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Workers' Compensation: Overview and Issues

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Summary

Workers' compensation provides cash and medical benefits to workers who are injured or become ill in the course of their employment and provides benefits to the survivors of workers killed on the job. Benefits are provided without regard to fault and are the exclusive remedy for workplace injuries, illnesses, and deaths. Nearly all workers in the United States are covered by workers' compensation. With the exception of federal employees and some small groups of private-sector employees covered by federal law, workers compensation is provided by a network of state programs. In general, employers purchase insurance to provide for workers' compensation benefits.

Workers' compensation has been called a *grand bargain* between employers and workers that developed at the beginning of the 20th century in response to dissatisfaction with the tort system as a method of compensating workers for occupational injuries, illnesses, and deaths. Under this grand bargain, workers receive guaranteed, no-fault benefits for injuries, illnesses, and deaths, but forfeit their rights to sue their employers. Employers receive protection from lawsuits but must provide benefits regardless of fault.

Recently, concerns have been raised over what some allege are cuts to state workers' compensation benefits or policy changes that make it harder for workers to receive benefits. These cuts and policy changes may be shifting some of the costs associated with workplace injuries, illnesses, and deaths away from the employer and to the employee or social programs, such as Social Security Disability Insurance (SSDI) and Medicare.

There is no federal requirement for states to have workers' compensation systems and no minimum federal standards for state systems. The decentralized nature of workers' compensation led to unsuccessful calls for minimum state standards in the early 1970s and has caused concerns over benefit equity among the states today.

In 2013, Oklahoma joined Texas in making its workers' compensation system noncompulsory. Unlike in Texas, Oklahoma employers were permitted to opt-out of workers' compensation by offering alternative benefits to employees and keep their protection from lawsuits, whereas Texas employers are exposed to legal liability in the event of employee injury when employers opt-out of worker's compensation. In 2016, the Oklahoma Supreme Court ruled that the state's noncompulsory workers' compensation system violated the state's constitution.

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Workers' Compensation in the United States

Workers' compensation provides cash and medical benefits to workers who are injured or become ill in the course of their employment and benefits to the survivors of workers killed on the job. Benefits are provided without regard to fault and are the exclusive remedy for workplace injuries, illnesses, and deaths. Nearly all workers and employers in the United States are covered by workers' compensation and each state, with the exception of Texas, has a mandatory workers' compensation system. In 2015, more than 135 million workers, accounting for more than $7.1 trillion in wages, were covered by a state or federal workers' compensation system.[1] When a covered worker is injured, becomes sick, or dies as a result of his or her employment, that worker is entitled to full medical coverage for the injury or illness, cash benefits to replace a portion of wages lost due to inability to work, and benefits for surviving family members in case of death.

Employers are responsible for providing workers' compensation benefits to their workers and generally purchase insurance to cover these costs. The federal government has only a limited role in the provision of workers' compensation because most workers are covered by state laws. Although every state has a workers' compensation system and in all but one state workers' compensation or an equivalent is mandatory, there is no federal mandate that states must have workers' compensation, no federal standards for state programs, and no federal oversight of state systems.

Table 1. Workers' Compensation Benefits and Employer Costs, 2015

	Total in Billions of Dollars	Per $100 in Covered Payroll
Benefits Paid	$61.9	$0.86
Medical Benefits	$31.1	$0.43
Cash Benefits	$30.7	$0.43
Employer Costs	$94.8	$1.32

Source: Christopher F. McLaren and Marjorie L. Baldwin, *Workers' Compensation: Benefits, Coverage, and Costs, (2015 Data)*, National Academy of Social Insurance, October 2017, p. 1, https://www.nasi.org/sites/default/files/research/NASI_Workers%20Comp%20Report%202017.pdf.

Notes: Benefits and costs are those paid in the calendar year, regardless of when the injury occurred. Costs include cost of insurance, benefits paid before meeting an insurance deductible, and administrative costs associated with self-insurance. Sums may not add due to rounding.

The Grand Bargain

Workers' compensation is often referred to as a *grand bargain* between workers and employers. Under workers' compensation, workers receive defined benefits for covered injuries, illnesses, and deaths without regard to fault or liability. In exchange for this coverage, employees are prohibited from suing their employers for workplace injuries, illnesses, and deaths. Workers' compensation is the exclusive remedy available to employees. Employers are protected from lawsuits but must pay defined benefits in all cases, regardless of fault, liability, or defense.

[1] Christopher F. McLaren and Marjorie L. Baldwin, *Workers' Compensation: Benefits, Coverage, and Costs*, (2015 Data), National Academy of Social Insurance, October 2017, p. 1, https://www.nasi.org/sites/default/files/research/NASI_Workers%20Comp%20Report%202017.pdf. Hereinafter cited as *Workers' Compensation: Benefits, Coverage, and Costs, 2015.*

Employers are able to purchase insurance to mitigate their financial risks and increase cost predictability or, in a majority of systems, can self-insure.

The History of Workers' Compensation in the United States

The Era of Litigation

Prior to the establishment of workers' compensation laws at the beginning of the 20th century, the civil courts were the only avenue for the adjudication of disputes over responsibility for employment-related injuries, illnesses, and deaths, and the courts could order employers to provide compensation to injured workers or the survivors of workers killed on the job if it was determined that the employer was negligent.

Establishing Negligence

Under the common-law doctrine of negligence, the burden of proof was on the employee, as plaintiff, to prove that the employer was negligent by failing to provide "due care" to prevent the injury and that this negligence was the proximate cause of the injury, illness, or death. An employer demonstrated due care to prevent injury in the workplace by hiring "suitable and sufficient" workers, establishing and enforcing workplace safety rules, providing a safe workplace and safe equipment, and providing employees with warnings about potential dangers and instructions on how to work in dangerous situations.[2]

In addition, an employer was generally only required to demonstrate due care to prevent a workplace accident if the costs of such care were less than the expected costs of the accident. The expected costs of the accident were the actual losses to the accident victim multiplied by the probability of the accident occurring.[3] This calculus, which came to be referred to as the *Hand Formula* after the decision of Judge Learned Hand in *United States v. Carroll Towing Co.*,[4] effectively meant that employers did not have an absolute duty to prevent accidents but rather had such a duty only to the extent that the costs of prevention did not exceed the expected costs of the accident.

This common-law standard of care is in contrast with the statutory requirement of the Occupational Safety Health Act (OSH Act), commonly referred to as the *general duty clause*, which states that every employer has a general duty to provide its employees with a workplace free of recognized hazards that cause or are likely cause death or serious physical harm to the employees, regardless of the costs associated with worker safety.[5] In addition, under workers' compensation, there is no calculation of negligence because the employer is always responsible for providing compensation to the injured worker, regardless of fault or circumstance.

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[2] Price V. Fishback and Shawn Everett Kantor, "The Adoption of Workers' Compensation in the United States, 1900-1930," *Journal of Law and Economics*, vol. 41, no. 2 (October 1998), p. 308. Hereinafter cited as Fishback and Kantor (1998).

[3] William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Cambridge: Harvard University Press, 1987), pp. 85-88. Hereinafter cited as Landes and Posner (1987).

[4] 159 F.2d. (2d. Cir. 1947). While the decision in this case came after the creation of workers' compensation, Landes and Posner argue that "... Hand was purporting only to make explicit what had long been the implicit meaning of negligence...." (Landes and Posner (1987), p. 85).

[5] Section 5 of the Occupational Safety and Health Act of 1970, as amended [29 U.S.C. §654].

Employer Defenses

Prior to workers' compensation, in addition to having to prove negligence on the part of the employer, employees seeking compensation for work injuries also had to overcome three defenses provided to employers under common law:

1. *assumption of risk*—the worker knew the risks of the job, including risks associated with latent defects in equipment and the employer's method of conducting business, and accepted those risks by accepting the job;
2. *fellow-servant*—the accident or injury was actually caused by a coworker and not the employer's negligence or action; and
3. *contributory negligence*—the affected employee's actions or failure to exercise due care resulted in the accident or injury.[6]

Under workers' compensation, the employer is responsible for the costs associated with a worker's injury, illness, or death, even if the worker accepted the known risks of the job or the accident was caused in some way by a coworker, other third party, or the worker.

Consensus and the Grand Bargain

The creation of the workers' compensation system was driven by a consensus among employers, workers, and insurers, who all stood to gain from the adoption of the grand bargain. For employers, workers' compensation reduced the uncertainty associated with the tort system, which, despite the advantages inherent in common law, still left the employer's ultimate costs for a workplace injury in the hands of a judge or jury. In addition, at the beginning of the 20th century, states began limiting the common-law defenses available to employers. In 1900, seven states had such laws. By 1911, a year after the enactment of the first state workers' compensation law, 23 states had laws limiting employer defenses in work-accident cases.[7] Through the purchase of workers' compensation insurance, employers could predict each year's costs associated with work injuries and these costs were not subject to the unpredictable nature of accidents themselves or the decisions of judges and juries. In addition, in many cases employers were able to shift some of the costs of workers' compensation insurance to their employees in the form of lower wages, especially in cases of non-union workforces.[8]

For employees, the creation of workers' compensation meant that they no longer had to overcome the burdens of common law to win compensation from their employers for injuries, illnesses, and deaths. In addition, the guaranteed benefits provided by workers' compensation in case of disability or death provided one of the first social safety nets for workers who were often unable to purchase or afford private disability insurance and who were not yet protected by unemployment insurance (UI) or Social Security Disability Insurance (SSDI). The first state UI law was enacted in 1932 and SSDI was enacted for workers over the age of 50 only in 1956 and for all workers in 1960, fifty years after the first state workers' compensation law was enacted.

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[6] For additional information on these common-law defenses, see Stephen D. Fessenden, "Present Status of Employers' Liability in the United States," *Bulletin of the Department of Labor*, vol. V, no. 31 (November 1900), pp. 1157-1210. Hereinafter cited as Fessenden (1900).

[7] Fishback and Kantor (1998), p. 317.

[8] Price V. Fishback and Shawn Everett Kantor, "Did Workers Pay for the Passage of Workers' Compensation Laws?," *Quarterly Journal of Economics*, vol. 110, no. 3 (August 1995), pp. 713-742. Hereinafter cited as Fishback and Kantor (1995).

Even before workers' compensation, insurers sold liability policies to employers to cover their costs associated with successful work injury claims. However, these policies became mandatory under workers' compensation laws, except in the rare cases of self-insurance or exclusive state insurance funds.[9] The mandatory nature of workers' compensation insurance resulted in increased customers and total premiums for insurers as well as a larger risk pool, which reduced each individual insurer's exposure to claims.

Workers' Compensation Legislation

Employers, workers, and insurers recognized that they would all be better off under a system of workers' compensation than under the tort system. This idea led to the grand bargain of workers' compensation. This bargain required legislation rather than voluntary contracts between employers and workers. Prior to workers' compensation, some employers offered workers ex post contracts in which the worker voluntarily accepted benefits from a relief fund jointly financed by the employer and the workers in exchange for forfeiting all future claims against the employer for a work injury. The decision to enter into an ex post contract was made by the worker after the accident occurred. Although such contracts were upheld by the courts, they were not an effective substitute for the tort system because workers retained the right to refuse relief fund payments and thus retain their rights to bring civil litigation against their employers, thus maintaining the uncertainty inherent in the tort system.

Although ex post contracts were legal but ineffective, employers also offered ex ante contracts in which workers agreed to waive their right to file suit against their employers in exchange for work-injury benefits, before any accident, injury, illness, or death occurred. The courts generally held such contracts to be unenforceable under common law because they violated public policy.[10] In addition, by 1909, 28 states had enacted laws prohibiting ex ante contracts[11] and such contracts were prohibited by the Wyoming constitution.[12] Although states could have adopted laws allowing ex ante contracts, workers and unions lobbied against such efforts and in favor of workers' compensation under the belief that workers would have more leverage to negotiate benefits in the state legislature than with individual employers.[13]

Federal Workers' Compensation for the United States Life Saving Service and Other Hazardous Federal Occupations

One of the first workers' compensation laws in the United States covered only selected federal employees and was enacted in 1882. This law provided up to two years of salary to any member of the federal United States Life Saving Service disabled in the line of duty and two years of salary to his or her survivors in case of a line of duty death.[14] In 1908, Congress passed a more comprehensive workers' compensation law for federal employees engaged in certain hazardous occupations, such as laborers at federal manufacturing facilities and arsenals or working on the

[9] There have never been more than seven exclusive state funds.

[10] Fessenden (1900), p. 1203.

[11] Ibid., and Lindley D. Clark, "The Legal Liability of Employers for Injuries to their Employees, in the United States," *Bulletin of the Bureau of Labor*, vol. XVI, no. 74 (January 1908), pp. 1-121.

[12] Wyo. Const. art. 10 §4(c).

[13] Fishback and Kantor (1998), p. 313.

[14] Act of May 4, 1882, ch. 117, 22 Stat. 55 (1882). In 1915 the United States Life Saving Service was merged with the Revenue Cutter Service to form the United States Coast Guard.

construction of the Panama Canal.[15] This law provided workers with up to one year of salary, after a 15-day waiting period, if disabled due to an employment-related injury, and their survivors with up to a year of salary in case of an employment-related death.

The 1882 and 1908 federal workers' compensation laws did not provide universal coverage for all federal employees. It is estimated that only one-fourth of the federal workforce was covered by the 1908 law, and the law was clearly designed only to provide coverage for what were seen to be the most hazardous jobs in the civil service.[16] President Theodore Roosevelt recognized this shortcoming of the law he would eventually sign. Before the 1908 law's passage, he called on Congress to pass a workers' compensation bill that would cover "all employees injured in the government service" and stated that the lack of such a comprehensive workers' compensation law was "a matter of humiliation to the nation."[17]

In addition to only covering a small portion of the federal workforce, the 1882 and 1908 laws did not provide for medical benefits for disabled workers, and the 1908 law only applied in cases of disability or death arising from injuries and not illnesses.

State Workers' Compensation Laws

Maryland enacted the first limited state workers' compensation law in 1902 that covered only miners, steam and street railway workers, and workers and contractors on municipal public works projects. Montana followed in 1909 with a workers' compensation law that only covered miners. Both laws were struck down as unconstitutional by their state courts.[18]

New York enacted the first comprehensive state workers' compensation laws in 1910 when it created both elective and compulsory workers' compensation systems for employers in that state. The compulsory system was declared unconstitutional by the New York Court of Appeals in 1911, with the court ruling in *Ives v. South Buffalo Ry. Co.* that the law deprived an employer of its property rights without due process of law in cases in which the employer would be required to compensate a worker for injuries that were not caused by employer's negligence.[19] New York responded to the *Ives* decision with an amendment to the state constitution permitting a compulsory workers' compensation law and the enactment of a compulsory law in 1913.[20]

Ten states enacted workers' compensation laws in 1911. In 1948, with the enactment of the Mississippi law, every state had a workers' compensation system as shown in **Table A-1** in the Appendix.[21] Although early state laws provided for a mix of elective and compulsory systems,

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[15] Act of May 30, 1908, ch. 236, 35 Stat. 556 (1908).

[16] Willis J. Nordlund, "The Federal Employees' Compensation Act," *Monthly Labor Review*, September 1991, p. 5.

[17] U.S. Congress, House Committee on Education and Labor, Subcommittee on Safety and Compensation, *Amendments to Federal Employees' Compensation Act*, hearings on H.R. 1196 and other bills to amend the Federal Employees' Compensation Act, 86th Cong., 2nd sess., February 10, 23, 24 and March 8, 23, 24, 1960 (Washington: GPO, 1960), p. 124.

[18] The Maryland law was struck down in 1904 by the Court of Common Pleas of Baltimore City in an unpublished opinion in *Franklin v. The United Railway and Electric Company of Baltimore*. The Montana law was struck down in 1911 by the Montana Supreme Court in *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 p. 554 (1911).

[19] 209 N.Y. 271, 94 N.E. 431 (1911). For additional information on the *Ives* decision, see Thomas Reed Powell, "The Workmen's Compensation Cases," *Political Science Quarterly*, vol. 32, no. 4 (December 1917), pp. 542-547.

[20] N.Y. Const. Article I §18 (formerly §19).

[21] Alaska and Hawaii enacted territorial workers' compensation laws in 1915, which became state laws with statehood in 1959. In 1928, workers' compensation coverage under the federal Longshore and Harbor Workers' Compensation Act (LHWCA) was extended to employees in the District of Columbia (District of Columbia Workmen's

eventually each state, with the exception of Texas, enacted a compulsory worker's compensation system.[22] Compulsory state workers' compensation laws were upheld by the U.S. Supreme court in a series of rulings in 1917.[23]

Federal Workers' Compensation Programs

After passing one of the first workers' compensation laws in the United States in 1882, the federal government has largely ceded jurisdiction over workers' compensation policy to the states. Today, the federal government administers two comprehensive workers' compensation programs and two programs that provide limited benefits to workers in selected industries with selected medical conditions.

Federal Employees' Compensation Act

President Woodrow Wilson signed the Federal Employees' Compensation Act (FECA) into law on September 7, 1916, and in so doing extended the protections of workers' compensation systems being developed in the states to nearly all federal employees.[24] This original FECA law remains the basis for the workers' compensation system for all federal civilian employees in the executive, legislative, and judicial branches of government.

FECA provides workers' compensation benefits to federal civilian employees, and by extension, to certain other groups, such as federal jurors and state and local law enforcement officers operating in a federal capacity. The Department of Labor (DOL) administers the FECA program, but each beneficiary's host agency pays benefit costs for their workers. Administrative costs for the FECA program are appropriated to DOL from general revenue, except in case of certain government corporations, such as the U.S. Postal Service, which must pay for its share of the program's administrative costs.

Longshore and Harbor Workers' Compensation Act

The Longshore and Harbor Workers' Compensation Act (LHWCA) was enacted in 1927 to provide a federal system of workers' compensation for private-sector workers engaged in the loading, unloading, building, or breaking of vessels that operate on the navigable waters of the United States.[25] Federal involvement in workers' compensation for maritime workers was preceded by the 1917 Supreme Court ruling in *Southern Pacific v. Jensen* that state workers' compensation coverage of maritime workers was unconstitutional because the Constitution

Compensation Act of 1928, P.L. 70-419). This provision was repealed, effective for all injuries occurring on or after July 26, 1982, with the enactment by the District of Columbia government of the District of Columbia Workers' Compensation Act of 1982 (D.C. Code §§36-501 et seq.). Benefits for injuries that occurred prior to July 26, 1982, continue to be paid under the LHWCA.

[22] Fishback and Kantor (1998), pp. 313-314.

[23] New York Central Railway Co. v. White, 243 U.S. 188 (1917); Hawkins v. Bleakly, 243 U.S. 210 (1917); and Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

[24] P.L 64-267; codified at 5 U.S.C. §§8101 et seq. For additional information on FECA, see CRS Report R42107, *The Federal Employees' Compensation Act (FECA): Workers' Compensation for Federal Employees*.

[25] P.L. 69-803; codified at 33 U.S.C. §§901 et seq. For additional information on the LHWCA, see CRS Report R41506, *The Longshore and Harbor Workers' Compensation Act (LHWCA): Overview of Workers' Compensation for Certain Private-Sector Maritime Workers*.

granted the federal government the authority over "matters of admiralty and maritime jurisdiction."[26]

The LHWCA has been extended several times to cover other groups of private-sector workers. In 1928, coverage was extended to employees of the District of Columbia. Coverage was extended to overseas military and public works contractors in 1941 with the enactment of the Defense Base Act.[27] In 1952, coverage was extended to civilian employees of nonappropriated fund instrumentalities of the Armed Forces, such as service clubs and post exchanges.[28] Coverage was extended in 1953 to employees working on the Outer Continental Shelf in the exploration and the development of natural resources, such as workers on offshore oil platforms.[29]

Under the LHWCA, covered employers are required to purchase workers' compensation insurance from carriers approved by DOL, or, with DOL's approval, self-insure, and pay benefits in accordance with the LHWCA statute and regulations.

Black Lung Benefits

DOL administers a limited workers' compensation program that provides cash and medical benefits to coal miners who are disabled by coal workers' pneumoconiosis, commonly referred to as Black Lung Disease, and to the survivors of miners who die from the disease. Black lung benefits began in 1969 with the enactment of Title IV of the Federal Coal Mine Health and Safety Act of 1969.[30] Claims for benefits filed before 1972 are paid by the federal government whereas all other claims are either paid by the responsible coal operators or the federal Black Lung Disability Trust Fund, which is financed by an excise tax on domestically produced coal.[31] Coal operators are required to purchase insurance to cover their workers. States may opt out of the black lung program if they provide equivalent black lung benefits under their state workers' compensation law. In 1973, Maryland, Kentucky, Virginia, and West Virginia submitted their state workers' compensation laws to DOL for approval, but were denied.[32] Currently no state has opted out of the black lung program.

Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act (EEOICPA), enacted in 2000, provides cash and medical benefits to workers who were involved in the development, research, and testing of atomic weapons.[33] EEOICPA is administered by DOL with all costs paid

[26] 244 U.S. 205 (1917). The Court cited Article 3, Section 2 of the Constitution, which extends the judicial authority of the United States to admiralty and maritime matters, and Article 1, Section 8 of the Constitution, which grants Congress the power to make all laws necessary and proper to execute the powers of the federal government, as the basis for its decision.

[27] P.L. 77-208.

[28] Nonappropriated Fund Instrumentalities Act, P.L. 82-397.

[29] Outer Continental Shelf Lands Act, P.L. 83-212.

[30] P.L. 91-173; codified at 30 U.S.C. §§901 et seq.

[31] The coal excise tax is charged to the producer at the time of the first sale or use of the coal. Pursuant to the decision of the U.S. District Court in *Ranger Fuel Corporation v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998), coal for export is not subject to the excise tax as the Constitution prohibits the taxation of exports (U.S. Const. art. I, §9, cl. 5).

[32] Peter S. Barth, *The Tragedy of Black Lung: Federal Compensation for Occupational Disease* (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1987), p. 196.

[33] P.L. 106-398; codified at 42 U.S.C. §§7348 et seq.

out of general revenue rather than by employers. Part B of EEOICPA provides lump-sum cash benefits and medical benefits to the following groups of workers:

- Department of Energy (DOE) employees or contractors and atomic weapons industry workers with specified types of cancer likely caused by exposure to radiation or chronic silicosis likely caused by the mining of tunnels for atomic weapons testing;
- beryllium workers with chronic beryllium disease; and
- uranium miners, millers, and ore transporters provided benefits under the Radiation Exposure Compensation Act (RECA).

Initially, Part D of EEOICPA authorized DOE to assist former DOE contractor employees with filing state workers' compensation claims based on exposures to toxic substances at DOE facilities. In 2004, Part D was replaced by Part E, which is a workers' compensation program that provides cash benefits based on degree of disability and impairment and medical benefits to former DOE contractor employees with illnesses or deaths caused by occupational exposure to any toxic substance.[34]

Elements of Workers' Compensation

The workers' compensation system in the United States is made up of individual state programs and four federal programs of limited jurisdiction. Caution should be exercised when making generalizations about these systems. However, while each workers' compensation system is different and operates under its own set of laws, regulations, and legal precedents, there are some common elements to these systems.

Exclusive Remedy

Workers' compensation is the exclusive remedy available to workers and their families for damages related to covered injuries, illnesses, and deaths. Workers and their families are not permitted to sue their employers to recover any costs, including costs not paid by workers' compensation or costs related to pain and suffering, or to seek punitive damages for covered injuries, illnesses, and deaths. Employees generally may sue third parties that may be responsible for their injuries, illnesses, or deaths. In such cases, the employer generally has a right of subrogation and can recover from the award paid by the third party any workers' compensation benefits already paid.

The exclusive nature of the workers' compensation remedy does not keep all cases out of the courts. In some cases, decisions of administrative bodies can be appealed to state courts. In addition, some workers sue their employers alleging that their injuries were caused by the employers' acts, or inactions, so grievous that they amount to intentional torts subject to litigation and exempt from workers' compensation.

Workers' compensation does not cover two groups of workers who are thus entitled to use the tort system to recover damages from occupational injuries, illnesses, and deaths. Railroad workers are exempt from workers' compensation and are instead covered by the Federal Employers' Liability

[34] P.L. 108-375.

Act (FELA).[35] Crew members of ships are also exempt from workers' compensation and are covered by the liability provision of Merchant Marine Act (also referred to as the Jones Act).[36]

Workers' Compensation Insurance

Employers generally finance workers' compensation through the purchase of insurance, with the employers paying premiums for coverage and the insurers paying the costs of covered benefits. Insurance premiums are regulated by the states. Premiums are generally affected by the risk involved in the specific types of jobs being insured and the experience rating of the employer. The experience rating is based on the employer's past history of claims and insurance losses.[37] Experience rating can serve as an incentive for employers to implement occupational safety and health practices to reduce injuries and illness and, by extension, workers' compensation claims.

Four types of insurance arrangements are used in workers' compensation:

1. insurance through an exclusive state fund,
2. insurance through a competitive state fund,
3. private insurance, and
4. self-insurance.

State Funds: Exclusive and Competitive

Twenty-two states operate state insurance funds that provide workers' compensation insurance to public and private employees, as shown in **Table A-2** in the Appendix. There are two types of state funds, exclusive and competitive. In the four states with exclusive state funds, the state fund is the only workers' compensation insurance available for purchase. Employers may not purchase workers' compensation insurance from private insurers. In the 18 states with competitive state funds, the state funds operate in open markets with private insurers and employers may purchase insurance from either the state funds or private insurers.

Private Insurance

In the majority of states, there are no state funds and workers' compensation is exclusively offered through private insurers. These insurers are regulated by the states, which limit their ability to set premiums and establish the benefits required by statute that must be paid to covered employees.

Whereas state insurance funds will generally provide insurance to any employer, private insurers are generally not required to provide insurance in all cases. If an insurer believes that an employer is too much of a risk, it can refuse to sell that employer a policy, which can create a situation in which a high-risk employer is unable to purchase coverage in a state. In these cases, states either assign these employers to insurers, often based on the insurer's market share in the state, or provide insurance through an assigned-risk pool managed by the state.

[35] 45 U.S.C. §§51 et seq.

[36] 46 U.S.C. §30104. The Merchant Marine Act (or the Jones Act) does not apply to federal employees who work on ships, such as crew members of Military Sealift Command vessels, because these employees are covered by the Federal Employees' Compensation Act (FECA).

[37] For additional information on experience rating see National Council on Compensation Insurance, *ABCs of Experience Rating*, Boca Raton, FL, 2016, https://www.ncci.com/Articles/Documents/UW_ABC_Exp_Rating.pdf.

Self-Insurance

All but two states, North Dakota and Wyoming, allow employers with sufficient resources to self-insure for workers' compensation. Under self-insurance, the employer does not purchase insurance from a state fund or private insurer, rather, the employer holds sufficient assets in reserve to pay any required benefits. Self-insured employers must be approved by the state and in some cases must post bonds to ensure that future benefits will be paid even if the employer is unable to pay them or becomes insolvent.

The Workers' Compensation Market

In a truly open market, employers and insurers would be able to come to agreements on optimal levels of premiums, benefits, and other services. However, the market for workers' compensation, even in states with only private insurers and no state funds, is not truly open. The benefits provided by insurers are set by the state and are not subject to negotiation and the premiums charged by insurers are regulated by the states as well. This regulation of both benefits and premiums may somewhat blunt the possible cost savings and efficiencies that could otherwise be gained by the private insurance system for workers' compensation.

In the four states with exclusive state funds, the market is closed and the state fund is in a monopoly position. Although monopolies are often associated with higher prices, state funds have the potential to offer cost savings over private insurers because of their nonprofit status. In addition, exclusive state funds do not have the advertising or customer acquisition costs of competitive state funds or private insurers, which can also result in lower costs.

Although workers' compensation benefits are standardized within each state, employers may still select insurers based on other services they provide. One example of this type of service is an insurer's worker-safety program designed to help employers lower their claims rates and thus, their premiums.

Second Injury Funds

A second injury fund (SIF) is a state-administered fund that pays the difference between the employers' responsibility for partial disability benefits and the actual costs of total disability benefits for cases involving workers who were partially disabled before working for the employer. SIFs are funded through assessments on insurers and self-insured employers.

A SIF's goals are to reduce the workers' compensation risk associated with hiring persons with disabilities and reduce the costs to employers when an injury that would otherwise result in a partial disability results in a total disability due to the previous disability of the worker.

During the period after World War II, each state that permitted employers to purchase private workers' compensation insurance or self-insure operated a SIF as part of its workers' compensation system. Since then, 20 states have abolished their SIFs with four states, Arkansas, Georgia, New York, and South Carolina, eliminating their funds since 2004 and Missouri, beginning in 2014, significantly limiting what its SIF covers.[38]

[38] Christopher J. Boggs, "Second Injury Funds: Are They Still Necessary or Just a Drain on the System," *Insurance Journal: Academy Journal Blog*, March 25, 2015, http://www.insurancejournal.com/blogs/academy-journal/2015/03/25/360666.htm; Yue Qiu and Michael Grabell, *Workers' Compensation Reforms by State*, ProPublica, March 4, 2015, http://projects.propublica.org/graphics/workers-comp-reform-by-state?; and data provided by the American Insurance Association (AIA).

New York established the first SIF in 1916 and these funds gained national attention in 1925 after the Oklahoma Supreme Court ruled in *Nease v. Hughes Stone Co.* that Hughes, the employer, was responsible for paying total disability benefits to W. A. Nease, who lost his second eye on the job, even though he had lost his first eye prior to being hired.[39] Hughes argued that it should only be responsible for the partial disability due to the loss of one eye that occurred while Nease was their employee, and not the larger effects of that injury on Nease due to his previous injury. In wake of the *Nease* decision, there were reports of thousands of Oklahomans with partial disabilities either being laid off or unable to find work because of the potential increased workers' compensation risk they posed to employers.[40] SIFs gained further attention after World War II as a way of ensuring that employers would not be dissuaded from hiring veterans with disabilities.

Some, including the American Insurance Association (AIA), have argued that SIFs are no longer necessary due to enactment of the Americans with Disabilities Act (ADA), which prohibits discrimination against persons with disabilities in employment and requires employers to provide reasonable accommodations to persons with disabilities on the job. In addition, it is argued that SIFs have not resulted in the intended increased employment of persons with disabilities, have accumulated large unfunded deficits, deviate from the principle that employers should be responsible for the costs of their own workers' injuries, and result in increased transaction costs and disputes.[41]

Workers' Compensation Benefits

In all workers' compensation systems, covered workers are entitled to medical care for their covered injuries or illnesses, and disability benefits to partially replace lost wages. In addition, the survivors of a worker who dies as a result of a covered injury or illness are provided benefits. In general, any injury, illness, or death that arises out of a person's employment is covered. However, there are exceptions for cases in which the employee is intoxicated or the injury occurs at a workplace but is wholly unrelated to the person's employment, such as crime that began outside of the workplace but continued into the workplace.

Workers' compensation systems generally have statutes of limitations on when claims must be filed after an injury, illness, or death. Because of the latent nature of many occupational illnesses, these provisions may complicate workplace illness benefit applications, especially if the statute of limitation begins at the time of exposure, rather than, as is the case in the FECA and LHWCA programs, when the employee first knew or should have known that his or her illness was related to his or her employment.

Medical Benefits

Injured workers are entitled to medical benefits under workers' compensation laws. A worker who is injured or sick due to an employment-related incident or exposure is provided medical coverage for his or her covered injuries or illnesses. Medical benefits under workers' compensation are provided without any cost sharing on the part of the workers. Covered workers do not have to use their personal insurance or pay coinsurance or satisfy any deductibles when

[39] 1925 OK 713.

[40] The primary source of these reports was the comments of I. K. Huber of the Empire Companies of Bartlesville, Oklahoma at the 1930 meeting of the International Association of Industrial Accident Boards and Commissions and published as part of the proceedings of that meeting in the *Bulletin of the Bureau of Labor Statistics* ("Proceedings of the Seventeenth Annual Meeting of the International Association of Industrial Accident Boards and Statistics," *Bulleting of the United States Bureau of Labor Statistics*, no. 536 [April 1931], pp. 268-272).

[41] AIA, *Second Injury Funds Should be Abolished*, Policy Statement, Washington, DC, June 2002.

receiving medical care. Medical benefits are only provided for covered injuries and illnesses and are not provided for general medical coverage for covered workers.

Because workers pay none of the costs associated with their medical care under workers' compensation, controlling costs and ensuring that only medically necessary care is provided are long-standing challenges for employers and insurers. One strategy to control medical utilization and costs is to allow employers and insurers to exercise greater control over who provides medical care to beneficiaries. Workers' compensation systems differ in how medical care is provided to covered workers. In some systems, including the federal systems, workers have near-complete control over which medical providers they choose for care. In other systems, employers have a greater role in affecting the choice of medical providers either through selecting providers for patients or limiting patients to selecting providers from an employer-approved list. In addition, many state workers' compensation systems permit pharmacy benefit managers (PBMs) to use formularies and utilization reviews to control prescription drug utilization and economies of scale to control prescription drug purchasing costs.

Workers' compensation is intended to be the primary payer for medical costs associated with covered injuries or illnesses. Private health insurance, Medicaid, or Medicare are not authorized payers for work-related medical expenses. In the case of a workers' compensation compromise and release settlement, a portion of the settled amount attributable to future medical expenses may be required to be set-aside to reimburse the Medicare program for these future medical expenses that the worker may bill to Medicare.

In recent years, price and utilization of prescription drugs has drawn particular attention as drivers of workers' compensation medical costs. Marked increases in the average wholesale prices of popular generic drugs in 2014, for example, drove prescription spending in both workers' compensation and non-occupational medical systems[42] and drew the attention of Congress.[43] According to the U.S. Postal Service (USPS) Office of the Inspector General, the growth in compound drug use and costs is a major driver of the agency's costs under the FECA program. In 2011, compound drugs made up 8% of total USPS FECA prescriptions and 6% of prescription costs. In 2015, compound drugs made up 34% of USPS FECA prescriptions and 53% of prescription costs.[44]

Factors that drive prescription drug utilization include physician dispensing of drugs, the repacking of drugs, and the prevalence of opioid painkillers. States have begun controlling utilization costs by contracting with PBMs; placing regulations and limits on physician dispensing; using formularies that limit the specific drugs that will be covered; requiring pre-authorization or step-therapies in which a less expensive drug must be tried before a more expensive alternative is authorized for certain drugs; and capping total prescriptions reimbursements.

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[42] Express Scripts, *The 2014 Drug Trend Report: Workers' Compensation*, April 2015, p. 5, http://lab.express-scripts.com/lab/drug-trend-report/~/media/fdc342d554514b2d81973dbcca4d4654.ashx; Helios, *Workers' Compensation Drug Trends Report: 2015*, 2015, p. 16; and M.J. Alpern, M.M Stauffer, and M.J. Kesselheim, "High-Cost Generic Drugs—Implications for Patients and Policymakers," *New England Journal of Medicine*, vol. 371, no. 20 (November 13, 2014), pp. 1859-1862.

[43] U.S. Congress, Senate Committee on Health, Education, Labor, and Pensions, Subcommittee on Primary Health and Aging, *Why Are Some Generic Drugs Skyrocketing in Price?*, 113th Cong., 2nd sess., November 20, 2014.

[44] United States Postal Service (USPS), Office of the Inspector General (OIG), *Workers' Compensation Compound Drug Costs*, Management Advisory Report Number HR-MA-16-003, March 14, 2016, p. 8, https://www.uspsoig.gov/sites/default/files/document-library-files/2016/HR-MA-16-003.pdf.

Cash Benefits

Workers' compensation pays cash benefits to workers for disabilities as a result of workplace injuries and illnesses and to the survivors of workers who die as a result of their employment. Cash benefits are only intended to replace a portion of the wages lost by the disabled or deceased worker. Partial-wage replacement is a feature of workers' compensation for two reasons. First, because workers' compensation benefits are seen as a replacement for untaxed tort awards that would otherwise be received by the worker, benefits are not considered income for the purposes of the federal income tax[45] and are often exempt from state and local taxes.[46] Second, the partial nature of these benefits serves a deductible function by reducing the economic incentive of workers to replace work with the receipt of benefits. There is generally a waiting period of several days before cash benefits begin, which serves as both a deductible provision and to keep the most minor injuries out of the workers' compensation system. Benefits for days during the waiting period are generally retroactively paid once it is determined that the claim is for a long-term or permanent disability.

Disability Benefits

Disability benefits under workers' compensation are paid when a covered worker is unable to work at his or her full earning capacity because of an employment-related injury or illness. Disability benefits can be either for *total* or *partial* disability and can be either *temporary* or *permanent.*

Total disability benefits are generally paid at a level of two-thirds of the employee's pre-disability wage.[47] Benefits are subject to system-specific minimum and maximum levels usually based on average wages in the state. Thus, workers with high earnings may see their benefits capped at a level below two-thirds of their pre-disability wage.

Partial disability benefits are paid as a percentage of the total disability rate that corresponds to the partial earning capacity of the worker. For example, if a state's total disability rate is two-thirds of the pre-disability wage, and a worker is injured and able to work only half-time due to his or her injury, then this worker's benefit would be equal to one-third of his or her pre-disability wage. The assessment of a worker's capacity to work is commonly made using the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment*, currently in its sixth edition.[48]

Permanent disability benefits are paid when it is determined that the worker's medical condition is not going to improve sufficiently to return to worker to full earning capacity. In most cases, temporary disability benefits are first paid until a determination of the permanence of the condition is made.

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[45] Section 104(a)(1) of the Internal Revenue Code (29 U.S.C. §104(a)(1)).

[46] Medical benefits are also not subject to the federal income tax. For additional information on the taxation of workers' compensation benefits, see U.S. Congress, Senate Committee on the Budget, *Tax Expenditures: Compendium of Background Material on Individual Provisions*, committee print, prepared by Congressional Research Service, 114th Cong., 2nd sess., December 22, 2016, S.Prt. 114-31 (Washington: GPO, 2017), pp. 857-860 and 921-926.

[47] In several states, the total disability rate is different from the two-thirds standard. In the FECA program, the total disability rate is increased to 75% of the pre-disability wage if the worker has a spouse or dependents.

[48] There has been some controversy over the use of the AMA *Guides* in workers' compensation, including whether the current edition should be used. These issues were the focus of a congressional hearing in 2010 (U.S. Congress, House Committee on Education and Labor, Subcommittee on Workforce Protections, *Developments in State Workers' Compensation Systems*, 111th Cong., 2nd sess., November 17, 2010, Serial No. 111-76 (Washington: GPO, 2010)).

Scheduled Awards for Permanent Partial Disabilities

In case of certain *permanent partial* disabilities, such as the loss of a limb, workers' compensation benefits are paid based on a schedule of benefits established by statute or regulation that sets the number of weeks that permanent disability benefits are to be paid for each disability. For example, under FECA, benefits for the loss of an arm are paid, by statute, for 312 weeks[49] whereas benefits for the loss of a breast are paid, by regulation, for 52 weeks.[50] Scheduled benefits for permanent partial disabilities are generally paid even if the beneficiary is able to work at full capacity.

In its 2015 report on workers' compensation, ProPublica calculated the maximum benefits under scheduled awards in each state and the FECA program and found considerable differences in how much a worker can receive for permanent partial disabilities based on where he or she lives or works.[51] These differences are due to different schedules of benefit durations and different maximum levels of compensation among the states. For example, for the loss of an arm, the national average maximum benefit was $169,878 in 2015. Maximum scheduled benefits for the loss of an arm ranged from $48,840 in Alabama to $859,634 in Nevada. These differences in maximum available benefits and permanent-partial award schedules should not be surprising given the decentralized nature of workers' compensation systems run by states without any federal mandates or standards as well as differences in average wages in the states, which are the basis for maximum and minimum benefits.

As part of their budget requests for DOL, Presidents George W. Bush and Barack Obama proposed changing the way permanent-partial benefits are paid under the FECA program.[52] These proposals would have changed the current schedule of benefit durations to a system of lump-sum payments for permanent partial disabilities with all workers' receiving the same amounts regardless of pre-disability wages.

Coordination with Social Security

A worker may receive disability benefits under both workers' compensation and the Social Security Disability Insurance (SSDI) program.[53] However, the combined amount of these benefits cannot exceed 80% of the worker's pre-disability wage in any month, with either the workers' compensation or SSDI benefits offset, depending on the state, to get the worker below the 80% threshold. Prior to 1981, states could elect whether to offset workers' compensation ("reverse offset") or SSDI benefits to get below the 80% threshold. However, pursuant to the Omnibus Budget Reconciliation Act of 1981, only those states with approved reverse offset plans in place as of February 18, 1981, may offset workers' compensation benefits to reach the 80% threshold.[54] In all other states and the federal programs, SSDI benefits are offset when total benefits exceed 80% of the worker's pre-disability wage in month.

[49] 5 U.S.C. §8107(c).

[50] 20 C.F.R. §10.404(a).

[51] Lena Groeger and Michael Grabell, *Workers' Compensation Benefits: How Much is a Limb Worth?*, ProPublica, March 5, 2015, http://projects.propublica.org/graphics/workers-compensation-benefits-by-limb.

[52] See, for example, Department of Labor (DOL), *FY2008 Congressional Budget Justification*, February 5, 2007, pp. ESA-43, https://www.dol.gov/dol/budget/2008/PDF/CBJ-2008-V2-03.pdf.

[53] For additional information on the SSDI program, see CRS Report R44948, *Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI): An Overview*.

[54] P.L. 97-35. The approved reverse offset states are Alaska, California, Colorado, Florida, Louisiana, Minnesota, New Jersey, New York, North Dakota, Ohio, Oregon, Washington, and Wisconsin.

Because the workers' compensation-SSDI offset is based on total monthly benefits, any reduction in monthly workers' compensation benefits could result in an increase in SSDI benefits paid in states that offset SSDI. Thus, a reduction in workers' compensation benefits would shift some of the costs of providing income replacement for the injury or illness from the workers' compensation system to the Social Security system. In addition, policy changes that make it more difficult to receive workers' compensation benefits, such as changing the way disabilities are evaluated, or that make workers' compensation less attractive for injured workers, such as reducing workers' choice of treating physicians would likely shift workers away the workers' compensation system, leaving other social programs, such as Unemployment Insurance (UI), SSDI, Supplemental Security Income (SSI), Medicare, or Medicaid to make up for the income lost to disability.

The Occupational Safety and Health Administration (OSHA) claims that state workers' compensation policy changes have shifted the costs of workplace injuries away from workers' compensation.[55] OSHA, citing a study published in the *Journal of Occupational and Environmental Medicine*, reports that workers' compensation only pays 21% of the cost of workplace injuries, with federal programs, such as SSDI, paying 11% of the costs.[56] The study, however, only looked at cases over one year (2007) and thus cannot be used to measure the cost-shifting to federal programs that occurs as a result of changes in workers' compensation benefits and policies. In addition, when estimating costs associated with work injuries, the study cited by OSHA included indirect costs associated with work injuries, such as additional costs associated with home production activities, such as cooking and home modifications. However, workers' compensation has always been limited to providing partial-wage replacement and medical benefits, and has never paid, nor been intended to pay the indirect costs associated with workplace injuries, illnesses, and deaths.

Benefit Duration

Workers' compensation systems vary in the maximum duration of permanent disability benefits. In the federal programs, and in 36 state programs, disability benefits can be paid for the duration of disability up to the life of the worker.[57] In the remaining state systems, benefits are capped either by age, duration of receipt, or total amount of benefits received. Proponents of limiting the duration of benefits argue that the workers' compensation system is intended to replace lost wages and once a person reaches a certain age, it is unlikely that he or she would be working, even if not injured. Thus, there are no wages to be replaced. Others argue that workers sacrifice potentially larger tort awards that they could win in civil court and thus should not have their workers' compensation benefits arbitrarily limited. In addition, workers injured at young ages may not have sufficient pensions or savings to rely on when they get older and all workers may continue to bear costs associated with their disabilities even after state-mandated duration limits have been reached.

As part of their packages of FECA reforms, Presidents Bush and Obama proposed reducing FECA benefits at retirement age to encourage older beneficiaries to opt to receive their federal pension benefits rather than FECA.[58]

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[55] DOL, Occupational Safety and Health Administration, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job*, June 2015, p. 6, https://www.dol.gov/osha/report/20150304-inequality.pdf.

[56] Paul J. Leigh and James P. Marcin, "Workers' Compensation Benefits and Shifting Costs for Occupational Injury and Illness, *Journal of Occupational and Environmental Medicine*, vol. 54, no. 4 (April 2012), pp. 445-450.

[57] *Workers' Compensation: Benefits, Coverage, and Costs, 2015*, pp. 74-79.

[58] See, for example, DOL, *FY2008 Congressional Budget Justification*, February 5, 2007, pp. ESA-43, https://www.dol.gov/dol/budget/2008/PDF/CBJ-2008-V2-03.pdf.

Compromise and Release Settlements

Compromise and release settlements are a key feature of state workers' compensation systems, but are not permitted under FECA. In a compromise and release settlement, the insurer agrees to provide the beneficiary with a lump-sum payment or structured series of payments in exchange for the worker forfeiting any future claims for medical or cash benefits against the insurer. In some cases, settlements may be limited to cover only future cash benefits or to allow for some future claims, and in others, settlements may be permitted to be reopened if there are material changes in the beneficiary's condition. However, in most cases, once the settlement has been reached and approved, the worker is no longer entitled to any benefits, regardless of what happens to his or her employment or health condition in the future.

Compromise and release settlements can serve as a mechanism to remove disputed claims from the state's adjudication process or the courts in much the same way that civil tort cases may be settled out of court. In addition, the insurer gets to clear the case off of its books and remove the uncertainty associated with possible future benefits. The beneficiary receives either a lump-sum payment or structure of payments, which can be used for injury-related expenses not covered or for unrelated expenses and removes the uncertainty associated with claims being disputed by the insurer. Because insurers will likely have more information on the claim's expected value, the insurer may be in an advantaged position over the worker when negotiating the settlement, which may result in the worker being worse off than had he or she continued with the claim through the normal adjudication process.

Administrative difficulties can arise in compromise and release settlements when administering SSDI offsets and Medicare set-asides. The SSDI offset is based on a comparison of monthly workers' compensation and SSDI benefits with the worker's monthly pre-disability wage. Because a lump-sum settlement replaces monthly benefits, the SSA must prorate the amount of the settlement attributable to cash benefits using an established proration rate as well as specific rules for each individual state, and it can be affected by how the projected life expectancy of the worker is treated in the settlement.[59]

Medicare is the secondary payer to workers' compensation for work-related medical expenses, and workers. Because a compromise and release settlement generally releases the workers' compensation system from paying for any future medical expenses, a worker may improperly use Medicare to pay for these expenses. The Centers for Medicare and Medicaid Services (CMS) recommends, but does not require, that workers' establish a Workers' Compensation Medicare Set-aside Arrangement (WCMSA) to dedicate a portion of the settlement to future medical costs so that Medicare is not improperly billed for these expenses.[60]

Survivors Benefits

If a worker dies in the course of employment or as a result of an employment-related injury or illness, his or her survivors are entitled to workers' compensation benefits. These monthly benefits are generally equivalent to the monthly disability benefit the worker would have received. Because survivors benefits are intended to replace the worker's lost income used to support his or her dependents, generally, only the spouse and dependent children or other dependent family members, such as a dependent parent, are eligible for these benefits. Benefits generally stop when the spouse remarries or the dependent children reach adulthood. If there is no

[59] The SSA's proration procedures are provided in the agency's Program Operations Manual System (POMS) at DI52150.060 and DI52150.065 as well as Social Security Rulings 76-34, 87-21, and 97-3.

[60] For additional information on the coordination between workers' compensation and Medicare, see CRS Report RL33587, *Medicare Secondary Payer: Coordination of Benefits*.

surviving spouse or dependents, survivors benefits are generally not paid to the estate or any other person.

In general, workers' compensation systems also provide a separate burial benefit or allowance in the case of covered deaths. This benefit is usually a lump-sum payment designed to partially offset the costs of the funeral or other final expenses related to the worker's death. Unlike survivors benefits, this benefit is generally paid even if the worker leaves behind no spouse or dependents.

Vocational Rehabilitation and Return to Work

The goal of the employer and insurer in workers' compensation is to return the worker to employment thus removing the worker from the cash benefit rolls. Because workers only receive partial wage replacement through workers' compensation and forfeit any possible career advancement, they also have an incentive to return to work. To assist beneficiaries' return to work and departure from the workers' compensation rolls, vocational rehabilitation services are provided. Participation in vocational rehabilitation is generally voluntary.

Although participation in vocational rehabilitation is voluntary, returning to work, even at a reduced capacity, is generally required if it is determined that the worker's condition permits at least a partial return to work. If a worker can only partially return to work, partial disability benefits are provided in addition to the pay the worker receives from employment. Employers are not required to hold a job open while a worker is receiving workers' compensation. However, the provisions of the Family and Medical Leave Act (FMLA) related to protected leave[61] and the American with Disabilities Act (ADA) related to the prohibition of discrimination against persons with disabilities in hiring and employment[62] may apply in workers' compensation cases.

Workers' Compensation Costs

The direct costs associated with workers' compensation benefits are generally the responsibility of the employers and not the workers or the general revenue stream of the government. Workers never directly pay for their own benefits, which are provided without any coinsurance costs or deductibles that must be met by the workers. Employers may have deductibles that must be met before their insurer will pay benefits.

Worker Costs

Although workers do not directly pay for workers' compensation benefits, they may pay implicitly for their benefits through lower wages as employers shift some of their costs to their workers.[63] In addition, in cases in which the employer is clearly at fault, workers' implicitly pay some of the costs of workers' compensation by forgoing their rights to recover compensatory and punitive damages from their employers. Even in workers' compensation systems that annually adjust workers' compensation benefits for increases in the cost of living, workers with long-term disabilities may pay costs in the form of lost opportunities for promotions or wage growth and

[61] For additional information on the FMLA, see CRS Report R44274, *The Family and Medical Leave Act: An Overview of Title I*.

[62] For additional information on the ADA, see CRS Report R43845, *Title I of the Americans with Disabilities Act (ADA): Employment Discrimination*.

[63] Fishback and Kantor (1995).

lost opportunities to pay into the Social Security system, company pension plans, or certain tax-advantaged investment accounts, such as 401(k) plans.

Employer Costs

As shown in **Table 1**, in 2015, workers' compensation costs for employers were $94.8 billion or $1.32 for every $100 in covered payroll.[64] Although there has been some growth in employer costs since 2009, employer costs for workers' compensation in 2015 are significantly lower than they were in 1980, which ended a period of cost and benefit expansion as states voluntarily adopted many of the recommendations of the National Commission on State Workmen's Compensation Laws, established in 1970 to recommend improvements to state systems, such as universal coverage and greater benefit levels.

Federal Oversight of Workers' Compensation

The federal government has no formal oversight of state workers' compensation programs. There is no federal mandate that states have workers' compensation laws and no federal standards for workers' compensation systems.

Occupational Safety and Health Act of 1970

The Occupational Safety and Health Act (OSH Act) of 1970 was the first comprehensive federal worker-safety law.[65] The OSH Act established OSHA within DOL to promulgate and enforce mandatory occupational safety and health standards. In addition, Section 5(a) of the OSH Act, commonly referred to as the *general duty clause* requires that each employer provide its employers with a workplace free from "recognized hazards that are causing or are likely to cause death or serious physical harm" to the employees.[66] With the general duty clause, Congress established that every employer has an affirmative responsibility to provide a safe workplace to its workers, thus reinforcing the basic tenet of workers' compensation that employers are responsible for the injuries, illnesses, and deaths of their employees, regardless of fault.

National Commission on State Workmen's Compensation Laws

Section 27 of the OSH Act established the National Commission on State Workmen's Compensation Laws to evaluate the adequacy, efficacy, and equity of state workers' compensation systems.[67] In the OSH Act, Congress provided the following justifications for the creation of the National Commission:

> (A) the vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation; and

[64] *Workers' Compensation: Benefits, Coverage, and Costs, 2015*, p. 1.

[65] P.L. 91-596; codified at 29 U.S.C. §§651 et seq.

[66] 29 U.S.C. §654(a).

[67] 29 U.S.C. §676.

> (B) in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living.[68]

The National Commission was made up of 15 members appointed by the President from state workers' compensation boards and the insurance industry, and representatives from employers, labor, medicine, and education. The National Commission was required to evaluate state workers' compensation focusing on benefit levels, medical benefits, uncovered workers and diseases, rehabilitation, SIFs, the use of state funds, and other administrative provisions of state systems.[69]

National Commission Recommendations

The National Commission submitted its final report to the President and Congress on July 31, 1972.[70] In its final report, the National Commission made 84 recommendations for state workers' compensation systems designed to ensure the following objectives of a modern workers' compensation system:

- broad coverage of employees, injuries, and diseases;
- substantial protection against the interruption of income due to injury or illness;
- sufficient medical care and rehabilitation services;
- encouragement of safety; and
- effective system of delivery of benefits.[71]

Of its 84 recommendations, the National Commission identified the following eight, which it claimed were "essential and particularly suitable for Federal support to guarantee their adoption:"

1. compulsory coverage;
2. coverage with no occupational or numerical exemptions, including coverage of farm and household workers and state and local government workers;
3. full coverage of occupational illnesses;
4. full medical care and physical rehabilitation services, without limitations based on duration or cost;
5. the right of employees to file claims in the state where injured, hired, or where work is principally located;
6. temporary total disability benefits equal to two-thirds of the worker's pre-disability wage, with maximum benefits capped at no less than two-thirds of the state's average wage by July 1, 1973, and 100% of the state average wage by July 1, 1975, with no limit on duration or amount of total benefits;
7. survivors benefits equal to two-thirds of the worker's pre-disability wage, with maximum benefits capped at no less than two-thirds of the state's average wage

[68] 29 U.S.C. §676(a)(1).

[69] 29 U.S.C. §676(d)(1).

[70] National Commission on State Workmen's Compensation Laws, *The Report of the National Commission on State Workmen's Compensation Laws*, Washington, DC, July 31, 1972.

[71] Ibid., pp. 117-118.

by July 1, 1973, and 100% of the state average wage by July 1, 1975, with no limit on duration or amount of total benefits;

8. permanent total disability benefits only paid to workers with permanent impairments that render them unable to earn a substantial wage, and equal to two-thirds of the worker's pre-disability wage, with maximum benefits capped at no less than two-thirds of the state's average wage by July 1, 1973, and 100% of the state average wage by July 1, 1975, with no limit on duration or amount of total benefits.[72]

The National Commission called for an evaluation of state compliance with these eight recommendations by July 1, 1975, and recommended that Congress guarantee state compliance after that date. In addition, the National Commission recommended federal legislation mandating minimum standards for state workers' compensation and the use of lawsuits filed by the Department of Justice and individual workers against employers that fail to secure mandated workers' compensation coverage.[73]

Legislative Response to the National Commission's Recommendations

The National Commission called on Congress to break with the long-standing precedent of allowing states to operate their workers' compensation systems without federal mandates or oversight. In 1973, S. 2008, introduced by Senators Harrison Williams and Jacob Javits, would have created minimum standards for state workers' compensation systems and given the federal government the authority to assume the regulation of workers' compensation from any state not in compliance with these standards. An identical bill, H.R. 8771 was introduced by Representative Carl Dewey Perkins. Neither bill was enacted into law.

The minimum standards for state workers' compensation systems proscribed by S. 2008 and H.R. 8771 were based on the recommendations of the National Commission. Beginning January 1, 1975, states would have been required to operate workers' compensation systems with the following elements:

- compulsory coverage of all employees, including coverage for occupational illnesses equivalent to the coverage provided by the federal black lung benefits program;
- no duration or monetary limit on total disability benefits paid;
- no duration or monetary limit on medical or rehabilitation benefits;
- total disability benefits paid at two-thirds of the worker's pre-disability wage, with maximum benefits increasing to 200% of the state's average wage by January 1, 1978, and minimum benefits of at least 50% of the state's average wage, with annual adjustments to benefits to reflect growth in the state's average wage;
- survivors benefits payable to a spouse for life or until two-years after remarriage and to children until the age of 18 or 23 if enrolled in higher education or for life if disabled;
- a waiting period of no more than three days with retroactive benefits paid after no more than 14 days of benefit duration;

[72] Ibid., pp. 126-127.

[73] Ibid., p. 127.

- maintenance of a SIF;
- reconsideration of denials of benefits made prior to the enactment of the federal standards;
- the right of workers to select the initial treating physician from a list maintained by the state workers' compensation agency, with the state agency having oversight of medical care and the right to order necessary changes to care;
- a three-year statute of limitation on claims beginning with when the worker knew or should have known that his or her condition was related to his or her employment;
- state regulation of attorney's fees;
- compromise and release settlements must be approved by the state workers' compensation agency;
- employee choice of state system if work involved more than more state;
- measures to ensure payment of benefits in case of employer or insurer insolvency.

The Secretary of Labor would have also had the authority to promulgate, through rulemaking, additional standards for state workers' compensation systems. Every three years states would be evaluated as to their compliance with the federal standards. In any state found by DOL not to be in compliance, the provisions of the LHWCA, not the state workers' compensation law, would govern workers' compensation in that state.

DOL would have been authorized to make grants to states through FY1976 to assist with compliance and the bill authorized $45 million for these grants. The bill would have also created a federal advisory board to monitor state compliance with the federal standards and would have established a federal system of workers' compensation statistics.

State Responses to the National Commission's Recommendations

Because the Williams-Javits legislation did not become law, states were free to decide to what extent they would adopt the policy changes necessary to bring their systems into compliance with the recommendations of the National Commission. Although full compliance across the states was never achieved, there was considerable expansion of state workers' compensation programs in response to the National Commission's report.

The Council on State Governments proposed a model workers' compensation act that incorporated all of the National Commission's recommendations. One way to compare overall state compliance with the National Commission's recommendations is to compare state benefit levels with those levels that would have been in effect had states adopted the model workers' compensation act. In 1972, average cash benefits in the states were 39.6% of those called for by the model act. By 1979, average cash benefits exceeded 50% (50.4%) and generally remained at this level through the 1990s.[74] For example, in 1972 only one state was in compliance with the National Commission's recommendation that the maximum weekly benefit for temporary total disability be at least 100% of the state's average weekly wage. By 1979, 28 states had adopted this measure.[75]

[74] Thomason, Schmidle, and Burton (2001), pp. 295-296.

[75] Ibid., p. 23.

This measure only examines cash benefits, however, and does not take into account state changes in benefit eligibility or changes to medical benefits or coverage, such as the use of managed care or limitations on the choice of medical providers. In addition, some of the expansions in workers' compensation benefits adopted in the wake of the National Commission's report were later rolled back as part of state workers' compensation reform efforts in the 1990s, which in some states reduced benefit levels, tightened eligibility for benefits, and implemented managed care and disability management systems.

New Calls for Federal Oversight

In the wake of the 2015 ProPublica report on state workers' compensation systems,[76] a group of Democratic and Independent Senators and Representatives with ranking positions on the Senate Budget; Finance; and Health, Education, Labor, and Pensions Committees and the House Budget; Education and the Workforce; and Ways and Means Committees sent a letter to the Secretary of Labor calling on DOL to increase its oversight of state workers' compensation programs under the agencies existing legal authority and asked DOL for a report on its oversight plans and what additional authorities the agency needs to conduct greater oversight of state workers' compensation systems.[77]

Cited in the letter was the decision of DOL to no longer publish a compilation of state workers' compensation laws. DOL had published a compilation of state laws beginning in 1972 and ending with the compilation of laws in effect on January 1, 2006. The publication of the compilation was terminated for budgetary reasons, leaving no official government-published compilation of state workers' compensation laws.[78] In addition, DOL had previously published a summary of changes to state workers' compensation laws in the first issue of the *Monthly Labor Review* each year, but this summary has not been published since 2005.[79]

Noncompulsory Worker's Compensation Systems

Compulsory workers' compensation that covers all employers and workers was one of the key goals of the National Commission. Today, while workers' compensation systems continue to exclude certain groups of workers, such as casual and household workers in certain states, coverage is generally compulsory for employers in all states except Texas.

Noncompulsory workers' compensation should not be confused with self-insurance for workers' compensation. Self-insurance is part of all but two states' workers' compensation systems (North Dakota and Wyoming) and although employers approved to self-insure do not have to purchase

[76] Lena Groeger and Michael Grabell, *Workers' Compensation Benefits: How Much is a Limb Worth?*, ProPublica, March 5, 2015, http://projects.propublica.org/graphics/workers-compensation-benefits-by-limb.

[77] Letter from Sen. Patty Murray, ranking Member, Senate HELP Committee, Rep. Robert C. "Bobby" Scott, ranking Member, House Education and Workforce Committee, and Sen. Bernard Sanders, ranking Member, Senate Budget Committee, et al. to Hon. Thomas E. Perez, Secretary of Labor, October 20, 2015, http://www.help.senate.gov/imo/media/doc/Letter%20to%20DOL%20re%20workers%20comp%2010-20-15.pdf.

[78] Ramona P. Tanabe, *Workers' Compensation Laws as of January 2012*, Workers' Compensation Research Institute, WC-12-18, Cambridge, MA, March 2012, p. 5, https://www.wcrinet.org/reports/workers-compensation-laws-as-of-january-2012.

[79] See for example Glenn Whittington, "Changes in Workers' Compensation Laws in 2004," *Monthly Labor Review*, January 1, 2005, pp. 28-32.

workers' compensation insurance, they are required to comply with all other provisions of the workers' compensation law and must pay benefits to covered workers.

Noncompulsory Workers' Compensation in Texas

In Texas, employers may opt-out of the workers' compensation system and employers who chose not to participate in workers' compensation are termed "nonsubscribers." The Texas Department of Insurance estimates that 22% of Texas employers are nonsubscribers and that 18% of employees in Texas work for nonsubscribers.[80] Nonsubscribers have the option of establishing their own benefit systems in place of workers' compensation. Currently 23% of nonsubscribers in Texas have such plans and these alternate benefit plans cover 72% of employees who work for nonsubscribers.[81]

In Texas, nonsubscribers forfeit their protection from lawsuits related to occupational injuries, illnesses, and deaths, even if they offer an alternative benefit plan in place of workers' compensation.

Noncompulsory Workers' Compensation in Oklahoma

On May 6, 2013, Oklahoma enacted Senate Bill 1062 (SB1062), the Oklahoma Employee Injury Benefit Act, establishing a new workers' compensation statute that permitted employers to opt-out of the state workers' compensation system by providing an approved alternative benefit plan.[82] Unlike the Texas noncompulsory system, in Oklahoma, an employer who opted-out of workers' compensation by providing an approved alternative benefit plan retained its protection from lawsuits for employment-related injuries, illnesses, and deaths.

Proponents of the Oklahoma system argued that rather than being bound by the state workers' compensation system, employers would have greater flexibility to create alternative benefits plans that are tailored to their particular circumstances or needs.[83] In addition, workers would also have a role in creating or changing these plans through negotiation with employers. In this manner, the Oklahoma system resembled the ex ante contracts that were signed between employers and workers before the development of workers' compensation. However, these contracts were generally rejected by workers and unions in favor of legislation as workers felt they would be in a better position to negotiate with legislators than with their employers. Advocates also argued that competition and flexibility would lead to cost savings for employers and the government in Oklahoma.

On September 13, 2016, the Oklahoma Supreme Court ruled in *Vasquez v. Dillard's* that the Oklahoma Employee Injury Benefit Act violated the state's constitution because the act's core provision "creates impermissible, unequal, disparate treatment of a select group of injured

[80] Texas Department of Insurance, *Employer Participation in the Texas Workers' Compensation System: 2016 Estimates*, December 2016, pp. 5-6, https://www.tdi.texas.gov/reports/wcreg/documents/nonsub2016.pdf.

[81] Ibid., p. 22.

[82] 85A O.S. §§201-213. SB1062 also included the Administrative Workers' Compensation Act that replaced the Oklahoma Workers' Compensation Court system with the Oklahoma Workers' Compensation Commission and the Workers' Compensation Arbitration Act that permits dispute resolution of workers' compensation cases through binding arbitration.

[83] See, for example, Association for Responsible Alternatives to Workers' Compensation, *The Option Resource Guide*, December 2015, http://arawc.org/wp-content/uploads/2016/02/ARAWC-Option-Resource-Guide-2016-1.pdf.

workers."[84] This decision upheld a previous ruling of the Oklahoma Workers' Compensation Commission that the act was unconstitutional.[85]

In 2015, lawmakers introduced legislation creating noncompulsory workers' compensation systems in South Carolina and Tennessee.[86] These bills have not been enacted and no legislation similar to SB1062 has yet been enacted in any state.

Appeals in Alternative Benefit Plans

Prior to the Oklahoma Supreme Court's ruling in *Vasquez,* an employee covered by an alternative benefit plan in Oklahoma and dissatisfied with the decision in his or her case, may have filed an initial appeal to the plan's review committee. If the employee remained dissatisfied with the decision in his or her claim, he or she may have filed an appeal either with the Oklahoma Workers' Compensation Commission, in the manner similar to appeals under traditional workers' compensation in Oklahoma, or the U.S. District Court.

ERISA Coverage

The Employee Retirement Income Security Act (ERISA) is a federal law that regulates voluntary pension and health insurance plans provided by employers.[87] Section 4(b)(3) of ERISA exempts from ERISA any plan "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws."[88] It has been argued that alternative benefit plans established pursuant to the Oklahoma Employee Injury Benefit Act are not part of the Oklahoma workers' compensation system and thus are not exempted from ERISA jurisdiction.[89]

Section 502(e)(1) of ERISA provides that state and federal courts have concurrent jurisdiction over civil actions brought by plan participants to recover benefits or enforce their rights under the plan. Under applicable federal law, the employer, as the defendant in a civil suit brought under ERISA, may remove the case from the state courts to the federal courts.[90] Thus, it has been argued that if ERISA applies to alternative benefit plans such as those in Oklahoma, then employers may demand that appeals of benefit denials be held in federal court rather than before the Oklahoma Workers' Compensation Commission. Removing appeals from an administrative body that traditionally handles workers' compensation appeals to the federal courts, which have little history of handling such appeals, may bring uncertainty into workers' compensation appeals.

In its 2015 letter to the Secretary of Labor, a group of Democratic Senators and Representatives expressed concern over the removal of alternative benefit plan appeals to federal court under ERISA due to the limited scope of ERISA appeals, claiming that Federal court review of these ERISA plans is constrained inasmuch as courts cannot evaluate the adequacy of a plan's benefits,

[84] Vasquez v. Dillard's 2016 OK 89.

[85] Vasquez v. Dillard's, File No. CM-2014-11060L (February 26, 2016).

[86] HB 4197; HB 0997 and SB 721.

[87] 29 U.S.C. §§1001 et seq.

[88] 29 U.S.C. §1003(b)(3).

[89] See, for example, information from PartnerSource, a company that advocated for the Oklahoma law and assists employers in establishing alternative benefit plans at https://www.partnersource.com/.

[90] 28 U.S.C. §§1441 and 1446.

and review is limited to a determination of whether the employer's conduct was arbitrary and capricious in interpreting their plan.[91]

In its ruling in *Vasquez,* the Oklahoma Workers' Compensation Commission ruled that the alternative benefit plan established by the employer was governed by ERISA but ERISA coverage did not leave employers "completely free to circumvent" state law.

Conclusion

For more than a century workers and employers in the United States have been protected and served by the workers' compensation system. The grand bargain of guaranteed no-fault benefits that replaced the tort system has, with only limited federal intervention and no federal mandate, largely stood the test of time and today covers nearly all workers in every state. Workers' compensation policy has not been without its challenges, however. The competing interests of employers looking to control costs and workers looking to maximize benefits and coverage have long been at odds. Recently, some in Congress have expressed concern that the lack of federal oversight of workers' compensation has led to changes in state policies that have negatively affected workers.

Compulsory coverage is one of the key tenets of the workers' compensation system and traditionally each state, with the exception of Texas, has required employers to participate in the workers' compensation system by purchasing insurance or self-insuring. In 2013, however, Oklahoma began to permit employers to opt out of workers' compensation by providing approved alternative benefit plans to their employers. Advocates have argued allowing employers to opt-out of workers' compensation will bring needed flexibility to the workers' compensation system, allow workers to have a say in their own benefits, and reduce employer and taxpayer costs. Concerns have been raised, however, that the plans offered by employers opting out of workers' compensation do not sufficiently protect workers and may compromise their ability to appeal benefit denials. Although the Oklahoma legislation was ruled unconstitutional by the state's Supreme Court and efforts to adopt the Oklahoma changes have so far been unsuccessful in other states, compulsory coverage will likely remain a key issue as workers' compensation moves through its second century.

[91] Letter from Sen. Patty Murray, ranking Member, Senate HELP Committee, Rep. Robert C. "Bobby" Scott, ranking Member, House Education and Workforce Committee, and Sen. Bernard Sanders, ranking Member, Senate Budget Committee, et al. to Hon. Thomas E. Perez, Secretary of Labor, October 20, 2015, http://www.help.senate.gov/imo/media/doc/Letter%20to%20DOL%20re%20workers%20comp%2010-20-15.pdf.

Appendix. State Workers' Compensation Laws and Insurance Arrangements

Table A-1. State Enactments of Workers' Compensation Laws

Year of Enactment	States
1910	New York[a]
1911	California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Washington, Wisconsin
1912	Maryland,[b] Michigan, Rhode Island
1913	Arizona, Connecticut, Iowa, Minnesota, Nebraska, Oregon, Texas, West Virginia
1914	Louisiana, Kentucky
1915	Alaska,[c] Colorado, Hawaii,[d] Indiana, Maine, Montana,[e] Oklahoma, Pennsylvania, Vermont, Wyoming
1917	Delaware, Idaho, New Mexico, South Dakota, Utah
1918	Virginia
1919	Alabama, North Dakota, Tennessee
1920	Georgia
1926	Missouri[f]
1928	District of Columbia[g]
1929	North Carolina
1935	Florida, South Carolina
1939	Arkansas
1948	Mississippi

Source: Price V. Fishback and Shawn Everett Kantor, "The Adoption of Workers' Compensation in the United States, 1900-1930," *Journal of Law and Economics*, vol. 41, no. 2 (October 1998), p. 320.

a. New York enacted both a compulsory and elective law in 1910. After the compulsory law was declared unconstitutional by the state court, a new compulsory law was enacted in 1913.

b. Maryland enacted a limited workers' compensation law in 1902 that was struck down by a local court in 1904.

c. Territorial law that became a state law when Alaska was granted statehood in 1959.

d. Territorial law that became a state law when Hawaii was granted statehood in 1959.

e. Montana enacted a limited workers' compensation law in 1909 that was struck down by the Montana Supreme Court in 1911.

f. Missouri's legislature passed a workers' compensation law in 1919, but it failed to gain enough votes in a statewide referendum to be enacted. Missouri's workers' compensation law was enacted through a statewide referendum in 1926.

g. The federal Longshore and Harbor Workers' Compensation Act (LHWCA) was extended to cover employees in the District of Columbia in 1928. The District of Columbia enacted its own workers' compensation law in 1982.

Table A-2. State Workers' Compensation Insurance Arrangements, 2015

Exclusive State Fund	Competitive State Fund	Private Insurance
Ohio	California	Alabama
North Dakota	Colorado	Alaska
Washington	Hawaii	Arizona
Wyoming	Idaho	Arkansas
	Kentucky	Connecticut
	Louisiana	Delaware
	Maryland	District of Columbia
	Missouri	Florida
	Montana	Georgia
	New Mexico	Illinois
	New York	Indiana
	Oklahoma	Iowa
	Oregon	Kansas
	Pennsylvania	Maine
	Rhode Island	Massachusetts
	South Carolina	Michigan
	Texas	Minnesota
	Utah	Mississippi
		Nebraska
		Nevada
		New Hampshire
		New Jersey
		North Carolina
		South Dakota
		Tennessee
		Vermont
		Virginia
		West Virginia
		Wisconsin

Source: Christopher F. McLaren and Marjorie L. Baldwin, *Workers' Compensation: Benefits, Coverage, and Costs, (2015 Data)*, National Academy of Social Insurance, October 2017, pp. 22-23, https://www.nasi.org/sites/default/files/research/NASI_Workers%20Comp%20Report%202017.pdf.

Note: All states, except North Dakota and Wyoming, permit employers to self-insure for workers' compensation.

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