



## MEMORANDUM

**To:** Oregon MLAC Members

**From:** Associated Oregon Industries (AOI), Associated General Contractors (AGC), Oregon Self-Insurers Association (OSIA), NFIB/Oregon, Oregon Farm Bureau, Oregon Home Builders Association, Oregon Metal Industry Council

**Date:** January 25, 2013

**Re:** HB 2068

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Oregon's business community seeks to address the negative ramifications of a recent Oregon Court of Appeals decision in *Antonio Cortez v. Nacco Materials Handling Group, Inc.* (A144045; 02/29/2012). The court's holding undermines the long-standing basic tenant of Oregon's workers' compensation statute that an injured workers' exclusive remedy against their employer is via the workers' compensation system.

### Background

Workers' compensation statutes in most states, including Oregon's, limit a worker's remedies for work-related injuries to a workers' comp claim against the employer.

The court ruled in *Cortez* that the exclusive remedy provision of the workers' compensation law, ORS 656.018, does not protect the members of a Limited Liability Company (LLC) from tort liability stemming from a workplace injury.

In this case, the worker was employed by an LLC and was injured in a fork lift accident. The worker filed a workers' comp claim against the LLC and received benefits. The worker then sued various parties, including the sole member and owner of the LLC.

The trial court dismissed the action, citing the workers' comp exclusive remedy provision.

The Court of Appeals reversed, however, noting that the exclusive remedy provision refers to an "employer" and also its "officers and directors," but not to an "LLC member or owner." Accordingly, the court held that even though the exclusive remedy provision protects an LLC as an "employer," it does not protect a "member" of an LLC.

The court allowed the plaintiff's negligence claim against the LLC member to proceed to trial.

## **Issue**

The issue stemming from the *Cortez* decision is that all employers across Oregon are protected from liability under Oregon's workers' comp exclusive remedy statute – except for LLC owners and members.

In this instance, it appears that the workers' compensation statute has not kept pace with advances in corporate law. Oregon's exclusive remedy statute dates back to the inception of the Oregon's workers' compensation law. Oregon's Limited Liability Act took effect in 1994.

Clearly, workers' comp law did not envision the rise and proliferation of limited liability companies as a preferred method of corporate organization.

The fact that the Oregon Appeals Court was able to parse the language of ORS 656.018 and not find specific exclusive remedy protection for owners and members of LLCs, even though the statute was designed to protect employers, is testament of this fact.

## **Proposed Solution – HB 2068**

The court's decision in *Cortez* has made clear that we need to be very specific in ORS 656.018 as to who is afforded exclusive remedy protections as an "employer."

In this case, the court exposed the lack of expressed protection for owners and members of LLCs. But the court's logic could easily apply to partnerships or other corporate entities not contemplated in the exclusive remedy statute.

Our initial attempt to fix this loophole created by the court is to fashion a legislative fix that is narrowly focused by simply including "owners and members of limited liability companies" to the list of those protected under ORS 656.018.

However, we realize that this may be an insufficient solution because the court's logic could be construed to apply to other corporate entities not specifically listed in ORS 656.018.

It is not our intent to carve out any new protections other than what ORS 656.018 originally intended. HB 2068, in our opinion, returns us to the status quo that existed prior to the Appeals Court *Cortez* decision.