

OREGON LAW UPDATE

Additional Liability of LLC Members Under the Employer Liability Law Statute

From the desk of Ryan McLellan: Can a corporation, which is the sole member-manager of the LLC that is the injured worker's employer, be liable under the Employer Liability Law statute where the corporation has limited involvement in the employer's work?

Claims Pointer: Yes. As a member-manager of the injured worker's employer, ORS 63.165 gives corporations a "right to control" the employer's work. Further, the limitations of liability in ORS 63.165 do not limit liability for Employer Liability Law claims.

case in point...

Cortez v. Nacco Material Handling Group, Inc., --- P.3d ---, 2014 WL4924293 (Or. 2014).

Sun Studs, Inc. is a lumber mill located in Oregon. In 2001, Swanson Group, Inc. ("Swanson") purchased Sun Studs, Inc., and reorganized that business as a limited liability company. Swanson was the sole member of Sun Studs, LLC ("Sun Studs"), and Swanson elected itself to manage the company. Swanson set general policies and priorities for Sun Studs. It provided Sun Studs with a safety manual, which stated general policies and served as a "template" that Sun Studs could customize to its particular operations. Swanson delegated day-to-day responsibility for safety at Sun Studs to Sun Studs' mill manager and HR director. It was up to Sun Studs' mill manager and HR director to identify and rectify any safety violations or unsafe workplace issues or safety hazard type issues at the worksite. Swanson executives did not visit Sun Studs to monitor safety conditions or set safety policy. If the Swanson executives observed a safety violation when either of the executives was at Sun Studs' worksite, each executive had authority to direct Sun Studs to correct the violation.

Antonio Cortez ("Cortez") was an employee of Sun Studs, LLC. While Cortez was walking through a dark corridor at the lumber mill, another Sun Studs employee, who was driving a forklift, accidentally hit Cortez. Cortez suffered severe injuries as a result of the accident. After receiving workers' compensation benefits from Sun Studs, Cortez filed suit against Swanson Group, Inc., and alleged Swanson was liable under the Employers Liability Law ("ELL").

Swanson moved for summary judgment arguing that it was immune from liability under either a statute that provides immunity to LLC members and managers, ORS 63.165(1), or under the statute that provides that workers' compensation is the exclusive remedy for certain workplace injuries under ORS 656.018 (2011). The workers

compensation statute has since been amended. The 2011 version of the statute provided that employers providing workers' compensation benefits to their employees are immune from further liability for their employees' workplace injuries. The statute extended the immunity to, among others, an employer's officers, directors, and insurers, but did not extend that immunity expressly to LLC members and managers. The legislature has since amended ORS 656.018 to extend immunity to LLC members, but such amendments only apply to claims arising on or after June 24, 2013, and therefore did not apply to Cortez's claims against Swanson. Because his injury occurred before the effective date of the amendment to the statute, the court concluded that the exclusive remedy provision of the workers' compensation statutes did not apply and the 2011 version of the statute did not shield Swanson from liability under the ELL.

The ELL imposes a heightened statutory standard of care on a person or entity who either is in charge of, or responsible for, any work involving risk or danger. See ORS 654.305. Here, the "work involving risk or danger" was Sun Studs employees driving forklifts through areas of the mill where Sun Studs employees customarily walked. The issue before the court was whether Swanson was a person "having charge of, or responsibility for" that risky or dangerous work.

A worker's direct employer may be liable for injuries sustained on the job, however, liability under the ELL can impose liability on a person or entity who: (1) is engaged with the injured worker's direct employer in a "common enterprise"; (2) retains the right to control the manner or method in which the risk-producing activity was performed; or (3) actually controls the manner or method in which the risk producing activity is performed. *Woodbury v. CH2M, Inc.*, 335 Or 154, 160 (2003). Swanson was not Cortez's direct employer. The court concluded that Swanson was not liable under the ELL on a



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common-enterprise or actual-control theory of responsibility. However, the court questioned whether Swanson retained the right to control he method or manner in which the risk-producing activity was performed.

To establish that Swanson retained the right to control a risk-producing activity, Cortez must either identify some source of legal authority for the perceived right or evidence from which a retained right could be inferred. See *Boothby v. D.R. Johnson Lumber Co.*, 341 Or 35, 41 (2006). Here, Swanson was the sole member-manager of Sun Studs. It chose to delegate the day-to-day decisions to Sun Studs' mill manager and HR director. However, Swanson retained the right under ORS 63.165 to manage all aspects of Sun Studs' operation, including the way that forklifts operated in the mill and the safety conditions in their area of operation. This potentially exposes Swanson to liability. Therefore, the court denied Swanson's motion for summary judgment on this issue.

The court noted that, compared to the common-law tort standards of negligence, the ELL provides broader statutory standards for determining a person or entity's vicarious liability. The court has held that in cases involving common-law negligence claims, in the absence of knowledge or participation, corporate officers and directors are not liable for their employees' negligence—even when the corporate officers delegate responsibility to others to carry out tasks and retain the right to control how those tasks are carried out. By contrast, cases involving ELL claims have held that persons who retain the right to control how others carry out risk-producing activities are liable under the ELL.



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