a case law analysis. The comprehensive analysis will demonstrate the necessity of performing both analyses in this investigation.

The first phase, introduction of the Program statutes, was completed in Section I and Section II above. The purpose of this phase was to provide the basic knowledge for understanding of the Program statutes, common construction, and the Constitutional principles relevant to the Program statutes.

The second phase is the analysis of empirical data. This empirical data analysis will be performed in two parts, first in the preliminary analysis, and then in the comprehensive analysis following the legal analysis. Following the contextual basis provided in the introductory sections, the preliminary analysis further provides context and frames the investigation for the legal analysis. This empirical analysis examines the public policy implications of the Programs, their operation, and the impact of the Programs in the labor force and economy. In light of the scope of this investigation previously detailed, the empirical analysis is not at the center of this investigation, particularly because of the various issues with the empirical data itself. However, the empirical data plays an important role in framing this investigation by illustrating the reach of the Program statutes in the labor force, the number of workers that are covered
by Program insurance coverage, and the estimated number of workplace injuries and
deaths that occur each year.

As previously detailed, the empirical data analysis is divided into two parts, a
historical analysis, and a general empirical analysis. The historical analysis is important
because the labor force in the United States has experienced remarkable change in the last
100 years. The historical analysis will analyze the evolution of the Programs, the
changes in the labor force revealed through empirical data, and change in general areas of
law, such as tort claims and the legal field. This historical analysis will provide context
in understanding the original logic and intent behind the Programs. In many
jurisdictions, the Programs were first implemented prior to 1930. In 1930, the Social
Security program and unemployment insurance did not exist, the middle class was
relatively small, and poverty was widespread. The combination of the New Deal
reforms, the Second World War, open international trade policy, and the steady economic
growth of the next 50 years resulted in a rapid rise in the cost of living, a decline of the
manual labor and manufacturing sector, and a strong and powerful middle class. The
historical analysis will show how these trends impacted the labor force and the Programs.

The general empirical analysis is critical to draw comparisons between the
jurisdictions. First and foremost, it is important to note that there are serious concerns
about the integrity of the data available. Notwithstanding, the available data will be used
to search for general trends. The resources were not available in this investigation to
thoroughly analyze the data sources and formulation of estimates used in the
development of the empirical data.
The last phase of this investigation is the legal analysis, which consists of the statutory analysis and the case law analysis. As previously mentioned, the introductory statutory analysis is contained in Section II above.

The case law analysis has two parts. The primary case law analysis clarifies and provides meaning, scope and application to the general principles of the Programs. The primary case law analysis will focus on five jurisdictions, which are California, New York, North Carolina, Texas, and Pennsylvania. As previously mentioned, California, New York, and North Carolina will be representative of their respective Sample groups. As such, the case law analysis for these three jurisdictions will be the most extensive. In this investigation, ten cases are analyzed from New York, five from California, and five from North Carolina. The analysis of cases in Texas and Pennsylvania are far more focused with only two cases summarily discussed in Texas, and one case reviewed from Pennsylvania.

The secondary case law analysis reaches deeper into the controversies surrounding the Program provisions and examines recent constitutional challenges to the Program provisions, and extraordinary statutory constructions and policy. This part of the case law analysis will focus on Illinois, Ohio, Georgia, Tennessee, Massachusetts, Maine, Rhode Island, Minnesota, Colorado, and Delaware. It is important to note that the secondary case law analysis includes jurisdictions from all four Sample groups. It is also important to note the importance of the extraordinary group of jurisdictions, and the diversity within the group. These trends clearly demonstrate the diversity within each Sample group, an important analytical point in this investigation.
This investigation will be finish with a comprehensive analysis. The comprehensive analysis will combine of the findings from the empirical data analysis and the legal analysis. By its nature, the legal analysis is devoid of empirical data. Legal analyses in the United States analyze the validity, meaning, scope and application of the law with respect to the Constitutional framework, and not to the performance of the law as public policy from an empirical standpoint. This trend is evident in the distinct separation of empirical analyses from legal analyses in the literature. For instance, the United States Department of Labor and the National Academy of Social Insurance primarily focus on the empirical data. The American Bar Association and the case law primarily focus on the legal analysis. It is important to note that certain cases analyzed in this work make specific reference to the need to separate the empirical analysis from the legal analysis. From an empirical standpoint, a public policy may be effective and meet its objectives, however, the law may violate the Constitutional principles that are central to governance in the United States. As such, this investigation has been designed to analyze the empirical and the law separately. Subsequently to the completion of the individual analyses, the comprehensive analysis will combine the findings to search for correlations between the various statutory constructions, the case law interpretations, and the empirical data.

Finally, this investigation will close with recommendations based on best practices identified in the comprehensive analysis. These recommendations will address the need for certain reforms, the need for public policy considerations, the lack of certain empirical data, and the ideal statutory construction for the Program statutes.
IV. Empirical Data Analysis

These preliminary observations and findings are primarily of an empirical nature. These findings will frame the legal analysis in this investigation. These findings separately address three components of this investigation, which are the Sample, the available empirical data, and the case law that will be analyzed in the legal analysis.

The sample analysis will closely analyze the jurisdictions within the Sample. This analysis is necessary to ensure that the Sample is robust, and appears to be sufficient representative of the universe of Program statutory constructions in the United States.

The historical and empirical analysis will present the findings of the empirical data analysis performed for this investigation. As previously mentioned, the empirical data gathered for this investigation provides the best method for comparing jurisdictions. The integrity of the same empirical data, however, has been questioned because of issues with the quality of the data sources and estimates. All of these issues will be analyzed in this section.

Finally, this section will use the empirical findings and the introductory statutory analysis to frame the case law analysis. This investigation has already shown that there are multiple dimensions of the law for the purposes of a legal analysis. In addition, public policy analysis can focus on empirical data rather than the philosophical foundation of the legal system. As previously discussed, this legal analysis will focus solely on the philosophical foundation of the legal system in the United States, which is enshrined in the Constitution of the United States of America, and the interaction between this foundation and the Program statutes.
A. Empirical Analysis of the Sample

This sample analysis will analyze the trends in empirical data with respect to the Sample groups. Within this sample, the preliminary analysis already shows significant differences between the groups.

The geographic and economic differences between the groups are significant. The jurisdictions with statutory guidance for adjudication tend to be in the North and West, while the jurisdictions with case law guidance for adjudication tend to be in the South. The jurisdictions with hybrid guidance for adjudication are all in the North and pioneered laws implementing the Programs. Historically, and up to the present, the jurisdictions with statutory guidance for adjudication all have had, and still have, a larger percentage of their respective labor forces in unions. In addition, the jurisdictions in the North and West tend to have a higher GDP per capita, and higher average wages for covered employees.

---

144 See the section concerning the “Statutory Construction of the Exclusivity Provisions” in Section II, Subsection D, and the section concerning the “Data Sets and Data Elements” in Section III, Subsection D. Also see Map A in Appendix Two and Table A in Appendix Three.
145 All of the empirical data collected for this investigation is presented in maps and tables in the Appendix of this work. Specifically, see Appendix Two and Appendix Three.
146 See Map A in Appendix Two.
148 See a summary of the findings with respect to trade union density in Map H in Appendix Two. Also, see the complete listing of empirical data collected with respect to trade union density in Table E in Appendix Three. It is important to note that the data is skewed in the District of Columbia, Virginia, Maryland, and Texas. In the District of Columbia, Virginia, and Maryland, a large proportion of the labor force works for the federal government in professional positions, thereby providing the labor force with abnormally high average wages, particularly considering most of these jobs are sedentary, while still covered by Program statutes. In Texas, a large proportion of the labor force works in natural resource extraction, particularly oil, which provides wages far higher than the average wage in other sectors. It is important to differentiate Texas from Maryland and Virginia, because mining and resource extraction is a very dangerous and hazardous profession.
149 See Map I in Appendix Two. Also, see the complete listing of empirical data collected with respect to GDP per capita and average wages for covered employees in Table C in Appendix Three.
Numerous investigations have analyzed the differences between the Program costs per jurisdiction.\textsuperscript{150} In addition, numerous investigations have also analyzed the differences between injury and fatality rates in each jurisdiction.\textsuperscript{151} The National Academy of Social Insurance estimates that nearly half of all industrial accidents and occupational illnesses are not reported.\textsuperscript{152} It is also clear that reporting requirements are not uniform nationwide.\textsuperscript{153} This presents significant challenges for the empirical analysis in this investigation.

In Texas, employers are not required to report industrial accidents that do not result in more than a day away from work.\textsuperscript{154} Texas has one of the highest fatal injury rates in the Sample at 5.3 deaths for every 100,000 workers in 2010, however, Texas has one of the lowest Non-Fatal Injury Rates at 3.1 industrial accidents for every 100 workers in 2010.\textsuperscript{155} Texas also has one of the lowest trade union densities in the country.\textsuperscript{156} As

\textsuperscript{150}See the Report from the National Academy of Social Insurance.
\textsuperscript{152}See the Report by the National Academy of Social Insurance. In this report, it is believed that low wage workers are far more likely to fail to report compensable injuries. In addition, the report cites disability insurance and sick leave as two benefits commonly used by workers who suffer from an industrial accident in lieu of workers’ compensation. Both benefits generally pay 100% of wages or above during the period in disability, while the Programs generally provide benefits between 50-75% of wages. However, the report estimates that only 63% of private sector employees have sick leave benefits, and only 38% of private sector employees have disability insurance.
\textsuperscript{153}Ibid. The National Academy of Social Insurance discusses this issue, but the United States Department of Labor Bureau of Labor Statistics, which maintains the most comprehensive repository of the data with respect to workplace injury, illness and death, also acknowledges the lack of standards with respect to reporting.
\textsuperscript{154}See the website for the Texas Department of Insurance Division of Workers Compensation. “Workers’ Compensation Resources for Employers.” http://www.tdi.texas.gov/wc/employer/index.html. The information for employers explicitly states that “Employers who do carry workers’ compensation insurance coverage are required to report all known occupational disease and any work-related injuries that result in more than one day of lost time.”
\textsuperscript{155}See Table D and Table E in Appendix Three. It should be noted the maps in Appendix Two provide a summary of the empirical data contained in these tables. Within the Sample, Texas has the second highest fatal injury rate at 5.3 deaths for every 100,000 covered employees, exceeded only by Missouri, which had 5.5 deaths for every 100,000 covered employees. It should be noted that outside of the sample, there are jurisdictions with fatal injury rates that are far higher, such as North Dakota (12.8), Alaska (12.7), Montana (12.1), and Wyoming (11.0) (these are the only jurisdictions with fatal injury
previously mentioned, Texas has a significant proportion of the labor force, 2.3%, working in mining and natural resource extraction, as well as construction and manufacturing.157 Texas also has the lowest average benefits paid per industrial accident in the country.158 These trends suggest that jurisdictions like Texas are more likely to have far lower rates of injury reporting. The latest statistics in Texas are in stark contrast to the statistics in the State of Washington. Washington has one of the lowest fatal injury rates, at 2.2, but also has one of the highest non-fatal injury rates in the country, at 4.1.159 It is important to consider, however, the proportion of the labor force in hazardous employment. Washington has a significantly lower proportion of workers in the mining and resource extraction sector as compared to Texas.160 Washington also has one of the highest trade union sector rates in the country.161 Washington also provides employees with one of the highest benefit rates in the country.162

Given these trends, this investigation will attempt to find correlations between statutory construction and empirical data.

\footnotesize
\textsuperscript{156} Specifically see Table E in Appendix Three.
\textsuperscript{157} Ibid. See Table E in Appendix Three. It is important to note that the nationwide average for the percentage of the labor force in mining and natural resource extraction sector is 0.60%, and the average within the Sample is 0.43%.
\textsuperscript{158} Ibid. It is very important to highlight that the National Academy of Social Insurance reported that employees are less likely to report workplace injuries under the Program guidelines when benefits are low, and alternatives are available, such as disability insurance and sick leave. Moreover, the National Academy of Social Insurance reported that employees are more likely to continue working with an injury in order to continue to receive full wages, particularly in low paying jobs, because the Programs also provide only a portion of wages, and never the full wages.
\textsuperscript{159} Ibid. See Table D in Appendix Three. Similarly, Vermont also has a relatively low fatal injury rate while also matching the non-fatal injury rate in Washington. Only Maine has a higher non-fatal injury rate than Washington and Vermont. Within the Sample, only Massachusetts has a lower fatal injury rate than Washington.
\textsuperscript{160} Ibid. Washington has a mining and natural resource extraction sector rate of 0.22% of the labor force, far lower than the average for the nation (0.60%), and the average for the Sample (0.43%).
\textsuperscript{161} Ibid. In Washington, 19% of the labor force holds memberships in unions. This trade union density rate is exceeded only by the rates in New York, Alaska and Hawaii.
\textsuperscript{162} Ibid. Washington has the second highest benefits rate, exceeded only by California.
B. Historical Analysis of Empirical Data

The complex history of the labor force and workplace safety in the United States is an important aspect of this investigation. Between 1900 and 1970, the labor force in the United States experienced significant changes.

The trade union density in the United States has steadily declined in the last 70 years, which was at 20% in 1983, and almost 35% in 1954. This decline in union membership has also accompanied a steady decline in the proportion of the labor force in the manufacturing sector in the United States. In 2009, only 9% of the labor force in the United States was employed in the manufacturing sector, as compared to 13% in 2000 and more than 33% in 1950.

More importantly, prior to 1910, employers in the United States “developed production methods that were both highly productive and often very dangerous,” which were the result of “a legal and regulatory climate that diminished employer’s interests in safety,” according to Mark Aldrich. Mining was the most dangerous sector, with more than 3 deaths for every 1,000 miners in 1904.

---

While manufacturing and good-producing industries were extremely important in the economy in 1900, nearly 38% of the labor force at that time worked on farms at compared to 3% in 1999, thereby leaving a much smaller proportion of the labor force for the remaining sectors, good-producing at that time only 31% and manufacturing only representing a part of the good-producing sector. See Fisk, Donald M (30 January 2003). “Compensation and Working Conditions: American Labor in the 20th Century.” United States Department of Labor Bureau of Labor Statistics. http://www.bls.gov/opub/cwc/cm20030124ar02p1.htm.
166 Ibid. It is important to note that Aldrich breaks down the findings to show the rate of death of workers between 1890-1894, and then again in a different period from 1900-1904. The increase in the rate of fatal injury for miners shows the changes in the sector within that short period of time.
It is important to note that Aldrich draws comparisons between other industrializing nations in the same time period.\textsuperscript{167} Between 1890 and 1904, Aldrich shows that the rate of fatality in the mining sector declined in Great Britain, from 1.61 deaths per 1,000 miners, to 1.28 deaths per 1,000 miners.\textsuperscript{168} During the same period between 1890 and 1904, the rate of fatality in the miner section increased in the United States, from 3.29 to 3.13 for Anthracite coal, and, far worse, from 2.52 to 3.53 for Bituminous coal.\textsuperscript{169} Similarly, Aldrich illustrates how the rate of fatality in the railroad industry was far higher in the United States (2.67 for every 1,000 railroad workers in 1889, and 2.50 in 1901), than in Great Britain (1.14 for every 1,000 railroad workers in 1889, 0.89 in 1901).\textsuperscript{170}

Aldrich accredits workers’ compensation laws, as well as safety regulations and public interest, for the significant decline in workplace injury and death between 1900 and 1940.\textsuperscript{171} Quoting Samuel Gompers of the American Federation of Labor, Aldrich notes that Gompers was “impressed with how [the German workers’ compensation insurance program] stimulated business.”\textsuperscript{172}

\textsuperscript{167} Particularly, Aldrich compares deaths in the mining sector in Great Britain to deaths in the mining sector in the United States in the same period.
\textsuperscript{168} \textit{Ibid.} Aldrich discusses in detail the techniques used in mining in Great Britain as compared to the United States, and that the techniques in the United States were far more dangerous. In addition, Aldrich highlights that miners were paid by the ton of coal extracted, so safety considerations were often ignored in order to ensure production was sustained at a viable rate for miners to collect wages.
\textsuperscript{169} \textit{Ibid.} While Aldrich is very detailed in discussing the differences between the “room and pillar” method for mining in the United States, as compared to the deep concentrated method for mining in Great Britain, he does not specify if the method was more commonly used for Anthracite coal or Bituminous coal, nor does he provide any details to explain the differences between the mining techniques of the two types of coal, or the reason for the differences in the fatality rates.
\textsuperscript{170} \textit{Ibid.} It should be noted that Aldrich also provides a breakdown of the different functions for railroad workers, including trainmen, coupling, and braking.
\textsuperscript{171} \textit{Ibid.} In 1910, in the steel injury, the fatality rate (deaths per one million man hours) was 0.40 and the non-fatal injury rate was 44.1 (injuries per one million man hours). In 1939, in the steel injury, the fatality rate was 0.13 and the non-fatal injury rate was 11.7. With an average of a 60-hour work week, 1 million man hours represents an estimated 320 employees working a 60-hour work week for a calendar year.
\textsuperscript{172} \textit{Ibid.}
Aldrich notes that, between 1911 and 1921, forty-four states implemented workers’ compensation laws, following the New York State Workers’ Compensation Law of 1910, and that union interests were an important factor in advocating for workers’ compensation laws. As a result of these efforts, workplace fatality and injury significantly declined between 1930 and 1970.

It is important to note that Aldrich analyzes two dynamics that occurred between 1900 and 1970. While special interests, namely unions, public interests and progressive political forces, were successful in implementing regulation and workers’ compensation laws, employers saw a sharp rise in the costs of accidents in the workplace. As a result, employers proactively took measures to reduce accidents in the workplace, including the development of the National Safety Council in 1913. At the same time, market forces continued to increase workplace injuries during economic booms and times of war, particularly the Second World War. As a result, political pressure led to the establishment of the Occupational Health and Safety Administration and the Mining Safety and Health Administration in 1970.

---

173 Ibid. It is important to note that Aldrich reports that unions had increased their political influence and power during the Second World War, and used that influence and power to promote workplace safety.
174 Ibid. In the mining sector, the injury rate (injuries per million man hours) declined from 89.9 to 42.6 between 1931 and 1970. In the manufacturing sector, the injury rate (injuries per million man hours) declined from 24.2 to 15.2.
175 Ibid. Aldrich reports that the mandatory insurance coverage required by law increased the average costs of employers dramatically with the implementation of the workers’ compensation laws.
176 Ibid. It is important to note that Aldrich also credits innovations in technology for the decrease in workplace injuries.
177 Ibid. It is important to note that Aldrich identifies a number of periods where workplace injury and death rates increased between 1930 and 1970, despite the overall downward trend, particularly during the Second World War. Aldrich credits this phenomenon to the high turnover and stress on productivity during those periods, as well as economic and political turmoil.
178 Ibid. It is important to note that Aldrich reports that work place injury and death increased in the decade prior to the establishment of the Occupational Safety and Health Administration and the Mining Safety and Health Administration.
The development of the regulatory framework coincided with remarkable changes in society in the United States. Prior to 1950, religious institutions provided most medical care, which was coordinated through community-based efforts without any focus on profitability.\(^{179}\) This model was inherited from the British during the colonial period.\(^{180}\) At that time, medical care was considered a public service, such as education, and religious institutions often provided free care to those in poverty.\(^{181}\) Costs were minimal, and advanced health care was not available to most of the population.\(^{182}\) In addition, most people did not regularly visit a doctor for preventative care.\(^{183}\) Most only sought medical care when they had a medical complication.\(^{184}\)

The devastation in Europe, Asia and the Middle East after the two World Wars encouraged public policy on health care to take a different trajectory than in the United States.\(^{185}\) In the United Kingdom, France, Germany, Italy, Spain, Japan, Canada,

---


\(^{180}\) Ibid. Particularly see “The Origins of the English Hospital.”

\(^{181}\) Ibid. It should be noted that education was primarily provided by religious institutions in the United States prior to 1900. The Supreme Court discusses the evolution of education in the United States in the case Brown v. Board of Education. Refer to discussion in section on “Principles of Constitutional Law” in Section II.E.i.

\(^{182}\) Ibid.

\(^{183}\) Ibid.

\(^{184}\) Ibid.

Australia, Egypt, Israel, Lebanon, and Turkey, the state intervened in the health care industry in order to strictly regulate health care, and ensure equal and available access.\(^{186}\)

In addition, economic turmoil in Latin America led to the intervention of the state in the health care industry in Argentina and Brazil, among other countries.\(^ {187}\) Only Switzerland and the United States have maintained health care industries dominated by private health care providers.\(^{188}\)

By 1960, technological advances in medicine, and a business model for profitability in the health care industry, prompted the rapid growth of the private health care industry in the United States, and the rapid rise of health care costs over the past 50 years.\(^ {189}\) During this same 50-year period, the United States experienced expansive economic growth.\(^ {190}\)

---

\(^{186}\) Ibid.

\(^{187}\) Ibid.


With the rise of the cost of health care, as well as other commodities, the increase of wealth and personal property, and the general cost of living, a newly empowered and strong middle class began to assert their legal rights to protect their property through the common law legal system, leading to a rapid rise in litigation.\textsuperscript{191} Towers Watson reports that tort cost have risen from $1.8 billion USD in 1950, to $248.1 billion USD in 2009. The report also highlights tort costs as a percentage of GDP, from 0.62\% in 1950 to 1.74\% in 2009, with a peak at 2.24\% in 1990.\textsuperscript{192} Adjusting for inflation, tort cost per capita have risen from $106 USD in 1950, to $808 USD in 2009, with a peak at $972 USD in 2005.\textsuperscript{193} Commercial tort costs have consistently exceeded personal tort costs. Towers Watson reports that commercial tort costs were $152.7 billion USD in 2009 as compared to $95.4 billion USD for personal tort costs.\textsuperscript{194}

All of these historical developments are important for this investigation. The changes in the labor force, the economy, the health care industry, organized labor, and political power all played a major role in shaping the Program statutes, reforms and application. In addition, changes in the adjudication of tort at common law encouraged an increase in personal tort claims. As demonstrated, these historical developments are both empirical and legal. The empirical data will be summarily analyzed in the empirical analysis section. The legal analysis will further examine the historical aspects of the changes in law and the interpretation of the law.

\textsuperscript{192} Ibid. See the report on page 5.
\textsuperscript{193} Ibid. See the report on page 6.
\textsuperscript{194} Ibid. See the report on page 7.
C. Analysis of Contemporary Empirical Data

In order to clearly understand the empirical data, this analysis must first provide context for the labor market and the health care industry, as well as the general profit-driven insurance industry. This investigation must also contextualize the current economic crisis in the United States, and the impact on the labor market, insurance industry, and thus the impact for the Programs.

The current trends in the labor market in the United States are important to understand to impact of the Programs. The National Academy of Social Insurance has estimated that the Programs provide coverage for approximately 125 million of the 155 million in the labor force. The United States Census Bureau reports that the working age population, between the ages of 18 and 64, is over 190 million people in the United States. This data raises a key question about this labor force population calculation, and the “labor force participation rate,” commonly referred to as the “unemployment rate,” currently at 7.9%. As of the end of January 2013, only 131 million people were employed on the payroll of a business entity, excluding farm labor. As a result, only two-thirds of the working age population is engaged in salaried work.

---

195 See Table C in Appendix Three.
196 United States Census Bureau. “Age and Sex Composition in the United States: 2011”. Retrieved from http://www.census.gov/population/age/data/2011comp.html. Note that the statistics show that there are over 183 million between the ages of 20 and 64. Assuming the 20.8 million between the ages of 15 and 19 are evenly distributed, there are another 8 million people at age 18 or 19, providing the total working age population at approximately 191 million people.
198 Ibid. This number was calculated by adding all of the salaried employees reported by the USDOL.
199 Ibid. This percentage was calculated by taking the 131 million as a percentage of the 191 million working age population.
The government uses various rules to exclude millions in the working age population from the calculation of the population in the labor force. According to these rules, the government excludes “those who have no job and are not looking for one” from the population of the labor force. Naturally, those confined to institutions such as prisons and treatment centers for disabilities, students attending university and not working, military personnel, or those engaged in informal work arrangements are not counted. Those that are independently wealthy, spouses of salaried workers that make a voluntary election not to work, small business owners, and others are also properly excluded from the calculated. But some of those excluded desire to find work, and the government provides various methods for calculating the unemployment rate, the highest of which is currently at 14.6%. Rather than using a labor force population with only 141 million, this calculation also factors in those that have stopped looking for work and those that are underemployed due to the economy. Critics, including Congressional Representatives, consider the current unemployment rate to be misleading and ineffective for crafting policy.

---

201 Ibid.
202 Ibid.
203 Ibid.
205 Ibid.

-67-
In light of the number of people searching for work today, this investigation must also analyze wages in order to provide the basis for analyzing benefits, which are based on wages at the time of injury. The United States Social Security Administration reported that nearly half of all wage earners are earning less than $30,000 per year in 2011. Even purchasing food has become a hardship for a majority of low-income households in the United States. As such, it is important to understand the implications for the Programs. Workers’ compensation provides benefits that are typically between 50-75% of wages while the injured worker is out of work recovering from the injury. Given that manual labor employment is more likely to provide lower wages, low-income households that already may be experiencing hardship may have further hardship when receiving partial wages through the Programs while an injured workers is out of work.

The health care services for injured workers comprise of the last key component of the Programs. As a result, the health care crisis has a profound impact on the Programs. With 44 million without healthcare, and 38 million without sufficient healthcare, nearly one-third of the population does not have secure and ready access to health care services. The crisis also impacts those with health insurance, whose claims are often denied by insurance coverage providers.

---

210 Ibid. These figures estimating the number of people without health care in the United States were published in 2000. However, analysts and experts report that the health care crisis is worsening. See Bybee, Roger (19 May 2011). In These Times. “America’s Healthcare Crisis Getting Worse”. Retrieved from https://www.commondreams.org/headline/2011/05/19-3
211 Ibid.
Critics of the Programs point to a number of issues with the administration of the Programs, including benefits rates, the profit-driven insurance model, and the complex and inconsistent regulatory schemes.

“Workers’ compensation systems, which are administered by each State, poorly serve the needs of many injured workers, and are unpopular with many employers and health care providers. While most states have similar approaches to providing workers’ compensation benefits, in covering most workers, and in paying for all necessary medical care, each state system is unique and varied in its case adjudication process, its levels of benefits, its allowance of choice of primary treating physician and treatment modalities, and its regulation of insurance companies and self-insured employers. States differ, often dramatically, on the level and scope of permanent disability benefits, coverage of mental health conditions resulting from work, and insurance and claims administration regulation. In most states, workers’ compensation benefits are administered through private, profit-oriented insurers. In 23 states, a state fund exists to provide coverage and administration in competition with private insurers; and in four states, a state-run fund is the exclusive provider of mandatory insurance. Purchase of insurance coverage by employers is commonly handled like a commodity, with premium cost being the primary consideration, and prevention and claims services undervalued. In those states with competitive private insurance, the shifting of coverage between carriers is counterproductive to public health: there is no consistent or long-term effort directed at injury and disease prevention. Premium levels often fluctuate because of macroeconomic changes rather than due to an individual employer’s attention and success in reducing injury and illness. Workers’ compensation, on average, covers only 27% of the $170 billion estimated annual cost of occupational injuries, illnesses and fatalities.”

As previously mentioned, geography, trade union density, character of manufacturing and hazardous employment sectors, and the character of workplace safety regulations all appear to significantly impact the statutory construction of the Programs. The preceding historical analysis clearly showed that organized labor, political interests, and hazardous working conditions all promoted workplace safety and workers’ compensation laws. The introductory legal analysis and sample analysis has already showed the similarities between Program statutory construction and the nature of the labor forces in neighboring jurisdictions.

Strong organized labor seems to have a greater influence over labor policy, including Program policy, and there appears to be a correlation between strong organized labor (higher trade union density) and a higher degree of statutory guidance for adjudication of Program application. In addition, studies have suggested that workers in a union are more likely to exercise their rights under the law, to have affordable resources available in order to exercise those rights, to have strong protection against harassment for exercising such rights, and to ensure receipt of benefits.

It appears that jurisdictions with high trade union density are more likely to have workers that to understand their rights under the law, to have services readily available to provide low-cost or free legal assistance, and to have legal protections and advocacy to ensure that workers exercise those rights. In addition, it appears that there is a correlation between trade union density and higher benefit rates. This would suggest that


214 Ibid. Specifically, this study discusses the inherent differences in unionized workplaces as compared to workplaces that are not organized, and the wealth of information provided to unionized workers about their rights and protections under the law, including rights provided by the Programs.
jurisdictions with high trade union density have a higher rate of reported injury. This logic suggests that the jurisdictions with low trade union densities have lower rates of reported work place injuries because workers are less likely to report these injuries. Just as jurisdictions with low trade union density have higher rates of fatal injury in the workplace, this preliminary analysis suggest that these jurisdictions also have higher rates of workplace non-fatal injury, but that these injuries are far less likely to be reported. There are many efforts to reform the Programs to increase cost effectiveness, however, there are many concerns about any proposals to reduce benefit rates.\(^{215}\) Unions have played a key role in advocating for workers and ensuring that benefits provide sufficient funds to support workers and their families.\(^{216}\) In addition to issues with the monetary benefits for employees, the dramatic rise in health care costs to employers is the major cause of the rise in overall Program costs.\(^{217}\)

The correlation between unionization and fatal injury rates can also be observed in other countries. In 2011, less than 12% of the labor force in the United States was organized into unions, as compared to only 7.6% in France, 13% in Mexico, 15% in Spain, 18% in Australia, 18% in Germany and the Netherlands, 25% in the United Kingdom, 28% in Canada and Austria, 32% in Ireland and Italy, 52% in Belgium and Norway, 68% in Denmark and 70% in Finland, Sweden and Iceland.\(^{218}\) Nearly every country has seen a decline in the proportion of the labor force in unions in the past

---


\(^{216}\) See Hirsch and the Report from the National Academy of Social Insurance.

\(^{217}\) Ibid. Specifically, the Report from the National Academy of Social Insurance discusses the dramatic rise in health care costs associated with employee benefits through the Programs.

The fatal injury rates in Europe are significantly lower than in the United States, while the rates of reported non-fatal injury are higher. This preliminary analysis suggests that the rates of reported non-fatal injury is higher, because countries in Europe provide a higher rate of monetary benefits, and additional benefits that are not available in the United States.

Despite the decline of membership, labor unions still have political influence in the United States. The differences in trade union density between the various sectors and jurisdictions may offer an explanation to the varying protections for workers, including through the Programs. For instance, New York (the highest with 24.1%), California, Illinois, Pennsylvania, Michigan, New Jersey, Ohio, Alaska and Hawaii have some of the highest rates of trade union density, while North Carolina (the lowest with 2.9%), South Carolina, Georgia, Arkansas, Louisiana, Tennessee, and Virginia have the lowest. These regional trends also are significant for the purposes of this study. In addition, public sector employees have a trade union density of 37% while private sector

---

219 Ibid. There are outliers, such as Italy, which has seen a slight increase in union membership, and Spain and Norway, which has not seen a significant change in trade union density rate. Mexico has also experienced a slight rise in trade union density rate.  
220 For instance, in the United Kingdom, only 0.59 workers died in fatal workplace accidents for every 100,000 workers in the labor force. Germany (0.66), France (2.07), Italy (1.73) and Spain (2.04) also have rates that are lower than the rate in the United States. At the same time, more than 5% of the workers in the European Union are reported to have suffered from a non-fatal injury. The European Union has also experienced a decline in fatal injury rates in the past two decades. See the website of the Health and Safety Executive for the United Kingdom. “European Comparisons for Work-Related Deaths”. http://www.hse.gov.uk/statistics/european/index.htm. Due to limited resources, the public policy and benefit schemes for workers that suffer industrial accidents were not further analyzed in this investigation.  
222 See Hirsch.  
223 Ibid. Specifically Hirsch examines the differentiated in enumeration schemes and benefit rates between workplaces with unionized workers.  
224 See Map H in Appendix Two and Table E in Appendix Three.
employees have a density of only 6.9%.\textsuperscript{225} The evidence is clear that jurisdictions with high trade union density rates have higher benefit rates for injured employees.

The empirical data does not, however, reveal a strong correlation between union density and fatal and non-fatal injury rates. The data analysis is inconclusive, particularly because of the difficulty in comparing data. For the calendar year 2010, the Bureau of Labor Statistics reported that 4,547 individuals were killed in a fatal work accident, which accounted for approximately 3.5 deaths per 100,000 full-time equivalent workers.\textsuperscript{226} The rate of fatal injury is higher for the private sector than the public sector.\textsuperscript{227} The data from the private sector and the public sector, however, may not be comparable.\textsuperscript{228} There are significant hazards in public service, specifically for police officers and fire fighters. However, there are also significant hazards of a much different nature in the private sector, particularly in construction, manufacturing and mining and natural resource extraction.

For the year calendar 2011, the Bureau of Labor Statistics further reports that nearly 3.8 million non-fatal workplace injuries and illnesses impacted the labor force of more than 120 million workers in the United States, approximately 3.5 cases per 100 full-

\textsuperscript{225} \textit{Ibid.}
\textsuperscript{226} See United States Department of Labor Bureau of Labor Statistics. Census of Fatal Occupational Injuries, 2010. http://www.bls.gov/news.release/cfoi.toc.htm. The Bureau of Labor Statistics reported that fatal injuries in the private construction sector declined by 10% since in 2009, and declined by 40% since 2003. Men overwhelmingly suffered more fatal workplace injuries than women (over 92% of work-related deaths, 4,192 men with fatal injuries as compared to 355 women with fatal injuries in 2010). The industries with the most fatal workplace injuries included “Trade, Transportation and Utilities” (1,141), “Natural Resources and Mining” (768), “Construction” (751), and “Manufacturing” (320), with the private sector accounting for an overwhelming majority of fatal workplace injuries (nearly 90%)
\textsuperscript{227} \textit{Ibid.} The private sector had a fatal injury rate of 3.7, while the public sector had a fatal injury rate of 3.5. However, the report noted that fatal injury rates for the private sector have been steadily falling.
\textsuperscript{228} \textit{Ibid.} Not only because of the differences in the natural of work performed in the public sector and the private, but also the differences in benefits schemes for injured employees.
time equivalent workers.\textsuperscript{229} From 2003 to 2012, incidence rates in the private sector fell considerably from 5.0 cases per 100 full-time equivalent workers, to 3.5 cases per 100 full-time equivalent workers.\textsuperscript{230} The highest incidence rates occurred in the most hazardous industries, including manufacturing, transportation, and resource extraction.\textsuperscript{231} In 2012, the public sector reported over 820,000 non-fatal workplace injuries and illnesses, resulting in 5.7 cases per 100 full-time equivalent workers.\textsuperscript{232} Nearly 80% of public sector injuries inflicted local government workers, resulting in 6.1 cases per 100 full-time equivalent workers for local government workers.\textsuperscript{233}

In order to show a strong correlation between statutory construction and lower rates of workplace injury and death, the jurisdictions would need to have comparable labor forces. Preliminary analysis shows that the labor forces are drastically different in different jurisdictions. For instance, the national average rate of fatal injury is 3.8, as compared to 3.4 for the Sample.\textsuperscript{234} The least populous jurisdictions have the highest fatal injury rates, such as North Dakota (12.8), Alaska (12.7), Montana (12.1), Wyoming (11.0), Arkansas (8.7), and South Dakota (8.3).\textsuperscript{235} Nationally, more than half of all fatal injuries occurred in the goods producing sector (natural resources, construction and


\textsuperscript{230} Ibid. The significant decrease in reported non-fatal injuries in the private sector, while not completely credible because of the issues with the integrity of the data, is significant because hazardous industries, typically well regulated, such as construction, reported significant declines in non-fatal and fatal injury rates. These sectors also have engaged in good faith efforts to improve workplace safety and health.

\textsuperscript{231} Ibid. Again, because nearly 90% of fatal injuries and a significant proportion of non-fatal injuries were reported in highly regulated sectors, the data can be used for trending, even if a data integrity analysis may show slightly different trends.

\textsuperscript{232} Ibid. The significantly higher non-fatal injury rate can be correlated to both the higher trade union density within the public sector, as well as enhanced benefits for public sector workers.

\textsuperscript{233} Ibid. The higher rate for local government workers can be easily correlated with the increased hazard to police officers and fire fighters, which are typically employed by local governments, as well as other local government workers, as well as other local government workers engaged in hazardous work.

\textsuperscript{234} See Table D and Table E in Appendix Three.

\textsuperscript{235} Ibid. Even though these jurisdictions are not included in the sample, all jurisdictions were included in this part of the analysis to ensure integrity of the findings.
manufacturing), and transportation and warehousing, which contains only 13.7% of the labor force.\textsuperscript{236} Deaths in the construction sector accounted for more than 15% of all fatal injuries, and deaths in the natural resource extraction sector also accounted for 15% of all fatal injuries.\textsuperscript{237} This is significant because nearly 30% of all fatal injuries occurred in two sectors that contain only 4.7% of the labor force, illustrating the higher degree of danger inherent in the work in the sector.\textsuperscript{238} Particular attention is paid to the most hazardous sector, the mining sector, in which 15% of all fatal injuries occurred in a sector that only contains 0.43% of the labor force.\textsuperscript{239}

Within the 25 most populous jurisdictions, the jurisdictions with the highest fatal injury rates include Louisiana (6.1), Missouri (5.5), Texas (5.3), and Tennessee (5.0).\textsuperscript{240} The jurisdictions with the lowest fatal injury rates include New Hampshire (1.5), Rhode Island (1.6), District of Columbia (1.9), Massachusetts (2.0), Washington (2.2), Connecticut (2.3), Minnesota (2.4), New York (2.5), and California (2.5).\textsuperscript{241} It is

\textsuperscript{236} Ibid. Also see United States Department of Labor Bureau of Labor Statistics. “Fatal occupational injuries by industry and selected event or exposure, 2011”. Retrieved from http://www.bls.gov/news.release/cfoi.t02.htm. It is important to note that the “Transportation and Warehousing” sector is considered part of the “Trade, Transportation and Utilities” sector. Also see United States Department of Labor Bureau of Labor Statistics. “Current Employment Statistics”. Retrieved from http://www.bls.gov/ces/ceseeb1a.htm. It is important to note that only 13.7% of the labor force works in the goods producing sector, which includes mining, logging and resource extraction sector (nationally contains only 0.7% of the labor force), construction sector (nationally contains only 4.2% of the labor force), manufacturing sector (nationally contains only 8.9% of the labor force), transportation and warehousing sector (nationally contains only 3.3% of the labor force), while more than 86% of the labor force works in the service sector and in professional jobs, many of which are sedentary and without manual labor.

\textsuperscript{237} Ibid. Again, this data was cited directly from the United States Department of Labor. The breakdown of fatal injury rates by sector is not contained in the Appendix of this work.

\textsuperscript{238} Ibid. The size of the construction sector and the mining and resource extraction sector were calculated using data from the United States Department of Labor.

\textsuperscript{239} Ibid. This sector has been identified as the “most hazardous” sector because this sector currently has the highest per capita rate of fatal injury of any other sector in the United States. This finding is also significant from a historical perspective because of the extremely high rate of fatal injury in the mining sector historically.

\textsuperscript{240} Ibid. Note that Louisiana is not in the Sample, as the Sample only includes the 20 most populous jurisdictions together with significant outliers.

\textsuperscript{241} Ibid. It is significant to note that most of the jurisdictions with the lowest fatal injury rates are in the
important to analyze the national average for the relevant proportion of hazardous sectors in the labor market, and compare the proportions of these hazardous sectors between the jurisdictions with the highest fatal injury rates with those with the lowest fatal injury rates. In the most hazardous sector, mining and resource extraction, the jurisdictions with the highest fatal injury rates also have the highest proportions of the labor force in the mining and resource extraction sector, such as Wyoming (9.5%), Alaska (4.82%), West Virginia (4.59%), North Dakota (4.33%), Oklahoma (3.37%), Louisiana (2.84%), New Mexico (2.68%), and Texas (2.30%). Most of the other jurisdictions have a mining and resource extraction sector rate of the average 0.4%. In addition, the jurisdictions with the lowest fatal injury rates also have the lowest proportion of workers in the manufacturing sector. It does not appear that trade union density is a significant indicator of fatal injury rate. After a comprehensive data analysis, it appears that administrative costs are closely correlated to the fatal injury rate, simply because fatal injuries are more complex and more often require litigation. The jurisdictions with the

Sample.

242 Ibid.
243 Ibid. It is important to note that Texas, the jurisdiction with the second largest labor force in the country, has the largest number of workers in the mining and resource extraction sector at over 244,000, and Texas had the highest number of fatal injuries in the workplace, with 433 in 2011.
244 Ibid. For instance, in the 25 most populous jurisdictions, the average rate is slightly lower at 0.4%, which includes California (0.21%), New York (0.06%), Florida (0.08%), Illinois (0.17%), Pennsylvania (0.62%), Ohio (0.23%), Michigan (0.19%), Georgia (0.23%), and North Carolina (0.14%).
245 Ibid. For instance, in the 25 most populous jurisdictions, the average rate of workers in the manufacturing sector is slightly lower than the national average, at 8.9%, and includes a number of jurisdictions with rates far lower than this average, including New York (5.31%), Florida (4.28%), New Jersey (6.56%), Virginia (6.21%), Massachusetts (7.92%), Arizona (6.20%), and Maryland (4.41%).
246 Ibid. For instance, New York and Alaska have similar trade density rates, 24.1% and 22.1% respectively, but vastly different sector representation in the labor force, regulatory schemes, and economies. Similarly, Florida, Texas and Tennessee have similar trade density rates, 6.3%, 5.2%, and 4.6% respectively, but also have vastly different sector representation in the labor force, regulatory schemes, and economies. It is also important to note that the workers’ compensation program in Texas is voluntary for employers, and that only 66% of the labor force (including farm employees and the unemployed) are covered by the workers’ compensation program, whereas other jurisdictions have an average coverage of over 77% of the total labor force.
247 Ibid. See Appendix One. The only jurisdictions with administrative costs above 30% of total costs to

-76-
highest fatal injury rates also have the highest proportion of administrative costs as a percentage of total costs to employers.\textsuperscript{248}

The data analysis of the non-fatal injury rates is inconclusive. First, the differences between the economies in the various jurisdictions significantly impact the comparability of the data. Second, the regulatory schemes have much more significance for non-fatal injuries and require a more thorough analysis. Finally, additional investigation is needed to attempt to find data concerning unreported injuries, and the differences between jurisdictions with respect to unreported injuries.

Costs between the common law system and the Program administration can be compared. In 2009, total cost for tort claims adjudicated through the common law judicial system in the United States exceeded $248 billion USD (1.75\% of the $14.1 trillion USD GDP in 2009).\textsuperscript{249} In a recent report from the National Academy of Social Insurance, in 2010, employers paid more than $71.3 billion USD in total costs associated with the Programs.\textsuperscript{250}

employers are North Dakota (42.95\%), Texas (41.34\%), the District of Columbia (40\%), South Dakota (37.66\%), Arkansas (34.78\%), Wisconsin (34.56\%), Alaska (33.59\%), Kansas (31.16\%) and Virginia (30.05\%). All of these rates are significantly higher than the national average of 19\%. It is noted that the District of Columbia, Wisconsin, and Virginia are outliers because of their relatively low fatal injury rates. However, the higher proportion of administrative costs may be caused by the operations of the federal government in the District of Columbia and Northern Virginia. Similarly, various jurisdictions have the most efficient workers compensation program administration, including Delaware (3.96\%), Wyoming (7.04\%), Minnesota (11.10\%), Oregon (11.77\%), Nevada (12.48\%), Georgia (13.14\%), Arizona (13.34\%), Florida (13.93\%), Connecticut (14.03\%), Ohio (14.48\%), and Colorado (14.60\%).

\textsuperscript{248} Ibid.
Even using conservative estimates, the Programs are far more efficient than the common law system in controlling costs, with conservative estimates placing costs per injury at less than $18,000 per injury within the Program as compared to more than $40,000 per injury for common law tort claims.\textsuperscript{251} In 2008, Programs provided coverage for an estimated 130 million workers with total wages of $5.9 trillion USD, thereby controlling costs for a large segment of the economy and for most employers.\textsuperscript{252} It is important, however, to note the estimates of accidental injury in the workplace that require medical attention. The Rand Institute estimates that more than 30 million injuries occur in the workplace per year, and most of the these injuries require medical attention.\textsuperscript{253} With barely 10\% of these estimated injuries reflected in the official statistics, this further brings into question the true scope of industrial accidents and incidents of injury in the workplace.

Data providing overall costs for the authorities for administration of the Programs is limited, as well as data providing the costs of litigation to the parties. This data is

\textsuperscript{0.3\% over the total cash benefits paid in 2007 to $28.6 billion USD. Total costs to employers (including administration and benefits) of $71.3 billion USD represent a 2.7\% decline from the total costs to employers in 2009. Relative to total wages paid to covered employees, these costs represent 1.26\% of covered wages. Administrative costs for employers were approximately $14 billion USD in 2010. Since costs for employers spiked in 2005 at $89.2 billion USD, costs have decreased 20\%, which is significant considering the number of covered employees and the total covered wages have increased. Note that this figure of $71.3 billion USD does not include the costs for the various jurisdictions in Program administration, or any costs to the injured employees, though the Programs are designed to minimize costs (such as legal fees and incidental costs) for injured employees.\textsuperscript{251} I\textit{bid.} Also see Towers Perrin (2009). “2009 Update on U.S. Tort Cost Trends.” Retrieved from http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf; The Rand Institute estimates that 20\% of the population in the United States (approximately 60 million people) suffers economic loss from an accidental injury each year, and most of these injuries require professional medical attention. Moreover, a vast majority of these injuries occur in the workplace (almost 60\%), and over 30\% result from automobile or traffic accidents (accounting for almost 90\% of total accidental injuries). Annual per capita tort costs have increased significantly over the past 60 years, particularly driven by the rising cost of medical care. Using a conservative estimate, that only 10\% of those injured outside of the workplace file a tort claim, the Programs are still far more efficient in costs, at only $17,750 USD per injury, as compared to the common law system at more than $40,000 USD per injury.\textsuperscript{252} I\textit{bid.} See the Report from the National Academy of Social Insurance.\textsuperscript{253} I\textit{bid.} See Report from Towers Perrin
generally in the possessions of the respective agencies of the several States, and are not all reported to the public.

In California in 1998, it was reported that the annual budget for Program administration is $90 million USD to provide over 1,000 employees in manpower.\textsuperscript{254} Between 1995 and 1998, an average of over 200,000 new claims were filed per year, and over 238,000 hearings were held in 1998.\textsuperscript{255} In addition, nearly 20\% of injured employees file without an attorney.\textsuperscript{256} It was estimated that total Program costs for employers peaked in 1993 at $11 billion USD, but statutory reforms lowered total employer costs below $9 billion USD by 1998.\textsuperscript{257} Furthermore, the agency report estimates that the number of filings per year dropped from 1.3 million per year in 1990 to 900,000 in 1996, also credited to the statutory reforms and success in promoting workplace safety throughout the State.\textsuperscript{258}

In a comparison of costs in California with costs in Canada in 2007, the Institute for Work and Health determined that the significantly lower costs to employers in Canada revealed a more efficient system through the public funding mechanisms and the public health care system.\textsuperscript{259} First, administrative costs and health care costs are far higher in California.\textsuperscript{260} Medical care costs account for more than half of all benefits paid by employers in California, whereas in Canada, medical case costs account for less than

---


\textsuperscript{255} Ibid.

\textsuperscript{256} Ibid.

\textsuperscript{257} Ibid.

\textsuperscript{258} Ibid.

\textsuperscript{259} Institute for Work & Health. “At issue: Comparing the costs of workers’ compensation in California and Canada.” http://www.iwh.on.ca/at-work/60/at-issue-comparing-the-costs-of-workers-compensation-in-california-and-canada. In 2007, California had approximately 15 million workers covered by the Program. The same year, approximately 14 million workers were covered by the Program in Canada.

\textsuperscript{260} Ibid.
30% of benefits paid by employers.\textsuperscript{261} Administrative costs in Canada were only $93USD per employee, where as administrative cost in California were $478USD per employee.\textsuperscript{262} On average, injured employees receive a higher rate of benefits in Canada.\textsuperscript{263}

In New York in 2011, there were over 123,000 claims for serious injury, and an additional 103,000 claims, primarily with agreement between the parties without litigation.\textsuperscript{264} In addition, the agency finalized over 329,000 decisions in cases, and held over 266,000 hearings.\textsuperscript{265} Between 2008 and 2011, disputes between the parties over the eligibility of the employee to receive benefits fell from over 16,000 per year to nearly 9,000 per year, following a 2007 statutory reform.\textsuperscript{266} In addition, claims for serious injury fell from over 164,000 in 2002 to just over 123,000 in 2011.\textsuperscript{267} These declines in costs to employers were credited to reforms and successes in promoting workplace safety.\textsuperscript{268} According to the National Academy of Social Insurance, there is a well-founded concern that the monetary benefits disbursed through the Programs are insufficient to sustain injured employees, particularly over the long term. While compensation and benefit schemes vary between the several states, generally, benefits are provided as a percentage of wages received prior to the injury, between 50-85%.\textsuperscript{269}

\begin{thebibliography}{99}
\bibitem{261}Ibid.
\bibitem{262}Ibid.
\bibitem{263}Ibid. It is important to note that more employees were awarded permanent disability benefits (more than 25%) as compared to only 10% of employees in Canada, due to the difference in classification of injuries under the law.
\bibitem{265}Ibid.
\bibitem{266}Ibid.
\bibitem{267}Ibid.
\bibitem{268}Ibid.
\bibitem{269}Ibid.
\end{thebibliography}
All 25 jurisdictions in the Sample maintain web sites and publicly accessible portals that provide free and open public access to statistics, the statutes and related directives and rules for the Programs. Some of these jurisdictions also provide case law and important judicial decisions concerning the interpretation and construction of the statutory provisions, such as New Jersey and Massachusetts. Some of these jurisdictions also provided online services for employees with claims, such as online status updates on claims in process, and services for completing and uploading digital documentation and forms through the web site.

Notwithstanding, there are still significant barriers for the public to access case law, and other legal information. Until recently, databases of case law were only accessible through online portals with costly and exclusive membership accounts, such as Lexis Nexis and Westlaw. More recently, various public interests organizations have provided free and open public access to case law through the Internet, however, the effectiveness of the databases and search functions of these new services, such as Google Scholar, are not as developed or as easy to use as the private online portals. Lexis Nexis and Westlaw also provide custom annotations and headnotes for ease of summary and categorization of case law.

---

270 See Table C in Appendix Three.
271 Ibid.
272 Ibid.
274 Ibid. Also see Google Scholar at http://scholar.google.com.
275 Ibid.
As revealed by this investigation, there are millions of pages of published judicial opinions across the country, and these opinions are difficult to sort through without database technology.\textsuperscript{276} Of the 25 jurisdictions in the Sample, only California and New York were found to have collected detailed statistics to measure Program performance over the long term, and both California and New York have used these statistics to design Program reforms to increase efficiency and effectiveness.\textsuperscript{277} These statistics included information on the number of employees that obtained legal counsel during the processing of their claim, the number of claims processed, the number of claims that were awarded benefits, the number of claims that were denied benefits, etc.\textsuperscript{278} This type of approach is exactly the type of initiative necessary to ensure effective improvements in Program performance.\textsuperscript{279}

After thorough investigation, there was no statistical data found that revealed the number of common law claims dismissed pursuant to the exclusivity provisions of the Program, and no tracking mechanism for ensuring that these forbidden common law claims were eligible for benefits under the Programs. Even in New York and California, information was not found that provided statistics on the number of common law claims dismissed pursuant to the exclusivity provisions of the Programs.

\textsuperscript{276}Ibid. It should be noted that cases cited in case law can be directly accessed by links provided through Google Scholar, similar to Lexis Nexis and West Law. In addition, Google Scholar provides the head notes from the Reporters, which provides summary information even though Google Scholar has not developed its own head notes for case law. Also see the notes in the Index of Cited Case Law in Appendix Four for a more thorough discussion of case law citations and publications.\textsuperscript{277} See Part I for discussion on the statistics available on the Program operations in California and New York.\textsuperscript{278} Ibid.\textsuperscript{279} Ibid.
This statistical data is imperative in order for the general public, public officials, and legislative analysts to truly measure the effectiveness and efficiency of the Programs, and to understand the economic impact of excessive litigation due to ambiguous statutory provisions and questionable judicial interpretations. It is clear that each and every cause of action is different, and arises from different distinct facts, however, the judicial system, in all other respects, has developed standardized methods of addressing all claims to provide relief where relief is appropriate. This guarantee of a venue to voice any and all civil wrongs is a Constitutional right held by all persons.

This critical issue in this investigation shows how the empirical analysis is closely tied to the legal analysis, even though both are distinct and generally have different goals. In order to measure the “success” of certain statutory provisions, empirical data can provide the information necessary to determine the true impact of a given statutory provision, particularly the exclusivity provisions.

It should be noted that nearly all of the case law cited in this investigation concerns an employee pursuing a common law claim against an employer, and the employer aggressively fighting to ensure the employee has no rights to pursue a common law claim. The case law gathered for this investigation suggests that the most important metrics for the purposes of this investigation should be gathered from the common law side of the judicial system, and not from within the Programs.

The case law analysis in this work will speak further to the Constitutional issues presented by the exclusivity provisions. This lack of empirical data will be highlighted later in this investigation.
V. Primary Case Law Analysis

This primary case law analysis will detail the judicial decisions concerning ambiguity of the exclusivity provisions and other statutory provisions. This section will provide judicial definitions of legal terms necessary to understand the application of the exclusivity provisions. It is the responsibility of the judiciary to establish the meaning and intent of laws that are subject to interpretation and require clarity.

First, this part will examine key judicial decisions from California. It is important to note that California is considered to be the standard bearer for the jurisdictions with statutory guidance for adjudication. In California, the legislature codified important conclusions of key judicial decisions into the statutory provisions, particularly with respect to intentional tort. This codification provides the statutory guidance, but this is a passive legislative response to judicial decisions concerning ambiguity of the statutes.

Second, this part will examine key judicial decisions from New York. New York is not only considered the most important jurisdictions with hybrid guidance for adjudication, but one of the most important jurisdictions in the United States. New York established the standard and pioneered the Programs, using new innovative ideas for Program administration and statutory construction.

Finally, this section will examine key judicial decision from North Carolina. North Carolina is considered the standard for jurisdictions with case law guidance for adjudication.

Texas and Pennsylvania will also be analyzed.
A. California

There are five key cases that are analyzed from California.²⁸⁰

*Saala v. McFarland*, decided in 1965, addresses a question of the application of the Program when an employee is injured, but the injury in question is not an industrial accident. The employee was injured in the parking lot of her employee by a co-employee. These facts raise questions about the ability of the employee to pursue a common law claim against a co-employee.

*Johns-Manville Corp. v. Superior Court*, decided in 1980, addresses the question of common law claims for intentional tort of the employer and the serious injury of an employee as a result of such intentional tort. This Plaintiff in this case was a manufacturing sector employee for over twenty years, and represents the hazardous employment for which the Programs were designed.

*Cole v. Fair Oaks Fire Protection District*, decided in 1987, addresses the question of non-economic damages and the ability of employees to pursue common law claims against employers to collect legal remedy for non-economic damages.

*Hendy v. Losse*, decided in 1991, also addresses the question of ability of the employee to pursue a common law claim against a co-employee.

*Fermino v. Fedco, Inc.*, decided in 1994, addresses the question of illegal activity of an employer, and the ability of an employee to pursue a common law claim against an employer for non-economic damages. The Plaintiff in this case worked as a sale clerk, primarily sedentary work, without significant manual labor.

²⁸⁰ For itemization and full citations for these cases, see the Index of Cited Case Law in Appendix Four. For a more thorough discussion for these cases, see the Primary Case Law Analysis in Appendix Six.
The issues addressed by the court in *Saala v. McFarland* speak to the issues in Hypothesis Number Three, which focuses on the application test, which is “due process”. First, an employment relationship has to be established between the parties to determine if the parties could plausibly be subject to the Program. In the instance case, the classifications are clear. Next, the application test requires the facts related to the cause of action to be closely analyzed to determine if the cause of action resulted from an industrial accident. As previously discussed in the introductory sections, an industrial accident is “an injury which occurs by accident and arises out of and in the course of the employment”. This case also addresses the right of an injured employee to pursue a common law claim against a co-employee for a cause of action that is not an industrial accident. The court determined that this cause of action did not result from an industrial accident. The last two remaining elements of the test (eligibility for benefits and adequacy of the Program as a substitute for the common law claim), need not be addressed.

The liability of a co-employee to an injured employee in the workplace is an important issue that will be addressed in this investigation. At times, co-employees do not have significant resources, similar to the injured employee, and as such, a common law suit against a co-employee for a cause of action even remotely proximate to the workplace, would most likely not provide significant monetary relief for injury. As such, employees may elect to apply for benefits from the employer through the Programs. At other times, employees may elect to pursue common law claims against employees for causes of action arising from an intentional tort or intentional misconduct, and, more

---

importantly, when it appears that the co-employee has the resources to provide a significant monetary award.

This case also speaks to the principle of “election of remedy” which occurs when, under certain circumstances, an injured employee may be able to pursue both a common law claim and pursue a claim for benefits through the Program statutes. In the instance case, the injured employee was able to collect Program benefits from the employer, and pursue a common law claim against the co-employee for an excepted cause of action. The ability to seek remedy through both venues is primarily because of the nature of the cause of action, the relationships between the parties. For the purposes of this investigation, the co-employee was truly a third party under the Program statutes. The co-employee was not acting in an official capacity, and the injured employee was not engaged in tasks directly related to work. As previously discussed, the right of an employee to pursue a common law claim against a third party, even for an industrial accident, is well established. The fact that the injured employee received Program benefits is an issue that will be further addressed in this investigation.

This case reveals a number of trends. During this period, litigation because to rapidly rise in the United States. As a result, common law suits began to become more common. The rise in litigation in the United States plays a major role in the issues analyzed in this investigation.

This investigation will address these unique scenarios further. These principles include (1) the application test, (2) liability of a co-employee, (3) right of employees to pursue common law claims, and (4) election of remedy.
In *Johns-Manville Corp. v. Superior Court*, the Supreme Court of California speaks to the issues of the right of an employee to pursue a common law claim and the application test embodied in Hypothesis Number Three. In addition, this case also speaks to the principles of “due process,” “rational basis,” and “equal protection” embodied in Hypothesis Number One. In addition, this case also speaks to the principles embodied in Hypothesis Number Four.

Due process and equal protection guarantees the availability of a venue to seek remedy. In this case, fraud and conspiracy of an employer does not fit the benefits scheme created under the Programs. The employer attempted to use the exclusivity provisions to bar a common law claim for fraud and conspiracy, but such a bar must have an adequate substitute for the forbidden common law claim. Without a benefits scheme for a cause of action such as fraud and conspiracy, the employee would not have equal protection under the law, because he would be classified as an employee subject to the Programs, his injury would not be eligible for benefits under the Program, but he would simultaneously be denied the right to pursue a common law claim.

It is important to note that the cause of action of the original occupational illness is distinct from the claim for fraud and conspiracy. Fraud and conspiracy, generally, and specifically in this case, is an act committed with an intention to cause injury to another. This ruling allows the injured employee to seek punitive damages at common law against the employer. It is believed that this punitive element is a deterrent to prevent employers from engaging in egregious behavior.

---

282 Lexis Nexis. *Johns-Manville Corp. v. Superior Court of Contra Costa County* (Rudkin, Real Party of Interest), 27 Cal. 3d 465, 612 P.2d 948 (1980). For a more thorough discussion for this case, see the Primary Case Law Analysis in Appendix Six.
In *Cole v. Fair Oaks Fire Protection District*, the judicial decision is significant for multiple reasons, particularly with respect to Hypothesis Number One, Hypothesis Number Three, and Hypothesis Number Four. First and foremost, it is important to note that not only is the injured employee a member of a union, but he served as a union representative, and the injured employee allegedly experienced harassment due to his union activities and his application for benefits through the Program.

The decision in this case is significant primarily because the last element of the application test was not performed. It is clear that the injured employee has an employment relationship with the employer, and the injuries occurred in the workplace. However, there are significant question as to if these injuries occurred “by accident.” The employer received benefits, but the court never addressed the question of whether those limited benefits are adequate considering the circumstances surrounding the cause of action. Notwithstanding the fact that many jurisdictions have severe penalties for employers that harass or otherwise retaliate against employees who exercises their rights under the Program statutes, there is a significant question about the rational basis and legislative intent of allowing employers to harass employees exercising their rights.

In addition, the principle of equal treatment is important with respect to this injured employee. While the behavior of the employer did not necessarily rise to the level of intentional misconduct or intentional tort, similar malicious, careless and reckless behavior on the part of employees, particularly drunkenness, carries severe penalties for employees, including the denial of all benefits. Similar harsh penalties should exist for employers.

---

In *Hendy v. Losse*, the judicial decision is important for many reasons.\(^\text{284}\) First and foremost, this case cites a law codified in response to the decision in *Johns-Manville Corp. v. Superior Court*. The 1980 decision concerning the fraudulent concealment of occupational hazards and occupational illnesses garnered enough attention to warrant legislation. This case is critical for Hypothesis Number One, Hypothesis Number Three, and Hypothesis Number Five. This case also implicitly addresses the issues raised in Hypothesis Number Two and Hypothesis Number Four.

First, Hypothesis Number Five addresses the complexity of relationships in the workplace. This case discussed, at length, the principle of “dual capacity”. With respect to the physician that was employed with the San Diego Chargers at the time, the injured football player is arguing that, as a physician, the doctor was acting in a capacity as both a co-employee and a third party. It is common that, under normal arrangements, a doctor is not employed by the same employer as an injured employee. However, the design of the Programs requires employers to provide medical care, and, as a result, employers have influence over the medical care provider. This influence is a critical reason for the law concerning fraudulent concealment of occupational hazards and occupational illnesses. However, the language in the law requires the employer to intentionally engage in such conduct that is substantially certain to cause serious injury or death, otherwise referred to as the “substantially certain” threshold or the “intentional misconduct” threshold. The court specifically finds that the complaint in this case does not allege intentional action on the part of the employer to meet this threshold, and this right to suit only exists against the employer and not against a co-employee.

The decision references the exclusivity provisions directly and speaks to the protection for co-employees when acting “within the scope of their employment.” Under this principle, all actions of the co-employee are for the benefit of the employer, and the employer assumes legal responsibility for the actions of the co-employee, under the principle of “respondeat superior”. This assumption of legal responsibility extends to industrial accidents suffered by other employees of the employer as a result the actions of an employee.

In this case, it is clear that the injured employee is eligible for benefits. It could be disputed if these benefits would be adequate. The injured employee in this case is alleging gross negligence and medical malpractice. Under normal circumstances, medical malpractice is adjudicated through the common law or through administrative law, but provides monetary relief that is significantly higher than the average benefits provided through the Programs.

From an equal protection standpoint, there is an important question as the rational basis for revoking the right to a medical malpractice suit against a doctor within an employment relationship as compared to a medical malpractice suit outside of an employment relationship. A thorough Constitutional challenge would seek a justification in support of the rational purpose behind this policy. In addition, a challenge would also question the adequacy of the Program benefits as a remedy in lieu of an award through a medical malpractice suit.

All of these issues speak to Hypothesis Number One, Hypothesis Number Three and the application test. In addition, there is a crucial question as to due process for the medical malpractice claims arising from within an employment relationship.
In *Fermino v. Fedco, Inc.*, this judicial decision is the most important in the selection from California.\(^{285}\) As illustrated, the court reviewed landmark decisions, including case law previous analyzed in this section. This decision shows strong support for punitive measures taken against employers that engage in egregious behavior, but sets limits on the scope of the punitive measures. The mention of the additional compensation through the program for injuries which are caused by the gross negligence and intentional misconduct of an employer is instructive. The court specifically addresses the dilemma presented by ambiguous statutory provisions, and the impact that these provisions can have in litigation and legal disputes. It is important to note that since this decision, California codified statutes explicitly excepting injuries caused by intentional tort of the employer from the Program coverage.

It is also important to note that this case draws comparisons with other jurisdictions, particularly New Jersey and the State of Washington (also in the group of jurisdictions with statutory guidance for adjudication of exclusivity provision application). This issue concerning statutory ambiguity speaks to the argument presented in Hypothesis Number Two.

Even with the ambiguity, the quote from the Utah Supreme Court truly embodies the spirit of Hypothesis Number One and Hypothesis Number Three, as well as Hypothesis Number Four. These jurisdictions generally agree that there is no rational basis for a public policy that allows employers, co-employees or third parties to commit intentional torts and then use the Program statutes to shield themselves from liability at common law. In addition, employers are provided the same consideration with

\(^{285}\) Lexis Nexis. *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 872 P.2d 559 (1994). For a more thorough discussion for this case, see the Primary Case Law Analysis in Appendix Six.
provisions that ensure employers do not have to pay benefits for intentional tort in the workplace that are not the fault of the employer or management, particularly self-inflicted injury.

With respect to Hypothesis Number Three, injured employees may have suffered an injury in the workplace, but injury due to intentional tort typically is not adequately compensated by the Program benefits. Finally, the courts agree, and this investigation also agrees, that it is in the public interest to allow employees to pursue common law claims against employers for intentional tort. This measure provides a deterrent.

Particularly with respect to this case, the alleged criminal actions of the employer are egregious and intentional. This case set the standard in California. In addition, this case underscored the deficiencies and ambiguity in the exclusivity provisions, which encouraged the legislative branch to take action to codify exceptions to the exclusivity provisions, including exceptions for intentional tort. While there is not a wealth of empirical data to analyze the efficiency of explicit statutory provisions, the very nature of the case law analyzed in this section, and the comparisons drawn with other jurisdictions with explicit statutory provisions at the time, speaks to the potential benefit to reforms to codify exceptions.

This case is the most powerful evidence in support of statutory reform. This investigation will later cite this case in order to draw comparisons between the other Sample groups. It should be noted that California is considered the standard for statutory guidance for adjudication at present, but that California was not the first jurisdiction to reform the Program statutes to include explicit exclusivity provisions.
B. New York

There are eight key cases from New York.286


Bardere v. Zafir, decided in 1984, addressed the question of the right of employees to pursue common law claims against employers for intentional misconduct. Particularly, this case raises questions about the liability of the employer if injury results from the violation of the labor law and safety regulations. The Plaintiff in this case was engaged in traditionally hazardous employment.

Briggs v. Pymm, decided in 1989, also addresses the question of the right of employees to pursue common law claims against employers for intentional misconduct and violations of labor law and safety regulations. The Plaintiff in this case was also engaged in traditionally hazardous employment.

Acevedo v. Consolidated Edison, decided in 1993, addresses the differences between intentional misconduct and intentional tort.

Fucile v. Grand Union Company, Inc., decided in 2000, also addresses the question of the right of employees to pursue common law claims against employers for intentional misconduct and violations of labor law and safety regulations.

286 For itemization and full citations for these cases, see the Index of Cited Case Law in Appendix Four. For a more thorough discussion for these cases, see the Primary Case Law Analysis in Appendix Six.
Werner v. New York, Prave v. New York, Jones v. New York, and Hardie v. New York are all important because of the infamy of the Attica Prison Riot in 1971. These cases raise multiple issues, most of which are related to the issue of intentional tort and election of remedy. This issue has implications for due process, the application test, and the right to common law claims, principles that are addressed in Hypothesis Number One, Hypothesis Number Two, Hypothesis Number Three and Hypothesis Number Four.

The issue of election of remedy is thoroughly discussed in these cases. This issue, however, is approached from different angles and with different conclusions, all for the same incident. This clearly demonstrates the dangers of case law adjudication. All of the estates suing the State of New York represent decedents that were killed in the line of duty while hostages during the Attica Prison Riot. The adjudication of the appeal filed by Werner is the most instructive. This appeal was the first appeal heard by the Court of Appeals. In this case, the estate earned benefits based on the allegation that the overtaking of the prison and the time in which the decedent was taken hostage was an industrial accident, unforeseen and unanticipated by the State. The estate then claimed that the State then allegedly committed an intentional tort against the decedent, in the intentional killing of the decedent during the retaking of the prison. The estate asserted that this claim was a separate and distinct claim from the industrial accident. In Werner, the court noted that the estate filed a claim for benefits through the Program before the completion of the investigation into the riot, hostage situation, and retaking of the prison.

---

The circumstances in *Werner* are in stark contrast to the remaining three cases. In the remaining three cases, the claims were not presented in a similar fashion. As such, the court used the principle of election of remedies, because the estates elected to accept benefits through the Programs, the availability of common law claim was foreclosed. However, it is peculiar that the court allowed the estates to seek reconsideration from the adjudicating authority after the acceptance of benefits. Generally, the acceptance of benefits forever and always forecloses on all other remedies.

The allegation that the State misled the estates and encouraged the estates to accept benefits in order to avoid a potentially larger monetary award through a common law claim is concerning. In nearly every case, the employers, and particularly the several States, have far more resources in order to litigate. Employees have a strategic disadvantage. As such, issues related to intentional tort should be adjudicated in light of the public interest, not simply the strategic disadvantage of injured employees, or their representatives in the event of death. For this purpose, explicit statutory provisions, and particularly explicit exclusivity provisions and provisions concerning intentional tort, will assist claimants to understand their rights. The introduction and case law presented in this work clearly show that even lawyers and judges disagree on the breadth and scope of the intentional tort exception, and that this exception is not universal.

*Bardere v. Zafir* is an important decision concerning the principle of the election of remedy.\footnote{Lexis Nexis. *Bardere v. Zafir*, 102 A.D.2d 422, 477 N.Y.S.2d 131 (1984). For a more thorough discussion for this case, see the Primary Case Law Analysis in Appendix Six.} The fact that the employee accepted workers’ compensation benefits forecloses on an action at common law. In addition, the case addresses the difference between an intentional tort and intentional misconduct substantially certain to cause
serious injury or death. As stated, in New York, intentional misconduct does not except claims from the exclusive jurisdiction of the Program statutes. The tort of the employer must rise to the level of intentional tort.

This case speaks to the issues in Hypothesis Number Two and Hypothesis Number Four. In addition, consideration should be given to the equality between employees and employers, as well as the adequacy of the remedy in Hypothesis Number One and Hypothesis Number Three.

In light of the decision in Fermino, it is critical to question the legislative purpose of providing employers and co-employees immunity to commit tort involving intentional misconduct without providing any additional consideration to the injured employee, or including a punitive element to the damages. This calls into question the rational basis of this policy. In addition, where most employer have immunity from liability for the self-inflicted injury of an employee due to intentional misconduct, this also presents a question of equal protection.

As evidenced by the cases in Attica, often employees seek immediate relief through benefits provided by the Programs, but later learn of the egregious actions of the employer that may allow the employee to recover significantly higher monetary awards in consideration of such egregious actions. As a key component of due process, this investigation asserts that the employee should be able to present this newly obtained evidence, and to pursue a suit at law for recovery. This common law principle is embodied in the Attica cases.

In addition, cases revolving around questions that must be resolved through case law further illustrate the need for statutory guidance for adjudication.
Briggs v. Pymm is important because of the proximity of the date of this ruling after the Johns-Manville Corp. v. Superior Court decision in California, as well as the 1982 reform of the Program statutes in California (see discussion on case earlier in this work).\(^\text{289}\)

In that case, the court specifically found that the fraudulent concealment of hazards or illnesses in the workplace constitutes intentional misconduct substantially certain to cause serious injury or death, and that this fraudulent concealment warrants severe punishment of the employer by excepting the exclusive jurisdiction of the Program statutes and allowing the injured employee to pursue a common law claim against the employer. In New York, this reasoning was rejected.

These differences again raise questions of equal protection, rational basis and due process embodied in Hypothesis Number One. It also raises questions as to the adequacy of the remedy provided in the event of intentional misconduct of the employer embodied in Hypothesis Number Three. In light of Hypothesis Number Four, this public policy fails to penalize employers for engaging in intentional misconduct, which, in this case, included criminal acts in violation of safety regulations, and concealment of the risks and hazards associated with the failure to provide a safe work environment with such hazardous materials, particularly mercury. This failure to penalize the employer for such egregious behavior raises questions concerning the rational basis of this public policy. Specifically in light of the violation of safety regulations, this investigation finds that the employer in this case should be severely penalized for such action through punitive damages, and that penalties of this nature deter such behavior in the future.

Acevedo v. Consolidated Edison raises important issues with respect to the Programs. Most importantly, the court ruled on the issue of compensability. In Hypothesis Number Three, the compensability of the injury (eligibility to receive benefits) is one of the key elements of the application test. This application was derived from the principle that the Programs must provide an adequate substitute for the forbidden common law claim. The court clearly points out that medical cost for work related injury are eligible for benefits even if an employee does not lose wages. This investigation will further analyze this issue later in this work.

This case also addresses the question of the treatment of causes of action arising from the alleged intentional misconduct of an employer. Again, just as in Briggs, the cause of action in this case, arising from alleged intentional misconduct, is subject to the exclusive jurisdiction of the Program statutes. The rational basis for this immunity for the employer is again at issue. In addition, these issues are central to Hypothesis Number One.

The question of the adequacy of the remedy under the Programs also raises questions about equal protection and rational basis. The most important issue is the rational basis for providing employers with this immunity, while the employees have no recourse for their exposure to risk until the symptoms of a compensable injury or occupational disease appear and are confirmed by a medical specialist. The Program statutes are not designed to mitigate risks in this fashion. Fucile v. Grand Union Company, Inc. has similar implications.

---


C. North Carolina

There are five key cases from North Carolina.292

Brown v. Motor Inn, decided in 1980, addresses the question of the application of the Program provisions for causes of action that do not involve an industrial accident. In this case, the employer held an impromptu birthday party on the premises of employment, and an employee drowned in the pool on premises during this party.

Pleasant v. Johnson, decided in 1985, addresses the question of the right of an employee to pursue a common law claim against a co-employee for injury due to intentional misconduct.

Woodson v. Rowland, decided in 1991, addresses the question of the right of an employee to pursue a common law claim against an employer for injury due to intentional misconduct. The Plaintiff in this case was employed as a construction worker, employment that is traditionally considered hazardous.

Johnson and Smith v. First Union, decided in 1998, addresses the question of the test for application of the Program provisions for causes of action that are not industrial accidents. The Plaintiffs in this case were employees at a bank and performed primarily sedentary work, which is not traditionally considered hazardous.

Cameron v. Merisel, Inc., decided in 2004, addresses the definitions of gross negligence as compared to intentional misconduct. The Plaintiff in this case was employed in a call center, which primarily involves sedentary work. This work is not traditionally considered hazardous.

292 For itemization and full citations for these cases, see the Index of Cited Case Law in Appendix Four. For a more thorough discussion for these cases, see the Primary Case Law Analysis in Appendix Six.
Brown v. Motor Inns is a pivotal case in North Carolina. The language in these citations clearly illustrates the importance of this case law. This language embodies the very essence of Hypothesis Number One and Hypothesis Number Three.

Speaking to the legislative intent and purpose of the Program, the court addresses the application of the Program statutes, and reinforces key elements of the application test in Hypothesis Number Three. While the first key element of the application test may be a employment relationship between an employer and an employee, the application of the Program to the cause of action is equally important. This discussion concerning the rational basis of the Program application also addresses the equal protection issues for the class of employees, and provides guidance for the application of the Program statutes in various causes of action. Just as in Fermino, the court acknowledges the common practices of employers using the exclusivity provisions as a defense against causes of action far outside the scope of employment. This case law provides two perfect examples. While Brown was at least on the grounds of his employer at the time of his death, Barber was on an annual outing fishing as a guest of his employer. The discussion concerning Barber is critical to this investigation.

The employer argued that the Program provides employers with complete immunity from common law suit by an employee, even for tort that occurred while the employee was “off the job” or “independently of employment.” While the court provided excellent language to address the argument of the employer, Hypothesis Number Two suggests that statutory reform to include specific language concerning a test for application would further clarify the application of the Programs.

---

*Pleasant v. Johnson* is the primary source for defining the term “intentional misconduct,” which is termed as “willful negligence.” This “intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed” was, at that time, only recognized as an exception to exclusive Program coverage in Florida, Hawaii, Iowa and Wyoming. This is significant because Florida is a jurisdiction with statutory guidance for adjudication, and the remaining jurisdictions had statutory schemes that addressed the intentional misconduct of a co-employee in 1985. This decision specifically finds that this exception is provided to deter such conduct through the punitive damages available at common law. This finding speaks directly to Hypothesis Number Four. In addition, this ruling questions the rational basis and adequacy of the benefits provided through the Programs for the intentional misconduct in the New York cases *Briggs, Acevedo* and *Fucile*, in light of *New York C. R. Co. v. White*, Hypothesis Number One and Hypothesis Number Three.

In addition, the co-employee in this case is in fact a third party for the purposes of this cause of action. As discussed in this ruling, the election of remedy principle does not bar a common law claim against the co-employee, even though the employer had already paid benefits to the injured employee through the Program. The ruling also specifically discussed the statutory arrangement that provides reimbursement to employers for benefits paid when all fault rest on a third party.

These principles are central to this investigation and will continue to play a role in this analysis for remainder of the case law analysis, as well as the comprehensive analysis.

---

Woodson v. Rowland clearly demonstrates the importance of statutory construction for understanding the application and scope of the Programs. This case law contains language significant in the analysis for Hypothesis Number One, Hypothesis Number Two, Hypothesis Number Three, Hypothesis Number Four, and Hypothesis Number Five.

With respect to Hypothesis Number One, this case particularly discusses the rational basis for the Programs and the judicial decisions of the application of the Programs. This case, like Pleasant, discusses the rational in detail, which is important for providing clear definitions of the various levels of liability, particularly intentional tort and intentional misconduct. With respect to the question of the rational basis of the Program application, it is important to note that this case analyzes the rational basis based on equality between the classes of employers and employees. Like in Pleasant, the court rules that there is no rational basis for providing immunity to employers engaged in intentional misconduct. Employers have a duty to maintain a safe work environment and to protect employees against general hazards, particularly those hazards that are addressed by safety and health regulations. When an employer takes intentional action that fails to protect employees, the employer should be penalized for this behavior. In California, the statutes provide certain penalties with in the scope of the Programs. But in North Carolina, the case law establishes that the Programs have no application in the event of intentional misconduct, allowing the employee to pursue a common law claim against the employer, and to seek punitive damages through that venue.

---

This analysis will not attempt to draw comparisons between the effectiveness of these different approaches, but, instead, will compare these approaches with the denial of punitive damages for intentional misconduct, such as in New York. These three jurisdictions not only provide differences in the role of the statutes and case law in guiding adjudication, but also differences in the treatment of various levels of liability. These differences raise significant questions as the interpretations that benefit employers rather than employees.

The question of deterrence in Hypothesis Number Four is closely related to these rational basis and equal treatment issues. As the court noted in Pleasant, the court again speaks to the issue of deterrence. Harsh monetary penalties for employers, just like for co-employees, deter the intentional behavior amounting to intentional tort or intentional misconduct. The purpose of the universal insurance is to provide limited benefits for true accidents and negligence. In analyzing the treatment of intentional misconduct, this case not only provides a provocative statement of facts, but a precedent in which the court rejected the plea for punitive damages against an employer that engaged in egregious behavior. In Barrino as well as Briggs, it can easily be argued that the actions of the employers were far more egregious than in Woodson. While Woodson did involve safety code violations, Woodson did not involve a slow deadly hazard which slowly injured the employee, while, at the same time, the employer witnessed the causal connection and even concealed and misrepresented to employee. In Johns-Manville Corp., the court in California discussed the need for special consideration when an employer deliberately conceals or falsifies information pertaining to a hazard and developing injury and the concealment aggravates that injury. For the purposes of this investigation, the deterrence
mechanism contemplated in the exceptions suggests that the concealment and aggravation of injury is far more egregious than a quick, sudden injury, even if both are caused by intentional misconduct. As noted in *Johns-Manville Corp.* and *Briggs*, once the injury started to manifest itself, the employer could have taken action to mitigate the hazard and ensure the employee had adequate treatment. This failure to take action constitutes a higher level of intentional misconduct.

The court goes a step further than to simply discuss the rational basis and deterrence issues. The court also discusses the due process implications. As stated, allowing the injured employee to pursue a common law claim and collect benefits under the Programs is not compatible with the principle that there should only be one recovery for an injury. But the court says that an employee should be able to collect benefits, and then, if appropriate, obtain a significantly larger recovery through a common law claim and pay back the Program benefits. In addition, from the perspective of the employee, the incident was an accident and unexpected. The court acknowledges that employees generally do not have significant resources, and waiting a significant amount of time and incurring legal fees and other burdens, while injured, would deter the injured employee from pursuing the common law claim and simply accepting quick benefits through the Programs. By allowing the employee to accept quick benefits through the Programs, and then later pursue a common law claim, the policy allows for deterrence of intentional tort and intentional misconduct of the employer.

If the financial hardship of injured employees deterred common law claims, this deterrence would benefited the employers and, in turn, fail to deter intentional tort and intentional misconduct. In this sense, the scheme in California for intentional misconduct
seems to provide a faster and more efficient means of recovery. California, a jurisdiction with statutory guidance for adjudication, will provide the punitive damages through the Program, thus removing the need for the injured employee to ever have to file a common law claim in order to recover punitive damages. However, an empirical analysis of the differences between the amounts of punitive damages, and an attempt to quantify deterrence, would be necessary to provide a thorough comparison.

The court also addressed the insurance implications of this decision. From the perspective of insurance providers, actions that fall outside of the scope of the Programs should not be covered by the Program insurance policies. Naturally, these benefits raise costs for the insurance providers and premiums for all of the employers sharing the common fund. By excluding intentional tort and intentional misconduct from the Program coverage, the costs are placed on the tortfeasor, as stated in Pleasant. This policy controls overall Program costs, while also serving to deter intentional tort and intentional misconduct.

Finally, it is important to acknowledge the extensive research efforts of the courts in California and North Carolina to draw comparisons between jurisdictions. Fermino, Pleasant and Woodson all show that jurisdictions with high trade union density and with a significant mining and resource extraction sector, as well as strong manufacturing sector, all have the most progressive statutory schemes. Each case repeatedly cites the statutes and case law from Michigan, Ohio, New Jersey, Washington and West Virginia. It is telling that neither of those cases cited the statutes or case law in New York, Illinois or Pennsylvania, three populous and influential jurisdictions. These cases are far more likely to cite jurisdictions with statutory guidance for adjudication, even though North
Carolina is a jurisdiction with case law guidance for adjudication.

While not directly discussing the efficiency of the Programs, this comparison shows that statutory guidance can be far more efficient, addressing Hypothesis Number Two. It should be noted that North Carolina, as a jurisdiction with case law guidance for adjudication, also demonstrates the issues with case law guidance by showing the need for appeal to address this question.

Finally, this case also speaks to the need for robust and encompassing definitions for classes to ensure application in the complex work environment today. This case was not only brought against the direct employer, but also the company that hired the employer as a contractor. Other contracting companies were also working on the site simultaneous with the injured employee and his employer. The relationships between all of these parties is complex, particularly with respect to workers’ compensation.

It is significant to note that the estate of the employee brought a common law action against both construction companies, even the company for which the decedent did not work, and the company with oversight of the construction company that hired the employer of the decedent. The estate also sued the supervisor of the decedent at common law. This case raises many issues concerning insurance coverage. As noted in the case, the direct employer of the decedent had direct control over the decedent and was the only entity required by law to obtain Program coverage for the decedent. The remaining entities benefited from the relationship with the direct employer had with the decedent.

296 The discussion in the case law concerning the complicated nature of these relationship was omitted from the previous citations. In summary, the court discussed that only the entities that had a “employment-like” relationship with the decedent would enjoy exclusive Program coverage, that is of course, if the coverage was not nullified by intentional tort or intentional misconduct. In this sense, the contracting entities would have to, in some way, control the work of the decedent.
Johnson and Smith v. First Union Corporation discusses equal protection and rational basis, as well as the application test, which addresses Hypothesis Number One, Hypothesis Number Three and Hypothesis Number Four.\(^\text{297}\)

First, the question of the inclusion of these two employees in the class subject to the exclusive remedy provided by the Programs for their fraud claims was analyzed based on their eligibility for benefits. It is important to note that this case involves a case of action separate from the claims for benefits through the Programs. While the cause of action arises from the adjudication of the cause of action, the fraud and deception of court testimony is a separate claim. This cause of action is far different from the Johnson-Manville Corp., Briggs, and Bardere, where the employees were injured as a result of the fraud and deception of the employer. In this case, the second element of the application test is clearly not fulfilled, because the actions of the employer did not result in an industrial accident, or even physical injury to the employees.

This case also raises critical questions concerning the efforts of employers to hide behind the Programs to gain immunity for wrongdoing. There is a significant element of deterrence in ensuring that employers refrain from this type of behavior, which addresses Hypothesis Number Four.

Finally, there is an important question as to why the trial court dismissed the claims when there were no remedies at law for the employees. This is a critical element of the application test in Hypothesis Number Three, but also important due process considerations embodied in Hypothesis Number One.

Cameron v. Merisel, Inc. is important because it establishes a real test of the scope of the Woodson and Pleasant exceptions, addressing Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Five.298

In this case, the analysis of difference between “intentional misconduct” and simply “gross misconduct and gross negligence” is at the heart of the rational basis and equal protection issues in Hypothesis Number One. In Pleasant, the court established a lower threshold for exceptions for co-employee immunity, which included gross negligence and gross misconduct, depending on the circumstances. In Woodson, the court established a higher threshold for exceptions for employer immunity, holding that the actions of the employer must have been “intentional” and “substantially certain to cause serious injury or death” to the employee.

This differentiation is important because intentional misconduct is considered to be more egregious than simply gross misconduct or gross negligence. In this case, the injured employee failed to prove that the employer was “substantially certain” of the risk of serious injury or death to the employee. This clearly establishes that the rationale behind the exception is intent, rather than simply the nature of the injury. It should be noted that in Hendy, the court in California also used “intent to injure” as the test of the exception. In that case, intent was also not shown. In Johns-Manville Corp., the injured employee met the threshold of showing “intent to injure.” It should be noted that, in New York, “intent to injure” was not the test, but rather, a physical action taken which directly caused injury, such as the shooting deaths of the decedents in the Attica Prison Riot. This requirement for more egregious action on the part of the employer does not capture the

universe of “intent” as evidenced by the analysis in *Pleasant* and *Woodson*, and this policy does not reach the full scope of tools available to deter egregious behavior. In light of Hypothesis Number One, this logic is justified as to the rational purpose and equal protection issues.

In light of Hypothesis Number Four, there is still a question as to deterrence even with a case such as this. Again, like in *Bardere*, *Briggs*, *Johns-Manville Corp.*, and *Hendy*, actions of the employer and certain co-employees aggravated the injury. According to these decisions, the aggravation of the injury only be considered egregious if there is “intent to injure.” The employee, however, is still far worse due to injury than without the actions of the employer. Particularly with *Hendy*, the “intent to injure” would have been irrelevant for a regular medical malpractice suit. If his doctor had not been employed by the same employer, the normal rules for medical malpractice would have applied. Similarly, both with Hendy and this case concern a lack of care relevant to general safety standards, with Hendy the medical profession, and in this case, the maintenance of a building in accordance with building codes.

It can easily be argued that this failure is egregious, particularly due to the length of time the employers continued to fail to meet their duty of care. This failure also has implications for Hypothesis Number One. Under similar circumstances, if the employee was not employed by the employer, but injured due to medical malpractice or failure to maintain a building to code, the common law would provide a significant recovery. The purpose of medical malpractice suits and building codes is to ensure that landlords and medical professionals have strict and guiding standards for practice, because gross negligence can have grave consequences. The best deterrence against violation of these
standards is to provide significant penalties to those individuals injured as a result of the failure of the medical professionals or landlords to uphold the standard, and who are grossly negligent in their field.

This case also addresses Hypothesis Number Three. In Acevedo, the employees had not yet experienced injury or loss of the ability to earn wages, but had knowledge of a significant health hazard. Similarly, in this case, the employee had already started to experience medical complications due to the hazards, but, for quite a long period, was able to continue working because his work was sedentary and without physical exertion. In both of these cases, it is assumed that these hazards will produce more severe medical complications in the future. Particularly in Acevedo, the employees would have to incur the cost of medical screenings and such until an occupational disease related to the original hazard presents itself, which typically takes years. At which point, the court assumes that the employees would have the ability to apply for benefits under the Programs. The key difference between this case and Acevedo is that the health risks of asbestos exposure are well known, and typically established by statute. The court never answered the question of whether the costs of medical screening could be reimbursed, but the design of the Programs generally does not provide for this type of remedy.

In this case, the risks of prolonged mold exposure are not well known. It is questionable if medical complications that are correlated with mold exposure are able to be proven, or even compensable as occupational diseases. The question of compensability of the injury, or claim, was answered in Acevedo, but not in Cameron.
D. Texas

As previously noted, Texas has a very unique statutory framework.

First, employers have the option to elect to obtain workers’ compensation coverage. Likewise, employees have the option to elect to retain the right to common law claims for all causes of action in the workplace. This construction addresses the issue of equal protection embodied in Hypothesis Number One. The statutes treat employers and employees alike, and provides each classes with the option.

Second, the statutes have many hurdles to common law claims. The statutes explicitly provide that the exclusivity provision apply even the injury does not qualify for compensation. In an important decision in 2008, the Texas Court of Appeals ruled that, where a cause of action primarily rose from mental trauma cause in a personnel action and intentional tort, and was not compensable, that the employee could pursue a common law claims. This ruling is significant. Disputes due to personnel actions are not industrial accidents. Similarly, the stress and possible medical conditions developed as a result of such disputes should also be placed outside the reach of the Programs coverage. This issue speaks directly to Hypothesis Number Three, which requires the cause of action to arise from an industrial accident. This ruling is also comparable to the ruling in Cole. In Cole, the Programs in California was interpreted to bar the common law action after the employee suffered a severe cardiovascular injury correlated with his high stress and high blood pressure. In Cole, the employee was also in a dispute over personnel action.

---

The statutes are also interpreted to bar common law claims once an injured employee has accepted benefits, even a common law claim against a co-employee for intentional tort.302 This is a far departure from the standard established in California, New York and North Carolina. As mentioned in Saala and Pleasant, for the purposes of workers’ compensation, co-employees that commit intentional tort are effectively third parties under the law for that cause of action. As such, most statutory constructions allow for actions against third parties whether the injured employee has obtained benefits through the Programs or not. Moreover, many jurisdictions also provide for the reimbursement of the Program fund from the proceeds of a potentially higher recovery at common law from the co-employee. In addition, the threshold for common law suits against co-employees is generally assumed to be lower than for employers, and, even in North Carolina, Woodson provides that injured employees can pursue common law claims for intentional tort against employers after receiving benefits through the Programs.

This is an important issue concerning deterrence embodied in Hypothesis Number Four. As noted in Woodson, employers generally have far more resources at their disposal than employees. In addition, employees are at a disadvantage not only from the standpoint of resources, but legal posture, because employees have to elect the remedy first, whereas employers only have to respond to the claims afterwards. In light of these issues, Hypothesis Number One suggests that these imbalances should be considered in crafting policy for intentional tort in the workplace, and Woodson makes a compelling argument in support of these additional considerations.

Finally, there is an issue concerning the requirement that employers notify employees of Program coverage. There are a number of recent cases in which the Texas Court of Appeals ruled that Program coverage applies even if the employer failed to notify the employee of the coverage.\textsuperscript{303} None of the case law addresses this issue as a due process issue. If employers never notify an employee of coverage, then the employee has no opportunity to opt out of such coverage. By ruling that the Program coverage applied even though the employees had no notice fails to provide the employees with due process to decide if they want to opt out of Program coverage. This issue speaks to Hypothesis Number One, which requires due process and equal protection. The case law clearly did not provide the same luxury for employees. Without the written election to opt out of the Program coverage, the Program always applied unless statutory exceptions were applicable.

This issue also has implications for the application test embodied in Hypothesis Number Three. Because Texas allows for the election of Program coverage by both employers and employees, the application test must establish if either party has elected to opt out of Program coverage, and how this election impacts benefits and the application of the exclusivity provisions. But these cases not only speak to the issue of the employer obtaining Program coverage, but also properly notifying employees of such coverage.

E. Pennsylvania

Heath v. Workers’ Compensation Appeal Board is one of the most important cases in this investigation.\textsuperscript{304} This case speaks to Hypothesis Number One, Hypothesis Number Two, Hypothesis Number Three, and Hypothesis Number Four.

First, this case involves a unionized employee subject both to sexual harassment, and harassment as a result of exercising her rights established under the Program. As note in Cole, even membership in a union does not protect employees from harassment, both in general, and harassment as a result of exercising rights established under the Programs. The sexual harassment claims raise important issues about Program application. In generally, it is probably assumed that sexual harassment is not an “accident,” but an intentional act. However, Woodson raises an important question about the victim of intentional tort or intentional misconduct, even with a personal animus. In Woodson, the court noted that, from the perspective of the employee, the injury caused by intentional tort or intentional misconduct is an accident, because the injury is not expected or designed by the victim. In addition, the exception cited by the court also raises issues. First and foremost, it is important to note that the exception was repealed in 1996 and replaced with the language in section 411, which provides that “personal injury, as used in this act,” does not include tort by third parties.\textsuperscript{305}

\textsuperscript{304} Lexis Nexis. Heath v. Workers’ Compensation Appeal Board, 580 Pa. 174; 860 A.2d 25 (2004); Heath v. Pennsylvania Board of Probation and Parole, 869 A.2d 39 (Pa. Commonwealth 2005). It should be noted that the statement of fact is cited from the published case law from the remand from the Supreme Court of Pennsylvania back to the Commonwealth Court of Pennsylvania due to the fact that the remand decision includes a more detailed account of the testimony and evidence presented in the proceedings. For a more thorough discussion for this case, see the Primary Case Law Analysis in Appendix Six.

With respect to due process considerations and rational basis, there is a question as to if the statutory provision has a rational basis. It is important to differentiate \textit{Woodson} from this case and \textit{Cole}. In \textit{Woodson}, again, the injury was immediate and swift, typical of an “accident.” In this case, and in \textit{Cole}, the onset of anxiety and medical complications was slow, and both employees sought medical attention for their condition at various times during the course of the dispute with their employers. As a result, there came a certain point in time when a reasonable person would have removed oneself from the situation in order to care for the medical conditions. In this case, the employee resigned. In \textit{Cole}, the employee suffered a catastrophic cardiovascular failure. Even in \textit{Woodson}, the employee could have refused to work in the trench without the proper exercise of best practices. But the key difference between Woodson, and the numerous slow onset injury cases analyzed in this investigation, is that once the injury has first presented itself, the injured employee has a responsibility to oneself to remove oneself from the hazard.

The detail concerning the dispute in this case is important because of the length of time between the discovery of the injury and the end of the employment relationship. For instance, in Cole, the injury was discovered in October 1981. In February 1982, the doctor ordered the employee to remove himself from the stressful environment. By May 11, 1982, the employee was placed on sick leave on the order of a doctor that reported to the harassing supervisor, but the harassing supervisor still continued the harassment through administrative matters that were unnecessary, resulting in the stroke.
Similarly, in this case, the continued interaction between the superior that allegedly harassed the employee was ordered to cease in March 1998 by the union and the administrative authorities, and yet the interaction continued until the employee requested an administrative transfer to another work site on April 1998. Far worse, the employee alleges that she was harassed by the administration in her employment after she filed the claim for benefits under the Program in May 1998. As a result of the harassment, she refused to return to work on the order of her physician and her employment was terminated in April 1999.

In both of these cases, the employees took various actions to remove themselves from the harassment. In Cole, the employee was confined to the Program benefits. In this case, the employer attempted to deny Program benefits. But both cases are clearly distinguished from Pleasant and Woodson, which take the view that employees should have both remedies available in the interests of justice. This brings into question the rational basis for both policies, though, under California law, “intent to injure” warrants punitive compensation under the Program.

The most important questions in this case are the due process considerations. Hypothesis Number One and Hypothesis Number Three suggest that adjudication should test the applicability of the Program based on the eligibility for benefits. In this case, it appears that the statutes are constructed in such a way to deny benefits in this cause of action. The common law claim has not yet been presented. But it is important to note that these claims are extremely complex. In Werner, there were also complexities of the claims that warranted benefits under the Program and at common law for the death of the employee during the Attica Prison Riot.
Similarly, the decision in this case requires a full finding of the facts relevant to these claims to examine if the claims can survive as an “accident” in any form. It is clear that the sexual harassment claim will not survive as an “accident,” but sexual harassment is only a part of the claims. There is also significant harassment due to the filing of the request for benefits through the Program, personnel disputes, which, after the transfer to the new duty assignment, also resulted in stress related medical conditions.

This case clearly concludes that the question of “subject matter jurisdiction” is distinctly separate from questions of fact. If a court does not have subject matter jurisdiction, the court has no authority to make finding of fact, and adjudicate the claims on the merits. The court clearly concluded that the application of workers’ compensation schemes is a question of fact, because the question of whether an industrial accident occurred or not is a question of the facts specific to the cause of action. This finding strongly supports Hypothesis Number Three, which requires the findings of application of the cause of action to be made in order to test applicability.

Finally, with respect to Hypothesis Number Two and Hypothesis Number Four, this case did not speak to the eligibility of the claims for adjudication at common law. However, the language in the statutes is ambiguous. It is clear the injury occurred in the workplace and was not anticipated by the employee, but, at the same time, the employee may be unable to pursue a common law claim to recover damages. In addition, the ruling fails to speak to the need to deter such behavior of the employer and co-employees, particularly supervisors.
V. Secondary Case Law Analysis

This secondary case law analysis provides judicial decisions for major tort reform of the Programs, as well as rejection of a liberal interpretation of the Program statutes. Some of these jurisdictions use a very conservative interpretation of ambiguous statutory provisions, which will be closely analyzed.

In Illinois, the legislature enacted comprehensive tort reform that also modified the Program statutes in 1995. In 1997, the Illinois Supreme Court found the tort reform unconstitutional in its entirety in Best v. Taylor Machine Works. This judicial decision has important implications not just for Program statutes, but also for any and all tort reform efforts.

In Ohio, the Ohio Supreme Court ruled that statutory provisions explicitly forbidding employees to pursue common law claims against employers for intentional tort of employers are unconstitutional.

In Georgia and Tennessee, the courts have heard challenges to the applicability of the Program statutes due to the fact that serious injuries do not qualify for significant benefits if those injuries to not result in a loss of wages.

In Massachusetts, Maine, Rhode Island, Minnesota, Colorado and Delaware, the statutory construction, as well as the relevant case law, have resulted in Program administration unlike the majority of jurisdictions in the United States. These exceptions are examined independently.

For itemization and full citations for these cases, see the Index of Cited Case Law in Appendix Four. For a more thorough discussion for these cases, see the Secondary Case Law Analysis in Appendix Seven.
A. Illinois

*Best v. Taylor Machine Works* speaks to the issues in Hypothesis Number One, Hypothesis Number Two, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six.\(^{307}\) With respect to Hypothesis Number One and Hypothesis Number Six, the issues with due process, equal protection and rational basis are all clearly detailed in the decision. In summary, it is important to note that the State Constitutional provisions provide similar protects to the Federal Constitution. Therefore, it is important to note that these protections are universal within the United States. With respect to Hypothesis Number Two, the confusion with the meaning and intent of the Joint Tortfeasor Contribution Act clearly demonstrates the issues with ambiguous and poorly constructed statutory provisions. It should be noted that Illinois is a jurisdiction that uses hybrid guidance for adjudication.

With respect to Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six, the application test is again an important element of this analysis, as well as the element of deterrence in the policy. The case does not speak directly to the issue of deterrence, but clearly implies that the punitive measures used to deter behavior disappear for the most egregious behavior with the cap on monetary benefits. In addition, no additional consideration is made for those subject to the cap, such as coverage of additional medical expenses. The key element of the Programs is a regulation of all claims between employees and employers for industrial accidents. The cap simply impacts the claims involving the most severe and grave injuries.

B. Ohio

*Brady v. Safety-Kleen Corp.* is significant because of the explicit discussion concerning a bar forbidding employees to pursue common law intentional tort claims against employers.\(^{308}\) The constitutional implications are clear, and related to Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six. This case speaks to the due process, equal protection and rational basis and legitimate purposes tests previous discussed. In addition, this case clearly differentiates industrial accidents from intentional tort.

It should be noted that Ohio is a jurisdiction with statutory guidance for adjudication. It is clear that the legislature in Ohio attempted to strictly confine the rights of employees in order to ease adjudication of claims. However, it should be noted that the legislature cannot exceed the limitations established by the constitutional protection of basic rights, particularly due process, equal protection, rational basis and legitimate purpose.

The most important finding in this ruling is that intentional torts are never industrial accidents. This conclusion is closely aligned with the ruling in *Pleasant* and *Woodson*.\(^{309}\) In these decisions, the court found that it is critical to differentiate between industrial accident and other causes of action which may arise in the workplace, or from the employment relationship, but are outside the scope of the Programs.

---


\(^{309}\) It is important to note that the statutes in North Carolina define an industrial accident as an “injury by accident arising out of and in the course of the employment”. However, as noted in this case, and other cases in other jurisdictions, particularly California, the definition of an industrial accident is not qualified by the word “accident” or “intentional tort”. So, while North Carolina has case law guidance for adjudication, this statutory definition for industrial accident explicitly stating that it is an “injury by accident” has assisted in clearer guidance for adjudication than in California and in Ohio.
C. Georgia and Tennessee

Nowell v. Stone Mountain Scenic, and Clayton v. Pizza Hut are similar to Acevedo. The injured employees simply argue that simple negligence caused these injuries. However, it is important to differentiate this case from Acevedo. In Acevedo, the employees had knowledge of a deadly hazard to which they were exposed, but had not yet developed any injury. In both of these cases, the employees had already suffered serious permanent disfigurement as a result of the injury, disfigurement for which there was no compensation through the Programs. The most important detail to highlight in these two cases is that the Programs were not constitutionally challenged for a failure to provide an adequate substitute. It should be noted that most of these cases are not framed within the basic individual protections enshrined in the Constitution of the United States. The last element of the application test is not address, which is a question of adequacy of the remedy. In Clayton, the Tennessee Supreme Court concluded that:

“Under the Act, Ms. Clayton would be entitled to temporary total disability benefits, if her injury incapacitated her for any length of time, and also to necessary medical expenses for treatment of her injuries, whether she was incapacitated or not. Under Worker’s Compensation Acts similar to the Tennessee Act, it has been held that where permanent disfigurement is not compensable, but the worker is compensated, or is entitled to compensation, for temporary disability or to medical expenses, the exclusive remedy provision of the Worker’s Compensation Act extends to the entire injury and all its damages.”

Lexis Nexis. Nowell v. Stone Mountain Scenic R.R., 150 Ga. App. 325, 257 S.E.2d 344 (1979); Clayton v. Pizza Hut, 673 S.W.2d 144 (Tenn. 1984). It is important to note that Clayton cites Nowell as an authority. For a more thorough discussion for this case, see the Secondary Case Law Analysis in Appendix Seven.
Hypothesis Number One and Hypothesis Number Three suggest that if these benefits are not adequate, then the Program cannot prove the exclusive remedy. It is important to draw a comparison to two jurisdictions outside of the Sample with respect to the availability of a remedy through the Programs and adequacy of a remedy through the Programs. Both territorial possessions of the United States in the Caribbean Sea have incorporated an availability clause into their exclusivity provisions. In Puerto Rico, the exclusivity provisions provide that:

“When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the only remedy against the employer, even in those cases where maximum compensations and benefits have been granted in accordance thereof; but in case of accident to, or disease or death of, the workmen or employees not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be, the same as if this chapter did not exist.”

Similarly, in the Virgin Islands, the exclusivity provisions provide that:

“When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist.”

These two jurisdictions provide the most explicit provisions concerning the availability of remedy. The specific language of the exclusivity provisions were included and are analyzed in this investigation in order to ascertain the best construction for the statutes.

311 Lexis Nexis. 11 L.P.R.A. § 21.
312 Lexis Nexis. 24 V.I.C. § 284.
While the provisions in Puerto Rico and the Virgin Islands do not speak directly to intentional tort or intentional misconduct, these provisions do guarantee that employees will not suffer a tort in the workplace for which no remedy is available. This investigation has not only shown the difficulty in establishing the definition of an injury “by accident arising out of and in the course of” the employment, but this investigation has also shown that it is difficult to establish the meaning of the term “where the employer and the employee are subject to and have complied with” the Program statutes, all other remedies are excluded.313

The construction in Puerto Rico and the Virgin Islands ensures that employees will have a remedy available, even at common law, in compliance with the requirement that the Programs provide an “adequate substitute” for the forbidden common law remedy. It is important to note that these cases concern the fact that only a significant element of the injury was not compensable, namely the permanent disfigurement. In other respects, the employee is eligible to receive at least some benefits. This is in stark contrast not only to Acevedo, but also to Johnson and Smith. In Johnson and Smith, the case law provided the guidance for adjudication of the claims for fraudulent and deceptive practices. In light of Hypothesis Number Two, this statutory language requires the trial court to make findings that the Program provides a remedy for the cause of action, otherwise the employee is eligible to seek remedy through the common law.

313 The earlier sections already demonstrated the several differences between the language of the statutes, but this language is particularly included in the exclusivity provisions in North Carolina. Lexis Nexis. N.C. Gen. Stat. § 97-10.1.
D. Massachusetts, Maine and Rhode Island

This statutory arrangement is significant because, not only is there a remedy available in nearly every instance of a claim against an employer, the arrangement also allows for punitive damages through the Programs and other administrative law, depending on the nature of the egregious wrong. The law in Massachusetts does not provide any exceptions to the exclusivity provisions. Even when an intentional tort is alleged, the employee can only pursue a common law claim against an employer or a co-employee, if the employee has duly elected to be removed from Program coverage. However, an employee can pursue a common law claim for intentional tort against a co-employee, but only if the intentional tort “was in no way within scope of employment furthering interest of employer.”

No case law was found that attacked the constitutionality of this statutory arrangement. This statutory arrangement provides punitive damage through efficient administrative means, similar to California. In this sense, this arrangement shows how efficient administrative law can simplify adjudication, as stated in Hypothesis Number Two. However, a thorough empirical analysis would be required to measure the effectiveness of this arrangement as compared to common law relief.


315 Lexis Nexis. Anzalone v. Massachusetts Bay Transp. Authority, 403 Mass 119, 526 NE2d 246, 1988 Mass LEXIS 222 (1988). In this case, the court specifically ruled that “[e]mployee’s suit against co-employee for intentional tort in course of employment relationship is barred by exclusivity provision of Workers’ Compensation Act, unless employee reserved his right of action.”

316 Lexis Nexis. O’Connell v. Chasdi, 400 Mass 686, 511 NE2d 349, 1987 Mass LEXIS 1432. (1987). In this case, the court specifically ruled that the “[e]xclusivity provisions of Workmens' Compensation Act did not bar action against fellow employee who committed intentional tort which was in no way within scope of employment furthering interest of employer.”
The issues raised in *Cole v. Chandler* and *Lopes v. G.T.E. Products Corporation* are extraordinarily important. These cases raise questions as to the independence and role of the judiciary. In *Heath*, the judiciary took the role of guiding adjudication standards in light of the hybrid guidance for adjudication in Pennsylvania. In *Best*, the judiciary aggressively tested the comprehensive tort reform for constitutionality in Illinois. In *Brady*, the judiciary ensured the maintenance of due process, equal protection and rational basis and legitimate purpose in Ohio. It is important to note that neither of these two cases in Maine or Rhode Island mentioned that a constitutional challenge raising these issues was presented before the court. However, it is important to note that simply questioning venue and procedures invokes the protections of due process, which is noted in *Pleasant* and *Woodson*. In Illinois, the court established the clear standard for appellate review by establishing that after the legislative intent of the laws are analyzed, the intent must be tested against due process, equal protection, rational basis and legitimate purpose principles. Neither of this New England cases reached the constitutional questions to answer the question of if the Programs provide an “adequate substitute.”

The implications for Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six are profound. Not only are the constitutional principles and application test not sufficiently challenged by the judiciary, the judiciary failed to perform its proper role in the system of governance. In addition, the element of deterrence has been removed by the policy. It is important to note that the

---

ambiguity of the statutes exists even in California, but that the failure to qualify the
definition of industrial accident as an injury “by accident” is also a significant deficiency
in the statutory provisions.

The statutory construction of the Program in Massachusetts (as well as Rhode
Island) presents a challenge from an analytical standpoint. Given the statutory
provisions, employees have the option to opt out of the universal Program coverage. In
this sense, the Program is not necessarily compulsory. However, employees assume the
risk of injury by true accident in the workplace, and difficulty in receiving compensation
for such injury without Program coverage. With respect to Hypothesis Number One, the
illusion of choice is not necessarily equality. As previously discussed in this
investigation, employers and employees are inherently unequal. Employers generally
have far more resources at their disposal, including insurance to cover for incidental costs
for which the employer could not other collect at law. The employee, however, generally
has no such luxury. As reported by the National Academy of Social Insurance, only 60%
of employees have sick leave and only 40% have disability insurance. While this
investigation has focused on intentional torts and intentional misconduct of an employer
which causes injury to an employee, it can be assumed that a vast majority of injuries are
caused by true accidents or simple negligence. With true accidents, or simple
negligence without substantial evidence of fault, employees would be unable to collect
through a claim at common law. Employees have far less resources available in order
collect evidence in order to support a claim, while employers have far more resources in

318 The empirical data does not provide information on the nature of injuries that serve as causes of action
in claims. This assumption is made based on the fact that a majority of workers’ compensation claims
are simple and without much controversy. The primary sources of empirical data are the United States
Department of Labor and the National Academy of Social Insurance. See Appendix Three for empirical
data collected.
order to defend against a claim. If employers voluntarily opt out of Program coverage, their only liability would be at common law when negligence or intentional tort can be proven.

Voluntary options for coverage, for either employee or employers, are extremely problematic, particularly when employers have the option for coverage. Simply by the nature of this election, employers have the luxury of choosing the options that best suits their needs and business model. Employees choose their options based on speculation. The case law hereinabove shows the full scope of the levels of liability of employers, from true accidents and simple accidents to intentional misconduct and international tort. Without Program coverage, true accidents without any negligence attributable to the employer would result in the employees bearing the full costs of the accident. As previously illustrated, intentional torts are not within the scope of Program coverage in many jurisdictions. In addition, most injuries in the workplace are true accidents. Therefore, employers that have the option to waive Program coverage significantly reduce their costs. For employees, waiving Program coverage also has significant implications, however, these implications are extremely negative disadvantages. The case law shows that employees bear significant costs in asserting common law claims. 

*Pleasant* and *Woodson* establish that the Programs can provide employees with quick and efficient alternatives to burdensome common law claims, even for intentional misconduct and intentional tort. This option is provided in consideration of the limited resources available to employees. The very idea that employees must choose between Program coverage and common law claims, and have no option to change that decision for an entire calendar year, places employees at a strategic disadvantage.
E. Minnesota, Colorado and Delaware

According to the findings of this investigation, Minnesota, Colorado and Delaware are three of the jurisdictions within the United States that forbids all common law actions of employees against employers, even for intentional tort, but allow intentional tort claims at common law against co-employees.\textsuperscript{319}

The case law in Minnesota

"Minnesota case law has limited the exception to [the exclusivity provisions of the Program to] assaults that are ‘wholly unconnected’ with the plaintiff’s employment. Additionally, employers who assault employees may face common law liability under the intentional injury exception to the [exclusivity provisions of the Program]. The exception, which applies only to employers, allows the injured employee to assert a tort claim against her employer if the employer exhibited a ‘conscious and deliberate intent to inflict injury’ in assaulting the employee. \textit{Corporate employers cannot be held vicariously liable under this exception, as ‘[a] corporate entity is by its nature incapable of harboring [a malicious or deliberate intent].'}\textsuperscript{320}

This language is extremely important. By excluding “corporate employers,” this language only leaves less than 20\% of small business firms vulnerable to this provision.\textsuperscript{321}

\begin{footnotesize}
\begin{footnotes}
\item[321] While 99\% of formally recognized firms are small businesses (the United States Small Business Administration and the United States Census Bureau classifies small businesses as recognized firms that employ less than 500 people; nationwide, there are 5.71 million small business firms compared to only 17,000 corporate firms with more than 500 people), most Programs do not cover firms with less than 5 employees (of the 5.71 million small businesses, 3.5 million have less than 5 employees, and 4.5 million have less than 10 employees, leaving only 1 million recognized small business firms with less than 500 employees. In addition, of the 112 million employees working for these 5.73 million firms, only half of them work for small businesses (54 million work for small businesses while 56 million work for larger corporate firms). Of the 54 million employees working for small businesses, 6 million work for firms with less than 5 people and 12.4 million work for firms with less than 10 people. This leaves only 40
\end{footnotes}
\end{footnotesize}
Case law in Alaska further clarifies this policy position:

“Where the manager of the corporate premises was guilty of assault and battery, directed against two employees, the corporate veil may not be pierced and the corporation’s assets made liable for his intentional torts merely because the manager controlled the activities of the corporation, owned 50 percent of its shares and was its president. Workmen’s compensation is the exclusive remedy against the employer. An employer is not vicariously liable to its employees in an assault and battery action for the acts of its managerial employee. This section makes workmen’s compensation the exclusive remedy against the employer for compensable injuries. [The exclusivity provisions] define compensable injuries to include ‘an injury caused by the willful act of a third person directed against an employee because of his employment.’ A supervisor is such a third person within this definition, and so workmen’s compensation is the exclusive remedy against the employer.”

This policy has significant implications for this investigation. In comparison to the ruling of the court in Woodson, this policy draws a distinct separation between the official policy of an employer and the ownership of an employer. Even with the intentional tort of a manager with significant ownership interests in the firm, the exclusivity provisions were found to protect the company from common law liability and punitive damages, in order to protect the business interests of the other investors. Similar to the ruling in Pleasant, when a senior officer, manager or owner of a company engages in an intentional tort, the resulting injury is not an industrial accident and the senior officer, manager or owner does not enjoy the immunity from common law suit.

---

million employees working for small businesses. Presumably a “corporate employer” is one a company in which stocks are either publicly traded, or stocks are owned by a multitude of shareholders, thereby making it impossible for the “owners” of the firm to manage the business operations, but through a proxy, the executive and management team. See United States Census Bureau: “Statistics of U.S. Businesses.” http://www.census.gov/econ/susb/. Also see National Federation of Independent Business. “State by State Comparison of Workers’ Compensation Laws.” http://www.nfib.com/legal-center/compliance-resource-center/compliance-resource-item/cmsid/57181#table.

Not only is this a concern from the standpoint of the limited resources held by individuals which can be made liable, but also because this policy does not give any focus to deterrence of egregious behavior of employers and senior officers and owners of the employers. Both Woodson and Brady provide that it is in the public interest to allow punitive damages against an employer whose management, ownership, or senior officials engage in an intentional tort in furthering the official policy of the employer.

Case law in Alabama also supports the policy position of this Sample group:

“Employee’s injury and resulting death were covered under the Alabama Workers’ Compensation Act; Ala. Code § 25-5-1 et seq., therefore, the Act’s exclusive remedy provisions barred the employee’s survivors from suing the employer for failure to provide a safe place to work, regardless of whether the employer’s conduct was negligent, wanton, intentional, or willful.”

This policy raises issues with respect to Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six. Not only does this policy fail to provide an element of deterrence for egregious behavior of the employer, this policy provides unfair advantages to employers in the event of tort in the workplace. While it is important to note that this group allows injured employees to sue co-employees at common law, the relief provided will most likely be small compared to punitive damages that can be extracted from employers. This policy position also raises concerns about the constitutionality of the arrangement for employees in light of the advantages for employers.

---

The Supreme Court of Colorado also considered the question of the application of the Workers’ Compensation Act in the event of sexual harassment, and found that sexual harassment does not “arise out of and in the course of the employment” and therefore common law claims against a co-employee personally are not barred by the exclusivity provisions of the Workers’ Compensation Act.\textsuperscript{324}

In pertinent part, the Court ruled that:

“...[E]mployers are responsible for maintaining a workplace free from sexual harassment, and thus, exclusivity provisions of the workers’ compensation act do not prohibit employees from raising claims outside of the act. . . . [P]ublic policy considerations support the court’s holding that sexual harassment legislation, not the workers’ compensation act, is the appropriate avenue of relief for victims of sexual harassment. . . . [S]exual harassment should not be covered by workers’ compensation since workers’ compensation laws fulfill different statutory purposes than do statutes enacted to address workplace sexual harassment. . . .”\textsuperscript{325}

In Delaware, the Supreme Court held that:

“There is nothing in our Workers' Compensation Act that indicates that our General Assembly intended to adopt the substantial certainty rule. Mindful of the separation of powers doctrine, in the absence of clear statutory language, we cannot rewrite the statute to apply the \textbf{substantial certainty doctrine} in Delaware. Many state courts, under similar statutes, have held that an intentional act by the employer that causes injury to an employee is not an ‘accident’ and therefore a claim based on an intentional injury is not barred by the Workers’ Compensation Act. We agree that those claims that involve a true intent by the employer to injure the employee fall outside of the Workers’ Compensation Act and remain separately actionable as common law tort claims.”\textsuperscript{326}

\textsuperscript{324} Ibid.
\textsuperscript{325} Ibid.
\textsuperscript{326} Ibid. The “substantial certainty doctrine” is the doctrine described in detail in \textit{Woodson}. 

-132-
This sample group is significant because of the many anomalies present. The statutory construction of the Program in Massachusetts (as well as Rhode Island) presents a challenge from an analytical standpoint. Given the statutory provisions, employees have the option to opt out of the universal Program coverage. In this sense, the Program is not necessarily compulsory. However, employees assume the risk of injury by true accident in the workplace, and difficulty in receiving compensation for such injury without Program coverage.

Most importantly, this sample group is significant because the judicial decisions are extremely conservative. The courts have expressly refrained from using a liberal interpretation of the statutory provisions in order to ensure the legislative intent and goals are realized, and in order to maintain the rights and protections guaranteed by the Constitution.

The implications for the Hypotheses in this investigation are, again, profound. Again, the judiciary has taken no steps to test the due process, equal protection or rational basis considerations with respect to these statutory provisions. In essence, the court simply stopped short after acknowledging the ambiguity.

This judicial practice is problematic for two reasons.

First, the legislatures, and the general public, or powerful political interests, such as business interests, may willfully seek to violate the constitutional rights of a certain class, minority or group. One of the only venues for recourse to restore constitutional and civil rights is through the judicial system. While Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four, and Hypothesis Number Six do not speak directly to the role and power of the courts, there is an assumption that the judicial
system will fulfill its proper role in order to ensure the maintenance of these constitutional and civil rights, the proper use of the application test, and the proper interpretation of the statutes to deter egregious behavior of the employer.

Second, where a law fails to properly establish due process, equal protection, rational basis and legitimate purpose, the entire law should be declared unconstitutional, just as in Best in Illinois, and Brady in Ohio. In Best and Brady, the courts clearly established that the legislature has a responsibility to provide clear and useful language in statutes in order that the public may be able to interpret, understand, and abide by, the law. In these New England judicial decisions, not even the courts themselves understand the intentions of the legislatures in crafting the Program statutes. Therefore, logic would suggest that the entire laws should be invalidated and remanded back to the legislature to produce viable and clear statutory language.

It is important to note that this entire analysis hinges upon the role of the judiciary, and the standard of adjudication for constitutional challenges and due process challenges. It assumed that the appropriate standard of review for constitutional challenges is provided by Best and Brady. It is assumed that the appropriate standard of review for due process consideration is contained in Heath. It is considered that the best interpretation of the appropriate operation and purpose of the Programs is contained in Pleasant and Woodson. It is assumed that the case law examined in New York, Texas, Georgia and Tennessee fails to address the critical question of the adequacy of the benefits provided through the Programs for the various scenarios, including employer intentional misconduct, ineligibility for benefits, and insignificant benefits in light of the injuries.
VII. Comprehensive Analysis

The comprehensive analysis brings together the findings of the various phases of this investigation. Most of the findings from the historical analysis and the empirical data analysis were presented with the preliminary observations and findings. The preliminary legal analytical findings were presented in the same section. The case law analysis findings were presented in the case law analysis. As previously mentioned in the discussion concerning the design of this investigation, this comprehensive analysis will tie together the historical and empirical data findings with the case law findings.

First, the findings from the empirical data analysis will be briefly summarized. The findings will make direct reference to the analysis.

Then, the case law findings will be summarized. Summary of the case law findings will be a complex process. As already shown in the case law analysis, comparisons are drawn between cases and between statutory constructions across jurisdictions. The brief summary of the case law analysis will make references back to certain parts of the case law analysis that extensively discuss the case law. As a result, the arguments presented in this section will be framed within the context of the case law analysis. The detailed arguments presented in the case law analysis will not be repeated for the sake of the length of this work.

Finally, comparisons will be drawn between findings, and conclusions will be drawn on the hypotheses.

---

327 See the Empirical Data Analysis in Section IV.
328 See the case analysis in Section V and Section VI.
A. Summary Findings of Empirical Data Analysis

The following are a summary of the most important findings from the historical and empirical data analysis performed in this investigation.

Neighboring jurisdictions, and jurisdictions with similar economies, political forces and trade union densities, share characteristics in regulation and Program statutory construction.\textsuperscript{329} There are significant differences in statutory construction between Sample groups.\textsuperscript{330}

The empirical data analysis generally shows that important empirical data was not available, and there are serious questions of data integrity and validity with the empirical data that is available.\textsuperscript{331} These concerns include a lack of comparability between jurisdictions, and the estimate that more than half of all workplace injuries are not reported through the Programs.\textsuperscript{332} As previously stated, some empirical data is still useful for attempting to analyze trends.\textsuperscript{333} Empirical data clearly shows that the percentage of the labor force engaged in employment traditionally considered “hazardous” is on the decline.\textsuperscript{334} Empirical data shows that most injuries in the workplace are not reported due to valid concerns of the adequacy of Program benefits.\textsuperscript{335} While the empirical data analysis is inconclusive, there is evidence that jurisdictions with higher benefit rates, stronger regulatory environments, and harsh punitive measures for employers that engage in egregious behavior, have a higher rate of reported non-fatal

\textsuperscript{329} See the section concerning the “Sample Analysis” in Section IV.A.\textsuperscript{330} \textit{Ibid.}\textsuperscript{331} See the section concerning the “Empirical Data Analysis” in Section IV.C.\textsuperscript{332} \textit{Ibid.}\textsuperscript{333} \textit{Ibid.}\textsuperscript{334} See the section concerning the “Historical Analysis” in Section IV.B.\textsuperscript{335} See the section concerning the “Empirical Data Analysis” in Section IV.C.
injury relative to other jurisdictions.\textsuperscript{336}

This investigation revealed that there is a wealth of open and public sources of information available about the Programs, including sources available through the Internet.\textsuperscript{337} There are still significant barriers, however, to public access to case law.\textsuperscript{338} It appears that the correlation between the Program statutory construction and the fatal injury rate in a given jurisdiction is weak, and the correlation between the proportion of the labor force engaged in hazardous employment and the fatal injury rate in a given jurisdiction is strong.\textsuperscript{339} Unions have historically played an important role in advocating for workers’ compensation and improving the programs through reforms.\textsuperscript{340} Unions continue to play an important role in the debate concerning workers’ compensation, particularly in promoting adequate benefits for workers injured in the workplace.\textsuperscript{341}

The cost of health care is a significant issue for Program administration.\textsuperscript{342} Employers, and particularly insurance companies, have been offsetting the rise in medical costs by attempting to avoid the payment of monetary benefits.\textsuperscript{343} Employers and insurance companies have also discouraged injured employees from exercising their rights.\textsuperscript{344}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{336} Ibid.
\item \textsuperscript{337} Ibid.
\item \textsuperscript{338} Ibid.
\item \textsuperscript{339} Ibid.
\item \textsuperscript{340} See the section concerning the “Historical Analysis” in Section IV.B.
\item \textsuperscript{341} Ibid. Also see the section concerning the “Empirical Data Analysis” in Section IV.C.
\item \textsuperscript{342} Ibid.
\item \textsuperscript{343} Ibid.
\item \textsuperscript{344} Ibid.
\end{itemize}
\end{footnotesize}
B. Summary Findings of Legal Analysis

The following are a summary of the most important findings from the legal and case law analysis performed in this investigation.

Ambiguous statutory provisions require adequate case law analysis for interpretation. Without this interpretation, implementation and adjudication may be inconsistent. An injury caused by intentional tort or intentional misconduct is not caused by an accident, and is therefore not an industrial accident. The Program statutes only apply to causes of action involving industrial accidents. Employees that suffer a physical injury in the workplace due to the egregious actions of an employer or a co-employee generally have the right to pursue a common law claim for remedy and punitive damages. Punitive damages, however, do not always have to be provided through proceedings at common law claims.

---

345 A thorough discussion addressing ambiguous statutory provisions is provided in Cole (see the section with case law in California, Section V.A.iii), and Woodson (see the section with case law in North Carolina, Section V.C.iii). Also relevant is the analysis of case law in Minnesota, Colorado and Delaware (see Section VI.E).

346 Ibid. Particularly see the opposing legal positions taken by the court on the same statutory provision in Woodson.

347 A thorough discussion addressing the definition of an industrial accident is provided in Cole (see the section with case law in California, Section V.A.iii), and in Pleasant and Woodson (see the section with case law in North Carolina, Section V.C.ii and Section V.C.iii).

348 Ibid. The method for testing the application of the Program statutes is also discussed in Saala and Fermino (see the section with case law in California, Section V.A.i and Section V.A.v), as well as Brown and Johnson (see the section with case law in North Carolina, Section V.C.i and Section V.C.v).

349 Note that not all jurisdictions allow employees to pursue common law claims against employers for intentional tort. For jurisdictions that allow intentional tort common law claims, see Cole (see the section with case law in California, Section V.A.iii), Pleasant and Woodson (see the section with case law in North Carolina, Section V.C.ii and Section V.C.iii), for jurisdictions that do not allow intentional tort common law claims, see the sections on Massachusetts, Maine, Rhode Island, Minnesota, Colorado and Delaware (Section VI.D and Section VI.E).

350 Ibid. While most jurisdictions provide employees with the opportunity to file a common law claim against an employer for intentional tort, Massachusetts and California provide punitive damages through administrative means. See Cole (see the section with case law in California, Section V.A.iii), and the section on Massachusetts (Section VI.D).
Questions concerning the application of the Programs revolve around the requirement that the Programs provide an “adequate substitute for the forbidden common-law claim,” and due process and equal protection considerations enshrined in the Constitution. \(^{351}\) Significant questions arise concerning application when the Programs do not provide any remedy for injury.\(^{352}\) Moreover, there is an ongoing debate about the treatment of intentional misconduct for the purposes of Program application.\(^{353}\)

The first element of the application test is the question of an employer-employee relationship between the parties to the dispute.\(^{354}\) The relationship must be relevant to the dispute, and where the relationship is not relevant, even if it exists, the Programs do not apply.\(^{355}\) The second element of the application test is the question of the cause of action, which must be an industrial accident.\(^{356}\) The third element of the application test is qualification for benefits under the Programs.\(^{357}\) The last element is a consideration of the adequacy of those benefits.\(^{358}\) To this end, employees should all receive comparable treatment under the law (benefits based on wages, eligibility for benefits in lieu of common law claim) and disparate treatment has been determined to be unconstitutional.\(^{359}\)

\(^{351}\) See the section concerning “Constitutional Challenges to Exclusivity Provisions” in Section II.E.
\(^{352}\) See *Acevedo* (Section V.B.iv), and the discussion on Georgia and Tennessee (Section VI.C).
\(^{353}\) See *Bardere, Briggs and Fucile* (Section V.B.ii, Section V.B.iii, and Section V.B.v), as well as *Woodson* (Section V.C.iii) and *Fermino* (Section V.A.v).
\(^{354}\) See *Brown, Johnson* and *Cameron* (North Carolina, Section V.C.i, Section V.C.iv, and Section V.C.v), and *Johnson-Manville Corp.* (California, Section V.A.ii and Section V.A.iv).
\(^{355}\) Ibid.
\(^{356}\) See *Woodson* (Section V.C.iii).
\(^{357}\) Ibid.
\(^{358}\) See *Woodson* (Section V.C.iii).
\(^{359}\) See the section concerning “Constitutional Challenges to Exclusivity Provisions” in Section II.E. It is important to note that recent case law has not directly and explicitly posed this question and evaluated the benefit scheme within the modern context for “adequacy.”
Constitutional considerations also require a rational and legitimate purpose for laws impacting basic rights, as well as adequate due process and equal protection.\textsuperscript{360} It is significant to point out that laws explicitly barring employees from pursuing common law claims against employers for intentional tort are unconstitutional.\textsuperscript{361}

This investigation has identified issues with the due process in Texas concerning the option to elect coverage.\textsuperscript{362} In Texas, case law has allowed for employers to receive immunity from common law claims even without providing written notice of Program coverage to employees.\textsuperscript{363} This is significant because employees have the option, under the law, to opt out of Program coverage, but the employee can only make that election if the employee receives notice of Program coverage from the employer.\textsuperscript{364}

This investigation also specifically focused on a landmark judicial decision in Pennsylvania that prescribed general rules for due process.\textsuperscript{365} It is important to highlight that the court ruled that common law claims against employers should not be dismissed until it is determined the employee is eligible for benefits under the Program statutes.\textsuperscript{366}

The principle of equal protection and rational purpose also is highlighted in the Illinois case ruling that comprehensive tort reform was unconstitutional, because it only limited recovery for the largest awards.\textsuperscript{367}

\begin{footnotes}
\item[360] See the section concerning “Constitutional Challenges to Exclusivity Provisions” in Section II.E.
\item[361] See the section concerning Ohio, Section VI.B.
\item[362] See the section concerning Texas, Section V.D.
\item[363] Ibid.
\item[364] Ibid.
\item[365] See the section concerning Pennsylvania, Section V.E.
\item[366] Ibid.
\item[367] See the section concerning Illinois (Section VI.A), which discusses the comprehensive tort reform, in which a cap on non-economic damages was ruled unconstitutional.
\end{footnotes}
C. Final Analysis of Hypotheses

The hypotheses tie together the empirical data analysis and the legal and case law analysis. Various hypotheses have both an empirical element as well as a legal element.

**Hypothesis Number One:** Employers and employees should, by and large, have equal treatment and the same legal protections of interests through the Programs. The Programs should include similar exceptions for intentional tort, intentional misconduct and gross negligence, and options of election, for both employers and employees.\(^{368}\) This hypothesis is framed by the principles of Constitutional law, “due process,” “rational basis,” and “equal protection.”\(^{369}\) These Constitutional guarantees will be analyzed in light of the statutory construction, particularly, the exclusivity provisions, the option of election and the election of remedy, as well as exceptions to the exclusivity provisions.\(^{370}\)

**Hypothesis Number Two:** Exclusivity provisions with explicit language concerning intentional tort, intentional misconduct, gross negligence and negligence of the employee or the employer are in the public interests and far more efficient and cost effective for administration, employees and employers.\(^{371}\) These statutory provisions reduce the need for litigation, and particularly for appellate review.\(^{372}\)

\(^{368}\) In consideration of the scope of this investigation, reference to the Programs particularly speaks to the exclusivity provisions, detailed in the section concerning the “Statutory Construction of the Exclusivity Provisions” in Section II, Subsection D.

\(^{369}\) Refer to the previous section concerning the “Principles of Constitutional Law” in Section II, Subsection E for the detailed discussion of these three constitutional principles.

\(^{370}\) The principle of “Option of Election,” which applies to Texas, Massachusetts and Rhode Island, is introduced in the section concerning the “Statutory Construction of the Exclusivity Provisions” in Section II, Subsection D. The principle of “Election of Remedy” will be introduced later in this work.

\(^{371}\) Refer to the previous section concerning the “Causes of Action Under Statute” in Section II, Subsection C. Also see the section concerning the “Statutory Construction of the Exclusivity Provisions” in Section II, Subsection D.

\(^{372}\) This aspect of the hypothesis will require an analysis of the empirical data.
**Hypothesis Number Three:** In order to ensure preservation of the Constitutional rights to due process, common law claims of employees against employers should not be dismissed until it is confirmed that the Programs apply to the cause of action, the employee is eligible for benefits under the Programs, and the Program benefits provide an adequate substitute to the common law remedy.\(^{373}\) All three of these conditions should be met in order to assure compliance with the decision of the Supreme Court in *New York C. R. Co. v. White.*\(^{374}\)

**Hypothesis Number Four:** Jurisdictions that provide statutory exceptions for employees to collect punitive damages against an employer for injury due to intentional tort or intentional misconduct of the employer have lower rates of fatal injury and severe permanent disability in the workplace, and higher trade union densities.

**Hypothesis Number Five:** Statutory provisions that provide robust, inclusive and encompassing definitions for classes are more efficient for adjudication of application of the Programs in the modern labor force.\(^{375}\)

**Hypothesis Number Six:** The protection of the rights of employees must be the centerpiece and primary focus of Program reforms. Reforms that focus only on reducing costs to employers could result in violations of the Constitutional rights of employees.\(^{376}\)

---

\(^{373}\) See the section concerning “Exclusion of Common Law Defenses” in Section II, Subsection E.

\(^{374}\) Ibid.

\(^{375}\) This hypothesis specifically refers to the statutory provisions concerning the classes and definitions. See the section concerning “Classes and Definitions established by Statute” in Section II, Subsection C.

\(^{376}\) This hypothesis specifically refers to the judicial decisions reviewing tort reform in Illinois and Ohio, as well as procedural due process challenges in Pennsylvania and other jurisdictions. This hypothesis will be discussed in detail later in this analysis.
Hypothesis Number One is supported by the findings of this investigation: All members of a class established by law must receive equal treatment under the law to comply with the Constitutional provisions. In *Best v. Taylor Machine Works*, the Court questions the unequal treatment of employees, which are within the same class. However, the Constitution not only requires equality between members of the same class, but also equality between all classes for which the challenged statute impacts and within the same sphere of application.\(^{377}\) From this standpoint, there is a key question concerning the equal treatment between classes with respect to the Programs. In most jurisdictions, employers receive special consideration if the employee engages in conduct that is intentional, reckless, or illegal, and such conduct results in injury to the person of the employee, or, depending on the jurisdiction, another co-employee. Similarly, Constitutional law would suggest that the employee should receive special consideration if the employer engages in similar conduct, where the employer already receives special consideration. In *New York C. R. Co. v. White*, the Supreme Court ruled that the New York Workers’ Compensation Law was constitutional with respect to employers because employers were afforded the minimal threshold of due process by the special considerations.\(^{378}\)

Hypothesis Number One, Hypothesis Number Three and Hypothesis Number Four require additional data in order to complete analysis: Different jurisdictions have different schemes for the election of remedies. As evidenced in the Actions resulting from the Attica Prison Riot (see Section V, Section B), it is common practice for the adjudicating authorities to foreclose on common law actions if the injured

\(^{377}\) See Section II, Section C.

\(^{378}\) See Section II, Section C.
employee, or his or her representative in the case of incapacity or death, has already accepted workers’ compensation benefits. However, this practice seems to not serve a legitimate purpose, nor to ensure justice. In *Woodson v. Rowland*, the North Carolina Supreme Court also addresses this issue, but, in that case, the estate of the decedent had not yet elected a remedy (see Section V, Section on North Carolina). In both *Pleasant v. Johnson* (see Section V, Section on North Carolina) and *Saala v. McFarland* (see Section V, Section on California), multiple jurisdictions allow injured employees to collect benefits through the Programs as well as pursue a common law claim against a co-employee guilty of intentional tort or negligent tort outside of the scope of employment (both Plaintiffs had already collected benefits through the Programs).

**Hypothesis Number Two and Hypothesis Number Four require additional empirical data in order to complete the analysis:** Ambiguous statutory provisions are extremely problematic, both from the perspective of execution and administration of the Programs, and the interpretation of the Programs for purposes of judicial review. Ambiguity in the meaning and construction of the statutes continues to exist in various jurisdictions. The case law clearly shows that courts are far more likely to be able to consistently adjudication, and the general public is far more likely to understand, explicit and clear statutory provisions, rather than ambiguous statutory language. The success of explicit statutory provisions and deterrence was not found through the empirical data analysis.

**Hypothesis Number Three are partially supported, but no case law addressed all four elements of the application test a the modern setting:** No jurisdiction has an explicit statutory provision requiring a test to determine if the Program
provides a “reasonably just substitute” before the common law claim is dismissed. This investigation has shown that the best statutory language for establishing an application test is in Wisconsin, and that *Heath v. Workers’ Compensation Appeal Board* in Pennsylvania also established rules for adjudication of application of the Program provisions. However, the statutes in both of those jurisdictions still do not explicitly require this test to be performed prior to dismissal of a common law claim of the employee against the employer. Though there are judicial precedents dating as early as 1980 that discuss in detail these issues concerning the scope and application of the Programs, the case law reveals that the Program administration does not consistently use case law to guide adjudication. In addition, there are significant questions about the ability of employees to receive compensation for serious injury that does not impact the ability of the employee to work. 379 Particularly, with *Cameron v. Merisel*, the common law claim against the employer was dismissed, because the Court ruled that the sole remedy of the employee was through the Program. 380 However, the employee was able to continue to work while sustaining injury. 381 It is important to differentiate these injuries from occupational diseases and illnesses. 382 It should be noted that most of the case law cited above originated from litigation at common law that was appealed in order to ask questions about the scope and application of the Programs. Therefore, this trend would suggest that the biggest challenge to date for the Programs, and the judicial system as a whole, remains the treatment of common law claims where the scope and application

379 See Section on Georgia and Tennessee.

380 See Section V, Sub-section C on North Carolina, Subsection (v).

381 Ibid.

382 See Section II, Sub-section A, Definition of “Occupational Diseases”.

-145-
of the Programs is in question.

**Hypothesis Number Five is supported by the findings of this investigation:** Classification of parties in the workplace are extremely complex today. Specifically with respect to the cases arising from the *Woodson v. Rowland* (see Section V, Section on North Carolina), it is evident that the relationships in the workplace are far more complex than ever 100 years ago. As a result, definitions of the classes subject to the Program statutes must be robust enough to moderate these relationships and provide clarity so that parties can anticipate their status under the law with respect to their employment relationship. As *Woodson v. Rowland* and *Cameron v. Merisel* revealed, liability under the law for workplace injuries depends on the status under the law of these relationships, and legal relationships have vastly transformed in the past 100 years.

**Hypothesis Number Six is supported by this investigation:** Reforms that seek to cut cost without establishing equal protection within a given class, as well as between classes, are unconstitutional. *Best v. Taylor Machine Works* illustrated the issue with caps for damages with common law claims. However, it is important to note that neither of these cases was aggressively litigated in light of the many dimensions of equal protection, and the implications for other issues with the Programs.

---

383 *Ibid.* In addition to the fact that the average member of the working class in 1917 did not have the resources in order to exercise their legal rights, typically only workers in hazardous employment sought benefits.

384 See Section V, Section C on North Carolina. It is specifically noted that employees have multiple legal relationships in the workplace, even with an employer, such as landlord-tenant,
VIII. Recommendations

**Recommendation Number One:** There is an immediate need for statutory reform to replace ambiguous statutory provisions with explicit and clear provisions that clearly and easily guide adjudication. The statutory provisions in each jurisdiction should be analyzed to ensure each provision contains only clear and explicit language.

**Recommendation Number Two:** Each jurisdiction should implement reforms, where appropriate, which ensure that there is parity between the classes of employers and employees, and that, where appropriate, provide employees with punitive damages from employers in the event of an injury due to egregious conduct of employers as the cause of action. These punitive damages can be awarded through the Program statutes, other administrative procedure, or the traditional common law judicial system. In addition, an application test must be provided through explicit statutory provisions, which requires findings that the cause of action is subject to the statutory provisions prior to dismissal of a common law claim.

**Recommendation Number Three:** Each jurisdiction must collect statistical data for the legislature to use in order to craft policy based on the real impact of the administration of the Program. It is the formal recommendation of this investigation that each jurisdiction implement policy to require the authorities to collect certain data and statistically analyze said data in order to provide the legislative bodies with a breadth of information from which to assess Program performance, efficiency and effectiveness. Lobbying efforts and public interest legal organizations should direct resources and attention to these issues, which potentially impact each and every member of the labor force in the United States. Furthermore, resources should be pooled in order to effectuate
this goal and support claimants without sufficient means to pursue appeals, considering the high costs of legal representation and court costs and fees during the appeals process.

**Recommendation Number Four:** Unions and organized labor need to take the lead in ensuring the protection of the interest of the working class through the Programs. This advocacy should take the form of support for significant legal cases that could set important precedents, as well as lobbying for reform with legislative bodies across the country.
IX. Conclusion

Ideally, this work has revealed the complexities of the workers’ compensation schemes in the United States, and the current issues with the administration and benefits with respect to the rights of employees and employers. As previously stated, this investigation is intended to inform academia, organized labor, and the working class of the critical policy and legal issues concerning workers’ compensation schemes. This work intended to reveal the statutory framework and construction, as well as the judicial rulings relevant to the programs. Hopefully, this work has provided a valuable resource for understanding the legal considerations concerning the Programs, as well as the empirical data available for understanding those considerations. In addition, this work specifically is intended to highlight to void of important information necessary to evaluate the performance of the programs. It is highly recommended that the programs are reformed to ensure the rights of employees are protected, and that employees receive adequate remedies for their injuries related to work.
Appendix One

Glossary of Terms
Glossary of Terms

“Accident” (see “Industrial Accident”).

“Action” (see “Cause of Action”).

“Adjudication” (or “to adjudicate”) is to settle a matter judicially or to act in a judicial capacity.¹

“Administrative Agency” is an administrative division of the government.² In the United States, most Administrative Agencies are a part of the Executive Branch, and authorized by the Legislature, as per the Constitution and the statutes.³

“Appeal” is a process for requesting a formal change to an official decision.⁴ The right for the public to appeals in the judicial system are typically established by right in the Constitution, but the process and procedure for pursuing an appeal is often provided by statute and/or rule.⁵

“Appellate Court”, “court of appeals” or “court of last resort” is a court in the judiciary with authority to hear appeals from the trial court, and to reverse the final judgment of the trial court with respect to a claim if appropriate.⁶ In the United States, the Constitution in each jurisdiction specifies the basic powers and jurisdiction of the appellate courts, such as the United States Supreme Court, the United States Court of Appeals or the many courts of last resort in the states, such as the New York Court of Appeals, and the California Supreme Court.⁷

“Benefits” (see section on “Classes and Definitions established by Statute”).

“Branches of Government” (see “Constitution”).

“Bill of Rights” (see “Constitutional Rights”).

“Case Law” (see “Common Law”).

¹ See the Merriam-Webster Dictionary.
² See the Merriam-Webster Dictionary.
³ Ibid. Also see Lexis Nexis. See the Constitution of the United States of America.
⁴ See the Merriam-Webster Dictionary.
⁵ Ibid. Also see Lexis Nexis. Article III of the Constitution of the United States of America; Title 28 of the United States Code; the Federal Rules of Appellate Procedure; the Rules of the Supreme Court of the United States.
⁶ For example see Lexis Nexis. Article III of the Constitution of the United States of America.
⁷ Ibid. Lexis Nexis. Also see the Constitution of the State of New York and the Constitution of the State of California.
“Cause of Action” is a set of facts showing cause to receive remedy under law.⁸ The written document stating a cause of action is commonly referred to as a claim, complaint or legal action.⁹

“Claim” (see “Cause of Action”).

“Co-Employee” (or “Co-Worker”) (see section on “Classes and Definitions established by Statute”).

“Codification” (or “to codify”) is the act of writing a tradition, norm or rule into the statutes after the tradition, norm or rule is formally considered law by custom, but was not included in the written statutory provisions.¹⁰

“Common Law” or “case law” is the law based on the judicial decisions of the judiciary within a jurisdiction.¹¹ The common law legal system is based on the British tradition of governance and law.¹² The common law is generally not explicitly codified in the statutes, but preserved through tradition and broad powers granted to the executive branch and the judiciary, such as the powers granted to the judiciary in the Constitution of the United States of America.¹³ The judiciary is obliged to use, or allow influence of, prior judicial decisions when deciding subsequent cases with similar issues or facts under the principle of “stare decisis et non quieta movere”.¹⁴ In the United States, lawyers and judges use case law published in official reports in order to litigate and adjudicate.¹⁵ Most published case law contains judicial decisions rendered by appellate courts.¹⁶

“Compensation” (see section on “Classes and Definitions established by Statute”).

“Compensable Injury” is an injury for which the injured party can receive compensation.¹⁷

“Complaint” (see “Cause of Action”).

---

⁸ For example, see Lexis Nexis. Rule 3 of the Federal Rules of Civil Procedure.
⁹ Ibid.
¹⁰ See the Merriam-Webster Dictionary.
¹¹ See Duhaime’s Law Dictionary, “Definition of Common Law”.
¹³ Ibid. Also see Lexis Nexis. Marbury v. Madison, 5. U.S. 137 (1803).
¹⁴ Ibid. Also see Black’s Law Dictionary.
¹⁶ Ibid.
¹⁷ See the Merriam-Webster Dictionary.
“Constitution” is a written document that establishes the fundamental principles of law for governing a state or organization. The Constitution of the United States of America is the most important governing document in the United States. Similarly, nearly every state in the United States has a constitution, such as the Constitution of the State of New York, or the Constitution of the State of California. Subordinate jurisdictions may also have a Constitution, though many municipalities have a similar fundamental governance document called a charter. The Constitution of the United States, and Constitutions in the several states establish a legislative branch or legislature, an executive branch, and a judicial branch, or judiciary, and establish Constitutional rights and protections for individuals.

“Constitutional Challenge” (see section on “General Framework of the Legal System”).

“Constitutional Rights”, in the Constitution of the United States, are basic protections guaranteed to every citizen of the United States, without exception.

“Constitutional Violation” (see section on “General Framework of the Legal System”).

“Court” (see “Judicial Branch”).

“Defendant” is a person required to respond to a claim in a court. In workers’ compensation, Defendants are typically employers, co-workers or third parties.

“Demurrer” is a pleading in court in which a defendant does not dispute the truth of the allegations of a cause of action but claims that the allegations are not sufficient grounds to justify legal action or that the court hearing the matter cannot grant the relief sought. A demurrer is similar to a motion to dismiss a claim.

“Disability” (see section on “Classes and Definitions established by Statute”).

“Dismissal” (or “to dismiss”) is a procedure in which a trial court, by order, removes a claim from the court when legal remedy sought cannot be granted.

“Dispute” (see “Cause of Action”).

---

18 See the Merriam-Webster Dictionary.
19 Ibid. Also see Lexis Nexis. See the Constitution of the United States of America.
20 Ibid. Also see Lexis Nexis. See the Constitution of the State of New York and the Constitution of the State of California.
21 Ibid. Also see Lexis Nexis. See the Charter of the City of New York.
22 Ibid.
23 Ibid.
24 See the Merriam-Webster Dictionary.
25 Ibid.
26 For example, see Lexis Nexis. Rule 12 of the Federal Rules of Criminal Procedure; Rule 41 of the Federal Rules of Civil Procedure.
“Due Process” is a legal term and a Constitutional right that “requires that every man shall have the protection of his day in court, and the benefit of the general [common law], a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general [common law] rules which govern society” for tort.\(^{27}\)

“Employee” (see section on “Classes and Definitions established by Statute”).

“Employment” (see section on “Classes and Definitions established by Statute”).

“Evidence” is testimony or physical matter, such as documents, photographs or recordings submitted to a court in order to adjudicate a related claim.\(^{28}\)

“Exclusivity Provision” (see section on “Statutory Construction of Exclusivity Provisions”).

“Executive Branch” is the administrative branch of the government, which enforces the law and administers government programs.\(^{29}\) In the United States, the executive branch of the government exists at the federal, state, and local level and are typically directed by the president (federal), governor (state), or mayor or executive (local), though titles may differ.\(^{30}\)

“Federation” or “Federal” entity is an encompassing political or social union formed by uniting various smaller entities.\(^{31}\)

“Government” is the body of persons that constitutes the governing authority of a political unit or organization.\(^{32}\)

“Industrial Accident” is defined as “an injury or death by accident which occurs out of and in the course of the employment”.\(^{33}\) An accident is an unlooked or untoward event not anticipated or designed by either party.\(^{34}\)

---


\(^{28}\) See the Merriam-Webster Dictionary.

\(^{29}\) Lexis Nexis. See the Constitution of the United States of America.

\(^{30}\) Ibid. Also see Lexis Nexis. See the Constitution of the State of New York; Charter of the City of New York.

\(^{31}\) See the Merriam-Webster Dictionary.

\(^{32}\) See the Merriam-Webster Dictionary.


“Judicial Branch” or “Judiciary” or “Judicial System” is the system of courts and judges, which, in the United States, is a branch of government establish under the Constitution for a given jurisdiction. The judicial branch adjudicates causes of action under the statutes and the common law, and makes judicial decisions to resolve disputes between the parties. The judicial branch also adjudicates alleged violations of Constitutional rights, such as due process rights.

“Judicial Decision” is a final order by a court in the judicial system.

“Judicial Proceedings” (see “Trial”).

“Judgment” (see “Judicial Decision”).

“Jurisdiction” means both the territory within which a legal body has power or authority, and the authority granted to such legal body, such as the judiciary, or a government in general.

“Law” (see “Common Law”).

“Legal Action” (see “Cause of Action”).

“Legal Dispute” (see “Cause of Action”).

“Legislative Branch” or “Legislature” or “Legislative Body” is an elected body, which creates laws, commonly referred to as statutes. In the United States, the Legislature is generally one of three branches established under the Constitution, at the federal level, as well as at the state level and subordinate jurisdictions.

“Legislator” is a member of a legislature, typically elected by popular vote within a specific jurisdiction.

“Litigation” (or “to litigate”) is to argue a claim according to the law before a court in the judicial system.

---

35 See the Merriam-Webster Dictionary; Lexis Nexis. See the Constitution of the United States of America; Constitution of the State of New York; Charter of the City of New York.
36 Ibid.
38 See the Merriam-Webster Dictionary.
39 See the Merriam-Webster Dictionary.
40 For example see Lexis Nexis. See the Constitution of the United States of America, Constitution of the State of New York; Charter of the City of New York.
41 For example, Members of Congress, or Members of the New York State Assembly, or the New York City Council. See Lexis Nexis. See the Constitution of the United States of America, Constitution of the State of New York; Charter of the City of New York.
42 See the Merriam-Webster Dictionary.
“Motion” is a request by a party for a court to take certain action. This investigation primarily discussed motions to dismiss, motions for summary judgment and demurrers filed by defendants that are generally employers, co-employees or third parties with respect to plaintiffs that are injured employees.

“Negligence” is a failure to exercise the care that a reasonably prudent person would exercise in like circumstances.

“Occupational Disease” or “Occupational Illness” is a disease or illness with prolonged effect on an employee that is considered by statute arises out of and in the course of the employment. The most common Occupational Diseases are lung diseases caused by prolonged exposure to respiratory hazards such as asbestos dust or mining dust (particularly crystalline silica dust). Typically, for the purpose of workers’ compensation, occupational diseases and illnesses are considered industrial accidents.

“Order” is a decision on a matter by a court in the judicial system (also see “Judicial Decision”).

“Party” with respect to legal disputes is any person with interest in the dispute, or named in a complaint. The parties include all plaintiffs and defendants.

“Plaintiff” is a person who files a complaint against another party, or parties, the defendants, in a court.

“Pleadings” are formal statements made by the parties in legal proceedings.

“Policy” (see “Public Policy”).

“Policymaker” (see “Legislator”).

“Proceedings” (see “Trial”).

“Public Policy” is a plan for action embracing the general goals and acceptable procedures especially of a governmental body. In the United States, public policy is controlled through the Constitution, statutes and the common law.

---

43 See the Federal Rules of Civil Procedure.
44 See the Merriam-Webster Dictionary.
45 Definitions differ by jurisdiction. For instance see New York Workers Compensation Law.
46 Ibid.
47 Ibid.
49 See the Merriam-Webster Dictionary.
50 See the Merriam-Webster Dictionary.
51 See the Merriam-Webster Dictionary.
52 See the Merriam-Webster Dictionary.
53 See the Merriam-Webster Dictionary.
“Reform” is a change in the statutes intended to improve a government program or government function.\[^{54}\]

“Regulations” are generally executive branch stipulations governing public function as well as private action that are derived from the statutes.\[^{55}\] In order to further define and elaborate on the statutory provisions and provide more specific laws for regulating behavior.\[^{56}\]

“Rules” are, while at times used by executive branch officials, generally judicial branch stipulations governing judicial proceedings and adjudication.\[^{57}\] Each court could have its own rules, or rules may be provided for an entire judicial system within a specific jurisdiction.\[^{58}\]

“State” is a politically organized body of people usually occupying a definite territory.\[^{59}\]

“Statutes” or “statutory provisions” are laws enacted by a legislative body.\[^{60}\] In the United States, there are federal, state and local legislative bodies established by Constitutions or charters, such as the United States Congress, State legislature, such as the New York State Legislature or the California State Legislature and local legislative bodies, such as the New York City Council.\[^{61}\] Congress enacts statutes as part of the United States Code.\[^{62}\] Each State legislature enacts statutes as part of its own body of statutes, such as the New York Laws, California Code, Texas Statutes, Florida Statutes or the Illinois Statutes.\[^{63}\]

“Summary Judgment” is an act which the judiciary takes to immediately grant relief or dismiss a case when the pleadings and evidence on file is sufficient to entitle a party in the dispute to immediate relief without a trial.\[^{64}\]

“Third Party” (see section on “Classes and Definitions established by Statute”).

---

\[^{54}\] See the Merriam-Webster Dictionary.
\[^{56}\] Ibid.
\[^{57}\] Lexis Nexis. See the Federal Rules for Civil Procedure.
\[^{58}\] Ibid. Also see Lexis Nexis. See the New York Rules of Civil Procedure. See the New York Workers’ Compensation Rules.
\[^{59}\] See the Merriam-Webster Dictionary.
\[^{60}\] See the Merriam-Webster Dictionary.
\[^{62}\] Lexis Nexis. See the United States Code.
\[^{63}\] Lexis Nexis. See the New York Consolidated Law Service, the California Code, Texas Statutes Annotated, the Florida Statutes Annotated, the Illinois Statutes Annotated.
\[^{64}\] For example, see Rule 56 of the Federal Rules of Civil Procedure.
“Tort” is a private wrong committed by one party that injures another, either physically, emotionally or financially, for which monetary relief or other relief should be granted.65

“A tortfeasor” is a person who commits a tort.66 A tortfeasor is typically a defendant in legal proceedings before a court.67

“A Tort Reform” is legislation which reforms the statutes concerning the litigation and adjudication of torts which confines parties who allege a tort has been committed against them by altering due process, changing procedures, narrowing grounds for liability and limiting monetary damages.68

“A Trial” is the formal examination of a dispute before a court, typically a trial court, in issue in a civil or criminal cause in order to resolve the dispute by adjudication of the questions of fact and law.69

“A Trial Court” is the court in the judicial system before which a trial is first held as distinguished from an appellate court.70

67 Ibid.
69 See the Merriam-Webster Dictionary.
70 See the Merriam-Webster Dictionary.
Appendix Two

Maps of Empirical Data
Map A. Map of Jurisdictions in Sample by Group

Data Set of 25 Jurisdictions contained in Table A in this Appendix

Color Code:

Green: Jurisdictions with Statutory Guidance for Adjudication; 10 States (in order from most populous to least populous): California, Texas, Florida, Ohio, Michigan, New Jersey, Washington, Arizona, Maryland, Wisconsin

Yellow: Jurisdictions with Hybrid Guidance for Adjudication; 3 States (in order from most populous to least populous): New York, Illinois, Pennsylvania

Red: Jurisdictions with Case Law Guidance for Adjudication; 6 States (in order from most populous to least populous): Georgia, North Carolina, Virginia, Indiana, Tennessee, Missouri

Blue: Jurisdictions without Exceptions (or few exceptions) to the Exclusivity Provisions; 6 States (in order from most populous to least populous): Massachusetts, Minnesota, Colorado, Maine, Delaware, Rhode Island (Alaska is the least populous state in this group and is not a part of the sample, but an important case is cited in the investigation that discusses the philosophy behind the statutory interpretations in this group).
Note: The Jurisdictions shown in Green, Yellow and Red above, along with Massachusetts, are the 20 most populous jurisdictions in the United States. Population data for these jurisdictions is contained in Table C of Appendix Three.

Note: Classifications of the statutory construction for all 50 States in the United States are contained in Map J in this Appendix and detailed in Table A of Appendix Three.
Map B. Map of Jurisdictions with the Highest and Lowest Average Benefit Rates for Employees

Data Set for all 50 Jurisdictions contained in Table D in this Appendix

Color Code:

Green: Highest Average Benefit Rates: 15 Jurisdictions (in order from highest average benefit rate to lowest average benefit rate) are California, Washington, Delaware, New York, Alaska, New Jersey, Illinois, Louisiana, Wyoming, South Carolina, Oklahoma, Montana, West Virginia, Hawaii, Pennsylvania

Red: Lowest Average Benefit Rates: 18 Jurisdictions: (in order from lowest average benefit rate to highest average benefit rate) are Texas, Arkansas, Indiana, South Dakota, Utah, Virginia, North Dakota, New Mexico, Mississippi, Kansas, Tennessee, Maine, Arizona, Nebraska, Rhode Island, Kentucky, Missouri, Colorado

Note: Benefits includes the monetary benefits paid to employees for wage replacement, medical care provided, and vocational training, among other benefits.
Map C. Map of Jurisdictions with the Highest and Lowest Average Monetary Costs for Employers

Data Set for all 50 Jurisdictions contained in Table D in this Appendix

Color Code:

Green: Highest Average Benefit Rates: 15 Jurisdictions (in order from highest average monetary costs to lowest average monetary costs) are Alaska, California, Louisiana, New York, Montana, New Jersey, Illinois, Delaware, Oklahoma, South Carolina, Wyoming, Hawaii, West Virginia, Wisconsin, Washington

Red: Lowest Average Benefit Rates: 18 Jurisdictions: (in order from lowest monetary costs to highest average monetary costs) are Indiana, Arkansas, Texas, Utah, Arizona, Maine, South Dakota, Mississippi, Rhode Island, Kentucky, Virginia, Colorado, New Mexico, Florida, Tennessee, Michigan, Nevada, Missouri

Note: The integrity of the estimate of costs for the State of Washington is in question. Based on the estimate of total benefits paid by employers, total costs are assumed to be far higher than reported by the National Academy of Social Insurance. For this reason, the State of Washington has been added to this list.
Map D. Map of Jurisdictions with the Highest and Lowest Administrative Costs as a percentage of Average Monetary Costs to the Employer

Data Set for all 50 Jurisdictions contained in Table D in this Appendix

Color Code:

Green: Lowest Administrative Costs: 16 Jurisdictions (in order from lowest administrative costs to highest administrative costs) are Delaware, Wyoming, Minnesota, Oregon, Nevada, Georgia, Arizona, Florida, Connecticut, Ohio, Colorado, Kentucky, Illinois, Maine, Rhode Island, Michigan

Red: Highest Administrative Costs: 14 Jurisdictions: (in order from highest administrative costs to lowest administrative costs) are North Dakota, Texas, District of Columbia (not shown above), South Dakota, Arkansas, Wisconsin, Alaska, Kansas, Virginia, Montana, Utah, Iowa, Louisiana, Nebraska, Tennessee

Note: The integrity of the estimate of costs for the State of Washington is in question. Based on the estimate of total benefits paid by employers, total costs are assumed to be far higher than reported by the National Academy of Social Insurance. For this reason, the State of Washington has been omitted from this list.
Map E. Map of Jurisdictions with the Highest and Lowest Fatal Workplace Injury Rates

Data Set for all 50 Jurisdictions contained in Table D in this Appendix

Color Code:

Green: Lowest Fatal Workplace Injury Rate: 12 Jurisdictions (in order from lowest fatal workplace injury rate to highest fatal workplace injury rate) are New Hampshire, Rhode Island, District of Columbia (not shown above), Massachusetts, Washington, Connecticut, Minnesota, New York, California, Delaware, New Jersey, Vermont, Arizona, Georgia

Red: Highest Fatal Workplace Injury Rate: 10 Jurisdictions (only the jurisdictions with fatal injury rates over 8.0 shown, unless one of the 25 most populous jurisdictions in the United States) (in order from highest fatal workplace injury rate to lowest fatal workplace injury rate) are North Dakota, Alaska, Montana, Wyoming, Arkansas, South Dakota, New Mexico (not shown), West Virginia (not shown), Iowa (not shown), Mississippi (not shown), Idaho (not shown), Kansas (not shown), Louisiana, Oklahoma (not shown above), Missouri, Texas, Kentucky (not shown), Tennessee
Map F. Map of Jurisdictions with the Highest and Lowest Proportion of the Labor Force working in the Mining and Resource Extraction Sector

Data Set for all 50 Jurisdictions contained in Table E in this Appendix

Color Code:

Green: Lowest Mining Sector Rate: 16 Jurisdictions (in order from lowest mining sector rate to highest mining sector rate) are District of Columbia (not shown), Delaware, Maryland, Hawaii, Tennessee, South Dakota, Nebraska, New Jersey, Connecticut, Massachusetts, Rhode Island, New York, Florida, Wisconsin, North Carolina, New Hampshire, Iowa

Red: Highest Mining Sector Rate: 14 Jurisdictions (in order from highest mining sector rate to lowest mining sector rate) are Wyoming, Alaska, West Virginia, North Dakota, Oklahoma, Louisiana, New Mexico, Texas, Montana, Nevada, Kentucky, Colorado, Utah, Arkansas, Mississippi
Map G. Map of Jurisdictions with the Highest and Lowest Proportion of the Labor Force working in the Manufacturing Sector

Data Set for all 50 Jurisdictions contained in Table E in this Appendix

Color Code:

Green: Lowest Manufacturing Sector Rate: 16 Jurisdictions (in order from lowest manufacturing sector rate to highest manufacturing sector rate) are District of Columbia (not shown), Hawaii, Wyoming, Nevada, New Mexico, Montana, Alaska, Florida, Maryland, New York, Colorado, North Dakota, Delaware, Arizona, Virginia, West Virginia, New Jersey

Red: Highest Manufacturing Sector Rate: 14 Jurisdictions (in order from highest manufacturing sector rate to lowest manufacturing sector rate) are Indiana, Wisconsin, Iowa, Arkansas, Michigan, Alabama, Ohio, Mississippi, Kansas, Kentucky, South Carolina, Tennessee, Minnesota, North Carolina, New Hampshire
Map H. Map of Jurisdictions with the Highest and Lowest Trade Union Density Rates

Data Set for all 50 Jurisdictions contained in Table E of Appendix Three

Color Code:

Green: Highest Trade Union Density: 16 Jurisdictions (in order from highest trade union density to lowest trade union density) are New York, Alaska, Hawaii, Washington, Michigan, Rhode Island, Oregon, California, Connecticut, Illinois, New Jersey, Minnesota, Pennsylvania, Massachusetts, Nevada, West Virginia (not shown)

Red: Lowest Trade Union Density: 15 Jurisdictions (in order from lowest trade union density to highest trade union density) are North Carolina, South Carolina, Georgia, Arkansas, Louisiana, Tennessee, Virginia, Mississippi, South Dakota, Idaho, Texas, Utah, Arizona, North Dakota, Florida
Map I. Map of Jurisdictions with the Highest and Lowest Average Wages Per Covered Employee

Data Set for all 50 Jurisdictions contained in Table C of Appendix Three

Color Code:

Green: Highest Trade Union Density: 15 Jurisdictions (in order from highest trade union density to lowest trade union density) are District of Columbia (not shown), New York, Connecticut, Massachusetts, New Jersey, California, Maryland, Illinois, Delaware, Washington, Virginia, Colorado, Alaska, Minnesota, Texas, New Hampshire

Red: Lowest Trade Union Density: 15 Jurisdictions (in order from lowest trade union density to highest trade union density) are North Carolina, South Carolina, Georgia, Arkansas, Louisiana, Tennessee, Virginia, Mississippi, South Dakota, Idaho, Texas, Utah, Arizona, North Dakota, Florida
Map J. Map of All Jurisdictions in United States Grouped by Type of Statutory Construction

Data Set of all 50 Jurisdictions contained in Table A in Appendix Three

Color Code:

Green: Jurisdictions with Statutory Guidance for Adjudication; 19 States (in order from most populous to least populous): California, Texas, Florida, Ohio, Michigan, New Jersey, Washington, Arizona, Maryland, Wisconsin, Louisiana, Kentucky, Oregon, Oklahoma, West Virginia, Idaho, Montana, South Dakota, North Dakota


Red: Jurisdictions with Case Law Guidance for Adjudication; 11 States (in order from most populous to least populous): Georgia, North Carolina, Virginia, Indiana, Tennessee, Missouri, South Carolina, Mississippi, Arkansas, Utah, New Mexico

Blue: Jurisdictions without Exceptions (or few exceptions) to the Exclusivity Provisions; 13 States (in order from most populous to least populous): Massachusetts, Minnesota, Colorado, Alabama, Kansas, Nevada, Nebraska, New Hampshire, Maine, Delaware, Rhode Island, Alaska, Wyoming
Note: The District of Columbia and the Territories of Puerto Rico, Guam, the Virgin Islands, American Samoa and Northern Mariana Islands are not classified above, but these 6 Jurisdictions are included in the Data Set in Table A of Appendix Three.

Note: The classification of the Jurisdictions outside of the Sample were performed with a high level analysis of the statutory provisions, particularly the exclusivity provisions, and the Lexis Nexis Case Law Annotations included with the exclusivity provisions. In order to verify that these classifications are correct, additional investigation must be performed to review the most recent case law in detail, and an in-depth analysis of all of the statutory provisions, and relevant case law, must be completed.
Appendix Three

Tables of Empirical Data
<table>
<thead>
<tr>
<th>State</th>
<th>Workers' Compensation Law</th>
<th>Exclusivity Provisions</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Alabama Code, Title 25, Chapter 5</td>
<td>Section 25-5-14</td>
<td>X</td>
</tr>
<tr>
<td>Alaska</td>
<td>Alaska Statutes, Title 23, Chapter 30</td>
<td>Section 23.30.055</td>
<td>X</td>
</tr>
<tr>
<td>American Samoa</td>
<td>American Samoa Code Annotated, Title 32, Chapter 5</td>
<td>Section 32.0522</td>
<td></td>
</tr>
<tr>
<td>Arizona</td>
<td>Arizona Revised Statutes, Title 23, Chapter 6</td>
<td>Section 23-1022</td>
<td>S</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Arkansas Code, Title 11, Chapter 9</td>
<td>Section 11-9-105</td>
<td>C</td>
</tr>
<tr>
<td>California</td>
<td>California Labor Code, Division 4</td>
<td>Sections 3601, 3602</td>
<td>S</td>
</tr>
<tr>
<td>Colorado</td>
<td>Colorado Revised Statutes, Title 8, (Labor II), Articles 40-66</td>
<td>Section 8-41-301</td>
<td>X</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Connecticut Annotated Statutes, Title 31, Chapter 568</td>
<td>Section 31-284</td>
<td>H</td>
</tr>
<tr>
<td>Delaware</td>
<td>Delaware Code Annotated, Title 19, Part II, Chapter 23</td>
<td>Section 2304</td>
<td>X</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>District of Columbia Code Annotated, Division V, Title 32, Chapter 15</td>
<td>Section 32-1504</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>Florida Statutes Annotated, Title 31, Chapter 440</td>
<td>Section 440-11</td>
<td>S</td>
</tr>
<tr>
<td>Georgia</td>
<td>Georgia Code Annotated, Title 34, Chapter 9</td>
<td>Section 34-9-11(a)</td>
<td>C</td>
</tr>
<tr>
<td>Guam</td>
<td>Guam Code Annotated, Title 22, Division 1, Chapter 9</td>
<td>Section 9106</td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>Hawaii Revised Statutes Annotated, Division 1, Title 21, Chapter 386</td>
<td>Section 386-5</td>
<td>H</td>
</tr>
<tr>
<td>Idaho</td>
<td>Idaho Code Annotated, Title 72</td>
<td>Section 72-211</td>
<td>S</td>
</tr>
<tr>
<td>Illinois</td>
<td>Illinois Compiled Statutes Annotated, Chapter 820</td>
<td>Section 305/5</td>
<td>H</td>
</tr>
<tr>
<td>Indiana</td>
<td>Indiana Statutes Annotated, Title 22, Article 3</td>
<td>Section 22-3-2-6</td>
<td>C</td>
</tr>
<tr>
<td>Iowa</td>
<td>Iowa Code, Title III, Subtitle 2, Chapter 85</td>
<td>Section 85.20</td>
<td>C</td>
</tr>
<tr>
<td>Kansas</td>
<td>Kansas Annotated Statutes, Chapter 44, Article 5</td>
<td>Section 44-501b</td>
<td>X</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Kentucky Revised Statutes Annotated, Title XXVII, Chapter 342</td>
<td>Section 342.690</td>
<td>S</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Louisiana Annotated Statutes, Title 23, Chapter 10</td>
<td>Section 23:1032</td>
<td>S</td>
</tr>
<tr>
<td>Maine</td>
<td>Maine Revised Statutes, Title 39-A, Part I, Chapter 1</td>
<td>Section 103</td>
<td>X</td>
</tr>
<tr>
<td>Maryland</td>
<td>Maryland Code Annotated, Labor and Employment, Title 9</td>
<td>Section 9-509</td>
<td>S</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Massachusetts General Laws, Chapter 152</td>
<td>Sections 24, 28</td>
<td>X</td>
</tr>
<tr>
<td>Michigan</td>
<td>Michigan Compiled Laws Annotated, Chapter 418</td>
<td>Section 418.131</td>
<td>S</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Minnesota Annotated Statutes, Labor and Industry, Chapter 176</td>
<td>Section 176.031</td>
<td>X</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Mississippi Code of 1972, Title 71, Chapter 3</td>
<td>Section 71-3-9</td>
<td>C</td>
</tr>
<tr>
<td>State</td>
<td>Statute and Section</td>
<td>State</td>
<td>Statute and Section</td>
</tr>
<tr>
<td>---------------------</td>
<td>---------------------</td>
<td>---------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>Missouri</td>
<td>Missouri Revised Statutes, Title 18, Chapter 287</td>
<td>Missouri</td>
<td>Missouri Revised Statutes, Title 18, Chapter 287</td>
</tr>
<tr>
<td>Montana</td>
<td>Montana Code Annotated, Title 39, Chapter 71</td>
<td>Montana</td>
<td>Montana Code Annotated, Title 39, Chapter 71</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Revised Statutes of Nebraska, Chapter 48</td>
<td>Nebraska</td>
<td>Revised Statutes of Nebraska, Chapter 48</td>
</tr>
<tr>
<td>Nevada</td>
<td>Nevada Revised Statutes, Title 53, Chapter 616</td>
<td>Nevada</td>
<td>Nevada Revised Statutes, Title 53, Chapter 616</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>New Hampshire Revised Statutes, Title XXIII, Chapter 281</td>
<td>New Hampshire</td>
<td>New Hampshire Revised Statutes, Title XXIII, Chapter 281</td>
</tr>
<tr>
<td>New Jersey</td>
<td>New Jersey Statutes Annotated, Title 34, Chapter 15</td>
<td>New Jersey</td>
<td>New Jersey Statutes Annotated, Title 34, Chapter 15</td>
</tr>
<tr>
<td>New Mexico</td>
<td>New Mexico Annotated Statutes, Chapter 52</td>
<td>New Mexico</td>
<td>New Mexico Annotated Statutes, Chapter 52</td>
</tr>
<tr>
<td>North Carolina</td>
<td>North Carolina General Statutes, Chapter 97</td>
<td>North Carolina</td>
<td>North Carolina General Statutes, Chapter 97</td>
</tr>
<tr>
<td>North Dakota</td>
<td>North Dakota Century Code, Title 65</td>
<td>North Dakota</td>
<td>North Dakota Century Code, Title 65</td>
</tr>
<tr>
<td>Northern Marianas Islands</td>
<td>Northern Marianas Islands Commonwealth Code, Title 4</td>
<td>Northern Marianas Islands</td>
<td>Northern Marianas Islands Commonwealth Code, Title 4</td>
</tr>
<tr>
<td>Ohio</td>
<td>Ohio Revised Code Annotated, Title 41, Chapter 4123</td>
<td>Ohio</td>
<td>Ohio Revised Code Annotated, Title 41, Chapter 4123</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Oklahoma Statutes, Title 85</td>
<td>Oklahoma</td>
<td>Oklahoma Statutes, Title 85</td>
</tr>
<tr>
<td>Oregon</td>
<td>Oregon Revised Statutes, Title 51, Chapter 656</td>
<td>Oregon</td>
<td>Oregon Revised Statutes, Title 51, Chapter 656</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Pennsylvania Statutes Annotated, Title 77</td>
<td>Pennsylvania</td>
<td>Pennsylvania Statutes Annotated, Title 77</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>Laws of Puerto Rico, Title 11</td>
<td>Puerto Rico</td>
<td>Laws of Puerto Rico, Title 11</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Rhode Island General Laws, Title 28, Chapters 29-54</td>
<td>Rhode Island</td>
<td>Rhode Island General Laws, Title 28, Chapters 29-54</td>
</tr>
<tr>
<td>South Carolina</td>
<td>South Carolina Code of Laws, Title 42</td>
<td>South Carolina</td>
<td>South Carolina Code of Laws, Title 42</td>
</tr>
<tr>
<td>South Dakota</td>
<td>South Dakota Codified Laws, Title 62</td>
<td>South Dakota</td>
<td>South Dakota Codified Laws, Title 62</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Tennessee Code Annotated, Title 50, Chapter 6</td>
<td>Tennessee</td>
<td>Tennessee Code Annotated, Title 50, Chapter 6</td>
</tr>
<tr>
<td>Texas</td>
<td>Texas Statutes and Codes, Labor Code, Title 5</td>
<td>Texas</td>
<td>Texas Statutes and Codes, Labor Code, Title 5</td>
</tr>
<tr>
<td>Utah</td>
<td>Utah Code Annotated, Title 34A, Chapter 2</td>
<td>Utah</td>
<td>Utah Code Annotated, Title 34A, Chapter 2</td>
</tr>
<tr>
<td>Vermont</td>
<td>Vermont Statutes Annotated, Title 21, Chapter 9</td>
<td>Vermont</td>
<td>Vermont Statutes Annotated, Title 21, Chapter 9</td>
</tr>
<tr>
<td>Virginia</td>
<td>Virginia Code Annotated, Title 65.2</td>
<td>Virginia</td>
<td>Virginia Code Annotated, Title 65.2</td>
</tr>
<tr>
<td>Virgin Islands</td>
<td>Virgin Islands Code Annotated, Title 24, Chapter 11</td>
<td>Virgin Islands</td>
<td>Virgin Islands Code Annotated, Title 24, Chapter 11</td>
</tr>
<tr>
<td>Washington</td>
<td>Washington Revised Code, Title 51</td>
<td>Washington</td>
<td>Washington Revised Code, Title 51</td>
</tr>
<tr>
<td>West Virginia</td>
<td>West Virginia Code, Chapter 23</td>
<td>West Virginia</td>
<td>West Virginia Code, Chapter 23</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Wisconsin Statutes An., (Regulation of Industry), Chapter 102</td>
<td>Wisconsin</td>
<td>Wisconsin Statutes An., (Regulation of Industry), Chapter 102</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Wyoming Statutes Annotated, Title 27, Chapter 14</td>
<td>Wyoming</td>
<td>Wyoming Statutes Annotated, Title 27, Chapter 14</td>
</tr>
</tbody>
</table>
The States that are shown in bold are a part of the Sample in this investigation.

The code is for the classification of the exclusivity provisions as “statutory guidance for adjudication” (Code “S”), “hybrid guidance for adjudication” (Code “H”), “case law guidance for adjudication” (Code “C”), or “no or few exceptions to exclusivity provisions” (Code “X”). Note: The classification of the Jurisdictions outside of the Sample were performed with a high level analysis of the statutory provisions, particularly the exclusivity provisions, and the Lexis Nexis Case Law Annotations included with the exclusivity provisions. In order to verify that these classifications are correct, additional investigation must be performed to review the most recent case law in detail, and an in-depth analysis of all of the statutory provisions, and relevant case law, must be completed. A briefing paper on the exclusivity provisions provided by the American Bar Association (http://www.americanbar.org) in cooperation with the National Workers’ Compensation National Defense Network (http://www.nwcdn.com) was used as a source, but not an authority as the briefing paper did not provide sufficient details for classification (see http://apps.americanbar.org/labor/lel-annualcle/09/materials/data/papers/087.pdf).


Also see Section 23.30.010 under Chapter 30, and Chapter 25 under the same title.

American Samoa Code is not available on Lexis Nexis. The codification of the Workers’ Compensation Act was provided by the American Samoa Bar Association at http://www.asbar.org/.

Also see Sections 31-293 and 31-293a.

Also see Sections 72-208, 72-209, 72-210, 72-212, 72-213, and 72-214.

Also see Section 44-501.

Employers can elect not to carry coverage.

Headings mention option for employer to elect coverage, but language in statutes not yet found.
Also see Section 176.011.

Also see Section 39-71-413.

Also see Section 48-111.


The Commonwealth Code is not available on Lexis Nexis and the research team was unable to locate a source for the code on the Internet, therefore the language of the code was not analyzed for the purposes of this investigation. The codification of the Workers’ Compensation Act was provided by case law. See Lexis Nexis. Santos v. Public School System; 2002 MP 12; 6 N. Mar. I. 422 (2002). The Workers’ Compensation Act is contained in Sections 9301 to 9357, inclusive, in Title 4.

The Commonwealth Code is not available on Lexis Nexis and the research team was unable to locate a source for the code on the Internet, therefore the language of the code was not analyzed for the purposes of this investigation. The codification of the Workers’ Compensation Act was provided by case law. See Din v. Eastern Hope Corporation, Superior Court of the Commonwealth of the Northern Mariana Islands, Civil Action Number 99-0561D. Retrieved from http://www.cnmilaw.org/pdf/superior_court/02-03-14-CV99-0561.pdf.

The exclusivity provisions, and the exceptions thereto, are provided in Title 27, which is not the Workers’ Compensation Act, but in Chapter 2745, Employer Intentional Tort, in Title 27, which provides the statutory framework for the Courts.

Also see Section 656.156.

Also see Sections 618 and 624.

The exclusivity provisions, and the exceptions thereto, are also provided by other sections. Also see Sections 51.04.090, 51.12.010, 51.24.020, and 51.24.030.

Also see Sections 32-2-6b and 23-4-2.
<table>
<thead>
<tr>
<th>Adjudicating Authority for each Jurisdiction</th>
<th>Online Resources</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State</strong></td>
<td><strong>Name of Administrative Agency</strong></td>
</tr>
<tr>
<td>Alabama</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>Alaska</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>American Samoa</td>
<td>Workmen’s Compensation Commission</td>
</tr>
<tr>
<td>Arizona</td>
<td>Industrial Commission&lt;sup&gt;6&lt;/sup&gt;</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Workers’ Compensation Commission&lt;sup&gt;8&lt;/sup&gt;</td>
</tr>
<tr>
<td>California</td>
<td>Division of Workers’ Compensation&lt;sup&gt;11&lt;/sup&gt;</td>
</tr>
<tr>
<td>Colorado</td>
<td>Division of Workers’ Compensation&lt;sup&gt;13&lt;/sup&gt;</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Workers’ Compensation Commission&lt;sup&gt;15&lt;/sup&gt;</td>
</tr>
<tr>
<td>Delaware</td>
<td>Office of Workers’ Compensation&lt;sup&gt;17&lt;/sup&gt;</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>Office of Workers’ Compensation&lt;sup&gt;19&lt;/sup&gt;</td>
</tr>
<tr>
<td>Florida</td>
<td>Division of Workers’ Compensation&lt;sup&gt;20&lt;/sup&gt;</td>
</tr>
<tr>
<td>Georgia</td>
<td>State Board of Workers’ Compensation&lt;sup&gt;22&lt;/sup&gt;</td>
</tr>
<tr>
<td>Guam</td>
<td>Workers’ Compensation Board&lt;sup&gt;24&lt;/sup&gt;</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Division of Disability Compensation&lt;sup&gt;25&lt;/sup&gt;</td>
</tr>
<tr>
<td>Idaho</td>
<td>Industrial Commission&lt;sup&gt;27&lt;/sup&gt;</td>
</tr>
<tr>
<td>Illinois</td>
<td>Workers’ Compensation Commission&lt;sup&gt;29&lt;/sup&gt;</td>
</tr>
<tr>
<td>Indiana</td>
<td>Workers’ Compensation Board&lt;sup&gt;31&lt;/sup&gt;</td>
</tr>
<tr>
<td>Iowa</td>
<td>Workers’ Compensation Commission&lt;sup&gt;33&lt;/sup&gt;</td>
</tr>
<tr>
<td>Kansas</td>
<td>Workers’ Compensation Board&lt;sup&gt;36&lt;/sup&gt;</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Department of Workers’ Claims&lt;sup&gt;38&lt;/sup&gt;</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Office of Workers’ Compensation&lt;sup&gt;40&lt;/sup&gt;</td>
</tr>
<tr>
<td>Maine</td>
<td>Workers’ Compensation Board&lt;sup&gt;41&lt;/sup&gt;</td>
</tr>
<tr>
<td>Maryland</td>
<td>Workers’ Compensation Commission&lt;sup&gt;43&lt;/sup&gt;</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Department of Industrial Accidents&lt;sup&gt;46&lt;/sup&gt;</td>
</tr>
<tr>
<td>Michigan</td>
<td>Workers’ Compensation Agency&lt;sup&gt;49&lt;/sup&gt;</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Division of Workers’ Compensation&lt;sup&gt;51&lt;/sup&gt;</td>
</tr>
<tr>
<td>State</td>
<td>Agency</td>
</tr>
<tr>
<td>--------------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Workers’ Compensation Commission</td>
</tr>
<tr>
<td>Missouri</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>Montana</td>
<td>Workers’ Compensation Court</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Workers’ Compensation Court</td>
</tr>
<tr>
<td>Nevada</td>
<td>Section of Workers’ Compensation</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Workers’ Compensation Administration</td>
</tr>
<tr>
<td>New York</td>
<td>Workers’ Compensation Board</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Industrial Commission</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Workplace Safety and Insurance</td>
</tr>
<tr>
<td>Northern Marianas Islands</td>
<td>Workers’ Compensation Commission</td>
</tr>
<tr>
<td>Ohio</td>
<td>Bureau of Workers’ Compensation</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Workers’ Compensation Court</td>
</tr>
<tr>
<td>Oregon</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Bureau of Workers’ Compensation</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>Comisión Industrial</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Workers’ Compensation</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Workers’ Compensation Commission</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Workers’ Compensation Program</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>Texas</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>Utah</td>
<td>Labor Commission</td>
</tr>
<tr>
<td>Vermont</td>
<td>Workers’ Compensation System</td>
</tr>
<tr>
<td>Virginia</td>
<td>Workers’ Compensation Commission</td>
</tr>
<tr>
<td>Virgin Islands</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>Washington</td>
<td>Division of Occupational Safety and Health</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Office of the Insurance Commissioner</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Division of Workers’ Compensation</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Division of Workers’ Compensation</td>
</tr>
</tbody>
</table>
In the Department of Industrial Relations; see http://dir.alabama.gov/wc/

2 Link for Statutes directly on Homepage: http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/123309.htm

3 In the Department of Labor and Workforce Development; see http://labor.alaska.gov/wc/

4 Link for Statutes and Case Law directly on Homepage: http://labor.alaska.gov/wc/legaldir.htm

5 Link for website is not functioning: http://americansamoa.gov/index.php/offices/departments/human-resources. Google search did not return a website for the administrative agency, but returned a detailed list of administrative agencies provided by the U.S. Social Security Administration at: https://secure.ssa.gov/poms.nsf/lnx/0452120000. The name of the administrative agency was researched in the American Samoa Code, access to which is provided by the American Samoa Bar Association website at http://www.asbar.org/ (which also provides free and open access for the public to case law)

6 See http://www.ica.state.az.us/

7 Link for Statutes directly on Homepage: http://www.ica.state.az.us/HomePage/HOME_Statutes.aspx

8 See http://www.awcc.state.ar.us/

9 Link for Statutes directly on Homepage: http://www.lexisnexis.com/hottopics/arcod/statutes-and-rules; free access provided through Lexis Nexis.

10 Link for Case Law directly on Homepage: http://www.awcc.state.ar.us/opinionmain.html; however, only opinions of the Administrative Agency and not the appellate courts above.

11 In the Department of Industrial Relations; see http://www.dir.ca.gov/dwc/

12 Link for Case Law directly on Homepage: http://www.leginfo.ca.gov/calaw.html

13 In the Department of Labor and Employment; see http://www.colorado.gov/cs/Satellite/CDLE-WorkComp/CDLE/1240336932511

14 Link for Statutes directly on Homepage: http://www.colorado.gov/cs/Satellite/CDLE-WorkComp/CDLE/1248095316461

15 See http://wcc.state.ct.us/

16 Link for Statutes directly on Homepage: http://wcc.state.ct.us/law/menus/wc-act-2009.htm

17 In the Division of Industrial Affairs in the Department of Labor; see http://dia.delawareworks.com/workers-comp/

18 Link for Statutes directly on Homepage: http://delcode.delaware.gov/title19/c023/index.shtml#P-1_0

19 In the Department of Employment Services; see http://does.dc.gov/page/workers-compensation-does

20 In the Department of Financial Services

21 Link for Statutes directly on Homepage: http://www.myfloridacfo.com/wc/forms.html

22 See http://sbwc.georgia.gov/

23 Link for Statutes directly on Homepage: http://sbwc.georgia.gov/statutes-and-rules
25 In the Department of Labor and Industrial Relations; see http://hawaii.gov/labor/dcd/aboutwc.shtml
26 Link for Statutes directly on Homepage: http://hawaii.gov/labor/legal
27 See http://www.iic.idaho.gov/
28 Link for Statutes and Case Law (though limited to administrative agency opinions) directly on Homepage:
29 See http://www.iwcc.il.gov/
30 Link for Statutes directly on Homepage: http://www.iwcc.il.gov/workers.htm
31 See http://www.in.gov/wcb/
32 Link for Statutes directly on Homepage: http://www.in.gov/wcb/2333.htm
33 In the Division of Workers’ Compensation in the Department of Workforce Development; see http://www.iowaworkforce.org/wc/
34 Link for Statutes directly on Homepage: http://www.iowaworkforce.org/wc/statutes.htm
35 Link for Case Law directly on Homepage: http://www.iowaworkforce.org/wc/decisions.htm
36 In the Department of Labor; see http://www.dol.ks.gov/WorkComp/Default.aspx
37 Link for Statutes directly on Homepage: http://www.dol.ks.gov/WorkComp/frmpub2.aspx#statutes
38 In the Labor Cabinet; see http://www.labor.ky.gov/workersclaims/Pages/Department-of-Workers'-Claims.aspx
39 Link for Statutes directly on Homepage: http://www.labor.ky.gov/workersclaims/Pages/Statutes-and-Regulations.aspx
40 In the Workforce Commission; see http://www.laworks.net/WorkersComp/OWC_WorkerMenu.asp
41 See http://www.mainelegislature.org/legis/statutes/39-A/title39-Ach0sec0.html
42 See http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter152
43 http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter152
44 Link for Statutes directly on Homepage: http://www.dsd.state.md.us/comar/subtitle_chapters/14_Chapters.aspx#Subtitle09
45 Link for Case Law directly on Homepage: http://www.wcc.state.md.us/Adjud_Claims/Crt_Appeals.html
46 In the Executive Office of Labor and Workforce Development; see http://www.mass.gov/lwd/workers-compensation/dia/
47 http://www.michigan.gov/wca
48 Link for Statutes and Case Law directly on Homepage: http://www.michigan.gov/wca/0,4682,7-191-26919---,00.html
49 In the Department of Licensing and Regulatory Affairs; see http://www.michigan.gov/wca
50 Link for Statutes and Case Law directly on Homepage: http://www.michigan.gov/wca/0,4682,7-191-26919---,00.html
51 In the Department of Labor and Industry; see http://www.doli.state.mn.us/workcomp.asp
Link for Statutes directly on Homepage: http://www.doli.state.mn.us/StatRule.asp
53 Link for Case Law directly on Homepage: http://www.doli.state.mn.us/WC/CourtDecisions.asp
54 See http://www.mwcc.state.ms.us/
55 Link for Statutes directly on Homepage: http://www.lexisnexis.com/hottopics/mscode/
56 In the Department of Labor and Industrial Relations; see http://labor.mo.gov/DWC/
57 Link for Statutes directly on Homepage: http://labor.mo.gov/laws/
58 See http://wcc.dli.mt.gov/
59 Link for Statutes directly on Homepage: http://wcc.dli.mt.gov/rules.asp
60 Link for Case Law directly on Homepage: http://wcc.dli.mt.gov/sccases.asp
61 See http://www.wcc.ne.gov/
62 Link for Statutes directly on Homepage: http://www.wcc.ne.gov/legal/statutes.aspx
63 In the Division of Industrial Relations, Department of Business and Industry; see http://dirweb.state.nv.us/wcs/wcs.htm
64 Link for Statutes directly on Homepage: http://www.nh.gov/labor/laws/index.htm
65 In the Department of Labor; see http://www.nh.gov/labor/workers-comp/index.htm
66 Link for Statutes directly on Homepage: http://www.nh.gov/labor/laws/index.htm
67 In the Department of Labor and Workforce Development; see http://lwd.dol.state.nj.us/labor/wc/wc_index.html
68 Link for Statutes directly on Homepage: http://lwd.dol.state.nj.us/labor/forms_pdfs/wc/pdf/wc_law.pdf
69 Link for Case Law directly on Homepage: http://lwd.dol.state.nj.us/labor/wc/legal/cases/index.html
70 See http://www.workerscomp.state.nm.us/
71 Link for Statutes directly on Homepage: http://www.workerscomp.state.nm.us/rules.php
72 See http://www.web.ny.gov/
73 Link for Statutes and Case Law directly on Homepage: http://www.wcb.ny.gov/content/main/wclaws/newlaws.jsp
74 In the Department of Commerce; see http://www.ic.nc.gov/
75 Link for Statutes and Case Law directly on Homepage: http://www.ic.nc.gov/attorneys.html
76 See https://www.workforcesafety.com/links/
77 There is website for the government of the Northern Mariana Islands, but there is no information concerning workers’ compensation on the website: http://gov.mp. The name of the administrative agency was found in case law. See Lexis Nexis. Santos v. Public Sch. Sys., 2002 MP 12; 6 N.M.I. 422 (2002).
79 Link for Statutes directly on Homepage: http://www.ohiobwc.com/basics/guidedtour/generalinfo/ORCandOAC.asp
See http://www.owcc.state.ok.us/

Link for Statutes directly on Homepage: http://www.owcc.state.ok.us/administrator_and_court_rules.htm

In the Department of Consumer and Business Services; see http://www.cbs.state.or.us/external/wcd/index.html

Link for Statutes directly on Homepage: http://www.cbs.state.or.us/external/wcd/policy/rules/oarors.html

In the Department of Labor and Industry; see http://www.portal.state.pa.us/portal/server.pt/community/workers%27_compensation/10386

Link for Statutes directly on Homepage: http://www.portal.state.pa.us/portal/server.pt/community/publications/10443

See http://www.cipr.gobierno.pr/. Note the web site is in Spanish.

In the Department of Labor and Training; see http://www.dlt.ri.gov/wc/

Link for Statutes directly on Homepage: http://www.dlt.ri.gov/wc/lawsrules.htm

See http://www.wcc.sc.gov/

Link for Statutes directly on Homepage: http://www.wcc.sc.gov/welcomeandoverview/lawsregulations/Pages/default.aspx

In the Department of Labor and Management in the Department of Labor and Regulation; see http://dlr.sd.gov/workerscomp/default.aspx

Link for Statutes directly on Homepage: http://dlr.sd.gov/workerscomp/statutes.aspx

In the Department of Labor and Workforce Development; see http://www.tn.gov/labor-wfd/wcomp.html

Link for Statutes directly on Homepage: http://www.tn.gov/labor-wfd/laborlaws.shtml

In the Department of Insurance; see http://www.tdi.texas.gov/wc/index.html

Link for Statutes directly on Homepage: http://www.tdi.texas.gov/wc/act/index.html

See http://laborcommission.utah.gov/

Link for Statutes directly on Homepage: http://laborcommission.utah.gov/divisions/Adjudication/LawsandRulesAdjudication.html

In the Department of Labor; see http://www.labor.vermont.gov/Business/WorkersCompensation/tabid/114/Default.aspx

See http://www.vwc.state.va.us/portal/vwc-website

Link for Statutes directly on Homepage: http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC6502000

http://www.vwc.state.va.us/portal/vwc-website/OnlineServices/JudicialOpinions;jsessionid=B9E8F1D70C62496DF278B1D4D9C5FCAA

In the Department of Labor; see http://www.vidol.gov/Units/Workers_Compensation/Workers_Comp.htm

In the Department of Labor and Industries; see http://www.lni.wa.gov/claimsins/claims/

Link for Statutes directly on Homepage: http://apps.leg.wa.gov/rcw/default.aspx?Cite=51

Link for Statutes directly on Homepage: http://www.wvinsurance.gov/PolicyLegislation.aspx

In the Department of Workforce Development; see http://dwd.wisconsin.gov/wc/

Link for Statutes and Case Law directly on Homepage: http://dwd.wisconsin.gov/wc/legal/

In the Department of Workforce Services; see http://wyomingworkforce.org/employers-and-businesses/workers-compensation/Pages/default.aspx

Link for Statutes and Case Law directly on Homepage: http://wyomingworkforce.org/tools-and-resources/Pages/statutes-and-rules.aspx
Table C. General Statistics on Population, GDP, Labor Force, Program Coverage, and Program Coverage Wages by Jurisdiction

<table>
<thead>
<tr>
<th>State</th>
<th>Population¹</th>
<th>GDP (mill.)²</th>
<th>GDP Per Cap.³</th>
<th>Lab. Force⁴</th>
<th>Lab./Pop.⁵</th>
<th>Covered⁶</th>
<th>Wages⁷</th>
<th>Cov./Lab.⁸</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 California</td>
<td>37,691,912</td>
<td>$1,936,400</td>
<td>$51,374.42</td>
<td>18,406,600</td>
<td>48.83%</td>
<td>14,171,000</td>
<td>$52,873</td>
<td>76.99%</td>
</tr>
<tr>
<td>2 Texas</td>
<td>25,674,681</td>
<td>$1,207,432</td>
<td>$47,028.12</td>
<td>12,475,600</td>
<td>48.59%</td>
<td>8,234,000</td>
<td>$46,543</td>
<td>66.00%</td>
</tr>
<tr>
<td>3 New York</td>
<td>19,465,197</td>
<td>$1,156,500</td>
<td>$59,413.73</td>
<td>9,496,200</td>
<td>48.79%</td>
<td>8,195,000</td>
<td>$50,157</td>
<td>86.30%</td>
</tr>
<tr>
<td>4 Florida</td>
<td>19,057,542</td>
<td>$754,000</td>
<td>$39,564.39</td>
<td>9,265,000</td>
<td>48.62%</td>
<td>6,612,000</td>
<td>$41,109</td>
<td>71.37%</td>
</tr>
<tr>
<td>5 Illinois</td>
<td>12,869,257</td>
<td>$644,200</td>
<td>$50,057.28</td>
<td>6,578,500</td>
<td>51.12%</td>
<td>5,397,000</td>
<td>$49,197</td>
<td>82.04%</td>
</tr>
<tr>
<td>6 Pennsylvania</td>
<td>12,742,886</td>
<td>$575,600</td>
<td>$45,170.30</td>
<td>6,373,700</td>
<td>50.02%</td>
<td>5,343,000</td>
<td>$45,343</td>
<td>83.83%</td>
</tr>
<tr>
<td>7 Ohio</td>
<td>11,544,951</td>
<td>$483,400</td>
<td>$41,871.12</td>
<td>5,799,200</td>
<td>50.23%</td>
<td>4,822,000</td>
<td>$41,362</td>
<td>83.15%</td>
</tr>
<tr>
<td>8 Michigan</td>
<td>8,976,187</td>
<td>$372,400</td>
<td>$37,706.86</td>
<td>4,648,000</td>
<td>47.06%</td>
<td>3,596,000</td>
<td>$44,165</td>
<td>77.37%</td>
</tr>
<tr>
<td>9 Georgia</td>
<td>9,815,210</td>
<td>$404,600</td>
<td>$41,221.74</td>
<td>4,731,300</td>
<td>48.20%</td>
<td>3,543,000</td>
<td>$43,244</td>
<td>74.88%</td>
</tr>
<tr>
<td>10 North Carolina</td>
<td>9,656,401</td>
<td>$407,400</td>
<td>$42,189.63</td>
<td>4,660,800</td>
<td>48.27%</td>
<td>3,602,000</td>
<td>$40,780</td>
<td>77.28%</td>
</tr>
<tr>
<td>11 New Jersey</td>
<td>8,821,155</td>
<td>$497,000</td>
<td>$56,341.83</td>
<td>4,562,100</td>
<td>51.72%</td>
<td>3,680,000</td>
<td>$56,108</td>
<td>80.66%</td>
</tr>
<tr>
<td>12 Virginia</td>
<td>8,096,604</td>
<td>$427,700</td>
<td>$52,824.62</td>
<td>4,320,500</td>
<td>53.36%</td>
<td>3,273,000</td>
<td>$47,924</td>
<td>75.76%</td>
</tr>
<tr>
<td>13 Washington</td>
<td>6,830,038</td>
<td>$351,100</td>
<td>$51,405.28</td>
<td>3,483,500</td>
<td>51.00%</td>
<td>2,667,000</td>
<td>$48,004</td>
<td>76.56%</td>
</tr>
<tr>
<td>14 Massachusetts</td>
<td>6,587,536</td>
<td>$377,700</td>
<td>$57,335.55</td>
<td>3,452,200</td>
<td>52.41%</td>
<td>3,098,000</td>
<td>$57,532</td>
<td>89.74%</td>
</tr>
<tr>
<td>15 Indiana</td>
<td>6,516,922</td>
<td>$267,600</td>
<td>$41,062.33</td>
<td>3,198,400</td>
<td>49.08%</td>
<td>2,655,000</td>
<td>$38,907</td>
<td>83.01%</td>
</tr>
<tr>
<td>16 Arizona</td>
<td>6,482,505</td>
<td>$261,300</td>
<td>$40,308.49</td>
<td>3,020,900</td>
<td>46.60%</td>
<td>2,295,000</td>
<td>$42,827</td>
<td>75.97%</td>
</tr>
<tr>
<td>17 Tennessee</td>
<td>6,403,353</td>
<td>$250,300</td>
<td>$39,088.90</td>
<td>3,133,200</td>
<td>48.93%</td>
<td>2,410,000</td>
<td>$41,044</td>
<td>76.92%</td>
</tr>
<tr>
<td>18 Missouri</td>
<td>6,010,688</td>
<td>$246,700</td>
<td>$41,043.55</td>
<td>3,044,200</td>
<td>50.65%</td>
<td>2,400,000</td>
<td>$40,208</td>
<td>78.84%</td>
</tr>
<tr>
<td>19 Maryland</td>
<td>5,828,289</td>
<td>$300,000</td>
<td>$51,473.08</td>
<td>3,074,200</td>
<td>52.75%</td>
<td>2,310,000</td>
<td>$49,477</td>
<td>75.14%</td>
</tr>
<tr>
<td>20 Wisconsin</td>
<td>5,711,767</td>
<td>$251,400</td>
<td>$44,014.40</td>
<td>3,057,400</td>
<td>53.53%</td>
<td>2,523,000</td>
<td>$39,778</td>
<td>82.52%</td>
</tr>
<tr>
<td>21 Minnesota</td>
<td>5,344,861</td>
<td>$267,100</td>
<td>$49,973.24</td>
<td>2,979,000</td>
<td>55.74%</td>
<td>2,506,000</td>
<td>$46,603</td>
<td>84.12%</td>
</tr>
<tr>
<td>22 Colorado</td>
<td>5,116,796</td>
<td>$259,700</td>
<td>$50,754.42</td>
<td>2,723,000</td>
<td>53.22%</td>
<td>2,110,000</td>
<td>$47,300</td>
<td>77.49%</td>
</tr>
<tr>
<td>23 Alabama</td>
<td>4,802,740</td>
<td>$174,400</td>
<td>$36,312.60</td>
<td>2,183,000</td>
<td>45.45%</td>
<td>1,679,000</td>
<td>$39,280</td>
<td>76.91%</td>
</tr>
<tr>
<td>24 South Carolina</td>
<td>4,679,230</td>
<td>$164,300</td>
<td>$35,112.61</td>
<td>2,159,100</td>
<td>46.14%</td>
<td>1,657,000</td>
<td>$37,166</td>
<td>76.74%</td>
</tr>
<tr>
<td>25 Louisiana</td>
<td>4,574,836</td>
<td>$213,600</td>
<td>$46,690.20</td>
<td>2,053,900</td>
<td>44.90%</td>
<td>1,796,000</td>
<td>$41,004</td>
<td>87.44%</td>
</tr>
<tr>
<td>26 Kentucky</td>
<td>4,369,356</td>
<td>$161,400</td>
<td>$36,939.08</td>
<td>2,066,400</td>
<td>47.29%</td>
<td>1,665,000</td>
<td>$38,280</td>
<td>80.57%</td>
</tr>
<tr>
<td>27 Oregon</td>
<td>3,871,859</td>
<td>$168,900</td>
<td>$43,622.46</td>
<td>1,992,000</td>
<td>51.45%</td>
<td>1,567,000</td>
<td>$41,250</td>
<td>78.66%</td>
</tr>
<tr>
<td>28 Oklahoma</td>
<td>3,791,508</td>
<td>$160,500</td>
<td>$42,331.44</td>
<td>1,774,600</td>
<td>46.80%</td>
<td>1,359,000</td>
<td>$37,423</td>
<td>76.58%</td>
</tr>
<tr>
<td>29 Puerto Rico</td>
<td>3,706,690</td>
<td>$93,520</td>
<td>$25,230.06</td>
<td>1,276,900</td>
<td>34.45%</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>30 Connecticut</td>
<td>3,580,709</td>
<td>$233,400</td>
<td>$65,182.62</td>
<td>1,916,300</td>
<td>53.52%</td>
<td>1,576,000</td>
<td>$59,401</td>
<td>82.24%</td>
</tr>
<tr>
<td>31 Iowa</td>
<td>3,062,309</td>
<td>$147,200</td>
<td>$48,068.30</td>
<td>1,660,400</td>
<td>54.22%</td>
<td>1,402,000</td>
<td>$37,872</td>
<td>84.44%</td>
</tr>
<tr>
<td>State</td>
<td>Population</td>
<td>Median Income</td>
<td>Total Income</td>
<td>Median Age</td>
<td>Median Income %</td>
<td>50% Median Income</td>
<td>Median Income %</td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>------------</td>
<td>---------------</td>
<td>--------------</td>
<td>------------</td>
<td>----------------</td>
<td>------------------</td>
<td>----------------</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>2,978,512</td>
<td>$98,900</td>
<td>$33,204.50</td>
<td>1,347,900</td>
<td>45.25%</td>
<td>$33,680</td>
<td>73.89%</td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>2,937,979</td>
<td>$105,800</td>
<td>$36,011.15</td>
<td>1,369,500</td>
<td>46.61%</td>
<td>$35,494</td>
<td>78.50%</td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>2,871,238</td>
<td>$128,500</td>
<td>$44,754.21</td>
<td>1,504,500</td>
<td>52.40%</td>
<td>$38,503</td>
<td>83.82%</td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>2,817,222</td>
<td>$116,900</td>
<td>$41,494.78</td>
<td>1,332,600</td>
<td>47.30%</td>
<td>$38,678</td>
<td>83.22%</td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>2,723,322</td>
<td>$127,500</td>
<td>$46,817.82</td>
<td>1,385,300</td>
<td>50.87%</td>
<td>$42,172</td>
<td>78.54%</td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>2,082,224</td>
<td>$75,000</td>
<td>$36,019.18</td>
<td>926,100</td>
<td>44.48%</td>
<td>$38,121</td>
<td>77.75%</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>1,855,364</td>
<td>$66,600</td>
<td>$35,895.92</td>
<td>799,900</td>
<td>43.11%</td>
<td>$38,354</td>
<td>79.76%</td>
<td></td>
</tr>
<tr>
<td>Nebraska</td>
<td>1,842,641</td>
<td>$89,600</td>
<td>$48,625.86</td>
<td>1,008,400</td>
<td>54.73%</td>
<td>$36,884</td>
<td>86.28%</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>1,584,985</td>
<td>$54,800</td>
<td>$34,574.46</td>
<td>771,800</td>
<td>48.69%</td>
<td>$34,350</td>
<td>76.70%</td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>1,374,810</td>
<td>$68,900</td>
<td>$50,116.02</td>
<td>660,600</td>
<td>48.05%</td>
<td>$51,000</td>
<td>83.41%</td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>1,328,188</td>
<td>$53,200</td>
<td>$40,054.57</td>
<td>704,700</td>
<td>53.06%</td>
<td>$36,676</td>
<td>79.32%</td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>1,318,194</td>
<td>$61,600</td>
<td>$46,730.60</td>
<td>738,700</td>
<td>56.04%</td>
<td>$45,641</td>
<td>80.28%</td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>1,051,302</td>
<td>$49,500</td>
<td>$47,084.47</td>
<td>562,800</td>
<td>53.53%</td>
<td>$43,897</td>
<td>77.47%</td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>998,199</td>
<td>$37,200</td>
<td>$37,267.12</td>
<td>505,400</td>
<td>50.63%</td>
<td>$40,000</td>
<td>80.13%</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>907,135</td>
<td>$62,700</td>
<td>$69,118.71</td>
<td>439,800</td>
<td>48.48%</td>
<td>$48,528</td>
<td>89.13%</td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td>824,082</td>
<td>$39,900</td>
<td>$48,417.51</td>
<td>446,000</td>
<td>54.12%</td>
<td>$33,623</td>
<td>83.86%</td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>722,718</td>
<td>$45,600</td>
<td>$63,095.15</td>
<td>367,400</td>
<td>50.84%</td>
<td>$47,030</td>
<td>81.38%</td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>683,932</td>
<td>$33,400</td>
<td>$48,835.26</td>
<td>384,800</td>
<td>56.26%</td>
<td>$37,693</td>
<td>89.66%</td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>626,431</td>
<td>$26,400</td>
<td>$42,143.51</td>
<td>358,800</td>
<td>57.28%</td>
<td>$38,926</td>
<td>79.15%</td>
<td></td>
</tr>
<tr>
<td>District of Columbia</td>
<td>617,996</td>
<td>$104,700</td>
<td>$169,418.57</td>
<td>343,200</td>
<td>55.53%</td>
<td>$72,907</td>
<td>140.73%</td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>568,158</td>
<td>$38,200</td>
<td>$67,234.82</td>
<td>304,600</td>
<td>53.61%</td>
<td>$263,000</td>
<td>86.34%</td>
<td></td>
</tr>
<tr>
<td>Guam</td>
<td>159,358</td>
<td>$2,773</td>
<td>$17,401.07</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>U.S. Virgin Islands</td>
<td>109,750</td>
<td>$4,243</td>
<td>$38,660.59</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>American Samoa</td>
<td>55,519</td>
<td>$462</td>
<td>$8,321.48</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>N. Mariana Islands</td>
<td>53,883</td>
<td>$633</td>
<td>$11,747.68</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>315,677,117</td>
<td>14,709,763</td>
<td>$46,597.50</td>
<td>155,828,900</td>
<td>50 States</td>
<td>121,476,000</td>
<td>$46,265</td>
<td></td>
</tr>
<tr>
<td>Top 20 Juris.</td>
<td>235,683,081</td>
<td>11,172,732</td>
<td>$47,405.74</td>
<td>116,781,500</td>
<td>24 Juris.</td>
<td>94,323,000</td>
<td>$47,742</td>
<td></td>
</tr>
<tr>
<td>Percentage of Total</td>
<td>74.65%</td>
<td>75.95%</td>
<td>20 Juris.</td>
<td>90,826,000</td>
<td>$47,835</td>
<td>77.77%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


3 “Gross Domestic Product per Capita by Jurisdiction.” Ibid.


5 “Total Number of Workers in the Labor Force as a Percentage of the Total Population within a given Jurisdiction.” Ibid.


7 “Average Wages paid each Covered Employees by Jurisdiction excluding Federal Program employees.” Ibid.

8 “Total Number of Covered Workers as a Percentage of the Total Number of Workers in the Labor Force in a given Jurisdiction”. Ibid.

9 Ibid. Note that the National Academy of Social Insurance reported that the number of covered workers in the District of Columbia exceeds the labor force within the jurisdiction.
<table>
<thead>
<tr>
<th>State</th>
<th>Non-Fatal</th>
<th>Rate</th>
<th>Fatal</th>
<th>Rate</th>
<th>Benefits</th>
<th>Costs</th>
<th>Ben./Injury</th>
<th>Cost/Inj.</th>
<th>Admin.</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>440,900</td>
<td>3.1</td>
<td>360</td>
<td>2.5</td>
<td>$9,396,443</td>
<td>$11,838,371</td>
<td>$21,294.57</td>
<td>$26,828.56</td>
<td>$5,533.99</td>
<td>20.63%</td>
</tr>
<tr>
<td>Texas</td>
<td>256,000</td>
<td>3.1</td>
<td>433</td>
<td>5.3</td>
<td>$1,483,708</td>
<td>$2,529,351</td>
<td>$5,785.95</td>
<td>$9,863.59</td>
<td>$4,077.65</td>
<td>41.34%</td>
</tr>
<tr>
<td>New York</td>
<td>232,200</td>
<td>2.8</td>
<td>205</td>
<td>2.5</td>
<td>$4,606,295</td>
<td>$5,767,901</td>
<td>$19,820.12</td>
<td>$24,818.32</td>
<td>$4,998.20</td>
<td>20.14%</td>
</tr>
<tr>
<td>Florida</td>
<td>222,600</td>
<td>3.4</td>
<td>227</td>
<td>3.4</td>
<td>$2,526,580</td>
<td>$2,935,570</td>
<td>$11,338.75</td>
<td>$13,174.21</td>
<td>$1,835.46</td>
<td>13.93%</td>
</tr>
<tr>
<td>Illinois</td>
<td>156,100</td>
<td>2.9</td>
<td>177</td>
<td>3.3</td>
<td>$2,916,379</td>
<td>$3,504,824</td>
<td>$18,661.60</td>
<td>$22,427.00</td>
<td>$3,765.40</td>
<td>16.79%</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>188,600</td>
<td>3.5</td>
<td>186</td>
<td>3.5</td>
<td>$2,909,341</td>
<td>$3,561,369</td>
<td>$15,410.79</td>
<td>$18,864.58</td>
<td>$3,453.79</td>
<td>18.31%</td>
</tr>
<tr>
<td>Ohio</td>
<td>168,770</td>
<td>3.5</td>
<td>153</td>
<td>3.2</td>
<td>$2,268,515</td>
<td>$2,652,645</td>
<td>$13,429.28</td>
<td>$15,703.28</td>
<td>$2,274.00</td>
<td>14.48%</td>
</tr>
<tr>
<td>Michigan</td>
<td>115,100</td>
<td>3.2</td>
<td>139</td>
<td>3.9</td>
<td>$1,271,892</td>
<td>$1,540,515</td>
<td>$11,036.99</td>
<td>$13,368.00</td>
<td>$2,331.01</td>
<td>17.44%</td>
</tr>
<tr>
<td>Georgia</td>
<td>107,500</td>
<td>3.0</td>
<td>107</td>
<td>3.0</td>
<td>$1,410,753</td>
<td>$1,624,079</td>
<td>$13,110.23</td>
<td>$15,092.69</td>
<td>$1,982.45</td>
<td>13.14%</td>
</tr>
<tr>
<td>North Carolina</td>
<td>99,500</td>
<td>2.8</td>
<td>148</td>
<td>4.1</td>
<td>$1,316,291</td>
<td>$1,630,490</td>
<td>$13,209.41</td>
<td>$16,362.50</td>
<td>$3,153.09</td>
<td>19.27%</td>
</tr>
<tr>
<td>New Jersey</td>
<td>104,400</td>
<td>2.8</td>
<td>98</td>
<td>2.7</td>
<td>$1,999,801</td>
<td>$2,477,712</td>
<td>$19,100.66</td>
<td>$23,665.32</td>
<td>$4,564.66</td>
<td>19.29%</td>
</tr>
<tr>
<td>Virginia</td>
<td>88,500</td>
<td>2.7</td>
<td>127</td>
<td>3.9</td>
<td>$790,025</td>
<td>$1,129,363</td>
<td>$8,914.04</td>
<td>$12,742.88</td>
<td>$3,828.84</td>
<td>30.05%</td>
</tr>
<tr>
<td>Washington</td>
<td>109,200</td>
<td>4.1</td>
<td>58</td>
<td>2.2</td>
<td>$2,308,748</td>
<td>$1,933,223</td>
<td>$21,131.16</td>
<td>$17,694.11</td>
<td>Unavail.</td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>83,400</td>
<td>2.7</td>
<td>63</td>
<td>2.0</td>
<td>$1,013,343</td>
<td>$1,301,101</td>
<td>$12,141.22</td>
<td>$15,588.95</td>
<td>$3,447.73</td>
<td>22.12%</td>
</tr>
<tr>
<td>Indiana</td>
<td>93,700</td>
<td>3.5</td>
<td>122</td>
<td>4.6</td>
<td>$603,193</td>
<td>$795,402</td>
<td>$6,429.12</td>
<td>$8,477.78</td>
<td>$2,048.66</td>
<td>24.17%</td>
</tr>
<tr>
<td>Arizona</td>
<td>67,900</td>
<td>3.0</td>
<td>65</td>
<td>2.8</td>
<td>$698,459</td>
<td>$805,962</td>
<td>$10,276.75</td>
<td>$11,885.48</td>
<td>$1,581.73</td>
<td>13.34%</td>
</tr>
<tr>
<td>Tennessee</td>
<td>79,200</td>
<td>3.3</td>
<td>120</td>
<td>5.0</td>
<td>$782,091</td>
<td>$1,048,520</td>
<td>$9,859.95</td>
<td>$13,218.86</td>
<td>$3,358.92</td>
<td>25.41%</td>
</tr>
<tr>
<td>Missouri</td>
<td>75,400</td>
<td>3.1</td>
<td>133</td>
<td>5.5</td>
<td>$811,427</td>
<td>$1,042,189</td>
<td>$10,742.68</td>
<td>$13,797.80</td>
<td>$3,055.12</td>
<td>22.14%</td>
</tr>
<tr>
<td>Maryland</td>
<td>64,400</td>
<td>2.8</td>
<td>71</td>
<td>3.1</td>
<td>$953,533</td>
<td>$1,188,626</td>
<td>$14,790.11</td>
<td>$18,436.61</td>
<td>$3,646.50</td>
<td>19.78%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>86,000</td>
<td>3.4</td>
<td>89</td>
<td>3.5</td>
<td>$1,070,534</td>
<td>$1,635,868</td>
<td>$12,435.20</td>
<td>$19,002.06</td>
<td>$6,566.86</td>
<td>34.56%</td>
</tr>
<tr>
<td>Minnesota</td>
<td>75,400</td>
<td>3.0</td>
<td>60</td>
<td>2.4</td>
<td>$1,038,272</td>
<td>$1,167,870</td>
<td>$13,759.24</td>
<td>$15,476.68</td>
<td>$1,717.44</td>
<td>11.10%</td>
</tr>
<tr>
<td>Colorado</td>
<td>73,850</td>
<td>3.5</td>
<td>87</td>
<td>4.1</td>
<td>$809,707</td>
<td>$948,138</td>
<td>$10,951.31</td>
<td>$12,823.59</td>
<td>$1,872.28</td>
<td>14.60%</td>
</tr>
<tr>
<td>Alabama</td>
<td>50,400</td>
<td>3.0</td>
<td>74</td>
<td>4.4</td>
<td>$629,069</td>
<td>$798,007</td>
<td>$12,463.23</td>
<td>$15,810.26</td>
<td>$3,347.03</td>
<td>21.17%</td>
</tr>
<tr>
<td>South Carolina</td>
<td>51,000</td>
<td>3.1</td>
<td>81</td>
<td>4.9</td>
<td>$891,283</td>
<td>$1,090,037</td>
<td>$17,448.43</td>
<td>$21,339.38</td>
<td>$3,890.95</td>
<td>18.23%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>44,900</td>
<td>2.5</td>
<td>109</td>
<td>6.1</td>
<td>$839,821</td>
<td>$1,134,102</td>
<td>$18,658.96</td>
<td>$25,197.23</td>
<td>$6,538.27</td>
<td>25.95%</td>
</tr>
<tr>
<td>Kentucky</td>
<td>60,700</td>
<td>3.6</td>
<td>86</td>
<td>5.2</td>
<td>$650,701</td>
<td>$771,206</td>
<td>$10,704.78</td>
<td>$12,687.22</td>
<td>$1,982.44</td>
<td>15.63%</td>
</tr>
<tr>
<td>Oregon</td>
<td>49,400</td>
<td>3.2</td>
<td>57</td>
<td>3.6</td>
<td>$633,054</td>
<td>$717,493</td>
<td>$12,800.09</td>
<td>$14,507.41</td>
<td>$1,707.32</td>
<td>11.77%</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>49,600</td>
<td>3.6</td>
<td>77</td>
<td>5.7</td>
<td>$845,726</td>
<td>$1,062,932</td>
<td>$17,024.50</td>
<td>$21,396.87</td>
<td>$4,372.37</td>
<td>20.43%</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Connecticut</td>
<td>60,500</td>
<td>3.8</td>
<td>36</td>
<td>2.3</td>
<td>$788,701</td>
<td>$917,437</td>
<td>$13,028.63</td>
<td>$15,155.23</td>
<td>$2,126.60</td>
<td>14.03%</td>
</tr>
<tr>
<td>Iowa</td>
<td>49,900</td>
<td>3.6</td>
<td>93</td>
<td>6.6</td>
<td>$554,973</td>
<td>$753,977</td>
<td>$11,101.01</td>
<td>$15,081.66</td>
<td>$3,980.65</td>
<td>26.39%</td>
</tr>
<tr>
<td></td>
<td>State</td>
<td>U.S. Pop.</td>
<td>Incarceration Rate</td>
<td>Total Incarcerates</td>
<td>FTEs</td>
<td>Recidivism Rate</td>
<td>Recidivism Population</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>----</td>
<td>-------------</td>
<td>-----------</td>
<td>-------------------</td>
<td>--------------------</td>
<td>------</td>
<td>----------------</td>
<td>-----------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>Mississippi</td>
<td>34,860</td>
<td>6.3</td>
<td>$337,633</td>
<td>$439,440</td>
<td>23.17%</td>
<td>$12,583.10</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>33</td>
<td>Arkansas</td>
<td>34,400</td>
<td>8.7</td>
<td>$204,066</td>
<td>$312,879</td>
<td>34.78%</td>
<td>$9,070.80</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>Kansas</td>
<td>41,400</td>
<td>6.1</td>
<td>$407,776</td>
<td>$592,334</td>
<td>31.16%</td>
<td>$9,831.38</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>Utah</td>
<td>32,500</td>
<td>3.5</td>
<td>$257,522</td>
<td>$351,731</td>
<td>26.78%</td>
<td>$7,914.26</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>36</td>
<td>Nevada</td>
<td>36,300</td>
<td>3.5</td>
<td>$249,686</td>
<td>$490,948</td>
<td>12.48%</td>
<td>$11,824.70</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>New Mexico</td>
<td>28,600</td>
<td>7.1</td>
<td>$276,697</td>
<td>$370,535</td>
<td>25.32%</td>
<td>$9,657.50</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>38</td>
<td>West Virginia</td>
<td>23,100</td>
<td>6.7</td>
<td>$221,327</td>
<td>$447,801</td>
<td>19.08%</td>
<td>$9,541.22</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>39</td>
<td>Nebraska</td>
<td>29,900</td>
<td>4.5</td>
<td>$204,066</td>
<td>$312,879</td>
<td>25.53%</td>
<td>$5,916.16</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>Idaho</td>
<td>20,720</td>
<td>6.3</td>
<td>$245,400</td>
<td>$370,535</td>
<td>25.32%</td>
<td>$9,657.50</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>41</td>
<td>Hawaii</td>
<td>15,700</td>
<td>4.7</td>
<td>$224,400</td>
<td>$312,033</td>
<td>22.32%</td>
<td>$9,413.96</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>42</td>
<td>Maine</td>
<td>25,400</td>
<td>4.7</td>
<td>$253,872</td>
<td>$305,480</td>
<td>16.89%</td>
<td>$12,014.47</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>43</td>
<td>New Hampshire</td>
<td>20,755</td>
<td>1.5</td>
<td>$237,168</td>
<td>$313,954</td>
<td>24.46%</td>
<td>$11,422.08</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>44</td>
<td>Rhode Island</td>
<td>15,260</td>
<td>1.6</td>
<td>$160,105</td>
<td>$193,304</td>
<td>7.17%</td>
<td>$12,661.55</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>45</td>
<td>Montana</td>
<td>15,700</td>
<td>12.1</td>
<td>$266,850</td>
<td>$372,863</td>
<td>28.43%</td>
<td>$6,731.44</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>46</td>
<td>Delaware</td>
<td>10,200</td>
<td>2.6</td>
<td>$211,921</td>
<td>$220,667</td>
<td>3.96%</td>
<td>$21,612.81</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>47</td>
<td>South Dakota</td>
<td>13,090</td>
<td>8.3</td>
<td>$100,348</td>
<td>$160,960</td>
<td>37.66%</td>
<td>$16,943.93</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>48</td>
<td>Alaska</td>
<td>11,300</td>
<td>12.7</td>
<td>$221,327</td>
<td>$333,269</td>
<td>33.59%</td>
<td>$19,520.81</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>49</td>
<td>North Dakota</td>
<td>12,075</td>
<td>12.8</td>
<td>$114,985</td>
<td>$201,562</td>
<td>42.95%</td>
<td>$9,413.96</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>50</td>
<td>Vermont</td>
<td>11,600</td>
<td>8.3</td>
<td>$138,370</td>
<td>$182,408</td>
<td>24.14%</td>
<td>$15,713.95</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>51</td>
<td>Dist. of Columbia</td>
<td>8,600</td>
<td>1.9</td>
<td>$105,636</td>
<td>$176,070</td>
<td>40.00%</td>
<td>$8,181.44</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>52</td>
<td>Wyoming</td>
<td>8,800</td>
<td>11.0</td>
<td>$163,497</td>
<td>$175,876</td>
<td>7.04%</td>
<td>$19,920.31</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>53</td>
<td>Guam</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>54</td>
<td>Virgin Islands</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>55</td>
<td>American Samoa</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>56</td>
<td>N. Mariana Islands</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>3,855,480</td>
<td>3.2</td>
<td>4.607</td>
<td>$53,869,358</td>
<td>$66,987,853</td>
<td>19.58%</td>
<td>$13,955.48</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>24 Jurisdictions</td>
<td>2,964,280</td>
<td>3.1</td>
<td>3.211</td>
<td>$42,572,956</td>
<td>$52,610,671</td>
<td>19.08%</td>
<td>$14,346.45</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Top 20 Juris.</td>
<td>2,839,570</td>
<td>3.1</td>
<td>3.081</td>
<td>$41,137,351</td>
<td>$50,943,082</td>
<td>19.25%</td>
<td>$17,920.98</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
“Total Work Related Non-Fatal Injuries and Illnesses by State.” Data Source: United States Department of Labor Bureau of Labor Statistics. State Occupational Injuries, Illnesses and Fatalities. Retrieved from http://www.bls.gov/iif/oshstate.htm. It is important to note that state statistics for Ohio, Colorado, Mississippi, Idaho, New Hampshire, Rhode Island, South Dakota and North Dakota were not available in this report. To complete the chart, it is assumed that the total number of non-fatal injuries in these jurisdictions is approximately 3.5 injuries per 100 covered employees, which provides the total 3.9 million injuries in the national statistics. Attempts to find individual state statistics through the United States Department of Labor were unsuccessful.

“Number of Work Related Non-Fatal Injuries and Illnesses per 100 covered workers within the jurisdiction.” Ibid. Note that the United States Department of Labor uses the calculation for number of non-fatal injuries and illnesses per 100 full time equivalent employees, which better reflects the time in which the employed spend in the workplace as compared to the average 40 hour full time week. For the purposes of this investigation, the actual number of employees was more important to reflect the impact of the injuries on the labor force.

“Total Work Related Fatalities by State.” Ibid.

“Number of Work Related Fatalities per 100,000 covered workers within the jurisdiction.” Ibid. Note that the United States Department of Labor uses the calculation for number of non-fatal injuries and illnesses per 100 full time equivalent employees, which better reflects the time in which the employed spend in the workplace as compared to the average 40 hour full time week. For the purposes of this investigation, the actual number of employees was more important to reflect the impact of the injuries on the labor force.


“Total Costs to Employers.” Ibid.

“Average Benefits per Injury or Fatality.” Ibid.

“Average Cost per Injury or Fatality.” Ibid.

“Average Administrative Cost per Injury or Fatality.” Ibid.

“Percentage of Average Costs per Injury or Fatality allocated to Administrative Costs.” Ibid.

Ibid. Not that the National Academy of Social Insurance reported that total benefits paid by employers in the State of Washington exceeded total costs to employers. Unfortunately, the National Academy of Social Insurance could not be reached for comment or clarification.
-190-

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

State
California
Texas
New York
Florida
Illinois
Pennsylvania
Ohio
Michigan
Georgia
North Carolina
New Jersey
Virginia
Washington
Massachusetts
Indiana
Arizona
Tennessee
Missouri
Maryland
Wisconsin
Minnesota
Colorado
Alabama
South Carolina
Louisiana
Kentucky
Oregon
Oklahoma
Puerto Rico
Connecticut
Iowa

Non-Farm1
14,057,700
10,595,800
8,696,300
7,250,100
5,685,700
5,700,200
5,112,900
3,969,400
3,877,600
3,941,000
3,864,000
3,690,400
2,834,300
3,220,200
2,863,900
2,417,500
2,680,100
2,663,500
2,562,700
2,755,300
2,697,100
2,272,600
1,866,900
1,832,600
1,913,400
1,796,200
1,626,700
1,562,600
N/A
1,626,800
1,481,300

Other2
23.63%
15.07%
8.42%
21.75%
13.57%
10.57%
11.83%
14.60%
18.04%
15.44%
15.30%
14.58%
18.64%
6.72%
10.46%
19.97%
14.46%
12.51%
16.64%
9.88%
9.46%
16.54%
14.48%
15.12%
6.84%
13.08%
18.34%
11.95%
N/A
15.11%
10.79%

Mining 3
29,700
244,100
5,600
5,600
9,700
35,500
12,000
7,700
8,900
5,700
1,400
11,000
6,200
1,200
6,900
11,600
0
4,400
0
3,300
6,900
27,900
12,500
3,900
54,300
22,800
7,400
52,600
N/A
600
2,400

Rate4
0.21%
2.30%
0.06%
0.08%
0.17%
0.62%
0.23%
0.19%
0.23%
0.14%
0.04%
0.30%
0.22%
0.04%
0.24%
0.48%
0.00%
0.17%
0.00%
0.12%
0.26%
1.23%
0.67%
0.21%
2.84%
1.27%
0.45%
3.37%
N/A
0.04%
0.16%

Constr.5
568,200
567,100
326,900
330,500
208,400
234,500
189,000
136,100
145,700
181,900
138,400
180,600
146,300
113,200
131,000
116,400
114,500
107,900
152,300
97,100
102,600
118,800
78,700
75,300
125,100
70,200
74,600
70,700
N/A
53,200
67,400

Rate6
4.04%
5.35%
3.76%
4.56%
3.67%
4.11%
3.70%
3.43%
3.76%
4.62%
3.58%
4.89%
5.16%
3.52%
4.57%
4.81%
4.27%
4.05%
5.94%
3.52%
3.80%
5.23%
4.22%
4.11%
6.54%
3.91%
4.59%
4.52%
N/A
3.27%
4.55%

Table E. General Statistics on Labor Market Sectors and Trade Union Density by Jurisdiction
Manufact.7
1,263,000
844,400
462,200
310,500
576,100
565,400
644,800
513,100
351,400
436,500
253,400
229,200
277,800
255,100
469,700
149,900
306,200
249,100
113,000
449,100
305,900
130,800
238,500
218,400
140,000
214,200
170,300
130,000
N/A
166,600
210,000

Rate8
8.98%
7.97%
5.31%
4.28%
10.13%
9.92%
12.61%
12.93%
9.06%
11.08%
6.56%
6.21%
9.80%
7.92%
16.40%
6.20%
11.42%
9.35%
4.41%
16.30%
11.34%
5.76%
12.78%
11.92%
7.32%
11.93%
10.47%
8.32%
N/A
10.24%
14.18%

Trade9
2,673,900
2,108,300
1,486,400
1,487,100
1,137,700
1,088,500
949,700
720,800
813,900
723,100
814,400
627,700
530,000
548,200
545,800
470,000
555,500
509,900
439,100
507,100
497,200
402,000
362,700
348,600
370,800
362,800
313,900
278,400
N/A
293,700
299,300

Rate10
19.02%
19.90%
17.09%
20.51%
20.01%
19.10%
18.57%
18.16%
20.99%
18.35%
21.08%
17.01%
18.70%
17.02%
19.06%
19.44%
20.73%
19.14%
17.13%
18.40%
18.43%
17.69%
19.43%
19.02%
19.38%
20.20%
19.30%
17.82%
N/A
18.05%
20.21%

Union11
17.10%
5.20%
24.10%
6.30%
16.20%
14.60%
13.40%
17.50%
3.90%
2.90%
16.10%
4.60%
19.00%
14.60%
11.30%
6.00%
4.60%
10.90%
12.40%
13.30%
15.10%
8.20%
10.00%
3.40%
4.50%
8.90%
17.10%
6.40%
N/A
16.80%
11.20%



“Percentage of Labor Force within a given Jurisdiction that is employed as a Farm Worker or Not Employed as a Salaried Worker.” Ibid. It is important to note that the number of salaried workers in the District of Columbia and North Dakota exceeded the total number of individuals in the labor force within the jurisdiction.

"Total Number of Salaried Workers in the Mining and Logging Sector.” Ibid. This sector includes natural resource extraction, including oil and natural gas.

"Total Number of Salaried Workers in the Mining Sector as a Percentage of Total Salaried Non-Farm Workers.” Ibid.

"Total Number of Salaried Workers in the Construction Sector.” Ibid.

"Total Number of Salaried Workers in the Construction Sector as a Percentage of Total Salaried Non-Farm Workers.” Ibid.

"Total Number of Salaried Workers in the Manufacturing Sector.” Ibid.

"Total Number of Salaried Workers in the Manufacturing Sector as a Percentage of Total Salaried Non-Farm Workers.” Ibid.

"Total Number of Salaried Workers in the Trade, Transportation and Utility Sector.” Ibid.

"Total Number of Salaried Workers in the Trade, Transportation and Utility Sector as a Percentage of Total Salaried Non-Farm Workers.” Ibid.

"Trade Union Density (total number of workers as member of unions as a percentage of the total non-farm salaried employees) within a given Jurisdiction.” Data Source: United States Department of Labor Bureau of Labor Statistics. “Union affiliation of employed wage and salary workers by state, 2010-2011 annual averages.” Retrieved from http://www.bls.gov/news.release/union2.t05.htm. It is important to note that these statistics also provide a different figure for total employees covered by union contracts and agreements but not members of unions.
Appendix Four

Index of Cited Case Law
Index of Cited Case Law

Note: Case law is cited using the parties in dispute in court (if there are multiple plaintiffs and multiple defendants, often the case is cited with only the first plaintiff and first defendant listed on the complaint), the abbreviation of the reporter, and the volume and page number, together with the year the judicial decision was published. Case law is published in a number of reporters that produced by private and public sources. These reporters do not provide this information free to the public. Lexis Nexis Case Law Service and Thomas Reuters West Case Law (WestLaw) Service are the primary sources of case law. In 1879, the West Publishing Company started its National Reporter System, which publishes select state court judicial decisions from certain regions. Thomas Reuters now owns the West Publishing Company. The National Reporter System is the primary publication route for judicial decisions from the federal courts and state appellate courts, particularly the state courts of last resort (typically called State Supreme Courts). There are now over 10,000 volumes (each with nearly 1,000 pages of case law). As a result, there are over 10 million pages of case law available through the National Report System. Because of the overwhelming amount of case law, online databases available through Lexis Nexis and WestLaw are the primary channels used by courts, lawyers and policymakers for accessing case law. However, not all case law is published through the National Reporter System. New York State has its own reporter system (the New York State Appellate Division Reporter [first and second series] A.D., and A.D.2d) and most trial court judicial decisions are not published in the National Reporter System (such as the case in Minnesota cited in this work). Even though all of the other cases cited in this work appear in the National Reporter System, citations for other reporters are also cited, as it standard in legal practice.

The Reporters in the National Reporter System includes:

Supreme Court Reporter – S. Ct.
Federal Reporter – F.
Federal Reporter, second series – F.2d
Federal Reporter, third series – F.3d
Federal Supplemental, second series – F.Supp.2d

Atlantic Reporter (first, second, and third series) – A., A.2d, A.3d
North Eastern Reporter (first, and second series) – N.E., N.E.2d
North Western Reporter (first, and second series) – N.W., N.W.2d
South Eastern Reporter (first, and second series) – S.E., S.E.2d
Southern Reporter (first, second, and third series) – So., So.2d, So.3d
Southwestern Reporter (first, second, and third series) – S.W., S.W.2d, S.W.3d
Pacific Reporter (first, second, and third series) – P., P.2d, P.3d

The cases are grouped together by state, and each state appears in alphabetical order, with the United States Supreme Court cases appearing first. Cases listed in chronological order.
United States Supreme Court

Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967)

Alabama:


Alaska:


California:

Saala v. McFarland, 63 Cal. 2d 124, 403 P.2d 400 (1965)
Johns-Manville Corp. v. Superior Court of Contra Costa County (Rudkin, Real Party of Interest), 27 Cal. 3d 465, 612 P.2d 948 (1980)
Hendy v. Losse, 54 Cal. 3d 723, 819 P.2d 1 (1991)

Colorado:

Horodyskyj v. Karanian, 32 P.3d 470 (Colo. 2001)

Delaware:


Georgia:


Illinois:


Maine:


Massachusetts:

Minnesota:


New York:


North Carolina:

Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985)
Johnson and Smith v. First Union Corporation, 128 N.C. App. 450, 496 S.E.2d 1 (1998)

Ohio:


Pennsylvania:


Rhode Island:


Tennessee:

Clayton v. Pizza Hut, 673 S.W.2d 144 (Tenn. 1984)
Texas:

Appendix Five

Legal Analysis of Statutory Framework
A. Scope of Statutory Provisions

For the purposes of the Programs, it is critical to define the relationship of employment, the parties to such a relationship, and the causes of action that fall under the jurisdiction of the programs. All of these provisions form the principles that underpin the Programs. Using these provisions, employees can determine if the Program provisions apply to a specific cause of action. For the purposes of this investigation, the most important provisions (1) establish the legislative intent and scope of the provisions, (2) define classes and key terms, such as employment and injury, subject to the provisions, (3) identify causes of action that are applicable to the Program provisions, (4) establish rules for jurisdiction, and (5) establish an executive branch administrative agency to act as an adjudicating authority. As the introduction of this work suggested, the Program statutes are not always explicitly or clearly interpreted by adjudicating authorities. As a result, the application of the Program for certain causes of action may be questionable, and these issues result in expensive and unnecessary litigation. This section will omit provisions with ambiguity. The analysis included later in this work will address issues of ambiguity.

The purpose of this section is to use the explicit statutory language in order to understand the very basic components of the Program, and the statutory framework for analysis and evaluation. Notwithstanding the omission of ambiguous provisions analyzed later in this work, the provisions detailed in this section will be analyzed within the context of the statutory and constitutional framework for the Programs as a whole. In addition, question of jurisdiction and adjudicating authority will examine the interaction between Programs in different jurisdictions.
i. **Legislative Intent and Key Statutory Provisions**

The Programs reformed the legal system in order to provide due process for employees who suffer an industrial accident through means other than the common law legal system. In terms of tort reform, the legislative intent is to provide a certain level of predictability, efficiency and cost controls for employers and employees alike in the event an employee suffers an industrial accident. In exchange for the right to pursue common law claims against an employer, employees are guaranteed limited benefits in the event of an industrial accident, with limited rules concerning fault and negligence, and employers have relatively low and fixed costs for industrial accidents. In this sense, policy makers identified the inefficiency of the legal system to process common law claims of employees against employers in the legal system as the problem to be addressed by the Programs. The Programs were not designed to provide workers with new rights, privileges, benefits, obligations or duties through innovative public policy. The Programs are wholly distinct from public policy developed to provide workers with new benefits, such as unemployment insurance and the United States Social Security program, both wholly outside and independent of the legal system.

---

3 *Ibid.* These benefits include monetary benefits to replace lost wages, medical benefits in order to address any needs for medical care arising out of the industrial accident, and vocational training in order to retool certain employees for positions with less demanding physical labor in order to be able to earn wages, as well as other benefits.
In furtherance of these legislative goals, the statutes establish two distinct classes, “employers” and “employees,” and alter the Constitutional rights of both classes, as well as other relevant parties, pertaining to due process in the event an employee is injured or killed by accident in the workplace. In order to achieve these legislative objectives, the statutes provide rules and regulation for insurance programs to guarantee benefits for employees through the Programs, as well as administrative procedures for due process and adjudication of claims of employees. For example, the statutes of the State of New York prescribe that:

“Every employer subject to this chapter shall . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury, except that there shall be no liability for compensation under this chapter when the injury has been solely occasioned by intoxication from alcohol or a controlled substance of the injured employee while on duty; or by willful intention of the injured employee to bring about the injury or death of himself or another; or where the injury was sustained in or caused by voluntary participation in an off-duty athletic activity not constituting part of the employee’s work related duties unless the employer (a) requires the employee to participate in such activity, (b) compensates the employee for participating in such activity or (c) otherwise sponsors the activity.”

This statutory provision provides a summary of the intent of the Programs in New York, and particularly the limited immunity from fault for employers, particularly in the event of intention, malfeasance or gross negligence of the employee.

---

7 Ibid. Definitions and classes established by statute are discussed further later in this work.
8 Ibid.
9 Lexis Nexis. N.Y. Workers’ Comp. Law § 10.
10 Ibid.
Similarly, the statutes in California prescribed that:

“Every employer except the state shall secure the payment of compensation [by] being insured against liability to pay compensation by one or more insurers duly authorized to write compensation insurance in this state, [or by] securing a certificate of consent to self-insure either as an individual employer, or as one employer in a group of employers, which may be given upon furnishing proof of ability to self-insure and to pay any compensation that may become due to his or her employees [and] for any political subdivision of the state, including each member of a pooling arrangement under a joint exercise of powers agreement, by securing a certificate of consent to self-insure against workers’ compensation claims . . . . It is not a defense . . . that a person injured while rendering service . . . was not lawfully employed by reason of the violation of any civil service or other law or regulation respecting the hiring of employees . . . . Liability for compensation . . . shall . . . exist . . . . [only] [w]here the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee . . . . [and] [w]here the injury is not intentionally self-inflicted.”

As illustrated, the above excerpts from the statutes in New York and California focus on the regulation of funds to ensure benefits for employees who suffer industrial accidents. In both New York, as well as in California, employers are only liable where the employee has not committed an intentional act or engaged in gross negligence which resulted in injury in the workplace. The provisions which require insurance are important because, in various jurisdictions, employers that do not obtain insurance are liable at common law for industrial accidents in the workplace, and are also subject to additional penalties and fines, as well as potential prosecution.

---

12 Ibid.
13 Ibid. It is important to note that injury as the result of an intentional act or intentional misconduct is generally not regarded as industrial accident. This issue will be discussed further in this work.
14 Ibid.
However, in order to effectuate this purpose, the statute must provide a framework for reforming the legal system.\textsuperscript{15} This reform completely replaces the legal process for remedy through common law due process.\textsuperscript{16} The statutes in Florida provide a comprehensive legislative intent on the books to introduce the statutory provisions.\textsuperscript{17} This introduction summarily describes the key components of the law that comprise of this reform, as follows:

"It is the intent of the Legislature that the Workers’ Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer. It is the specific intent of the Legislature that workers’ compensation cases shall be decided on their merits. The workers’ compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike. In addition, it is the intent of the Legislature that the facts in a workers’ compensation case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer... It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The department, agency, the Office of Insurance Regulation, the Department of Education, and the Division of Administrative Hearings shall administer the Workers’ Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments."\textsuperscript{18}

The “renunciation of common-law rights,” commonly referred to as the “exclusivity provisions,” is the centerpiece of this tort reform, and will be extensively analyzed in this work.

\textsuperscript{15} Ibid. This reform is the tort reform referenced earlier in this work.
\textsuperscript{16} Ibid. A constitutional analysis of the tort reform of the revocation of the common-law remedy for civil matters is contained later in this work.
\textsuperscript{17} Lexis Nexis. Fla. Stat. § 440.015.
\textsuperscript{18} Ibid.
In addition, the State of Washington provides a comprehensive statement of the legislative intent of the Program within the statutory provisions as follows:

“The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided. . . .”

Again, the general “jurisdiction of the courts,” another term for venue for common law claims, were “abolished” by statute, and replaced with “sure and certain relief for workers” through the comprehensive insurance program. This “renunciation of common-law rights” and the abolishment of “the jurisdiction of the courts” provide the core of tort reform embodied in the Program statutes. Through the universal insurance programs established to guarantee relief for workers injured in the workplace, the tort reform aims to ensure that the employer bears of the costs of the injury of workers, while, at the same time, controlling overall costs to employers through regulation.

---

While the Programs were originally separate from workplace safety regulations and other labor regulations, such as those pertaining to illegal labor, some efforts have been made to integrate the Programs with workplace safety regulations and illegal labor regulations, but those public policies continue to exist as completely distinct, even if enforced together with these Programs. Notwithstanding, this joint effort, between the several states through administrative agencies for the Programs, and the federal government, has promoted workplace safety regulations. These regulations ensure employees are informed of their right to a safe workplace in full compliance of all relevant laws and statutes. Through these efforts, the federal government, and the several states, routinely collect data in order to assess progress. This data includes the number of fatal work injuries, the number of non-fatal injuries, and trends in the rate of injuries and deaths over time. The focus is to prevent accidents, injury and death in the workplace, thus reducing the need for employees to seek benefits through the Programs. It is important to note, however, that the focus of this investigation is on the operation of the Programs to provide benefits to injured workers.

---

21 Ibid. It should be noted that the Federal agencies that focus on workplace safety are the United States Department of Labor and the United States Occupational Safety and Health Administration. It should also be noted that most states have agencies that also focus on workplace safety, such as the New York State Department of Labor, Division of Safety and Health, Workplace Safety and Loss Prevention Program; or the California Department of Industrial Relations, Division Occupational Safety and Health.
22 Ibid.
23 Ibid. The federal government work closely with the several States to compile national statistics for comparison of injury rates for each jurisdiction. It should be noted that it is believed that nearly 60% of injuries are not reported. In addition, there are only estimates of the costs of Program administration for the several States, as well as costs and benefits paid by employers. There are significant data gaps and issues with the integrity of the available data, which will be further discuss later in this work.
24 Ibid.
25 Ibid.
It is important to note that the scope of the Program application is limited to industrial accidents suffered by employees. If an employee sues an employer for a cause of action unrelated to an industrial accident, such as a failure to pay wages because of bankruptcy, or the employer sues an employee for any reason, such as for stealing from the company, the Program statutes do not apply.\footnote{The application of the Programs will be discussed further later in this analysis}

There are five key elements of the Programs that are universal and incorporated in the statutory provisions in nearly every jurisdiction. These key elements are:

1. employees are barred from pursuing common law claims against employers in the event of an industrial accident, in lieu of the benefits provided through the Programs;
2. employees receive guaranteed limited benefits through the Programs for industrial accidents;
3. the statutory provisions apply limitations for other expenses of employees, such as legal fees;
4. depending on the jurisdiction, employers only have to pay wage reimbursements if the employee is unable to earn wages in the same or any other employment; and
5. depending on the jurisdiction, employers are not required to pay any benefits if an employee asserts a claim, but the same employee, or another employee, are alleged to have committed an intentional tort, gross misconduct, gross negligence, malfeasance, or criminal activity.

First, all Programs include statutory provisions that forbid the employee from pursuing a common law claim against an employer when the employee falls under the
coverage of the universal insurance provided through the Programs (hereinafter referred to as the “exclusivity provisions”). The exclusivity provisions exclude all rights and remedies under the common law for employees, in exchange for swift, simple and guaranteed benefits through the Program.

Second, benefits provided through the Programs are limited and exclusive but are guaranteed (however the employer, under certain conditions, is not liable to pay benefits). In this sense, punitive damages, non-economic compensation and other types of consideration for material damages generally available in the common law system are forbidden within the statutory provisions of the Programs.

Third, the statutory provisions also apply limitations and requirements for other types of common expenses for litigation and legal disputes, particularly, legal fees. Many of the jurisdictions have limitations or special stipulations concerning legal fees for Plaintiffs who hire legal counsel for claims under the Programs.27 These conditions include percentage caps on legal fees payable in some instances, and in other instances legal counsel must get the approval of the adjudicating authority for the legal fees charged.

In certain jurisdictions, employers are only liable to pay wage replacement benefits if the employee is unable to secure employment “in the same or any other employment.”28 Under these statutory provisions, the employer can reassign an injured employee from manual labor to a sedentary job, and avoid paying wage replacement benefits. In addition, employers are not required to pay benefits to employees when employees are guilty of intentional tort, gross misconduct, gross negligence, malfeasance

27 Ibid. Also see Footnote 1.

28 For instance, see the North Carolina Workers’ Compensation Act, N.C. Gen. Stat. § 97-1 et seq.
or criminal activity. This exception, typically incorporated into the statutory provisions, protects employers from excess costs caused by grossly negligent conduct on the part of the employee, which causes injury or death to the same employee, or any other employee. In light of the general goals of the Programs, these exceptions embody the principle that all parties in the workplace have a legal responsibility to maintain good conduct and use their best good faith efforts to promote and maintain a safe workplace.

These principles are at the centerpiece of the legislative compromise embodied in the Programs. This investigation will examine the balance between the interests of the employers and the interests of the employees. The statutes generally provide more explicit language to ensure the interests of employers with respect to limiting costs are realized, as clearly shown. This investigation will examine how the interests of employees have, or have not been, explicitly addressed in the statutes, and, where necessary, employees have had to litigate and question the meaning and intent of the statutory provisions in order to ensure adequate protection. Employees have certain critically important interests with respect to the Programs. The most important issue is if, and when, employees can pursue a common law claim against an employer, particularly when the employee is ineligible for benefits through the Programs. Like employees, employers also have explicit legal responsibilities, as well as implicit duties to promote and maintain a safe workplace. The crucial question at the intersection of these five key statutory provisions concerns the rights of employees. When employers violate these general principles and, in bad faith, fail to promote and maintain a safe work environment, employees must be able to receive benefits, but, moreover, employers also should face additional punitive measures to deter such behavior in the future.
ii. 

Classes and Definitions established by Statute

Within the legal system in the United States and in accordance with the legal tradition in the United States, a legal class is defined as a social group or classification that receives a special legal classification or treatment under the law. Legal classes are constitutional so long as the special legal classification and treatment under the law is rational and reasonable, and does not violate the Constitutional rights of the class.

The definitions above clearly differentiate between the five key classes applicable to the Programs as follows:

1. employee, who are injured or killed by accident out of and in the course of employment;
2. employer, who are the legal entity which employs the employee at the time of injury or death;
3. management, the supervisory chain of command with direct control over the employee at the time of injury or death;
4. co-employees, fellow employees employed with the same employer working with the employee at the time of injury or death; and
5. third parties, a party that may be alleged to have fault and liability in the injury or death of an employee in the workplace, but is in no way involved in an employment or contractual relationship with the employee or employer.

These five classes form the basis of this analysis.

---

30 In New York C. R. Co. v. White, the Supreme Court notes that classification under the law for special legal treatment is constitutional as long as the classification is rational and reasonably justified.
The key terms defined by the Program statutes include “employment,” “employee,” “employer,” “co-employee,” “third party tortfeasor,” “injury or death by accident out of and in the course of employment.” Depending on the jurisdiction, explicit statutory provisions may also define other terms, such as “intentional tort,” “gross misconduct,” “sexual harassment” or “sexual assault.”

In New York, the statutes provide explicit definitions for the classes, which define the classes as follows:

```
“‘Hazardous employment’ means a work or occupation described in section three of this chapter. . . . ‘Employer,’ except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, having one or more persons in employment, including the state, a municipal corporation, fire district or other political subdivision of the state, and every authority or commission heretofore or hereafter continued or created by the public authorities law. . . . ‘Employee’ means a person engaged in one of the occupations enumerated in section three of this article or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his or her employment away from the plant of his or her employer . . . .”
```

A list of occupations that apply to the New York Workers’ Compensation Act is included in the statutes, which contains over 4,500 words.32

---

31 Lexis Nexis. See N.Y. Workers’ Comp. Law § 2., Paragraphs 1, 3 and 4. Paragraph 3 concerning “Employment” has 571 words, and Paragraph 4 concerning the definition of an “Employee” has 2,943 words, in addition N.Y. Workers’ Comp. Law § 3 specifying the application of the Act and listing hazardous employments has 4,508 words, for a total of over 8,000 words.
32 Ibid.
In addition, the Program statutes also define the specific conditions under which the statutes are controlling for the classes. In New York, the statutes prescribes that:

“‘Injury’ and ‘personal injury’ mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom. The terms ‘injury’ and ‘personal injury’ shall not include an injury which is solely mental and is based on work related stress if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer. . . . ‘Disability’ means the state of being disabled from earning full wages at the work at which the employee was last employed. . . . The disablement of an employee resulting from an occupational disease described in subdivision two of section three shall be treated as the happening of an accident within the meaning of this chapter and the procedure and practice provided in this chapter shall apply to all proceedings under this article, except where specifically otherwise provided herein.”

As previously discussed, the laws of the several States were modeled after the Program statutes in New York, such as in California, Florida, Illinois and North Carolina. While the construction of the statutes in terms of classifications are similar, and in many cases identical, the statutes begin to diverge in defining disability. For example, in North Carolina, “injury” and “disability” are defined as follows:

“‘Injury and personal injury’ shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. . . . The term ‘disability’ means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”

---

33 Lexis Nexis. See N.Y. Workers’ Comp. Law §§ 2, 37, 38.
Furthermore, the statutes in North Carolina define “employment,” “employee,” “employer” and “person” with more general language. In pertinent part, the statutes provide that:

“The term ‘employment’ includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which three or more employees are regularly employed in the same business or establishment or in which one or more employees are employed in activities which involve the use or presence of radiation, except agriculture and domestic services . . . . The term ‘employee’ means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer . . . . The term ‘employer’ means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustee of any person . . . . The term ‘person’ means individual, partnership, association or corporation.”

Due to the rapidly evolving nature of the labor market and technology, there is a critical question concerning attempts to explicitly list fields of employment, or capture every possibly scenario for which benefits should be paid with explicit language.37 For instance, in New York, the legislature introduced reforms specifically to address benefits under the Program for employees who sustained injuries while working during, or immediately after, the attack on the World Trade Center.38 As a result of the significant

36 Ibid. The provisions have less than 1,400 words.
37 Ibid.
38 Lexis Nexis. See N.Y. Workers’ Comp Law § 4, entitled “Special applicability; domestic partners; surviving domestic partners; death benefits; funeral expenses; terrorist attacks of September eleventh,
delays in providing financial relief, benefits and public programs for survivors and the families of those killed, there has been much criticism of the lack of legislative initiative to provide assistance.\textsuperscript{39}

Other important definitions include the definition of other classes, such as co-employees, third party tortfeasor and management. In addition, some statutes provide definitions of various types of causes of action, such as intentional tort and gross misconduct. While terms like co-employees are defined in the statutes in California, there are still significant questions about how independent consultants and contractors are treated under the law, given the complex relationships in the modern workplace. In addition, the definition of third parties to the employment relationship can also be complex, given the relationships between landlords of premises used by employers, legal relationships between parents companies and subsidiaries, and contracts between employers and third party providers for machinery and equipment. In other instances, a differentiation must be made between management and the employer itself, because statutes bar suit against the employer, but not against individuals party to the employment relationship, such as management. The lack of clear and explicit definitions for these classes is addressed further in this investigation.

\textsuperscript{39} Ibid. Particularly see the Daily News article.
iii.  *Causes of Action under Statute*

The causes of action under statute for the Programs are injury or death of an employee by accident out of and in the course of employment. Therefore, the employment relationship between the parties is central to the application of the Program. In addition, the nature of the injury or death, time, place and circumstance, is also central to the application of the Program. There are five different levels of liability with respect to causes of action, which include:

1. a true accident;
2. negligence;
3. gross misconduct or gross negligence;
4. intentional misconduct; and
5. intentional tort.

These levels of liability will be further discussed later in this work. Any of the classes can be liable at any level for the injury or death of an employee, depending on the circumstances. For instance, with machinery malfunction, a third party may be alleged to have engaged in intentional misconduct (such as failure to comply with safety regulations), while the employer may be considered to be without fault (a true accident from the employer perspective and the employee perspective). This investigation will focus on the interaction between these classes and the liability of the employer, who ultimately bears responsibility for promoting and maintaining a safe and secure workplace, in the event of the injury or death of an employee in the workplace. Specific legal definitions of these levels of liability will be discussed later in this investigation.
It is important to note that causes of action that originate outside of the employment relationship are not subject to the Program provisions. But more importantly, claims inside the employment relationship, but do not involve an injury by accident to an employee in the workplace, are also outside of the jurisdiction of the Programs. For instance, if an employee steals from an employer, and the employer decides to sue the employee for civil relief and press criminal charges, the Program statutes have no application. This specific application for the Programs is logical. The employer only pays insurance for accidental injuries suffered by employees in the workplace. All other matters that fall outside of the purview of the insurance program are not affected by the Program statutes.

However, this investigation will show how the Program statutes are used by employers to bar common law claims by employees when the cause of action is in no way related to an industrial accident. The bar of common law claims is a Constitutional issue because the Program statutes only provide benefits for industrial accidents. If a common law claim of an employee is barred, but the cause of action was not an industrial accident, then the employee has no opportunity to recover for economic loss, even though the right to due process is guaranteed by the Constitution. All of these issues are discussed further later in this work.

This issue is at the center of this investigation. The rest of this investigation is framed around this issue and the confusion caused by the questions of application of the Programs.
iv. Jurisdiction for Claims

Jurisdiction for claims is generally a simple question of the time and place of the cause of action. Typically, injuries or deaths of employees occur on the premises of the employer, and, therefore, the proper jurisdiction is the place of employment. However, at times, injuries or deaths of employees may occur within the scope of employment, but away from the premises of the employer, such as with traffic accidents or business engaged in transportation or logistics. Generally, since the employer secures insurance in order to pay benefits in the jurisdiction where the employer conducts business, the jurisdiction for the claim must be the jurisdiction wherein the employer conducts business and has secured insurance in order to guarantee payment of benefits.40

Jurisdiction can be a complicated question in the modern economy with multinational corporations with operations across state lines, and employees that travel frequently for work across state lines and international borders. In one case, an flight attendant, working for American Airlines, and based in Puerto, as well as a permanent resident of Puerto Rico, was injured while working a flight between Puerto Rico and Newark Liberty International Airport.41 American Airlines, one of the largest airlines in the United States, maintained workers’ compensation coverage under Florida law, and the flight attendant received benefits based on Florida law.42 After receiving benefits, the flight attendant sued American Airlines because, under Puerto Rico law, the flight attendant could have received better benefits.43 In addition, the flight attendant was not

40 See section on “Legislative Intent and Key Statutory Provisions” citing statutory provisions requiring employers to secure insurance.
42 Ibid. Garcia continued to live in Puerto Rico and continued to work with the Airline. At no time did Garcia live in Florida.
43 Ibid. The statutory construction and differences between Puerto Rico law and other jurisdictions is discussed later in this work. In addition, empirical data on the rate of benefits for each jurisdiction is also
in Florida when he was injured. The federal court ruled that the flight attendant could not sue the airline for more benefits under Puerto Rico law, and could not sue the airline under common law. Once the flight attendant accepted benefits under any law, those benefits were exclusive. Employees that travel frequently with work for employers that operated in multiple states are the most complex jurisdictional questions.

To a certain extent, Programs administered by the federal government, such as the Longshore and Harbor Workers’ Compensation Act, provide comprehensive coverage on a nationwide scale, eliminating the limited jurisdiction of state-by-state Programs. Similar Programs administered by the federal government provide coverage for coal workers, and certain federal employees. However, the scope of these Programs is limited, and most employees in the United States fall under the jurisdiction of a Program administered at the state level.

discussed later in this work.
44 Ibid. This illustrates the important of the insurance coverage obtained by the employer as compared to the time and place of the injury of the employee.
45 Ibid. The principle of the exclusivity of the remedies provided by the Programs will be discussed in detail later in this work.
46 Ibid.
47 Ibid. Also see Southern Pacific Company v. Jensen, 244 U.S. 205 (1917) (where a truck driver with a Kentucky company was killed in an automotive accident in New York City); Magnolia Petroleum Co v. Hunt, 320 U.S. 430 (1943) (where a worker on oil wells who lived in Louisiana and was permanently stationed to work in Louisiana was injured while working for the employer in Texas); Industrial Commission of Wisconsin v. McCartin, 330 US 622 (1947) (where a resident of Illinois was injured while working on a temporary contracting construction job for his employer in Wisconsin); Thomas v. Washington Gas Light Co. et al.; 488 U.S. 261 (1980) (where a resident of the District of Columbia worked for a District of Columbia employer but also worked assignments in Virginia and Maryland and was injured in Virginia)
48 According to the National Academy of Social Insurance, of the 124 million workers covered by Workers’ Compensation Programs, only 3 million are federal employees. It should be noted that federal employees does not include private industry workers covered by special federal industrial insurance programs designed for those working in specific conditions, such as coal mines or harbor facilities.
49 Ibid. Programs also exists for certain employees in the energy section to provide medical care and wage replacement for exposure to radiation, hazardous materials in the testing of nuclear weapons, and other hazardous materials.
50 Ibid.
v. Adjudicating Authority

In each jurisdiction, executive branch administrative agencies act as “quasi-judicial” authorities, with appeal from the decisions of the authorities generally adjudicated by the common judicial appellate system.\textsuperscript{51} These authorities have different forms, but are generally judicial, legal and industry experts appointed by the executive branch of the government to adjudicate administrative claims, such as the adjudicating officials of the New York State Workers Compensation Board and the California Department of Industrial Relations Division of Workers Compensation.\textsuperscript{52}

This is a complex scheme that, at the surface, contravenes the principle of the separation of powers embodied in the Constitution, and the political ideology at the foundation of the United States.\textsuperscript{53} For example, in North Carolina, the North Carolina General Assembly granted quasi-judicial authority to the executive branch administrative agency, the North Carolina Industrial Commission, to reconcile the inherent separation of powers required by the Constitution of the State of North Carolina, with the recognized need to utilize administrative expertise in implementing complicated regulatory

\textsuperscript{51} Lexis Nexis. N.Y. Workers Comp. Law § 140 et seq. (Article 8). “Administration” and specifically N.Y. Workers Comp. Law § 140, entitled “Workmen’s Compensation Board.” Also see N.C. Gen. Stat. § 97-77, entitled “North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman,” and N.C. Gen. Stat. §97-78.1, entitled “Standards of judicial conduct to apply to commissioners and deputy commissioners.”


\textsuperscript{53} The “Separation of Powers” doctrine requires that the powers of government be separated in three equal and independent branches and that one branch should not have the power granted to another branch to ensure a balance of power. See the Federalist Papers for indepth discussion on the “Separation of Powers” doctrine. Also see section above on “General Framework of the Legal System” in this work.
schemes. The Constitution of the State of North Carolina does not prohibit the legislature from conferring on administrative agencies the power to exercise discretion in determining judicial matters within an authorized range, provided that adequate guiding standards accompany that discretion to govern the exercise of the delegated powers. While it is constitutional to grant executive agencies quasi-judicial authority, actions of such executive agencies are subject to constitutional scrutiny. The courts have ruled that the Programs, such as the North Carolina Workers Compensation Act, are subject to the provisions of the Constitution of the United States and the Constitution of North Carolina. In a Constitutional challenge of the Programs, the federal standard for unconstitutional policy or official action applies to state law. A law is unconstitutional if the law deprives the aggrieved party of due process and equal protection rights afforded by the Fifth Amendment and Fourteenth Amendment.

The North Carolina Industrial Commission is “a creature” of the General Assembly and “was created by statute as a quasi-judicial” executive branch administrative agency. The Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the provisions of the North Carolina Workers’ Compensation Act. The Industrial Commission is not “a court of

55 Ibid.
59 Ibid.
general jurisdiction, and it has no implied jurisdiction beyond the presumption that it is
clothed with the power to perform the duties required of it, by the law entrusted to it, for
administration." The Industrial Commission is an administrative board with quasi-
judicial functions and “has a special or limited jurisdiction” created by statute and
confined to its terms. In its functions as a court, the jurisdiction of the Industrial
Commission is limited, and “jurisdiction cannot be conferred on it by agreement or
waiver” of these principles by the parties at suit.

The legislature intended that the Industrial Commission should administer the
Workers’ Compensation Act under “summary and simply procedure, distinctly its own,
so as to furnish speedy, substantial, and complete relief to parties bound by the Act.”
Despite the power granted to the Industrial Commission to act as a court in the making of
orders and administration of judicial proceedings, the Industrial Commission is only
authorized to act within the strict and explicit bounds of the statutory authority as a quasi-
judicial executive agency established by the North Carolina General Assembly.

Executive agencies constituted as a quasi-judicial authority, such as the North Carolina
Industrial Commission, do not have constitutional authority to hear constitutional
challenges to their actions or authority, unless explicitly granted by statute. This
authority is vested in the judicial system established by the Constitution of the United
States and the Constitutions of the several states, such as North Carolina General Court of

62 Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943); Hogan v. Cone Mills Corp., 315 N.C. 127, 337
63 Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962); Bowman v. Comfort Chair Co., 271 N.C.
Justice.\(^{67}\) The North Carolina Court of Appeals and the North Carolina Supreme Court have specifically held that constitutional challenges of quasi-judicial executive agency action and authority are only proper by the filing of a separate civil action instituted in superior court.\(^{68}\)

Pursuant to a relevant judicial decision of the United States Supreme Court, an order or proceedings of an executive branch administrative agency exercising quasi-judicial authority are only valid if the agency is acting within its granted statutory authority.\(^{69}\)

This issue is extremely important because this investigation will analyze disparities between the adjudication of various claims within the same jurisdiction, and critical questions of applicability of the statutes drawing comparisons on different jurisdictions. This investigation will analyze the lack of guiding principles contained in the statutes, and the attempts to clarify terms and guide adjudication of these executive agencies through case law. This investigation will attempt to analyze the effectiveness of case law in providing guidance in adjudication, and issues with inconsistent adjudication due to the use of case law by executive agencies.


\(^{68}\) Ibid.

\(^{69}\) Voehl v. Indemnity Ins. Co., 288 U.S. 162, 77 L. Ed. 676, 87 A.L.R. 245 (1933). Voehl specifically addresses the authority of executive branch administrative agencies exercising quasi-judicial authority pursuant to federal law, particularly the Longshore & Harbor Workers’ Compensation Act. However, as Voehl is cited in Letterlough, this is evidence of the applicability of the principle in all jurisdictions, federal, state and below.
B. Statutory Construction of Exclusivity Provisions

The exclusivity provisions are the centerpiece of the Program statutes, and provide the compromise, which both secures universal coverage for employees, but forbids employees from pursuing common law claims against employers. This legislative compromise of the Constitutional guarantee of due process is at the center of this investigation. While the definitions and classifications under the statutes of the Program are similar and without much controversy, the specific provisions of the exclusivity provisions diverge further and are the center of controversy. The exclusivity provisions establish the rights of the employee to sue an employer, management (personally and individually), co-employees, and third parties. The exclusivity provisions also provide conditions in which an employer is not liable to pay benefits to an injured employee at all, for instance, if the employee engaged in intentional tort or gross misconduct that is the cause of the injury or death.

In analyzing the specific language of the exclusivity provisions, this investigation will group the several States into categories based on the similarities of exclusions. The exclusivity provisions of the Programs in California, Texas, Florida and other jurisdictions provide for explicit statutory exceptions to the exclusivity provisions. These Programs provide extensive statutory guidance for adjudication. This group will be called “Statutory Guidance for Adjudication.”

70 Lexis Nexis. See U.S. Const. amend. V, XIV. Also see New York C. R. Co. v. White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917). In White, the question of the Constitutionality of the New York Workers’ Compensation Act revolved around the exclusion of common law remedies for the employer and the employee, but specifically focused on the denial of common law rights of the employer.

71 Ibid.

72 Ibid.

73 Ibid.

74 Ibid.

75 Ibid. See the Appendix for tables with the Jurisdictions listed in order by population, and categorization of jurisdictions according to general construction of the exclusivity provisions.
The exclusivity provisions of the Programs in New York, Illinois, Pennsylvania and other jurisdictions provide for explicit statutory exceptions to the exclusivity provisions, but only in certain instances. In other instances, the adjudicating authority must rely on case law to guide adjudication. Hereinafter, this group will be called “Hybrid Guidance for Adjudication.” The exclusivity provisions of the Programs in North Carolina, Georgia and other jurisdictions do not provide any explicit statutory exceptions to the prohibition of common law claims by employees against employers. The adjudicating authority must rely on case law to guide adjudication. This group will be called “Case Law Guidance for Adjudication.”

The exclusivity provisions of the Programs in Massachusetts, Minnesota, Colorado, Maine, Delaware, Rhode Island, and other jurisdictions provide little or no exceptions to the exclusivity provisions. Due to ambiguous statutory provisions, or judicial decisions, it has been established that there are no or few exceptions. This group will be called “Complete Bar to Common Law Claims.”

This sample comprises of the twenty most populous jurisdictions in the United States, together with Minnesota, Colorado, Maine, Delaware and Rhode Island. A table with these jurisdictions is provided in the Appendix. In addition, maps showing the geographic location of these jurisdictions are also provided in the Appendix.

---

76 Specifically see Table A in Appendix Three. Table A also provides the citation for the exclusivity provisions and classifications for each jurisdiction in the United States. However, additional detailed information for each jurisdiction is provided in Table B in Appendix Three as well as other tables in Appendix Three.

77 See Map A in Appendix Two for the geographic location of the States within the Sample. Also see Map J in Appendix Two for classification of each jurisdiction in the United States. Note that both Map A and Map J in Appendix Two are derived from the data contained in Table A in Appendix Three.
i. Statutory Guidance for Adjudication

In California, the exclusivity provisions provide that:

“Where the conditions of compensation set forth in [the Act] concur, the right to recover such compensation is, except as specifically provided in [the Act], the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer. . . .”\(^{78}\)

In order to thoroughly address the question of exclusivity of the Program remedies, the statutes in California provide detailed provisions that (1) address the right of an employee to pursue a common law claim against a co-employee, and (2) address the right of an employee to pursue a common law claim against an employer.\(^ {79}\) In pertinent part, the provision provides that:

“Where the conditions of compensation set forth in [the Act] concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases: (1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee. . . . (2) When the injury or death is proximately caused by the intoxication of the other employee.”\(^ {80}\)


This first provision provides employees with the right to pursue common law claims against their co-employees in the event of intentional tort or intoxication, which is a form of gross misconduct inherently dangerous and highly likely to cause injury in hazardous situation.

With respect to the right of employees to pursue common law claims against employers, the provisions provide that:

“An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances: (1) Where the employee’s injury or death is proximately caused by a willful physical assault by the employer. . . . (2) Where the employee’s injury is aggravated by the employer’s fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer’s liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer. . . . (3) Where the employee’s injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee’s use by a third person.”81

In addition to providing employees with the right to pursue common law claims against employers in the event of intentional tort, and other egregious acts, the statutes in California also address intentional misconduct of the employer, reading that “[t]he amount of compensation otherwise recoverable shall be increased one-half . . . where the employee is injured by reason of serious and willful misconduct of [the employer].”82

---

Additional provisions provide remedies for employees in the event that the employer fails to obtain insurance for compensation, or if the employer violates certain safety regulations.³³ The Program statutes in California model the first key group of exclusivity provision, and provide strict and explicit legislative guidance for adjudication and proper venue of claims.³⁴ Other jurisdictions in this group include Texas, Florida, Ohio, Michigan, New Jersey, Washington, Arizona, Maryland, and Wisconsin.

In Texas, the exclusivity provision provide that:

“(a) Recovery of workers’ compensation benefits is the exclusive remedy of an employee covered by workers’ compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee. (b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer’s gross negligence. (c) In this section, “gross negligence” has the meaning assigned by [the Statutes]. (d) A determination under [the Act] that a work-related injury is noncompensable does not adversely affect the exclusive remedy provisions under Subsection (a).”³⁵

These provisions clearly establish that employees have the right to pursue common law claims against employers for injury or death in the workplace caused by the intentional tort or gross negligence of the employer. In addition, the guidance is further clarified by providing a statutory definition of “gross negligence”. In certain respects, using categories of general liability, such as intentional tort or gross negligence, is more beneficial than certain specific situations, such as in the statutory

³⁴ Lexis Nexis. Cal. Lab. Code §§ 3601, 3602. It should be noted that these two sections contain 772 words (excluding the provisions for employer malfeasance).
provisions in California. For instance, the statutes in California primarily focus on fraud. Fraud, depending on the circumstances, can be intentional tort, intentional misconduct or gross negligence. In addition, there are many different types of intentional tort, intentional misconduct and gross negligence that does not involve fraud.

In Florida, the exclusivity provisions provide that:

“The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except . . . When an employer commits an intentional tort that causes the injury or death of the employee. For purposes of this paragraph, an employer’s actions shall be deemed to constitute an intentional tort and not an accident only when the employee proves, by clear and convincing evidence, that: 1. The employer deliberately intended to injure the employee; or 2. The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.”

In Florida, the exclusivity provisions also provide exceptions for intentional tort and intentional misconduct, providing legal definitions of both levels of liability in the provisions themselves. The similarities between the provisions in Texas and Florida are instructive, and show the trends that are evident in this group, and the slight divergence

---

of California. In addition, providing a definition for intentional tort in the statutes further reduces ambiguity and provides employers, employees and the adjudicating authority with clear and explicit guidelines for Program adjudication.

California, Texas and Florida all address a certain important aspect of the application of the Programs. These statutes all assume that an industrial accident, or physical injury to an employee, has occurred in the workplace. In other instances, an employee may have a cause of action against an employer that does not involve physical injury.

While most jurisdictions do not provide explicit guidance in this respect, in Washington, the provisions are an instructive model. The statutory provisions provide that:

"If any employer shall be adjudicated to be outside the lawful scope of this title, the title shall not apply to him or her or his or her worker, or if any worker shall be adjudicated to be outside the lawful scope of this title because of remoteness of his or her work from the hazard of his or her employer’s work, any such adjudication shall not impair the validity of this title in other respects, and in every such case an accounting in accordance with the justice of the case shall be had of moneys received. . . . If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title."

87 It is important to note that California will be extensively analyzed later in this investigation, and the investigation will show that California implemented the statutory guidance for adjudication within the last 20 years. Case law dated before 1990 will show the dilemma presented by the prior statutory framework.

These provisions reach a step further than those in California, Florida and Texas. In addition to explicitly addressing the intentional tort of the employer that results in injury to the employee, these provisions in Washington also provide explicit guidance which requires an “application test,” which is a test to determine if the Program statutes apply. While the explicit mention of a test for adjudication is important, the statutes in Wisconsin provide guidelines for the test for adjudication, as follows:

“Liability under this chapter shall exist against an employer only where the following conditions concur . . . Where the employee sustains an injury. . . . Where, at the time of the injury, both the employer and employee are subject to the provisions of this chapter. . . . Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment. . . . Where the injury is not intentionally self-inflicted. . . . Where the accident or disease causing injury arises out of the employee’s employment. . . . Every employee whose employment requires the employee to travel shall be deemed to be performing service growing out of and incidental to the employee’s employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employee’s employment. . . . Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the workers compensation insurance carrier. This section does not limit the right of an employee to bring action against any co-employee for an assault intended to cause bodily harm, or against a co-employee for negligent operation of a motor vehicle not owned or leased by the employer, or against a co-employee of the same employer to the extent that there would be liability of a governmental unit to pay judgments against employees under a collective bargaining agreement or a local ordinance.”

This test for the application of the Program in Wisconsin is the most comprehensive application test mandated by statute.

It is important to highlight to unique characteristics of the Program statutes in Texas. In Texas, employers have an option to elect to carry insurance and subject their operations to the Program statutes.\textsuperscript{90} Employers can elect to terminate, or acquire coverage under the Programs at any time, but Employers have a continual duty to notify employees in writing of this election.\textsuperscript{91} Employees have the option to opt out of the Program coverage immediately upon starting employment with an employer, and can change that election once every twelve (12) months while working with the same employer.\textsuperscript{92}

It is also important to note the significance of a certain judicial decision in Ohio. Ohio was one of the few jurisdictions with a statute that barred common law claims for intentional tort against employers.\textsuperscript{93} This law was challenged and deemed unconstitutional.\textsuperscript{94} This particular judicial decision is extensively analyzed later in this work.

All of these examples provide explicit guidance for adjudicating authorities for the processing of claims. The analysis will primarily focus on California, with additional significant points for analysis from other jurisdictions in this group.

\textsuperscript{90} Lexis Nexis. Tex. Lab. Code §§ 406.004, 406.005. These provisions provide that the employer had the option of obtaining insurance and subjecting their operations to the Program statutes. Employers are required to notify the State authorities in writing if the choice is made to opt out of the Program framework for industrial accidents.

\textsuperscript{91} Ibid. The statutes require this notice to be in writing and within a certain time frame relevant to the election.

\textsuperscript{92} Lexis Nexis. Tex. Lab. Code § 406.034


\textsuperscript{94} Ibid.
ii. Hybrid Guidance for Adjudication

In New York, the exclusivity provisions also contain specific language for guiding adjudication. The provisions explicitly enumerate the exceptions to the exclusivity of the Program, including the right to pursue common law claims against third parties for injuries in the workplace, and against an employer for failure to obtain insurance. In pertinent part, the statutes provide that:

“...The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or, in case of death, his or her dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ, the employer’s insurer or any collective bargaining agent of the employer's employees or any employee, of such insurer or such collective bargaining agent (while acting within the scope of his or her employment). . . . The limitation of liability of an employer set forth in [the Act] for the injury or death of an employee shall be applicable to another in the same employ . . . . The option to maintain an action in the courts for damages based on the employer's failure to secure compensation for injured employees and their dependents as set forth in [this Act] shall not be construed to include the right to maintain an action against another in the same employ . . . . If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter."95

Despite these explicit exceptions to the bar on common law claims embodied in

---

95 Lexis Nexis, New York Workers’ Comp. Law § 29. The provisions contain 3,027 words, of which only 282 are included in this excerpt. This excerpt provides the spirit and primary purpose of the provisions.
the statutes, the exception of intentional tort and other specific incidents, the adjudicating authority must use case law for guidance. As a result, the adjudicating authority has to seek guidance for adjudication from both the statutes and case law. Other jurisdictions with hybrid guidance for adjudication include Illinois and Pennsylvania.

In Illinois, the exclusivity provisions provide that:

“No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury. However, in any action now pending or hereafter begun to enforce a common law or statutory right to recover damages for negligently causing the injury or death of any employee it is not necessary to allege in the complaint that either the employee or the employer or both were not governed by the provisions of this Act or of any similar Act in force in this or any other State.”

In Pennsylvania, the exclusivity provisions provide that:

“The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in [the Act].”

With both Illinois and Pennsylvania, the adjudicating authority has to seek

---

guidance from case law in order to receive instructions on the exceptions to the exclusivity provisions for employees to pursue common law claims against employers, and to test for the application of the Program statutes to the cause of action. In Pennsylvania, the statutes also provide guidance for employee common law suits against third parties for injuries in the workplace. While guidance against third parties is important, this issue is not the central focus of this investigation. Third parties are generally liable at common law for employee injuries in the workplace. The key focus of this investigation seeks to analyze the liability of employers, depending on the conduct of employers, management, the employee and any co-employees, to suit at common law for injuries or deaths of employees in the workplace.

Both Illinois and Pennsylvania present unique challenges in this analysis. In Illinois, significant case law in recent years that has found comprehensive tort reform to be unconstitutional. In Pennsylvania, an important case raised significant questions about the due process issues with Program procedures and administration. The important conclusions in these two judicial decisions were not codified, and, as a result, the case law guidance for these landmark decisions remain the only guidance for the adjudicating authorities. These decisions, as well as key decisions from New York, are critically analyzed later in this investigation.

99 Ibid.
iii. Case Law Guidance for Adjudication

In North Carolina, the exclusivity provisions provide that:

“If the employee and the employer are subject to and have complied with the provisions of [the Act], then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.”¹⁰⁰

The statutes for the Program in North Carolina do not provide any explicit exceptions to the bar of common law claims. Accordingly, adjudicating authorities must rely solely on case law for guidance on adjudication. Other jurisdictions include Georgia, Virginia, Indiana, Tennessee, and Missouri. In Georgia, the statutes provide that:

“The rights and the remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death.”¹⁰¹

In Virginia, the provisions also closely mirror the provisions in North Carolina, providing that:

“The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.”¹⁰²

¹⁰¹ Lexis Nexis. Ga. Code Ann. § 34-9-11(a). It should be noted that the statutes in Georgia also provide statutory guidance for claims against third party tortfeasors. It has already been noted that the existence of these statutory provisions is not significant for this analysis.
In Indiana, the statutes also closely mirror the provisions in North Carolina, providing that:

“The rights and remedies granted to an employee subject to [the Act] on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, the employee’s personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or death, except for remedies available under [the Act].”

The statutes in Tennessee also closely mirror the statutes in North Carolina, providing that:

“The rights and remedies granted to an employee subject to this chapter, on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of the employee, the employee’s personal representative, dependents or next of kin, at common law or otherwise, on account of the injury or death.”

The seemingly simple phrase “by accident” provides immeasurable context to the provisions. While the inclusion of this phrase to qualify the personal injury or death to an employee in the workplace appears in the exclusivity provisions in Virginia, Indiana, and Tennessee, it is important to note that the phrase appears in the definition of an industrial accident in the statutes in North Carolina. Even though this group primarily relies on case law for guidance in adjudication, it is important to note that this group generally has specific statutory language for defining the classes and causes of action. The case law analysis later in this work will extensively discuss the meaning and intent of the statutory provisions, as well as the meaning of “injury by accident.”

The statutes in Missouri provide that:

“The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such injury or death, except such rights and remedies as are not provided for by this chapter. Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.”  

Missouri has a unique construction that mirrors provisions in California that increase benefits in the event of employer gross misconduct, rather than providing the employee the ability to pursue a common law claim against the employer. This mechanism both adds a punitive element to the benefits, but fixes benefit rates to wages rather than allowing for variability through judicial discretion.

Using the same rationale, the statutes also provide that:

“Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.”

105 Lexis Nexis. Mo. Rev. Stat. § 287.120.
106 Ibid.
107 Ibid.
108 Ibid.
The statutes use the same approach to addressing gross negligence of an employee that results in injury or death, by reducing the benefit rate to penalize the employee.\textsuperscript{109} Notwithstanding, Missouri is still a “case law guidance” jurisdiction because the statutes do not speak to the issues of intentional tort and other levels of liability explicitly. Again, in most instances, the adjudicating authority has to rely on case law for guidance in adjudication. In addition, Missouri is unique because of the clause “\textit{except such rights and remedies as are not provided for by this chapter.}” This clause, as in Washington and Wisconsin, raises the question of the adequacy of the Program remedies in lieu of common law remedies. Where the remedies do not exist under the Program statutes, the Program statutes do not apply. The case law analysis contained in this work will extensively analyze this legal principle, but it is significant to note that this language included in the statutes in Missouri. In most jurisdictions, across all groups, this “application test” is prescribed by case law, and not included in the statutes.

This investigation will primarily focus on North Carolina, but will also summarily analyze the remaining jurisdictions in this group. Particularly attention is paid to the statutory framework and specific judicial decision in Georgia and Tennessee. These cases are important because injured employees suffered permanent disfigurement as a result of an industrial accident, which was not compensatory under the Programs, and, yet, the judicial decisions held that the employees were barred from seeking any other remedy.

\textsuperscript{109} Ibid.
iv. Absolute Bar to Common Law Claims

Massachusetts is one of the jurisdictions that does not fit into any of the categories above. Massachusetts has a very peculiar statutory framework with unique elements. The first of these elements is described as follows:

“An employee shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury that is compensable under this chapter, to recover damages for personal injuries, if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person or self-insurer, if the employee shall not have given the said notice within thirty days of the time said employer became an insured person or self-insurer. An employee who has given notice to his employer that he claimed his right of action as aforesaid may waive such claim by a written notice, which shall take effect five days after it is delivered to the employer or his agent. The notices required by this section shall be given in such manner as the department may approve. If an employee has not given notice to his employer that he preserves his right of action at common law as provided by this section, the employee's spouse, children, parents and any other member of the employee's family or next of kin who is wholly or partly dependent upon the earnings of such employee at the time of injury or death, shall also be held to have waived any right created by statute, at common law, or under the law of any other jurisdiction against such employer, including, but not limited to claims for damages due to emotional distress, loss of consortium, parental guidance, companionship or the like, when such loss is a result of any injury to the employee that is compensable under this chapter.”

This statutory construction is unique to the New England region.

\[110\] Mass. Gen. Laws c. 152, § 24
In addition, the statutes provide that:

“If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled.”\(^{111}\)

This provision not only provides fixed rate increases for gross misconduct, but the language also particularly identifies management as a class that invokes the provision, acting in their official capacity and in the scope of their position. The statutes also create another special condition, as follows:

“The exclusivity provisions have no application in the event of employer gross negligence with respect to the care and maintenance of heavy machinery which caused the injury to the employee.”\(^{112}\)

A breach of these safety standards creates an exception, and employees are allowed to pursue common law claims against employers in the event of injury in the workplace. As with California and Missouri, the statutes in Massachusetts provide additional consideration to employees for egregious action on the part of an employer. Also, similar to California, the statutes in Massachusetts provide additional consideration for certain safety code violations. The complete bar on intentional tort claims against employers is unique. It is important to note that Massachusetts provides employees with additional consideration in the event of an intentional tort of an employer, which uses the Program statutes to apply punitive damages rather than the common law system. While in some respects this statutory arrangement is similar to California, it should be noted that this is different. California has a multi-tier system with common law claims for intentional tort, whereas Massachusetts does not.

In some respects, the statutes in Rhode Island mirror the provisions in Massachusetts. In Rhode Island, the statutes provide that:

“Employees or corporate officers of an employer, or managers, managing members or members of a limited liability company subject to or who have elected to become subject to the provisions of [the Act] shall be held to have waived his or her right of action at common law to recover damages for personal injuries if he or she has not given his or her employer at the time of the contract of hire or appointment notice in writing that he or she claims that right and within ten (10) days after that has filed a copy of the notice with the director, or, if the contract of hire or appointment was made before the employer became subject to or elected to become subject to the provisions of those chapters, the employee, or corporate officer, or manager, managing member or member of a limited liability company must have given notice and filed it with the director within ten (10) days after the filing by the employer who is subject to or who has elected to become subject to the provisions of those chapters of the written statement as provided. That waiver shall continue in force for the term of one year, and after that, without further act on his or her part, for successive terms of one year each, unless the employee, or corporate officer, or manager, managing member or member of a limited liability company, at least sixty (60) days prior to the expiration of the first or any succeeding year files with the director a notice in writing to the effect that he or she desires to claim his or her right of action at common law and within ten (10) days thereafter gives notice of this to his or her employer.  

In Rhode Island, again the statutes provide employees with the option to opt out of Program coverage. Despite these provisions, the statutes in Rhode Island are not identical to the provisions in Massachusetts. Rhode Island does not have special provisions to provide additional compensation to employees for intentional tort of the employer, nor the same type of exceptions and special considerations for the safety code violations of the employer.

113 R.I. Gen. Laws § 28-29-17
Colorado also has a statutory construction that does not fit into one of the three previous categories. The statutes provide that:

“The right to the compensation . . . in lieu of any other liability to any person for any personal injury or death resulting therefrom, shall obtain in all cases . . . Where, at the time of the injury, both employer and employee are subject to the provisions of said articles and where the employer has complied with the provisions thereof regarding insurance . . . Where, at the time of the injury, the employee is performing service arising out of and in the course of the employee’s employment . . . Where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee’s employment and is not intentionally self-inflicted.”\(^{14}\)

Furthermore, the statutes provide that:

“An employer who has complied with [this Act], including the provisions relating to insurance, shall not be . . . subject to any other liability for the death of or personal injury to any employee, except as provided in said articles; and all causes of action, actions at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of such death of or personal injury to any such employee and accruing to any person are abolished except as provided in said articles.”\(^{15}\)

With Colorado, and the remaining jurisdictions within this group, the provisions are rather ambiguous. As with the jurisdictions that require case law guidance for adjudication, or hybrid guidance for adjudication, the statutory provisions within this group require judicial interpretation to understanding the meaning, scope and application of the legislation. It is important to note that the provisions in Colorado do contain basic elements of an application test, which will be extensively discussed later in this work.

\(^{14}\) Colo. Rev. Stat. § 8-41-301.

In Minnesota, the exclusivity provisions provide that:

“It is the intent of the legislature that chapter 176 be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' compensation legislation shall not apply in such cases. The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. . . . The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employee, personal representative, surviving spouse, parent, any child, dependent, next of kin, or other person entitled to recover damages on account of such injury or death. If an employer other than the state or any municipal subdivision thereof fails to insure or self-insure liability for compensation to injured employees and their dependents, an injured employee, or legal representatives or, if death results from the injury, any dependent may elect to claim compensation under this chapter or to maintain an action in the courts for damages on account of such injury or death. In such action it is not necessary to plead or prove freedom from contributory negligence. The defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of employment, or that the injury was due to the contributory negligence of the employee, unless it appears that such negligence was willful on the part of the employee. The burden of proof to establish such willful negligence is upon the defendant. For the purposes of this chapter the state and each municipal subdivision thereof is treated as a self-insurer when not carrying insurance at the time of the injury or death of an employee.”

In Maine, the statutes provide that:

“An employer who has secured the payment of compensation in conformity with [the Act] is exempt from civil actions, either at common law or [by statute], involving personal injuries sustained by an employee arising out of and in the course of employment, or for death resulting from those injuries. An employer that uses a private employment agency for temporary help services is entitled to the same immunity from civil actions by employees of the temporary help service as is granted with respect to the employer's own employees as long as the temporary help service has secured the payment of compensation in conformity with [the Act]. ‘Temporary help services’ means a service where an agency assigns its own employees to a 3rd party to work under the direction and control of the 3rd party to support or supplement the 3rd party’s work force in work situations such as employee absences, temporary skill shortages, seasonal work load conditions and special assignments and projects. These exemptions from liability apply to all employees, supervisors, officers and directors of the employer for any personal injuries arising out of and in the course of employment, or for death resulting from those injuries. These exemptions also apply to occupational diseases sustained by an employee or for death resulting from those diseases. These exemptions do not apply to an illegally employed minor as described in [the Act].”\textsuperscript{117}

In Delaware, the statutes provide that:

“No employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.”\textsuperscript{118}

\textsuperscript{118} Del. Code Ann., Tit. 19, § 2304
In Minnesota, Maine and Delaware, the exclusivity provisions are similar to the states in the group with case law guidance for adjudication, simple and inclusive, but require interpretation.

For this group, the case law analysis will reveal the key characteristics of this group. Judicial decisions in this group tend to be more judicially conservative. The interpretation of the statutes is generally literal rather than in light of the intent of the law and general principles of equality and justice, as well as the general Constitutional framework. These judicial decisions give deference to the legislature and seek more explicit language to clarify the operation of the statutes for the varying degrees of liability.

It is important to note that the unique construction of the statutes in Massachusetts and Rhode Island are outside of the scope of this investigation. Significant resources were not dedicated to the question of the “option of election” provided by the statutes. However, it is important to note that Massachusetts and Rhode Island should be considered “quasi-voluntary” states in terms of the Programs. While employers do not have the choice to elect to participate in the Programs, employees have the option to remove themselves from the Program coverage. Similarly, Texas provides employees and employers with the option to opt out of coverage, with various rules for each class. This investigation does not include the empirical data and analysis necessary to evaluate the wisdom or efficiency of this statutory construction.
C. Constitutional Challenges to Exclusivity Provisions

The exclusivity provisions raise a number of questions concerning the Constitutional rights of employers and employees.

For employers, generally, common law defenses are at their disposal to protect their interests. These defenses generally include contributory negligence, assumption of risk, and primary fault of the employee. Contributory negligence is a legal principle whereby the employer would argue that the employee was also negligent and that the negligence of the employee contributed more to the injury than any alleged negligence of the employer. Assumption of risk is a legal principle whereby the employee, either implicitly or explicitly, assumes the risks of employment simply by accepting the employment and the hazards generally associated with the tasks of the job. Primary fault of the employee is a legal principle whereby the employee engaged in grossly negligent conduct and this conduct results in injury, without any significant tort on the part of the employer.

While common law defenses are abandoned, the principles were not completely discarded. As previously illustrated, employees that commit an intentional tort, engage in conduct that is grossly negligent or intentionally malicious are liable at common law for the injury of a co-employee. In addition, employers generally are not required to provide benefits for employees that engaged in grossly negligent behavior if the behavior results in injury to the employees themselves. These statutory provisions are not simply measures to appease the interest of employers. The Programs must provide employers with due process, and the Program design aims to meet these requirements.
For employees, common law claims generally provide significantly higher monetary remedies, but, however, are difficult and costly to pursue.\textsuperscript{119} As previously illustrated, the Programs were developed at a time when few employees exercised their rights at law, and many workers bore the costs of injury in the workplace. Today, the general public, including employees, are far more educated, are well aware of their rights at law, and are far more likely to have at least minimal resources in order to exercise those rights. In addition, the rapid rise in the cost of living, and particularly health care costs, has created a necessity for the general public and employees to ensure that there are economic programs in place to adequately cover costs caused by accidents through insurance programs. At the same time, these costs also encourage the general public to aggressively pursue remedy for economic loss due to the fault of others. The rapid rise in the frequency of litigation did not occur until after 1960, and thus, most of the Constitutional challenges of employees to the exclusivity provisions did not occur until after 1960.

This section will provide the basic Constitutional challenges. These challenges raised questions concerning the application of the Programs for employers and employees. First, this section will analyze the 1917 United States Supreme Court case \textit{New York C. R. Co. v. White}, the landmark case that established that the Programs are constitutional, with certain conditions.\textsuperscript{120} This section will also analyze more recent case law that addresses the rights of employees to pursue common law claims against employers.

i. **Principles of Constitutional Law**

The relevant constitutional provisions include the Fifth, Ninth, Tenth, and Fourteenth Amendments of the Constitution. In pertinent part, the Fifth Amendment provides that:

> “No person . . . shall . . . be deprived of life, liberty, or property, without due process of law.”

The Fifth Amendment guarantees the right to due process in civil matters, in order to seek remedy for an alleged tort.\(^\text{122}\)

The Ninth Amendment provides that:

> “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Ninth Amendment ensures that the government only exercises power explicitly delegated and provided in the statutory provisions.\(^\text{124}\) Any powers not explicitly delegated to the federal government are beyond the scope of federal power.\(^\text{125}\)

---

\(^\text{121}\) Lexis Nexis. U.S. Const. amend. V.

\(^\text{122}\) Ibid. Also see Lexis Nexis. *New York C. R. Co. v. White*, 243 U.S. 188 (1917) quoting *Walker v. Sauvinet*, 92 U.S. 90; and *Frank v. Mangum*, 237 U.S. 309, 340. It is important to note that the equal protection clause of the Fourteenth Amendment was cited in tandem with the Fifth Amendment in challenge the revocation of common law claims. The principle of guaranteed due process for civil suits will be examined further later in this work. It is important to note that the Seventh Amendment provides the right to trial by jury, but only in cases before federal courts, which are established by the Constitution. In state courts, the states have the power to established courts which grant “adequate due process” but are typically modeled after the federal court system with trial courts, and intermediate appellate court (or courts) and a supreme court. Appellate procedures in the state court systems also typically mirror the procedures in the federal court system. Similarly, most states have guarantees to a trial by jury in the state court system, but this guarantee is established by the State Constitution, and not the federal Constitution. However, where trials are not guaranteed by jury, the state must provide at least “adequate due process.”

\(^\text{123}\) Lexis Nexis. U.S. Const. amend. IX.

\(^\text{124}\) Ibid. With respect to the government in light of the Ninth Amendment, it is important to note that this limitation only pertains to the federal government. Limitations on State power would be through different measures, such as a similar provision in a State Constitution.

\(^\text{125}\) Ibid. Therefore the people and the several States retain this power.
Similarly, the Tenth Amendment provides that:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”126

The Ninth and Tenth Amendments provide that only the powers explicitly delegated to the federal government by the Constitution and federal law are within the federal domain.127 Therefore, where the federal law or the Constitution does not grant the federal government explicit powers, the people and the State retain such power and the freedom to act within said domain, but only in accordance with the remaining Constitutional provisions.128

The Fourteenth Amendment provides that:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”129

In furtherance of the guarantees provided in the Fifth Amendment, the Fourteenth Amendment establishes the rights of citizens for legal protection in every State, and guarantees the equal protection under the law for all citizens.130

126 Lexis Nexis. U.S. Const. amend. X.
127 Ibid. Even though federal law may not specifically delegate explicit power of the federal government, such as administration of Workers’ Compensation programs, Workers’ Compensation laws, and all other state laws and official state action, must comply with general Constitutional provisions concerning due process and other basic individual civil and constitutional rights.
128 Ibid. It should be noted that the power retained by the subordinate jurisdictions subject to the Constitution much comply with the Constitutional provisions.
130 Ibid.
Article VI of the Constitution provides that:

“*This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*”\(^{131}\)

This section in Article VI provides for the supremacy of the Constitution and federal law over State law, and binds judges in all courts, even in State courts, to uphold the Constitution and federal law as supreme.\(^{132}\) Therefore, when the Supreme Court renders a decision on a Constitutional question, all subordinate jurisdictions must use the interpretation for Constitutional questions in similar proceedings.\(^{133}\) This is a critical characteristic of the framework of governance in the United States.\(^{134}\) These principles ensure that the Constitution always remains the centerpiece of the framework of governance, and that the Supreme Court has the ultimate role of interpreting the Constitution to ensure the protection of basic individual rights at all.\(^{135}\)

This investigation primarily focuses on the principles of “due process of law,” embodied in the Fifth Amendment and Fourteenth Amendment. The principle of “equal protection of the law” is also important in this investigation. This principle is embodied in the Fourteenth Amendment. The interaction between federal Constitutional guarantees and state law will also serve as an important point of analysis in this investigation.

\(^{131}\) Lexis Nexis. U.S. Const. art. VI § 1.
\(^{132}\) Ibid.
\(^{133}\) Ibid.
\(^{134}\) Ibid.
\(^{135}\) Ibid.
The principles of “due process,” “rational basis,” and “equal protection,” will be briefly discussed in this section in order to provide context for the analysis contained in this investigation. Definitions for these three terms will primarily be provided in three important decisions rendered by the United States Supreme Court.

In *New York C. R. Co. v. White*, in 1917, an employer argued that workers’ compensation violated his due process rights enshrined in the Fifth Amendment and Fourteenth Amendment by guaranteeing an injured employee without regard for fault or negligence.\(^{136}\) Due process, from a civil law perspective, is a principle, which provides every person with the right to a venue for adjudication of tort claims, and the opportunity to assert claims and present defenses.\(^{137}\) In 1966, the Supreme Court established that “[w]here rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.”\(^{138}\)

In *Loving v. Virginia*, in 1967, the Supreme Court heard a challenge to a law forbidding interracial marriage.\(^{139}\) The Court noted that the prior major challenge to a law that forbid interracial marriage analyzed if two individuals of different races that married in a jurisdiction that forbids such a marriage received equal penalty for violation of the law.\(^{140}\) However, the Court ruled that, while this question is crucial, equally important is the question of whether interracial couples, as a class, are treated the same as same-race couples, a class with similar standing, under the law, a principle called “equal protection”.\(^{141}\) If interracial couples are treated differently than same-race couples, then

---


\(^{137}\) Ibid.


\(^{140}\) Ibid.

\(^{141}\) Ibid.
the differences must be reasonable and rational, a principle called “rational basis”.142

In Brown v. Board of Education, in 1954, the Court ruled that public education must be provided to all on an equal basis, and that the law must protect the basic rights to make sure there is equal access to basic rights and services, speaking more to the principle of “equal protection”.143 The Court noted that public education was virtually nonexistent at the time of the passage of the Fourteenth Amendment in 1868.144 As a result, there was little case law that addressed the meaning and effect of the Fourteenth Amendment on public school segregation in 1954.145

Similarly, in 1917, when the Supreme Court heard New York C. R. Co. v. White, the labor market was far different.146 Most of the working class, particularly in hazardous employment, did not have the resources to exercise their legal rights.147 However, today, the working class has resources at their disposal in order to exercise these legal rights.148 The middle class has significant interests in seeking legal remedy for economic damages because of the rapid rise in the cost of living as well as health care costs.149

This investigation will not only be framed with regard for these principles of Constitutional law, but also for the changes in the context within the labor market, both the changes in the nature of work of the majority of the workforce, and the availability of the common law legal system to the common worker.

---

142 Ibid.
144 Ibid.
145 Ibid.
146 See New York C. R. Co. v. White.
147 Ibid. In addition, employees had a heavy burden to prove sole negligence of the employer.
148 Ibid.
149 Ibid.
Challenges to Exclusion of Common Law Defenses

In 1917, the United States Supreme Court held, in *New York C. R. Co. v. White*, that the Programs are not a violation of the due process guarantees enshrined in the Fifth Amendment and Fourteenth Amendment of the Constitution, so long as the Programs provide an “reasonably just substitute” for the prohibited common law claims for civil remedy for personal injury or death by industrial accident in the workplace.\(^{150}\)

“A proceeding was commenced by [the Estate of Jacob White] before the Workmen’s Compensation Commission of the State of New York, established by the Workmen’s Compensation Law, to recover compensation from the New York Central & Hudson River Railroad Company for the death of . . . Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. . . . a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. . . . The Commission awarded compensation in accordance with the terms of the law; the New York Central Railroad Company, successor, through a consolidation of corporations, [appeals alleging the violation of] to the rights and liabilities of the employing company. The . . . [company argues] . . . that to award compensation to [the Estate] under the provisions of the Workmen’s Compensation Law would deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in contravention of the Fourteenth Amendment. . . . [T]he prescribed liability is made exclusive of all other rights and remedies [at law, including common law rights and remedies] for injuries to employees or for death resulting from such injuries . . . not [to] exceed a fixed or determinable sum . . . shall be held to be a proper charge in the cost of operating the business of the employer”\(^{151}\)


\(^{151}\) Ibid. The case cites the New York Workers’ Compensation Law, specifically Section 11 pertaining to the exclusivity of all other rights and remedies, the Laws of the State of New York of 1913, Chapter 816, and reenacted in Chapter 41 of the Laws of the State of New York of 1914. The case also cites the Constitutional Amendment of the Constitution of the State of New York pertaining to industrial insurance, which took effect on January 1, 1914.
The principle issues under review were the exclusivity provisions:

“The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) that the employer’s property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee’s rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer’s fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment.”

The Court justified this modification of the due process as a constitutional use of state police power, which is a principle that allows the State to impose rational statutes to regulate the relationships in implied contracts between classes properly established under the law. In light of the many regulations concerning workplace safety, occupational hazards, and the liability to employers, the Supreme Court had already ruled that “…the authority of the States to establish, by legislation, departures from the fellow-servant rule and other common-law rules affecting the employer’s liability for personal injuries to the employee…” are constitutional uses of state police power.

---

152 Ibid. Refer back to Part I in order to find summary information about the right of employees to sue employers, and the historical elements and political environment in which workers compensation was developed.
153 Ibid.
154 Ibid.
In support of the legislation, the supporters asserted that:

“[I]t is said that the whole common-law doctrine of employer’s liability for negligence, with its defenses of contributory negligence, fellow-servant’s negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.”

The Supreme Court further ruled that “the particular rules of the common law affecting the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the law making power of the State; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.” To this end, the Supreme Court found that “it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.”

155 Ibid.
156 Ibid.
157 Ibid.
The Court defended this stance by reasoning that the “common-law rules respecting the rights and liabilities of employer and employee in accident cases . . . may be altered by state legislation, and even set aside entirely -- at least if some reasonably just substitute be provided.”\textsuperscript{158} But, the Court warned that “it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.”\textsuperscript{159}

These common law rules include:

“The common law bases the employer’s liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. . . . The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman’s negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. . . . By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer’s negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them, in either of which cases he does assume them, if he continue in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not in ordinary cases assume the special risk.”\textsuperscript{160}

\textsuperscript{158} Ibid.
\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid.
The Court also found that:

“The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. ‘The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State must suffer.’ It cannot be doubted that the State may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be "natural and inalienable"; and the authority to prohibit contracts made in derogation of a lawfully established policy of the State respecting compensation for accidental death or disabling personal injury is equally clear.”\(^{161}\)

The Supreme Court further added that “[m]uch emphasis is laid upon the criticism that the act creates liability without fault.”\(^{162}\) The Court further added that “liability without fault is not a novelty in the law.”\(^{163}\) The Court provides the following examples of liability without fault, showing that “common-law liability of the carrier, of the inn-keeper, of him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence.”\(^{164}\) In summary, the Court held that “[s]tatutes imposing liability without fault have been sustained.”\(^{165}\)

\(^{161}\) Ibid. It should be noted that the Court quoted Holden v. Hardy, 169 U.S. 366, 397; Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 571; Second Employers’ Liability Cases, 223 U.S. 1, 52.

\(^{162}\) Ibid.

\(^{163}\) Ibid.

\(^{164}\) Ibid.

\(^{165}\) Ibid.
Accordingly, the Supreme Court concluded that:

“...it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall -- that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee’s interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale. . . . This being so, it is obvious that this case presents no question as to whether the State might, consistently with the Fourteenth Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the State to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee’s interests.”166

166 Ibid.
iii. Challenges to Exclusion of Common Law Remedy

More recently, employees have challenged the use of the exclusivity provisions to bar all common law claims against employers as a violation of the Constitution. These challenges have primarily included:

1. the right of the employee to pursue a common law claims when the cause of the injury is the intentional tort, intentional misconduct, gross negligence, malfeasance, illegal activity, regulatory violation, willful neglect or similar behavior of the employer;

2. the application of the exclusivity provisions to bar the common law claim of an employee against an employer of when the cause of action is not an industrial accident (thus the employee is unable to collect benefits under the Program statutory provisions); and

3. the dismissal of common law claims pursued by an employee against an employer without consideration of the cause of action as an industrial accident, the application of the Program statutory provisions, or the eligibility of the employee to receive benefits under the Program statutory provisions.

Since the several States, districts, territories and dependencies all have different statutory approaches to the application of the Programs, this analysis is extremely complex. Due to this complexity, the analysis will use the groups established in the sample to analyze trends, and will cite case law that shows comparisons between jurisdictions considered by courts in interpreting the statutory provisions and the meaning and application of the exclusivity provisions.
There are three key court cases where the exclusivity provisions and immunity for employees have been challenged. Illinois attempted to implement one of the most sweeping tort reforms in history in 1995.\textsuperscript{167} The reforms provide employees with complete immunity in the event that the employer was partially at fault together with a third party liable at common law.\textsuperscript{168} In addition, the liability of employers was partially subsidized by third parties under a number of circumstances by design, and the liability of third parties was significantly reduced.\textsuperscript{169} The Illinois Supreme Court found the sweeping tort reform effort to be unconstitutional, because management, employers and third parties were immune from liability under certain conditions.\textsuperscript{170} The Pennsylvania Supreme Court has not only held that an employee can pursue a civil remedy under common law against a co-employee, but, where common law claims against the employer are questionable, a tort action cannot be dismissed until injury is found to be compensable under the Programs.\textsuperscript{171} The Ohio Supreme Court found that a statute barring common law claims for intentional tort against an employer to be unconstitutional by violation of due process and equal protection provisions where the bar was without an “adequate substitute.”\textsuperscript{172} These cases will be extensively analyzed later in this work. The specifics facts and liability of the parties involved will be discussed in these later sections.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{168} Ibid.
\item \textsuperscript{169} Ibid.
\item \textsuperscript{170} Ibid.
\item \textsuperscript{172} Lexis Nexis. \textit{Brady v. Safety-Kleen Corp.}, 61 Ohio St. 3d 624; 576 N.E.2d 722 (1991); \textit{Johnson v. BP Chems., Inc.}, 85 Ohio St. 3d 298; 1999 Ohio 267; 707 N.E.2d 1107 (1999); \textit{Van Fossen v. Babcock & Wilcox Co.}, 36 Ohio St. 3d 100; 522 N.E.2d 489 (1988).
\end{enumerate}
\end{footnotesize}
In most jurisdictions, including 46 States, District of Columbia, Guam, Puerto Rico and U.S. Virgin Islands, the courts have ruled that the Programs only provides remedy for industrial accidents.\(^{173}\) Outside of this scope, the Programs have no application.\(^{174}\) This principle establishes that if cause of action is not injury which “arose” by accident in the workplace, the cause of action is not barred at common law by the exclusivity provisions.\(^ {175}\) These cases will be extensively analyzed later in this work.

The specifics facts and liability of the parties involved will be discussed in these later sections.


\(^{174}\) Ibid.

\(^{175}\) Ibid.
There are two contradicting legal theories behind the question of the impact of employer intentional tort or intentional misconduct in injuries or death suffered by employees in the workplace.\textsuperscript{176} It important to note that the case law is only significant in interpreting the statutes where this debate is not explicitly addressed by the statutory provisions.\textsuperscript{177} First, some judicial decisions have held that an injury suffered by an employee caused by an intentional tort of an employer is not an injury “by accident” and thus the insurance obtained by the employer, as well as the legal protections provided by the exclusivity provisions, do not apply.\textsuperscript{178} However, other judicial decisions have held that injury suffered by an employee caused by the intentional tort of an employer merits additional compensation for the employee and severe penalty for the employer.\textsuperscript{179} This additional compensation and severe penalty can be provided by granting the employee the right to pursue a common law claim.\textsuperscript{180} But this same consideration can be made by granting the employee additional benefits through the Program.\textsuperscript{181} In these jurisdictions, the statutes and case law consider injury suffered by an employee caused by an intentional tort of an employer to be an industrial accident.\textsuperscript{182}

\begin{footnotes}
\footnote{176} Ibid.
\footnote{177} Ibid.
\footnote{178} Ibid. North Carolina is one such jurisdiction that has this rule for intentional tort.
\footnote{179} Ibid. New York and Massachusetts are two such jurisdictions.
\footnote{180} Ibid. New York allows common law claims.
\footnote{181} Ibid. Massachusetts does not allow common law claims, but provides additional benefits in the case of intentional tort, thereby strictly regulating legal claims between employees and employers and ensuring administration processing of all claims involving injury of an employee in the workplace, even due to intentional tort of the employer or management.
\footnote{182} Ibid. If the employee elects the Program benefits for intentional tort, the common law claim for intentional tort are completely barred.
\end{footnotes}
Similarly, there are varying theories on the effect and meaning of intentional misconduct, gross misconduct and gross negligence of the employer when such conduct results in the injury or death of an employee in the workplace. First, it is important to note that it is difficult to define these terms from a legal perspective, and establish the legal threshold necessary in order to prove that the conduct of employers qualifies as “gross negligence.” In some jurisdictions, intentional misconduct is considered to be tantamount to intentional tort, and thus treated as intentional tort. In other jurisdictions, intentional tort of the employer is strictly defined as an act taken with specific intent to seriously injure or kill an employer, and intentional misconduct is still considered an industrial accident. As a result, there is inconsistency between jurisdictions, and in the treatment of “intention” to allow for common law claims and additional consideration for employees. The meaning of these terms as provided by the case law will be analyzed and compared in this investigation. This investigation will also analyze the justification of the exceptions from the exclusivity provisions, whether for criminal activity, safety code violations, intentional tort, or intentional misconduct.

---

183 Ibid.
184 Ibid.
185 Ibid. For example, in North Carolina, intentional misconduct is defined as “conduct which the employer knew, or should have known was substantially certain to cause serious injury or death to an employee”, which is not specifically intentional, but is certainly not simply negligent. This is called the “substantially certain” standard which is also used in other jurisdictions. However, in other jurisdictions, intentional misconduct and gross negligence and gross misconduct, even for a criminal offense committed by an employer, does not except the cause of action from the exclusive jurisdiction of the Program statutes. New York is one such jurisdiction that does not allow common law claims of employees against employers for injury due to the gross negligence or gross misconduct, or even intentional misconduct of the employer.
186 Ibid.
187 Ibid.
Appendix Six

Primary Case Law Analysis
A. California

There are five key cases that are analyzed from California.

*Saala v. McFarland*, decided in 1965, addresses a question of the application of the Program when an employee is injured, but the injury in question is not an industrial accident. The employee was injured in the parking lot of her employee by a co-employee. These facts raise questions about the ability of the employee to pursue a common law claim against a co-employee.

*Johns-Manville Corp. v. Superior Court*, decided in 1980, addresses the question of common law claims for intentional tort of the employer and the serious injury of an employee as a result of such intentional tort. This Plaintiff in this case was a manufacturing sector employee for over twenty years, and represents the hazardous employment for which the Programs were designed.

*Cole v. Fair Oaks Fire Protection District*, decided in 1987, addresses the question of non-economic damages and the ability of employees to pursue common law claims against employers to collect legal remedy for non-economic damages.

*Hendy v. Losse*, decided in 1991, also addresses the question of ability of the employee to pursue a common law claim against a co-employee.

*Fermino v. Fedco, Inc.*, decided in 1994, addresses the question of illegal activity of an employer, and the ability of an employee to pursue a common law claim against an employer for non-economic damages. The Plaintiff in this case worked as a sale clerk, primarily sedentary work, without significant manual labor. This case illustrates the changing dynamics of the labor force.
In 1965, the Supreme Court of California heard one of the first challenges of the scope of the Workers’ Compensation Act.

The facts of the case are as follows:

“Plaintiff Esther Saala appeals from a summary judgment in favor of respondent Maurine McFarland in an action to recover for personal injuries sustained when struck by defendant’s automobile on a parking lot maintained by the parties’ common employer. Even though plaintiff properly received workmen’s compensation benefits since her injury was one ‘arising out of and in the course of the employment’, summary judgment must be reversed because the trial court erred in concluding that the provisions of [the Workers’ Compensation Act] barred any recovery from defendant coemployee in the present civil action for negligence. The undisputed facts show that the employer maintained a parking lot for the convenience of its personnel. At the end of their shift and while plaintiff was walking on the parking lot, she was struck by defendant’s automobile as defendant was preparing to drive away from the plant. Plaintiff was awarded workmen’s compensation benefits under the established rule that ‘Injuries sustained by an employee while going to or from his place of work on premises owned and controlled by his employer are generally deemed to have arisen out of and in the course of the employment.’ [The Act] states in relevant part that ‘Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . . . shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment. . . .’ It is then provided in [the Act], that ‘(a) Where the conditions of compensation exist, the right to recover such compensation . . . is . . . the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment. . . .’”

---

Accordingly, the Court ruled that a co-employee only has immunity against common law claims from an employee for a workplace injury if acting “within the scope of the employment.” As such, any action outside of the scope of the employment leaves the co-employee without immunity.

The Court provided justification for this logic as follows:

“[The Act] then specifies that ‘The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer.’ In distinguishing between the latter two phrases descriptive of employee actions, we note that ‘Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master.’ Defendant has not attempted to establish that she was still serving her employer when she was in the act of removing her automobile from the parking lot after completing her work shift. As the record now stands it appears that parking in the lot was, instead, a benefit to defendant provided by the employer as an incident of compensation. It is established that injuries received while enjoying the benefits furnished by the employer arise out of the course of the employment, so that if defendant had been injured in the present accident she could have collected workmen’s compensation. The express judicial acknowledgment that an injury received while enjoying an incident of employment solely for the benefit of the employee is one arising out of and in the course of employment is a further indication that if the Legislature had intended to immunize employees from suit for their actions in such situations it would not have used in [the Act] the more restricted language ‘scope of employment.’

Also, a referee of the Industrial Accident Commission stated in a parking lot case identical on its basic facts to the situation at bar, in accordance with the position advanced in that case by the commission, that the negligent coemployee should be liable to the injured employee since the coemployee was not engaged in any active service for the employer and hence was not acting in the scope of his employment.”

---

2 Ibid.
The issues addressed by the court in this case speak to the issues in Hypothesis Number Three, which focuses on the application test, which is “due process”. First, an employment relationship has to be established between the parties to determine if the parties could plausibly be subject to the Program. In the instance case, the classifications are clear. Next, the application test requires the facts related to the cause of action to be closely analyzed to determine if the cause of action resulted from an industrial accident. As previously discussed in the introductory sections, an industrial accident is “an injury which occurs by accident and arises out of and in the course of the employment”. This case also addresses the right of an injured employee to pursue a common law claim against a co-employee for a cause of action that is not an industrial accident. The court determined that this cause of action did not result from an industrial accident. The last two remaining elements of the test (eligibility for benefits and adequacy of the Program as a substitute for the common law claim), need not be addressed.

The liability of a co-employee to an injured employee in the workplace is an important issue that will be addressed in this investigation. At times, co-employees do not have significant resources, similar to the injured employee, and as such, a common law suit against a co-employee for a cause of action even remotely proximate to the workplace, would most likely not provide significant monetary relief for injury. As such, employees may elect to apply for benefits from the employer through the Programs. At other times, employees may elect to pursue common law claims against employees for causes of action arising from an intentional tort or intentional misconduct, and, more importantly, when it appears that the co-employee has the resources to provide a significant monetary award.
This case also speaks to the principle of “election of remedy” which occurs when, under certain circumstances, an injured employee may be able to pursue both a common law claim and pursue a claim for benefits through the Program statutes. In the instance case, the injured employee was able to collect Program benefits from the employer, and pursue a common law claims against the co-employee for an excepted cause of action. The ability to seeks remedy through both venues is primarily because of the nature of the cause of action, the relationships between the parties. For the purposes of this investigation, the co-employee was truly a third party under the Program statutes. The co-employee was not acting in an official capacity, and the injured employee was not engaged in tasks directly related to work. As previously discussed, the right of an employee to pursue a common law claim against a third party, even for an industrial accident, is well established. The fact that the injured employee received Program benefits is an issue that will be further addressed in this investigation.

This case reveals a number of trends. During this period, litigation because to rapidly rise in the United States. As a result, common law suits began to become more common. The rise in litigation in the United States plays a major role in the issues analyzed in this investigation.

This investigation will address these unique scenarios further. These principles include (1) the application test, (2) liability of a co-employee, (3) right of employees to pursue common law claims, and (4) election of remedy.
ii.  Johns-Manville Corp. v. Superior Court

In 1980, the Supreme Court of California again revisited the issues of the scope of the Workers’ Compensation Act in the case of Rudkin v. Johns-Mansville Corp (parties changed for purposes of appeal). The statement of the facts is as follows:

“The Workers’ Compensation Act] provides that an employer is liable for injuries to its employees arising out of and in the course of employment, and . . . declares that where the conditions of workers’ compensation exist, the right to recover such compensation is the exclusive remedy against an employer for injury or death of an employee. The issue to be decided in this proceeding is whether an employee is barred by these provisions from prosecuting an action at law against his employer for the intentional torts of fraud and conspiracy in knowingly ordering the employee to work in an unsafe environment, concealing the risk from him, and, after the employee had contracted an industrial disease, deliberately failing to notify the state, the employee, or doctors retained to treat him, of the disease and its connection with the employment, thereby aggravating the consequences of the disease. We conclude that while the workers’ compensation law bars the employee’s action at law for his initial injury, a cause of action may exist for aggravation of the disease because of the employer’s fraudulent concealment of the condition and its cause. Reba Rudkin, real party in interest (hereinafter plaintiff), brought an action against Johns-Manville Products Corporation, his employer for 29 years (defendant) and others, alleging as follows: Defendant is engaged in mining, milling, manufacturing, and packaging asbestos. Plaintiff worked in its Pittsburg, California, plant for 29 years beginning in February 1946, and he was continuously exposed to asbestos during that period. As a result of the exposure, he developed pneumoconiosis, lung cancer, or other asbestos-related illnesses.”

---

3 Ibid.

In light of the foregoing, the court found that:

“The defendant corporation has known since 1924 that long exposure to asbestos or the ingestion of that substance is dangerous to health, yet it concealed this knowledge from plaintiff, and advised him that it was safe to work in close proximity to asbestos. It failed to provide him with adequate protective devices and did not operate the plant in accordance with state and federal regulations governing dust levels. In addition, the doctors retained by defendant to examine plaintiff were unqualified, and defendant did not provide them with adequate information regarding the risk of asbestos exposure. It failed to advise these doctors of the development of pulmonary disease in plaintiff or of the fact that the disease was the result of the working conditions at the plant, although it knew that his illness was caused by exposure to asbestos. Finally, defendant willfully failed to file a First Report of Occupational Injury or Illness with the State of California regarding plaintiff’s injury, as required by law. Had this been done, and if the danger from asbestos had been revealed, plaintiff would have been protected. Each of these acts and omissions was done falsely and fraudulently by defendant, with intent to induce plaintiff to continue to work in a dangerous environment. Plaintiff was ignorant of the risks involved, and would not have continued to work in such an environment if he had known the facts. In a separate cause of action plaintiff alleged that defendant knowingly conspired with others to perpetrate the acts set forth above. The complaint sought compensatory and punitive damages, including compensation for the cost of medical care which plaintiff was required to obtain in order to treat his illness.”

Therefore, the court found that the employee has the right to pursue a common law claim against his employer.

---

5 Ibid.
6 Ibid. Note that the court found that the employer was only allowed to pursue a common law claim with respect to the fraudulent and deceptive practices of the employer, and not for the original injury. Also note that injuries and illnesses sustained by miners are now covered by a Program administered by the federal government. It is also important to note the citation of both state and federal safety regulations pertaining to the workplace safety of the injured employee.
Again, this case speaks to the issues of the right of an employee to pursue a common law claim and the application test embodied in Hypothesis Number Three. In addition, this case also speaks to the principles of “due process,” “rational basis,” and “equal protection” embodied in Hypothesis Number One. In addition, this case also speaks to the principles embodied in Hypothesis Number Four.

Due process and equal protection guarantees the availability of a venue to seek remedy. In this case, fraud and conspiracy of an employer does not fit the benefits scheme created under the Programs. The employer attempted to use the exclusivity provisions to bar a common law claim for fraud and conspiracy, but such a bar must have an adequate substitute for the forbidden common law claim. Without a benefits scheme for a cause of action such as fraud and conspiracy, the employee would not have equal protection under the law, because he would be classified as an employee subject to the Programs, his injury would not be eligible for benefits under the Program, but he would simultaneously be denied the right to pursue a common law claim.

It is important to note that the cause of action of the original occupational illness is distinct from the claim for fraud and conspiracy. Fraud and conspiracy, generally, and specifically in this case, is an act committed with an intention to cause injury to another. This ruling allows the injured employee to seek punitive damages at common law against the employer. It is believed that this punitive element is a deterrent to prevent employers from engaging in egregious behavior.
iii. Cole v. Fair Oaks Fire Protection District

The Supreme Court of California again revisited the scope of the Workers’ Compensation Act in 1987 in the Cole v. Fair Oaks Fire Protection District.7

The summary of the appellate ruling is as follows:

“The main issue presented is whether an employee may maintain a civil action in the courts for intentional infliction of emotional distress against his employer and fellow employee when the conduct complained of has caused total, permanent, mental and physical disability compensable under workers’ compensation law. We conclude that when the employee’s claim is based on conduct normally occurring in the workplace, it is within the exclusive jurisdiction of the Workers’ Compensation Appeals Board. The trial court sustained the demurrer of defendants, Fair Oaks Fire Protection District and its assistant fire chief, without leave to amend on the ground that plaintiffs’ claims came within the exclusive jurisdiction of the Workers’ Compensation Appeals Board. The Court of Appeal affirmed as to eight of the ten causes of action alleged but reversed with directions to permit amendment of the complaint as to causes of action for defamation and for false light invasion of privacy. . . . [T]he causes of action for defamation and privacy are not barred by the [exclusivity] provisions. Plaintiffs challenge the Court of Appeal determination that their other claims [barred by the exclusivity provisions].”8

In the cause of action, the facts are as follows:

“Leonard Cole enlisted as a volunteer firefighter in 1964 with the district, and in the next year he was appointed a full-time firefighter. In 1970 he was appointed engineer, and in 1977 he was promoted to captain. In March 1981 he was elected union representative and continued to serve in that capacity until April 1982.”9

---

8 Ibid.
9 Ibid.
While an employee, the Plaintiff presented various allegations against the Defendants as follows:

“*In October 1981, he was diagnosed as having high blood pressure. His physician recommended rest and recreation. In February 1982 he was examined and again found to have elevated blood pressure. He was placed on medication. The elevated blood pressure was due to unreasonable stress and pressure by the assistant chief. As union representative Cole negotiated questions of contractual interpretation with management, and the assistant chief, although formerly the union representative, deliberately harassed him in the negotiations. On one occasion the assistant chief demanded that Cole report to a meeting for performance evaluation and possible disciplinary action and refused to excuse him to attend a funeral. Although Cole had repeatedly received superior performance ratings, the assistant chief devised a novel personnel evaluation procedure for Cole for the purpose of punishing him for his union activities. Cole was informed by various members of the fire department that the assistant chief and members of the management intended to take punitive action against him because of his union activities. On May 11, Cole was placed on sick leave because of his hypertension. A doctor employed by the assistant chief reported that the level of hypertension disabled Cole from performing heavy duty and that he should be restricted to light duty until his blood pressure was better controlled. Thereafter, the assistant chief notified him by mail that he was to present himself at a disciplinary hearing on June 3, 1982. The letter falsely asserted dishonesty as one of the grounds for the hearing. It stated that Cole had stated falsely that he was on workers’ compensation and that he had been told by a county safety official not to report to work. Defendants have furnished the court with documents showing that Cole applied for workers’ compensation benefits on June 14, and subsequently received an award of medical benefits.*”\(^{10}\)

The Court concluded by acknowledging the allegations presented by Cole, but

\(^{10}\) *Ibid.*
finding that these actions were within the reasonable scope of the power of the employer to make decisions, and was not unreasonable or extreme behavior, as follows:

“Thereafter, on June 28, 1982, Cole was demoted to engineer, and was publicly stripped of his Captain’s badge. The assistant chief assigned him to perform ‘humiliating and menial duties,’ and he was ordered to return to duty from sick leave and assigned to work as a dispatcher, an entry level position. On October 18, 1982, the Board of Directors of the Fair Oaks Fire Protection District reversed Cole’s demotion and reinstated him as a captain at a reduced salary and placed him on probationary status. The assistant chief continued his harassment and sometime between July and September 1982, the assistant chief filed an application with the state to force Cole to retire involuntarily. Cole’s blood pressure was elevated by the continuous harassment, and on November 8, 1982, he suffered a severe and totally disabling cerebral vascular accident. He cannot move, care for himself, or communicate other than by blinking. [The Workers Compensation Act] provided that where the ‘conditions of compensation exist,’ the right to recover compensation is ‘the exclusive remedy’ for injury or death of an employee against the employer or coemployee acting within the scope of employment except that an employee shall ‘in addition to the right of compensation against the employer, have a right to bring an action at law for damages against such other employee,’ when the injury is proximately caused by the willful and unprovoked ‘physical’ act of aggression of such other employee. The elements of a cause of action for intentional infliction of emotional distress . . . requires outrageous conduct by the defendant, intention to cause or reckless disregard of the probability of causing emotional distress, [and] actual and proximate causation of the emotional distress. There is liability for conduct ‘exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and does cause, mental distress.’”

This case is significant for multiple reasons, particularly with respect to

---

11 Ibid.
Hypothesis Number One, Hypothesis Number Three, and Hypothesis Number Four.

First and foremost, it is important to note that not only is the injured employee a member of a union, but he served as a union representative, and the injured employee allegedly experienced harassment due to his union activities and his application for benefits through the Program.

The decision in this case is significant primarily because the last element of the application test was not performed. It is clear that the injured employee has an employment relationship with the employer, and the injuries occurred in the workplace. However, there are significant question as to if these injuries occurred “by accident.” The employer received benefits, but the court never addressed the question of whether those limited benefits are adequate considering the circumstances surrounding the cause of action. Notwithstanding the fact that many jurisdictions have severe penalties for employers that harass or otherwise retaliate against employees who exercises their rights under the Program statutes, there is a significant question about the rational basis and legislative intent of allowing employers to harass employees exercising their rights.

In addition, the principle of equal treatment is important with respect to this injured employee. While the behavior of the employer did not necessarily rise to the level of intentional misconduct or intentional tort, similar malicious, careless and reckless behavior on the part of employees, particularly drunkenness, carries severe penalties for employees, including the denial of all benefits. Similar harsh penalties should exist for employers.
In 1991, the Supreme Court of California ruled on the following claim asserted by San Diego Charger John Hendy, finding as follows:

"Review was granted in this matter to determine the effect, if any, of a 1982 amendment of [the Act], on the right of a person who suffers an industrial injury to sue a coemployee physician whose treatment allegedly aggravated the injury. The Court of Appeal held that while section 3602, as amended, no longer permits actions against a physician employer under the 'dual capacity' doctrine, a coemployee action may be maintained under [the Act]. We disagree. While the Court of Appeal was correct in its conclusion that [the Act] alone governs the right of an employee to seek damages for industrial injuries caused by a coemployee, the immunity granted coemployees by [the Act] bars this medical malpractice action against Gary Losse, M.D., because he was acting within the scope of his employment when the conduct complained of occurred. . . . Plaintiff John Hendy suffered injury to his right knee on August 11, 1986, while playing in a regular season football game as an employee of the San Diego Chargers. He was treated for that injury by defendant Losse, who was employed as a Club physician. As a condition of his continued receipt of salary and medical care at the expense of his employer, plaintiff was required to consult the Club physician. Defendant Losse examined plaintiff pursuant to his employment by the Club, and advised plaintiff to continue playing football. From May 11, 1987, and continuing to September 1987, defendant Losse negligently diagnosed and/or treated plaintiff and advised plaintiff to continue playing football. On or about May 28, 1987, plaintiff suffered another injury to his right knee during a training session. He again consulted Dr. Losse, and defendant Losse again advised plaintiff to continue playing football. Dr. Losse lacked the knowledge and skill necessary to properly diagnose and treat plaintiff's condition or, although aware of the condition, advised plaintiff to continue to play football, with the result that plaintiff suffered irreparable and permanent injury to his right knee."\(^\text{12}\)

The Court, in reviewing the allegations, found that:

“On or about September 8, 1987, when he consulted a physician who was not employed by the Club, plaintiff discovered that the cause of his injuries was defendant's failure to properly diagnose and treat his condition. Defendant demurred to the cause of action for medical malpractice on the ground that plaintiff’s exclusive remedy for his employment-related injury was within the workers’ compensation system. In support of the demurrer defendant asked that the court take judicial notice of both the National Football League employment contract and the collective bargaining agreement between the league’s management council and the National Football League Players Association, both of which governed plaintiff's employment. The collective bargaining agreement included a provision outlining the players’ right to medical care and treatment, and made the cost of medical services to be rendered by Club physicians the responsibility of the Club. The contract between plaintiff and the Club provided that plaintiff would receive ‘such medical and hospital care during the term of this contract as the Club physician may deem necessary . . . .’ The contract between defendant and the Club is not part of the record. Plaintiff opposed the demurrer on two grounds -- (1) defendant was acting in a dual capacity when he diagnosed and treated plaintiff, and (2) the action was permitted [by the Act], which permits an action at law against an employer for damages proximately caused by aggravation of a work-related injury if the ‘injury is aggravated by the employer’s fraudulent concealment of the existence of the injury and its connection with the employment . . . .’ The trial court sustained the demurrer without leave to amend, ruling that [the Act] made workers’ compensation plaintiff’s exclusive remedy even if a dual capacity situation existed, and that the complaint failed to state facts to establish concealment of either the injury or its relation to plaintiff’s employment. The Court of Appeal held that because [the Act] applies only to lawsuits against employers, its limitation on use of the dual capacity doctrine applied only to actions against employers and had no impact on an injured employee’s right to sue a coemployee.”

13 Ibid.
The Court ruled that the physician was acting within the scope of his employment in the cause of action, and details the justification for the ruling as follows:

“[The Act] establishes the conditions under which an employer’s liability for compensation . . . is in lieu of any other liability of the employer to the employee for an injury suffered on the job. [The Act also] provides in turn, with exceptions not relevant here, that when compensation is payable under [the Act], the right to recover compensation is ‘the sole and exclusive remedy of the employee or his or her dependents against the employer. . . .’ A parallel, but not identical, exclusive remedy provision, [the Act], prohibits actions against coemployees for injuries they cause when acting within the scope of their employment. Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in [the Act], shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur: A judicially recognized exception to the exclusive remedy restriction on actions against employers -- the dual capacity doctrine -- has been understood to also permit an action for damages against a coemployee physician if the injury to the plaintiff employee was caused or aggravated by the defendant. This case arises because the Legislature has imposed limits on the dual capacity doctrine by amendment of [the Act]. The 1982 amendment of [the Act] to restrict the dual capacity doctrine theretofore applied to employers does not affect the liability of coemployees. If a coemployee was acting within the scope of his or her employment, the only exceptions to the immunity created by [the exclusivity provisions] are those created by statute. A coemployee’s conduct is within the scope of his or her employment if it could be imputed to the employer under the doctrine of respondeat superior”\textsuperscript{14}

\textsuperscript{14} \textit{Ibid.}
This case is important for many reasons. First and foremost, this case cites a law codified in response to the decision in *Johns-Manville Corp. v. Superior Court*. The 1980 decision concerning the fraudulent concealment of occupational hazards and occupational illnesses garnered enough attention to warrant legislation.

This case is critical for Hypothesis Number One, Hypothesis Number Three, and Hypothesis Number Five. This case also implicitly addresses the issues raised in Hypothesis Number Two and Hypothesis Number Four.

First, Hypothesis Number Five addresses the complexity of relationships in the workplace. This case discussed, at length, the principle of “dual capacity”. With respect to the physician that was employed with the San Diego Chargers at the time, the injured football player is arguing that, as a physician, the doctor was acting in a capacity as both a co-employee and a third party. It is common that, under normal arrangements, a doctor is not employed by the same employer as an injured employee. However, the design of the Programs requires employers to provide medical care, and, as a result, employers have influence over the medical care provider. This influence is a critical reason for the law concerning fraudulent concealment of occupational hazards and occupational illnesses. However, the language in the law requires the employer to intentionally engage in such conduct that is substantially certain to cause serious injury or death, otherwise referred to as the “substantially certain” threshold or the “intentional misconduct” threshold. The court specifically finds that the complaint in this case does not allege intentional action on the part of the employer to meet this threshold, and this right to suit only exists against the employer and not against a co-employee.
The decision references the exclusivity provisions directly and speaks to the protection for co-employees when acting “within the scope of their employment.” Under this principle, all actions of the co-employee are for the benefit of the employer, and the employer assumes legal responsibility for the actions of the co-employee, under the principle of “respondeat superior”. This assumption of legal responsibility extends to industrial accidents suffered by other employees of the employer as a result the actions of an employee.

In this case, it is clear that the injured employee is eligible for benefits. It could be disputed if these benefits would be adequate. The injured employee in this case is alleging gross negligence and medical malpractice. Under normal circumstances, medical malpractice is adjudicated through the common law or through administrative law, but provides monetary relief that is significantly higher than the average benefits provided through the Programs.

From an equal protection standpoint, there is an important question as the rational basis for revoking the right to a medical malpractice suit against a doctor within an employment relationship as compared to a medical malpractice suit outside of an employment relationship. A thorough Constitutional challenge would seek a justification in support of the rational purpose behind this policy. In addition, a challenge would also question the adequacy of the Program benefits as a remedy in lieu of an award through a medical malpractice suit.

All of these issues speak to Hypothesis Number One, Hypothesis Number Three and the application test. In addition, there is a crucial question as to due process for the medical malpractice claims arising from within an employment relationship.
In 1994, the Supreme Court of California again revisited the question of the scope of the Workers’ Compensation Act in *Fermino v. Fedco, Inc.* The statement of the facts is as follows:

“Plaintiff Fermino was employed as a salesclerk in defendant’s department store, working in the jewelry department. The store’s personnel manager summoned her to a windowless room, and proceeded to interrogate her concerning her alleged theft of the proceeds of a $4.95 sale to a customer. The personnel manager was joined by the store’s loss prevention manager and by two security agents. One of the security agents stated that a customer and an employee, who were waiting in the next room, had witnessed the theft. He then demanded that Fermino confess. He told her that the interrogation could be handled in two ways: the ‘Fedco way’ or the ‘system way.’ The ‘Fedco way’ was to award points each time she denied her guilt. When 14 points were reached, she would be handled the ‘system way,’ i.e., handed over to the police. After each of plaintiff’s repeated and vehement denials, the security agent said ‘one point.’ The loss prevention manager ‘hurled profanities’ and demanded that Fermino confess. Fermino’s repeated requests to leave the room and to call her mother were denied. She was physically compelled to remain in the room for more than one hour. At one point Fermino rose out of her chair and walked toward the door of the interrogation room in an attempt to leave; however, as soon as she made a move toward the door, one of the security guards slid in front of the door, threw up a hand and gestured her to stop. Finally, Fermino became hysterical, and broke down in tears. At this point her interrogators departed from the room. Upon returning, they admitted no employee or customer was waiting to testify against her. They further stated they believed her, and that she could leave. As the result of this incident, Fermino sustained unspecified physical injury and ‘shock and injury to her nervous system and person,’ as well as ‘mental anguish and emotional distress.’”

---

16 Ibid.
As a result of this incident, Fermino pursued a common law claim against her employer. The allegations and assertions in the complaint were as follows:

"Fermino sued for false imprisonment, as well as intentional and negligent infliction of emotional distress. She claimed that the false imprisonment resulted from a method of interrogation that was approved company policy. Defendant Fedco demurred on the grounds that Fermino's claim was barred by the Workers' Compensation Act, and in particular the exclusivity provisions. The trial court sustained the demurrer. A divided Court of Appeal upheld the trial court, relying on the statute, and on [a number of] our decisions. Only the false imprisonment claim has been raised in Fermino's petition for review with this court. [The Act] provides that, subject to certain particular exceptions and conditions, workers' compensation liability, 'in lieu of any other liability whatsoever' will exist 'against an employer for any injury sustained by his or her employees arising out of and in the course of the employment.' As we have recognized, the basis for the exclusivity rule in workers' compensation law is the 'presumed compensation bargain, pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' We recognized in Shoemaker and elsewhere, however, that certain types of injurious employer misconduct remain outside this bargain. There are some instances in which, although the injury arose in the course of employment, the employer engaging in that conduct 'stepped out of [its] proper role' or engaged in conduct of 'questionable relationship to the employment.' Fermino took the position below that her false imprisonment was in fact an instance of an employer acting outside of its proper role. The Court of Appeal disagreed."

---

17 Ibid.
18 Ibid.
In analyzing the proper treatment of intentional tort and reckless misconduct of employers and co-employees, the Court analyzed the statutes and important case law in other jurisdictions. The court found that:

“It regarded Fedco’s action as merely a form of employee interrogation, as normal as ‘demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances . . . .’ The court concluded that in this case, as in Cole, the mere fact that the practice was characterized as intentionally tortious and calculated to cause the employee harm was not sufficient to place the conduct outside the scope of the workers’ compensation system. We agree that a proper understanding of Cole, and the related line of cases preceding and succeeding it regarding the relationship between intentional torts and worker’s compensation, is important for deciding the case before us. We find however, that the Court of Appeal has misapplied the doctrine that has emerged from these cases. A brief review of that doctrine is appropriate. In a majority of jurisdictions, all or virtually all intentionally tortious acts committed by an employer against an employee in the course of employment are excluded from the worker’s compensation system. These jurisdictions typically have statutes that provide or are construed as providing that only ‘accidental’ workplace injuries are to be covered by workers’ compensation. Courts also rely on general public policy considerations to exclude intentional torts from the compensation systems or have statutes that explicitly exclude intentional torts. As the Utah Supreme Court declared, ‘it would serve no social purpose to allow an employee to intentionally injure another employee engaged in the same employment, then use an otherwise socially beneficial, remedial, statute as a shield for such wrongdoing.’ Employees in these jurisdictions are therefore free to pursue civil actions against employers that engage in intentionally tortious conduct.”

---

19 Ibid.

After analyzing the scope of Workers’ Compensation coverage in Utah, Mississippi, New Jersey, Michigan, and Washington, the Court then analyzed the scope of Program coverage in California.\textsuperscript{21}

“In California, the place of intentional torts in the workers’ compensation system has been somewhat more complicated, for at least two reasons. First, the . . . exclusivity [provision], which declares that ‘any injury . . . arising out of and in the course of . . . employment’ is covered by the Act, is unqualified by any reference to accident or intentional tort. Second, [the Act] provides that employees shall have their workers’ compensation awards ‘increased [by] one-half’ if the employee’s injury results from the employer’s ‘serious and willful misconduct.’ The Legislature, it would seem, has thereby evinced its intent to include at least some portion of what are classified as ‘intentional torts’ within the workers’ compensation system. It is equally true, however, that the Legislature has not expressed clearly its intent to categorically exclude from the courts all intentional torts committed by employers against employees. [The Act] provides that workers’ compensation liability will exist ‘in lieu of any other liability whatsoever . . . without regard to negligence . . . .’, we concluded, after extensive review of the applicable constitutional and legislative history of the Act, that the 1918 constitutional amendment which establishes the workers’ compensation system ‘irrespective of . . . fault,’ should be read in light of . . . the . . . Act. [B]oth the language and the legislative history of the Act make clear that the Legislature, in setting the terms of the compensation bargain, was focused on eliminating ‘common law tort concepts of negligence.’ Thus focused, the Legislature did not explicitly address the place of common law intentional torts in the workers’ compensation system. This legislative ambiguity is compounded by case law construing [the Act], which suggests that the concept of ‘serious and willful misconduct’ is not completely congruent with that of intentional common law tort.”\textsuperscript{22}

\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid.
Accordingly, the Court proceeds to review precedents in order to seek to define
the scope of the Workers’ Compensation Act with respect to intentional tort, and the
continuum of causes of action between intentional tort and reckless behavior.  

“We attempted greater clarification of the place of
intentional torts in the workers’ compensation system in
Johns-Manville Products Corp. v. Superior Court. In that
case the plaintiff was an asbestos manufacturing company
employee who had contracted various diseases related to
long-term exposure to asbestos.’ Nonetheless, we
 concluded that plaintiff’s second claim of injury was not
barred. We recognized that ‘where the employer is charged
with intentional misconduct which goes beyond his failure
to assure that the tools or substances used by the employee
or the physical environment of a workplace are safe, some
cases have held that the employer may be subject to
common law liability.’ . . . We thus permitted an action at
law against the employer/defendant for fraudulent
concealment. This court returned to the subject of
intentional torts and workers’ compensation in Cole. . . .
We held, nonetheless, that his claim was barred by
workers’ compensation. We reasoned that a supervisor’s
conduct was ‘inherently intentional.’ In order to properly
manage its business, every employer must on occasion
review, criticize, demote, transfer and discipline employees.
Employers are necessarily aware that their employees . . .
may consider any such adverse action to be improper and
outrageous. We concluded that ‘when the misconduct
attributed to the employer is actions which are a normal
part of the employment relationship . . . an employee
suffering emotional distress causing disability may not
avoid the exclusive remedy provisions.”

23 Ibid.

24 Ibid. It should be noted that the Court cited Johns-Manville Products Corp. v. Superior Court (1980)
District, 43 Cal. 3d 148, 729 P.2d 743 (1987); as well as Unruh v. Truck Insurance Exchange (1972) 7
Cal.3d 616 [102 Cal.Rptr. 815, 498 P.2d 1063]; and Ramey v. General Petroleum Corp. (1959) 173
The Court then established criteria for intentional tort as follows:

“Thus Cole and Johns-Manville contemplated a tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers’ compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under [the Act]. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought. Cases decided after Cole have elaborated on this third category. In Hart v. National Mortgage & Land Co., the court considered whether a civil action for intentional infliction of emotional distress and battery, based on a supervisors persistent personal harassment of an employee that included acts of physical molestation and deliberate humiliation, was barred by the exclusivity rule. In holding that the action for intentional infliction of emotional distress was permitted, the court distinguished the case from Cole. Unlike the demotion in Cole, the campaign of harassment directed against the plaintiff/employee ‘had a questionable relationship to employment, and [was] neither a risk, an incident, nor a normal part of Hart’s employment . . . .’ The Hart court therefore distinguished its case from Cole by looking to the employers conduct, rather than its state of mind. The employer, in engaging in this campaign of harassment, used behavior that could not be considered a normal risk of employment. In Gantt v. Sentry Insurance, we further clarified the ‘proper role’ exception to the exclusivity rule. In that case, the plaintiff was demoted and constructively discharged for no reason other than his support for a fellow employee, who was the victim of sexual harassment, and his refusal to testify untruthfully or withhold testimony in the course of the Department of Fair Employment and Housing investigation.”

---

The Court found that:

“We concluded that ‘[w]hen an employer’s decision to discharge an employee results from an animus that violates the fundamental policy of this state . . ., such misconduct cannot under any reasonable viewpoint be considered a normal part of the employment relationship.’ Gantt thus further defines the doctrine formulated in Johns-Mansville and Cole. The case makes clear that any inquiry into an employer’s motivation is undertaken not to determine whether the employer intentionally or knowingly injured the employee, but rather to ascertain whether the employer’s conduct violated public policy and therefore fell outside the compensation bargain. Such a narrow inquiry poses none of the dangers recognized in Johns-Manville and Cole that the normal conduct of an employer could be excepted from the exclusivity rule merely because it was characterized as deliberately harmful to the employee. Our judgment that a discharge in violation of public policy was not a ‘normal part of the employment relationship’ did not constitute a factual statement about the frequency of such public policy discharges, but rather a declaration grounded in public policy itself, that such discharges should not be a part of the workplace, however common they may be. Thus, we analogized to a contractual agreement: ‘Just as the individual employment agreement may not include terms which violate fundamental public policy, so the more general compensation bargain cannot encompass conduct, such as sexual or racial discrimination obnoxious to the interests of the state and contrary to public policy and sound morality.’ With these considerations in mind, we now turn to the question whether Fedco’s alleged false imprisonment of Fermino falls within the scope of the compensation bargain. The crime of false imprisonment is defined by Penal Code as the ‘unlawful violation of the personal liberty of another.’ The tort is identically defined. As we recently formulated it, the tort consists of the ‘nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.’ That length of time can be as brief as 15 minutes. [P]laintiff . . . pleaded that she was held against her will by her employer for ill-founded reason. [H]er cause of action cannot be . . . barred by [the Act]”26

26 Ibid.
This case is the most important in the selection from California.

As illustrated, the court reviewed landmark decisions, including case law previously analyzed in this section. This decision shows strong support for punitive measures taken against employers that engage in egregious behavior, but sets limits on the scope of the punitive measures. The mention of the additional compensation through the program for injuries which are caused by the gross negligence and intentional misconduct of an employer is instructive. The court specifically addresses the dilemma presented by ambiguous statutory provisions, and the impact that these provisions can have in litigation and legal disputes. It is important to note that since this decision, California codified statutes explicitly excepting injuries caused by intentional tort of the employer from the Program coverage.

It is also important to note that this case draws comparisons with other jurisdictions, particularly New Jersey and the State of Washington (also in the group of jurisdictions with statutory guidance for adjudication of exclusivity provision application). This issue concerning statutory ambiguity speaks to the argument presented in Hypothesis Number Two.

Even with the ambiguity, the quote from the Utah Supreme Court truly embodies the spirit of Hypothesis Number One and Hypothesis Number Three, as well as Hypothesis Number Four. These jurisdictions generally agree that there is no rational basis for a public policy that allows employers, co-employees or third parties to commit intentional torts and then use the Program statutes to shield themselves from liability at common law. In addition, employers are provided the same consideration with provisions that ensure employers do not have to pay benefits for intentional tort in the
workplace that are not the fault of the employer or management, particularly self-inflicted injury.

With respect to Hypothesis Number Three, injured employees may have suffered an injury in the workplace, but injury due to intentional tort typically is not adequately compensated by the Program benefits. Finally, the courts agree, and this investigation also agrees, that it is in the public interest to allow employees to pursue common law claims against employers for intentional tort. This measure provides a deterrent.

Particularly with respect to this case, the alleged criminal actions of the employer are egregious and intentional. This case set the standard in California. In addition, this case underscored the deficiencies and ambiguity in the exclusivity provisions, which encouraged the legislative branch to take action to codify exceptions to the exclusivity provisions, including exceptions for intentional tort. While there is not a wealth of empirical data to analyze the efficiency of explicit statutory provisions, there very nature of the case law analyzed in this section, and the comparisons drawn with other jurisdictions with explicit statutory provisions at the time, speaks to the potential benefit to reforms to codify exceptions.

This case is the most powerful evidence in support of statutory reform. This investigation will later cite this case in order to draw comparisons between the other Sample groups. It should be noted that California is considered the standard for statutory guidance for adjudication at present, but that California was not the first jurisdiction to reform the Program statutes to include explicit exclusivity provisions.
B. New York

There are eight key cases from New York.


*Bardere v. Zafir*, decided in 1984, addressed the question of the right of employees to pursue common law claims against employers for intentional misconduct. Particularly, this case raises questions about the liability of the employer if injury results from the violation of the labor law and safety regulations. The Plaintiff in this case was engaged in traditionally hazardous employment.

*Briggs v. Pymm*, decided in 1989, also addresses the question of the right of employees to pursue common law claims against employers for intentional misconduct and violations of labor law and safety regulations. The Plaintiff in this case was also engaged in traditionally hazardous employment.

*Acevedo v. Consolidated Edison*, decided in 1993, addresses the differences between intentional misconduct and intentional tort.

*Fucile v. Grand Union Company, Inc.*, decided in 2000, also addresses the question of the right of employees to pursue common law claims against employers for intentional misconduct and violations of labor law and safety regulations.
i. Actions Resulting from the Attica Prison Riot

In 1980, the Court of Appeals in New York State heard the first landmark appeal on the matter of the scope of Workers’ Compensation in the Attica Prison Riot in *Werner v. New York.* The statement of the facts is as follows:

“Defendant appeals from an order of the Court of Claims denying its motion for summary judgment. The notice of claim alleges that claimant’s decedent, while employed by defendant as a guard at the Attica Correctional Facility, was killed as a result of the actions of the State of New York in retaking control of the prison from riotous inmates on September 13, 1971. The notice of claim asserts both negligence and intentional tort, specifically claiming damages for alleged false imprisonment, personal injuries and wrongful death sustained by claimant’s decedent as the result of an unprovoked, willful, wanton and intentional assault and battery by the State of New York, its officers, agents and employees. So much of the claim as alleged negligence was dismissed upon the ground that the exclusive remedy for such injuries is workers’ compensation. The uncontradicted evidence is that claimant filed for and was awarded workers’ compensation for the same injuries alleged in her claim, and that compensation payments from the State Insurance Fund were made and accepted after she started suit. Claimant received compensation for approximately 10 months before asserting her claim, and continued thereafter to receive compensation for greater than two years until a remarriage lump-sum award was made. The payments for dependent children were doubled two years after the remarriage, and continue in that amount. Claimant, having filed for workers’ compensation benefits, and having received, accepted and retained such benefits, elected to take the statutory remedy and is, therefor, estopped from pursuing the alternative remedy of a civil action at law.”

---

28 Ibid.
The Court found that:

“Defendant's motion for summary judgment should have been granted, and the claim for intentional assault dismissed. In urging affirmance, the dissenters recognize that this is not the situation where the cause of action is against a coemployee not acting within the scope of his employment at the time he inflicted the injury, a situation not covered by the policy considerations of the compensation law on suits against employers. They fail to recognize, however, the [distinction] between this situation and that where the plaintiff has not applied for and has not secured compensation payments. All concur, except Cardamone, J.P., and Callahan, J., who dissent and vote to affirm, in the following memorandum: Cardamone, J.P., and Callahan, J. (dissenting). Claimant’s decedent was a State employee killed by State troopers during the retaking of Attica Correctional Facility on September 13, 1971. An award of compensation was made by the Workmen’s Compensation Board of New York on February 8, 1972 and claimant received payments for the period from September 13, 1971 until her remarriage in 1975. The State now urges and the majority agree that the acceptance of the compensation award precludes claimant from pursuing a claim against the State for damages caused by an intentional battery that resulted in the death of claimant’s decedent. We take a different view. Although workers’ compensation is the sole remedy for a cause of action based in negligence, this claim alleges an intentional tort committed by the State’s agents, New York State troopers involved in the storming of the prison. The exclusive remedy of Workers’ Compensation Law does not bar an employee who has accepted workers’ compensation benefits from bringing a common-law cause of action against a coemployee who has committed an intentional assault upon him. The statute has also been so construed where an employee has been assaulted by the employer. The Court of Claims properly dismissed so much of the claim as alleged injuries arising out of negligence on the part of the State upon the ground that the exclusive remedy is workers’ compensation.”

---

29 Ibid.
The Court found that:

“It properly declined to dismiss that portion of the claim which alleges that injuries resulted from a willful and intentional assault upon claimant perpetrated by the State, its officers, agents and employees. In Legault v. Brown relied upon by the majority, plaintiff was injured when a scaffold gave way. The court noted that plaintiff had two inconsistent remedies available – workmen’s compensation or common-law intentional assault. Since the theory of one action negated the theory of the other, plaintiff’s decision to pursue one remedy foreclosed a second action brought on contradictory grounds. Plaintiff was deemed to have elected his remedy. Legault was cited with approval in Matter of Martin v. C. A. Prods. Co. The case presently before us differs in a crucial manner from Legault and Martin. In those cases there was but one action by the defendant employer. The employer was either negligent or it acted with intent. It could not be both. When the employees secured workmen’s compensation insurance, they elected their remedy and relinquished their common-law claim. Here the situation is entirely different. Claimant alleges that the State caused her decedent’s death in two ways. First, it negligently failed to prevent the riot. This claim is covered by the workers’ compensation award. Second, it is alleged that the State, through its agents, intentionally shot and killed the decedent. Since this is an entirely separate cause of action based on a different wrong, it is not foreclosed by an election of remedies theory. It would be particularly unjust to hold otherwise. The death of claimant’s husband on September 13, 1971 left her a widow with three minor children. Her claim for compensation, filed on October 1, 1971, was at the time when investigations into the assault on the ‘D’ yard were just beginning, and the reasonableness of the State’s use of force was being questioned. It would seem unreasonable to expect claimant to realize that there might exist a cause of action for intentional tort. We do not believe that she can be held to have waived a remedy when unaware of its existence. Accordingly we dissent and vote to affirm.”

In 1983, the high court in New York State heard a second landmark case concerning the question as to the scope of the Workers’ Compensation Act in the Attica Prison Riot in *Prave v. New York*. The facts are as follows:

“The State appeals from 17 separate orders of the Court of Claims which denied its motion for summary judgment in actions for intentional assault stemming from the Attica uprising. The State contends that the actions are barred by claimants’ acceptance of workers’ compensation benefits. Claimants contend that they never applied for the benefits and should not be held to have elected their remedy. After the retaking of the prison, the State continued to pay claimants’ salary and sought reimbursement from the State Insurance Fund, its workers’ compensation carrier, on a form signed by claimants. In some cases claimants received a lump-sum award for permanent injury or disfigurement and medical expenses in addition to full salary for the time they were unable to work. In all cases salary and medical expenses were paid pursuant to determinations by the Workers’ Compensation Board that the injuries were compensable. Although an exception to the general rule that workers’ compensation is the exclusive remedy of an injured employee exists wherein the injury results from an intentional tort committed by the employer, the acceptance of benefits properly awarded and based on a determination that the injury is accidental bars the employee from maintaining an action at law. Claimants are not without protection when the employer applies for benefits or reports the injury since the employee may demand a hearing before the Board and contest compensability on the ground that the injury was intentional rather than accidental. We agree with the Court of Claims approach in allowing the claimants an opportunity to return to the Board for reconsideration of its determination. However, we do not believe that denial of summary judgment is necessary to accomplish that purpose.”

---

Also in 1983, the high court in New York State heard another landmark case concerning the question as to the scope of the Workers’ Compensation Act in the Attica Prison Riot, in Jones v. New York. The statement of the facts is as follows:

“Herbert W. Jones, Jr., an account clerk employed by the State at Attica Correctional Facility, was taken hostage on September 9, 1971 during the Attica uprising. He died instantly on September 13, 1971 from a gunshot wound to the head caused by a .270 caliber bullet discharged by one of the State troopers during the rescue and retaking operation. In her claim against the State for Jones’ wrongful death, claimant, his widow and administratrix, asserted two causes of action, the first for negligence and the second for intentional tort. In an earlier appeal to this court, we reversed the Court of Claims and dismissed the claim in its entirety. Because workers’ compensation is the exclusive remedy for the claims based on negligence, the Court of Appeals affirmed our dismissal of the first cause of action. As to the second cause of action based on intentional tort, however, it reversed and reinstated the claim stating: ‘Should the Judge in the Court of Claims find that the force used against the decedent was more than necessary under all the circumstances, then plaintiff is entitled to recover.’

In light of the allegations, the Court held that:

“The general rule is, of course, that an employee injured in the course of employment is relegated to workers’ compensation as his exclusive remedy. Where, however, injury results from ‘an intentional tort perpetrated by the employer or at the employer’s direction, the [Act] is not a bar to a common-law action for damages. . . . [F]or . . . the intentional tort exception, the employee must establish that the employer used excessive force and that the acts of the employer constituting such excessive force were deliberate and not merely reckless.’

34 Ibid.
35 Ibid.
The Court proceeds to analyze if the actions of the State were excessive and intentional as follows:

"Whether the injury is inflicted by the employer himself or by a coemployee, the basic rule is the same. Thus, where one employee assaults another and the act was neither instigated nor authorized by the employer, the employer will not be found liable in an action for damages under respondeat superior, for the offending employee’s conduct, although intended by him, may be found accidental as to the employer and therefore compensable under workers’ compensation with the result that the injured employee’s common-law action is barred by the exclusivity provision. Where, however, the assault by the coemployee was directed by the employer or committed at the employer’s instigation, common-law liability may result. The question is whether, applying the above rules, the evidence adduced on the trial is sufficient to support liability under the intentional tort exception. We find that it is and that the judgment should be affirmed. The Court of Appeals has not specified what degree of force will be viewed as sufficiently excessive to impose liability on the State for an intentional assault. By any definition of ‘excessive force’, however, we agree with the Court of Claims that the force employed here ‘in retaking the facility’ was ‘indeed excessive’. A full-scale armed assault was planned and carried out for the purpose of retaking control of the prison from the inmates and freeing the hostages. Almost 700 men, including 262 State troopers and 423 correction officers from both Attica and Auburn Correctional Facilities plus some park policemen from Letchworth State Park, participated. They were armed with a wide variety of weapons including .270 caliber rifles suitable for big game hunting and other high-powered rifles of various calibers, .38 and .357 caliber pistols, 12 gauge shotguns loaded with ‘00’ buckshot, a .44 Magnum Ruger carbine and .45 caliber Thompson machine guns. Their orders were to fire when in their judgment an ‘overt act’ was in progress which threatened the life of one of the hostages, each of whom was being physically held by an inmate."
Accordingly, the Court analyzes if the employees followed the orders of the State and if the orders of the State were clear and within reason:

“After an immobilizing type of tear gas was dropped for the purpose of putting the inmates ‘on the ground’, the assault team fired hundreds of rounds of ammunition of various descriptions in the direction of the prisoners and hostages, most of whom were grouped in D yard -- including 261 rounds of 12 gauge shells, each containing 9-12 pellets of buckshot which would spread into a 24-inch wide pattern at 150 feet. It was a cloudy day and visibility was obscured by the tear gas and the smoke from smoldering fires in the prison. The gas masks that members of the assault group were wearing made it difficult and in some cases impossible to aim through the rifle sights. The firing resulted, the court found, in the deaths of 10 prison employees held as hostages and 32 inmates; 33 employees were injured. Opinions differ as to whether the circumstances called for the use of any fire power. In our view, however, the testimony reveals no instance where one of the hostages was observed by a member of the assault team to be in such imminent danger of being killed as to justify the extreme risk to him and to others of firing under conditions of reduced visibility for the purpose of hitting a threatening inmate at a distance of 100 yards or more. The proof is overwhelming that much of the firing was haphazard and directed indiscriminately at the group of prisoners and hostages in D yard and that most, if not all, of it was unwarranted as a reasonable means of protecting the hostages from harm. Under any conception of the proof, this massive use of fire power directed at the group of inmates and hostages (with the obvious risk to the hostages, some of whom were held as shields for the inmates) cannot have been necessary and cannot be considered to have been the employment of a degree of force that was appropriate or one that was justified by any or all of the existing circumstances. Such a degree of force, we hold, was ‘more than necessary under all the circumstances’. Claimant, we find, has met her heavy burden of proof on this issue. . . . [I]t must appear that the offending actions were those of the State. On this issue also, we find that claimant has met her burden of proof.”

37 Ibid.
Also in 1988, the high court in New York State heard another landmark case concerning the question as to the scope of the Workers’ Compensation Act in the Attica Prison Riot, in *Hardie v. New York*. The statement of the facts is as follows:

“Claimant’s deceased husband was one of the State correctional employees killed when the State Police and other law enforcement agencies retook Attica Correctional Facility in Wyoming County during the prisoner uprising in September 1971. Shortly thereafter, she filed a claim for workers’ compensation death benefits and received and cashed a number of compensation checks from the State Insurance Fund, until she retained an attorney and, upon his advice, ceased accepting benefits. In December 1971, claimant filed a notice of intention to file a civil damage claim in the Court of Claims against the State, asserting, inter alia, a cause of action for intentional assault by State Police personnel. At the same time, her attorney sought and obtained adjournments of the workers’ compensation proceeding pending the outcome of the action in the Court of Claims, and the compensation case was closed in October 1980 pending such outcome. Claimant’s action against the State in the Court of Claims was one of those arising out of the retaking of the prison whose dismissals were affirmed in 1983 by the Court of Appeals in *Cunningham v. State of New York*. The various claimants’ actions in that case were dismissed on alternative grounds, namely, (1) that the claimants could not, in their actions against the State, collaterally attack the conclusiveness of the Workers’ Compensation Board awards based on findings of accidental death, and (2) that they forfeited their right to pursue their alternative civil remedy for intentional tort by accepting workers’ compensation benefits. Although claimant’s compensation case had not proceeded to an award, dismissal of her action was expressly affirmed on the second of the foregoing grounds. The court, however, recognized that the claimants would not be precluded from suing the State civilly upon establishing before the Board that they were misled by the State into seeking or accepting compensation benefits.”

---


39 Ibid.
Accordingly, the Court found as follows:

“Following the decision in Cunningham, the instant case and those of the other Attica claimants were reopened before the Board for proof on the issue of whether the claimants were misled by the State into filing for or accepting benefits. The Board in all of the cases resolved the issue against the claimants, reaffirming all prior awards. In claimant’s particular case, there having been no prior award, the Board also sua sponte made a finding of accident arising out of and in the course of employment, based upon the certificate of death and the averments of the claim, and restored the case to the Trial Calendar for the making of appropriate awards. The Board further held that claimant’s claim could not be withdrawn because of her prior acceptance of workers’ compensation benefits. This appeal by claimant ensued. As to the Board’s finding that claimant was not misled by the State into applying for and accepting benefits, this case is factually indistinguishable from those of the companion Attica claimants and is, therefore, controlled by this court's recent decision affirming the Board’s adverse determination as to those claimants on that issue. The main thrust of claimant’s appeal is that the Board erred in refusing to hear proof on or consider whether the State committed an intentional tort in causing the death of her husband. Claimant argues that she was thus precluded from establishing that her husband’s death was not accidental and, therefore, outside the jurisdiction of the Board. We disagree. The case law is absolutely clear that an intentional tort by an employer does not divest the Board of jurisdiction or remove the case from the scope of workers’ compensation. It merely creates the unique, initial option on the part of the injured employee to sue the employer for civil damages or, in the alternative, to obtain workers’ compensation benefits. However, the remedies are inconsistent and mutually exclusive. That is why the acceptance of compensation benefits, whether or not a formal award is made, is preclusive of any alternative civil recovery. And this remains so even if the claimant accepts compensation benefits without awareness of the alternative remedy. Accordingly, the Board’s decision should be affirmed.”

40 Ibid.
First and foremost, these cases are all important because of the infamy of the Attica Prison Riot in 1971. These cases raise multiple issues, most of which are related to the issue of intentional tort and election of remedy. This issue has implications for due process, the application test, and the right to common law claims, principles that are addressed in Hypothesis Number One, Hypothesis Number Two, Hypothesis Number Three and Hypothesis Number Four.

The issue of election of remedy is thoroughly discussed in these cases. This issue, however, is approached from different angles and with different conclusions, all for the same incident. This clearly demonstrates the dangers of case law adjudication. All of the estates suing the State of New York represent decedents that were killed in the line of duty while hostages during the Attica Prison Riot. The adjudication of the appeal filed by Werner is the most instructive. This appeal was the first appeal heard by the Court of Appeals. In this case, the estate earned benefits based on the allegation that the overtaking of the prison and the time in which the decedent was taken hostage was an industrial accident, unforeseen and unanticipated by the State. The estate then claimed that the State then allegedly committed an intentional tort against the decedent, in the intentional killing of the decedent during the retaking of the prison. The estate asserted that this claim was a separate and distinct claim from the industrial accident. In Werner, the court noted that the estate filed a claim for benefits through the Program before the completion of the investigation into the riot, the hostage situation, and the retaking of the prison.
The circumstances in Werner are in stark contrast to the remaining three cases. In the remaining three cases, the claims were not presented in a similar fashion. As such, the court used the principle of election of remedies, because the estates elected to accept benefits through the Programs, the availability of common law claim was foreclosed. However, it is peculiar that the court allowed the estates to seek reconsideration from the adjudicating authority after the acceptance of benefits. Generally, the acceptance of benefits forever and always forecloses on all other remedies.

The allegation that the State misled the estates and encouraged the estates to accept benefits in order to avoid a potentially larger monetary award through a common law claim is concerning. In nearly every case, the employers, and particularly the several States, have far more resources in order to litigate. Employees have a strategic disadvantage. As such, issues related to intentional tort should be adjudicated in light of the public interest, not simply the strategic disadvantage of injured employees, or their representatives in the event of death. For this purpose, explicit statutory provisions, and particularly explicit exclusivity provisions and provisions concerning intentional tort, will assist claimants to understand their rights. The introduction and case law presented in this work clearly show that even lawyers and judges disagree on the breadth and scope of the intentional tort exception, and that this exception is not universal.
In 1984, the high court in New York considered another question on the scope of the Workers’ Compensation Act in *Bardere v. Zafir*.

The statement of fact is as follows:

“The Plaintiff, after receiving a job placement from defendant Geneva Employment Agency, Inc., was hired to work for Brooklyn Garbage Bag Co., Inc., by Arthur Zafir, principal officer of Brooklyn. On his first day of work for Brooklyn, plaintiff was severely injured while operating an extruder machine, which grinds plastic bags into pellets for recycling. Plaintiff sued Zafir, Brooklyn and Astro Plastic Corporation, of which Zafir was also the principal officer, asserting liability for Zafir’s criminally negligent operation of the machine while Zafir was principal officer of Astro and Brooklyn. Punitive damages were also sought. A motion to dismiss was granted in favor of the employment agency but denied as against Zafir and Brooklyn, both of whom appeal. The premise of liability is that Zafir altered, modified and removed safety components of the extruder machine so as to increase its speed, with knowledge of the dangers to an operator by reason thereof. Plaintiff had applied for and received workers’ compensation benefits as an employee of Brooklyn, prior to initiation of this action. By definition, that compensation award established all factual issues relevant to the claim, including notice of the accident and its causal relationship to the injury. Further, as a basic premise of the workers’ compensation concept, such award constituted the exclusive remedy for the employer’s liability. Nevertheless, Special Term ruled that the employer could still be held liable under the theory of violation of . . . the Labor Law, notwithstanding the compensation award. Section 200 of the Labor Law is the general provision requiring an owner or general contractor to provide a safe place to work. However, this statute is designed to protect the employees of other than the owner or general contractor of the dangerous property or device.”

---

42 Ibid.
In light of the foregoing, the Court ruled that:

“This Labor Law codification of the requirement to provide a safe place to work does not overrule, and indeed, is subject to the exclusivity provisions of the Workers’ Compensation Law. . . . Plaintiff seeks to salvage this action by asserting that the cause of his injury was an intentional tort perpetrated by Zafir, acting in the capacity of either an employer or a coemployee. . . . An intentional tort may not be founded upon the allegations that Zafir altered the mechanism in an unsafe manner, for the purpose of increasing output, with knowledge that an operator might come in contact with this now hazardous piece of machinery. Such allegations belie any intent to cause injury to an employee. The description of such conduct as criminal negligence is merely the equivalent of an allegation of gross negligence or reckless conduct, which does not except it from the exclusive remedy provisions of the Workers’ Compensation Law. . . . Intentionally tortious conduct connotes conduct engaged in with the desire to bring about the consequences of the injurious act. For a complaint to neutralize the Workers’ Compensation Law’s exclusivity of remedy, it must allege that the employer engaged in intentional or deliberate conduct ‘directed at causing harm to this particular employee’. Moreover, as the Court of Appeals noted in affirming Mylroie, once the plaintiff accepted the award of workers’ compensation benefits, alternative recovery at law was foreclosed on the theory of intentional tort.”

This case is also an important decision concerning the principle of the election of remedy. The fact that the employee accepted workers’ compensation benefits forecloses on an action at common law. In addition, the case addresses the difference between an intentional tort and intentional misconduct substantially certain to cause serious injury or death. As stated, in New York, intentional misconduct does not except claims from the exclusive jurisdiction of the Program statutes. The tort of the employer must rise to the level of intentional tort.

\[43\] \textit{Ibid.}\[43\]
This case speaks to the issues in Hypothesis Number Two and Hypothesis Number Four. In addition, consideration should be given to the equality between employees and employers, as well as the adequacy of the remedy in Hypothesis Number One and Hypothesis Number Three.

In light of the decision in Fermino, it is critical to question the legislative purpose of providing employers and co-employees immunity to commit tort involving intentional misconduct without providing any additional consideration to the injured employee, or including a punitive element to the damages. This calls into question the rational basis of this policy. In addition, where most employer have immunity from liability for the self-inflicted injury of an employee due to intentional misconduct, this also presents a question of equal protection.

As evidenced by the cases in Attica, often employees seek immediate relief through benefits provided by the Programs, but later learn of the egregious actions of the employer that may allow the employee to recover significantly higher monetary awards in consideration of such egregious actions. As a key component of due process, this investigation asserts that the employee should be able to present this newly obtained evidence, and to pursue a suit at law for recovery. This common law principle is embodied in the Attica cases.

In addition, cases revolving around questions that must be resolved through case law further illustrate the need for statutory guidance for adjudication.
iii. Briggs v. Pymm

In 1989, the high court in New York considered another question of the scope of the Workers’ Compensation Act in *Briggs v. Pymm*.\(^{44}\) The statement of fact is as follows:

“The instant action was commenced by the plaintiffs, former employees of the defendant Pymm Thermometer Corporation, to recover damages for injuries allegedly suffered as a result of their exposure to mercury, cleaning fluids and solvents which were used at Pymm's plant in Brooklyn. In the first cause of action of the complaint, the plaintiffs alleged that the injuries were caused by 'the negligence of the defendant, Pymm'. In the second cause of action of the complaint, the plaintiffs alleged that Pymm had violated certain provisions of the Labor Law of this State. The second cause of action also alleged the following: 'That defendant failure to comply with the relevant statutory directives . . . constituted a fraudulent concealment and deceptive inducement to plaintiffs to work, and to continue working, in an environment which defendant knew to be unsafe and detrimental to the health and well-being of the plaintiffs referred to above. . . . That the conduct and advice of defendant was false, fraudulent and misleading and was known to be false, fraudulent and misleading by defendant when uttered and given with the intent to deceive the plaintiffs and to have plaintiffs rely upon them and plaintiffs entered into, and continued, said employment to their damage and detriment. . . . That pursuant to said fraudulent scheme and device, defendant warranted and represented that it maintained a safe, healthy and legal place to work knowing such warrantees [sic], statements, representations and omissions were false and fraudulent when made, intending that plaintiffs would rely thereon, which plaintiffs did, to their damage. . . . At all times herein mentioned, defendant was aware of, yet willfully concealed, misrepresented, misinformed, deceived, and failed to disclose to the plaintiffs that defendant's place of business was unsafe, unhealthy and illegal.'\(^{45}\)


\(^{45}\) Ibid.
Prior to the appeal, the procedural posture was as follows:

“Pymm moved to dismiss the complaint on the ground that it was barred by the Workers’ Compensation Law. In opposition to the motion to dismiss the complaint, the plaintiffs argued that they had pleaded an intentional tort in their complaint and therefore, that cause of action was not barred by the defense of the Workers’ Compensation Law. The Supreme Court granted Pymm’s motion to dismiss the complaint as against it.”

The Court concluded that:

“We agree with the determination of the Supreme Court. It is well settled that an employee cannot maintain a common-law tort action against his employer for injuries sustained in the course of his employment, since such incidents are covered by the Workers’ Compensation Law. However, an exception exists ‘[w]here injury is sustained to an employee due to an intentional tort perpetrated by the employer or at the employer's direction’. In that situation, the Workers' Compensation Law ‘is not a bar to a common-law action for damages’. In view of these principles, it is clear that the first cause of action asserted in the plaintiffs’ complaint must be dismissed, since it only alleges negligent conduct [and not intentional tort] on the part of Pymm. The second cause of action, insofar as it alleges a violation of the State Labor Law, must also be dismissed. In Bardere v Zafir the court stated that the Labor Law ‘provides an enforcement procedure for the Commissioner of the Department of Labor to prohibit and enjoin hazardous work conditions’ but it ‘does not overrule, and indeed, is subject to the exclusivity provisions of the Workers’ Compensation Law’. . . . We have reviewed the plaintiffs’ remaining argument and find it to be without merit.”

This case is important because of the proximity of the date of this ruling after the Johns-Manville Corp. v. Superior Court decision in California, as well as the 1982 reform of the Program statutes in California (see discussion on case earlier in this work).

46 Ibid.
47 Ibid.
In that case, the court specifically found that the fraudulent concealment of hazards or illnesses in the workplace constitutes intentional misconduct substantially certain to cause serious injury or death, and that this fraudulent concealment warrants severe punishment of the employer by excepting the exclusive jurisdiction of the Program statutes and allowing the injured employee to pursue a common law claim against the employer. In New York, this reasoning is rejected. In addition, the Program statutes in New York do not provide additional consideration to employees for any cause of action resulting from intentional misconduct of the employer through the Program statutes.

These differences again raise questions of equal protection, rational basis and due process embodied in Hypothesis Number One. It also raises questions as to the adequacy of the remedy provided in the event of intentional misconduct of the employer embodied in Hypothesis Number Three. In light of Hypothesis Number Four, this public policy fails to penalize employers for engaging in intentional misconduct, which, in this case, included criminal acts in violation of safety regulations, and concealment of the risks and hazards associated with the failure to provide a safe work environment with such hazardous materials, particularly mercury. This failure to penalize the employer for such egregious behavior raises questions concerning the rational basis of this public policy. Specifically in light of the violation of safety regulations, this investigation finds that the employer in this case should be severely penalized for such action through punitive damages, and that penalties of this nature deter such behavior in the future.
iv. Acevedo v. Consolidated Edison

In 1993, the high court in New York heard another question on the scope of the Worker’s Compensation Act in *Acevedo v. Consolidated Edison*. The statement of the facts is as follows:

“The action involved on this appeal arises from the highly publicized explosion, on August 19, 1990, of a steam pipe located at 20th Street between Third Avenue and Irving Place in Manhattan. According to the complaint, the exploding pipe was covered with insulating material containing toxic friable asbestos and, as a result of the explosion, fibers of this material were spewed into the air and onto the public street, with two Consolidated Edison (Con Ed) workers being killed in the explosion itself. Immediately thereafter, numerous Con Ed employees were dispatched to the area to participate in cleaning up the debris. These workers were never informed by their employer of any potential danger associated with exposure to friable asbestos and were not provided with protective clothing or equipment. The instant action was commenced by certain of the employees who were involved in the cleanup and various members of their families who claim that they were exposed to the asbestos fibers remaining on the clothing and persons of the employees after they returned to their homes. While plaintiffs have alleged causes of action for battery, intentional infliction of emotional distress and public nuisance, there are no allegations that as of the time the action was instituted, any of the plaintiffs had exhibited or were suffering from overt physical symptoms arising from exposure to the toxin. However, plaintiffs have included among the damages sought the expenses for lifetime medical monitoring which has been medically prescribed based on their history of exposure to the toxin. Con Ed moved for partial summary judgment dismissing all causes of action asserted by the employee plaintiffs on the ground that the claims were barred by Workers’ Compensation Law.”

---

49 Ibid.
Accordingly, the Court concluded that:

“While the Court’s desire to afford some meaningful redress to employees exposed to a pernicious toxic substance is understandable, unfortunately, the exclusive reach of [the Act] is not dependent upon compensability. The courts of this State have long held that, if an injury or disease is covered in any way by workers’ compensation, recovery at law for a particular type of damage resulting from that injury or disease, even though not compensable, will also be barred. In the instant case, therefore, whether the harm suffered by plaintiff employees from their exposure to the toxic asbestos fibers is characterized as injury or disease, any damage resulting from such harm will clearly have arisen out of plaintiffs’ employment and is governed exclusively by the Workers’ Compensation Law, irrespective of the adequacy or inadequacy of that law’s remedial provisions. Accordingly, since any remedy for recovery of plaintiff employees’ medical monitoring costs must be pursued within the framework of the Workers’ Compensation Law, the Court improperly denied defendant’s motion for summary judgment seeking dismissal of such causes of action. While the question of whether or not employee medical monitoring costs are, in fact, recoverable under workers’ compensation, is not before us, nor relevant on the issue of the viability of a common-law action for such costs, the record should reflect that the Court’s affirmative finding that medical monitoring costs are not compensable through workers’ compensation on the ground that workers who have not been rendered unable to earn full wages may not be found to have been ‘disabled’ within the meaning of [the Act], is an erroneous statement. In order to recover medical costs under [the Act] for a work-related accidental injury or occupational disease, there is no requirement that an employee establish that he or she lost wages as a result of the injury or disease. Accordingly, the order . . . which . . . granted the motion of defendant Consolidated Edison . . . should be modified . . . to reverse the denial . . . and should otherwise be affirmed.”

50 Ibid.
This case raises important issues with respect to the Programs. Most importantly, the court ruled on the issue of compensability. In Hypothesis Number Three, the compensability of the injury (eligibility to receive benefits) is one of the key elements of the application test. This application was derived from the principle that the Programs must provide an adequate substitute for the forbidden common law claim. The court clearly points out that medical cost for work related injury are eligible for benefits even if an employee does not lose wages. This investigation will further analyze this issue later in this work.

This case also addresses the question of the treatment of causes of action arising from the alleged intentional misconduct of an employer. Again, just as in Briggs, the cause of action in this case, arising from alleged intentional misconduct, is subject to the exclusive jurisdiction of the Program statutes. The rational basis for this immunity for the employer is again at issue. In addition, these issues are central to Hypothesis Number One.

The question of the adequacy of the remedy under the Programs also raises questions about equal protection and rational basis. The most important issue is the rational basis for providing employers with this immunity, while the employees have no recourse for their exposure to risk until the symptoms of a compensable injury or occupational disease appear and are confirmed by a medical specialist. The Program statutes are not designed to mitigate risks in this fashion.
In 2000, the high court in New York heard another question concerning the scope of the Workers’ Compensation Law in *Fucile v. Grand Union Company, Inc.* The statement of fact is as follows:

“The plaintiff was working late at night in a grocery store when he was attacked and injured by robbers. He commenced this action against his employer, Grand Union Company, Inc., [and] his supervisor to recover damages for negligence, unlawful imprisonment, and intentional infliction of emotional distress. The plaintiff alleges that he was prevented from escaping from the robbers because the doors to the store were locked, and he was not provided with a key. The plaintiff failed to establish the existence of a significant structural or design defect that was contrary to a specific statutory provision. The plaintiff acknowledged that he received Workers’ Compensation benefits due to injuries received in the incident. Accordingly, the Supreme Court properly dismissed the negligence causes of action against Grand Union and [his supervisor] as barred by the exclusivity provision of the Workers’ Compensation Law. The plaintiff’s allegations failed to establish the elements of an intentional tort so as to fall under this exception to the exclusivity provision of the Workers’ Compensation Law.”

This case also addresses the issue of intentional misconduct. In addition, the election of remedies is at issue in this case. But, this case also uniquely addresses the issue of the immunity of a co-employee for alleged intentional misconduct. For the same reasons the immunity of the employer for alleged intentional misconduct is questionable, the same is true for co-employees, particularly considering Hypothesis Number One, Hypothesis Number Three and Hypothesis Number Four.

---


52 Ibid.
C. North Carolina

There are five key cases from North Carolina.

*Brown v. Motor Inn*, decided in 1980, addresses the question of the application of the Program provisions for causes of action that do not involve an industrial accident. In this case, the employer held an impromptu birthday party on the premises of employment, and an employee drowned in the pool on premises during this party.

*Pleasant v. Johnson*, decided in 1985, addresses the question of the right of an employee to pursue a common law claim against a co-employee for injury due to intentional misconduct.

*Woodson v. Rowland*, decided in 1991, addresses the question of the right of an employee to pursue a common law claim against an employer for injury due to intentional misconduct. The Plaintiff in this case was employed as a construction worker, employment that is traditionally considered hazardous.

*Johnson and Smith v. First Union*, decided in 1998, addresses the question of the test for application of the Program provisions for causes of action that are not industrial accidents. The Plaintiffs in this case were employees at a bank and performed primarily sedentary work, which is not traditionally considered hazardous.

*Cameron v. Merisel, Inc.*, decided in 2004, addresses the definitions of gross negligence as compared to intentional misconduct. The Plaintiff in this case was employed in a call center, which primarily involves sedentary work. This work is not traditionally considered hazardous.
i. Brown v. Motor Inns

In 1980, the North Carolina Court of Appeals ruled on the question of the scope and application of the Workers’ Compensation Act. While Brown was not the first major appeal before the North Carolina Court of Appeals on the question of the scope of the North Carolina Workers Compensation Act, Brown is significant because this ruling corresponded with the dramatic rise in litigation in the United States starting around 1970. The statement of facts is as follows:

“On 8 June 1978 plaintiff filed this negligence action to recover damages for the wrongful death of her intestate, William Oscar Brown, who died on 16 June 1976 as a result of suffocation by drowning in defendant's swimming pool. The incident occurred after plaintiff's intestate, an employee of defendant, had completed his day's work and while he was attending an impromptu birthday celebration given for another employee at the pool area. Defendant answered, denying negligence on its part, and asserted that plaintiff's intestate was contributorily negligent. In addition, defendant moved to dismiss the action for want of subject matter jurisdiction in that plaintiff’s rights, if any, were governed by the Workers’ Compensation Act. Defendant's motion was based on a denial of plaintiff’s previous claim for compensation benefits [under the North Carolina Workers Compensation Act] against defendant and defendant's insurance carrier. In an opinion dated 25 March 1977, the Deputy Commissioner ruled that the death of plaintiff's intestate ‘did not arise out of and in the course of the employment because the social event attended by him after work was not a regular incident of the employment, was not required as a condition of employment, did not constitute remuneration in lieu of wages and did not involve substantial direct benefit to the employer.’ No appeal was taken from this order.”


54 Ibid. This dramatic rise in litigation was discussed in the Empirical Data Analysis in Section IV.

55 Ibid.
After the close of the proceedings under the North Carolina Workers Compensation Act before the North Carolina Industrial Commission, the plaintiff elected to file a common law claim for negligence and tort against the employer.

"[When hearing the] defendant's motion to dismiss, the court considered, in addition to the pleadings, the opinion of the Deputy Commissioner denying plaintiff's claim for benefits. That order included the stipulation of the parties that they were "bound by and subject to the provisions of the North Carolina Workers’] Compensation Act. On 21 May 1979, the trial court entered summary judgment in favor of defendant and dismissed plaintiff’s claim with prejudice. Plaintiff appeals."\(^56\)

The North Carolina Court of Appeals acknowledged the dilemma which exists with the Program statutes as follows:

"The question of coverage under the Worker’s Compensation Act is commonly raised by a defendant who seeks to defend a negligence action by alleging exclusive jurisdiction in the Industrial Commission because of plaintiff’s employment by defendant at the time the injuries were incurred, thus limiting plaintiff to recovery of compensation benefits. Exclusive jurisdiction is based on [the exclusivity provisions]. . . . This section implements the purpose of the Act, which is to provide certain limited benefits to an injured employee regardless of negligence on the part of the employer, and simultaneously to deprive the employee of certain rights he had at the common law."\(^57\)

---

\(^{56}\) Ibid.

However, the Court continues to specifically define the legal interpretation of the exclusivity provisions as follows:

“Our Supreme Court has created an exception to the operation of [exclusivity provisions] in cases where the injury arises from activities disconnected with the employment. In Barber v. Minges, plaintiff’s intestate died as a result of an accident occurring while he was on a fishing trip as a guest of his employer, who customarily provided an annual outing for his employees and their families ‘in the promotion of good will’. In a subsequent negligence suit against defendant and his company, the trial court granted defendants’ motion to dismiss based on the ground that the North Carolina Industrial Commission had exclusive jurisdiction over the case under the Workers’ Compensation Act. On appeal, defendants contended that the Act ‘excludes all remedies other than through the Industrial Commission, whether plaintiff be invitee or licensee; whether he be on the job, or off the job; whether the accident arises out of employment, or independently of employment.’ The Court rejected this argument, stating: Carried to its logical extreme, this would confer immunity from liability upon an employer who inflicts a negligent injury on an employee while the latter is not engaged in any activity of his employment and is far from the scene of his duties, while he is on the way to the grocer or to church, or wherever he has the right to be in the pursuit of his own affairs. The contention is too sweeping to merit serious attention except for the fact that counsel for defense cite certain decisions of this Court which have been recognized as having that significance.”

Brown set the stage for a clear and explicit legal definition of the legislative intent of the North Carolina Workers Compensation Act to apply only to employment, and specifically to apply to work-related accidents that occurred in the workplace or are otherwise work related.59

58 Ibid.
59 Ibid.
Most notably, the Court ruled that:

“The Court characterized the Act as concerning itself with the relation of master and servant and their mutual rights and liabilities, which in the Court’s opinion, did not extend beyond the context of ‘employment’: The incidence of the law is on the status created by the contract of employment. It deals with the incidents and risks of that employment, in which concededly is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common law or other rights which pertain to the parties only as members of the general public, disconnected with the employment . . . . Expressions in [the Act] regarding the surrender of the right to maintain common law or statutory actions against the employer are not absolute -- not words of universal import, making no contact with time, place or circumstance. They must be construed within the framework of the Act, and as qualified by its subject and purposes. The Workmen's Compensation Act relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising [by accident] out of and in the course of the employment relation. Where that relation does not exist the Act has no application. Where the employer and the employee are subject to and have accepted and complied with the provisions of the Act, the rights and remedies therein granted to the employee exclude all other rights and remedies in his favor against the employer. The Act does not, however, take away any common law right of the employee, even as against the employer, provided the right be one which is disconnected with the employment and pertains to the employee, not as an employee but as a member of the public.”

This case is a pivotal case in North Carolina. The language in these citations clearly illustrates the importance of this case law. This language embodies the very essence of Hypothesis Number One and Hypothesis Number Three.

---

Ibid. It should be noted that the Court again quoted Barber v. Minges, and also quoted Pilley v. Cotton Mills, 201 N.C., 426, 160 S.E., 479; Francis v. Wood Turning Co., 208 N.C., 517, 181 S.E., 628. 223 N.C. at 215, 25 S.E. 2d at 838. (emphasis added)
Speaking to the legislative intent and purpose of the Program, the court addresses the application of the Program statutes, and reinforces key elements of the application test in Hypothesis Number Three. While the first key element of the application test may be an employment relationship between an employer and an employee, the application of the Program to the cause of action is equally important. This discussion concerning the rational basis of the Program application also addresses the equal protection issues for the class of employees, and provides guidance for the application of the Program statutes in various causes of action. Just as in *Fermino*, the court acknowledges the common practices of employers using the exclusivity provisions as a defense against causes of action far outside the scope of employment. This case law provides two perfect examples. While *Brown* was at least on the grounds of his employer at the time of his death, *Barber* was on an annual outing fishing as a guest of his employer. The discussion concerning *Barber* is critical to this investigation.

The employer argued that the Program provides employers with complete immunity from common law suit by an employee, even for tort that occurred while the employee was “off the job” or “independently of employment.” While the court provided excellent language to address the argument of the employer, Hypothesis Number Two suggests that statutory reform to include specific language concerning a test for application, and egregious behavior of the employer, management or co-employees would further clarify the application of the Programs.
ii.  Pleasant v. Johnson

In 1985, the Supreme Court of North Carolina again ruled on the controversial issue of the scope of the Workers’ Compensation Act and immunity provided to co-employees against common law claims of employees injured in the workplace. To summarize the findings, the Court decisions provide as follows:

“The pivotal issue in this case is whether the North Carolina Workers’ Compensation Act provides the exclusive remedy when an employee is injured in the course of his employment by the willful, wanton and reckless conduct of a co-employee. We hold that it does not and that an employee may bring an action against the co-employee for injuries received as a result of such conduct. Accordingly, we reverse the decision of the Court of Appeals. . . . The plaintiff and the defendant were employees of Electricon Incorporated. On May 13, 1980, the plaintiff returned from lunch to the construction site where he and the defendant were working. As the plaintiff walked across the parking lot toward the job site, a truck driven by the defendant struck the plaintiff, seriously injuring his right knee. The plaintiff was awarded disability benefits under the Workers’ Compensation Act. He then filed this action for damages, alleging in addition to simple negligence that: Defendant was willfully, recklessly and wantonly negligent in that he was operating the motor vehicle in such a fashion so as to see how close he could operate the said motor vehicle to the plaintiff without actually striking him but, misjudging his ability to accomplish such a prank, actually struck the plaintiff with the motor vehicle he was operating. During his case in chief, the plaintiff called the defendant to the stand. The defendant testified that he had been joking or ‘horse-playing’ at the time of the accident. He stated that he had intended to scare the plaintiff by blowing the horn and by operating the truck close to him.”

---

62 Ibid.
The trial court dismissed the plaintiff’s claims pursuant to the exclusivity provisions of the Workers Compensation Act, holding that an employee was barred from pursuing a common law claim against a co-employee by the Act. The Court held as follows:

“North Carolina adopted its Workers’ Compensation Act in 1929. The social policy behind workers’ compensation is that injured workers should be provided with dignified, efficient and certain benefits for work-related injuries and that the consumers of the product are the most appropriate group to bear the burden of the payments. The most important feature of the typical workers’ compensation scheme is that the employee and his dependents give up their common law right to sue the employer for negligence in exchange for limited but assured benefits. . . . We also have interpreted the Act as foreclosing a worker who is injured in the course of his employment from suing a co-employee whose negligence caused the injury. Provisions of the Act relative to an injured worker bringing an action against a third party for negligence causing injury have been held to apply only to third parties who were ‘strangers to the employment.’ We have recognized that, in cases involving intentional injury by the employer, the employee cannot be relegated to the limited recovery afforded by the Act, but may bring a common law tort action against the employer. We also have said that an injured worker may maintain a tort action against a co-employee for intentional injury. In a recent opinion, our Court of Appeals expressly held that the Workers’ Compensation Act does not preclude a suit against a co-employee for intentional torts. This holding rested upon the common-sense conclusion that the legislature did not intend to insulate a co-employee from liability for intentional torts inflicted upon a fellow worker. The Court of Appeals also noted that in many of the jurisdictions granting co-employee immunity, an exception for intentional acts causing injury had been either expressly set out in the statutes or judicially grafted upon them.”

---

63 Ibid.
64 Ibid. (emphasis added)
The Court proceeds to provide a specific definition of “willful, reckless and wonton negligence” as follows:

“In his complaint in the present case, the plaintiff alleged that his injury occurred because the defendant was ‘willfully, recklessly and wantonly negligent.’ The defendant contends that such allegations are insufficient to allege an intentional tort, which would support the plaintiff's action. We disagree. The concept of willful, reckless and wanton negligence inhabits a twilight zone which exists somewhere between ordinary negligence and intentional injury. The state of mind of the perpetrator of such conduct lies within the penumbra of what has been referred to as ‘quasi intent.’ Though the terms ‘willful’, ‘reckless’ and ‘wanton’ are often used in conjunction, we have endeavored in prior cases to differentiate between them. We have described ‘wanton’ conduct as an act manifesting a reckless disregard for the rights and safety of others. The term ‘reckless’, as used in this context, appears to be merely a synonym for ‘wanton’ and has been used in conjunction with it for many years. Defining ‘willful negligence’ has been more difficult. At first glance the phrase appears to be a contradiction in terms. The term ‘willful negligence’ has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed. A breach of duty may be willful while the resulting injury is still negligent. Only when the injury is intentional does the concept of negligence cease to play a part. We have noted the distinction between the willfulness which refers to a breach of duty and the willfulness which refers to the injury. In the former only the negligence is willful, while in the latter the injury is intentional. Even in cases involving ‘willful injury’, however, the intent to inflict injury need not be actual. Constructive intent to injure may also provide the mental state necessary for an intentional tort. Constructive intent to injure exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. Wanton and reckless negligence gives rise to constructive intent.”65

65 Ibid. (emphasis added)
From this finding that this behavior amounts to “constructive intent” to inflict harm, the Court continues as follows:

“We have previously acknowledged that wanton and reckless behavior may be equated with an intentional act for certain purposes. PUNITIVE DAMAGES may be recovered in an action for an intentional tort, though not in suits for ordinary negligence. By allowing recovery of punitive damages in cases involving wanton negligence, we have implicitly treated such cases as actions for intentional torts. We have also held that wanton and reckless conduct can supply the malice necessary to support a second degree murder conviction against a defendant who killed another when driving while intoxicated. We conclude that injury to another resulting from willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers’ Compensation Act. Of the jurisdictions which provide co-employees with immunity from common law tort actions in situations covered by workers’ compensation acts, sixteen appear to recognize an exception to such immunity in cases involving intentional torts. Only four states, however, Florida, Hawaii, Iowa and Wyoming, have statutory schemes which treat willful, wanton and reckless conduct (or its equivalent) as an intentional tort and exclude it from co-employee immunity. Our research reveals no state which has explicitly judicially adopted the willful, wanton and reckless exception to co-employee immunity.”

This finding in the case law is extremely important, particularly because Florida is part of the sample in this investigation and included in the statutory guidance for adjudication. Based on this research, this ruling is extremely progressive for 1985.

66 Ibid. It should be noted that the Court cited the statutes in those four jurisdictions, Fla. Stat. Ann. § 440.11(1) (“willful and wanton disregard” or “gross negligence”); Hawaii Rev.Stat. § 386-8 (“willful and wanton misconduct”); Iowa Code Ann. § 85.20 (“gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another”); Wyo.Stat. § 27-12-103(a) (“culpably negligent”) Mandolidis v. Elkins Industries, Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978) (West Virginia Supreme Court permitted employees to sue for injuries caused by the employer's willful, wanton and reckless conduct and appeared to recognize that the reasoning could be applied to suits against co-employees). It should also be noted that the immunity provided by the Programs for employers and co-employees have changed since 1985, but this finding provides the general consensus in this area of law at that time.
Accordingly, the Court concluded as follows:

“Permitting an injured worker to bring an action against a co-employee for an intentional tort places responsibility upon the tortfeasor where it belongs. Since the commission of an intentional tort includes a constructive or actual intent to injure, allowing an injured co-worker to sue the tortfeasor serves as a deterrent against future misconduct. By allowing wanton negligence to support awards of punitive damages, we have recognized that such conduct can be deterred and should be treated as an intentional tort. Therefore, we hold that the Workers’ Compensation Act does not shield a co-employee from liability for injury caused by his willful, wanton and reckless negligence. The fact that the plaintiff has received benefits under the Workers’ Compensation Act does not foreclose him from bringing an action for the defendant’s willful and wanton negligence. Since the negligent co-employee is neither required to participate in the defense of the compensation claim nor contribute to the award, he is in no unduly prejudiced by permitting the injured employee to sue him after receiving benefits under the Act. Furthermore, when an employee who receives benefits under the Act is awarded a judgment against a co-worker, any amount obtained will be disbursed according to the provisions of [the North Carolina Workers’ Compensation Act] and may reduce the burden otherwise placed upon an innocent employer or insurer. In conclusion we hold that the North Carolina Workers’ Compensation Act does not insulate a co-employee from the effects of his willful, wanton and reckless negligence. An injured worker in such situations may receive benefits under the Act and also maintain a common law action against the co-employee. We believe that this result will help to deter such conduct in the future. It would be a travesty of justice and logic to permit a worker to injure a co-employee through such conduct, and then compel the injured co-employee to accept moderate benefits under the Act. Since the plaintiff’s complaint did allege that the defendant had been willfully, wantonly and recklessly negligent, the decision of the Court of Appeals affirming a directed verdict in favor of the defendant is reversed.”


67 Ibid. (emphasis added)
This case is the primary source for defining the term “intentional misconduct,” which is termed as “willful negligence.” This “intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed” was, at that time, only recognized as an exception to exclusive Program coverage in Florida, Hawaii, Iowa and Wyoming. This is significant because Florida is a jurisdiction with statutory guidance for adjudication, and the remaining jurisdictions had statutory schemes that addressed the intentional misconduct of a co-employee in 1985. This decision specifically finds that this exception is provided to deter such conduct through the punitive damages available at common law. This finding speaks directly to Hypothesis Number Four. In addition, this ruling questions the rational basis and adequacy of the benefits provided through the Programs for the intentional misconduct in the New York cases Briggs, Acevedo and Fucile, in light of New York C. R. Co. v. White, Hypothesis Number One and Hypothesis Number Three.

In addition, the co-employee in this case is in fact a third party for the purposes of this cause of action. As discussed in this ruling, the election of remedy principle does not bar a common law claim against the co-employee, even though the employer had already paid benefits to the injured employee through the Program. The ruling also specifically discussed the statutory arrangement that provides reimbursement to employers for benefits paid when all fault rest on a third party.

These principles are central to this investigation and will continue to play a role in this analysis for remainder of the case law analysis, as well as the comprehensive analysis.
iii. Woodson v. Rowland

In 1991, Woodson is considered to be one of the most important court cases in North Carolina pertaining to the scope of the Workers’ Compensation Act and interpretation of the exclusivity provisions. The statement of the facts is as follows:

“Defendant Pinnacle One Associates was the developer on a construction project for IBM in Research Triangle Park. It retained defendant Davidson & Jones, Inc. as general contractor. One aspect of the project required construction of a sanitary sewer line . . . . Davidson & Jones hired defendant Morris Rowland Utility, Inc. to dig the line. Defendant Neal Morris Rowland has at all relevant times been the president and sole shareholder of Rowland Utility. Decedent Thomas Sprouse was Rowland Utility's employee. On Saturday, 3 August 1985, workers from both Rowland Utility and Davidson & Jones were digging trenches to lay sewer lines. The Chin Page Road project required two separate trenches. Although Rowland Utility was hired to dig both, in the interest of time a Davidson & Jones crew provided men to work in one of the trench sites. Because the trenches were not sloped, shored, or braced, and did not have a trench box, Lynn Craig, the Davidson & Jones foreman, refused to let his men work in them. The Occupational Safety and Health Act of North Carolina and the rules promulgated thereunder required such safety precautions for the trenches in question. Because of the soil conditions and geography, Craig believed that a trench box was the best means of ensuring his workers’ safety. Morris Rowland procured a trench box for Craig and the Davidson & Jones crew, which commenced work inside the trench after receiving the safety device on the morning of Saturday, 3 August. Morris Rowland did not acquire a trench box for his own crew. Charles Greene, a member of the Davidson & Jones crew, was operating a backhoe at the Rowland Utility site that Saturday. Craig checked on the site's progress several times. Morris Rowland asked Craig if he could put a Rowland Utility man on the job because he believed that Greene was not operating the backhoe fast enough. Several times Craig denied these requests. . . .”

---

The statement of facts continues as follows:

“... Once, Craig operated the machinery himself for a few minutes and concluded that Greene's progress had been adequate. In his deposition, Craig testified that by the end of the day the sides of the Rowland Utility trench were not being adequately sloped, and that it ‘could have been a little safer.’ At that point, the trench construction violated [state] regulations. On Sunday, 4 August, the Davidson & Jones crew did not work, and its trench box lay idle. However, the Rowland Utility crew reported to the site to continue digging its trench. A Rowland Utility man, rather than Greene, was now operating the backhoe. Morris Rowland and project supervisor, Elmer Fry, discussed whether to use the trench box in their ditch. They decided not to use it, indicating in deposition that they had believed the soil was packed hard enough so the trench would not cave in. A backhoe worked in front of decedent Sprouse and his co-workers, who were laying pipe inside the freshly dug trench. A piece of heavy machinery called a front-end loader drove along the edge of the ditch and followed their progress, dumping loads of gravel onto the newly laid pipe. Workers tamped the gravel using a device similar to a jackhammer. Sprouse was the closest person in the trench to the front-end loader. At about 9:30 a.m. one side of the trench collapsed, completely burying Sprouse and burying the man closest to him up to his armpits. The partially buried man was Alan Fry, son of project supervisor Elmer Fry. The workers pulled Alan Fry out of the trench, and Morris Rowland took him to the hospital. Morris Rowland did not return to the site for several hours after the cave-in. The remaining workers continued to dig Sprouse out. They refused several offers of help given by Jennifer Spencer, a security guard for another company, who was then on duty and who volunteered to call a rescue squad. By the time the workers had finished digging Sprouse out, he was dead. The trench was approximately fourteen feet deep and four feet wide with vertical sides at the point of the cave-in. Craig, who saw the site later and commented on a photograph of it at his deposition, stated that the trench was being sloped less than it had been at the end of the previous day's work. He characterized it as ‘unsafe’ and stated that he ‘would never put a man in it.’"^{69}

^{69} Ibid.
The procedural posture is as follows:

“Plaintiff [Woodson as Executor and Administrator of the Estate of Sprouse] filed civil suits against Rowland Utility; Morris Rowland in his individual capacity; Davidson & Jones; and Pinnacle One Associates. In July 1987, plaintiff filed a Workers’ Compensation claim to meet the filing deadline for compensation claims. In order to avoid a judicial ruling that she had elected a workers’ compensation remedy inconsistent with the civil remedies she presently seeks, plaintiff specifically requested that the Industrial Commission not hear her case until completion of this action. The Commission has complied with her request, and plaintiff has received no benefits under the Workers’ Compensation Act. In the civil actions before us, the trial court granted all defendants’ motions for summary judgment; and the Court of Appeals affirmed, with Judge Phillips concurring in part and dissenting in part. Plaintiff appealed of right on the basis of Judge Phillips’ dissent, and we granted her petition for discretionary review as to additional issues. We now affirm in part and reverse in part.”70

In the findings of the Court, it was held that:

“We first decide whether the forecast of evidence is sufficient to survive Rowland Utility’s and Morris Rowland’s motions for summary judgment, which are based on the ground that Sprouse’s death was caused only by ‘accident’ under the Workers’ Compensation Act. If the death can only be considered accidental, defendants’ summary judgment motions were properly allowed because Sprouse’s death would fall within the Act's exclusive coverage, and no other remedies than those provided in the Act are available to plaintiff either against his employer or a co-worker.”71

70 Ibid.

71 Ibid. It should be noted that the Court quoted Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966), Strickland v. King, 293 N.C. 731, 239 S.E.2d 243 (1977).
The Court further held that:

“The Court further held that:

“On the other hand, if the forecast of evidence is sufficient to show that Sprouse’s death was the result of an intentional tort committed by his employer, then summary judgment was improperly allowed on the ground stated, because the employer’s intentional tort will support a civil action. We conclude, for reasons given below, that the forecast of evidence is sufficient for plaintiff to survive defendants’ motions for summary judgment because: (1) it tends to show that Sprouse’s death was the result of intentional conduct by his employer which the employer knew was substantially certain to cause serious injury or death; and (2) this conduct is tantamount to an intentional tort committed by the employer. We conclude, further, that plaintiff may pursue simultaneously her workers’ compensation claim and her civil action without being required to elect between them because the forecast of evidence tends to show that: (1) Sprouse’s death was the result of both an ‘accident’ under the Act and an intentional tort; and (2) the Act’s exclusivity provision does not shield the employer from civil liability for an intentional tort. Plaintiff is, of course, entitled to but one recovery.”\(^{72}\)

This legal analysis starts with the rules and principles of statutory construction as follows:

“We interpret the Act according to well-established principles of statutory construction. The primary principle is to ensure that the purpose of the legislature is accomplished. To further this aim, the Court accords words undefined in the statute their plain meaning as long as it is reasonable to do so. Ambiguous or unclear terms are read consistently with overriding legislative purpose.”\(^{73}\)

\(^{72}\)Ibid. It should be noted that the Court quoted Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

Given the responsibility of the Court to analyze the challenged statutes, the Court first defines the legislative intent, purpose and goals of the Program. This definition is provided as follows:

“The Act seeks to balance competing interests and implement trade-offs between the rights of employees and their employers. It provides for an injured employee’s certain and sure recovery without having to prove employer negligence or face affirmative defenses such as contributory negligence and the fellow servant rule. In return the Act limits the amount of recovery available for work-related injuries and removes the employee’s right to pursue potentially larger damage awards in civil actions. ‘[W]hile the employer assumes a new liability without fault he is relieved of the prospect of large damage verdicts.’ Notwithstanding these important trade-offs, the legislature did not intend to relieve employers of civil liability for intentional torts which result in injury or death to employees. In such cases the injury or death is considered to be both by accident, for which the employee or personal representative may pursue a compensation claim under the Act, and the result of an intentional tort, for which a civil action against the employer may be maintained. In Pleasant, which involved co-employee liability for recklessly operating a motor vehicle, we concluded that ‘injury to another resulting from willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers’ Compensation Act.’ The Pleasant Court expressly refused to consider whether the same rationale would apply to employer misconduct. Nonetheless, Pleasant equated willful, wanton and reckless misconduct with intentional injury for Workers’ Compensation purposes.”

74 Ibid.
75 Ibid.
In light of the foregoing, the Court uses the previous rulings in *Pleasant* and *Brown* to establish a test for the application of the North Carolina Workers’ Compensation Act.\(^{76}\) In pertinent part, the Court noted that:

“The plaintiff in *Barrino v. Radiator Specialty Co.* urged us to extend the *Pleasant* rationale to injuries caused by an employer’s willful and wanton misconduct. The plaintiff, administrator of the estate of the deceased employee, alleged in part that the decedent died as a result of severe burns and other injuries caused by an explosion and fire in the employer’s plant. On the employer’s motion for summary judgment, the plaintiff’s forecast of evidence, which included the allegations of the complaint, tended to show as follows: the employer utilized ignitable concentrations of flammable gasses and volatile flammable liquids at its plant, violated [state] regulations in the use of these substances, covered meters and turned off alarms designed to detect and warn of dangerous levels of explosive gasses and vapors -- all of which resulted in the explosion and fire which caused the employee’s death. A majority of this Court in *Barrino* refused to extend the *Pleasant* rationale to employer conduct, but only two of the four majority justices expressed the view that the plaintiff’s injuries were solely by accident and that the remedies provided by the Act were exclusive. These two justices . . . concluded that a complaint alleging injuries caused by the willful and wanton negligence of an employer should be dismissed . . . because exclusive jurisdiction rested under the Workers’ Compensation Act . . . . The other two justices in the *Barrino* majority concurred on the ground that the plaintiff, having accepted workers’ compensation benefits, was thereby barred from bringing a civil suit.”\(^{77}\)

\(^{76}\) *Ibid.*

\(^{77}\) *Ibid.* It should be noted that the Court quoted *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 340 S.E.2d 295 (1986).
But, in Barrino, the dissent of the remaining justices was considered as applicable in the instant case. In reviewing the dissent, the Court found that:

“The three remaining justices dissented on the ground that the plaintiff's forecast of evidence was sufficient to raise a genuine issue of material fact as to whether the defendant-employer's conduct ‘embodies a degree of culpability beyond negligence’ so as to allow the plaintiff to maintain a civil action. Believing the plaintiff's forecast of evidence was sufficient to survive summary judgment on the question of whether the employer was guilty of an intentional tort, the Barrino dissenters said: As Prosser states: ‘Intent is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does’. The death of Lora Ann Barrino [the employee] . . . was, at the very least, ‘substantially certain’ to occur given defendants’ deliberate failure to observe even basic safety laws.’ As discussed in a subsequent portion of this opinion, the dissenters also concluded that the plaintiff was not put to an election of remedies. They thus would have allowed the plaintiff's common law intentional tort claim to proceed to trial on the theory that the defendant intentionally engaged in conduct knowing it was substantially certain to cause serious injury or death. They would also have allowed the plaintiff to pursue both a workers' compensation claim and a civil action. Today we adopt the views of the Barrino dissent. We hold that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act. Because, as also discussed in a subsequent portion of this opinion, the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers’ compensation claims may also be pursued. There may, however, only be one recovery.”

78 Ibid.
79 Ibid.
The Court continues to discuss the nature of intentional torts, normal negligence, and the continuum of causes of action in between, and upholds the idea that “constructive intent” qualifies a cause of action for an exception based on intentional tort. But the Court does not apply the same standard to employers and co-employees with respect to the application of Program statutes. The Court specifies the reasons as follows:

“Though the reasons in Pleasant for holding co-employees civilly liable for injuries caused by willful and wanton misconduct are sound, it is also in keeping with the statutory workers' compensation trade-offs to require that civil actions against employers be grounded on more aggravated conduct than actions against co-employees. Co-employees do not finance or otherwise directly participate in workers’ compensation programs; employers, on the other hand, do. This distinction alone justifies the higher 'substantial certainty' threshold for civil recovery against employers. The substantial certainty standard satisfies the Act’s purposes of providing trade-offs to competing interests and balancing these interests, while serving as a deterrent to intentional wrongdoing and promoting safety in the workplace. Other jurisdictions which have considered how egregious employer misconduct must be in order to justify a worker’s civil recovery against the employer extraneous to workers’ compensation statutes have reached different results. Some require that the employer actually intend to harm the worker, as in a classic assault and battery suit. Others require the employer’s misconduct to be willful and wanton. Still others require intentional conduct which the employer knows is 'substantially certain' to cause injury or death. It is true that some of the cases adopting the willful and wanton misconduct or substantial certainty standard have been modified by statute.”

80 Ibid.
81 Ibid.
The Court gives weight to the statutory construction in other jurisdictions, namely Michigan, Ohio, West Virginia and Arkansas. In the decision, the Court cites Michigan and Ohio law as follows:

"Legislation enacted in Michigan modified the decision. The legislation provides: The only exception [to the exclusivity of workers’ compensation] is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer has actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. Effective in 1986, the Ohio legislature amended its workers’ compensation law in an apparent response to [important] cases. The Ohio statutory amendments provide for civil recovery outside workers' compensation for acts ‘committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.’ Although the Ohio amendments equate substantial certainty with the ‘deliberate intent to cause an employee to suffer injury . . . or death,’ id., they also treat certain unsafe acts as if they were done with the intent to injure another. While generally moving away from the willful and wanton misconduct standard, and toward a standard requiring ‘deliberate intention to injure’, the West Virginia legislature has set out an important exception. The exception allows plaintiffs to recover outside workers’ compensation where the employer is aware that there is a high degree of risk of serious harm, and that the conditions creating the risk violate specific safety statutes. On the basis of these kinds of statutory modifications, Rowland Utility urges us to conclude that the willful and wanton misconduct and substantial certainty standards should be rejected as inconsistent with the legislative purpose of North Carolina’s Workers’ Compensation Act. . . ."
In consideration of the statutory construction and judicial practices in those jurisdictions, the Court concludes that the “substantially certain” standard is appropriate in North Carolina pursuant to the statutes, as follows:

“The Michigan legislature provided that ‘an employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.’ This amounts only to a rejection of the substantiality aspect of the substantial certainty standard. The Ohio and West Virginia legislatures essentially redefined what employer conduct will allow tort recovery. These legislative modifications confirm, rather than reject, the proposition that, in those states, actual intent to injure is not required in order for an employer to be civilly liable outside workers’ compensation statutes. At least two other states, Louisiana and South Dakota, continue to apply the substantial certainty standard adopted by their judiciaries, without legislative modification. Thus, both courts and legislatures in a fair number of other jurisdictions have rejected the proposition that actual intent to harm is required for an employer’s conduct to be actionable in tort and not protected by the exclusivity provisions of workers’ compensation. Our adoption of the substantial certainty standard does the same.”

The foregoing constitutes the *Woodson* test developed by the Court and used as a judicial test for the applicability of the Program. In keeping with the language of the Court, the Court then implements the test using an analysis of the facts as follows:

“‘Accident’ under the Act means ‘(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause.’ Because employees do not expect to suffer intentional torts committed against them while on the job, such injuries are ‘unlooked for and untoward events. . . not expected or designed by the injured employee.’”

\[^{85}\text{Ibid.}\]
\[^{86}\text{Ibid.}\]
However, the Court also ruled that:

“The employee may treat these injuries as accidental and accept workers’ compensation benefits. From the standpoint of the injured party, an injury intentionally inflicted by another can nonetheless at the same time be an ‘unlooked for and untoward event . . . not expected or designed by the injured employee.’ It is, therefore, not inherently inconsistent to assert that an injury caused by the same conduct was both the result of an accident, giving rise to the remedies provided by the Act, and an intentional tort, making the exclusivity provision of the Act unavailable to bar a civil action. Allowing an injured worker to pursue both avenues to relief does not run afoul of the goal of the election doctrine, which is to prevent double redress of a single wrong. Although the worker may pursue both statutory and common law remedies, the worker ultimately is entitled to only one recovery. Double recovery should be avoided by requiring the claimant who recovers civilly against his employer to reimburse the workers’ compensation carrier to the extent the carrier paid workers’ compensation benefits, or by permitting the carrier to become subrogated to the claimant’s civil claim to the extent of benefits paid. As the Barrino dissent points out: The result thus obtained would be a more equitable one than forcing an employee who believes in good faith that he was injured by the intentional misconduct of his employer to forego his compensation claim in order to maintain his common law claim. An injured employee having financial difficulties would be likely to accept workers’ compensation benefits and forego a valid tort claim because he would have no real alternative. Such a policy would not serve to discourage intentional employer misconduct.”

This decision embraces the idea that the Programs should use punitive damages and exception to bars on common law claims against employers in the event of intentional tort or intentional misconduct by the employer.

87 Ibid.
The Court further found that:

“In determining whether the trenching process which killed Thomas Sprouse was inherently dangerous, the focus is not on some abstract activity called ‘trenching.’ The focus is on the particular trench being dug and the pertinent circumstances surrounding the digging. . . . It must be shown that because of these circumstances, the digging of the trench itself presents ‘a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor.’ We conclude the forecast of evidence is sufficient to survive summary judgment on the question of whether the trenching in this case was ‘inherently dangerous.’ [One] foreman . . . stated that the trench at point of collapse was ‘unsafe’ and that on the evening before it ‘could have been safer.’ [An] Agronomist . . . stated in his affidavit that the trench . . . ‘consisting of sheer, vertical walls approximately fourteen feet deep, had an exceedingly high probability of failure, and the trench was substantially certain to fail.’ [The Agronomist also testified that:] ‘The trench collapse, in my opinion, was caused by the verticality and depth of the walls under the conditions then existent, given nature of the soil and parent materials and the natural and mechanical forces acting on the walls.’”88

Accordingly, the Court ruled that the Plaintiff could pursue a common law claim against the employer and the company that hired the employer as an independent contractor to perform the tasks in question.89

The case law clearly demonstrates the importance of statutory construction for understanding the application and scope of the Programs. This case law contains language significant in the analysis for Hypothesis Number One, Hypothesis Number Two, Hypothesis Number Three, Hypothesis Number Four, and Hypothesis Number Five.

88 Ibid.
89 Ibid.
With respect to Hypothesis Number One, this case particularly discusses the rational basis for the Programs and the judicial decisions of the application of the Programs. This case, like Pleasant, discusses the rational in detail, which is important for providing clear definitions of the various levels of liability, particularly intentional tort and intentional misconduct. With respect to the question of the rational basis of the Program application, it is important to note that this case analyzes the rational basis based on equality between the classes of employers and employees. Like in Pleasant, the court rules that there is no rational basis for providing immunity to employers engaged in intentional misconduct. Employers have a duty to maintain a safe work environment and to protect employees against general hazards, particularly those hazards that are addressed by safety and health regulations. When an employer takes intentional action that fails to protect employees, the employer should be penalized for this behavior. In California, the statutes provide certain penalties with in the scope of the Programs. But in North Carolina, the case law establishes that the Programs have no application in the event of intentional misconduct, allowing the employee to pursue a common law claim against the employer, and to seek punitive damages through that venue.

This analysis will not attempt to draw comparisons between the effectiveness of these different approaches, but, instead, will compare these approaches with the denial of punitive damages for intentional misconduct, such as in New York. These three jurisdictions not only provide differences in the role of the statutes and case law in guiding adjudication, but also differences in the treatment of various levels of liability. These differences raise significant questions as the interpretations that benefit employers rather than employees.
The question of deterrence in Hypothesis Number Four is closely related to these rational basis and equal treatment issues. As the court noted in *Pleasant*, the court again speaks to the issue of deterrence. Harsh monetary penalties for employers, just like for co-employees, deter the intentional behavior amounting to intentional tort or intentional misconduct. The purpose of the universal insurance is to provide limited benefits for true accidents and negligence. In analyzing the treatment of intentional misconduct, this case not only provides a provocative statement of facts, but a precedent in which the court rejected the plea for punitive damages against an employer that engaged in egregious behavior. In *Barrino* as well as *Briggs*, it can easily be argued that the actions of the employers were far more egregious than in *Woodson*. While Woodson did involve safety code violations, Woodson did not involve a slow deadly hazard which slowly injured the employee, while, at the same time, the employer witnessed the causal connection and even concealed and misrepresented to employee. In *Johns-Manville Corp.*, the court in California discussed the need for special consideration when an employer deliberately conceals or falsifies information pertaining to a hazard and developing injury and the concealment aggravates that injury. For the purposes of this investigation, the deterrence mechanism contemplated in the exceptions suggests that the concealment and aggravation of injury is far more egregious than a quick, sudden injury, even if both are caused by intentional misconduct. As noted in *Johns-Manville Corp.* and *Briggs*, once the injury started to manifest itself, the employer could have taken action to mitigate the hazard and ensure the employee had adequate treatment. This failure to take action constitutes a higher level of intentional misconduct.
The court goes a step further than to simply discuss the rational basis and deterrence issues. The court also discusses the due process implications. As stated, allowing the injured employee to pursue a common law claim and collect benefits under the Programs is not compatible with the principle that there should only be one recovery for an injury. But the court says that an employee should be able to collect benefits, and then, if appropriate, obtain a significantly larger recovery through a common law claim and pay back the Program benefits. In addition, from the perspective of the employee, the incident was an accident and unexpected. The court acknowledges that employees generally do not have significant resources, and waiting a significant amount of time and incurring legal fees and other burdens, while injured, would deter the injured employee from pursuing the common law claim and simply accepting quick benefits through the Programs. By allowing the employee to accept quick benefits through the Programs, and then later pursue a common law claim, the policy allows for deterrence of intentional tort and intentional misconduct of the employer.

If the financial hardship of injured employees deterred common law claims, this deterrence would benefited the employers and, in turn, fail to deter intentional tort and intentional misconduct. In this sense, the scheme in California for intentional misconduct seems to provide a faster and more efficient means of recovery. California, a jurisdiction with statutory guidance for adjudication, will provide the punitive damages through the Program, thus removing the need for the injured employee to ever have to file a common law claim in order to recover punitive damages. However, an empirical analysis of the differences between the amounts of punitive damages, and an attempt to quantify deterrence, would be necessary to provide a thorough comparison.
The court also addressed the insurance implications of this decision. From the perspective of insurance providers, actions that fall outside of the scope of the Programs should not be covered by the Program insurance policies. Naturally, these benefits raise costs for the insurance providers and premiums for all of the employers sharing the common fund. By excluding intentional tort and intentional misconduct from the Program coverage, the costs are placed on the tortfeasor, as stated in *Pleasant*. This policy controls overall Program costs, while also serving to deter intentional tort and intentional misconduct.

Finally, it is important to acknowledge the extensive research efforts of the courts in California and North Carolina to draw comparisons between jurisdictions. *Fermino*, *Pleasant* and *Woodson* all show that jurisdictions with high trade union density and with a significant mining and resource extraction sector, as well as strong manufacturing sector, all have the most progressive statutory schemes. Each case repeatedly cites the statutes and case law from Michigan, Ohio, New Jersey, Washington and West Virginia. It is telling that neither of those cases cited the statutes or case law in New York, Illinois or Pennsylvania, three populous and influential jurisdictions. These cases are far more likely to cite jurisdictions with statutory guidance for adjudication, even though North Carolina is a jurisdiction with case law guidance for adjudication.

While not directly discussing the efficiency of the Programs, this comparison shows that statutory guidance can be far more efficient, addressing Hypothesis Number Two. It should be noted that North Carolina, as a jurisdiction with case law guidance for adjudication, also demonstrates the issues with case law guidance by showing the need for appeal to address this question.
Finally, this case also speaks to the need for robust and encompassing definitions for classes to ensure application in the complex work environment today. This case was not only brought against the direct employer, but also the company that hired the employer as a contractor. Other contracting companies were also working on the site simultaneous with the injured employee and his employer. The relationships between all of these parties is complex, particularly with respect to workers’ compensation.

It is significant to note that the estate of the employee brought a common law action against both construction companies, even the company for which the decedent did not work, and the company with oversight of the construction company that hired the employer of the decedent. The estate also sued the supervisor of the decedent at common law. This case raises many issues concerning insurance coverage. As noted in the case, the direct employer of the decedent had direct control over the decedent and was the only entity required by law to obtain Program coverage for the decedent. The remaining entities benefited from the relationship with the direct employer had with the decedent.

This test is similar to the test in *Fucile*, where the landlord was not liable because the landlord did not have any control over the premises, and was not responsible for the maintenance of the premises with respect to the locked rear door, which prevented the employee from escaping during the robbery. Similarly, the contracting parties did not retain control over the duties of the decedent, and therefore could not be held liable at common law.

90 The discussion in the case law concerning the complicated nature of these relationship was omitted from the previous citations. In summary, the court discussed that only the entities that had a “employment-like” relationship with the decedent would enjoy exclusive Program coverage, that is of course, if the coverage was not nullified by intentional tort or intentional misconduct. In this sense, the contracting entities would have to, in some way, control the work of the decedent.
In 1998, the North Carolina Court of Appeals revisited the question of the scope of the Workers Compensation Act. The statement of facts is as follows:

“Plaintiffs’ complaint alleged common law fraud, unfair or deceptive trade practices, intentional infliction of emotional distress, bad faith claims practices and civil conspiracy by defendant First Union Corporation and/or First Union Mortgage Corporation and defendants Cigna Property and Casualty Company and/or Esis, Inc., and International Rehabilitation Associates, Inc., in connection with the handling of their workers’ compensation claims. In 1992 and 1993 plaintiffs separately filed claims with the North Carolina Industrial Commission seeking workers’ compensation benefits for injuries they allegedly sustained in the course of their employment with First Union as customer representatives in the Raleigh, North Carolina office. Specifically, plaintiffs allege that they developed a ‘repetitive motion disorder’ affecting their hands, arms, shoulders, and neck. Viewing the facts in the light most favorable to the plaintiffs, the allegations in plaintiffs’ complaint show that in August 1992 Smith signed a form, which obligated the insurer to pay compensation to her ‘for an unlimited period of necessary weeks.’ . . . Smith was notified by the Commission that it had received a form which appeared to have been materially altered by defendants. Plaintiff was further notified that defendants had failed to file other reports with the Commission required by law. Smith alleged in her complaint that: defendants, with the intent to deceive plaintiff Smith, her attorney and the Industrial Commission, altered material terms of the [agreement] she had signed, and returned the altered [paperwork] to the Industrial Commission for approval and filing. Smith further alleged that by providing her physician with a videotape inaccurately depicting her work-related activities at First Union, the insurers intentionally misrepresented her work-related activities in order to cause her physician to withdraw his opinion that she was disabled.”

“The first issue before this Court is whether the Workers’ Compensation Act provides the exclusive remedy for acts of fraud committed in the handling of workers’ compensation claims. We first examine the scope of the Commission’s authority under the applicable statutes pertaining to fraud under the Act. The Commission’s power to remedy the effects of fraud involving ‘settlements made by and between the employee and the employer,’ such as an . . . Agreement, was limited to setting aside the agreement tainted by fraud. This statute provides that if there has been error due to fraud, misrepresentation, undue influence or mutual mistake, ‘the Industrial Commission may set aside such agreement.’ ‘When an effective administrative remedy exists, that remedy is exclusive.’ However, when the relief sought differs from the statutory remedy provided, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court. We hold that the remedy provided by [the Act] is not effective as it does not adequately address the plaintiffs’ injuries. First, plaintiffs have alleged injuries beyond the mere loss of workers’ compensation benefits, including emotional distress arising from defendants’ fraudulent actions. They also seek punitive damages not provided for [the Act] which only empowers the Commission to set aside the tainted agreement. It is well-settled that the ‘punishment of . . . intentional wrongdoing,’ including acts of fraud, is ‘well within North Carolina’s policy underlying its concept of punitive damages.’ This Court has ruled it is error to dismiss a claim for punitive damages arising from a claim for bad faith refusal of insurer to pay benefits when the claim alleges that an insurer acted in ‘willful, wanton and in conscious disregard of [its] duty to pay plaintiff’s insurance claim.’ For these reasons, we hold that [the Act] is not an effective remedy for plaintiffs’ additional injuries beyond the loss of workers’ compensation benefits; thus, the exclusive remedy doctrine does not apply to bar plaintiffs’ civil action.”

Accordingly, the Court rules that the Plaintiffs had the right to pursue a common law claim for fraudulent and deceptive practices against their employer.

---

92 Ibid.
93 Ibid.
Again, this case discusses equal protection and rational basis, as well as the application test, which addresses Hypothesis Number One, Hypothesis Number Three and Hypothesis Number Four.

First, the question of the inclusion of these two employees in the class subject to the exclusive remedy provided by the Programs for their fraud claims was analyzed based on their eligibility for benefits. It is important to note that this case involves a case of action separate from the claims for benefits through the Programs. While the cause of action arises from the adjudication of the cause of action, the fraud and deception of court testimony is a separate claim. This cause of action is far different from the *Johns-Manville Corp.*, *Briggs*, and *Bardere*, where the employees were injured as a result of the fraud and deception of the employer. In this case, the second element of the application test is clearly not fulfilled, because the actions of the employer did not result in an industrial accident, or even physical injury to the employees.

This case also raises critical questions concerning the efforts of employers to hide behind the Programs to gain immunity for wrongdoing. There is a significant element of deterrence in ensuring that employers refrain from this type of behavior, which addresses Hypothesis Number Four.

Finally, there is an important question as to why the trial court dismissed the claims when there were no remedies at law for the employees. This is a critical element of the application test in Hypothesis Number Three, but also important due process considerations embodied in Hypothesis Number One.
v.  Cameron v. Merisel, Inc.

In 2004, the North Carolina Court of Appeals again revisited the question of the scope of the North Carolina Workers’ Compensation Act in Cameron.94 The statement of facts is as follows:

“Tommy Davis Nathan Cameron and his wife Lisa Cameron filed a complaint on 2 November 2001 alleging that they suffered injury from a toxic workplace maintained by Merisel, Inc., Merisel Properties, Inc., Merisel Americas, Inc., and Brian Goldsworthy. Specifically, plaintiffs alleged that defendants knew that the workplace at which Mr. Cameron was employed was contaminated with toxic molds. The complaint further alleged that defendants knew that several of Mr. Cameron’s co-employees had suffered serious illnesses from toxic molds, but that defendants failed to warn Mr. Cameron and other employees of the molds or the dangers associated with the molds. Plaintiffs also alleged that despite defendants’ knowledge of the molds, defendants failed to address the problem at the workplace premises. Plaintiffs alleged that due to defendants’ failure to warn or to take action to correct the mold problem, Mr. Cameron sustained debilitating, irreversible, and disabling injuries. Plaintiffs alleged in their complaint that Mr. Cameron was employed by Merisel Americas on 1 December 1998 at the company’s remote customer call center located in Cary, North Carolina, which was operated by Merisel and Merisel Americas. Merisel or Merisel Americas had leased the entire building from its owner and had used the building for a remote customer call center since at least 1996. Goldsworthy was hired by Merisel or Merisel Americas as director of security for the Cary call center around 1996. Goldsworthy’s responsibilities included the maintenance and upkeep of the workplace at the Cary call center. Plaintiffs alleged that between 1996 and 1 December 1998 Merisel, Merisel Americas, and Goldsworthy became aware of the existence of toxic molds in the workplace but took no action to remove the molds.”95


95 Ibid.
As a result of the foregoing, the Plaintiffs sought a common law claim against the employer alleging, in pertinent part, that:

“Defendants took no action to remove or alleviate the toxic molds in the Cary call center between 1 December 1998 and 31 December 1999, and in fact knowingly concealed their existence from the employees and occupants of the Cary call center. Plaintiffs alleged that between 1996 and December 1999, numerous employees and occupants at the Cary call center complained to defendants about a variety of symptoms, maladies, and serious illnesses which defendants knew resulted from the complainants’ exposure to the toxic molds. Soon after Mr. Cameron began working at the Cary call center he experienced dizziness. This dizziness eventually became chronic and resulted in nausea, blackouts, and falling spells. By the end of 1999, Mr. Cameron had been diagnosed with complete loss of the balance function of both inner ears and significant damage to the vestibular end organs of both ears. Throughout Mr. Cameron’s employment at the Cary call center, defendants repeatedly assured him that the workplace and premises were safe and free from toxic molds. Based on these assurances, Mr. Cameron continued to work at the Cary call center through April 2000, until he was diagnosed as being completely disabled and was ordered by his doctors not to return to the Cary call center. Based on these allegations, plaintiffs asserted the following claims: (1) under Woodson v. Rowland, against Merisel and Merisel Americas for intentionally exposing Mr. Cameron to toxic workplace conditions which they knew were substantially certain to cause severe bodily injury or death; (2) under Pleasant v. Johnson, against Goldsworthy for his willful, wanton, and gross disregard for the safety of his fellow employees by failing to maintain the Cary call center in a safe condition which resulted in the development of an unsafe and toxic environment; (3) for negligence against Merisel Properties for its failure to maintain its premises in a reasonably safe condition and allowing defects to exist; and (4) for punitive damages against all defendants. Ms. Cameron also filed a loss of consortium claim against all defendants.”

96 Ibid.
The procedural posture, prior to appeal, was as follows:

“Defendants filed a motion to dismiss. . . . [and] Defendants argued that the complaint failed to state a claim under any exception to the exclusivity provisions of the Workers’ Compensation Act and the trial court therefore had no jurisdiction to hear plaintiffs’ claims. Defendants argued that ‘because the allegations [did] not amount to willful, wanton and reckless conduct, [resulting in] a constructive intent to injure [Mr. Cameron],’ the complaint failed to state a claim against Goldsworthy under the exception created in Pleasant. Further, defendants argued that the complaint failed to state a claim under Woodson, ‘because the allegations [were] insufficient to show any willful, wanton, reckless or intentional conduct by defendants that [was] substantially certain to cause serious injury or death.’ The trial court entered an order . . . dismissing plaintiffs’ claims . . . for failure to state a claim upon which relief could be granted and because the claims were barred by the applicable statute of limitations. Plaintiffs appeal.”

On appeal, the Court first analyzed the questions of the Pleasant claim of the Plaintiff as follows:

“Our Supreme Court recognized an exception in Pleasant, stating the ‘Workers’ Compensation Act does not insulate a co-employee from the effects of his willful, wanton and reckless negligence.’ In the present case, the allegations in the complaint are sufficient under this standard to support Mr. Cameron's claim for co-employee liability under Pleasant. The complaint sufficiently alleges Mr. Cameron's co-employee, Goldsworthy, engaged in ‘conduct [that] threaten[ed] the safety of others and [was] so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified.’ While Mr. Cameron must present evidence of these allegations at trial, we find the allegations in the complaint are sufficient to overcome a motion to dismiss as to Mr. Cameron’s Pleasant claim.”

97 Ibid.
98 Ibid.
The Court then analyzed the question of the Woodson claim of the Plaintiffs, as follows:

"Another exception to the exclusivity rule in workers’ compensation cases arose in Woodson. In this case, allegations in the complaint that several of Mr. Cameron’s co-employees ‘had contracted serious illnesses’ and had complained to all defendants of a variety of ‘symptoms, maladies, and serious illnesses’ are insufficient allegations that Merisel and Merisel Americas had knowledge of a ‘substantial certainty’ of ‘serious injury.’ Allegations in the complaint do not set out the types of symptoms, maladies, and illnesses that co-employees had allegedly complained of to defendants. In fact, the allegations themselves tend to indicate that the co-employees had different reactions to the alleged toxic mold in the Cary call center. It is insufficient for plaintiffs to simply make a conclusory statement that some of these illnesses were ‘serious,’ as opposed to general symptoms and maladies, without describing the illnesses or indicating the number of co-employees who suffered ‘serious’ illnesses. Further, Mr. Cameron’s own alleged specific illness, while it can be relevant for other purposes, should not be included in this inquiry because the inquiry focuses on what defendants knew prior to Mr. Cameron’s injury. Therefore, plaintiffs cannot ‘bootstrap’ Mr. Cameron’s claim by pointing to the specific illness he contracted to indicate prior knowledge by defendants. Where the complaint simply alleges defendants knew co-employees had varying reactions to an alleged harm without any further description of those reactions, it is insufficient to meet the standard under Woodson. Therefore, we affirm the trial court’s dismissal of Mr. Cameron’s Woodson claim against Merisel and Merisel Americas."\(^{99}\)

This case is important because it establishes a real test of the scope of the Woodson and Pleasant exceptions, addressing Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Five.

\(^{99}\) Ibid.
In this case, the analysis of difference between “intentional misconduct” and simply “gross misconduct and gross negligence” is at the heart of the rational basis and equal protection issues in Hypothesis Number One. In Pleasant, the court established a lower threshold for exceptions for co-employee immunity, which included gross negligence and gross misconduct, depending on the circumstances. In Woodson, the court established a higher threshold for exceptions for employer immunity, holding that the actions of the employer must have been “intentional” and “substantially certain to cause serious injury or death” to the employee.

This differentiation is important because intentional misconduct is considered to be more egregious than simply gross misconduct or gross negligence. In this case, the injured employee failed to prove that the employer was “substantially certain” of the risk of serious injury or death to the employee. This clearly establishes that the rationale behind the exception is intent, rather than simply the nature of the injury. It should be noted that in Hendy, the court in California also used “intent to injure” as the test of the exception. In that case, intent was also not shown. In Johns-Manville Corp., the injured employee met the threshold of showing “intent to injure.” It should be noted that, in New York, “intent to injure” was not the test, but rather, a physical action taken which directly caused injury, such as the shooting deaths of the decedents in the Attica Prison Riot. This requirement for more egregious action on the part of the employer does not capture the universe of “intent” as evidenced by the analysis in Pleasant and Woodson, and this policy does not reach the full scope of tools available to deter egregious behavior. In light of Hypothesis Number One, this logic is justified as to the rational purpose and equal protection issues.
In light of Hypothesis Number Four, there is still a question as to deterrence even with a case such as this. Again, like in *Bardere, Briggs, Johns-Manville Corp.*, and *Hendy*, actions of the employer and certain co-employees aggravated the injury. According to these decisions, the aggravation of the injury only be considered egregious if there is “intent to injure.” The employee, however, is still far worse due to injury than without the actions of the employer. Particularly with *Hendy*, the “intent to injure” would have been irrelevant for a regular medical malpractice suit. If his doctor had not been employed by the same employer, the normal rules for medical malpractice would have applied. Similarly, both with Hendy and this case concern a lack of care relevant to general safety standards, with Hendy the medical profession, and in this case, the maintenance of a building in accordance with building codes.

It can easily be argued that this failure is egregious, particularly due to the length of time the employers continued to fail to meet their duty of care. This failure also has implications for Hypothesis Number One. Under similar circumstances, if the employee was not employed by the employer, but injured due to medical malpractice or failure to maintain a building to code, the common law would provide a significant recovery. The purpose of medical malpractice suits and building codes is to ensure that landlords and medical professionals have strict and guiding standards for practice, because gross negligence can have grave consequences. The best deterrence against violation of these standards is to provide significant penalties to those individuals injured as a result of the failure of the medical professionals or landlords to uphold the standard, and who are grossly negligent in their field.
This case also addresses Hypothesis Number Three. In *Acevedo*, the employees had not yet experienced injury or loss of the ability to earn wages, but had knowledge of a significant health hazard. Similarly, in this case, the employee had already started to experience medical complications due to the hazards, but, for quite a long period, was able to continue working because his work was sedentary and without physical exertion. In both of these cases, it is assumed that these hazards will produce more severe medical complications in the future. Particularly in *Acevedo*, the employees would have to incur the cost of medical screenings and such until an occupational disease related to the original hazard presents itself, which typically takes years. At which point, the court assumes that the employees would have the ability to apply for benefits under the Programs. The key difference between this case and *Acevedo* is that the health risks of asbestos exposure are well known, and typically established by statute. The court never answered the question of whether the costs of medical screening could be reimbursed, but the design of the Programs generally does not provide for this type of remedy.

In this case, the risks of prolonged mold exposure are not well known. It is questionable if medical complications that are correlated with mold exposure are able to be proven, or even compensable as occupational diseases. The question of compensability of the injury, or claim, was answered in *Acevedo*, but not in *Cameron*. It is important to note that there are differences between *Cameron* and *Johnson and Smith*. Again, the claims in *Johnson and Smith* did not involve a physical injury in the cause of action. However, in *Cameron*, the claims do involve a physical injury. In light of Hypothesis Number Five, it is important to note that the claims against the landlord were also dismissed.
D. Texas

As previously noted, Texas has a very unique statutory framework.

First, employers have the option to elect to obtain workers’ compensation coverage. Likewise, employees have the option to elect to retain the right to common law claims for all causes of action in the workplace. This construction addresses the issue of equal protection embodied in Hypothesis Number One. The statutes treat employers and employees alike, and provides each classes with the option.

Second, the statutes have many hurdles to common law claims. The statutes explicitly provide that the exclusivity provision apply even the injury does not qualify for compensation. In an important decision in 2008, the Texas Court of Appeals ruled that, where a cause of action primarily rose from mental trauma cause in a personnel action and intentional tort, and was not compensable, that the employee could pursue a common law claims. This ruling is significant. Disputes due to personnel actions are not industrial accidents. Similarly, the stress and possible medical conditions developed as a result of such disputes should also be placed outside the reach of the Programs coverage. This issue speaks directly to Hypothesis Number Three, which requires the cause of action to arise from an industrial accident. This ruling is also comparable to the ruling in Cole. In Cole, the Programs in California was interpreted to bar the common law action after the employee suffered a severe cardiovascular injury correlated with his high stress and high blood pressure. In Cole, the employee was also in a dispute over personnel action.

100 Lexis Nexis. Tex. Lab. Code §§ 406.004, 406.005
The statutes are also interpreted to bar common law claims once an injured employee has accepted benefits, even a common law claim against a co-employee for intentional tort.\textsuperscript{103} This is a far departure from the standard established in California, New York and North Carolina. As mentioned in \textit{Saala} and \textit{Pleasant}, for the purposes of workers’ compensation, co-employees that commit intentional tort are effectively third parties under the law for that cause of action. As such, most statutory constructions allow for actions against third parties whether the injured employee has obtained benefits through the Programs or not. Moreover, many jurisdictions also provide for the reimbursement of the Program fund from the proceeds of a potentially higher recovery at common law from the co-employee. In addition, the threshold for common law suits against co-employees is generally assumed to be lower than for employers, and, even in North Carolina, \textit{Woodson} provides that injured employees can pursue common law claims for intentional tort against employers after receiving benefits through the Programs.

This is an important issue concerning deterrence embodied in Hypothesis Number Four. As noted in \textit{Woodson}, employers generally have far more resources at their disposal than employees. In addition, employees are at a disadvantage not only from the standpoint of resources, but legal posture, because employees have to elect the remedy first, whereas employers only have to respond to the claims afterwards. In light of these issues, Hypothesis Number One suggests that these imbalances should be considered in crafting policy for intentional tort in the workplace, and \textit{Woodson} makes a compelling argument in support of these additional considerations.

Finally, there is an issue concerning the requirement that employers notify employees of Program coverage. There are a number of recent cases in which the Texas Court of Appeals ruled that Program coverage applies even if the employer failed to notify the employee of the coverage.\footnote{Lexis Nexis. Salinas v. Pankratz, 2012 Tex. App. LEXIS 308 (Tex. App. Corpus Christi Jan. 12 2012); Warnke v. Nabors Drilling Usa, L.P., 358 S.W.3d 338, 2011 Tex. App. LEXIS 6873, 32 I.E.R. Cas. (BNA) 1356 (Tex. App. Houston 1st Dist. 2011).} None of the case law addresses this issue as a due process issue. If employers never notify an employee of coverage, then the employee has no opportunity to opt out of such coverage. By ruling that the Program coverage applied even though the employees had no notice fails to provide the employees with due process to decide if they want to opt out of Program coverage. This issue speaks to Hypothesis Number One, which requires due process and equal protection. The case law clearly did not provide the same luxury for employees. Without the written election to opt out of the Program coverage, the Program always applied unless statutory exceptions were applicable.

This issue also has implications for the application test embodied in Hypothesis Number Three. Because Texas allows for the election of Program coverage by both employers and employees, the application test must establish if either party has elected to opt out of Program coverage, and how this election impacts benefits and the application of the exclusivity provisions. But these cases not only speak to the issue of the employer obtaining Program coverage, but also properly notifying employees of such coverage.
E. Pennsylvania

In 2004, the Supreme Court of Pennsylvania heard a question of the scope and application of the Workers’ Compensation Act in *Heath v. Workers’ Comp. Appeal Bd.*[^105]

The statement of fact is as follows:

“Claimant was employed by the Pennsylvania Board of Probation and Parole as a parole agent at Graterford Prison. Claimant’s immediate supervisor at Graterford was Calvin Ogletree, Jr., whose immediate supervisor was James Newton. Claimant testified that the following occurred: In October of 1997, Newton asked Claimant to join him at a casting call for an Oprah Winfrey movie, thus beginning a course of conduct whereby Newton subjected Claimant to attention she did not seek and sought to discourage. Claimant declined Newton’s invitation, but within the week he invited Claimant to a concert at which Newton’s brother would be performing. Again, Claimant declined. Shortly thereafter Newton telephoned Claimant to invite her to another show; Claimant again declined. Newton then proceeded to discuss his personal issues and problems, at which point Claimant ended the call. In January of 1998, Claimant found an envelope on her desk with a ticket for another show of Newton’s brother. Claimant spoke to Newton’s brother, who also worked at Graterford, and he explained that Newton asked him to give her the ticket. Claimant did not attend the show. Newton’s conduct did not abate. Once, also in January of 1998, a love song came on the radio at work, prompting Newton to move up close to Claimant and express his opinion that it was a ‘sexy, sweet’ song. Newton also developed such habits as standing behind Claimant at her desk and making sucking sounds and sitting near Claimant’s desk and staring at her.”[^106]


[^106]: Lexis Nexis. *Heath v. Pennsylvania Board of Probation and Parole*, 869 A.2d 39 (Pa. Commonwealth 2005). It should be noted that the statement of fact is cited from the published case law from the remand from the Supreme Court of Pennsylvania back to the Commonwealth Court of Pennsylvania due to the fact that the remand decision includes a more detailed account of the testimony and evidence presented in the proceedings.
The statement of fact continues as follows:

“When Claimant asked if there was something he wanted, Newton would start a personal conversation. Claimant would then advise him that she was busy with work in an effort to end the conversation. On one occasion, Newton asked Claimant for her home address and telephone number. Claimant responded that her supervisor, Ogletree, had this information if it were ever needed. Following Claimant’s continued rebuffs of these overtures, Newton began to burden Claimant with additional work assignments, which required her to put aside her normal caseloads and to fall behind. When informed, Ogletree expressed surprise to learn that Newton was giving assignments to Claimant without his knowledge and stated that he would talk to Newton about it. On February 10, 1998, Newton asked Claimant to attend a meeting in his office, which was not located at the prison, on Friday, February 13, 1998. He refused to respond to Claimant’s inquiry about the meeting’s purpose; Claimant objected and stated that she might bring union representation to the meeting. Newton responded by telling her that union representation was not necessary. When Claimant persisted with her inquiry, Newton became irate. Claimant complained to Ogletree, who agreed to speak to Newton. On Thursday, February 12, 1998, near the end of the day, Newton gave Claimant a memo ordering her to attend the meeting at his office the following day and that union representation would not be permitted. Newton did not advise Ogletree of the meeting, but Claimant did. On February 13, 1998, Claimant went to the meeting accompanied by Ogletree and her union president, who was not allowed into Newton’s office. At the meeting, Newton told Claimant that he wanted the meeting so he could tell her that she was doing a great job. When Claimant brought up the subject of Newton’s harassment of her, Newton refused to respond and abruptly ended the meeting. On or about February 18, 1998, Claimant filed a grievance with her union regarding Newton’s harassment. Within a week, Newton tried to lure Claimant into Ogletree’s empty office on the stated pretext that she needed a second photo identification card; there was no such need.”

\[107\] Ibid.
The statement of fact continues as follows:

“That day, Claimant spoke to the Employer’s Affirmative Action Officer, LaDelle Ingram, and shortly thereafter, on March 4, 1998, Claimant presented Ingram with a written complaint of sexual harassment against Newton. Ingram informed Newton that he was not to have any contact with Claimant. Despite this warning, Newton called Claimant’s direct line at work on at least two separate occasions. Soon after presenting her sexual harassment complaint, Claimant testified that she received a written warning from an inmate that her life was in danger. Claimant attempted to admit this note into evidence, but the Employer registered a hearsay objection. The [Workers’ Compensation Judge] (WCJ) requested some foundation testimony before ruling on the objection, and Claimant testified that the note came through interagency mail, which inmates can use to send mail to parole officers. Claimant stated that after receiving the warning she asked the inmate how another inmate could hurt her, and the inmate responded that it was the corrections officers that were out to get her. The WCJ sustained Employer’s hearsay objection and noted that ‘at this point I don’t have enough to have this go to the employee’s conduct. You may have to take the testimony of the inmate at this point to get that in.’ Claimant’s attorney stated that he was going to attempt to obtain more evidence. However, Claimant did not present any further evidence in this regard. Some time later, Claimant sought a job transfer to a different location, and on April 1, 1998, Claimant was told to report to a Philadelphia District Office. She did, but for the next month, she lacked a desk and had almost no work. Further, she was not issued a weapon, as required by Employer’s policy. Claimant began experiencing anxiety, which was manifested in chest pains, heart palpitations and anxiety attacks. Claimant contacted a State Employee Assistance Program and was referred to a psychologist, Suzanne Baxter, M.A. for treatment. Baxter saw Claimant the next day and testified that she put her out of work due to acute stress disorder, caused by a feeling of lack of support from her employer and failure to protect her from Newton’s unwanted advances.”

\[108\]

\[108\] Ibid.
The statement of fact continues as follows:

“Within a week, Claimant also saw Richard Watson, D.O., an employer approved ‘panel’ physician. Dr. Watson agreed with Baxter’s diagnosis of acute stress disorder and her direction that Claimant not return to work due to an undue amount of stress. Employer refused Claimant workers’ compensation benefits for the stated reason that Claimant did not suffer a work-related injury and did not give notice of her alleged injury to employer within one hundred and twenty days. On or about June 24, 1998, Claimant filed a claim petition alleging that as of May 1, 1998, she sustained a disabling psychological injury in the form of stress anxiety while in the course of her employment as a parole agent, which resulted from the sexual harassment by Newton and the retaliatory acts of her employer. On August 10, 1998, Employer filed an answer denying the allegations contained in the claim petition. On November 6, 1998, Employer offered Claimant a position at a new facility in Chester as one of two institutional parole agents. On December 11, 1998, Employer sent Claimant a release to sign as a condition to being allowed to return to work. This release required Claimant to give up all claims against Employer, including her pending workers’ compensation claim and sexual harassment claims. Claimant refused to sign the release. By letter dated January 4, 1999, Employer informed Claimant that she had to return to work by January 11, 1999 or risk termination. Claimant returned to work as instructed and reported to her assigned supervisor, Bonnie Ferguson who informed Claimant she had no knowledge that Claimant would be reporting for work. Claimant testified that she was given very few work assignments. After reviewing Claimant's activity sheets, which indicated that she had no work, Ferguson instructed Claimant not to make such entries because they would jeopardize her ability to receive her paycheck. Another parole agent, Stanley Webb, verbally assaulted Claimant, screaming at her that if she did not like her job, then she needed to leave.”

109 Ibid.
The statement of fact continues as follows:

“By February 5, 1999 Claimant’s anxiety again forced her to leave her new position with Employer. On February 8, 1999, Claimant’s treating psychologist, Baxter, wrote to Claimant’s supervisor and informed her that Claimant was unable to continue work due to her medical condition. By letter dated March 3, 1999, Employer directed Claimant to: (1) return to work by March 15, 1999; (2) apply for disability retirement; or (3) resign from her employment. Claimant, through counsel, sent Employer a response on March 11, 1999 stating that due to her on-going medical condition and her unwillingness to retire or resign from her employment, she would not be returning to work on March 15, 1999. On April 16, 1999, Claimant’s employment was terminated.”\textsuperscript{110}

The procedural posture at the time of appeal was as follows:

“Following several hearings, on March 6, 2001, the WCJ granted Claimant’s claim petition, determining that Claimant satisfied her burden of proving that she was disabled by a work-related psychic illness that arose out of the abnormal working conditions that were created by Newton’s conduct toward her and by the actions Employer took after she lodged complaints about his behavior. Employer appealed to the Board, challenging the WCJ’s findings of fact, legal conclusions, and an evidentiary ruling; objecting to the competency of Claimant’s experts; asserting that Claimant failed to prove the existence of abnormal working conditions or to provide objective, corroborating evidence of her descriptions of the workplace; questioning the WCJ’s authority to find sexual harassment; and raising the doctrine of collateral estoppel. In a decision and order dated February 25, 2002, the Board reversed the WCJ’s order granting Claimant’s claim petition.”\textsuperscript{111}

\textsuperscript{110} Ibid.
The procedural posture continues as follows:

“Applying the principle that the recovery of workers’ compensation benefits for a psychic injury depends on the presence of objective evidence that such an injury is other than a subjective reaction to normal working conditions, the Board concluded that Claimant’s testimony that her interactions with Newton were out of the ordinary and constituted incidents of harassment was uncorroborated and that the conditions of employment in which Claimant found herself after she complained about Newton were not abnormal. Claimant filed an appeal in the Commonwealth Court. In a published opinion, the Commonwealth Court affirmed the Board’s order. Following a recitation of the facts, the Commonwealth Court referred to Section 301(c) of the Act and observed that under that portion of the provision that is commonly known as the ‘personal animus’ exception, injuries that arise from personal conduct at the workplace are not compensable. The Commonwealth Court went on to state that even though Employer did not argue the exception, it could be considered. According to the court, because the exception addressed subject matter jurisdiction, it could be raised by the court’s own motion. Further, if applicable, the exception would provide the court with an alternative ground upon which to affirm the Board’s order. Id. The court then stated that even if it accepted Claimant's allegations of sexual harassment on the part of Newton as true and there was corroborative evidence to support them, it believed, as did the Superior Court in Schweitzer v. Rockwell International, that ‘when a co-employee or third party sexually harasses an employee, any resulting mental injury is not compensable under the Act because Section 301(c)(1) operates to remove any claim for that injury from the purview of the [Act].’ Turning next to Claimant's allegations regarding the other injury-producing conditions that Employer imposed upon her, the Commonwealth Court agreed with the Board that either the conditions were not abnormal or that Claimant failed to prove that the conditions actually existed.”

112 Ibid. It should be noted that the decision of the Commonwealth Court of Pennsylvania below is published at Heath v. Workers’ Compensation Appeal Board (Pennsylvania Board of Probation and Parole), 573 Pa. 700, 825 A.2d 1263 (2003).
As such, the Court concluded that:

“It is Claimant’s position that the exception is not a question of subject matter jurisdiction; that the Commonwealth Court erred by raising it; and that Employer waived it. Employer counters without discussion that the exception plainly implicates the Commonwealth Court’s appellate jurisdiction. We begin with the well-established principle that subject matter jurisdiction is a question that is not waivable and may be raised by a court on its own motion. Therefore, we have no quarrel with the Commonwealth Court’s asking sua sponte whether the ‘personal animus’ exception implicated its subject matter jurisdiction. Rather, we disagree with the Commonwealth Court’s ultimate conclusion that the exception is indeed jurisdictional. The case turns on the burden of proof as to that fact. . . . The instant controversy is clearly one of a general class that a WCJ, the Board, and the Commonwealth Court are empowered to decide. . . . That is, a WCJ and the Board are authorized by the Act to determine whether or not an employee who alleges that he was injured during the course of his employment is entitled to compensation. In turn, the Commonwealth Court is authorized to hear an appeal from such a determination. . . . Whether the ‘personal animus’ exception applies and removes an employee’s alleged injury from Section 301(c)’s definition of a compensable injury under the Act goes only to whether the compensation a claimant seeks will ultimately be granted; it has nothing whatsoever to do with whether a WCJ, the Board, or the Commonwealth Court on appeal is empowered to decide his claim for workers compensation. . . . For these reasons, we vacate the Commonwealth Court’s order and remand this case for the court to reconsider the merits of Claimant’s appeal from the Board’s decision.”

This is one of the most important cases in this investigation. This case speaks to Hypothesis Number One, Hypothesis Number Two, Hypothesis Number Three, and Hypothesis Number Four.

---

113 Ibid.
First, this case involves a unionized employee subject both to sexual harassment, and harassment as a result of exercising her rights established under the Program. As note in Cole, even membership in a union does not protect employees from harassment, both in general, and harassment as a result of exercising rights established under the Programs. The sexual harassment claims raise important issues about Program application. In generally, it is probably assumed that sexual harassment is not an “accident,” but an intentional act. However, Woodson raises an important question about the victim of intentional tort or intentional misconduct, even with a personal animus. In Woodson, the court noted that, from the perspective of the employee, the injury caused by intentional tort or intentional misconduct is an accident, because the injury is not expected or designed by the victim.

In addition, the exception cited by the court also raises issues. First and foremost, it is important to note that the exception was repealed in 1996 and replaced with the language in section 411, which provides that:

“The terms ‘injury’ and ‘personal injury,’ as used in this act, shall be construed to mean an injury to an employee, regardless of his previous physical condition, except as provided under subsection (f), arising in the course of his employment and related thereto. . . . The term ‘injury arising in the course of his employment,’ as used in this article, shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment; nor shall it include injuries sustained while the employee is operating a motor vehicle provided by the employer if the employee is not otherwise in the course of employment at the time of injury.”

---

With respect to due process considerations and rational basis, there is a question as to if the statutory provision has a rational basis. It is important to differentiate *Woodson* from this case and *Cole*. In *Woodson*, again, the injury was immediate and swift, typical of an “accident.” In this case, and in *Cole*, the onset of anxiety and medical complications was slow, and both employees sought medical attention for their condition at various times during the course of the dispute with their employers. As a result, there came a certain point in time when a reasonable person would have removed oneself from the situation in order to care for the medical conditions. In this case, the employee resigned. In *Cole*, the employee suffered a catastrophic cardiovascular failure. Even in *Woodson*, the employee could have refused to work in the trench without the proper exercise of best practices. But the key difference between Woodson, and the numerous slow onset injury cases analyzed in this investigation, is that once the injury has first presented itself, the injured employee has a responsibility to oneself to remove oneself from the hazard.

The detail concerning the dispute in this case is important because of the length of time between the discovery of the injury and the end of the employment relationship. For instance, in Cole, the injury was discovered in October 1981. In February 1982, the doctor ordered the employee to remove himself from the stressful environment. By May 11, 1982, the employee was placed on sick leave on the order of a doctor that reported to the harassing supervisor, but the harassing supervisor still continued the harassment through administrative matters that were unnecessary, resulting in the stroke.
Similarly, in this case, the continued interaction between the superior that allegedly harassed the employee was ordered to cease in March 1998 by the union and the administrative authorities, and yet the interaction continued until the employee requested an administrative transfer to another work site on April 1998. Far worse, the employee alleges that she was harassed by the administration in her employment after she filed the claim for benefits under the Program in May 1998. As a result of the harassment, she refused to return to work on the order of her physician and her employment was terminated in April 1999.

In both of these cases, the employees took various actions to remove themselves from the harassment. In *Cole*, the employee was confined to the Program benefits. In this case, the employer attempted to deny Program benefits. But both cases are clearly distinguished from *Pleasant* and *Woodson*, which take the view that employees should have both remedies available in the interests of justice. This brings into question the rational basis for both policies, though, under California law, “intent to injure” warrants punitive compensation under the Program.

The most important questions in this case are the due process considerations. Hypothesis Number One and Hypothesis Number Three suggest that adjudication should test the applicability of the Program based on the eligibility for benefits. In this case, it appears that the statutes are constructed in such a way to deny benefits in this cause of action. The common law claim has not yet been presented. But it is important to note that these claims are extremely complex. In *Werner*, there were also complexities of the claims that warranted benefits under the Program and at common law for the death of the employee during the Attica Prison Riot.
Similarly, the decision in this case requires a full finding of the facts relevant to these claims to examine if the claims can survive as an “accident” in any form. It is clear that the sexual harassment claim will not survive as an “accident,” but sexual harassment is only a part of the claims. There is also significant harassment due to the filing of the request for benefits through the Program, personnel disputes, which, after the transfer to the new duty assignment, also resulted in stress related medical conditions.

This case clearly concludes that the question of “subject matter jurisdiction” is distinctly separate from questions of fact. If a court does not have subject matter jurisdiction, the court has no authority to make finding of fact, and adjudicate the claims on the merits. The court clearly concluded that the application of workers’ compensation schemes is a question of fact, because the question of whether an industrial accident occurred or not is a question of the facts specific to the cause of action. This finding strongly supports Hypothesis Number Three, which requires the findings of application of the cause of action to be made in order to test applicability.

Finally, with respect to Hypothesis Number Two and Hypothesis Number Four, this case did not speak to the eligibility of the claims for adjudication at common law. However, the language in the statutes is ambiguous. It is clear the injury occurred in the workplace and was not anticipated by the employee, but, at the same time, the employee may be unable to pursue a common law claim to recover damages. In addition, the ruling fails to speak to the need to deter such behavior of the employer and co-employees, particularly supervisors.
Appendix Seven

Secondary Case Law Analysis
A. Illinois

In 1995, the Workers’ Compensation Act in Illinois was amended by Public Act 87-9 to include the following language in the exclusivity provisions (Section 5 Part b), as follows:

“If the employee or personal representative brings an action against another person and the other person then brings an action for contribution against the employer, the amount, if any, that shall be paid to the employer by the employee or personal representative pursuant to this Section shall be reduced by an amount equal to the amount found by the trier of fact to be the employee’s pro rata share of the common liability in the action. . . . This amendatory Act of 1995 applies to causes of action accruing on or after its effective date.”

This law attempts to create the same arrangement that exist in North Carolina, but with a different construction. In Woodson, the court notes that, if an employee collects benefits through the Program, and after receives a significant recovery from a third party (here referred to as “another person outside of the employment”) through a common law claim, and the employer was not liable for the injury in any way (the injury was a true accident for the employer, such as in Pleasant or Saala), then the employer should be reimbursed for the benefits paid to the employee through the common law recovery. Again, in line with Pleasant, this places liability with the tortfeasor, where it belongs. If tort liability exists outside of the work relationship with a third party, the third party should be held liable. Saala, Pleasant, and Woodson all embrace this reasoning because third party actions are outside of the Program compromise.

---

2 The language at the beginning of Ill. Stat. Ann. 820, § 305/5(b) provides that the employee must reimburse the employer for benefits paid if the employee receives a significant recovery from a third party.
This law, however, attempts to provide monetary relief for employers even if employers are liable for negligence under the Program coverage.\(^3\) Case law also prohibits employees from pursuing a common law claim for intentional tort against an employer after receiving benefits, similar to Texas.\(^4\) Again, this policy is contrary to the nuanced argument in *Woodson*. Employees should receive special consideration, because of their lack of resources, to use both venues to seek both immediate and limited relief, and to obtain punitive damages against an employer, co-employee or third party, on a later date.

In 1995, the legislature in Illinois passed Public Act 87-9 provided a comprehensive tort reform in the State of Illinois, not only within the areas of Program coverage and application.\(^5\) The most important provisions of the law placed a cap on “non-economic damages.” Economic damages are reimbursement for costs incurred, such as medical expenses or lost wages. Non-economic damages intended to provide compensation for the emotional toll of the injury, and a punitive measure, as well as an estimated costs for future costs associated with the injury.

---

\(^3\) It is important to note that the liability of the employer in this sense does not exceed normal negligence usually covered by the Programs. See Santos v. Boeing Co., F.Supp.2d (not yet published), 2004 U.S. Dist. LEXIS 8337 (N.D. Ill. May 10, 2004). This case provides: Exclusivity provision of the Illinois Workers’ Compensation Act (IWCA), 820 ILCS 305/1 et seq., bars employees from bringing any common law or statutory claims for accidental injuries sustained during the performance of his or her duties, and this bar includes negligence-based suits and suits asserting negligent retention claims; the IWCA does not bar suits arising from intentional torts, because if an employer or its alter ego acts with a specific intent to injure the employee, the injury that results no longer remains an accident, but to escape the IWCA exclusivity provision bar, an employee has to show that: (1) his or her injury was not accidental; (2) the injury did not arise from the employment; (3) the injury was not received during the course of the employment; or (4) the injury was not compensable under the IWCA


\(^5\) See Public Act 87-9.
In 1997, the Supreme Court of Illinois found Public Act 87-9 invalid in its entirety in *Best v. Taylor Machine Works*. In summary, the Court identified the central issue in the Constitutional challenge as follows:

“The parties agree that Public Act 89-7 effects substantial changes to numerous aspects of tort law. The parties further agree that the challenged provisions of Public Act 89-7 pertain primarily to personal injury actions as distinct from business-related torts, defamation, or other actions not involving physical injury. There is also no dispute that the heart of Public Act 89-7 is the $500,000 limit on compensatory damages for injuries that are considered ‘non-economic’ in nature.”

In defense of the reform of the General Assembly of Illinois, the Attorney General of Illinois, and allied parties “characterize the Act as a legitimate reform measure that is within the scope of the Illinois General Assembly’s power to change the common law, shape public policy, and regulate the state’s economic health.” However, opponents to the reform argue that “the Act uses the guise of reform to erect arbitrary and irrational barriers to meritorious claims, and, therefore, that the Act violates the Illinois Constitution of 1970.”

---

7 *Ibid*. It is important to remember that the changes to tort law include both the Program statutes and tort law outside of the scope of the Programs, including common law claims. It is also important to note that there are other administrative law mechanisms for the adjudication of tort claims, particularly against government officials acting in their official capacity. Therefore, it should not be assumed that any tort claim outside of the scope of the Programs would be adjudicated at common law. It is also important to note that tort includes claims that do not involve personal injury, such as business-related claims, defamation claims, and fraud and deceptive practices claims previously discussed in *Johns-Manville Corp.* and *Johnson and Smith*. It is important to note that certain fraudulent and deceptive practices, particularly in New York, may fall under the scope of the Program, even if not compensable.
The Supreme Court determined that:

“For the reasons stated below, we determine that the following provisions of Public Act 89-7 violate the Illinois Constitution: (1) the limitation on compensatory damages for noneconomic injury, (2) section 3.5(a) of the Joint Tortfeasor Contribution Act, (3) the abolition of joint and several liability, and (4) the discovery statutes which mandate the unlimited disclosure of plaintiffs’ medical information and records. We further hold that because these unconstitutional provisions may not be severed from the remainder of the act, Public Act 89-7 as a whole is invalid. . . .”

Each of these principles will be discussed in this analysis in detail. These issues are closely related to the Program construction and the Program limitations on liability. Along with “non-economic” damages, the reform also altered the contribution of joint tortfeasor. Under this principle, if two or more parties are liable for a tort, then the court has a responsibility to divide the monetary reward for the injured party into portions, and each respective party must pay a proportion of the monetary relief due to the injured party based on the decision of the court. Joint tortfeasor arrangements also related closely to joint and several liability, particularly between employers and third parties for injuries to employees sustained in the workplace. When two or more parties commit a tort, their liability is both joint and several. The liability is joint because the tort was caused by the joint actions of the parties. But, the liability is also several because each of the parties are distinct and separate, and, therefore, the monetary relief should be portioned to each party to pay the appropriate share.

---

9 Ibid.
This Constitutional challenge arose from two separate causes of action, which were consolidated together by the Supreme Court due to the identical nature of the issues raised on appeal. The first Plaintiff, Vernon Best, was injured as follows:

"Plaintiff, Vernon Best, was injured on July 24, 1995, while he was operating a forklift for his employer, Laclede Steel Company, in Alton, Illinois. The forklift was designed and manufactured by Taylor Machine Works (Taylor) and sold by Allied Industrial Equipment Corporation (Allied). Best sustained injuries when the forklift's mast and support assembly collapsed while Best was moving slabs of hot steel. As a result of the collapse, flammable hydraulic fluid manufactured by Lee Helms, Inc. (Helms), ignited and engulfed Best in a fireball. While on fire, Best leaped from the cab of the forklift and fractured both heels. Best also suffered second and third degree burns over 40% of his body, including his face, torso, arms and hands. Best filed a product liability action seeking damages against Taylor, Allied and Helms. In his amended complaint, Best alleges that the forklift and hydraulic fluid were defective and not reasonably safe. As to Taylor and Allied, Best alleges strict product liability, negligence, breaches of implied and express warranties, and breach of warranty for a particular purpose. As to Helms, Best alleges strict product liability, negligence and breach of implied warranty. Best alleges that he sustained lost earnings, he anticipates diminished future earnings, he has incurred past medical expenses, and he will incur future medical expenses as a result of his injuries. Best anticipates that he will need vocational rehabilitation and convalescent care because of his injuries. He further alleges that his injuries are severe, disfiguring and permanent. Best states that he has suffered and will continue to suffer from grievous pain and anguish from his injuries. He further asserts that he has had a painful and lengthy experience as a patient in a hospital burn unit, and has undergone numerous surgeries. In his amended complaint, Best seeks compensatory damages for all injuries. Best alleges that he has and will incur noneconomic damages in excess of $500,000. He also seeks declaratory and injunctive relief against Public Act 89-7 on the grounds that the Act violates the Illinois Constitution."\(^{10}\)

\(^{10}\) *Ibid.*
The second Plaintiff, Steven Kelso, was injured as follows:

“The second action arises out of the death of 20-year-old Steven Kelso, who was killed by a train at a railroad crossing in Madison County, Illinois, on December 12, 1995. At the time of his death, Kelso was driving a truck for his employer. Union Pacific owned the train that killed Kelso, and Donald Cain operated the train at the time of Kelso’s death. Plaintiff Jonathan Isbell, the administrator of Kelso’s estate, filed a complaint against Union Pacific and Cain. In the complaint, Isbell alleges that the train that killed Kelso was negligently operated. He states that the train’s speed was excessive, it did not adequately warn of its approach, and it failed to slow or stop before the crash. The complaint also alleges that the railroad crossing was negligently constructed, inspected, and maintained, with inadequate warning signals and other deficiencies. Isbell seeks damages under the Wrongful Death Act, the Probate Act of 1975 and the Rights of Married Persons Act. Like Best, Isbell also seeks declaratory and injunctive relief challenging the constitutionality of Public Act 89-7.”

In pertinent part, the challenged law provides that:

“In all common law, statutory or other actions that seek damages on account of death, bodily injury, or physical damage to property based on negligence, or product liability based on any theory or doctrine, recovery of non-economic damages shall be limited to $500,000 per plaintiff. There shall be no recovery for hedonic damages. . . . The statute defines ‘non-economic damages’ as ‘damages which are intangible, including but not limited to damages for pain and suffering, disability, disfigurement, loss of consortium, and loss of society.’ [as opposed to] [e]conomic damages, defined as ‘all damages which are tangible, such as damages for past and future medical expenses, loss of income or earnings and other property loss’ [which] are not limited. By its terms, the statute defines ‘compensatory’ or ‘actual’ damages as ‘the sum of economic and non-economic damages.’”

---

11 Ibid.
12 Ibid.
In summary, the Supreme Court concluded that “compensatory damages, i.e., damages which are intended to make an injured plaintiff whole, are limited by” the tort reform.\textsuperscript{13}

The first major argument of the opponents of the tort reform is that the damage cap violates the special legislation clause of the Constitution of the State of Illinois. Specifically opponents argue that:

“[F]or individuals whose injuries are minor or moderate, the limit will rarely, if ever, be implicated. Instead, the limit is imposed only when a jury or trial court finds, and the reviewing court agrees, that an award of compensatory noneconomic damages in excess of $500,000 is required to make the plaintiff whole. According to plaintiffs, [the reform] impermissibly penalizes the most severely injured individuals, whose pain and suffering, disfigurement, and other noneconomic injuries would be most likely to result in a compensatory award in excess of $500,000 but for the statutory limit. Similarly, plaintiffs reason, the damages cap arbitrarily benefits certain tortfeasors, who are relieved of liability for fully compensating plaintiffs. Thus, plaintiffs maintain, [the reform] constitutes special legislation. The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination. It has been noted that the prohibition against special legislation is the ‘one provision in the legislative articles that specifically limits the lawmaking power of the General Assembly.’ The special legislation clause expressly prohibits the General Assembly from conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated. This court has consistently held that the purpose of the special legislation clause is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis.”\textsuperscript{14}

\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid. Specifically Ill. Const. 1970, art. IV, sec. 13. This constitutional clause is vitally important because it provides protections similar to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States of America.
The Court highlights that the special legislation clause “originally arose in the nineteenth century in response to the General Assembly’s abuse of the legislative process by granting special charters for various economic entities.”

The Court notes that the inspiration for the Constitutional clause was a theory that “Governments were not made to make the rich richer and the poor poorer, nor to advance the interest of the few against the many; but that the weak might be protected from the will of the strong; that the poor might enjoy the same rights with the rich; that one species of property might be as free as another -- that one class or interest should not flourish by the aid of government, whilst another is oppressed with all the burdens.”

Specifically, the Court analyzed three court cases in discussing controlling precedents, Wright v. Central Du Page Hospital Ass’n (invalidating $500,000 cap on damages in medical malpractice actions), Grace v. Howlett (striking classifications that conditioned recovery for personal injuries upon fortuity of whether negligent driver was using vehicle for commercial or private purposes), and Grasse v. Dealer’s Transport Co. (invalidating a provision of the Worker’s Compensation Act that created arbitrary classifications, by automatically transferring to an employer, in certain cases, an employee’s common law right of action against a third-party tortfeasor).

---

15 Ibid. The history of this constitutional provision is far different from the Fourteenth Amendment. The Fourteenth Amendment was passed in response to slavery and the disparity between rights for the races during the Civil War period. The idea of equal protection of the laws for all persons was especially important for basic democratic rights, such as voting rights.

16 Ibid. (emphasis added)

17 Ibid. The citations for these cases are Wright v. Central Du Page Hospital Ass’n, 63 Ill. 2d 313 (1976); Grace v. Howlett, 51 Ill. 2d 478 (1972); Grasse v. Dealer’s Transport Co., 412 Ill. 179 (1952).
Finally, the Court takes into account the final argument of the allies of the tort reform as follows:

“[Allies of the tort reform] additionally argue that the General Assembly has the power to change the common law and, therefore, the limitation on compensatory damages is constitutional. For example, defendants cite to the Worker’s Compensation Act as an instance of the legislature's valid exercise of the police power in limiting liability of an employer for injuries sustained by an employee during the course of his or her employment. [Opponents of the tort reform] do not dispute that the legislature has the power to change the common law, and we do not question defendants’ argument insofar as it stands for the general principle that the General Assembly may alter the common law and change or limit available remedies. This principle is well grounded in the jurisprudence of this state. However, defendants’ argument assumes too much. . . . The legislature is not free to enact changes to the common law which are not rationally related to a legitimate government interest. The General Assembly’s authority to exercise its police power by altering the common law and limiting available remedies is also dependent upon the nature and scope of the particular change in the law. We hold in the case at bar that the statutory cap on compensatory damages for noneconomic losses is arbitrary. . . .”

Ibid. (emphasis added). This finding of the court speaks directly to the principle of rational basis for policies grounded in legitimate government interest. As previously discussed, rational basis is closely related to equal protection, because laws should have a rational basis for the disparate treatment between similar classes. Already, in this case, the court found that there is no rational basis for unequal treatment of those with minor injuries as compared to those with significant and serious injuries, who would be subject to the cap for non-economic damages. In addition, the rational basis test also requires parity between classes. This analysis has already shown that tortfeasors, who committed the most serious and grave torts, benefit from the compensatory cap, while victims with significant and serious injuries suffer, without any justification for the arrangement. Again, the requirement for rational basis and legitimate purpose for laws is grounded in the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States of America. Alterations of due process must be rational and legitimate, and due process is guaranteed by the Fifth Amendment. In addition, laws must be rational and legitimate in order to ensure equal protection of the laws, which is guaranteed by the Fourteenth Amendment. Alteration of common law due process invokes both of these provisions.
The Court also acknowledges the argument of the Allies of the tort reform citing cases where tort reforms of a similar nature have been upheld in other jurisdictions.\textsuperscript{19} The Court cites a number of instances where tort reforms of a similar nature have been declared invalid.\textsuperscript{20} The Court found that these caps differ significantly in scope and effect, even if all are a form of tort reform and thus “\textit{may be instructive in some respects}” but that “\textit{these decisions are of limited assistance in answering the specific question}” at bar. In consideration of the foregoing, the Court concluded that the damage cap of $500,000 is unconstitutional. Opponents of the tort reform argue that the tort reform violates the separation of powers clause of the Constitution of the State of Illinois “\textit{by improperly delegating to the legislature the power of remitting verdicts and judgments, which is a power unique to the judiciary.}” Opponents further argue that the tort reform “\textit{violates the constitutional separation of powers doctrine by invading the province of the judiciary and imposing a ‘one-size-fits-all legislative remittitur’ . . . [and] the cap on damages contravenes the traditional authority of the courts to assess, on a case-by-case basis, whether a jury’s damages award is excessive.}”


The Court argues that:

“Under our constitution, the three branches of government--legislative, executive, and judicial--are separate and one branch shall not ‘exercise powers properly belonging to another.’ Although our state constitution does not define legislative, executive, and judicial power in ‘both theory and practice, the purpose of the [separation of powers] provision is to ensure that the whole power of two or more branches of government shall not reside in the same hands.’ Each branch of government has its own unique sphere of authority that cannot be exercised by another branch. This court has often recognized that the separation of the three branches of government is not absolute and unyielding. The separation of powers clause is not contravened merely because separate spheres of governmental authority may overlap. However, it should be emphasized that the determination of when, and under what circumstances, a violation of the separation of powers doctrine has occurred remains with the judiciary. In furtherance of the authority of the judiciary to carry out its constitutional obligations, the legislature is prohibited from enacting laws that unduly infringe upon the inherent powers of judges.”

Finally, the opponents of the tort reform challenge the validity of the Joint Tortfeasor Contribution Act, and the “contribution credit” embodied in the statutes. In pertinent part, the statutory provision provides that:

“If a tortfeasor brings an action for contribution against the plaintiff’s employer, the employer’s liability for contribution shall not exceed the amount of the employer’s liability to the plaintiff under the Workers’ Compensation Act or the Workers’ Occupational Diseases Act. The tortfeasor seeking contribution from the plaintiff’s employer is not entitled to recover money from the employer.”

21 Ibid.
The reform provided that:

“The tortfeasor shall receive a credit against his or her liability to the plaintiff in an amount equal to the amount of contribution, if any, for which the employer is found to be liable to that tortfeasor, even if the amount exceeds the employer’s liability under the Workers’ Compensation Act or the Workers’ Occupational Diseases Act.”  

This statutory provision “abolishes the doctrine of joint and several liability in all actions brought on account of death, bodily injury to person, or physical damage to property.”  

The provisions replace the doctrine of joint and several liability with proportionate several liability in certain actions, whereby a defendant is liable “only for that proportion of recoverable economic and non-economic damages, if any, that the amount of that defendant’s fault, if any, bears to the aggregate amount of fault of all other tortfeasors.”  

While an employer could be found to bear a large portion of joint liability, but only have to pay benefits through the Workers’ Compensation, other liable parties may pay nothing due to the statutory provisions regardless of fault.  

The Court closely investigates the statutory operation to see how the statutes reduce the liability of employers and third parties in the event of an injury to an employee.

---

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid. It should be noted that the provisions are constructed to provide a “double reduction” of individual liability of a third party by percentage as credit to the third party for the Workers Compensation benefits guaranteed to the employee.
The Court found that:

“As an illustration of how the double reduction would occur in practice, plaintiffs offer the following examples. Consider an action involving an employee plaintiff, an employer, and a third-party tortfeasor. Assume that the plaintiff is awarded $500,000 in damages and that the tortfeasor and the employer are each 50% at fault. Pursuant to the amended version of the Joint Tortfeasor Contribution Act, the tortfeasor would be liable only for his or her proportionate share of the damages, or $250,000. Then, under section 3.5(a), the tortfeasor would obtain a credit against his or her liability to the plaintiff in an amount equal to the employer’s proportionate share of the damages, in this case, 50% or $250,000. Thus, because $250,000 minus $250,000 equals zero, the tortfeasor would incur no liability to the plaintiff. A similar situation occurs when the contributory fault of the plaintiff and the employer's fault together equals 50% or more. Assume the same verdict of $500,000. Further assume that the plaintiff’s percentage of contributory fault is 10%, the tortfeasor's percentage of fault is 50%, and the employer's percentage of fault is 40%. The $500,000 verdict would first be reduced by the plaintiff’s degree of contributory fault. This reduction would be 10% of $500,000, or $50,000. The tortfeasor is liable for 50% of the verdict, or $250,000, but then gets a credit for the amount of liability allocated to the employer (in this example, 40%, or $200,000). Thus, the tortfeasor, whose percentage of fault is 50%, is liable for only $50,000, or 10% of the total damages. Plaintiffs argue that in both of the examples above, the employee's recovery from the third-party tortfeasor is subjected to a double reduction. Plaintiffs maintain that this double reduction is arbitrary and discriminatory, and in violation of principles of due process and equal protection.”

Accordingly, the Court found the entire reform unconstitutional.

This case speaks to the issues in Hypothesis Number One, Hypothesis Number Two, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six.

---

26 Ibid.

27 Ibid.
With respect to Hypothesis Number One and Hypothesis Number Six, the issues with due process, equal protection and rational basis are all clearly detailed in the decision. In summary, it is important to note that the State Constitutional provisions provide similar protects to the Federal Constitution. Therefore, it is important to note that these protections are universal within the United States.

With respect to Hypothesis Number Two, the confusion with the meaning and intent of the Joint Tortfeasor Contribution Act clearly demonstrates the issues with ambiguous and poorly constructed statutory provisions. It should be noted that Illinois is a jurisdiction that uses hybrid guidance for adjudication.

With respect to Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six, the application test is again an important element of this analysis, as well as the element of deterrence in the policy. The case does not speak directly to the issue of deterrence, but clearly implies that the punitive measures used to deter behavior disappear for the most egregious behavior with the cap on monetary benefits. In addition, no additional consideration is made for those subject to the cap, such as coverage of additional medical expenses. The key element of the Programs is a regulation of all claims between employees and employers for industrial accidents. The cap simply impacts the claims involving the most severe and grave injuries.

For the purposes of this investigation, it is important to note that Program benefits also cannot replace a significantly larger monetary award for third party liability or intentional tort or intentional misconduct of parties involved in the employment relationship.
B. Ohio

In 1991, the Supreme Court of the State of Ohio ruled on a significant matter concerning the Ohio Workers Compensation Act, in Brady v. Safety-Kleen Corp. In the introduction, the decision opens with:

“The precise issue before us on certification from the federal district court is whether [the bar on common law claims against employer for intentional tort] is unconstitutional in whole or in part under the Ohio Constitution. For the reasons that follow, we hold that [the bar] exceeds the scope of legislative authority granted to the General Assembly under the Ohio Constitution, and is therefore unconstitutional in toto.”

As a background, the Court provides that “[f]or some thirteen years following the 1911 enactment of the workers’ compensation system, Ohio specifically excepted injuries arising from an employer’s ‘willful act’ from the general grant of employer common-law immunity.” In 1931, the Ohio Constitution was amended to read:

“For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen’s employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays premiums or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.”


29 Ibid.

30 Ibid.
In *Triff*, the Court identified a gap of coverage of employees by the workers’ compensation exclusivity provisions and permitted the common-law action of an employee whose employer negligently inflicted an injury, even in the workplace.\(^{31}\) The legislature in Ohio responded by amending the statutes to negate the impact of *Triff*.\(^{32}\) The statute was amended to read “*Employers who comply shall not be liable to respond in damages at common law or by statute, for any injury, disease, or bodily condition, whether such injury, disease or bodily condition is compensable under this act or not.*”\(^{33}\) As a result, common law actions were completely forbidden to employees, even if the work-related injury was not compensable.\(^{34}\)

In response, the Workers’ Compensation Act was amended in 1959, to provide, in pertinent part:

> “*Employers who comply with [the requirements] of the [Act] shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition whether or not compensable under [the provisions] of the [Act].*”\(^{35}\)


\(^{32}\) *Ibid.*

\(^{33}\) *Ibid.*

\(^{34}\) *Ibid.* For example, in *Bevis v. Armco Steel Corp.* (1951), 156 Ohio St. 295, 46 O.O. 172, 102 N.E.2d 444 the Court noted that “no remedy [was] permitted where the employer knowingly concealed from the employee his progressive occupational disease.”

\(^{35}\) *Ibid.*
In 1982, the Court found that a claimant could maintain a common law action to recover for intentionally inflicted harm of an employer, even if the cause of action accrued in the workplace. In 1984, the Court provided explicit parameters to test a cause of action of an employee for the intention of the employer.

In consideration of the legislative history of the Workers’ Compensation Act, and the Constitutional guarantees afforded every person in the jurisdiction thereof, both under the Constitution of the State of Ohio, and the Constitution of the United States of America, the Court decided and concluded as follows:

“After careful consideration, we find that [the bar] is totally repugnant to [the State Constitution]. Petitioners and their supporting amici set forth the persuasive argument that the statute in issue is not a law that furthers the ‘comfort, health, safety and general welfare of all employee,’ and we conclude that this argument is well taken. A legislative enactment that attempts to remove a remedy under common law that would otherwise benefit the employee cannot be held to be a law that furthers the ‘comfort, health, safety and general welfare of all [employees]’. However, [the bar] encounters even more constitutional problems when reviewed under the other [State] constitutional provision governing nuances of the workplace. The opening sentence of this constitutional provision states in pertinent part: ‘For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen’s employment.’ The plain import of this constitutional language indicates that the purpose of workers’ compensation is to create a source of compensation for workers injured or killed in the course of employment.”


37 Ibid. Jones v. VIP Development Co. (1984), 15 Ohio St.3d 90, 15 OBR 246, 472 N.E.2d 1046.

38 Ibid. (emphasis added).
“[The State Constitution] then defines, inter alia, the scope and limits of the General Assembly’s power in the creation and development of the workers’ compensation system. The [Workers’ Compensation] Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability. But the protection afforded by the Act has always been for negligent acts and not for intentional conduct.”

The Court found that the provisions do not accomplish the goals stated in the provisions.\(^{39}\) The Court reasoned as follows:

“Injuries resulting from an employer’s intentional torts, even though committed at the workplace, are utterly outside the scope of the purposes intended to be achieved by [the State Constitution] and by the Act. Such injuries are totally unrelated to the fact of employment. When an employer intentionally harms his employee, that act effects a complete breach of the employment relationship, and for purposes of the legal remedy for such an injury, the two parties are not employer and employee, but intentional tortfeasor and victim. If the victim brings an intentional tort suit against the tortfeasor, it is a tort action like any other. The employer has forfeited his status as such and all the attendant protections fall away. The Industrial Commission can have no jurisdiction over such an action. The lawsuit has no bearing upon any question relating to employment. The jurisdiction of the commission is limited to the matters delineated in [the State Constitution]. The General Assembly has no power to confer jurisdiction on the commission except as authorized by that constitutional provision. [The State Constitution] concerns itself solely with compensation for injuries arising from employment. [The bar] concerns itself solely with injuries which by their nature have no connection whatsoever with the fact of employment.”\(^{40}\)

\(^{39}\) Ibid.

\(^{40}\) Ibid.
The Court concluded that:

“[T]he General Assembly has exceeded the scope of the authority granted to it by the constitutional amendment, and the statute is, therefore, void as an improper exercise of legislative power. We hereby adopt the foregoing analysis and reiterate our firm belief that the legislature cannot, consistent with [the State Constitution] enact legislation governing intentional torts that occur within the employment relationship, because such intentional tortious conduct will always take place outside that relationship. Since we find that [the State Constitution] authorizes only enactment of laws encompassing death, injuries or occupational disease occasioned within the employment relationship, [the bar] cannot logically withstand constitutional scrutiny, inasmuch as it attempts to regulate an area that is beyond the reach of its constitutional empowerment. As brought out from the bench during oral argument of this case, it appears that the General Assembly was amply cognizant of the fact that [the bar] exceeded the scope of its legislative power under [the State Constitution], given the language of section (A) of the statute which states in relevant part that: ‘the employee [has] the right to receive workers’ compensation benefits and [has] a cause of action against the employer for an excess of damages over the amount received or receivable under [the State] Constitution.’ In our view, such language cannot be lightly dismissed as merely a product of inartful drafting; rather, we find that it exemplifies the intent of the General Assembly to enact something beyond that which is permitted by [the State Constitution]. . . . Based on all the foregoing, we reaffirm our prior holding in Blankenship, supra, and hold that a cause of action brought by an employee alleging intentional tort by the employer in the workplace is not preempted by [the State Constitution or the Workers’ Compensation Act]. While such a cause of action contemplates redress of tortious conduct that occurs during the course of employment, an intentional tort alleged in this context necessarily occurs outside the employment relationship. We further hold that [the bar] exceeds and conflicts with the legislative authority granted to the General Assembly pursuant to the [State] Constitution, and is therefore unconstitutional in toto.”

41 Ibid.
This case is significant because of the explicit discussion concerning a bar for
bidding employees to pursue common law intentional tort claims against employers. The constitutional implications are clear, and related to Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six. This case speaks to the due process, equal protection and rational basis and legitimate purposes tests previous discussed. In addition, this case clearly differentiates industrial accidents from intentional tort.

It should be noted that Ohio is a jurisdiction with statutory guidance for adjudication. It is clear that the legislature in Ohio attempted to strictly confine the rights of employees in order to ease adjudication of claims. However, it should be noted that the legislature cannot exceed the limitations established by the constitutional protection of basic rights, particularly due process, equal protection, rational basis and legitimate purpose.

The most important finding in this ruling is that intentional torts are never industrial accidents. This conclusion is closely aligned with the ruling in *Pleasant* and *Woodson*.

It is important to note that the statutes in North Carolina define an industrial accident as an “injury by accident arising out of and in the course of the employment”. However, as noted in this case, and other cases in other jurisdictions, particularly California, the definition of an industrial accident is not qualified by the word “accident” or “intentional tort”. So, while North Carolina has case law guidance for adjudication, this statutory definition for industrial accident explicitly stating that it is an “injury by accident” has assisted in clearer guidance for adjudication than in California and in Ohio.
C. Georgia and Tennessee

There are a group of jurisdictions that have addressed the question of non-compensable injuries. These are causes of action that fall under the purview of the Program, but are not eligible for significant benefits, or possibly no benefits at all. *Acevedo* was an example of a cause of action that was ruled to fall under the Program coverage, but, for which no benefits or relief could be provided.

For example, in Georgia, the Court of Appeals held that:

“The Workers’ Compensation Act provides: ‘The rights and the remedies herein granted to an employee shall exclude all other rights and remedies of such employee . . . at common law or otherwise, on account of such injury, loss of service, or death.’ In exchange for the right to recover scheduled compensation without proof of negligence on the part of the employer in those cases in which a right of recovery is granted, the employee forgoes other rights and remedies which he might otherwise have had, but if he accepts the terms of the Act he as well as the employer is limited to those things for which the Act makes provision. For example, pain and suffering, unless it is so severe as to result in economic disability, is not compensable. ‘It is likewise well settled that the compensation act covers the entire subject-matter of a claim for injuries by an employee against his employer, and that the remedy given by the act is in lieu of any remedy formerly afforded by an action at common law.’ Georgia is in the minority of states which do not allow compensation for non-disability producing disfigurement under the Workers' Compensation Act. However, no attack has been made, or can be made in this court on the constitutionality of the Act in this regard. It follows that this common law suit by a young girl against her employer for burns to her neck and chest caused by the firing of a loaded gun in a staged entertainment, but which resulted in no physical or economic disability, is not maintainable and the trial court properly granted the defendant's motion for summary judgment.”

---

Similarly in Tennessee, the State Supreme Court found that:

“Angela Clayton, a waitress at Pizza Hut Restaurant in Johnson City, was severely burned on the abdomen, when a coffee pot she was carrying in the course and scope of her employment came apart. She filed an action against her employer, Pizza Hut, and against the distributor of the coffee dispensing equipment, alleging that the defendants, separately and collectively, were guilty of negligence which proximately caused [the] injuries. Pizza Hut answered, admitting that Ms. Clayton was injured in the course and scope of her employment, and pleading affirmatively that Ms. Clayton’s sole remedy against it was under the Worker's Compensation Act [due to the exclusivity provisions]. Pizza Hut then filed a motion to dismiss or in the alternative for a summary judgment, which was overruled. The basis given for the trial court’s ruling was that the 1977 amendment to the Act limits the exclusive remedy provision to injuries ‘causing either disablement or death even if occurring in the course and scope of employment.’ There was no intent in the passage of the 1977 amendment to limit the coverage of the Worker’s Compensation Act, or its exclusivity. To the contrary the stated purpose of the amendment, as set forth in the caption of the bill, was to provide full coverage of occupational diseases. The Act provides that ‘[i]njury’ and ‘personal injury’ shall mean an injury by accident arising out of and in the course of employment which causes either disablement or death of the employee and shall include occupational diseases arising out of and in the course of employment which cause either disablement or death of an employee. Ms. Clayton argues that since her injuries resulted in a permanent disfigurement which is not disabling in that it does not materially affect her employability, and is not compensable, her common law action for damages is not barred by the exclusivity provision. We see no merit in this argument. While Ms. Clayton is not entitled to recover permanent disability benefits as the result of her disfigurement, nevertheless her injury was the result of an accident arising out of and in the course of her employment, which brings the Worker's Compensation Act into play.”

---

44 Lexis Nexis. Clayton v. Pizza Hut, 673 S.W.2d 144 (Tenn. 1984). It is important to note that this case cites Nowell as an authority.
The logic used in both of these cases is similar to the logic in *Acevedo*. It is important to note that there are no issues of intentional tort or intentional misconduct of the employer, management, co-employees or any third parties. The injured employees simply argue that simple negligence caused these injuries. However, it is important to differentiate this case from *Acevedo*. In *Acevedo*, the employees had knowledge of a deadly hazard to which they were exposed, but had not yet developed any injury. In both of these cases, the employees had already suffered serious permanent disfigurement as a result of the injury, disfigurement for which there was no compensation through the Programs. The most important detail to highlight in these two cases is that the Programs were **not constitutionally challenged for a failure to provide an adequate substitute**.

It should be noted that most of these cases are not framed within the basic individual protections enshrined in the Constitution of the United States. The last element of the application test is not address, which is a question of adequacy of the remedy. The Tennessee Supreme Court concludes:

> “Under the Act, Ms. Clayton would be entitled to temporary total disability benefits, if her injury incapacitated her for any length of time, and also to necessary medical expenses for treatment of her injuries, whether she was incapacitated or not. Under Worker’s Compensation Acts similar to the Tennessee Act, it has been held that where permanent disfigurement is not compensable, but the worker is compensated, or is entitled to compensation, for temporary disability or to medical expenses, the exclusive remedy provision of the Worker’s Compensation Act extends to the entire injury and all its damages.”

Hypothesis Number One and Hypothesis Number Three suggest that if these benefits are not adequate, then the Program cannot prove the exclusive remedy.
It is important to draw a comparison to two jurisdictions outside of the Sample with respect to the availability of a remedy through the Programs and adequacy of a remedy through the Programs. Both territorial possessions of the United States in the Caribbean Sea have incorporated an availability clause into their exclusivity provisions. In Puerto Rico, the exclusivity provisions provide that:

“When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the only remedy against the employer, even in those cases where maximum compensations and benefits have been granted in accordance thereof; but in case of accident to, or disease or death of, the workmen or employees not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be, the same as if this chapter did not exist.”\(^{45}\)

Similarly, in the Virgin Islands, the exclusivity provisions provide that:

“When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist.”\(^{46}\)

These two jurisdictions provide the most explicit provisions concerning the availability of remedy. The specific language of the exclusivity provisions were included and are analyzed in this investigation in order to ascertain the best construction for the statutes.

\(^{45}\) Lexis Nexis. 11 L.P.R.A. § 21.  
\(^{46}\) Lexis Nexis. 24 V.I.C. § 284.
While the provisions in Puerto Rico and the Virgin Islands do not speak directly to intentional tort or intentional misconduct, these provisions do guarantee that employees will not suffer a tort in the workplace for which no remedy is available. This investigation has not only shown the difficulty in establishing the definition of an injury “by accident arising out of and in the course of” the employment, but this investigation has also shown that it is difficult to establish the meaning of the term “where the employer and the employee are subject to and have complied with” the Program statutes, all other remedies are excluded.47

The construction in Puerto Rico and the Virgin Islands ensures that employees will have a remedy available, even at common law, in compliance with the requirement that the Programs provide an “adequate substitute” for the forbidden common law remedy. It is important to note that these cases concern the fact that only a significant element of the injury was not compensable, namely the permanent disfigurement. In other respects, the employee is eligible to receive at least some benefits. This is in stark contrast not only to Acevedo, but also to Johnson and Smith. In Johnson and Smith, the case law provided the guidance for adjudication of the claims for fraudulent and deceptive practices. In light of Hypothesis Number Two, this statutory language requires the trial court to make findings that the Program provides a remedy for the cause of action, otherwise the employee is eligible to seek remedy through the common law.

47 The earlier sections already demonstrated the several differences between the language of the statutes, but this language is particularly included in the exclusivity provisions in North Carolina. Lexis Nexis. N.C. Gen. Stat. § 97-10.1.
D. Massachusetts, Maine and Rhode Island

According to the findings of this investigation, Massachusetts, Maine and Rhode Island are three of the jurisdictions within the United States that forbid all common law actions of employees against employers, even for intentional tort. As previously mentioned, this trend is significant because of the geographic proximity of these three jurisdictions. In addition, New England is one of the only regions in the United States that provides employees with the option to opt out of the Program coverage (Texas and other states in the Mid-West also provide this option).

In an important decision of the Supreme Court of Massachusetts, the Court upheld the exclusivity of administrative remedies for all claims against employers, and certain claims against co-employees, as follows:

"[Administrative law] provides [the exclusive] remedy for sexual harassment involving employers with six or more employees. Plaintiffs alleging sexual harassment in this environment must comply with the procedural requirements of [the administrative law], by filing a complaint with the Massachusetts Commission Against Discrimination within the statutory time limit. Although the 'broad exclusivity provision' of [the administrative law], precludes plaintiffs from 'recasting' their claims of sexual harassment as common-law claims or violations of other statutes, it permits recovery of actual and punitive damages (as well as reasonable attorney's fees and costs) [through administrative procedure]. . . . Common-law claims for negligence, assault and battery, and intentional and negligent infliction of emotional distress barred by exclusivity provision of workers' compensation act; statutory claims barred by exclusivity provision of [administrative law] . . ." \(^{49}\)

---


\(^{49}\) *Ibid.*
This statutory arrangement is significant because, not only is there a remedy available in nearly every instance of a claim against an employer, the arrangement also allows for punitive damages through the Programs and other administrative law, depending on the nature of the egregious wrong.\textsuperscript{50} The law in Massachusetts does not provide any exceptions to the exclusivity provisions. Even when an intentional tort is alleged, the employee can only pursue a common law claim against an employer or a co-employee, if the employee has duly elected to be removed from Program coverage.\textsuperscript{51} However, an employee can pursue a common law claim for intentional tort against a co-employee, but only if the intentional tort “was in no way within scope of employment furthering interest of employer.”\textsuperscript{52}

No case law was found that attacked the constitutionality of this statutory arrangement. This statutory arrangement provides punitive damage through efficient administrative means, similar to California. In this sense, this arrangement shows how efficient administrative law can simplify adjudication, as stated in Hypothesis Number Two. However, a thorough empirical analysis would be required to measure the effectiveness of this arrangement as compared to common law relief. As previously discussed, the scope of this investigation does not draw comparisons between different methods of providing punitive damages.

\begin{flushright}
50 cites
\end{flushright}
\begin{flushright}
Ibid. Note that this investigation previously discussed the punitive damages provided through administrative law for gross and willful misconduct of the employer.
\end{flushright}
\begin{flushright}
51 Lexis Nexis. Anzalone v. Massachusetts Bay Transp. Authority, 403 Mass 119, 526 NE2d 246, 1988 Mass LEXIS 222 (1988). In this case, the court specifically ruled that “[e]mployee’s suit against co-employee for intentional tort in course of employment relationship is barred by exclusivity provision of Workers’ Compensation Act, unless employee reserved his right of action.”
\end{flushright}
\begin{flushright}
52 Lexis Nexis. O’Connell v. Chasdi, 400 Mass 686, 511 NE2d 349, 1987 Mass LEXIS 1432, (1987). In this case, the court specifically ruled that the “[e]xclusivity provisions of Workmen’s Compensation Act did not bar action against fellow employee who committed intentional tort which was in no way within scope of employment furthering interest of employer.”
\end{flushright}
In an important decision of the Supreme Judicial Court of Maine, an employee brought an action against his former employer due to the following accusations:

“Cole was the controller of the Mead Corporation, Publishing Paper Division, Rumford, and the head of the financial department at the Rumford paper mill from April 1, 1997, until October 28, 1997, when his employment was terminated based on the following series of events. Chandler and Buckley were supervised by Cole. In mid-October, 1997, Chandler's husband reported to the human resources manager that Cole had told a sexually explicit joke to Chandler that upset her. The manager confirmed with Chandler that the remark had been made and then asked a representative of the human resources department to investigate. Without naming Cole, the investigator conducted interviews with the persons whom Cole directly supervised. Two of those individuals were Chandler and Buckley. When interviewed Chandler reported the joke and the following incident: In September or October, 1997, when several persons were standing around discussing a seminar in Atlanta that they were to attend and the cost of the accommodations, Cole suggested that the attendees, both male and female, could share rooms if their spouses did not mind. Buckley reported the following incidents: (1) Cole yelled from his corner office to her ‘why don’t you come in here—we’ll close the door and have some fun!’; (2) Cole asked Buckley to go for a drink after work; (3) Cole asked Buckley for a back rub; and (4) Cole told an inappropriate sexual joke.”

As previously discussed, the place of sexual harassment disputes in workers’ compensation schemes is troublesome. In many jurisdictions, it is recognized that sexual harassment is not an “accident,” and therefore falls outside of the Program coverage. In addition various jurisdictions have included language in the statutes that specifically address sexual harassment, such as in Massachusetts.

---

53 Ibid.
The procedural posture prior to appeal was as follows:

“On October 24, 1997, after the interviews, the manager and the investigator interviewed Cole. During that meeting, the manager advised Cole that he was suspended pending further investigation. On October 28, 1997, at the conclusion of Mead’s investigation, the manager informed Cole that his employment was terminated. . . . Cole brought separate complaints against Chandler and Buckley alleging defamation; invasion of privacy by placing Cole in false light with Mead, other potential employers and the general public; interference with advantageous economic relations; intentional infliction of emotional distress; and punitive damages. The actions were consolidated, and Cole filed an amended complaint alleging an additional count of defamation against Buckley. The amended complaint also added Mead Corporation as a defendant alleging forced publication of libel and slander, that is, that Mead told him that his discharge from employment was for sexual harassment, that it should have known that Cole would be forced to reveal the reasons for his termination in a search for new employment, and that he was forced to republish the libelous and slanderous statements. Buckley, Chandler, and Mead filed motions for summary judgment. The court granted Buckley’s and Chandler’s motions on the basis that they were immune from suit by virtue of the exclusivity and immunity provisions of the Workers’ Compensation Act. It granted Mead’s motion on the basis that, even if Maine law recognizes defamation by compelled self-publication as a theory of liability, Mead was entitled to immunity by statute or common law. Cole appeals both judgments. Although this is a case of first impression, we are guided by our developing case law. We have consistently applied a broad and encompassing construction to the exclusivity provision. In Beverage we stated the purpose of the Workers’ Compensation Act as follows: ‘The legislative intendment in enacting the comprehensive scheme for worker’s compensation was to give[ef] effect to the underlying policy of providing certainty of remedy to the injured employee and absolute but limited and determinate liability for the employer.’”

54 Ibid.
In consideration of the foregoing, the Court ruled that:

“We further noted that ‘[i]f few occasions remain for employees to bring civil actions in tort against employers, such is merely the inevitable consequence of the legislature’s extension of the coverage of workers’ compensation.’ We have refused to carve out an exception for intentional torts. In Li [v. C.N. Brown Co.] the employee of defendant was killed when a former employee robbed the store and stabbed the employee; the employer allegedly knew of the intended armed robbery but did not close the store where the employee was working alone. The plaintiff argued that the exclusivity and immunity provisions should not apply to injuries to employees caused by intentional torts. We found, however, that the Act applied ‘to all work-related injuries and deaths, however caused, not just accidental injuries and deaths.’ We ‘decline[d] to create a judicial exception to the exclusivity and immunity provisions for employers’ intentional torts,’ noting that if the Legislature intended to exclude intentional acts, it could have created the exception. We also have not required that the excluded claims be compensable. In Knox [v. Combined Ins. Co. of America], the plaintiff brought a civil action alleging [sexual] assault and battery, intentional and negligent infliction of emotional distress, and negligent supervision of her supervisor by the employer. We determined that, because injuries arising from assaults have been held compensable under the Workers’ Compensation Act, no reason exists to distinguish between sexual assaults and non-sexual assaults for purposes of coverage under the Act. We also noted that ‘[l]ikewise, injuries resulting from acts of sexual harassment are not excluded from the Act’s coverage solely because of the sexual nature of the harassment. . . . Thus, the alleged slander and the damage would necessarily have occurred at the place of employment while he was still in the performance of his duties before he was suspended. Therefore, his personal injuries, if any, arose out of and in the course of his employment and are precluded by the exclusivity provision of the Workers’ Compensation Act.’

---

55 Ibid.
Similarly, in 1989, the Supreme Court of Rhode Island heard a question concerning the treatment of intentional torts under the Workers’ Compensation Act in *Lopes v. G.T.E. Products Corporation.*\(^{56}\)  

In pertinent part, the Court ruled that:

“No October 7, 1983, Lopes sustained spinal injuries while operating a forklift in the course of his employment at G.T.E. The injuries were proximately caused by G.T.E.’s ‘[willful] and intentional’ removal of the vehicle’s safety guards and devices, thereby creating a dangerous and hazardous condition that G.T.E. knew was substantially certain to cause injury. Subsequent to his injuries, Lopes filed for and received workers’ compensation benefits. Also, it is undisputed that Lopes failed to give G.T.E. notice of his intention to retain his common-law rights. With these facts in mind, we must decide if the trial justice was correct in granting G.T.E.’s motion for summary judgment. . . . Many jurisdictions have, either by legislative enactment or by judicial opinion, permitted suits sounding in intentional tort despite an exclusive-remedy provision in their workers’ compensation statutes. However, in Rhode Island neither the Legislature nor this court has created an intentional tort exception to the [exclusivity provisions]. The language of Hornsby cited by Lopes is dictum and simply recognizes that other courts have created exceptions to exclusive-remedy provisions. Therefore, in the absence of a legislatively created exception to [the exclusivity provisions of the Act], we shall adhere to the principle that an employee waives his or her common-law remedy if the employee fails to properly notify the employer of his or her intention to rely on the common law. We affirm the trial justice’s grant of G.T.E.’s summary-judgment motion. Lopes’ appeal is dismissed”\(^ {57}\)

The Court upheld this ruling in subsequent appeals in 1990 and 1995.\(^ {58}\)

\(^{56}\) Ibid.  

\(^{57}\) Ibid.  

\(^{58}\) Ibid.
The issues raised in the cases in Maine and Rhode Island are extraordinarily important. These cases raise questions as to the independence and role of the judiciary. In *Heath*, the judiciary took the role of guiding adjudication standards in light of the hybrid guidance for adjudication in Pennsylvania. In *Best*, the judiciary aggressively tested the comprehensive tort reform for constitutionality in Illinois. In *Brady*, the judiciary ensured the maintenance of due process, equal protection and rational basis and legitimate purpose in Ohio. It is important to note that neither of these two cases in Maine or Rhode Island mentioned that a constitutional challenge raising these issues was presented before the court. However, it is important to note that simply questioning venue and procedures invokes the protections of due process, which is noted in *Pleasant* and *Woodson*. In Illinois, the court established the clear standard for appellate review by establishing that after the legislative intent of the laws are analyzed, the intent must be tested against due process, equal protection, rational basis and legitimate purpose principles. Neither of this New England cases reached the constitutional questions to answer the question of if the Programs provide an “adequate substitute.”

The implications for Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six are profound. Not only are the constitutional principles and application test not sufficiently challenged by the judiciary, the judiciary failed to perform its proper role in the system of governance. In addition, the element of deterrence has been removed by the policy. It is important to note that the ambiguity of the statutes exists even in California, but that the failure to qualify the definition of industrial accident as an injury “by accident” is also a significant deficiency in the statutory provisions.
The statutory construction of the Program in Massachusetts (as well as Rhode Island) presents a challenge from an analytical standpoint. Given the statutory provisions, employees have the option to opt out of the universal Program coverage. In this sense, the Program is not necessarily compulsory. However, employees assume the risk of injury by true accident in the workplace, and difficulty in receiving compensation for such injury without Program coverage. With respect to Hypothesis Number One, the illusion of choice is not necessarily equality. As previously discussed in this investigation, employers and employees are inherently unequal. Employers generally have far more resources at their disposal, including insurance to cover for incidental costs for which the employer could not other collect at law. The employee, however, generally has no such luxury. As reported by the National Academy of Social Insurance, only 60% of employees have sick leave and only 40% have disability insurance. While this investigation has focused on intentional torts and intentional misconduct of an employer which causes injury to an employee, it can be assumed that a vast majority of injuries are caused by true accidents or simple negligence.59 With true accidents, or simple negligence without substantial evidence of fault, employees would be unable to collect through a claim at common law. Employees have far less resources available in order collect evidence in order to support a claim, while employers have far more resources in order to defend against a claim. If employers voluntarily opt out of Program coverage, their only liability would be at common law when negligence or intentional tort can be proven.

59 The empirical data does not provide information on the nature of injuries that serve as causes of action in claims. This assumption is made based on the fact that a majority of workers’ compensation claims are simple and without much controversy. The primary sources of empirical data are the United States Department of Labor and the National Academy of Social Insurance. See Appendix Three for empirical data collected.
Voluntary options for coverage, for either employee or employers, are extremely problematic, particularly when employers have the option for coverage. Simply by the nature of this election, employers have the luxury of choosing the options that best suits their needs and business model. Employees choose their options based on speculation. The case law hereinabove shows the full scope of the levels of liability of employers, from true accidents and simple accidents to intentional misconduct and international tort. Without Program coverage, true accidents without any negligence attributable to the employer would result in the employees bearing the full costs of the accident. As previously illustrated, intentional torts are not within the scope of Program coverage in many jurisdictions. In addition, most injuries in the workplace are true accidents. Therefore, employers that have the option to waive Program coverage significantly reduce their costs.

For employees, waiving Program coverage also has significant implications, however, these implications are extremely negative disadvantages. The case law shows that employees bear significant costs in asserting common law claims. Pleasant and Woodson establish that the Programs can provide employees with quick and efficient alternatives to burdensome common law claims, even for intentional misconduct and intentional tort. This option is provided in consideration of the limited resources available to employees. The very idea that employees must choose between Program coverage and common law claims, and have no option to change that decision for an entire calendar year, places employees at a strategic disadvantage.
E. Minnesota, Colorado and Delaware

According to the findings of this investigation, Minnesota, Colorado and Delaware are three of the jurisdictions within the United States that forbids all common law actions of employees against employers, even for intentional tort, but allow intentional tort claims at common law against co-employees.\(^60\)

The case law in Minnesota

"Minnesota case law has limited the exception to [the exclusivity provisions of the Program to] assaults that are \textquoteleft wholly unconnected\textquoteright with the plaintiff\textquoteleft s employment. Additionally, employers who assault employees may face common law liability under the intentional injury exception to the [exclusivity provisions of the Program]. The exception, which applies only to employers, allows the injured employee to assert a tort claim against her employer if the employer exhibited a \textquoteleft conscious and deliberate intent to inflict injury\textquoteright in assaulting the employee. \textit{Corporate employers cannot be held vicariously liable under this exception, as \textquoteleft[a] corporate entity is by its nature incapable of harboring [a malicious or deliberate intent].\textquoteright} \(^61\)

This language is extremely important. By excluding \textquoteleft corporate employers,\textquoteright this language only leaves less than 20% of small business firms vulnerable to this provision.\(^62\)

---


\(^62\) While 99\% of formally recognized firms are small businesses (the United States Small Business Administration and the United States Census Bureau classifies small businesses as recognized firms that employ less than 500 people; nationwide, there are 5.71 million small business firms compared to only 17,000 corporate firms with more than 500 people), most Programs do not cover firms with less than 5 employees (of the 5.71 million small businesses, 3.5 million have less than 5 employees, and 4.5 million have less than 10 employees, leaving only 1 million recognized small business firms with less than 500 employees. In addition, of the 112 million employees working for these 5.73 million firms, only half of them work for small businesses (54 million work for small businesses while 56 million work for larger corporate firms). Of the 54 million employees working for small businesses, 6 million work for firms with less than 5 people and 12.4 million work for firms with less than 10 people. This leaves only 40 million employees working for small businesses. Presumably a \textquoteleft corporate employer\textquoteright is one a company in which stocks are either publicly traded, or stocks are owned by a multitude of shareholders, thereby...
Case law in Alaska further clarifies this policy position:

“Where the manager of the corporate premises was guilty of assault and battery, directed against two employees, the corporate veil may not be pierced and the corporation’s assets made liable for his intentional torts merely because the manager controlled the activities of the corporation, owned 50 percent of its shares and was its president. Workmen’s compensation is the exclusive remedy against the employer. An employer is not vicariously liable to its employees in an assault and battery action for the acts of its managerial employee. This section makes workmen’s compensation the exclusive remedy against the employer for compensable injuries. [The exclusivity provisions] define compensable injuries to include ‘an injury caused by the willful act of a third person directed against an employee because of his employment.’ A supervisor is such a third person within this definition, and so workmen’s compensation is the exclusive remedy against the employer.”63

This policy has significant implications for this investigation. In comparison to the ruling of the court in Woodson, this policy draws a distinct separation between the official policy of an employer and the ownership of an employer. Even with the intentional tort of a manager with significant ownership interests in the firm, the exclusivity provisions were found to protect the company from common law liability and punitive damages, in order to protect the business interests of the other investors. Similar to the ruling in Pleasant, when a senior officer, manager or owner of a company engages in an intentional tort, the resulting injury is not an industrial accident and the senior officer, manager or owner does not enjoy the immunity from common law suit.

---

Not only is this a concern from the standpoint of the limited resources held by individuals which can be made liable, but also because this policy does not give any focus to deterrence of egregious behavior of employers and senior officers and owners of the employers. Both Woodson and Brady provide that it is in the public interest to allow punitive damages against an employer whose management, ownership, or senior officials engage in an intentional tort in furthering the official policy of the employer.

Case law in Alabama also supports the policy position of this Sample group:

“Employee’s injury and resulting death were covered under the Alabama Workers’ Compensation Act; Ala. Code § 25-5-1 et seq., therefore, the Act’s exclusive remedy provisions barred the employee’s survivors from suing the employer for failure to provide a safe place to work, regardless of whether the employer’s conduct was negligent, wanton, intentional, or willful.”

This policy raises issues with respect to Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four and Hypothesis Number Six. Not only does this policy fail to provide an element of deterrence for egregious behavior of the employer, this policy provides unfair advantages to employers in the event of tort in the workplace. While it is important to note that this group allows injured employees to sue co-employees at common law, the relief provided will most likely be small compared to punitive damages that can be extracted from employers. This policy position also raises concerns about the constitutionality of the arrangement for employees in light of the advantages for employers.

---

The Supreme Court of Colorado also considered the question of the application of the Workers’ Compensation Act in the event of sexual harassment, and found that sexual harassment does not “arise out of and in the course of the employment” and therefore common law claims against a co-employee personally are not barred by the exclusivity provisions of the Workers’ Compensation Act.\textsuperscript{65}

In pertinent part, the Court ruled that:

“…[E]mployers are responsible for maintaining a workplace free from sexual harassment, and thus, exclusivity provisions of the workers’ compensation act do not prohibit employees from raising claims outside of the act. . . . [P]ublic policy considerations support the court’s holding that sexual harassment legislation, not the workers’ compensation act, is the appropriate avenue of relief for victims of sexual harassment. . . . [S]exual harassment should not be covered by workers’ compensation since workers’ compensation laws fulfill different statutory purposes than do statutes enacted to address workplace sexual harassment. . . .”\textsuperscript{66}

In Delaware, the Supreme Court held that:

“There is nothing in our Workers' Compensation Act that indicates that our General Assembly intended to adopt the substantial certainty rule. Mindful of the separation of powers doctrine, in the absence of clear statutory language, we cannot rewrite the statute to apply the substantial certainty doctrine in Delaware. Many state courts, under similar statutes, have held that an intentional act by the employer that causes injury to an employee is not an ‘accident’ and therefore a claim based on an intentional injury is not barred by the Workers' Compensation Act. We agree that those claims that involve a true intent by the employer to injure the employee fall outside of the Workers’ Compensation Act and remain separately actionable as common law tort claims.”\textsuperscript{67}

\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid. The “substantial certainty doctrine” is the doctrine described in detail in \textit{Woodson}. 

-403-
This sample group is significant because of the many anomalies present. The statutory construction of the Program in Massachusetts (as well as Rhode Island) presents a challenge from an analytical standpoint. Given the statutory provisions, employees have the option to opt out of the universal Program coverage. In this sense, the Program is not necessarily compulsory. However, employees assume the risk of injury by true accident in the workplace, and difficulty in receiving compensation for such injury without Program coverage.

Most importantly, this sample group is significant because the judicial decisions are extremely conservative. The courts have expressly refrained from using a liberal interpretation of the statutory provisions in order to ensure the legislative intent and goals are realized, and in order to maintain the rights and protections guaranteed by the Constitution.

The implications for the Hypotheses in this investigation are, again, profound. Again, the judiciary has taken no steps to test the due process, equal protection or rational basis considerations with respect to these statutory provisions. In essence, the court simply stopped short after acknowledging the ambiguity.

This judicial practice is problematic for two reasons.

First, the legislatures, and the general public, or powerful political interests, such as business interests, may willfully seek to violate the constitutional rights of a certain class, minority or group. One of the only venues for recourse to restore constitutional and civil rights is through the judicial system. While Hypothesis Number One, Hypothesis Number Three, Hypothesis Number Four, and Hypothesis Number Six do not speak directly to the role and power of the courts, there is an assumption that the judicial
system will fulfill its proper role in order to ensure the maintenance of these constitutional and civil rights, the proper use of the application test, and the proper interpretation of the statutes to deter egregious behavior of the employer.

Second, where a law fails to properly establish due process, equal protection, rational basis and legitimate purpose, the entire law should be declared unconstitutional, just as in Best in Illinois, and Brady in Ohio. In Best and Brady, the courts clearly established that the legislature has a responsibility to provide clear and useful language in statutes in order that the public may be able to interpret, understand, and abide by, the law. In these New England judicial decisions, not even the courts themselves understand the intentions of the legislatures in crafting the Program statutes. Therefore, logic would suggest that the entire laws should be invalidated and remanded back to the legislature to produce viable and clear statutory language.

It is important to note that this entire analysis hinges upon the role of the judiciary, and the standard of adjudication for constitutional challenges and due process challenges. It assumed that the appropriate standard of review for constitutional challenges is provided by Best and Brady. It is assumed that the appropriate standard of review for due process consideration is contained in Heath. It is considered that the best interpretation of the appropriate operation and purpose of the Programs is contained in Pleasant and Woodson. It is assumed that the case law examined in New York, Texas, Georgia and Tennessee fails to address the critical question of the adequacy of the benefits provided through the Programs for the various scenarios, including employer intentional misconduct, ineligibility for benefits, and insignificant benefits in light of the injuries.
Works Cited

Note: All laws, statutes and regulations, as well as case law, were retrieved from Lexis Nexis and are not itemized in this work cited. An itemization of workers’ compensation statutes for each jurisdiction is provided in Appendix Three. An itemization of case law is provided in Appendix Four. All other laws and statutes, include federal laws and provisions of the Constitution of the United States of America were also provided by Lexis Nexis. All laws, statutes, regulations and case law are cited using the legal standard for citations in legal publications in the United States, and are cited in the footnotes throughout this work preceded by the term “Lexis Nexis” to identify the source.

Alabama Department of Industrial Relations Division of Workers' Compensation. http://dir.alabama.gov/wc/


Alaska Department of Labor and Workforce Development Division of Workers' Compensation. http://labor.alaska.gov/wc/


California Department of Industrial Relations Division of Workers Compensation. “Homepage.” http://www.dir.ca.gov/dwc/


City University of New York. “How to Brief a Case.”
http://www.lib.jjay.cuny.edu/research/brief.html

Colorado Department of Labor and Employment Division of Workers' Compensation.
http://www.colorado.gov/cs/Satellite/CDLE-WorkComp/CDLE/1240336932511


Florida Department of Financial Services Division of Workers' Compensation. http://www.myfloridacfo.com/wc/


Gallup. 'Food Prices a Hardship for 64% of Low-Income Americans: One in five of those making less than $30,000 a year call the situation 'severe'." Retrieved from http://www.gallup.com/poll/106804/food-prices-hardship-64-low-income-americans.aspx
Georgia State Board of Workers' Compensation. http://sbwc.georgia.gov/


Guam Department of Labor Workers' Compensation Board. http://www.dol.guam.gov/

Hawaii Department of Labor and Industrial Relations Division of Disability Compensation. http://hawaii.gov/labor/dcd/aboutwc.shtml


Indiana Workers' Compensation Board. http://www.in.gov/wcb/

Iowa Department of Workforce Development Division of Workers’ Compensation. http://www.iowaworkforce.org/wc/


Kellett, Brian (22 March 2012). “NHS cuts and staff reductions: is it any wonder nurses are so unhappy?: Falling budgets mean people and equipment are not replaced while paperwork keeps nurses from the job they trained for”. The Guardian. Retrieved from http://www.guardian.co.uk/commentisfree/2012/mar/22/nurses-unhappy-nhs-staff-budget-cuts;


Maryland Office of the Secretary of State. http://www.dsd.state.md.us/

Maryland Workers’ Compensation Commission. http://www.wcc.state.md.us/


Minnesota Department of Labor and Industry Division of Workers’ Compensation. http://www.doli.state.mn.us/workcomp.asp

Mississippi Workers’ Compensation Commission. http://www.mwcc.state.ms.us/

Missouri Department of Labor and Industrial Relations Division of Workers' Compensation. http://labor.mo.gov/DWC/


Nevada Department of Business and Industry Division of Industrial Relations Section of Workers' Compensation. http://dirweb.state.nv.us/wcs/wcs.htm


New Jersey Department of Labor and Workforce Development Division of Workers' Compensation. http://lwd.dol.state.nj.us/labor/wc/wc_index.html

New Mexico Workers' Compensation Administration. http://www.workerscomp.state.nm.us/


New York State Workers Compensation Board. “About Us.” http://www.wcb.ny.gov/content/main/TheBoard/factsht.jsp


Oklahoma Workers' Compensation Court. http://www.owcc.state.ok.us/

Oregon Department of Consumer and Business Services Division of Workers’ Compensation. http://www.cbs.state.or.us/external/wcd/index.html


Puerto Rico Comisión Industrial. http://www.cipr.gobierno.pr/ (Note: The website is in Spanish)


Rhode Island Department of Labor and Training Workers' Compensation ??. http://www.dlt.ri.gov/wc/ WHAT EXACTLY IS THE NAME OF THE OFFICE???. ALSO EDIT THE NAME OF THE OFFICE IN THE TABLE ITSELF!


San Francisco State University. “How to do a Legal Analysis of a Fact Situation.” http://userwww.sfsu.edu/dlegates/URBS513/howtodoa.htm


South Dakota Department of Labor and Regulation Division of Labor and Management Workers' Compensation Program. http://dlr.sd.gov/workerscomp/default.aspx


Texas Department of Insurance Division of Workers' Compensation. http://www.tdi.texas.gov/wc/index.html


Wisconsin Department of Workforce Development Division of Workers’ Compensation. http://dwd.wisconsin.gov/wc/