

NATIONAL TRENDS IN WORKERS' COMPENSATION INSURANCE – WINTER 2015



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PIERCING THE “EXCLUSIVE REMEDY” PROTECTION

Workers’ compensation insurance is founded on the theory that it is the “exclusive remedy.” When adopted, the states intended for this “no-fault” insurance coverage to reduce, or even eliminate, litigation between employers and their injured workers. According to the National Council on Compensation Insurance (NCCI), this doctrine was challenged in four states in 2015 – Arkansas, Illinois, Florida and Oklahoma – as claimants sued their employers for benefits beyond the traditional workers’ compensation coverages. As this trend continues, state regulators, the insurance industry and business community could realize increased pressure to modify the existing system so that it meets the changing demands of the nation’s injured workers.

OPTING OUT – THE CASE FOR A NEW WORKERS’ COMPENSATION PRODUCT

Some states have already developed unique ways to provide coverage for their injured workers. Texas has allowed employers to “opt out” of workers’ compensation coverage for years, while other Texas employers have chosen non-subscriber programs. These are non-traditional products that provide benefits to employees injured on the job, but whose benefits are selected and controlled by the employer.

Oklahoma is in its third year of a similar workers’ compensation product, but their new system has undergone a number of legal challenges. NCCI reports that legislation for alternative workers’ compensation systems was introduced in Tennessee and South Carolina in 2015. While those two movements were unsuccessful, NCCI expects the states of Alabama, Georgia, Florida and North Carolina to consider these programs in 2016. While heralded as a cost-saving mechanism for business, the existing non-traditional systems have received sharp consumer criticism for their very limited benefits for injured workers.

Any changes to existing systems in these states will be challenged to develop one that honors and cares for the injured worker, while still providing an insurance product that is affordable, efficient and protects employers from undue litigation.



MARIJUANA

According to the National Conference of State Legislatures' (NCSL) September 2015 release, medical marijuana is now legal in 23 U.S. states and the District of Columbia, while recreational marijuana is legal in four U.S. states. NCCI reports that additional marijuana initiatives failed in 11 states in 2015 and they expect marijuana initiatives to be introduced in at least 16 states in the coming year. This shift in our cultural acceptance of this drug has resulted in mixed reaction by business. Some employers have integrated drug testing into their corporate policies for the first time, while others have reacted by eliminating their drug testing programs entirely.

Individual states are ruling differently on marijuana as well. Colorado, where laws regulate both medical and recreational marijuana, expressly prohibits the use of marijuana in the workplace. Colorado cases include the June 2015's *Coats vs. Dish Network* case (termination of employment due to positive drug test) and August 2011's *Beinar vs. ICAU* (unemployment benefits denied due to positive drug test). The appellate courts upheld the decisions by both companies who enforced their drug-free workplace policies.

However, in New Mexico, appellate courts have ordered insurance carriers to pay for medical marijuana prescribed to treat workers' compensation injuries in at least three separate cases in 2015. (Associated Press, July 9, 2015; *Lewis vs. American General Media*, *Maez vs. Riley Industrial* and *Vialpando vs. Ben's Auto Service*).

The insurance industry will continue to be faced with important decisions regarding the use of marijuana as a treatment for industrial injuries, while employers expanding into other states may want to revisit their own drug-free policies. Employers should understand how marijuana is viewed by each state, as additional states decriminalize or legalize it for medicinal and recreational use.

RATE TRENDS

NCCI noted in a September 2015 State Advisory Forum, that seven states increased their rates for workers' compensation, while 31 filed rate decreases. West Virginia topped the list, with a -12.1% rate decrease, while the rate decrease in Texas was -10.9% in 2015. Kansas filed a -10.5% rate decrease in 2015, only to pass another -11.2% rate decrease for 2016. California, separate from the 38 states administered by NCCI, continues to have some of the highest workers' compensation rates in the nation. Nevertheless, even California enacted rate decreases in January 2015, July 2015 and January 2016.



PRESCRIPTION DRUGS: OPIOIDS AND PHYSICIAN DISPENSING

Medicines originally developed to help with chronic pain for the terminally ill, opioids have captured our nation's headlines with their continued abuse. According to both business and injured workers, these medicines have been over-prescribed for workers' compensation injuries. Concerns over the proven addictive qualities of opioids have resulted in a multitude of states passing laws to regulate them. In addition, numerous lawsuits have been filed by injured workers who claim they became addicted to these painkillers as a result of their workers' compensation injury (www.businessinsurance.com, May 21, 2015).

The ability for physicians to dispense opioids has also been limited by many state laws and regulatory schedules, in an attempt to curb the sell of opioids at above the Average Wholesale Price (AWP).

The following legislative bills introduced in 2015 give an indication of the widespread concern and the urgent need to address the over-prescribing of opioids. They include efforts to track the dispensing of addictive medicines and to limit physician-dispensing, as well as over-charging for prescriptions (www.mymatrixx.com, April 2015).

CA AB1124
MT SB292
NY AB 5929

LA SB256
AL SB330
NV SB231

NC SB697 and SB 656
TX HB1483 and SB 588
UT SB255 and SB 119

MO HB130

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