State Workers’ Compensation Legislative Update

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Montana Governor's Conference on Workers’ Compensation
Big Sky, MT
“Grand Bargain”

the use of workers compensation laws in place of constitutionally guaranteed tort remedies, must provide “significant” benefits and any substitute considerations must provide a “reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise...”

*New York Central Railroad v. White, 243 US 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917)*
Top Legislative Trends

01  Limitations on medical benefits
02  Limitations on access to benefits
03  Restrictions of access to justice
Case Study: Iowa
Major Changes in the 2017 Iowa Reform

• Reclassification of shoulder injuries as scheduled injuries rather than whole-body injuries

• Reduction of benefits for older workers

• Elimination of concurrent receipt of permanent total wage-loss and scheduled indemnity benefits
Proposed but Not-Enacted Provisions in the 2017 Iowa Reform

• Predominate cause standard of 50%

• Termination of benefits at age 67
Iowa's Position in Oregon's Premium Rate Ranking Study

State Rank: #1 is highest cost; #50 is lowest

Source: Oregon Workers’ Compensation Premium Rate Ranking, years 2000-2016.
Iowa Premium Level Changes

*Note: 2018 rate decrease was approved before 2017 reform legislation

Source: NCCI
Workers’ Compensation Costs Per $100 of Covered Wages

Source: National Academy of Social Insurance.
HOW DID BENEFITS AND COSTS PER $100 OF PAYROLL CHANGE IN EACH STATE BETWEEN 2011 AND 2015?

EMPLOYER COSTS DECREASED IN 27 STATES

BENEFITS DECREASED IN 48 STATES

Increased  Decreased

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The Medical Portion of Workers' Compensation Benefits has been Steadily Increasing

Source: National Academy of Social Insurance.
WHAT SHARE OF TOTAL WORKERS’ COMP BENEFITS ARE MEDICAL BENEFITS?

1980: 29%
2015: 50%
Policy Options for Addressing Opioids

- Stronger prescription drug monitoring program (PDMP) requirements (ME)
- 5-day limit on initial opioid prescriptions (NJ)
- Mediation track for opioid cases (Mass.)
- Physician registry (Ga.)
- Requirement to cover abuse-deterrent opioid analgesic drug products (PA)
- Medical marijuana (WCRI)
- CDC opioid prescribing guidelines
All laws, rules and regulations restricting the use of opioid pain medications must:

- include reasonable alternatives aimed at reducing or relieving pain and improving functioning, with an emphasis on these alternatives having equal or greater efficacy;
- emphasize quality of care rather than an arbitrary reduction in the number or type of prescriptions;
- enhance, maintain and avoid intrusions into the physician-patient relationship;
- provide physicians and their patients speedy due process, including a process for seeking exceptions and variances based on patients’ specific needs; and
- offer evaluation and treatment assisting in the reduction, tapering or cessation of opioid usage when appropriate.
Medical Treatment Guidelines
States with Prescription Drug Formularies
Caps on Medical Benefits

- Montana
- Georgia
- Kentucky

Legend:
- Red: In place
- Orange: Proposed
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Limitations on Access to Benefits

TERMINATION OF BENEFITS AT RETIREMENT AGE

IMPAIRMENT GUIDELINES

PREDOMINATE CAUSE STANDARD

STATUTES OF LIMITATIONS

REDUCTION OF BENEFITS FOR OLDER WORKERS

EXCLUSION OF UNDOCUMENTED WORKERS

EXCLUSION OF NONSTANDARD WORKERS
Impairment Guidelines
Predominate Cause Standards

- 7 states with "major contributing cause" thresholds for benefits
- Proposed in:
  - Iowa
  - California
Shortened Statutes of Limitations
Reduction in Benefits for Older Workers

• Passed in Iowa

• Requires reduction in benefits based on consideration of reasonable expectation of time remaining in the workforce
Exclusion of Undocumented Immigrants

- Technically covered by workers comp in most states
- But anti-fraud rules effectively make it illegal to file a claim as an undocumented worker
- Legal challenges for reemployment
Exclusion of Independent Contractors

- Growing share of the workforce is exempt from workers’ comp because of independent-contractor status
- Misclassification is most common in industries where it is most profitable: where workers’ comp costs are the highest
The gig economy

42 million
US workers are 1099

65 million
Projected increase by 2020

34%
of the workforce has a second job

1 of 3
Millennials freelance
Percent of Workforce Working as Nonstandard Workers

Note: The data are for workers' main jobs.
Percent Increase in Share of Workforce as Nonstandard Workers

- **1995-2005**
  - Independent contractors: 9.5%
  - All nonstandard workers: 7.0%

- **2005-2015**
  - Independent contractors: 21.7%
  - All nonstandard workers: 47.7%

Note: The data are for workers' main jobs.
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Access to Justice Trends

Reconfiguring the Process
• Modifying Access to Courts/Appeals
• Making It Harder to File Claims
• Restricting Access to Attorneys
Reclassification of Judges

- North Carolina (2015)
- Louisiana (proposed 2016)
- Wisconsin (proposed 2017)
  - Eliminate appellate Labor and Industry Review Commission
Opt Out
Texas comp opt-out model could spread to other states: Report

Kristen Beckman
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The Texas Public Policy Foundation, a research and advocacy group that promotes free enterprise and notably favors the workers compensation opt-out model, released a report Tuesday analyzing the Texas nonsubscription system and says more states may try to emulate the opt-out model.

The report titled "The Lone Star Model for Helping Injured Workers," says competition between the state's regulated workers comp system and its nonsubscription system has led to improved claims handling, cost control and better return-to-work rates. About 78% of Texas employers representing 82% of the state's private-sector employees are covered by the state's regulated comp system, the report says. Five percent of Texas employees are not covered by workers comp or alternative injury benefit plans, according to the report.

The report compares the state's opt-out system with group health plans, whereby alternative injury benefit plans set up by Texas nonsubscribers outside of workers comp can limit or expand coverage because they are not subject to statutory workers comp rules.
Worker-Favorable Developments

01 Successful constitutional challenges

02 Renewed focus on insurer profits

03 Federal Focus on Workers’ Compensation
the use of workers compensation laws in place of constitutionally guaranteed tort remedies, must provide “significant” benefits and any substitute considerations must provide a “reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise…”

Successful Constitutional Challenges

**Attorney fees**
- **Florida**, 2016: *Castellanos* (due process)
- **Utah**, 2016: *IWA v. Utah* (separation of powers)
- **Florida**, 2016: *Miles* (freedom of speech)

**Inadequacy of WC system**
- **Florida**, 2016: *Westphal* (TTD limit violates due process); *Bosch* (cap on max benefits inadequate)
- **Florida**, 2018:
- **Alabama**, 2017: *Clower* (cap on PPD and atty fee are inadequate)
- **Pennsylvania**, 2017: *Protz* (use of AMA 6th unconst.)
- **New Mexico**, 2017: *Rodriguez* (exclusion of farm and ranch laborers unconst.)

**Misclassification**
- **Massachusetts**, 2018: *Camargo*
Worker-Favorable Developments

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Successful constitutional challenges

02
Renewed focus on insurer profits

03
Federal Focus on Workers’ Compensation
Cost Shifting

Due to cost shifting, workers’ compensation only covers 21% of the cost of a work related injury.

- The Costs of Failing to Protect Workers On The Job, OSHA, March 2015
Worker-Favorable Developments

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“Does The Workers’ Compensation System Fulfil Its Obligations to Injured Workers?”

- “We know the way the systems are designed does not meet the needs of injured workers”
- “We are increasingly far from universal compliance with many of the 1972 National Commission’s 19 essential recommendations”
- “Overly complicated procedures are frustrating for workers and employers”
- “there is cause for alarm”
Need to explore “whether to increase the federal role in oversight of workers’ compensation programs”

- A new National Commission on Workers’ Compensation
- Reinstitution of federal tracking of changes in state Workers’ Compensation programs
- Establishment of federal “minimum standards” for state workers’ compensation programs
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