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# OCIP/CCIP SUBROGATION IN WORKERS' COMPENSATION CONSTRUCTION CASES

Every state has a system of workers' compensation to provide benefits for workers injured on the job. These benefits are paid regardless of fault and usually according to a statutory scheme set forth in the state statute. Where the work-related injury is a result of negligence of a third-party tortfeasor, most states grant the employee a right to pursue the third-party tortfeasor for damages resulting from the injury and give the workers' compensation carrier some sort of subrogated interest, lien, or statutory scheme of reimbursement with the idea of preventing a double recovery to the employee and reducing the burden of insurance to the employing public of the state. In most jurisdictions, the subrogation statutes include some version of the following two provisions:

(1) An injured employee may pursue an action for damages against the person or party who has a legal liability for the damages; and
(2) the workers' compensation carrier is either:
  (a) subrogated to or has a lien against any recovery in such action;
  (b) entitled to a credit for the amount of such recovery; or
  (c) able to pursue the claim against that person or party.

Workers' compensation legislation first came into being in 1911 when Wisconsin became the first state to adopt workers' compensation legislation. By 1948, every state had some form of "workman's compensation." Such legislation had its roots in socialism and is a social contract in which employers are mandated by law to pay unlimited medical expenses and lost wages when employees are injured while working – even if the employer is absolutely without fault.

## ***Exclusive Remedy Protection of Employer***

In exchange for this social safety net, workers' compensation becomes a worker's exclusive remedy against their employer, and the employer is given immunity from liability. The workers' compensation claim becomes the "exclusive remedy" against the employer, with certain limited—and a growing number of—exceptions. As part of the social contract, the employer (or its insurance carrier) is also entitled to be reimbursed for any benefits paid whenever a third-party tortfeasor (somebody other than the employer or employee) is responsible for the injury or death. Unfortunately, courts and legislatures have begun eroding away the employers' end of the bargain, rendering them liable both when they are at fault and when they are not. At the same time, their rights of reimbursement have also been assailed.

It is always important to look at the exact language of the workers' compensation subrogation statute in the state in which you are working. For example, the **Texas** statute refers to a recovery from a "third party" who is or becomes liable to pay damages for an injury or death that is compensable under this subtitle. V.T.C.A. Labor Code § 417.001(a) (1996). This amounts to a broad definition of the "third party" who is subject to liability for a compensable injury. This language from the Texas statute becomes pivotal as Texas appellate courts cannot agree with one another as to whether or not a workers' compensation carrier is subrogated to the proceeds paid to the worker by an uninsured motorist's policy. Under the **Louisiana** Act, only "third persons" can be sued in a third-party action. La. R.S. § 23:1101 (1998). Louisiana courts

have held third persons to be anyone other than the employer and/or co-employees. La. R.S. § 23:1032(A)(1)(b). Therefore, who qualifies as a "third party" will not only vary from state to state but will vary from appellate court to appellate court within a particular state depending on the ambiguity of the statute and how well the legislature thought out these issues before enacting the statute. States looking to resolve the issues regarding who is a "third party" would be well advised to look only to the language of the statute, instead of judicially legislating who they "think" should be a "third party." Unfortunately, many appellate courts fail to restrain themselves in this area, and the result is conflicting appellate decisions within a single state.

Naturally, in order to have a third-party action, you need a "third party." Who can be sued as "third parties" in third-party actions? The answer, as you might expect, also varies from state to state. The employer is almost universally given immunity for non-intentional acts which cause injury to an employee. Co-employees are usually likewise protected by the "workers' compensation bar," but not always. Uninsured motorists' carriers can be third parties in some situations while underinsured motorists' carriers might not. Whether an uninsured/underinsured motorists' carrier can be considered a "third party," in some states depends on whether the policy was purchased by the insured or employer. Many states have also legislated specific restrictions regarding subrogating against a subcontractor or an employee of a subcontractor in a construction scenario. All of these things must be taken into consideration when determining exactly who and what qualifies as a "third party."

## ***OCIP/CCIP/Wrap-Up Insurance Programs***

*Wrap-Up Insurance Programs* (also known as "Controlled Insurance Programs" or "CIPs") are a family of project-specific insurance (multiple lines) that are very common in large construction projects. In projects without such an insurance program, all parties to the construction project obtain their own insurance and the cost is inevitably passed on to the owner in the bid price. In such circumstances, there is a lot of overlap, duplicate coverage, and waste which can inflate the cost of a project. The owner is made an "additional insured" on the general contractor's policies and the owner, general contractor, and all "up-stream" subcontractors are made "additional insureds" on the lower-tier subcontractors' policies. A wrap-up program helps to hold down the cost of large construction projects by preventing third-party lawsuits between contractors and subcontractors in large construction projects. Parties associated with an OCIP or a CCIP include insurance costs in their bid, but then "back out" those insurance costs which results in a lower cost project. OCIPs typically provide coverage through substantial completion of construction plus a period of years thereafter, typically ten years. The benefits to the owner are significant because they guarantee they will have coverage and force the limits they selected for the applicable statute, and they can be comfortable that any contractor setting foot on the site is covered.

In the OCIP or CCIP documents, the parties seek indemnification or contribution from each other and agree to look solely to insurance when there is an injury or death during construction. Pursuant to a waiver of subrogation clause, the contractors and subcontractors, all in relatively equal bargaining positions, exculpate each other and shift the ultimate risk of losses pertaining to the project to the owner. That risk is then transferred to the owner's insurer for valuable consideration. These wrap-up programs can involve multiple policies and different lines of insurance. Specifically, with regard to workers' compensation insurance, however, wrap-up programs usually involve very large construction projects that cost upwards of $10 million ($3-5 million in California) or for a string of smaller but related construction projects that are just as expensive in total. The insurance policies are obtained either by the owner or general contractor and cover all parties (contractors, subcontractors, etc.) to the construction project. These programs consolidate insurance coverage for all parties on a job site into one blanket policy controlled by the owner or general contractor. Under an OCIP, the Owner of a project sponsors the CIP. Under a CCIP, a general contractor controls the insurance program.

In a typical OCIP wrap-up program, the project owner is the first named insured under the policy, but the general contractor, subcontractors, consultants, etc. of all tiers are also "named insureds." In a typical CCIP wrap-up program, the general contractor is usually the first named insured and the other parties are given "named insured" status. The "Named Insured Endorsement" to an OCIP wrap-up program usually provides that coverage afforded by the policy is automatically extended to contractors who are issued a worker's compensation policy under the OCIP. All other contractors who are not issued a workers' compensation policy under the OCIP are usually provided coverage through an endorsement to the policy. The "named insured" under a typical policy does not include vendors, installers, truck persons, delivery persons, concrete/asphalt haulers, and/or contractors who do not have on-site dedicated payroll. The idea here is that these are parties whose work and safety are not controlled by the owner or contractor. The OCIP endorsement extends "named insured" status only to those subcontractors/consultants or subcontractors for whom the owner or

the owner's agent are responsible to arrange insurance and to whom a worker's compensation policy has been issued. These OCIPs and CCIPs are usually for a single project. However, there are rare instances in which a "rolling" OCIP or CCIP is set up for a series of similar projects. A "Maintenance OCIP" (also known as a "Gate OCIP") is set up to cover ongoing plant maintenance or renovations. They are called "Gate OCIPs" because they cover persons/companies who come through the facility's gate to do work.

OCIPs do pose some challenges. All policy forms are manuscripted and heavily negotiated, which can be expensive and time consuming. OCIPs are complicated policies with extremely long-time horizons, and each participant (usually contractors) must be enrolled into the policy. This can be time consuming and occasionally confusing. One area of coverage which may or may not be included into OCIP is workers' compensation. Frequently, workers' compensation is included in the OCIP. When workers' compensation is rolled into an OCIP, it is recommended that each party to the project waive their rights of subrogation against the other parties on the project. OCIPs have been around since the turn of the century. The American Institute of Architects took a stand against additional insured statuses when it revised its General Conditions form in 1997 and pushed a policy somewhat comparable to the OCIP policy known as the Project Management Protective Liability policy (PMPL). However, as of 2000, only one insurer was providing the PMPL policy and that was CNA Insurance Company. See *OCIP Coverage -- Confusion Still Reigns,* by Donald Malecki, Rough Notes Magazine, Oct. 2000.

State laws vary with regard to the effect on subrogation of such wrap-up insurance programs. In theory, subrogation is generally less of an issue for OCIP covered projects because all parties are covered under the same program and only one party (the project sponsor) paid for insurance on the project. Claims made on an OCIP will not be counted against the contractor. If the contractor experiences a covered loss on the OCIP-covered project, it will usually not affect their own experience modifier. In some states, a party to the wrap-up program who is not the injured employee's employer might be deemed to be a "statutory employer" and worthy of protection from third-party litigation. In **Nevada**, for example, a principal contractor is not liable for payment of any benefits to any injured worker if the contract between the principal contractor and the independent contractor provides that the independent contractor will maintain such coverage, proof of such coverage is provided to the principal contractor, the principal contractor is not engaged in any construction project, and the independent contractor is not "in the same trade, profession, or occupation as the principal contractor." N.R.S. § 616B.639(1)(A-D). In an OCIP, the principal contractor has agreed to provide coverage and will be liable for such compensation benefits. The term "contractor" is synonymous with "builder." Nevada law has specific definitions of a "contractor."

Theoretically, when it comes to injuries sustained on the construction project, there should be less litigation when a wrap-up program is involved. The issue in each state is whether all parties to a wrap-up insurance program are protected as "employer" or "statutory employer" if they are involved in such a program. As an example, in **Nevada**, the statute specifically states that the exclusive remedy provided by this section applies to the owner of a construction project who provides an OCIP pursuant to § 616B.710, to the extent that the program covers the employees of the contractors and subcontractors who are engaged in the construction of the project. In Nevada, all employers, including principal contractors, may take advantage of the Exclusive Remedy Rule. However, § 616B.603 now provides an exception to the general rule that principal contractors are statutory employers. This section sets forth that a person is not an employer if he enters into a contract with another person or business which is an independent enterprise, and is not in the same trade, business, profession, or occupation as the independent contractor. However, this exception does not apply when the principal contractor is licensed pursuant to Nevada Chapter 624. *Billmayer v. Newmont Gold Co*., 963 F. Supp. 938 (D. Nev. 1996).

There is also a presumption of the existence of an employer/employee relationship which must be overcome. It appears that an owner of a project who does not assume an additional status of being a principal employer or contractor, but is simply the owner, can be liable as a third party. However, the exclusive remedy does apply to the owner of a construction project who provides workers' compensation coverage for the project by establishing and administering a Consolidated Insurance Program pursuant to N.R.S. § 616B.710, to the extent that the program covers the employees of the contractors and subcontractors who are engaged in the construction of the project. Also, where an owner functions as his own principal contractor, he will be deemed an "employer" under the Industrial Insurance Act. Notwithstanding that, merely being an owner is not sufficient to grant immunity. Such immunity attaches to an employer of labor, not simply the owners of construction projects. However, it appears that if the owner does provide OCIP workers' compensation coverage, the owner will be considered an employer and the Exclusive Remedy Rule will apply, at least to the extent that the program covers the employees of the contractors and subcontractors engaged in the construction project. It should be argued that the

architect, who is not covered under the OCIP workers' compensation coverage, is not "an employer" because he didn't provide workers' compensation benefits through this program and cannot be considered an "employee" under the Act.

Not everybody on the jobsite is given exclusive remedy "statutory employer" protection under an OCIP or CCIP. Such a program will include "enrolled contractors" and "excluded contractors." For example, security guards, suppliers, vendors, material dealers, truckers, haulers, smaller subcontractors, and others with little or no on-site payrolls, are often excluded and not protected. Design professionals performing services in the construction field may face potential liability for negligence and premises liability claims asserting that the design professional visits the construction site and has the authority to stop the construction work if something is not right. The argument is that the design professional has the duty, therefore, to observe and direct the owner or contractor to correct any unsafe work conditions. However, over the past twenty years, several states have adopted tort immunity for design professionals under their workers' compensation laws, either through expanded statutory employer immunity (*e.g.,* statutory employer defense) or through special exceptions set forth in the statute. In § 617.017(3), Nevada protects design professionals such as architects, engineers, or land surveyors, and their employees, by preventing third-party actions based on a failure to comply with safety standards from being brought against them, provided workers' compensation benefits are being provided. The immunity does not apply to the negligent preparation of design plans or specifications.

## ***Effect of Wrap-Up Programs on Third-Party Liability and Subrogation***

The effect of a wrap-up program on third-party subrogation efforts varies from state to state. The law is still young in this area and most states have little or no precedent outlining how, whether, or when the existence of a wrap-up program allows extension of the exclusive remedy protection (usually enjoyed only by the immediate employer) to all members of the wrap-up insurance program. In **California**, the exclusive remedy protection applies to all parties to a wrap-up insurance program, provided the employer complies with state statutes. In **Connecticut**, case law sets forth that exclusivity applies to both OCIP and CCIP programs. *Bishel v. Conn. Yankee Atomic Power Co*., 771 A.2d 252 (Conn. App. 2001); *Gonzalez, et al. v. O and G Industries, Inc., et al*., 140 A.3d 950 (Conn. 2016). **Georgia** has ruled that exclusivity is not applicable for an owner who sets up an OCIP. *Pogue v. Oglethorpe Power Corp*., 477 S.E.2d 107 (Ga. 1996).

The following chart details the existing law and precedent with regard to the effect of a wrap-up insurance program (such as an OCIP or CCIP) on the third-party liability of potential tortfeasors other than the actual employer, and whether the state's laws grant the owner, contractor, or other subcontractors within the wrap-up program to be "statutory employers" worthy of exclusive remedy protection against third-party liability. It is vital for subrogation professionals to be familiar with the law regarding this subject in each state. This chart does not discuss or deal with the effect of employee leasing and/or temporary employment services, and/or Professional Employer Organizations ("PEO") situations. Those are discussed in our book, "Workers' Compensation Subrogation In All 50 States."

For any questions regarding the effect of OCIP policies and wrap-up insurance programs on subrogation efforts, please contact Gary Wickert at gwickert@mwl-law.com.

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **ALABAMA** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Alabama remains one of the minority states who have maintained a sensible approach to the Exclusivity Rule in construction settings. In order for contractor or subcontractor to have their liability limits limited to benefits paid under workers' compensation, it is essential that the person seeking to limit the remedy of the injured party be in an actual employer/ employee relationship with that party. The Exclusive Remedy Rule does not preclude a suit against an owner or general contractor, even though the compensation benefits were paid by the insurer for the owner or general contractor. *Kilgore v. C.G. Canter*, 396 So.2d 60 (Ala. 1981) | Must generally look to terms of the wrap-up program documents. The Exclusive Remedy Rule does not preclude a suit against an owner or general contractor, even though the compensation benefits were paid by the insurer for the owner or general contractor. *Kilgore v. C.G. Canter*, 396 So.2d 60 (Ala. 1981); Ala. Stats. § 25-5-51, 25-5-53. |
| **ALASKA** | No statute or case law specifically dealing with effect of OCIP/CCIP.<br><br>OCIPs and CCIPs are allowed only in property and casualty insurance. OCIPs are limited to only "major construction projects" approved by the Director of the Division of Insurance. Alaska Stat. § 21.36.475. | An owner or contractor is liable for workers' compensation benefits to the employee of the general contractor, and the general contractor is liable for benefits to employees of subcontractors, unless the actual employer secures the payments of benefits as a result of a work-related injury. Alaska Stat. § 23.30.045.<br><br>Alaska courts appear to have made up a name to describe this type of statute: "contractor-under." It is found nowhere else in the industry. See *Miller v. Northside Danzi Constr. Co*., 629 P.2d 1389 (Alaska 1981). | Must generally look to terms of the wrap-up program documents. If an owner or contractor pays benefits, the owner or contractor may still be sued as a third party and is not immune from suit under the Exclusive Remedy Rule. *Miller v. Northside Danzi Constr. Co*., 629 P.2d 1389 (Alaska 1981). The owner or contractor will have the right of indemnification against an uninsured contractor and will also be able to set-off from any third-party award the amount of compensation benefits previously paid to the subcontractor's employee. Alaska Stat. § 23.30.015(g).<br><br>Statute limiting OCIPs to "major construction projects" does not apply to non-construction projects, such as transporting crude oil through the Trans–Alaska Pipeline System. *State, Dept. of Commerce, Community & Economic Development, Div. of Ins. v. Alyeska Pipeline Service Co*., 262 P.3d 593 (Alaska 2011). |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **ARIZONA** | No statute or case law specifically dealing with effect of OCIP/CCIP.<br><br>"Owner-controlled or wrap-up insurance" means a series of insurance policies issued to cover this state and all of the contractors, subcontractors, architects, and engineers on a specified contracted work site for purposes of general liability, property damage, and workers' compensation. They are allowed on public works projects of over $50 million. A.R.S. § 41-621. | If an employer retains supervision or control over subcontractor, and the work is "a part or process in the trade or business of the employer," the employees of such subcontractors are deemed statutory employees of the original employer. A.R.S. § 23-902(B).<br><br>Such "statutory employers" are entitled to immunity to third-party actions under the Exclusive Remedy Rule. *Word v. Motorola, Inc*., 662 P.2d 1031 (Ariz. App. 1982), *rev'd on other grounds*, 662 P.2d 1024; *Livingston v. Citizen's Utility, Inc*., 481 P.2d 855 (Ariz. 1971). | If an employer procures work to be done by a contractor over whose work the employer retains supervision or control, and the work is "a part or process in the trade or business of the employer," the employees of such subcontractors are deemed statutory employees of the original employer. A.R.S. § 23-902(B). This type of work is further defined as "a particular work activity that in the context of an ongoing and integral business process is regular, ordinary or routine in the operation of the business or is routinely done through the business' own employees." |
| **ARKANSAS** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Arkansas law requires a general contractor (prime contractor) to be liable for workers' compensation benefits to the employee of a subcontractor, where the subcontractor fails to secure such workers' compensation coverage. A.C.A. § 11-9-402(a). Section 11-9-402 provides an exception to this rule. The "prime contractor" will not be liable for compensation benefits to the employees of the subcontractor where there is an "intermediate contractor" who has workers' compensation coverage. Any prime contractor or intermediate contractor who becomes liable for compensation benefits may recover such benefits from the subcontractor, and any such claim for reimbursement constitutes a lien against any amount due in owing to the subcontractor from the prime contractor. A.C.A. § 11-9-402(b)(2). While a general contractor may be sued directly by an injured employee of a subcontractor, in 1993 the Arkansas General Assembly amended § 11-9-105, clearly intending to extend tort immunity to a contractor regardless of whether the subcontractor had paid workers' compensation benefits to its injured employee. | "Statutory employer" likely entitled to immunity only if actual employer fails to provide the statutory employee with benefits and the statutory employer does provide benefits. *Stapleton v. M.D. Limbaugh Constr. Co*., 969 S.W.2d 648 (Ark. 1998). |

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| **CALIFORNIA** | No case law specifically dealing with effect of OCIP/CCIP.<br><br>However, § 3602(d)(1) sets specific rules regarding implementation and handling of wrap-up programs. | In construction settings, there is rebuttable presumption any company who hires a contractor for a job requiring a license is the statutory employer of any unlicensed contractor. Cal. Labor Code § 2750.5.<br><br>This statute can make a valid contractor's license prerequisite for independent contractor status and create a dual employment relationship whereby the worker may be the employee of both the general contractor and subcontractor. *Cedilio v. W.C.A.B.*, 130 Cal. Rptr.2d 581 (Cal. App. 2003); Cal. Labor Code § 2750.5. | There currently is no case law in California specifically discussing or applying the Exclusive Remedy Rule to construction cases involving OCIPs or "wrap-up" policies, despite the fact that California has specific rules and regulations regarding how a wrap-up program is to be implemented and handled.<br><br>Section 3602(d)(1) provides that where a wrap-up agreement is in place that requires the owner/contractor to obtain workers' compensation coverage, and such coverage remains in effect for the duration of the employment, both the general employer and the owner or contractor "statutory" employer are considered to have provided workers' compensation coverage under California law. |
| **COLORADO** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Section 8-41-401 provides that any person, company or corporation which conducts any business by leasing or contracting out any part of its work to any lessee, sublessee, contractor, or subcontractor is deemed to be a "statutory employer" and liable for benefits to the employees of the uninsured employer.<br><br>Workers' compensation is the exclusive remedy for all contractors and subcontractors in the vertical chain of employment. Statutory employer entitled to immunity regardless of actual payment of benefits. *Buzard v. Super Walls, Inc*., 681 P.2d 520 (Colo. 1984). | To qualify as a statutory employer, the test is whether the entity is contracting out the work as a part of its regular business. That is, the work must be something he would normally accomplish with his own employees. The Colorado Supreme Court has expanded the "regular business test" so that it confers statutory employer status in almost all circumstances where the employer contracts out for routine, repetitive and regular services. *Finlay v. Storage Tech. Corp*., 764 P.2d 62 (Colo. 1988). |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **CONNECTICUT** | Owner granted exclusive remedy protection where member of OCIP which provided benefits to employee and indicated owner was alternate employer. *Bishel v. Connecticut Yankee Atomic Power Co.*, 771 A.2d 252 (Conn. App. 2001).<br><br>Connecticut's OCIP statute permits the use of an OCIP for public construction and public works projects. C.G.S.A. § 49-41(E)(1). | In Connecticut, when any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a contractor, and the work so procured is to be done as a part of or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer will be liable for workers' compensation to the employees of such contractors or sub-contractors. C.G.S.A. § 31-291.<br><br>If an owner or contractor becomes a "statutory employer" (known in Connecticut as a "principal employer"), such statutory employer is entitled to immunity under the Exclusive Remedy Rule. *Farrell v. L.G. De Felice & Sons, Inc*., 42 A.2d 697 (Conn. 1945); *Sgueglia v. Milne Constr. Co*., 562 A.2d 505 (Conn. 1989); *Esposito v. PGP Indus., Inc.*, 1990 WL 283963 (Conn. Super. 1990) (*unreported decision*). | "Statutory employer" is known as a "principal employer" in Connecticut. |
| **DELAWARE** | No statute or case law specifically dealing with effect of OCIP/CCIP. | In construction settings, if an owner or contractor contracts to perform work, an employee's right to recover workers' compensation subrogation is against his immediate employer only. 19 Del. C. § 2311.<br><br>Therefore, only the direct employer of an injured worker can claim the Exclusive Remedy Rule as a defense to a third-party action, and no other employer on a job site. *Dickinson v. Eastern R.R. Builders, Inc.,* 403 A.2d 717 (Del. 1979).<br><br>There is no immunity for upstream contractors. | Because 19 Del. C. §§ 2304, 2311 provides that subcontractor on construction site is alone responsible for compensation of its employees working on or under subcontract, it alone is immune from third-party suits. Suit by injured employee can be maintained against contractor on construction site. *Dickinson v. Eastern R. R. Builders, Inc*., 403 A.2d 717 (Del. 1979). |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **DISTRICT OF COLUMBIA** | An entity is not able to claim exclusive remedy protection simply because it is part of an OCIP or CCIP. *Black v. Kiewit Constr. Co.,* 1990 U.S. Dist. LEXIS 3951 (D. D.C. 1990). | District of Columbia Superior Courts are split on how far to extend workers' compensation liability past the immediate employer, including how to apply the Exclusive Remedy Rule in construction settings. The District of Columbia allows exclusive remedy immunity if a subcontractor fails to secure payment for workers' compensation and a contractor does secure such payment for an injured employee of a subcontractor. | In one case, the court found that a general contractor that did not obtain compensation for an injured worker was immune from tort liability when the subcontractor that directly employed the worker did meet its statutory obligation to provide compensation. *Estep v. Constr. General, Inc*., 546 A.2d 376 (D.C. 1988).<br><br>Another court found that a general contractor is not an "employer" immune from tort liability in a suit brought by an injured employee and subcontractor where subcontractor had secured payment of workers' compensation to employee. *Meiggs v. Assoc. Builders, Inc*., 545 A.2d 631 (D.C. 1988), *cert. denied,* 109 S. Ct. 3178. |
| **FLORIDA** | Very little law on OCIP/CCIP programs. Possibly no exclusive remedy protection for an owner because it is not required to obtain workers' compensation coverage for contractor's employees. *Wenzel v. Boyles Galvanizing Co.*, 920 F.2d 778 (11th Cir. 1991).<br><br>An OCIP may only be used in connection with a public construction project. F.S.A. § 255.0517. | if a contractor subcontracts for any part of his contract work to a subcontractor, all of the employees of the contractor and the subcontractor shall be deemed to be employed in one and the same business or establishment, and the contractor is *liable for the payment of workers' compensation insurance* to all such employees, with the exception of employees of a subcontractor who have secured such payment. F.S.A. § 440.10. | *Vertical immunity* is addressed in § 440.10(1)(b). Contractors are responsible for securing workers' compensation coverage for their employees in exchange for the exclusive remedy protection set forth in § 440.11. It affords immunity to the contractor and all subcontractors below it with a direct vertical connection to the injured worker.<br><br>*Horizontal immunity* was adopted in 2003, along with § 440.10(1)(e). It eliminates the direct, vertical link requirement between company and worker, effectively extending immunity to every construction site employer. *Amorin v. Gordon*, 996 So.2d 913 (Fla. App. 2008); *Employers Ins. of Wausau v. Abernathy*, 442 So.2d 953 (Fla. 1983). |
| **GEORGIA** | A premises owner is not entitled to statutory tort immunity, even if it purchases a wrap-up policy to provide workers' compensation coverage for all on-site contractors. *Pogue v. Oglethorpe Power Corp.,* 477 S.E.2d 107 (Ga. 1996). | Georgia's exclusive remedy statute (O.C.G.A. § 34-9-11) creates three express exceptions to the employee's right to sue a third party, granting immunity to: (1) employees of the same employer; (2) persons who provide workers' compensation benefits under a contract with the employer; and (3) construction design professionals. *Cotton v. Bowen*, 524 S.E.2d 737 (Ga. 1999). | Georgia says that while the OCIP contract may require the owner to pay workers' compensation premiums for employees of subcontractors, the contract does not meet the requirements of a workers' compensation insurance policy. Therefore, no exclusive remedy protection. *Pogue v. Oglethorpe Power Corp.,* 477 S.E.2d 107 (Ga. 1996). |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **HAWAII** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Haw. Rev. Stat. §§ 386-1 and 386-5 appear to deem a general contractor to be the employer of its subcontractors' employees, and under § 386-5, Hawai'i's exclusive remedy statute, it would appear to then be immune from suit by its "employees."<br><br>However, the Supreme Court has said that in construction settings, third-party general contractors (independent contractors) are not immune from negligence actions brought by the employees of their subcontractors, absent evidence of a true employer-employee relationship. *Jordan v. Rita*, 670 P.2d 457 (Haw. 1983). | There is downstream liability. When an independent contractor engages subcontractors to perform work for another person pursuant to contract, express or implied, oral or written, such independent contractor is deemed to be the employer of all employees of the independent contractor's subcontractors and their subcontractors, performing work in the execution of the contract. Haw. Rev. Stat. § 386-1 (under definition of "employee").<br><br>If the common law employer/subcontractor fails to furnish workers' compensation benefits pursuant to Hawai'i law, and the general contractor thereby assumes responsibility for providing such benefits, the general contractor will be able to take advantage of the Exclusive Remedy Rule and cannot be sued as a third party (upstream immunity). *Jordan v. Rita*, 670 P.2d 457 (Haw. 1983); *Makaneole v. Gampon*, 777 P.2d 1183 (Haw. 1989). |
| **IDAHO** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Statutory employers are entitled to immunity regardless of whether they actually pay the workers' compensation benefits. *Fuhriman v. State, Dept. of Transp.,* 153 P.3d 480 (Idaho 2007).<br><br>Employee cannot sue (1) statutory employer who hired contractors and is liable to provide comp benefits, and (2) owner of premises. Idaho Code § 72-223*; Venters v. Sorrento Delaware, Inc.,* 108 P.3d 392, 396 (Idaho 2005). | Because § 72-216 requires the general contractor to be responsible for workers' compensation benefits to an employee of a contractor or subcontractor who has not complied with the provisions of § 72-301, a general contractor may be considered a statutory employer, while an owner of property or a project may not. *Robison v. Bateman-Hall, Inc*., 76 P.3d 951 (Idaho 2003).<br><br>To find a person or business to be a statutory employer, the work being carried out by the independent contractor on the owner or proprietor's premises must have been the type that could have been carried out by the employees of the owner or proprietor in the course of its usual trade or business. *Harpole v. State*, 958 P.2d 594 (Idaho 1998). |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **ILLINOIS** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Owner or contractor who contracts any part of work to a subcontractor is liable for workers' compensation benefits to the employees of any such contractor or subcontractor unless the direct employer has provided benefits. 820 I.L.C.S. § 305/1(a)(3). | Owner or contractor who provides workers' compensation benefits to the employees of an uninsured subcontractor may not claim immunity under the Exclusive Remedy Rule as a "statutory employer. *Laffoon v. Bell & Zoller Coal Co*., 359 N.E.2d 125 (Ill. 1976); *Statewide Ins. Co. v. Brendan Constr. Co*., 578 N.E.2d 1264 (Ill. App. 1991). |
| **INDIANA** | The Exclusive Remedy and Immunity are not applicable to OCIPs. An owner and a general contractor may not assert the exclusive remedy defense and that "to hold otherwise would allow an owner or general contractor to voluntarily take out insurance that the law does not require and thereby secure for itself freedom from liability from negligence. *Wolf v. Kajima Int'l, Inc*., 621 N.E.2d 1128 (Ind. App. 1993) *opinion adopted,* 629 N.E.2d 1237 (Ind. 1994). | General contractor generally not liable for injuries to employees of subcontractors unless it retains control. *Lewis v. Lockard*, 498 N.E.2d 1024 (Ind. App. 1986). | A general contractor does not have a statutory duty to secure worker's compensation for each of its subcontractors. Rather, a general contractor has a statutory duty to require that each subcontractor obtain such coverage. An owner or general contractor may not alter its status concerning potential tort liability to employees of contractors or subcontractors by directly purchasing worker's compensation insurance on behalf of subcontractors. |
| **IOWA** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Iowa does not require a general contractor to be responsible for workers' compensation benefits for an uninsured subcontractor. Therefore, a general contractor is not entitled to the protection of the Exclusive Remedy Rule unless it is directly an employer of an injured worker. *Farris v. General Growth Dev. Corp*., 354 N.W.2d 251 (Iowa App. 1984). | Section 85.20 provides that the rights and remedies provided under the workmen's compensation law are to be the exclusive rights and remedies against the injured employee's *employer* only. The Exclusive Remedy Rule protection is applicable only when a relationship of employer and employee exists between the injured employee and the third-party defendant. |
| **KANSAS** | If CGL coverage is included for all participants on a project, then project participants are not required to carry CGL coverage. Parties to OCIP may not be required to waive rights of recovery for claims covered by OCIP against other participants in the program. K.S.A. § 40-5403(b)(4)-(5). | Section 44-503 says owner or general contractor responsible for workers' compensation payments to any employee on the project, even if he is employed by a subcontractor. Such employees are referred to as "statutory employees." A statutory employer is immune from third-party liability, even though the subcontractor, and not the principal, had secured the workers' compensation benefits for the employee. *Robinett v. Haskell Co.,* 12 P.3d 411 (Kan. 2000). | Kansas does not have any case law specifically dealing with whether subcontractors included within a wrap-up program are considered statutory employees under Kansas law as they would be under the law of some other states.<br><br>Waivers of Subrogation in construction contracts are prohibited in a consolidated or wrap-up insurance program under § 16-1803. |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **KENTUCKY** | There is only one unreported federal court decision dealing with the effect of an OCIP in Kentucky. It appears to state that exclusive remedy protection is extended to parties enrolled in an OCIP program in which workers' compensation coverage was obtained for all subcontractors. *Casey v. Vanderlande Indus., Inc.*, 2002 WL 1496815 (W.D. Ky. 2002) (*unreported decision*). | A contractor who subcontracts and his workers' compensation carrier are both liable for the payment of compensation benefits to the employees of subcontractors unless the subcontractor has secured workers' compensation coverage on its own. If such a contractor becomes liable for workers' compensation benefits, it may take advantage of the Exclusive Remedy Rule and claim immunity from tort actions filed by employees of subcontractors. K.R.S. § 342.691(1) (stating that for purposes of Exclusive Remedy Rule, the term "employer" shall include a "contractor" covered by Subsection 2 of § 342.610).<br><br>In order to obtain the exclusive remedy provision, a "contractor" under § 342.610 must contract with another to do work of a kind which is a recurrent part of the work of the trade or occupation of such person. K.R.S. § 342.610. | Section 342.610 has been interpreted to mean that a person who engages another to perform a part of the work which is a recurrent part of his business, trade, or occupation is a "contractor", even though he may never perform that particular job with his own employees. He is still a contractor if the job is one that is usually a regular or recurrent part of his trade or occupation. *Firemen's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986). |
| **LOUISIANA** | There is no precedent governing the application of the Exclusive Remedy Rule and the status of statutory employer to members of an OCIP or CCIP. | Louisiana law does not have any specific restrictions with regard to suits against subcontractors or other related companies in third-party actions. However, a third party will be immune from suit by either the employee, employer, or workers' compensation carrier under the Borrowed Servant and Statutory Employer Doctrines, if the worker is, in fact, a borrowed servant at the time of the injury. La. R.S. § 23:1032 and § 23:1061. | OCIP or "wrap-up" insurance programs are used for large construction projects and usually obtained by the owner to cover workers' compensation and liability risks of specific parties to a construction project and risks associated with the job site. By obtaining an OCIP, the owner, or sponsor, procures insurance for himself, the general contractor, subcontractors, and employees working on the construction project, but the coverage is generally limited in scope and covers only risks associated with the specific project. *Zeitoun v. Orleans Parish School Bd.*, 33 So.3d 361 (La. App. 2010). |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **MAINE** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Any owner or contractor contracting for any work which is part of its usual trade, occupation, profession, or business, is deemed to be an employer for purposes of providing workers' compensation benefits to each employee of any contractor or subcontractor underneath it. Me. Rev. Stat. Ann. Tit. 26, § 1043(10).<br><br>Nonetheless, the owner or general contractor provides such workers' compensation benefits will not be immune from a third-party action due to the Exclusive Remedy Rule. Me. Rev. Stat. Ann. Tit. 39-A, § 906 | In 2009, Maine became concerned that construction workers who were functioning as employees were being treated as independent contractors in order to avoid workers' compensation premiums. As a result, effective January 1, 2010, the Legislature enacted §105-A, entitled "Construction Contractors." Section 105-A provides that a person performing "construction work" for a "general contractor" or "*hiring agent*" is deemed to be an employee for workers' compensation purposes, unless the person is a legitimate independent contractor, after meeting all twelve listed criteria set forth in § 102. Section 105-A is limited to the construction industry. Whether or not a person in any other industry is an independent contractor for workers' compensation purposes is still governed by the test in §102 |
| **MARYLAND** | The Exclusive Remedy Rule applies to an owner who has provided workers' compensation coverage for all employees of subcontractors through an OCIP/CCIP program. *Rodriguez Novo v. Recchi America, Inc.*, 846 A.2d 1048 (Md. App. 2004). | Maryland law requires a principal contractor to provide and pay workers' compensation benefits to the employee of any contractor or subcontractor, provided that the work undertaken is part of the business, occupation, or trade of the principal contractor. Md. Labor § 9-508. Therefore, when certain conditions are met, the Act broadens the definition of "employer" to cover "principal contractors" that ordinarily would not be considered employers under common law.<br><br>To have immunity under the Exclusive Remedy Rule in Maryland, a principal contractor must: *(1) have contracted to perform the work; (2) which is a part of his trade, business, or occupation; and (3) must have contracted with a subcontractor for the execution by or under the subcontractor of the whole or any part of such work.*<br><br>Principal contractors who do not meet the requirements of § 9-508 are not considered "statutory employers" and can be sued as third parties. *Honaker v. W. C. & A. N. Miller Development Co*., 365 A.2d 287 (Md. 1976). | A principal employer under Md. Labor § 9-508 is entitled to Exclusive Remedy protection even if it does not actually provide workers' compensation benefits to the employee of a subcontractor. *Para v. Richards Group of Washington Ltd. Partnership*, 339 Md. 241 (Md. 1995). |

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| **MASSACHUSETTS** | No statute or case law specifically dealing with effect of OCIP/CCIP. | In 2011, Massachusetts Supreme Court held that statutory employers who pay benefits to the employees of a subcontractor are not able to claim protection under the Exclusive Remedy Rule. *Wentworth v. Henry C. Becker Custom Bldg., Ltd*., 947 N.E.2d 571 (Mass. 2011). | Massachusetts used to employ the Common Employment Doctrine, which held that the plaintiff and the defendant's employer and every other employee on the job, where engaged in a common employment and having workers' compensation benefits, are all immune from third-party suit. However, Massachusetts abolished the Common Employment Doctrine by statute in 1972. M.G.L.A. 152 § 15. |
| **MICHIGAN** | A contractor does not have exclusive remedy protection merely because a subcontractor is enrolled in an OCIP. *Burger v. Midland Cogeneration Venture,* 507 N.W.2d 827 (Mich. App. 1993).<br><br>However, a contrary outcome was reached in *Stevenson v. HH & N/Turner*, No. 01-CV-71705-DT, 2002 U.S. Dist. LEXIS 26831 (E.D. Mich. 2002). | A contractor who contracts with a subcontractor for the whole or any part of any work undertaken by the contractor is liable to pay workers' compensation benefits for all employees of the subcontractor. M.C.L.A. § 418.171<br><br>If the contractor must pay benefits to the employee of a subcontractor because the subcontractor failed to provide for workers' compensation coverage, then the contractor will be deemed to be a "statutory employer" and subject to the Exclusive Remedy Rule within Michigan. *Dagenhardt v. Special Mach. & Eng'g, Inc*., 345 N.W.2d 164 (Mich. 1984), *reh'g denied*, 362 N.W.2d 217.<br><br>The contractor benefits from the exclusive remedy protection only if it ultimately ends up becoming liable for the subcontractor's failure to provide benefits. *Drewes v. Grand Valley State Colleges,* 308 N.W.2d 642 (Mich. App. 1981). | OCIPs allowed for workers' compensation only if construction costs exceed $65 million and must be authorized by Michigan insurance director. Mich. Laws Ann. § 418.621(3).<br><br>The first decision in the U.S. regarding the effect of an OCIP program on workers' compensation subrogation was the 2002 federal district court unpublished opinion of *Stevenson v. HH & N/Turner,* No. 01-CV-71705-DT, 2002 U.S. Dist. LEXIS 26831 (E.D. Mich. 2002), which stated that an OCIP effectively transforms all enrolled contractors into the employer of the injured plaintiff. |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **MINNESOTA** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Generally, a general contractor paying workers' compensation benefits to the employee of a subcontractor will not be immune from tort liability via the Exclusive Remedy Rule and can be sued as a third party by the injured employee of the subcontractor. *Hallas v. Maegele Outdoor Advertising, Inc.*, 541 N.W.2d 594 (Minn. App. 1995).<br><br>However, an injured employee of a subcontractor who elects to receive workers' compensation benefits from a subcontractor or its insurer, may not sue the general contractor as a third party where the contractor and subcontractor are engaged in a "common enterprise." *O'Malley v. Ulland Bros.,* 549 N.W.2d 889 (Minn. 1996). | When a subcontractor fails to properly insure its employees, the general or intermediate contractor becomes liable for all benefits due to the subcontractor's injured employee. M.S.A. § 176.215<br><br>A "common enterprise" exists if all of the following three factors are met: (1) employers must be engaged on the same project; (2) employees must be *working together* (common activity); and (3) in such fashion that they are subject to the same or similar hazards.<br><br>This exception to third-party liability exists for the protection of employers who have joined forces and placed their forces in a common pool. To be successful with this defense, the defendant must prove that all three of the above elements have been met. It is a difficult burden to meet. M.S.A. §§ 176.061(1) and 176.061(4); *McCourtie v. U.S. Steel Corp*., 93 N.W.2d 552 (Minn. 1958). |
| **MISSISSIPPI** | In 2017, in a case of first impression, the Mississippi Supreme Court announced that an owner which provided workers' compensation coverage to employees of a subcontractor through a wrap-up insurance program (OCIP) was not considered to be the statutory employer of an injured employee of the subcontractor and could not claim immunity under the Exclusive Remedy Rule. *Thomas v. Chevron U.S.A., Inc*., 212 So.3d 58 (Miss. 2017). | When an employee is engaged in the service of two employers in relation to the same act (dual employment), both employers are exempt from common law liability, although only one of them has actually provided workmen's compensation coverage. *Ray v. Babcock & Wilcox Co., Inc*. 388 So.2d 166 (Miss. 1980).<br><br>Mississippi has not followed this line of reasoning with a blanket rule that any subcontractor and statutory employer are "dual employers" in an "up-the-line" situation. Rather, the court has coupled immunity with the statutory obligation to secure compensation imposed by § 71-3-7 on direct and statutory employers. | In *Thomas v. Chevron U.S.A., Inc*., the court explained its decision by saying that the owner had no duty as an employer or contractor to secure workers' compensation insurance and its act of voluntarily purchasing coverage did not change its status. They held the owner was not immune from a negligence action and was subject to a subcontractor's employee's tort claim as "any other party" would be pursuant to Mississippi Code § 71–3–71.<br><br>Exclusive remedy protected extended to both owners and general contractors. *American Resources Ins. Co., Inc. v. W.G. Yates & Sons Constr. Co*., 2012 WL 1033521 (S.D. Miss. 2012).<br><br>The legal fiction of the "statutory employer" defense in Mississippi is paper thin. To grant a contractor "statutory employer" status simply because it requires its subcontractors to obtain workers' compensation insurance seems contrary to the intent and purpose of the Act. |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **MISSOURI** | No statute or case law specifically dealing with effect of OCIP/CCIP. | The employee of a subcontractor cannot maintain a common law action against a general, principal, or original contractor, because they become "statutory employers." The reasoning behind the law is that because such contractors are secondarily liable for compensation under § 287.040 of the Missouri statutes, they are, therefore, protected. Mo. Rev. Stat. § 287.040(1) (1993); *Bailey v. Morrison-Knudsen Co*., 411 S.W.2d 178 (Mo. 1967); *Bunner v. Patti*, 121 S.W.2d 153 (Mo. 1938) (*en banc).* | Statutory employer immunity applies regardless of actual payment of benefits. *Shaw v. Mega Indus., Corp*., 406 S.W.3d 466 (Mo. App. 2013). |
| **MONTANA** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Montana requires that an employer who contracts with an independent contractor to perform work of a kind which is a regular or recurrent part of the work of such employer is liable for payment of the workers' compensation benefits to the employees of a subcontractor which has not done so. Mont. Stat. § 39-71-405.<br>Despite this statute, the employer/general contractor is not entitled to immunity under the Exclusive Remedy Rule as a "statutory employer," even though he is compelled to provide workers' compensation benefits. *Trankel v. State, Dept. of Military Affairs*, 938 P.2d 614 (Mont. 1997). | Montana has not adopted Professor Larson's "statutory employer" concept and has backed away from the rationale that the statutory employer-employee extension by the legislature is for the benefit of the employee and that such a benefit conferring a liability on the employer is co-existent with immunity from common law liability. After § 39-71-405 was amended to allow owners or general contractors who did pay benefits for a subcontractor to recover such payments from the actual employer, so the *quid pro quo* underlying Larson's statutory employer concept has gone away. *Webb v. Montana Masonry Constr. Co*., 761 P.2d 343 (Mont. 1988). |
| **NEBRASKA** | If participation in the OCIP is mandatory, the owner of the OCIP cannot be considered the plaintiff's statutory employer, nor could be sued. Even though the owner's insurance company pays workers' compensation benefits to a subcontractor's employee, the exclusive remedy defense did not apply to protect the owner. *Culp v. Archer-Daniels-Midlands Co.*, 2009 WL 1035246 (D. Neb. 2009). | An owner who requires its contractor or contractors to take out workers' compensation insurance is not considered an employer for purposes of the Exclusive Remedy Rule. If there was no such obligation of the subcontractor to obtain workers' compensation coverage, then the owner would be a statutory employer and the exclusive remedy protection would apply. *Culp v. Archer-Daniels-Midlands Co.*, 2009 WL 1035246 (D. Neb. 2009). | An owner is the "employer" or "statutory employer" of an independent contractor's employee under Neb. Stat. § 48–116 when the owner does not require the independent contractor to procure workers' compensation insurance. *Rogers v. Hansen*, 317 N.W.2d 905, 908 (Neb. 1982).<br>Nebraska law does not recognize as a statutory employer one who ultimately bears the insurance costs. *Petznick v. United States*, 575 F.Supp. 698 (D. Neb.1983).<br>The key inquiry is whether the subcontractor is required to obtain workers' compensation coverage or not. |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **NEVADA** | Section 616A.020(3) provides that the Exclusive Remedy Rule applies to an owner (statutory employer) who provides an OCIP pursuant to § 616B.710, to the extent that that OCIP covers employees of the contractors and subcontractors who are engaged in the construction of the project. | An owner who hires a contractor to construct improvements to real property and secures compensation for the contractor's injured employees is deemed to be a statutory employer and entitled to workers' compensation immunity. N.R.S. § 616B.612.<br><br>All "subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of [the NIIA]." N.R.S. § 616A.210(1).<br><br>This exclusive remedy protection applies even if the owner does not actually pay the benefits. *Oliver v. Barrick Goldstrike Mines*, 905 P.2d 168 (Nev. 1995); N.R.S. § 616A.020(3). | Section 616B.603 now provides an exception to the general rule that principal contractors are statutory employers. The owner is not an employer if he enters into a contract with another person or business which is an independent enterprise which is not in the same trade, business, profession, or occupation as the independent contractor. However, this exception does not apply when the principal contractor is licensed pursuant to Chapter 624. *Billmayer v. Newmont Gold Co*., 963 F. Supp. 938 (D. Nev. 1996). |
| **NEW HAMPSHIRE** | No statute or case law specifically dealing with effect of OCIP/CCIP. | An owner or subcontractor who subcontracts all or any part of a contract is liable for workers' compensation benefits to the employees of subcontractors. N.H. Rev. Stat. Ann. § 281-A:18. | Although case law is sparse on this issue, it can be argued that the owner or contractor responsible for benefits to the employee of a subcontractor can claim immunity under the Exclusive Remedy Rule in New Hampshire. |
| **NEW JERSEY** | New Jersey's OCIP statute authorizes the use of an OCIP for "school facilities projects." N.J.S.A. § 18A-7G-44(a). | A general contractor is liable for payment of compensation benefits to employees of a subcontractor only in the event that the subcontractor has failed to secure workers' compensation insurance. *Wilson v. Faull*, 141 A.2d 768 (N.J. 1958).<br><br>However, there is no exclusive remedy immunity for statutory employers. *Boehm v. Witte*, 231 A.2d 240 (N.J. Super. 1967).<br><br>If the general contractor becomes liable for compensation benefits to the employee of a subcontractor, he is granted a right of reimbursement from the derelict subcontractor. N.J.S.A. § 34: 79. | Note that the term "statutory employer" is not found in the New Jersey Workers' Compensation Act.<br><br>"Any contractor placing work with a subcontractor shall, in the event of the subcontractor's failing to carry workers' compensation insurance as required by this article, become liable for any compensation which may be due to an employee or the dependents of a deceased employee of a subcontractor. The contractor shall then have a right of action against the subcontractor for reimbursement." N.J.S.A. § 34:15-79. |

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| **NEW MEXICO** | No statute or case law specifically dealing with effect of OCIP/CCIP.<br><br>OCIP permitted, provided for projects in excess of $150 million over a five-year period. N.M.S.A. § 52-1-4.2(A). | If an employer procures any work to be done wholly or in part for him by a contractor, and the work to be done is a part or process in the trade or business or undertaking of such employer, then such employer shall be liable to pay all compensation benefits to employees of such subcontractor, just as if the work was done without the use of the subcontractor. N.M.S.A. § 52-1-22.<br><br>A general contractor who pays benefits pursuant to § 52-1-22 may take advantage of the Exclusive Remedy Rule if sued by an employee of the subcontractor, provided that it shows that the subcontractor is not an independent contractor and that "the work so procured to be done as a part or process in the trade or business or undertaking of the general contractor." *Chavez v. Sundt Corp*., 920 P.2d 1032 (N.M. 1996). | |
| **NEW YORK** | A general contractor is not considered to be the statutory employer of a subcontractor's employee, even when there is an OCIP in place. *Duchenne v. 774 Dev., LLC,* 2010 WL 4668462 (N.Y. Sup. 2013) (*unreported decision*). | A contractor who subcontracts all or part of a contract to be liable and pay workers' compensation benefits to any employee and subcontractor who is injured on the job. N.Y. Work. Comp. § 56.<br><br>There is no immunity for a statutory employer under § 56. *Cutillo v Emory Housing Corp*., 190 N.Y.S.2d 502 (N.Y. Sup. 1959). | A "subcontractor" under an OCIP who does not actually perform work on the project but merely provides materials to those who do perform the construction work is not protected as a "statutory employer." *Higgins Erectors & Haulers, Inc. v. Niagara Frontier Transportation Authority*, 529 N.Y.S.2d 654 (N.Y. App. 1988). |

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| **NORTH CAROLINA** | No statute or case law specifically dealing with effect of OCIP/CCIP.<br><br>OCIP authorized for the construction of state public works projects over $50 million and may include workers' compensation insurance. N.C.S.A. § 58-31-65(a). | Generally, an injured employee of a subcontractor may bring a tort action against a general contractor or against another subcontractor. *Braxton v. Anco Elec*., 397 S.E.2d 640 (N.C. App. 1990), *aff'd*, 409 S.E.2d 914 (N.C. 1991).<br><br>However, § 97-19 provides that a "principal contractor" becomes liable for comp benefits to a subcontractor's employee and has exclusive remedy protection when: (1) employee is working for subcontractor contracted with principal contractor, and (2) the subcontractor does not have comp insurance. *Rich v. R.L. Casey, Inc*., 454 S.E.2d 666 (N.C. App. 1995); N.C.G.S.A. § 97-19. | Principal contractor also enjoys the exclusive remedy immunity of an employer from third-party suit when the facts are such that he *could be made liable* for compensation. *Rich v. R.L. Casey, Inc*., 454 S.E.2d 666 (N.C. App. 1995).<br><br>Any contractor who sublets any contract for the performance of any work without requiring from such contractor a certificate of insurance indicating that he has obtained workers' compensation insurance for the subcontractor's employee, will be liable for workers' compensation benefits to the employees of the subcontractor. N.C.G.S.A. § 97-19 (1996); N.C.G.S.A. § 97-19.1 (2003) (same as § 97-19, except that it deals with individuals in interstate or intrastate trucking who operate a truck licensed by a governmental motor vehicle regulatory agency). |
| **NORTH DAKOTA** | No statute or case law specifically dealing with effect of OCIP/CCIP. (Monopolistic State Fund). | A general contractor must ensure that employees of subcontractors are covered. HB 1137, passed on August 1, 2017, extends a general contractor's liability for the workers' compensation coverage of workers employed by a subcontractor or independent contractor operating under agreement with the general contractor. If a subcontractor or independent contractor does not secure workers' compensation coverage, the general contractor is liable for the payment of penalties as well as premiums, until such time as the subcontractor or independent contractor pays the amounts owed. N.D.C.C. § 65-04-26.2. | If a general contractor secures workers' compensation benefits, it is protected by the Exclusive Remedy Rule. N.D.C.C. § 65-01-02(16)(c). |

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| **OHIO** | A subcontractor enrolled in a CCIP or OCIP has immunity from a tort claim for workplace injury by an employee of another enrolled subcontractor on the same project. All subcontractors are entitled to "horizontal" immunity from a lawsuit brought by an injured employee of *any another* subcontractor working on the project. Until the *Stolz* decision, subcontractors were only entitled to "vertical immunity" from suit by their own employees. Subcontractors must carry additional CGL coverage to address the possibility of suit by employees of other subcontractors. The "horizontal immunity" should only apply to large, self-insured construction projects. *Stolz v. J & B Steel Erectors, Inc.*, 55 N.E.3d 1082 (Ohio 2016). (Monopolistic State Fund). | Section 4123.35 is confusing and short on detail. There is not much guidance given with regard to subrogation rights against general contractors by employees of subcontractors. | An "employee" is defined to include:<br>*"Every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the administrator of workers' compensation for the person's employment or occupation or who is a self-insuring employer and who has failed to pay compensation and benefits directly to the employer's injured and to the dependents of the employer's killed employees as required by section 4123.35 of the Revised Code, shall be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer."*<br>Ohio Stat. § 4123.01(A)(1)(c). |
| **OKLAHOMA** | No statute or case law specifically dealing with effect of OCIP/CCIP. | Whereas most states refer to non-employers who become liable for workers' compensation benefits as "statutory employers," Oklahoma refers to them as "general employers" or "intermediate employers." Liability for workers' compensation benefits owed by an "immediate employer" may fall onto either a "general employer" or an "intermediate employer" under certain conditions. | A "principal employer" is secondarily liable for a subcontractor's employee's injury if the immediate employer has failed to provide comp coverage and the principal employer has failed to exercise "good faith" to determine the existence of coverage under a valid insurance policy. 85 O.S. §11(B)(2). The work of the subcontractor must be necessary and integral to the work of the principal employer.<br>The "good faith" requirement of §11(B)(2) is satisfied when the "principal employer" obtains a certificate of insurance showing the period of the subcontractor's work. "Good faith" requires a continuing obligation to obtain a current certificate on the expiration date of the coverage. The principal employer is entitled to rely on the certificate of coverage and is not secondarily liable. *Myers v. Wescon Constr. Inc.,* 59 P.3d 1277 (Okla. App. 2002). |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **OREGON** | Who is a "covered worker" is normally determined by the right to control the details of the employee's work. This is true even when there is an OCIP. No automatic exclusive remedy protection. *Schmidt v. Intel Corp*., 112 P.3d 428 (Or. App. 2005). | In general, a general contractor is not the "employer" of a subcontractor's injured employee and is not protected by the exclusivity provisions of workers' compensation law. *Martelli v. R.A. Chambers and Associates*, 800 P.2d 766 (Or. 1990).<br><br>However, where an owner/contractor which contracts for performance of labor where such labor is a normal and customary part or process of that entity's trade or business is responsible for providing workers' compensation coverage to all individuals who perform labor under the contract, unless the subcontractor provides such coverage before labor under the contract commences. O.R.S. § 656.029. | The court In *Martelli* distinguished between a contract requiring primarily the performance of labor and one requiring the services of a separate business engaged in the occupation covered by the contract at the time performance of the contract commenced; *i.e.,* whether an independent contractor is involved. The result will be different if there is purely the supplying of labor. *Lancaster v. E.S.S. Corp*., 1992 WL 66652 (9th Cir. [Or.] 1992) (*unpublished opinion*). |
| **PENNSYLVANIA** | No statute or case law specifically dealing with effect of OCIP/CCIP. | A contractor who subcontracts all or part of a contract is liable for workers' compensation benefits to the employees of the subcontractor unless the subcontractor (direct employer) has secured payment of such benefits. 77 P.S. §§ 461, 462. | A statutory employer is an employer who is not a contractual employer or a common law employer, but an employer as a result of the workers' compensation law. A statutory employer is entitled to exclusive remedy protection as a matter of law, regardless of actual payment of benefits. *Peck v. Delaware Cty. Bd. of Prison Inspectors*, 814 A.2d 185 (Pa. 2002). |
| **RHODE ISLAND** | No statute or case law specifically dealing with effect of OCIP/CCIP. | A general contractor who enters into a contract with a subcontractor for work to be performed in Rhode Island must maintain written documentation evidencing that the subcontractor carries workers' compensation insurance. If he does not, he will be deemed the employer. The general contractor's status as "statutory employer" will not prevent a third-party action from being filed against it by the injured worker. *Sorenson v. Colibri Corp*., 650 A.2d 125 (R.I. 1994). | A general contractor can be the statutory employer of a sub-subcontractor's employee, even though there is no direct contractual involvement between them, provided the general contractor fails to obtain written documentation from the subcontractor which hired sub-subcontractor assuring that subcontractor had workers' compensation insurance. *Brogno v. W & J Associates, Ltd*., 698 A.2d 191 (R.I. 1997). |

| STATE | OCIP LAW | STATUTORY EMPLOYER LAW | COMMENTS |
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| **SOUTH CAROLINA** | No statute or case law specifically dealing with effect of OCIP/CCIP. | "Upstream" subcontractors are deemed *statutory employers* of an employee of a sub-subcontractor under the Workers' Compensation Act and are immune from tort liability. S.C. Code Ann. § 42-1-410. This is true even if they are not called on to pay benefits to the statutory employee. *Johnson v. Jackson*, 735 S.E.2d 664 (S.C. App. 2012). | South Carolina has been clear in that exclusivity remedy protection does not extend to a subcontractor sued for negligence by the employee of the business owner, even though the subcontractor becomes a "statutory employee" of the owner for purposes of compensation liability under § 42-1-400 (deals with "owners"). Section 42-1-410 is almost identical but applies to "contractors." Section 42-1-420 deals with "subcontractors." |
| **SOUTH DAKOTA** | No statute or case law specifically dealing with effect of OCIP/CCIP. | The principal contractor in a construction setting is liable for payment of workers' compensation to the same extent as any of his subcontractors. *Thompson v. Mehlhaff*, 698 N.W.2d 512 (S.D. 2005).<br>Immunity is also extended to the principal contractor, regardless whether it actually pays benefits. *Metzger v. J.F. Brunken & Son, Inc*., 169 N.W.2d 261 (S.D. 1969). | An employee of a general contractor may collect workers' compensation from the worker's compensation carrier of his employer and may also sue a negligent subcontractor or sue a subcontractor for the negligence of an employee of that subcontractor. *Metzger v. J.F. Brunken & Son, Inc*., 169 N.W.2d 261 (S.D. 1969).<br>Court rejected the common employment theory holding the general contractor's and all subcontractor's employees on the job, regardless of position, when engaged in a common employment and who have had the benefits of workers' compensation, are all immune from being sued. *Thompson v. Mehlhaff*, 698 N.W.2d 512 (S.D. 2005). |
| **TENNESSEE** | No statute or case law specifically dealing with effect of OCIP/CCIP. | A principal contractor, intermediate contractor or subcontractor is liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal, intermediate contractor, or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer. T.C.A. § 50-6-113. | Creates "statutory employers" in situations where injured workers are covered by workers' compensation insurance provided either by their immediate employers or principal contractors, intermediate contractors, or other sub-contractors. The principal contractor is not considered a "third party" subject to a common-law action by the employee under § 50-6-112, even if it did not pay benefits. *Troupe v. Fischer Steel Corp*., 236 S.W.3d 143 (Tenn. 2007); *Scott v. AMEC Kamtech, Inc*., 583 F.Supp.2d 912 (E.D. Tenn. 2008). |

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| **TEXAS** | Section 406.123 of the Texas Workers Compensation Act extends exclusive remedy protection to all participating tiers of contractors and their employees when the general contractor "provides" workers compensation insurance through a project-specific "wrap"—either in the form of an OCIP or CCIP. *Austin Bridge & Road, LP v. Suarez*, 556 S.W.3d 363 (Tex. App. 2018). | When the general contractor provides workers' compensation coverage for subcontractors and their employees, the general contractor becomes immune from a third-party suit brought by an injured employee of a subcontractor. *Etie v. Walsh & Albert Co., Ltd*., 135 S.W.3d 764 (Tex. App. – Houston [1st Dist.] 2004).<br><br>This is true even where the contract specifies that the subcontractor's employees were not employees of the general contractor/owner and where they were also covered under different workers' compensation policies by both. *Garza v. Zachry Constr. Corp*., 2012 WL 1864350 (Tex. App. 2012); *Austin Bridge & Road, LP v. Suarez*, 556 S.W.3d 363 (Tex. App. 2018). | A general contractor on a project with an OCIP (negotiated and purchased by the owner) nonetheless "provides" workers compensation insurance as required by § 406.123 when its downstream contracts require all subcontractors on site to enroll in the OCIP, and coverage is in fact in place. *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 350 (Tex. 2009).<br><br>Exclusive remedy protection is granted to a property owner who provided workers' compensation for an on-site independent contractor through an OCIP. *Entergy Gulf States v. Summers,* 282 S.W.3d 433 (Tex. 2009) (OCIP); *Becon Const. Co., Inc. v. Alonso*, 444 S.W.3d 824 (Tex. App. – Beaumont, 2014) (CCIP). |
| **UTAH** | A "statutory employer" who obtains OCIP/CCIP enrollment of a subcontractor cannot be sued by the employee of the subcontractor. *Nichols v. Jacobsen Constr. Co., Inc.,* 374 P.3d 3 (Utah 2016). | Any employer or general contractor who procures work to be done by a subcontractor over whose work the employer retains supervision or control is liable for compensation benefits to employees of subcontractors, provided that the work is a part or process in the trade or business of the original employer. Despite this, the subcontractor may sue the statutory employer if it did not actually pay workers' compensation benefits. *Pate v. Marathon Steel Co.*, 777 P.2d 428 (Utah 1989); *Adamson v. Okland Constr.*, 508 P.2d 805 (Utah 1973); U.C.A. § 34A-2-103(7)(f)(ii).<br><br>A contractor qualifies as an "eligible employer" who "procures work to be done wholly or in part for the employer by a contractor" which "secures" the payment of workers' compensation benefits for purposes of § 34A-2-103(7)(f)(i) when it enrolls a subcontractor in an OCIP/CCIP. *Nichols*, supra. | Section 31A-2-103(7)(a) provides that if an employer procures work to be done wholly or in part for the employer by a contractor over whose work the employer retains supervision or control, and this work is a part or process in the trade or business of the employer, all persons employed by any of the subcontractors are considered employees of the original employer for the purposes of providing workers' compensation benefits.<br><br>The degree of control which a general contractor must exercise over a subcontractor to qualify as a statutory employer is less than that the amount of control required under the right-to-control test to determine whether someone is a common law employee. *Utah Home Fire Ins. Co. v. Manning*, 985 P.2d 243 (Utah 1999). |

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| **VERMONT** | No statute or case law specifically dealing with effect of OCIP/CCIP. | An owner or general contractor is contingently liable to employees of subcontractors for workers' compensation benefits. Vt. Stat. Ann. Tit. 21, § 601(3) (1999); *Ryan v. New Bedford Cordage Co*., 421 F. Supp. 794 (D.C. Vt. 1976).<br>Nonetheless, the owner or contractor may not be sued as a third party by an employee of the subcontractor. Vermont forbids lawsuits by subcontractors' employees against general contractors. | *King v. Lowell,* 648 A.2d 822 (Vt. 1993) (holding that a general contractor was a statutory employer of the subcontractor's employee and, therefore, owed benefits to the employee); *King v. Snide,* 479 A.2d 752 (Vt. 1984) (holding that amendments to Vermont's laws were designed to create the statutory employer-employee relationship between a general contractor and a subcontractor's employee in order to prevent "general contractors from relieving themselves under the Workers' Compensation Act by doing through independent contractors what they would otherwise do through their direct employees"). *Galeotti v. Cianbro Corp.*, 2013 WL 3207312 (N.D.N.Y. 2013). |
| **VIRGINIA** | No statute or case law specifically dealing with effect of OCIP/CCIP.<br>OCIPs allowed for public construction contracts over $100 million. V.C.A. § 22-4308.1(C). | A person or entity that hires a contractor to perform work that is part of the person's trade, business, or occupation is liable for benefits to any worker injured in the performance of this work. Va. St. § 65.2-307. | Each party responsible for compensation benefits pursuant to this law becomes a "statutory employer," and may not be sued, even if they never actually paid compensation benefits. *Jones v. Commw. of Va*., 591 S.E.2d 72 (Va. 2004); Va. St. § 65.2-303; *Slusher v. Paramount Warrior, Inc*., 336 F. Supp. 1381 (W.D. Va. 1971). |
| **WASHINGTON** | No statute or case law specifically dealing with effect of OCIP/CCIP. (Monopolistic State Fund). | An owner or general contractor who contracts with the employer acts as a surety for the payment of workers' compensation benefits in the event of an injury to an employee of a subcontractor. R.C.W. § 51.12.070; *Hildahl v. Bringolf*, 5 P.3d 38 (Wash. App. 2000). | Payment of premiums does not create immunity. The remedy of a general contractor or owner who is obligated to provide workers' compensation coverage for the employees of an independent contractor appears to be a right of reimbursement from the independent contractor, rather than statutory immunity from a third-party suit. *Hildahl v. Bringolf,* 5 P.3d 38 (Wash. App. 2000); *Greenleaf v. Puget Sond Bridge & Dredging Co*., 5 P.3d 38 (Wash. App. 2000). |
| **WEST VIRGINIA** | No statute or case law specifically dealing with effect of OCIP/CCIP. (Monopolistic State Fund). | Prime contractors are liable for providing workers' compensation benefits to an uninsured subcontractor's employees if the prime contractor had failed to require the subcontractor to produce a certificate of insurance. W. Va. Code § 23-2-1(d). | Nothing extends the Exclusive Remedy Rule to a primary contractor or subcontractor. W. Va. Code § 23-2-1d(a). |

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| **WISCONSIN** | Wisconsin law requires that all contractors and subcontractors "shall be included under the wrap-up program." Wis. Adm. Code. § 80.61(3)(b)(5). | Wisconsin law requires that an owner or contractor be responsible for compensation benefits to the employee of a contractor or subcontractor where employer fails to do so. Wis. Stat. § 102.06.<br><br>Statutory employer does not enjoy exclusive remedy immunity. *Kaltenbrun v. City of Port Washington*, 457 N.W.2d 527 (Wis. App. 1990). | A 2005 Wisconsin federal court decision was the nation's first attack on the Exclusive Remedy Rule in wrap-up programs. *Pride v. Liberty Mut. Ins. Co*., 2007 WL 1655111 (E.D. Wis. 2007).<br><br>Exclusive Remedy Rule does not protect owners and general contractors involved in an OCIP. |
| **WYOMING** | No statute or case law specifically dealing with effect of OCIP/CCIP. (Monopolistic State Fund). | Section 27-14-206(e) requires a general contractor which subcontracts all or part of a contract to a subcontractor to be responsible for payment of premiums if the subcontractor does not provide such coverage. | If the general contractor actually provides for payment of the premiums, it enjoys exclusive remedy immunity but can recover the amount of the premiums it paid, along with necessary expenses, from the subcontractor primarily liable for the premiums. Wyo. Stat. § 27-14-206(e). |