

# TECHNICAL ADVISORY

## INDEPENDENT INSURANCE AGENTS OF LOUISIANA

TA 114

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**SUBJECT:** HOMEOWNERS AND WORKER'S COMPENSATION

**BACKGROUND:** A frequent question arises about the need for homeowners to purchase Worker's Compensation insurance. Homeowners hire workers for a wide assortment of jobs, including domestic house work, lawn care, in-home child or health care, home repair and home construction. Would the homeowner be required to carry Worker's Compensation in any of these circumstances?

**MAIN POINTS:** For the question to be fully explored, three issues should be examined: (1) When is Worker's Compensation **required**? (2) When is it **advisable** although not required? (3) How does the **Homeowners Policy** respond, if necessary?

The **requirement** to provide Worker's Compensation is stipulated in Louisiana law, R.S. 23:1035.A., which applies to *"every person performing services arising out of and incidental to his employment in the course of his own trade, business or occupation, or in the course of his employer's trade, business or occupation..."*

However, R.S. 23:1035.B. contains the following exemption for homeowners: *"There is exempt from coverage under this Chapter all labor, work or services performed by any employee of a private residential householder in connection with the private residential premises of such householder... and which labor, work, or services are not incidental to and do not arise out of any trade, business or occupation of such householder. With respect to such labor, work or services and any employee performing the same, a private residential householder shall have no liability under the provisions of this Chapter either as an employer or as a principal; however, any person who is engaged in the trade, business or occupation of furnishing labor, work, or services to private residential premises shall be liable under the provisions of this Chapter to his employees or their dependents for injury or death arising from and incidental to their employment in rendering such labor, work, or service."*

This exemption from Worker's Compensation seems broad enough to apply to most employment or fee-for-service situations a homeowner might encounter. Note, however, that if the homeowner is in the business of providing any of these services, the exemption does not apply. For example, a homeowner who owns a janitorial or lawn care business, and sends his personal housekeeper or gardener to a job site one day to fill in for an absent employee of the janitorial or lawn care business, would not be exempt under 23:1035.B.

On the other hand, if the same homeowner sent one of his janitorial or lawn care employees to do work at his personal residence, the exemption would apply.

A 2003 Louisiana appellate case illustrates this situation. In Soileau v. Theriot, 848 So.2d 797, the owner of a building and remodeling business lost his personal residence due to a fire. One of the drywall workers he hired to work on his personal residence was injured and sought workers' compensation coverage from the homeowner. The appellate court ruled that the homeowner was exempt under 23:1035.B., since the work was being done on his personal residence, and not in connection with his building and remodeling business.

The situation that probably generates the most questions is home construction. While there has been surprisingly little litigation in this area, legal experts often cite the following cases as illustrative of the judicial support for the broad exemption in the worker's compensation law for homeowners.

In Reed v. Lewing, a homeowner engaged the services of a home builder to act merely in a "supervisory capacity" for the homeowner's construction of his new private residence. The homeowner was involved in virtually every aspect of construction, including the hiring (and in one instance firing) of workers. An injured carpenter brought suit against both the homeowner and builder/supervisor. The court found that the homeowner had no responsibility for worker's compensation. However, the court ruled that the builder/supervisor was in fact acting in the capacity of employer, given his degree of control, and that home building was his trade. The court held him responsible for injuries to the carpenter.

The second case is McMorris v. Home Indemnity Insurance Co., in which the homeowner was personally supervising the construction of his new home, and had actually purchased a worker's compensation policy. An injured carpenter sought coverage under the worker's compensation policy, but the court denied the claim, on the basis that the homeowner was not in the home construction business, and the carpenter's injury was not a valid worker's compensation claim, even though the homeowner had a worker's compensation policy in force.

The third case is a Louisiana Supreme Court case, Fonesca v. Marlin Marine Corp. A homeowner hired a carpenter to finish construction of a barn, which the homeowner originally started work on himself, but was unable to complete. The carpenter was subsequently injured when he fell off some flooring boards that the homeowner had left unnailed. While the barn was for horses owned by the homeowner, the carpenter was paid with checks in the name of the corporation, of which the homeowner was president and major stockholder. However, it was established in court that the corporation had no connection with the horses or the construction, so the carpenter was not allowed to substantiate a worker's compensation claim against either the homeowner or the corporation.

It should be noted that while a worker's compensation claim is rarely permitted against most homeowners, plaintiffs still retain the right to bring suit for negligence. This right is reaffirmed in another provision of the worker's compensation law, R.S. 23:1035.C.: "*Where applicable, an employee may seek tort recovery for injuries arising out of such labor, work, or services, or recovery from any insurance policy that the homeowner or employer may have which extends coverage to persons injured on the homeowner's or employer's premises, regardless of the employee's employment status, provided that the*

*labor, work, or services performed by such employee are exempt from the provisions of this Chapter.”*

The second issue for analysis is: When might Worker’s Compensation be **advisable**, although not required? Essentially, any exposure that falls outside the exemption in R.S. 23:1035.B. That is, any situation in which a homeowner hires workers, or uses current employees, in activities related to the business, trade or occupation of the homeowner.

The final issue is: How might the **Homeowners Policy** respond to various situations of employment-related claims?

The standard ISO Homeowners Policy affords Section II Liability coverage for the insured if *legally liable for bodily injury or property damage*. In most instances, such as a maid tripping over the vacuum cleaner cord, or a painter falling off a ladder, it seems rather remote that the homeowner would be found legally liable for such accidents. However, in the event of a lawsuit, the insured should receive protection under the Homeowners Policy, both for defense as well as a judgment.

The Homeowners Policy has the following exclusion related to worker’s compensation:

- “2. Coverage E - Personal Liability, does not apply to:*
- d. “Bodily injury” to any person eligible to receive any benefits:*
- (1) Voluntarily provided; or*
- (2) Required to be provided;*
- by the “insured” under any:*
- (1) Workers’ Compensation law;*
- (2) Non-occupational disability law; or*
- (3) Occupational disease law;”*

Thus, the Homeowners Policy will not respond for the homeowner’s legal liability for bodily injury or property damage, if a Worker’s Compensation Policy is voluntarily provided, or is required (whether or not actually provided).

As to Medical Payments, “residence employees” are included in the insuring agreement for Coverage F. However, there is an exclusion if the bodily injury to “residence employees” occurs off the “insured location,” and does not arise out of or in the course of employment.

One additional exclusion related to employment is the business exclusion, which would eliminate any Section II coverage.

**NECESSARY ACTION:** Circulate this article to all agency staff who work with Homeowners and Worker’s Compensation.