

Stateline Midwest

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Reworking workers' comp

On 100th anniversary of system, states focusing on changes that cut business costs, remove uncertainties

by *Laura A. Tomaka (ltomaka@csg.org)*

For 100 years, employees injured on the job have been provided guarantees through state workers' compensation systems that cover the cost of medical and rehabilitation services, as well as lost wages.

In return for carrying this mandatory insurance, employers are protected from potentially costly lawsuits.

But have the systems themselves become too costly for business and inefficient?

For states and their elected officials, it is an important question to answer during a period when the competition for business is high and a premium has been placed on rooting out fraud and waste in government-run programs.

The result has been a flurry of activity on the century anniversary of state workers' compensation systems.

This year, according to the American Insurance Association, six U.S. states have already made significant changes to their systems, including Illinois and Kansas in the Midwest. Proposed reforms were also advancing in Michigan in November and are expected to be a priority of Ohio legislators in 2012.

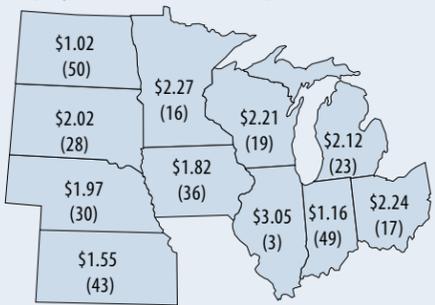
In each state, proponents of the legislative changes have used at least one common theme: the need to create a more business-friendly climate.

"It's not a good situation when your state has the highest workers' compensation costs in the country, or even if you're in the top 10," says Doug Whitley, president of the Illinois Chamber of Commerce.

Illinois adopts reforms on final day of spring session

Illinois has found itself in just that position: A national study conducted by the state of Oregon showed that Illinois' workers' compensation premiums were 149 percent higher than the U.S. median

Workers' compensation premiums in Midwest in 2010: Rate per \$100 of payroll (U.S. rank in parentheses)



* The median rate in the U.S. was \$2.04.
Source: Oregon Department of Consumer & Business Services

in 2010, and the third most expensive in the nation.

In previous sessions, bills to change Illinois' system — and better control costs — had been introduced but failed to advance.

This year, with the Illinois economy sputtering and recent partisan changes in the legislature (Republicans picked up seats in the 2010 elections), the political climate in the state was right for carrying out systemic reform. On the final day of

the spring session, the General Assembly passed HB 1698; it was signed into law in June.

"This is the most significant reform of the workers' comp system that's occurred in the state of Illinois in years, possibly in its history," says Democratic Rep. John Bradley, sponsor of the bill and chair of the House Labor Committee and the Workers' Compensation Subcommittee.

"[It] is already providing significant savings for Illinois businesses."

HB 1698 cuts medical rates, sets new standards for determining a disability, and sets in place new safeguards against fraud and abuse.

The major cost-saving measure is a provision that reduces medical fees paid for the treatment of work-related injuries by 30 percent. Supporters of the bill have estimated that this change will reduce annual expenses by up to \$700 million.

According to Bradley, other key provisions include:

- Requiring physicians to use the American Medical Association's "Guides

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Overview of workers' compensation systems in the Midwest (2009)

State	# of workers covered in system	\$ amount of wages covered in system	Benefits paid (cash to injured workers + payments to medical providers)	Benefits paid per \$100 of covered wages
Illinois	5,452,000	\$262 billion	\$3.0 billion (47.9% medical)	\$1.14
Indiana	2,655,000	\$100 billion	\$612 million (71.1% medical)	61 cents
Iowa	1,415,000	\$52 billion	\$557 million (54.0% medical)	\$1.07
Kansas	1,283,000	\$49 billion	\$419 million (59.2% medical)	86 cents
Michigan	3,608,000	\$157 billion	\$1.5 billion (35.4% medical)	96 cents
Minnesota	2,521,000	\$114 billion	\$1.1 billion (52.1% medical)	95 cents
Nebraska	876,000	\$32 billion	\$304 million (60.5% medical)	96 cents
North Dakota	337,000	\$12 billion	\$111 million (60.5% medical)	92 cents
Ohio	4,866,000	\$197 billion	\$2.4 billion (42.4% medical)	\$1.19
South Dakota	374,000	\$12 billion	\$93.6 million (65.4% medical)	76 cents
Wisconsin	2,539,000	\$99 billion	\$1.1 billion (68.8% medical)	\$1.13

Source: National Academy of Social Insurance, "Workers' Compensation: Benefits, Coverage and Costs" (August 2011)

▶ CONTINUED FROM PAGE 1

Illinois, Kansas among states that have adopted workers' comp reform in 2011

to Evaluation of Permanent Impairment" when evaluating the level of impairment in workers' compensation claims.

- Creating a network of medical providers to deal with claims in order to prevent "doctor shopping."
- Reducing the benefit period for carpal tunnel injuries from 40 weeks to 28 weeks.
- Shifting the burden of proof from the employer to workers in proving whether alcohol or drugs were a contributing factor in an accident.
- Restructuring the state's Workers' Compensation Commission and how the system's arbitrators are selected.

According to Whitley, though, there was one critical piece missing from the legislation: changing the threshold for determining whether an injury was work-related. Whitley says Illinois' low threshold for causation makes it nearly impossible to deny a workers' compensation claim.

"Did they make progress? Yes. Did they make adjustments that needed to be made? Yes. But did they bring about significant reform to the point that Illinois' standing vis-à-vis all the other states in the country is going to change? I think not," Whitley concludes.



Rep. John Bradley

But Bradley says only time will tell how effective the reforms are in lowering costs. He notes that initial indicators predict, at minimum, a 9 percent rate reduction for employers.

"I think we reached a balance in that a legitimately injured worker can still receive fair compensation in Illinois, but businesses, on average and on the whole, will be provided with significant savings," he says.

In Kansas, bipartisan agreement aims to bring more 'predictability'

Establishing that balance was also the driving force behind recent reforms enacted by the Kansas Legislature.

The passage of HB 2134 marked the first reform of the system since 1993. Over that 18-year period, several state Supreme Court decisions in Kansas had led to much uncertainty in the workers' compensation system and to discontent among employers and employees alike.

"Business and labor threw up their hands and decided we needed some changes that would be fairer to both sides," says Republican Sen. Julia Lynn, vice chair of the Senate Commerce Committee.

The result was a compromise measure that had the backing of both sides and that received bipartisan support in the Legislature.

"We worked out something that really went beyond party affiliation," says Lynn. "When you consider the totality of what our bill does, it evens the playing field between employee and employer."

For workers, benefits for those injured, permanently disabled or killed on the job were increased.

For businesses, there were provisions addressing the issue of causation: Employers will be given

Proposed, enacted changes in 2011 to workers' compensation systems

ILLINOIS ~ HB 1698 ~ SIGNED INTO LAW

- Reduces by 30 percent medical provider fees for the treatment of workers' compensation-related injuries
- Requires the use of the American Medical Association's "Guides to Evaluation of Permanent Impairment" and establishes the AMA guidelines as the basis for evaluating injuries
- Gives businesses additional rights with regard to health care utilization; gives them the ability to question what may appear to be unnecessary or overuse of medical procedures
- Limits the wage differential; it is no longer calculated on life expectancy, but on work expectancy
- Reduces the benefit period for carpal tunnel injuries from 40 weeks to 28 weeks
- Establishes health care networks for workers' compensation with the goals of helping employers direct worker care and limiting the choice of doctors to those approved by the Illinois Department of Insurance
- Switches the burden of proof from employers to workers in proving whether alcohol or drugs contributed to work-related accidents or injuries
- Dismantles the state board that evaluated workers' compensation claims
- Changes the term of service for workers' compensation arbitrators (to three-year terms rather than six-year terms)

KANSAS ~ HB 2134 ~ SIGNED INTO LAW

- Addresses payment of unwarranted claims by raising the threshold required for an incident to be compensable.
- Overturns court decisions that eroded the intent of the state's workers compensation system, including a provision of the bill requiring wage loss to be tied to an injury
- Clarifies in statute that employers are entitled to a credit for pre-existing conditions and ensures that the employer pays only for what happened on the job
- Increases the benefit caps for injured workers who have lost the capacity to work — cap on permanent partial disability awards increased to \$130,000 from \$100,000; cap on death benefits increased to \$300,000 from \$250,000; cap on permanent total disability benefits increased to \$155,000 from \$125,000
- Requires employers to provide the names of two alternative doctors, rather than three, to injured employees

MICHIGAN ~ HB 5002 ~ PASSED BY HOUSE (AWAITING ACTION IN SENATE AS OF EARLY NOVEMBER)

- Clarifies a personal injury as one sustained while working or as a result of the job
- Specifies that injuries without a connection to work are not eligible for workers' compensation
- Makes a distinction between total and partial disability, so an employee's compensation award could be reduced if the injured worker were able to handle a lighter, lower-paying job
- Requires injured workers to conduct a "good-faith" job search in order to receive disability benefits
- Clarifies definitions of disability, wage-earning capacity and wage loss
- Acknowledges advancements in medical technology by allowing medical implants or replacements to be taken into account in workers' compensation cases
- Extends the time period before an employee could select a treating physician from 10 to 45 days
- Clarifies the compensability of mental disabilities when not caused by physical trauma
- Changes the appointment process and qualifications for workers' compensation magistrates

a credit for a worker's pre-existing conditions and will pay only for injuries that occur on the job.

The new law also changes how a work-related disability is calculated. For example, it defines the level of functional impairment necessary in order to make a claim for work disability.

Under the bill, too, employees must make a good-faith effort to return to a job after a work-related injury — a provision added in direct response to a court decision that had essentially removed this requirement.

Lynn says business and labor backed the bill not only because it was fair, but because it removed frustrating ambiguities in the current system — from the process used, to the definitions of injuries and compensation, to the expectations of employers and injured workers.

"There's not a whole lot of room for interpretation" with the new law, she says.

"When we're trying to create jobs and improve business growth and the business environment in Kansas, we can point to this law," Lynn adds. "We have a fine-tuned law that makes it predictable for business, and

it's that predictability that is so important in this economy."

Michigan could become third Midwest state to adopt workers' comp reform

Michigan Republican Rep. Brad Jacobsen tells a similar story about how the workers' compensation system has evolved in his state. It has become a source of confusion for all parties involved with it, he says.

His legislation, HB 5002, is an attempt to modernize the system by codifying a number of Supreme Court decisions made over the past two decades. (As of early November, the legislation had been passed by the House and sent to the Senate for consideration.)

"We've had numerous lawsuits trying to reinterpret the case law and the court rulings," Jacobson says. "Hopefully, if those are implemented into statute, there won't be as many lawsuits, and the process will be faster and more cost-effective."

The system has not been changed in nearly 25 years, Jacobsen says, and that has resulted in a mismatch between the statute and the state of medical technology. For example, the law does not account for advances that allow workers to return



Sen. Julia Lynn

to work after joint replacement and reconstructive surgery.

“The case law is pretty much there; we’re just putting it into statute that once an injured worker is able to return to work, they are required to seek a position,” Jacobsen says.

Supporters of the bill point to several other provisions as well:

- increasing the duration of the time the employer controls treatment of medical care immediately after the injury, from 10 days to 45 days, to ensure a prompt return to work when possible;

- strengthening requirements that workers seek new employment (they must make a good-faith effort to find a job);

- addressing business concerns about causation by giving consideration of pre-existing conditions in determining benefit payments; and

- clarifying that benefits for a mental disability can only be paid if it comes from actual events of employment, not “unfounded perceptions.”

Opponents, though, have criticized the bill as much more than a modernization, but as a measure that will reduce benefits to workers — thus putting the burden of caring for injured

or disabled workers more on taxpayers.

In October testimony before a House committee, John Braden, an expert on the state’s workers’ compensation law, gave the example of a worker suffering from disabling back pain and a bulged disc — a common workers’ compensation case. Could that individual prove that work caused the injury?

Without pre-injury tests on the worker’s back (which are unlikely to have been done), proving the causal relationship becomes difficult, Braden said. He says under the proposed changes under HB 5002, the worker would be denied wage-loss benefits (despite not being able to work) as well as the medical payments to repair the bulged disc.

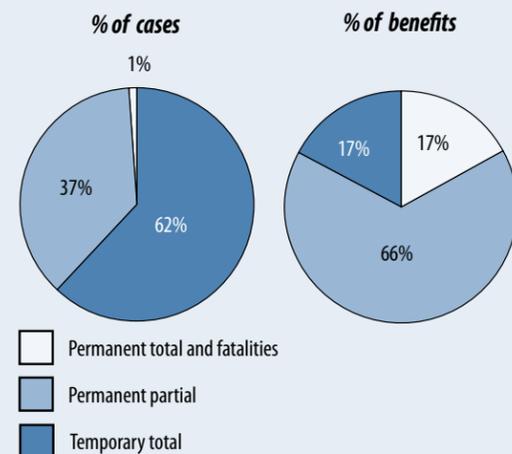
According to Braden, the bill also has new ways of defining or calculating “wage-earning capacity,” “disability” and “wage loss” that will make it more difficult for workers to prove they are entitled to economic and medical benefits.

Under the bill, an employee would have to prove that a work-related injury prevents him or her from performing all jobs within his or her qualifications or training, not just jobs he or she has actually performed. If the injury does not prevent such employment, the worker would have to demonstrate a good-faith effort to secure one of these jobs.

“I think some of the opposition to the changes think that we are ready to throw people out to the wolves, Jacobsen says, “and that’s certainly not the case.”

What he does want to do is encourage individu-

Types of disabilities in workers’ compensation cases with cash benefits, 2006 (% of total cases and % of cash benefits)



Source: National Academy of Social Insurance

als to return to work when possible. For example, the bill spells out that if a worker returns to a lesser-paying job, he or she would earn the new wage plus 80 percent of the wage differential.

“If we can get people back to work quicker, require them to take a position and pay them the difference, that should lower the cost for the workers’ comp carriers and thus then save businesses some money,” Jacobsen says.

And driving down these costs, he adds, will make the state a more attractive place for business. ★



Rep. Brad Jacobsen

Ohio is one of two Midwestern states with ‘monopolistic’ workers’ compensation system, but that could soon change

Fifty years ago, about 40 percent of states ran monopolistic workers’ compensation systems. Today, only four states insure employers through a compulsory state fund that serves as the exclusive provider for coverage. Two of those states — North Dakota and Ohio — are in the Midwest. (Washington and Wyoming are the other two.)

In these four states, employers cannot use a private insurer to meet their obligations to purchase workers’ compensation coverage.

In Ohio, though, Republican Gov. John Kasich and some leading lawmakers have expressed interest in moving toward a privatized or free-market model.

Advocates of this approach say it has the potential to increase consumer choice and lower costs for Ohio employers.

According to a state-by-state study of workers’ compensation rates conducted by the Oregon Department of Consumer and Business Services, Ohio ranks as the 17th costliest state for workers’ compensation premiums. In 2010, employers paid an average of \$2.24 per \$100 in payroll — second highest in the Midwest.

“When we look at our cost on a per claim basis — whether it’s the medical or indemnity side — we’re going up at a rate that’s much faster than the other states,” says Steve Buehrer, administrator and CEO of the Ohio Bureau of Workers’ Compensation.

“At the same time, we’ve seen our return-to-work numbers falling off, going from the mid- to high 70s five years ago to below 69 percent now. That’s not good. That means that people are staying in our system for longer periods and not getting back to providing for themselves and their families.”

Buehrer also points to a study by the National Council on Compensation Insurance, which shows how long it takes state workers’ compensation systems to pay on claims.

Nationally, eight years after an injury, most of the claim had been paid out — all but 17 percent.

“Ohio is the worst in the country, with 45 percent of our money yet to be paid on a worker’s comp claim eight years after injury,” Buehrer says. “That means that people are going in our system, staying longer and becoming longer cost issues for our system.”

Sen. Kevin Bacon, chair of the Insurance, Commerce and Labor Committee, is among those who believes a revamped workers’ compensation system is long overdue in Ohio.

He says the monopolistic system in place now is “archaic.”

“We should be privatized, but it’s more difficult to do than what you would think,” says Bacon, adding that he is committed to pursuing major reforms.

For years, Buehrer says, there has been talk of moving to a competitive system; whether it happens in 2012 remains to be seen. But he is confident that the state will take some immediate steps to improve the system: for example, better management of claims, a more aggressive approach to settling claims, and initiating drug utilization reviews.

“Those are the kinds of things we can do within the current parameters,” he explains.

“There’s also a sense in Ohio that we need to look at the benefits and the structure of the bureau and some of the procedures and policies that are in the statute. We are in the process of gathering information and ideas for what will likely become a bill.”

According to Buehrer, any reform bill is likely to include provisions on medical management. Currently, injured workers in Ohio have the option of choosing any medical provider.

“What we’re finding is that there are some providers who get some very good outcomes for injured workers, who have good return-to-work records,” Buehrer says.

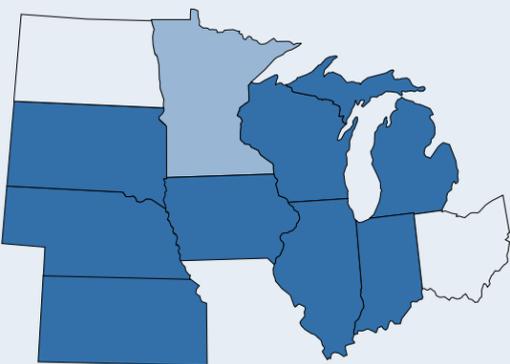
“Having this free choice — which sounds good on paper — is in my view a fairly significant factor in people not getting as good of outcomes in the system.”

Most states, in fact, already direct care in some way.

“The system we have now was put in place in the mid-1990s when there wasn’t much managed care,” explains Buehrer. “Fast-forward to today, and whose health care doesn’t have some sort of [oversight] panel or preferred providers? Almost no one.”

“If it means sacrificing a little bit of choice for better outcomes, let’s do it,” he adds.

Types of worker’s compensation systems in place in Midwest *



- Private — Employers choose between private insurance companies; no state fund available
- Competitive state fund — Employers choose between private insurance and state fund
- Monopoly state — State fund only; no private companies can sell workers’ compensation insurance

* In all Midwestern states except North Dakota, employers have the choice to self-insure.

Source: American Association of State Compensation Insurance Funds