

Workers' Compensation: Recent Legal and Regulatory Developments



Workers' compensation programs represent one of the largest costs for most employers. Because it is regulated at the state level, employers must stay informed about legal and regulatory developments in the states in which they operate. The following are highlights of recent significant legislation and court decisions that could affect workers' compensation programs.

CONSTITUTIONALITY OF STATE WORKERS' COMPENSATION STATUTES

In 2016, in two separate rulings, the Florida Supreme Court declared two elements of Florida's workers' compensation statute to be unconstitutional. In 2017, courts in three other states have made similar judgments.

Marshall Parker v. Webster County Coal, LLC, et al. and Webster County Coal, LLC v. Marshall Parker, et al. (Kentucky)

On April 27, the Supreme Court of Kentucky declared the provision of the state's Workers' Compensation Act that terminates income benefits on the date the employee qualifies for normal retirement benefits to be unconstitutional; this was enacted as part of a series of 1996 reforms to Kentucky's workers' compensation system. The court held that this provision violates the Equal Protection Clause of the 14th Amendment.

Clower v. CVS Caremark Corp. (Alabama)

On May 8, a judge in the Circuit Court of Jefferson County found that two provisions of the Alabama Workers' Compensation Act were unconstitutional under the Alabama and US Constitutions:

- A \$220 cap on weekly permanent partial disability (PPD) benefits: According to the court, this violates the 14th Amendment to the US Constitution. The court also declared that this provision was in violation of the Alabama constitution: Because of the "sub-poverty level subsistence" the \$220 cap now affords, the benefits given to claimants to give up their right to sue employers under common law are no longer "equivalent." The \$220 PPD cap — and the Alabama legislature's failure to allow adjustments to keep up with current wages and costs of living — is unconstitutional, according to the court.
- The cap on attorneys' fees at 15% of the compensation awarded or paid to workers' compensation claimants.

According to the court, this cap is arbitrary, does not take into account the amount of work performed by a claimant's attorney, and violates the separation of powers between the state legislature and judiciary branch.

Because the Alabama Workers' Compensation Act has a non-severability clause, the court declared the entire law to be unconstitutional.

Protz v. WCAB (Derry Area School District) (Pennsylvania)

A June 20 ruling by the Pennsylvania Supreme Court effectively declared a provision of the state's Workers' Compensation Act that permitted employers to schedule impairment rating evaluations (IREs) for workers after 104 weeks of disability to be unconstitutional. Previously, if such an evaluation yielded an impairment rating for an employee of less than 50%, an employer was permitted to modify the claimant's disability status. Following this ruling, the Pennsylvania Department of Labor & Industry Bureau of Workers' Compensation announced on June 21 that it will no longer designate physicians to perform IREs.

IMPLICATIONS FOR EMPLOYERS

The Kentucky ruling represents a significant change in the duration of income awards. Without the termination of benefits provided under the 1996 law, employees who are near or past their Social Security retirement age are now entitled to a full 425 weeks or 520 weeks of PPD. Permanent total disability awards are payable for the duration of that disability — meaning the life of the claimant — unless an



employer can prove on reopening a change of disability or return to work.

Meanwhile, the Circuit Court of Jefferson County issued a 120-day stay to give the Alabama legislature time to address its ruling; as of this writing, the state's workers' compensation law remains in effect. At the expiration of the stay — in early September — opposing counsel is to inform the court of any “efforts underway to amend, salvage, or modify the Act” so the order does not become effective.

In Pennsylvania, employers no longer have the option of scheduling IREs. It is not clear how this will affect claimants whose status was previously modified following IREs; employers may see reinstatement, review, or modification petitions from such claimants based on IRE findings. Going forward, employers can no longer expect to rely on IREs and should consider alternatives for seeking to modify a claimant's status.

Moreover, these rulings demonstrate the state courts' willingness to consider plaintiff attorney claims that parts of workers' compensation statutes are unconstitutional. And given the tendency of plaintiff attorneys to piggyback on recent prior cases — the plaintiff attorney in *Clower*, for example, referenced one of the Florida rulings as a basis for his case — similar rulings should be expected in other states. As a result, employers will likely see increases in workers'

compensation claim costs similar to those seen in Florida following its 2016 rulings.

ARIZONA SENATE BILL 1332

Effective November 1, Arizona employers will be able to consider full and final settlements of workers' compensation claims. Meanwhile, employers will be required to reimburse injured employees for reasonable travel expenses if they must travel more than 25 miles from their places of residence to obtain medical care.

Although this option is available in some other states, Arizona employers have never been able to permanently settle claims. Employers can now take action to reduce their claims backlogs, allowing them to devote more resources to manage those claims that remain open. This should also create opportunities for investments in workplace safety programs and other areas.

Employers operating in Arizona should consider revisiting earlier awards on existing claims to evaluate them for potential final settlements.

CALIFORNIA SENATE BILL 1160

Signed into law in September 2016, Senate Bill 1160 introduced changes to processes related to medical treatment, utilization review, and the filing of liens against employers by medical providers:

- Effective January 1, 2017, any new liens filed are required to be submitted with a declaration that the claims are within the employer's medical provider network (MPN) or that the lien party has searched and does not believe the employer has an MPN or has proof of denial of care.
- Effective January 1, 2017, all liens of medical providers criminally charged with fraud against the workers' compensation system, medical billing fraud, insurance fraud, or fraud against Medicare or Medi-Cal, have been stayed until criminal proceedings are resolved.
- Effective January 1, 2017, medical providers cannot file liens unless they are no longer practicing. Practicing providers should instead negotiate unpaid amounts directly with insurers or third-party administrators (TPAs).



- For claims with dates of injury on or after January 1, 2018, utilization review in the first 30 days of treatment will no longer be required, with some exceptions.
- Effective July 1, 2018, employers and claims administrators will be prohibited from providing physicians with financial incentives to deny or modify treatment requests.

Under Senate Bill 1160, fewer liens should be filed by medical providers, but there are still consequences to medical providers if treatment does not conform to evidence-based standards. The new law may also reduce the time delays for injured employees to receive medical treatment during the first 30 days following injury, which should contribute to improved and quicker recoveries for employers.

California employers should review their postings for completeness and accuracy of MPN information given to injured workers at the time injuries are reported. Employers should also bring any questionable claims to the attention of claims administrators in order to facilitate prompt and complete investigations.

IOWA HOUSE FILE 518

Six significant reforms to the state's workers compensation system took effect July 1:

- **Intoxication:** It is presumed that an employee was intoxicated at the time of the injury and that intoxication was a substantial factor in causing the injury if the employee tests positive for any drugs or alcohol at the time of the accident or shortly thereafter. The burden of proof then shifts to the employee.

- **Temporary benefits:** Employees who refuse to accept suitable work shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of refusal. Employers are also now permitted to use nonprofit return-to-work options.
- **Preexisting conditions:** Employers are now only liable for portions of employee disability claims related directly to injuries occurring in their organizations. Employers are not liable for portions of disability claims caused by work injuries at previous employers or other preexisting injuries.
- **Shoulder injuries:** Some employees who cannot return to employment due to shoulder injuries can now be retrained at community colleges. The shoulder is now also a scheduled body part.
- **Notice of injury:** In order to receive workers' compensation benefits, injured employees must notify their employers within 90 days from the date they "knew or should have known that [an] injury was work-related."
- **Permanent partial disability:** PPD payments will not be made until an injured employee reaches maximum medical improvement (MMI). Doctors' permanency ratings will be based on American Medical Association guidelines.

These reforms will likely lead to changes in how certain injuries and claims types are managed. Employers should report any suspicions of drugs or alcohol use by injured employees to claims adjusters and provide them with any post-accident drug test results. Employers should also strive to offer suitable modified duty work when appropriate.



NEW MEXICO SENATE BILL 155

Effective July 1, temporary total disability and permanent partial disability benefits are suspended for any injured worker who:

- Rejects a reasonable offer of employment with his/her employer at or above pre-injury wage within medical restrictions.
- Accepts employment with another employer at or above pre-injury wage.
- Is terminated for misconduct unrelated to the workplace injury.

Employers that terminate workers for pretextual reasons in order to avoid payment of benefits or as retaliation against workers simply for seeking benefits can now face fines of up to \$10,000.

The new law was passed in response to a 2013 New Mexico Court of Appeals ruling, in *Hawkins v. McDonald's*, that workers are entitled to lost-time benefits even if they have been terminated for cause. Prior to *Hawkins*, lost-time benefits and modifiers (upon placement of MMI) were not owed if a worker was terminated for cause unrelated to the work injury; the new law effectively reinstates that rule.

New Mexico employers should discuss new claim handling procedures that may be required as a result of Senate Bill 155 with their claims advisors and insurers. It may also now prove more important for employers to offer return-to-work positions that are within medical restrictions.

VAN BUREN V. AUGUSTA COUNTY (VIRGINIA)

On July 19, 2016, the Court of Appeals of Virginia concluded that a firefighter who injured his back over a 45-minute time period while twisting, pushing, pulling, and dragging a large man from his shower to an ambulance constituted an “identifiable incident.” Under Virginia law, compensable workers’ compensation injuries must result from an “injury by accident.” In *Van Buren v. Augusta County*, the court noted that an accident is an “identifiable incident” that occurs at some reasonably definite time causing a sudden change in the body.

The Court of Appeals reversed a decision by the Virginia Workers’ Compensation Commission and found the firefighter’s claim compensable. The court concluded that the entire rescue was “one piece of work,” the 45-minute time period was one event, and the event was an “identifiable incident” that caused a sudden change in the body causally related to the incident.

The Virginia Supreme Court declined to hear the appeal, so the Court of Appeals ruling stands. In a more recent case, the court referred to the ruling in *Van Buren* as a “first responder exception,” suggesting that *Van Buren* only applies to emergency services workers.



The ruling suggests that an “identifiable incident” does not have strict temporal requirements. It could also affect an employer’s “cumulative trauma” defense, which asserts that claims based on repetitive or cumulative trauma are not compensable injuries, as injuries must occur “by accident” in order to qualify for workers’ compensation. Employers may expect additional challenges involving injuries sustained over longer time periods.

MANAGING LEGAL AND REGULATORY CHANGES

Staying abreast of legal and regulatory developments across the country can be challenging for risk professionals, but it’s essential to maintaining effective workers’ compensation programs. Employers should work with their advisors — including brokers, TPAs, insurers, and attorneys — to stay informed about significant court decisions and new laws that can affect their programs. Risk professionals should also be ready to implement new changes to address those developments, with support from those same advisors.

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- Listen to the replay of our Workers' Compensation Center of Excellence webcast, [How Changes to Florida Laws Are Impacting Workers' Compensation Insurance](#).
- Read [New York Workers' Compensation Law Changes: Implications for Employers](#).

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