

May 20, 1999

Senator Grant R. Ipsen  
Idaho State Senate  
1010 Houston Road  
Boise, ID 83706

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Senator Ipsen:

You have asked the Attorney General's Office to provide legal guidance regarding the workers' compensation law in the state as it specifically pertains to non-profits and, more specifically, to faith groups. The more specific questions are listed below.

**QUESTIONS PRESENTED**

1. Is workers' compensation insurance required for "small" non-profits, more specifically, faith groups?
2. If so, is the communication of such clearly stipulated under the law?
3. Is the minimum premium and penalty assessed these small organizations reasonable in light of the fact that the minimum premium charged is often a large percentage of the compensation paid?

**CONCLUSION**

1. Yes. Pursuant to Idaho Code § 72-203, the workers' compensation law applies to all public employment and private employment not expressly exempted by the provisions of Idaho Code § 72-212.
2. Yes, the requirement for workers' compensation insurance is set forth in Idaho Code § 72-301 with exemptions to that requirement set forth in Idaho Code § 72-212. There is Idaho case law interpreting the exemptions provided in Idaho Code § 72-212.
3. The penalty for failure to secure compensation is statutorily set by Idaho Code § 72-319. The minimum premium is confined to a range by Idaho Code § 41-1612(2), which states that "no filing shall contain a minimum premium that is less than one hundred fifty dollars (\$150) or greater than three hundred dollars (\$300)."

## ANALYSIS

### Question Number 1:

Idaho Code § 72-203 provides that all public and private employment is covered by the workers' compensation law, and coverage is required unless expressly exempt by the provisions of Idaho Code § 72-212. The exemptions from coverage, under Idaho Code § 72-212, that may be applicable to "small" non-profits, more specifically, faith groups, are set forth as follows:

**72-212. Exemptions from coverage.**—None of the provisions of this law shall apply to the following employments unless coverage thereof is elected as provided in section 72-213, Idaho Code.

....

(2) Casual employment.

....

(6) Employment which is not carried on by the employer for the sake of pecuniary gain.

As is set forth in this analysis, Idaho case law does not support the application of the above quoted exemptions in the case of faith groups.

The Supreme Court of Idaho has defined "casual employment" as found in Idaho Code § 72-212(2) as follows:

This Court has defined "casual employment" as employment that is only occasional, or comes at uncertain times, or at irregular intervals, and whose happening cannot be reasonably anticipated as certain or likely to occur or to become necessary. It is employment that arises only occasionally or incidentally and is not part of the usual trade or business of the employer. *Tuma v. Kosterman*, 106 Idaho 728, 682 P.2d 1275 (1984); *Wachtler v. Calnon*, 90 Idaho 468, 413 P.2d 449 (1966); *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926).

Larson v. Bonneville Pacific Services Co., 117 Idaho 988, 989-90, 723 P.2d 220, 221-22 (1990).

It does not appear that typical employees of a small faith group would meet the casual employment exception as interpreted by Idaho case law. My understanding is that

the employees of a small faith group, that is the focus of this analysis, would consist of a pastor and secretaries conducting the usual business of the faith group.

The “pecuniary gain” exemption provided under Idaho Code § 72-212(5) was recently interpreted by the Supreme Court of Idaho in Burrow v. Caldwell Treasure Valley Rodeo, 129 Idaho 675, 931 P.2d 1193 (1997). Don Burrow was employed by the Caldwell Treasure Valley Rodeo to do various maintenance jobs. When Mr. Burrow was injured in the course of installing a scoreboard, he sought workers’ compensation benefits. Caldwell Treasure Valley Rodeo asserted that it was an exempt employer under Idaho Code § 72-212(5). Caldwell Treasure Valley Rodeo, the employer, was described in the decision as follows:

For federal tax purposes, the employer is a non-profit, tax-exempt organization under 26 U.S.C. § 501(c)(4). The employer does not fall within the definition of non-profit organization for purposes of the collection of state sales tax. The employer reinvests its proceeds back into the rodeo grounds it operates, and the members of its board of directors are volunteers.

*Id.* at 676.

The supreme court held that the employer was not exempt under Idaho Code § 72-212(5). It reasoned as follows:

The Commission determined that the employer is not exempt under the I.C. § 72-212(5) exemption because it receives remuneration for its services in the form of admissions to the rodeos it conducts. The Commission based its decision on *Modlin*, 49 Idaho 199, 286 P. 612. In *Modlin*, the employer was a for-profit employer, and attempted to avoid workers’ compensation liability on the basis that it did not generate any profit in the particular instance in which the employee was injured. *Id.* In *Modlin*, the employer argued that it was not acting for pecuniary gain. *Id.* at 206, 286 P. at 614. The Court rejected this contention, stating, “[w]hether it made a profit or not is beside the issue. It was supplying service and receiving remuneration for it.” *Id.*

The Court has cited *Modlin* for the proposition that “an employer cannot escape liability for compensation on the ground that he is not engaged in a business for pecuniary gain because on some transactions he loses money.” *Dillard v. Jones*, 58 Idaho 273, 279, 72 P.2d 705, 708 (1937); see also *Dameron v. Yellowstone Trail Garage, Inc.*, 54 Idaho 646, 652, 34 P.2d 417, 419 (1934) (“Whether or not the employer was making a profit at the time the employee was injured is immaterial.”) Therefore, the

employer's non-profit tax status is irrelevant to the determination of whether the employment was carried on by the employer for the sake of pecuniary gain.

More recently, this Court addressed the I.C. § 72-212(5) exemption in *Dewey v. Merrill*, 124 Idaho 201, 858 P.2d 740 (1993), stating that “[i]n addressing the issue of pecuniary gain, the Court considers whether a party is supplying a service and receiving remuneration for it.” *Id.* at 205, 858 P.2d at 744. The Court also stated in *Dewey* that the “Worker’s Compensation Act was intended for commercial and governmental employers who can spread the costs of compensation through the price of goods and services. The pecuniary gain exemption was created to protect individuals . . . who may be deemed to be statutory employers but do not regularly employ others for business purposes.” *Id.*

The employer in the present case received remuneration for its services. Therefore, the employer is not exempt under I.C. § 72-212(5).

*Id.* at 676-77 (citations omitted).

Applying the Burrow holding, a small faith group is not exempt under the Idaho Code § 72-212(5) exemption because it receives remuneration for its services in the form of donations for the religious services it conducts. “[T]he employer’s non-profit tax status is irrelevant to the determination of whether the employment was carried on by the employer for the sake of pecuniary gain.” Burrow, 125 Idaho at 676.

### **Question Number 2:**

Please see analysis for Question Number 1.

### **Question Number 3:**

The penalty for failure to secure compensation is set forth in Idaho Code § 72-319, which provides in pertinent part, as follows:

72-319. Penalty for failure to secure compensation.—. . . .

(4) Any employer required to secure the payment of compensation under this law, who fails to do so, may be liable for a penalty of either two dollars (\$2.00) for each employee for each day or twenty-five dollars (\$25.00) for each day during which such failure continues, whichever is greater. . . . In determining whether penalties should be

assessed or collected for the employer's failure to secure the payment of compensation, the commission may consider the following factors:

(a) When the employer was notified that such employer's worker's compensation insurance coverage had been cancelled or that such insurance was required;

(b) The length of time that elapsed between when the employer was notified that worker's compensation insurance coverage was required or that such employer's coverage had been cancelled, and the date that such coverage was put into effect;

(c) Whether the employer is able to document attempts to secure worker's compensation insurance coverage during the period of time that such employer was without such coverage;

(d) Whether there were prior instances in which the employer failed to keep worker's compensation insurance in effect or such coverage was cancelled, and the reasons for such failure or cancellation;

(e) The reasons that the employer is unable to obtain or keep in effect worker's compensation insurance coverage;

The above factors are not exclusive and the commission may consider any other relevant factor.

The Idaho Industrial Commission is given discretion on assessing penalties.

Workers' compensation rates are regulated pursuant to title 41, chapter 16, Idaho Code. Idaho Code § 41-1612 provides in pertinent part as follows:

41-1612. Adherence to filings.

....

(2) No filing shall contain a minimum premium that is less than one hundred fifty dollars (\$150) or greater than three hundred dollars (\$300).

Every insurer writing workers' compensation coverage in Idaho files its rates with the Director of the Idaho Department of Insurance. Idaho Code § 41-1606. Every insurer, including the Idaho State Insurance Fund, writing workers' compensation insurance in Idaho shall be a member of a workers' compensation rating organization. Idaho Code § 41-1615. The workers' compensation rating organization currently operating in Idaho is NCCI.

## CONCLUSION

All public and private employers are required to carry workers' compensation insurance unless they are expressly exempt pursuant to Idaho Code § 72-212. Absent some unique situation that places the employer within one of the exemptions provided by Idaho Code § 72-212, a small faith group would be required to carry workers' compensation insurance. The penalty for failure to secure compensation is provided by Idaho Code § 72-319, which gives the Industrial Commission discretion in assessing penalties. Idaho Code § 41-1612 provides that a minimum premium must be within the range of one hundred fifty dollars to three hundred dollars. The filing and approval of workers' compensation rates is under the authority of the Department of Insurance pursuant to title 41, chapter 16, Idaho Code.

Sincerely,

SCOTT B. MUIR  
Deputy Attorney General