

Amendment No. 1 to SB0721

Johnson
Signature of Sponsor

AMEND Senate Bill No. 721*

House Bill No. 997

by deleting all language after the enacting clause and substituting instead the following:

SECTION 1. Tennessee Code Annotated, Title 50, is amended by adding the following new chapter:

50-10-101. This chapter shall be known and may be cited as the “Tennessee Employee Injury Benefit Alternative.”

50-10-102. As used in this chapter:

(1) “Benefit plan” means a plan established by a qualified employer under the requirements of § 50-10-108;

(2) “Commissioner” means the commissioner of commerce and insurance or the commissioner’s designee;

(3) “Covered employee” means an employee whose employment with a qualified employer is principally located within this state;

(4) “Department” means the department of commerce and insurance;

(5) “Employee” has the same meaning as defined in § 50-6-102;

(6) “Employer”:

(A) Means any individual, firm, association, or corporation; the receiver or trustee of the individual, firm, association, or corporation; or the legal representative of a deceased employer, using the services of not less than five (5) persons for pay; and

(B) Excludes:

(i) A construction services provider as described in § 50-6-902;

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and

(ii) Any employment arrangement set out in § 50-6-106(1)–(7);

(7) “Financial statement” means an employer’s financial statements that are audited and prepared according to generally accepted accounting principles, or otherwise signed by a certified public accountant as a complete and accurate representation of the employer’s financial condition, including a balance sheet and income statement;

(8) “Occupational injury” means an injury by accident; a mental injury; occupational disease including diseases of the heart, lung, and hypertension; and cumulative trauma conditions including hearing loss, carpal tunnel syndrome, or any other repetitive motion conditions, which all arise out of and in the course and scope of employment, that causes death, disablement, or the need for medical treatment of the employee;

(9) “Qualified employer” means an employer that has obtained a qualified employer certification;

(10) “Qualified employer certification” or “certification” means authorization, as evidenced by a written document, from the commissioner to an employer, allowing an employer to be exempt from chapter 6 of this title; and

(11) “Related employers” means two (2) or more legal entities within a controlled group of companies, as determined under 26 U.S.C. § 414(b) and (c).

50-10-103. Any employer may apply for a qualified employer certification pursuant to this chapter. If an employer has a valid certification issued by the commissioner, the employer

is authorized to exempt itself and its employees from chapter 6 of this title and shall no longer be covered by chapter 6 of this title. Any employer that does not have a qualified employer certification shall comply with chapter 6 of this title.

50-10-104.

(a) Any employer may apply for a qualified employer certification by providing the following to the commissioner in the form and manner prescribed by the commissioner:

- (1) The employer's name, address, and phone number;
- (2) The name or title of a representative of the employer who may be contacted regarding this chapter;
- (3) The number of persons the employer employs in this state as of a specified date determined by the commissioner;
- (4) The employer's claim administration contact information;
- (5) A listing of all covered business locations in this state;
- (6) The date the employer's benefit plan becomes effective if the employer receives qualified employer certification;
- (7) A nonrefundable application fee of five hundred dollars (\$500);
- (8) Satisfactory proof, as determined by the commissioner, of the employer's ability to financially secure compensation for its covered employees for occupational injuries as described in § 50-10-112;
- (9) A written benefit plan, as described in § 50-10-108; and
- (10) A description, or other evidence satisfactory to the commissioner, of the employer's proposed plan to comply with § 50-10-110.

(b) The commissioner shall review applications submitted pursuant to this section to determine whether the application satisfies the requirements of this chapter as soon as possible. The commissioner shall provide notification to the employer as to

whether the employer's application is approved or rejected not more than thirty (30) calendar days after the date the commissioner receives the information set out in subsection (a).

50-10-105.

(a) If an employer applies for a qualified employer certification pursuant to this chapter, the certification shall be for all business locations within this state and all employees within the employer's single legal entity; provided, however, subject to any required approval by the employer's insurer, one (1) or more legal entities that are related employers may obtain qualified employer certification and be exempt from chapter 6 of this title, while the remaining legal entities among those related employers are covered by the requirements and protections provided in chapter 6 of this title and provide workers' compensation coverage.

(b)

(1) Related employers may submit an application to obtain a qualified employer certification to the commissioner with a single filing fee for a single certification that will name such related employers as employers who have a qualified employer certification; provided, the application satisfies § 50-10-104; and the application contains the following:

(A) A listing of all related employers seeking qualified employer certification, including the federal employer identification numbers and all Tennessee business locations for each employer;

(B) Insurance and financial information required by the commissioner for all employers; provided, however, financial information may be submitted on a consolidated basis for all related employers seeking one (1) qualified employer certification; and

(C) Satisfactory proof, as determined by the commissioner, that:

(i) The related employers shall be covered by one (1) insurance policy, if a policy is required, and the same benefit plan; and

(ii) The same claims administrator shall be used for all employees of such related employers.

(2) If related employers adopt separate benefit plans, provide coverage under separate insurance policies, or use different claims administrators, then each employer shall obtain separate qualified employer certification and submit separate applications and filing fees to the commissioner.

50-10-106.

(a) The commissioner shall issue a certification to an employer that has applied for qualified employer certification if all of the requirements of this chapter are satisfied, as determined by the commissioner. The certification is an authorization allowing an employer to exempt itself from chapter 6 of this title.

(b) The certification issued by the commissioner pursuant to subsection (a) shall confirm the effective date of the employer's benefit plan as described in § 50-10-104 and of all financial security required under § 50-10-112. The employer shall be exempt from chapter 6 of this title and shall no longer be covered by chapter 6 of this title on the date set out in this subsection (b).

(c) Any covered employee of an employer that maintains a qualified employer certification and has elected to be exempt from chapter 6 of this title shall be removed from the Tennessee workers' compensation system and become eligible for the employer's benefit plan coverage at the time provided in subsection (b).

50-10-107.

(a) Upon request, or as otherwise required by the commissioner, an employer who maintains a qualified employer certification shall submit documentation to affirm its

continued compliance with this chapter. If the employer fails to demonstrate past compliance with this chapter or otherwise fails to meet the requirements of § 50-10-103, the commissioner may provide an opportunity to cure the violation, withdraw a qualified employer certification, or deny the application to renew. If an employer's certification is withdrawn or an application to renew is denied by the commission for noncompliance with this chapter, the commissioner shall provide the employer a reasonable time after the withdrawal or denial to secure workers' compensation insurance coverage.

(b) An employer may annually elect to renew its status as a qualified employer in the manner prescribed by the commissioner. The employer shall pay a five hundred dollar (\$500) annual renewal fee.

(c) An employer who maintains a qualified employer certification shall notify the commissioner of any material change in information required to be submitted to the commissioner under this chapter within fourteen (14) business days after the change.

(d) An employer may withdraw its exemption as of any date upon notice to the commissioner in the manner prescribed by the commissioner.

50-10-108.

(a) Prior to an employer who maintains a qualified employer certification becoming exempt from chapter 6 of this title, the employer shall adopt a written benefit plan approved by the commissioner that complies with this section.

(b) The benefit plan shall provide for payment of benefits as follows:

(1) Medical expense coverage for at least one hundred fifty-six (156) weeks and five hundred thousand dollars (\$500,000) per employee;

(2) Temporary total disability benefits beginning on the fourth day of disability, of at least seventy percent (70%) of the employee's average weekly wages up to one hundred ten percent (110%) of the state average weekly wage, for at least one hundred fifty-six (156) weeks;

(3) Temporary partial disability benefits beginning on the fourth day of disability, of at least seventy percent (70%) of the difference between the employee's average weekly wage at the time of the injury and the wage the employee is able to earn in the employee's partially disabled condition, until the employee reaches maximum medical improvement, as determined by the employee's treating physician;

(4) Permanent partial disability benefits of at least seventy percent (70%) of the employee's average weekly wages up to one hundred ten percent (110%) of the state average weekly wage, based on criteria established by the American Medical Association's "Guides to the Evaluation of Permanent Impairment" in effect at the time of the impairment rating, and subject to a whole body maximum of four hundred and fifty (450) weeks; provided, however, that permanent partial disability benefits need not be paid unless the employee agrees in a form acceptable to the employer to waive the cause of action described in § 50-10-113(a); provided, however, in order for a waiver pursuant to this subdivision (b)(4) to be effective, the waiver must comply with § 50-10-114;

(5) Permanent total disability benefits of at least seventy percent (70%) of the employee's average weekly wages up to one hundred ten percent (110%) of the state average weekly wage, until the later of the employee, by age, becoming eligible for full benefits in the Old Age Insurance Benefit Program under the Social Security Act (42 U.S.C. § 401 et seq.), or two hundred and sixty (260) weeks; provided, that permanent total disability benefits need not be paid unless the employee agrees in a form acceptable to the employer to waive the cause of action described in § 50-10-113; provided, in order for a waiver pursuant to this subdivision (b)(5) to be effective, the waiver must comply with §

50-10-114; and

(6) Death benefits in at least an amount equal to the lesser of three (3) times the employee's average annualized wages, or three hundred thousand dollars (\$300,000) per employee; provided, if the employee leaves no surviving spouse or dependents, then a death benefit may be reduced to not less than twenty thousand dollars (\$20,000); and provided, further that:

(A) A death benefit amount may be reduced by the amount of any other disability benefits payable with respect to the employee;

(B) A death benefit may be paid in a lump sum or monthly installments over a period up to three (3) years;

(C) Death benefits shall include a funeral benefit of at least seven thousand five hundred dollars (\$7,500) for burial expenses, regardless of the reductions made in subdivision (b)(6)(A); and

(D) A death benefit need not be paid unless the employee's personal representative, dependents, or next of kin agrees in a form acceptable to the employer to waive the cause of action described in § 50-10-113(a); provided, in order for a waiver pursuant to this subdivision (b)(6)(D) to be effective, the waiver shall comply with § 50-10-114.

(c) All benefit determinations shall be made under provisions of the employer's benefit plan and shall not be governed by chapter 6 of this title.

(d) The benefit plan may have a combined single limit for all benefits payable due to an occupational injury; provided, that the combined limit is at least one million dollars (\$1,000,000) per employee, and there is no limit per occurrence.

(e) Nothing in this section shall prohibit or limit a qualified employer from providing occupational injury benefits that are greater than the benefits set out in this section.

(f) Except as otherwise provided in this chapter, payment of benefits to or on behalf of an employee shall not limit the right of the employee or the employee's personal representative, dependents, or next of kin to recover under a cause of action for employer negligence.

(g) The benefit plan may specify, and insurance carriers shall be permitted to compete on the basis of, conditions and limitations on benefits that are not inconsistent with the requirements of this section.

(h)

(1) The benefit plan required by this section may provide for lump-sum payouts in full and final satisfaction of all benefit obligations that are actuarially equivalent to expected future payments as reasonably determined by the claims administrator appointed by the qualified employer. The benefit plan may also provide for settlement agreements between a covered employee and qualified employer that pay more or less than an amount actuarially equivalent to expected future payments; provided, any settlement agreement by or with respect to a covered employee shall comply with § 50-10-114.

(2) Any waiver of rights shall be stated conspicuously on the face of any settlement agreement.

(i) The benefit plan shall pay benefits on a no-fault basis, without regard to whether the covered employee, the qualified employer, or a third party caused the occupational injury; provided, the benefit plan may deny benefits for other reasons including the following:

(1) If the occupational injury was an intentional self-inflicted injury caused by the employee; or

(2) Any occupational injury sustained while the employee was in a state of intoxication or under the influence of drugs.

(j) No employer shall charge a fee or cost to the employee to cover the employee by the qualified employer's benefit plan; provided, normal payroll deductions from disability benefit payments shall not violate this subsection (j).

(k) The benefit plan shall provide eligibility to participate and provide the same forms and levels of benefits to all covered employees of the qualified employer.

(l) For purposes of state and federal taxation, all benefit plan payments made under this chapter are made pursuant to a statute in the nature of a workers' compensation law and like benefit payments pursuant to chapter 6 of this title.

50-10-109.

(a) The commissioner shall maintain a list on the department's web site of the status of qualified employer certification for employers in this state. The list shall include the following information:

(1) A list of all employers that have obtained a qualified employer certification and the effective date of the employer's benefit plan; and

(2) Information set out in § 50-10-104(a)(1) and (4) for all qualified employers.

(b) Any information maintained by the commissioner pursuant to this chapter that is not set out in subsection (a) is confidential and not subject to disclosure pursuant to title 10, chapter 7.

50-10-110.

(a) A qualified employer shall notify each of its covered employees that the employer is a qualified employer and does not provide workers' compensation coverage pursuant to chapter 6 of this title. The notice required by this section shall be provided in paper or electronic form prior to the employer becoming a qualified employer and at the time an employee is hired if the employee is hired after the employer becomes a qualified employer.

(b) The qualified employer shall also post the employee notification required by this section at conspicuous locations within the qualified employer's places of business, as reasonably necessary to provide notice to all employees.

(c) The notice shall include the name, title, address, and telephone number for the person to contact for injury benefit claims administration, and state:

Your employer is a Qualified Employer under the Tennessee Employee Injury Benefit Alternative as of [effective date]. Your employer does not carry workers' compensation insurance coverage under the Tennessee Workers' Compensation Law. If injured on the job, your benefits are governed by a written benefit plan sponsored by your employer. Contact your employer if you have questions about your benefits, rights, or responsibilities under the benefit plan.

50-10-111. A qualified employer's benefit plan established in compliance with this chapter:

(1) Is not maintained solely to comply with the Workers' Compensation Law, compiled in chapter 6 of this title;

(2) Is an employee welfare benefit plan that is subject to all applicable reporting and disclosure, fiduciary responsibility, claims administration, enforcement, and other applicable provisions of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1021–1191c), as amended; and

(3) Provides excepted benefits within the meaning of 29 U.S.C. § 1191b(c).

50-10-112.

(a) Except as otherwise provided in subsections (d) and (e), an employer electing to be a qualified employer under this chapter shall demonstrate financial ability to pay claims by complying with the requirements in § 50-6-405 unless otherwise provided in this section.

(b) A qualified employer may self-fund, insure, or partially self-fund and partially insure the benefits and liabilities under this chapter with any insurance carrier authorized to do business in this state. Insurance coverage obtained by a qualified employer shall be from an admitted insurer with an AM Best Rating of A- or better. Insurance coverage maintained pursuant to this subsection (b) pertains to covered employees only. Employers with employees principally working in states other than this state shall arrange separate insurance coverage in compliance with the other states' laws.

(c) Any security held for purposes of compliance with this section and § 50-6-405 shall serve to guarantee the payment of claims under chapter 6 of this title, and this chapter.

(d) An employer that insures or obtains coverage to reimburse the employer for payments under the employer's benefit plan with an insurance policy that has a self-insured retention (SIR) no higher than twenty-five thousand dollars (\$25,000) per occurrence shall be deemed to have fully insured the employer's compensation obligation under § 50-6-405(a)(1) and shall not be required to post any security deposit with or provide any financial data to the commissioner.

(e)

(1) An employer that insures or obtains coverage to reimburse the employer for payments made under the employer's benefit plan with an insurance policy that has an SIR above twenty-five thousand dollars (\$25,000) but no more than five hundred thousand dollars (\$500,000) per occurrence may seek qualification under this financial security safe harbor if the employer certifies, on the qualified employer application under penalty of perjury, that the employer has:

(A) A commissioner-approved and licensed claims servicing company or in-house adjuster approved by the employer's insurance

carrier, if any;

(B) A workplace safety program;

(C) A record of being continuously engaged in business in this state for at least five (5) years with no change in majority control within the prior two (2) years;

(D) An average payroll of at least one million dollars (\$1,000,000) in each of the preceding three (3) years;

(E) Shareholders' equity of not less than five hundred thousand dollars (\$500,000); and

(F) No fewer than one hundred (100) employees.

(2)

(A) The financial security safe harbor established pursuant to this subsection (e) requires submission of financial statements and is based on the greatest of:

(i) Five percent (5%) of net worth;

(ii) One-and-three-quarters (1.75) times working capital; or

(iii) One-and-three-quarters (1.75) times the loss

projection for the coming year, based on an adjusted three-year average of loss experience, determined by taking the insured's three-year average incurred losses, valued within ninety (90) business days prior to the qualified employer application, and adjusting by limiting losses to the proposed SIR, then indexing the average loss amount for any change in projected payroll from the past three (3) years to the coming year, computed by using total estimated payroll for the coming policy term divided by total actual payroll for the three (3) years of loss experience. This value is

adopted as the approved SIR.

(B) Notwithstanding § 50-6-405, employers insuring at or below the approved SIR may qualify without posting any security for financial obligations under this chapter. Based upon this financial exposure, employers may insure at a higher SIR by posting an amount of security such that the insured SIR less posted security is equal to or below the approved SIR.

(f) The commissioner has final authority to determine if an employer shall post security, regardless of whether or not the employer meets the requirements of this section. The commissioner may also waive the requirements of this section in an amount that is commensurate with the ability of the employer to pay the benefits required by this chapter or as the commissioner otherwise deems is necessary to protect the public.

(g) An employer that does not fulfill the requirements of this section shall not be relieved of the obligation for compensation to a covered employee.

50-10-113.

(a) An employee who is covered by a qualified employer's benefit plan or the employee's personal representative, dependents, or next of kin may bring a cause of action for employer negligence to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment. In the action, the employee shall be required to prove negligence of the employer or of an agent or servant of the employer acting within the general scope of the agent or servant's employment.

(b)

(1) When final judgment is rendered against a qualified employer on a cause of action brought pursuant to subsection (a), the civil liability of the

employer, inclusive of all persons and entities for which vicarious liability may apply, and regardless of the number of defendants against whom the claim is asserted or the number of separate causes of action on which the claim is based, shall be limited to:

(A) Economic damages in an amount not to exceed one million dollars (\$1,000,000) per employee;

(B) Noneconomic damages as determined under § 29-39-102;

and

(C) Punitive damages as determined under § 29-39-104.

(2) The total amount of all benefits paid under a qualified employer's benefit plan shall offset any damages recoverable pursuant to subdivision (b)(1) against such qualified employer. The total amount of all damages recoverable pursuant to subdivision (b)(1) shall not exceed five million dollars (\$5,000,000) per occurrence.

(c) In an action brought pursuant to subsection (a), it is not a defense that the injury or death was caused by the negligence of another employee. The employer may defend the action on any other ground available under state or federal law.

(d) All actions brought pursuant to this section shall proceed through the appropriate state courts, and mediation, arbitration, or any other form of alternative dispute resolution or settlement process available at common law shall be available to such actions; provided, however, benefit claims brought pursuant to an employer's benefit plan shall be resolved through the procedures set forth in or otherwise applicable to the benefit plan.

(e) An insurance agent or broker who sells an employer a benefit plan shall not be subject to an independent cause of action for the sale.

50-10-114.

(a) A cause of action described in § 50-10-113 shall not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive a cause of action or any right described in that section before the employee's injury or death is void and unenforceable.

(b)

(1) A cause of action described in § 50-10-113 may be waived by an employee or the employee's personal representative, dependents, or next of kin after the employee's injury if:

(A) The person voluntarily enters into the waiver with knowledge of the waiver's effect;

(B) The waiver is entered into no earlier than the tenth business day after the date of the initial report of injury;

(C) The employee, before signing the waiver, has received a medical evaluation from a nonemergency care doctor; and

(D) The waiver is in a writing in which the true intent of the parties is specifically stated in the document.

(2) A waiver pursuant to this subsection (b) shall be conspicuous and appear on the face of the agreement. In order to be conspicuous, the waiver provisions shall appear in a type larger than the type contained in the body of the agreement or in contrasting colors.

50-10-115. The department of commerce and insurance shall report to the senate commerce and labor committee and the house of representatives consumer and human resources committee no later than February 1, 2017, and annually thereafter, on the effectiveness of this chapter.

50-10-116.

(a) In the event that the insurer of injury benefit obligations for a qualified

employer is a member of the Tennessee Insurance Guaranty Association, and is determined by a court of competent jurisdiction to be an insolvent insurer pursuant to title 56, chapter 12, part 1, and a final order of liquidation is entered, the Tennessee Insurance Guaranty Association Act, compiled in title 56, chapter 12, part 1, shall become applicable for the purposes of continuation of benefits under this chapter. For guaranty assessments and other purposes of this subsection (a), all insurance covering benefit plan obligations pursuant to this chapter shall be deemed to be workers' compensation insurance; provided, however, guaranty fund coverage shall be for the lesser of the policy limits for such benefit coverage or statutory limits applicable to workers' compensation insurance policies.

(b) In the event that the insurer of injury benefit obligations of a qualified employer shall be a member insurer of the Life and Health Insurance Guaranty Association, and is determined by a court of competent jurisdiction to be an insolvent insurer pursuant to title 56, chapter 12, part 2, and a final order of liquidation is entered, the Tennessee Life and Health Insurance Guaranty Association Act, compiled in title 56, chapter 12, part 2, shall become applicable for the purposes of continuation of benefits under this chapter. For guaranty fund assessments and other purposes of this subsection (b), all insurance covering the benefit obligations of such a qualified employer under this chapter shall be deemed to be life and health insurance premiums.

50-10-117.

(a) Any fees collected pursuant to this act shall be credited by the treasurer to the department for purposes of administering this chapter and not to the general fund.

(b) Any insurance company writing insurance to cover the obligations of this act shall be subject to and pay the taxes and surcharges set out in § 56-4-206.

(c) Any employer that does not satisfy the requirements of § 50-10-112(d) or (e) shall be subject to and pay the taxes and surcharges set out in § 56-4-207.

SECTION 2. Tennessee Code Annotated, Section 50-6-106, is amended by adding the following new subdivision:

(8) An employer that satisfies the requirements of the Tennessee Employee Injury Benefit Alternative, compiled in chapter 10 of this title.

SECTION 3. This act shall be strictly construed. Any conflict between this act and any other law shall be resolved in favor of the operation of this act.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, then:

(1) All provisions and applications of this act shall be invalid and void;

(2) An employer that was exempt from Tennessee Code Annotated, Title 50, Chapter 6, pursuant to this act prior to the invalidity shall not be deemed to have failed to secure workers' compensation insurance; and

(3) An employer that was exempt from Tennessee Code Annotated, Title 50, Chapter 6, pursuant to this act prior to the invalidity shall be liable for an injury to an employee:

(A) Only to the extent to which an employer that complied with Tennessee Code Annotated, Title 50, Chapter 6, would be liable to an employee in compensation for injuries that occur after the date the employer secures compliance with Tennessee Code Annotated, Title 50, Chapter 6, which shall be no later than ninety (90) business days from any final decision declaring any provision of this act or the application thereof to any person or circumstance invalid; and

(B) Only to the extent provided in the employer's benefit plan and only for liability under Tennessee Code Annotated, Title 50, Chapter 10, that arises out of injuries occurring on or after the date set out in Tennessee Code Annotated, Section 50-10-106(b).

SECTION 5.

(a) The commissioner of commerce and insurance is authorized to promulgate rules to effectuate the purposes of this act. The rules shall be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in Tennessee Code Annotated, Title 4, Chapter 5.

(b) Except as otherwise expressly provided in subsection (a), no administrative agency of this state shall promulgate rules or any procedures related to design, documentation, implementation, administration, or funding of a qualified employer's benefit plan.

(c) No regulatory authority shall have the right or duty to approve insurance rates charged for or prescribe policy forms for coverage obtained pursuant to Tennessee Code Annotated, Title 50, Chapter 10.

SECTION 6. For purposes of promulgating rules, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes, this act shall take effect on January 1, 2016, the public welfare requiring it, and shall apply to occupational injuries occurring on or after that date.