



2003 State Legislative Outlook

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As it usually happens, the 50 state legislatures are producing a potpourri of workers compensation legislation this year. However, what's adding a different element to the typical variety of proposals has been the number of new governors and new insurance commissioners, legislatures transformed by turnover, and the effects of the ongoing economic weakness. In addition, workers compensation carriers continue to have important federal interests and issues.

Despite the broad range of issues, there are clear themes that continue to pace the agenda:

- Continuing concern over the potential impact of terrorist-related losses, plus a concern related to the nation's need to inoculate health care workers and "first responders" against smallpox
- System reform efforts in Florida, Texas, and California

- Efforts to protect the privacy of individual health and medical-related records
- Ongoing debates over the role of the state workers compensation funds

Terrorism

While the adoption of the Terrorism Risk Insurance Act of 2002 (TRIA) was a true legislative milestone, workers

compensation insurers continue to face significant terrorism risks and remaining implementation issues from TRIA. Workers compensation insurers, for example, remain exposed to losses arising from domestic or “non-certified” acts of terrorism, and to losses beneath their deductibles and within their coinsurance retentions.

There are other issues surrounding TRIA, and insurers and their associations are working to clarify a range of implementation elements with the U.S. Treasury Department. Given the short time since TRIA was enacted, the progress to date has been remarkable and reflects well on both insurers and the Treasury Department.

At the same time, insurers face entirely new terrorism issues. For example, because of fears of future smallpox attacks, the Bush administration proposed that millions of health care workers and “first responders” be vaccinated. We know that some of those vaccinated got sick and were also, for a short time, highly contagious.

These workers are raising questions of whether illness and death caused by vaccination are compensable under the workers compensation systems—for either the vaccinated individuals or those exposed to them. There are also significant issues to consider in regard to employers’ liability for such cases.

In response, Congress passed the Smallpox Emergency Personnel Protection Act of 2003 on April 11. The bill provides compensation for participants in the National Smallpox Response Team program who experienced adverse effects after receiving the smallpox vaccine. It also compensates individuals who suffer adverse reactions after coming into contact with someone who has been vaccinated as part of the national smallpox program.

Eligible individuals who are permanently disabled would be entitled to lifetime benefits up to \$50,000 annually. Spouses of vaccine recipients who die as a result of the vaccine would receive \$262,000 and spouses with dependent children can choose either the lump sum of \$262,000 or \$50,000 annually until the youngest child reaches the age of 18. Compensation for lost wages for someone not permanently disabled is limited to \$50,000 in any year, up to a lifetime total of \$262,000.

Reasonable and necessary medical treatment is also paid under this program. Importantly, payment of medical and compensation for loss of employment income or death benefits is secondary to any other obligation of the U.S. or any third party under any provision of law or contractual agreement. This would include any benefits available under workers compensation.



The Smallpox Emergency Personnel Protection Act of 2003 provides, among other things, compensation for participants in the National Smallpox Response Team program who experienced adverse effects after receiving the smallpox vaccine. Additionally, related legislation has surfaced on the state level.

In addition to the federal bills, we’ve seen related legislation enacted in Virginia (providing a presumption of workers compensation coverage for hospital employees suffering as a result of participating in this program). We have seen related legislation in Maryland, California, Arkansas, and Illinois, and we expect to see more before the state sessions are over.

To understand these issues and to prepare thoughtful public policy responses, workers compensation insurers and their trade associations are engaged in a variety of discussions and development efforts. Just as the legislative debates of 2002 were strongly marked by the battle over terrorism reinsurance legislation, the first several months of 2003 have shown continued strong interest in this issue.

System Reforms

This year, insurers are facing major system reform legislative efforts in three key states—Florida, Texas, and California. In Florida, insurers and employers have been working since the 2002 legislative session ended to prepare

a reform proposal. At the same time, Governor Jeb Bush asked his Workers Compensation Commission to examine possible reforms. The Governor recently weighed in on the issue, saying, "Fixing the system is one of the two most important issues facing Florida businesses. Rising health care costs is the other."

A key factor—though not the only factor—in the Florida reform effort is rising medical costs. Proposals to contain medical costs



Workers compensation reform proposals in three key states are addressing medical cost containment, restructuring of fee schedules, and limits on legal fees, among other issues, to improve benefits to workers and reduce rates for employers.

from the state's employer/insurer coalition include:

- Replacing the hospital and physician fee schedules with Medicare-based schedules
- Reducing the hospital fee schedule and using the savings to raise the physician fee schedule
- Enacting some limits on attorney fees
- Strengthening the intentional tort exception to the workers compensation law
- Further restricting exemptions to workers compensation laws
- Clarifying the standard for determining the "major contributing cause" for a workers compensation injury
- Eliminating the current Social Security disability presumption for entitlement to permanent total benefits

While the executive branch has not released a bill at the time of this writing, Governor Bush recently said that he wants to limit attorney fees, fight fraud, and reduce rates for employers. Clearly,

workers compensation reform will be a very contentious issue through the rest of the Florida session—and may even require a special session.

The growth in medical costs in workers compensation is also the key issue in Texas. As in Florida, a coalition of employers and insurers has prepared several legislative proposals. These proposals intend to restrain rising medical costs by strengthening the cost-saving abilities of managed care networks. Other proposals include ways to reduce the costs of chiropractor care.

Finally, California has been a bit of a surprise regarding the degree of interest that has developed around issues in that state. Last year's adoption of AB 749, the big workers compensation benefit increase bill—along with significant workers compensation premium increases—appears finally to have sparked significant grassroots employer response. Republican legislators and business groups have capitalized on this interest and are offering a variety of proposals.

New Insurance Commissioner John Garamendi is focusing on workers compensation system reform, noting that the market has been in shambles, the State Compensation Insurance Fund (SCIF) is financially weakened, and medical costs are rising rapidly.

The Commissioner has proposed a seven-point program to restructure the workers compensation system:

1. Improved financial oversight
2. Medical cost containment
3. More consistency in determining the level of permanent disability
4. Improved coordination and communication with state regulatory agencies
5. Continued aggressive fraud interdiction
6. Creation of a 24-hour medical care system merging health insurance and workers compensation
7. Development of professional training and quality standards for service decision makers

Recently, California political observers speculated that Governor Gray Davis and Commissioner Garamendi may team up to offer a legislative proposal this year. If so, it would mark a dramatic turn in the California debate and significantly increase the chances of legislation being enacted in the near term.

Privacy Protection

Another theme this year has been continued efforts to protect the privacy of personal medical records. At this writing, legislation has been introduced in 19 states. In 4 states—Arizona, Indiana, Mississippi, and Nebraska—the bills are specific to workers compensation.

These bills generally give the employee the right to:

- Examine and request correction of personal health information maintained in such files
- Provide some restrictions on the dissemination, distribution, or sharing of personal health information
- Require employee permission to collect or share information (in some instances)

Insurers have been sympathetic to the privacy concerns expressed in these bills, but have also articulated the need for insurers to have prompt access to appropriate medical information for treatment, compensability, and disability determinations.

State Funds

A final theme seen in a number of states this year, particularly the western states, has been legislation and attention focused on the role of workers compensation state funds.

In California, press attention has focused on efforts by Commissioner Garamendi to improve the financial condition of SCIF. The Fund is now the largest workers compensation writer in the state—and possibly the nation. Commissioner Garamendi has expressed grave concerns about the Fund's condition, and its own executives have suggested that it may have to cease writing new business. The Commissioner recently ordered the Fund to develop a new business plan in order to reduce coverage, increase rates, cut broker commissions, strengthen underwriting practices, and require brokers to prove that coverage is not available in the private market.

Utah, Idaho, North Dakota, and Minnesota have experienced legislative debates over efforts to expand coverage beyond their domiciliary states. In Montana, Oregon, Arizona, New York, and Rhode Island, there have been legislative proposals or legislative discussion of the potential benefits of selling or privatiz-

ing the funds. This activity is clearly driven by severe state budget pressures and the realization that the funds may represent a significant, marketable state asset.

Conclusion

This review has covered only a fraction of the workers compensation-related legislation currently being debated in the states. As of this writing, state legislative sessions are still under way in most states—with significant opportunities for additional legislation affecting the workers compensation systems. With costs rising and the range of issues discussed above, 2003 will likely prove to be one of the busiest recent years for workers compensation insurers. ■

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