

**DOES THE WORKERS'
COMPENSATION SYSTEM
FULFILL ITS OBLIGATIONS
TO INJURED WORKERS?**

EXECUTIVE SUMMARY

State-based workers' compensation programs provide critical support to workers who are injured or made sick by their jobs. These programs are a key component of the country's social benefit structure and of occupational safety policy, and the only major component of the social safety net with no federal oversight or minimum national standards. This Report provides an introduction to these programs, but it also sounds an alarm: working people are at great risk of falling into poverty as a result of workplace injuries and the failure of state workers' compensation systems to provide them with adequate benefits.

Despite the sizable cost of workers' compensation, only a small portion of the overall costs of occupational injury and illness is borne by employers. Costs are instead shifted away from employers, often to workers, their families and communities. Other social benefit systems – including Social Security retirement benefits, Social Security Disability Insurance (SSDI), Medicare, and, most recently, health care provided under the Affordable Care Act – have expanded our social safety net, while the workers' compensation safety net has been shrinking. There is growing evidence that costs of workplace-related disability are being transferred to other benefit programs, placing additional strains on these programs at a time when they are already under considerable stress.

“If you work hard in America, you have the right to a safe workplace. And if you get hurt on the job, or become disabled or unemployed, you should still be able to keep food on the table.”

–President Barack Obama

As the costs of work injury and illness are shifted, high hazard employers have fewer incentives to eliminate workplace hazards and actually prevent injuries and illnesses from occurring. Under these conditions, injured workers, their families and other benefit programs effectively subsidize high hazard employers.

In 1970, Congress created the National Commission on State Workmen's Compensation Laws to undertake “a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation.”

The National Commission agreed on five basic objectives for workers' compensation programs: broad coverage of employees and work-related injuries and diseases; substantial protection against interruption of income; provision of sufficient medical care and rehabilitation services; encouragement of safety; and an effective system for delivery of the benefits and services. Using these objectives as a starting point, the National Commission members unanimously concluded that "the protection furnished by workmen's compensation to American workers presently is, in general, inadequate and inequitable," and endorsed 84 recommendations, including 19 recommendations that they regarded as "essential." The National Commission suggested that states should be given until July 1, 1975, to comply with its essential elements and urged that, if compliance was not achieved, Congress should then act to secure compliance.

Progress in particular areas after the National Commission's Report was notable. Perhaps acting under fear of federal intervention, states' compliance with the 19 essential recommendations increased and the adequacy of some benefits unquestionably improved. By the mid-1980s, however, it became clear that federal intervention was improbable, and the motivation to conform to the National Commission's recommendations dwindled. As the National Commission's legacy faded and medical and lost wage costs began to rise, there was a shift toward controlling costs by cutting benefits. Restrictions on access to benefits generally and medical care specifically increased; inflation-adjusted statutory benefit levels began to decline.

Recent years have seen significant changes to the workers' compensation laws, procedures, and policies in numerous states, which have limited benefits, reduced the likelihood of successful application for workers' compensation, and/or discouraged injured workers from applying for benefits. These include changes that have resulted in the denial of claims that were previously compensated, a decrease in the adequacy of cash benefits to those awarded compensation, imposition of restrictions regarding the medical care provided to injured workers, and the institution of new procedural and evidentiary rules that create barriers for injured workers who file claims. In addition, the elimination by several state legislatures of Second Injury Funds – that is, state-administered funds that provide compensation for injuries not otherwise covered – creates additional holes in the fabric of insurance and coverage.

Some state legislatures continue to attempt to reduce workers' compensation costs, and proposals for statutory amendments that restrict workers' benefits or access have become increasingly bold. Notably, there have been legislative efforts to restrict benefits and increase employer control over benefits and claim processing, most dramatically exemplified by the opt-out legislation enacted, and recently struck down by the state supreme court, in Oklahoma and considered in Tennessee and South Carolina, among other states.

We are moving further from many of the National Commission's 19 essential recommendations – and these recommendations do not address some of the new issues that have arisen. For example, new ways of reducing access to benefits have emerged, primarily focused on higher burdens of

“A nation built on the dignity of work must provide for workers’ safety, as well as take care of them if they get hurt on the job. When workers are hurt, a robust workers’ compensation program can make the difference between poverty and recovery. It is time that we look at whether this basic bargain is fraying and how we fortify this critical lifeline for millions of working families.”

–Secretary of Labor Thomas E. Perez

proof for injured workers. Using the historical consensus of replacement of two-thirds of gross pre-injury earnings recommended by the National Commission, indemnity benefits are inadequate in many – perhaps most – jurisdictions. Workers who file for compensation are blocked from receiving benefits because of the combination of higher evidentiary bars, exclusion of conditions that do not meet standards like “major contributing cause,” and requirements for drug testing. Some states have enacted arbitrary limits on the number of weeks that benefits can be paid; some have enacted caps on medical payments as well.

All of these issues result in the transfer of the economic cost of occupationally-caused or aggravated injuries and illnesses to families, communities and other benefit programs, further burdening the federal Medicare and Social Security Disability Insurance programs. As benefits erode, workers with significant permanent disabilities that make it difficult for them to function in the labor market turn to SSDI. While studies vary in their conclusions regarding the specific effects of recent changes in workers’ compensation, all agree that a substantial number of SSDI claims involve at least one work-related chronic condition, often simultaneously with other conditions; some show an increasing reliance on SSDI as workers’ compensation programs tighten eligibility standards.

The current situation warrants a significant change in approach in order to address the inadequacies of the systems. We need to identify best practices in order to provide better benefits to injured workers, increase the likelihood that workers with occupational injuries or illnesses can access the wage replacement benefits they need until they can go back to work, and reduce costs to employers.

In addition, the most effective means to reduce workers’ compensation costs is to prevent work injuries and illnesses from occurring. Workers’ compensation is not simply another disability program; participation in the program is the direct result of the work environment. It is important to strengthen the link between workers’ compensation and efforts to prevent work-related injuries and illnesses.

Policy areas that deserve exploration include:

- Whether to increase the federal role in oversight of workers' compensation programs, including the appointment of a new National Commission and the establishment of standards that would trigger increased federal oversight if workers' compensation programs fail to meet those standards.
- How to strengthen the linkage of workers' compensation with injury and illness prevention, including by facilitating data sharing among state compensation systems, insurance carriers, state and federal Occupational Safety and Health Administration (OSHA), and state health departments.
- Whether to develop programs that adhere to evidence-based standards that would assist employers, injured workers, and insurers in addressing the long-term management of workers' disabilities to improve injured workers' likelihood of continuing their productive working lives.
- Whether to update the coordination of SSDI and Medicare benefits with workers' compensation, in order to ensure, to the extent possible, that costs associated with work-caused injuries and illnesses are not transferred to social insurance programs.

In addition, there are many ways in which additional research would provide valuable data and insight into ways to improve the functioning of workers' compensation systems and the experience of injured workers. An expanded research agenda focusing on the impact of aspects of the workers' compensation system on workers and the families, and on evidence-based approaches to improving the functions of the compensation systems, would be beneficial.

“...[T]he 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 ... 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.”

–Occupational Safety and Health Act

Introduction

State-based workers' compensation programs provide critical support to workers who are injured or made sick by their jobs. These programs are a key component of the U.S. social benefit structure and of occupational safety policy, and the only major component of the social safety net with no federal oversight or minimum national standards.¹ This Report provides an introduction to these programs, but it also sounds an alarm: working people are at great risk of falling into poverty as a result of workplace injuries and the failure of state workers' compensation systems to provide them with adequate benefits.

In 1970, Congress passed the Occupational Safety and Health Act (OSHAct), and in doing so established the National Commission on State Workmen's Compensation Laws, calling for workers' compensation that is "adequate, prompt and equitable." We are far from meeting this goal today. Recent history suggests that there is a growing need for a new consensus regarding adequacy, equity and efficiency of workers' compensation, as well as for a new research agenda that will focus on information that will help to ensure that the goals of the program will be met in the future.

While they have been declining over the past two decades, injuries and fatalities at work are still too frequent.² Reported injuries are understated: we know that many work injuries and illnesses are never reported, and that the actual number is much higher than the official estimates.³ We also know that the risks of injury and illness are not evenly distributed, and are greatly elevated in certain industries. Current OSHA special emphasis programs attempt to address some of these imbalances by focusing on hazards or industries that pose a particular risk to workers. Some workers remain especially vulnerable – and therefore more dependent on the workers' compensation system to ensure that they do not fall into poverty as a result of an injury or illness. In the poultry industry, for example, workers face low wages, hard work and injury rates that are almost double, and disease rates that are six times, the average rate of workers in private industry.⁴

Employers' workers' compensation costs in 2014 were \$91.8 billion.⁵ This amount dwarfs direct federal investment in safety at work: the combined budget for OSHA and the Mine Safety and Health Administration, the two federal agencies whose primary focus is worker safety and health, was \$900 million for FY 2016.⁶ Although it is true that employers undoubtedly spend more on safety than is included in workers' compensation costs, and expenditures in other federal and state agencies would add to the total governmental expenditures on prevention, it is nevertheless quite clear: a much larger part of publicly mandated investment in workplace safety is going toward the cost *after* an injury occurs, rather than toward prevention.

Despite the sizable cost of workers' compensation, only a small portion of the overall costs of occupational injury and illness is borne by employers: the full cost of occupational injuries was estimated to be \$206 billion in 2013 by the National Safety Council.⁷ According to one researcher, employers now provide only about 20 percent of the overall financial cost of occupationally caused injuries and illnesses.⁸ Costs are instead shifted away from employers, often to workers, their families and communities. Other social benefit systems – including Social Security retirement benefits, Social Security Disability Insurance, Medicare, and, most recently,

the Affordable Care Act – have expanded our social safety net, while the workers’ compensation safety net has been shrinking. There is now growing evidence that costs of workplace-related disability are being transferred to other programs, placing additional strains on programs at a time when they are already under considerable stress.⁹

As the costs of work injury and illness shifts onto workers, their families and other benefit programs, high hazard employers have fewer incentives to eliminate workplace hazards and actually prevent injuries and illnesses from occurring. Under these conditions, injured workers, their families and taxpayers subsidize unsafe employers.

This Report briefly summarizes the history and current status of the programs, enumerates areas of concern, and concludes with areas to consider for possible future policy development and research that focus on ensuring that the goals of workers’ compensation will be met in the future. We issue this Report in hopes that more attention will be paid to the need to provide adequate benefits for injured workers and to create a system that is efficient and equitable for workers and employers alike.

Brief History of Workers’ Compensation in the U.S.

The history of workers’ compensation in the U.S. spans over 100 years: from the late 19th and early in the 20th century, when occupational injuries and fatalities grew in frequency to crisis proportions; to the period of growing attention to workplace safety, the 1970 passage of the OSHAct and the creation of the National Commission on State Workmen’s Compensation Laws that set out consensus recommendations for an adequate system of compensation; to a period starting in 1990 of formidable attacks on benefits that raise new questions about the adequacy of the program.

Early 20th century to the 1970s

At the end of the 19th century, rapid industrialization led to widespread injuries, fatalities and disease among workers. There was truly carnage in too many of the nation’s workplaces: an estimated 35,000 deaths and two million injuries occurred each year, and one quarter of the injuries produced disabilities lasting longer than one week. The railway injury rate doubled between 1889 and 1906. In 1907 alone, 4,534 railroad workers and 2,534 miners were killed.¹⁰ In comparison, in 2014, there were 4,679 fatal work injuries across all occupations and industries in a population approximately four times as big as at the turn of the 20th century.

Employers had been largely protected from workers’ lawsuits for damages in the 19th century,¹¹ but the beginning of the 20th century brought many changes. Employers’ common law defenses to workers’ claims were being eroded through judicial intervention as well as by employer liability acts that were enacted by state legislatures to change or eliminate these defenses. These changes led to frequent litigation – in some places dominating courts’ dockets¹² – and potentially large damage awards for workers, thereby increasing both the costs and the level of uncertainty for employers. The Progressive Era of politics was demanding a new look at longstanding

political and legal assumptions. Disasters – such as the Grover Shoe Factory explosion in 1905, the Monongah coal mine disaster (1907) and the Triangle Shirtwaist Fire (1911) – made it impossible to ignore the hazards of work. Fiction – such as Upton Sinclair’s The Jungle (1906) – and reports – including Crystal Eastman’s Work Accidents and the Law (1910) – also caught the public imagination. Awareness was growing of the emerging social insurance systems in Germany, the United Kingdom and elsewhere. Labor organizations were calling attention to the destitution of families of injured workers.¹³

One state after another established a commission to investigate solutions, and many, noting the apparent inevitability of these injuries as part of the progress of industrialization, advocated for some form of compensation that would provide more certainty to employers and workers alike. Frances Perkins, long before she was Secretary of Labor, fought for a compensation system in New York. President Theodore Roosevelt reiterated the call for reform:

In spite of all precautions exercised by employers there are unavoidable accidents and even deaths involved in nearly every line of business connected with the mechanic arts. This inevitable sacrifice of life may be reduced to a minimum, but it can not [sic] be completely eliminated. It is a great social injustice to compel the employee, or rather the family of the killed or disabled victim, to bear the entire burden of such an inevitable sacrifice. In other words, society shirks its duty by laying the whole cost on the victim, whereas the injury comes from what may be called the legitimate risks of the trade. Compensation for accidents or deaths due in any line of industry to the actual conditions under which that industry is carried on, should be paid by that portion of the community for the benefit of which the industry is carried on – that is, by those who profit by the industry. If the entire trade risk is placed upon the employer he will promptly and properly add it to the legitimate cost of production and assess it proportionately upon the consumers of his commodity. It is therefore clear to my mind that the law should place this entire “risk of a trade” upon the employer. Neither the Federal law, nor, as far as I am informed, the State laws dealing with the question of employers’ liability are sufficiently thoroughgoing.¹⁴

Despite this presidential call, state workers’ compensation laws did not get off to a smooth start. At the time, interpretation of the U.S. Constitution did not allow for a federal approach to an increasingly well-recognized problem.¹⁵ State legislatures stepped into the breach, and the laws became the focus of successful constitutional challenges in New York, Montana and Kentucky.¹⁶ The day after the court ruling in New York that struck down the state’s workers’ compensation law, 146 garment workers lost their lives in the Triangle Shirtwaist Fire in lower Manhattan. New York responded to the court ruling with a constitutional amendment; Wisconsin passed a comprehensive law in 1911 that was not successfully challenged; and in 1917, the U.S. Supreme Court in *New York Central Railroad Company v. White* upheld the constitutionality of the revamped New York law.¹⁷ This law, like those of many states, limited compensation to specified hazardous industries and to injuries caused by “accidents” at work. Between 1911 and 1948, every state developed some form of workers’ compensation program, with significant variation among state laws with regard to coverage, benefits and administration.

From the outset, workers' compensation represented a political compromise, worked out in each state legislature in the face of aggressive lobbying by employers, insurance carriers, unions and others.¹⁸ Under the compromises that were worked out – sometimes referred to as “The Grand Bargain” – covered workers were to receive presumptively fair, no-fault and universal (though limited in amount) benefits; in exchange, employers were broadly shielded from tort liability for workplace injuries and deaths. Workers gave up their right to sue; employers gave up the right to refuse to compensate their employees injured on the job. This basic compromise ultimately had broad political support from industry, labor and progressive political groups.

Despite the changing views of the powers of the federal government that have allowed for federal regulation and social programs since the New Deal, workers' compensation has remained, primarily, a state-initiated and state-run program. The federal role has been limited, and specific federal programs were developed only for particular groups of workers or exposures.¹⁹ Theodore Roosevelt called for a program to cover federal employees, and the Federal Employees Compensation Act (FECA) was passed in 1916. Other federal laws followed, written to address gaps or failures in state workers' compensation coverage: the Longshore and Harbor Workers Compensation Act (passed in 1927 to cover workers in U.S. maritime and harbor employment); the Defense Base Act (passed in 1941 to provide compensation for employees at military bases); the Black Lung Benefits Act (passed in 1969 in response to the failure of state programs to adequately compensate miners with coal workers pneumoconiosis); and the Energy Employees Occupational Illness Compensation Program Act (passed in 2000 in response to the failure of state workers' compensation systems to provide adequate coverage for private sector civilian workers in defense nuclear weapons facilities who developed work-related illnesses). But the state-based programs remained primary; private employers in general industry and their employees, as well as public sector workers in the states, were left under the jurisdiction of the state programs.

These state programs shared – and generally continue to share – some basic characteristics. All provided, and continue to provide, broad tort immunity to employers. At the beginning, many states focused on hazardous industries and required injuries to occur “by accident” and arise out of and in the course of employment. Many programs were elective rather than mandatory. Almost all provided first-dollar coverage – meaning that they did not include a deductible – for medical expenses to workers with compensable conditions, although medical coverage was limited in a variety of ways. Cash benefits were available to cover temporary loss of wages (“temporary total” or “temporary partial” disability benefits), generally paid after a waiting period of several days, and some compensation was provided for partial and permanent on-going disability as well as for death. Most states provided some form of rehabilitative services; these too varied in scope. None of these programs was intended to provide full damages that might have been available in tort, and, in fact, the cash benefits were quite limited. None required a proof of legal negligence in order for the worker to qualify for benefits. All excluded workers who were not, technically, employees: independent contractors and solo proprietors were, therefore, by definition outside the scope the laws – an issue that has become more salient as the number of people classified as independent contractors has grown.

Beyond basic shared characteristics, state systems varied and continue to vary in important ways.²⁰ Over time, states amended their laws – sometimes annually. Texas is the only state in which employers may still choose whether to opt-in to workers’ compensation coverage.

Other differences and exclusions remained. Employers are still not required to provide full coverage in many states to agricultural and domestic workers.²¹ Processes for reviewing claims and resolving disputes vary from administrative processes to judicial proceedings. Methods of financing – from exclusive state funding mechanisms to broad private insurance – also differ; today, Ohio, North Dakota, Washington, and Wyoming are the remaining four states that bar private insurers. Small employers were not included initially; as of 2014, 15 states continue to have small firm exemptions.^{20,22}

Levels of benefits for each category still differ considerably from one state to another. Temporary benefits, generally referred to as Temporary Total Disability benefits (TTD) and paid while the worker is healing and unable to work, are set at different levels in terms of weekly benefit levels and maximum duration of time to collect these benefits. Since many states set the maximum benefit at 100 percent of the state average weekly wage, many workers in higher paid but dangerous industries – such as mining and construction – receive a far lower percentage of their pre-injury earnings as weekly benefits under these laws.

The methodology for calculation of weekly or lump sum payments for permanent partial disability (PPD), the largest component of costs in workers’ compensation, varies tremendously from one state to another.^{20,23} This variation in payment means that workers who earn the same wages and suffer equivalent injuries receive widely different amounts of compensation from one state to another.²⁴ One conclusion is obvious: workers who earn less and who work in states where replacement of wages is less generous are at greatest risk of falling into poverty. If workers are poor before an injury, an injury may push them into destitution.²⁵

These variations create a conundrum: it is difficult to generalize about the problems – or the strengths – of the programs, as they vary from one state to another. Nevertheless, it has become clear that recent changes in legislation and administration are increasingly restricting many workers’ access to critical benefits.^{24,26} While injury and fatality rates have declined dramatically through the 20th century,²⁷ the basic issue for workers who are injured or made ill by their work remains the same: the need for an equitable, adequate and efficient system of compensation.

The Occupational Safety and Health Act, the National Commission on State Workmen’s Compensation Laws, and the aftermath

The first major federal review of the adequacy of the state workers’ compensation systems was linked to an expanded focus on occupational safety and health and brought new attention to the questions of adequacy and equity in these programs. The Federal Coal Mine Health and Safety Act of 1969 included not only significantly increased federal regulatory oversight over dangerous conditions in the nation’s mines, but also the first federal occupational disease compensation law: the federal Black Lung Compensation Act was initially passed as a component of the 1969 law following successful agitation by coal miners and the United

Mineworkers of America that exposed the inadequacy of disease compensation in state workers' compensation programs. A year later, when the OSHA Act was enacted to provide on-the-job protections for workers in general industry, concerns about post-injury compensation were referred for study to a newly created National Commission on State Workmen's Compensation Laws.

The Congressional findings that provided the justification for the National Commission echo concerns that have been voiced more recently:

(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

(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.

The 18 member National Commission²⁸ was charged to report back to Congress no later than July 31, 1972, after undertaking "a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation"²⁹ The rest of the OSH Act, which focuses on prevention of work injuries and illnesses through the elimination of hazards in workplaces, explicitly did not affect the rights and responsibilities of employers and employees under workers' compensation laws, stating:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."³⁰

The National Commission – which had one year to complete its task – first agreed on five basic objectives for workers' compensation programs: broad coverage of employees and work-related injuries and diseases; substantial protection against interruption of income; provision of sufficient medical care and rehabilitation services; encouragement of safety; and an effective system for delivery of the benefits and services. Using these objectives as a starting point, the National Commission members unanimously concluded that "the protection furnished by workmen's compensation to American workers presently is, in general, inadequate and inequitable," and endorsed 84 recommendations, including 19 recommendations that they regarded as "essential."³¹

These 19 essential recommendations focused on six areas:

- 1) compulsory rather than elective coverage, with no exemptions for small firms, government employment, household and casual workers, or, starting in 1975, for any farmworkers;
- 2) broadening of employee choice for filing interstate claims so that employees could file claims where the injury occurred, where the employment was localized, or where the employee was hired;
- 3) full coverage for work-related diseases;
- 4) adequate weekly benefits for temporary total, permanent total and death benefits including both statutory rates and a desired earnings replacement rate. This area included recommendations that the maximum weekly benefit rise to a maximum of at least 100 percent of the state's average weekly wage initially, and then to 200 percent, and that, subject to this maximum, benefits be at least $66 \frac{2}{3}$ of the worker's gross weekly wage. Notably, many of the 84 National Commission recommendations not included in the 19 essential recommendations went further with regard to income maintenance, including that beneficiaries in death cases have their benefits escalate with increases in the state average weekly wage and that maximum weekly benefits should ultimately reach 200 percent of the state's average weekly wage.
- 5) no arbitrary limits on the duration of benefits for permanent total disability or death, including that total disability benefits be paid for the duration of the worker's disability or for life; and
- 6) full medical and rehabilitation benefits without limits on amount or duration.³²

The National Commission was unable to reach a consensus regarding the design of a system for permanent partial disability benefits, calling for state and federal examinations of approaches to these benefits. In general, the National Commission's focus was on the inadequate statutory benefit levels available to workers who were eligible for compensation and on the large numbers of employers and workers who were excluded from the state laws, rather than on roadblocks to compensation for workers who were covered. The National Commission's diagnosis of the problem of inadequacy was that economic competition among the states was creating a political environment in which legislators were reluctant to improve workers' compensation laws.²⁸

The National Commission suggested that states should be given until July 1, 1975, to comply with its essential elements and urged that, if compliance was not achieved, Congress should then act to secure compliance – but the National Commission explicitly rejected federalization of the state programs. The National Commission then disbanded, 90 days after issuing the Report, as required under the sunset provision in the enabling statute. An Interagency Task Force in the 1970s attempted to address many of the outstanding issues. Other federal reports in the late 1970s and 1980 continued to focus on inadequacies in the workers' compensation systems, including the persistent failure to compensate occupational diseases.³³

Progress in particular areas after the National Commission's Report was notable. Perhaps acting under fear of federal intervention, states' compliance with the essential recommendations increased, moving from an average of 6.8 in 1972 to 12.1 in 1980. Adequacy of some benefits unquestionably improved. For example, in 1972 only four states had maximums for temporary total disability benefits that were at least 75 percent of the state average weekly wage; by 2004, 34 states and the District of Columbia had raised these maximum to 100 percent of the state average weekly wage.³⁴ Weekly statutory benefit rates increased substantially between 1970 and 1985 and continued to increase, though more modestly, between 1985 and 1990.³⁵ Some states lagged, however. A review of state compliance with the National Commission's essential recommendations is set out in Appendix B.

Congress did not adopt the National Commission's unanimous recommendation to require full compliance with the essential recommendations if significant improvements in state laws were not made by 1975. Despite the recommendations of the National Commission and the failure of the states to meet the National Commission's standard for compliance, regulation of state workers' compensation programs remained firmly within the states, without any federal requirements or minimum standards.

Developments in the last 25 years

The Department of Labor's monitoring of the adequacy, equity and efficiency of state workers' compensation programs waned considerably after 1980. The Department of Labor's Office of Workers' Compensation Programs published a periodic evaluation of states' compliance with the essential recommendations until 2004, but lacked authority to compel greater compliance, despite a plateauing in states' compliance. Some state progress toward National Commission goals was made in the late 1970s and into the 1980s, but by the mid-1980s, the political tide turned. It became clear that federal intervention was improbable, and the motivation to conform to the National Commission's recommendations dwindled.

There had always been battles about striking the right balance, but now the balance shifted: a focus on improving benefits, in the wake of the National Commission's harsh criticism of the status of these state programs, gave way in many states to legislative concerns about employers' costs. As the National Commission's legacy faded and medical and lost wage costs increased, there was a shift toward controlling costs by cutting benefits. Restrictions on access to benefits generally and medical care specifically increased; inflation-adjusted statutory benefit levels began to decline. Compliance with the 19 essential recommendations of the National Commission slowed: average compliance rose only from 12.1 in 1980 to 12.8 in 2004, the last time that the Department of Labor analyzed the state laws. A ProPublica analysis of state compliance in 2015 shows that only 7 states now follow at least 15 of the recommendations, and 4 states comply with less than half of them.³⁶ Although most states had raised and maintained the level of weekly temporary total benefits to conform to the basic National Commission recommendations, other statutory changes represented both overt and more subtle attacks on the availability of benefits for people who were injured at work.

Why did this happen?

Employers' costs and insurance rates rose in the period from 1984 to 1990, creating growing political pressure on the programs. Medical costs were escalating – in many cases faster than the rate of increase in health care costs generally – and constituted a growing share of the paid benefits. Wage replacement benefits to workers also increased, as states had raised the weekly benefits to better comply with the recommendations of the National Commission. Both benefits and employers' costs per \$100 of payroll rose substantially from 1984 to 1990.³⁷

The political focus on reducing costs for employers grew, and, by the early 1990s, benefits came under attack. Various new legislative changes were championed as “reforms.” It was a race to the bottom: as each state compared its statute with those of neighboring states, found areas of greater generosity, and moved to change those provisions of its law.³⁸ The political conversation shifted, and the ability of workers and their allies to hold back this tide waned as union membership and strength declined.

The resulting legislation has, in many states, diminished this already weak safety net for workers. Changes have focused on worker behavior and “fraud,” rules governing eligibility that result in exclusion of claims from the programs, restrictions on provision of medical care and substantial limitations on benefits for injured workers. Although not every state has followed each trend, the trend lines are clear: the number of states that cut access to benefits significantly outnumbers those that have increased or maintained benefit availability in the period 2002 to 2014.³⁹

Not surprisingly, benefits per \$100 of payroll have declined since a high of \$1.65 in the early 1990s to \$0.98 in 2013.⁴⁰ Of course, one might expect that reductions in employment in dangerous industries (like mining) and increasing attention to safety might be responsible for this trend. But research suggests that a significant component of the decline in total benefits can be attributed to statutory changes that reduced the availability of benefits.²⁶ Average employers' costs have not always followed this same downward pattern, further fueling the political attacks on benefits, although there is large variation in this pattern among states and from one industry to another.⁴¹

What do some of the key changes look like?

▪ Exclusionary standards result in increased denial of claims

A 2015 report found that, since 2003, legislators in 33 states have passed workers' compensation laws that reduce benefits or make it more difficult for those with certain injuries and diseases to qualify for them.²⁴ None of the benefit adequacy studies address the economic effects of workplace injuries and diseases on injured workers who never receive compensation. Recent statutory changes presumably result in expanded exclusion of claims that might previously have been accepted, thus increasing the likelihood that more injured workers are not receiving any benefits at all.

Many workers who might be eligible for workers' compensation benefits never file claims. Research funded by the Bureau of Labor Statistics examined reporting of amputations, injuries that should be the least subject to underreporting. These studies found significant underreporting in workers' compensation systems in the three states that were studied,^{3,42} confirming prior research that had found a widespread phenomenon of underreporting of injuries.^{3,43} Explanations for this phenomenon vary.⁴⁴ As discussed below, concerns about retaliation and stigmatization – enhanced by investigations regarding alleged fraud – undoubtedly discourage workers from filing claims.⁴⁵ Undocumented or otherwise particularly vulnerable workers are particularly unlikely to file claims.⁴⁶ Programs and policies of employers may themselves discourage reporting.⁴⁷ Workers are more vulnerable to retaliation without unions – and few workers in the private sector are now unionized.

Legislative changes over the past quarter century contribute to these problems. As benefits are reduced or friction in the system is increased, it is reasonable to assume that workers will respond to these changes by filing fewer claims, given the associated stigma and the administrative barriers.⁴⁸ Specific changes to the workers' compensation laws that may discourage filing include: shorter time limits for filing claims; intensified efforts to weed out worker-based "fraud," including the expansion of the use of invasive video-taping of workers; and requirements for post-injury drug testing or selective enforcement of safety policies. Litigation that is increasingly confusing and complex has the same effect.

In addition, the actual incidence of occupational disease is far greater than the number of disease claims that are filed and compensated in workers' compensation systems.⁴⁹ Reasons for this are deeply rooted and persistent, including that proof of causation can be complex, that diseases may not develop until long after the time of exposure, and that both workers and their physicians may not be aware that the illness was occupationally caused. Recent legislative changes may make compensation even less likely, as many diseases result from complex causation making it difficult to prove by a preponderance of evidence (or clear and convincing evidence) that the workplace was the major contributing cause of the disease, even when work exposures increase risk significantly.

Specific changes made through recent legislation have led to the exclusion of many claims that might previously have been approved. For example, in the historic view of workers' compensation, workers were to be compensated if the workplace event aggravated a pre-existing condition. Many states have now enacted higher standards for causation, requiring that the work be the "major contributing cause" (or similar language) of the worker's disability. As a result, workers who enter a workplace with preexisting disabilities – whether caused by work or not – may be denied compensation, despite the fact that they were able to perform their jobs before they were injured. Often included in these limitations on benefits, or addressed separately, are exclusions of injuries for which aging is a contributing factor – eliminating compensation for injuries of the growing number of older workers for whom workplace injuries may aggravate conditions of aging and accelerate their exit from the workforce. Some states have developed specific exclusions or requirements for frequent modern-day ailments such as repetitive strain injuries or mental stress. There have also been legislative proposals to deny benefits to undocumented workers – although these have largely failed because of concerns about potential tort liability in the absence of the workers' compensation shield.⁵⁰

The result of these exclusions is that workers may have no recourse in either workers' compensation or in civil legal actions, even if their injuries were caused or aggravated by duties performed while working for an employer. Moreover, for those workers who choose to file and engage in the appeals process, the system becomes considerably more litigious and delays are extended. Experts are needed to prove the degree of causation. In at least one state, this removal of remedies was initially held to violate the state constitution, although this decision was recently reversed;⁵¹ equivalent challenges are pending elsewhere.

■ **Adequacy of cash benefits is decreasing**

For workers whose claims are accepted or approved, the amount of benefits they receive has been limited through various legislative changes. The National Commission's benchmark for wage replacement adequacy (two-thirds of lost earnings, at least up to a maximum of the state average weekly wage) was later endorsed by a study panel of the National Academy of Social Insurance.⁵² Research suggests that this goal has never been met.⁵³ Even for those workers whose claims involve limited lost time – and according to the Workers' Compensation Research Institute, 95 percent of workers have 6 weeks or less of time off work⁵⁴ – there is evidence of lifetime earnings losses.⁵⁵

Recent changes in states' rules governing benefits have exacerbated the problem.⁵⁶ For example, arbitrary limits on the number of weeks that temporary total disability benefits are available in a claim – irrespective of the medical status of the injured workers – have been instituted or shortened;⁵⁷ This provision was successfully challenged when the Florida Supreme Court recently held a 104 week limit on these benefits to be unconstitutional under the Florida state constitution.⁵⁸ Employers in some states are apparently forbidden to provide longer benefits, under threat of audit and fine, even if they are willing.⁵⁹

Some states, like California, that have not adopted the major contributing cause standard discussed above instead require physicians to “apportion” the amount of impairment between work and non-work-related causes.⁶⁰ Under the system in California, workers suffering from permanent impairment are evaluated by physicians who are asked to determine the level of total impairment, using the AMA Guides, and then to divide the impairment between that which is due to the specific workplace event or exposure and that which is not. Pre-existing impairments are thus excluded from the rating for compensation purposes. This process sets the amount of compensation at a level below the level of actual impairment – and it leads inevitably to increases in the complexity of evaluation and the potential for more litigation. It also leads to another example of benefits not tracking the reality facing injured workers. Prior to an injury, in these situations, workers were able to work despite having pre-existing impairments. However, after the injury, they were no longer able to work. Their benefits, however, ignore this reality and compensate them as if they were still able to work. .

Permanent total disability benefits are rarely awarded. Not surprisingly, these are the most costly benefits on a per claim basis.⁶¹ In the last two decades, the requirements to qualify for these awards have become more stringent and the length of time the benefits are provided has shrunk. Some states have cut off these benefits at retirement age.⁶² Some jurisdictions have

set a maximum duration or amount on these benefits, despite the permanency of the disability.⁶³ It is these workers – who are hurt the worst or who are most disabled as a result of occupationally-caused injuries or illnesses – who are most likely to turn to other social benefit programs, particularly Social Security Disability Insurance (SSDI).

■ **Growth of programs and policies that may discourage reporting of injuries**

The 1990s saw one state after another pass legislation focusing on worker fraud. Video surveillance of injured workers who are off work and collecting benefits became commonplace. Nonetheless, there was no empirical evidence that worker fraud lay at the heart of increasing costs.⁶⁴ However, the very prominent public focus on worker fraud stigmatizes injured recipients, suggesting they are faking their injury and taking advantage of the compensation system. To avoid this stigma, some workers, especially those with adequate disability and group health insurance coverage, may skip applying for workers' compensation benefits.

Recent legislative changes in other areas may also reduce the willingness of workers to alert employers to injuries or to file claims for compensation.⁶⁵ For example, post-injury drug testing is currently required or encouraged by some workers' compensation insurance carriers and it is now mandated in some states. Although workers' compensation benefits have historically been awarded on a no-fault basis, evidence of a positive drug test can now be grounds for denial of workers' compensation claims. In Florida, the Drug Free Workplace requirement in the workers' compensation statute creates incentives for employers to adopt drug testing programs by offering discounts on insurance premiums; includes within the definition of "reasonable suspicion" to justify performing a drug test that an employee has "been involved in an accident while at work"; and allows employers to deny medical and indemnity benefits if an injured worker tests positive.⁶⁶ While post-injury drug testing may be a useful deterrent against illicit drug use (that may lead to occupational injuries), post-injury drug testing could also discourage workers from reporting their injuries and applying for workers' compensation benefits.⁶⁷

■ **Restrictions have been instituted regarding medical care for injured workers**

Medical care has historically been a central component of the workers' compensation bargain – long pre-dating the existence of employer-based general health care insurance. In fact, 75 percent of workers' compensation cases involve only medical benefits. These claims are generally for relatively minor injuries, do not include temporary or permanent disability benefits, and represent only about seven percent of total benefit payments. Overall, however, medical costs are considerable and have been increasing, both as a component of all benefits paid and in absolute terms, at alarming rates since 1980. Medical care now represents half of total workers' compensation costs paid.⁶⁸ This means, of course, that workers' compensation dollars are going increasingly to health care providers and administrators, and not to injured workers themselves.

In response to medical cost escalation, states have moved to control costs in a variety of ways. These efforts have included fee schedules, restrictions on first dollar coverage of medical expenses, employer rather than worker choice of physician, relatively low reimbursement schedules for providers, various administrative review processes for treatment choices including extensive utilization review, caps on the duration of medical coverage and limitations on numbers of visits for particular kinds of therapies.⁶⁹ The intention is to reduce costs and, in some cases, increase the quality of medical care that is provided. It is not clear that many of these efforts have succeeded in achieving either goal.

At the same time, the role of primary care physicians has been diminished, both in the delivery of care and in the evaluation of claims, as increasing levels of expertise in claims assessment is required under the emerging requirements described above. In contrast to these provisions, New York has adopted a promising practice to seek more efficient delivery of care. There, a component of insurance premiums has been used to fund occupational health clinics where health care providers who are expert in the diagnosis and treatment of occupational injuries and illnesses are available to injured workers. This is the exception, however, and not the rule.

- **New procedural and evidentiary rules create barriers for injured workers who file claims**

Changes in the processing and adjudication of claims have had enormous, though perhaps more hidden, impact on injured workers' access to benefits.

The historical rule was generally to apply a liberal standard to interpretation of workers' compensation laws. Under this rule, "all things being equal," the worker would prevail in the claim. This historically dominant rule has been changed, in many states, to a requirement that workers prove cases by a preponderance of evidence or, in some states, even higher burdens of proof such as "clear and convincing" evidence for some types of claims. These higher burdens of proof create a greater incentive for employers to challenge workers' compensation claims and make it harder for injured workers to prevail.

Many of the legislative changes also lead to more complexity in proof requirements in claims, and therefore more complexity within the administrative processes. Evaluating physicians must determine what percentage of a disability is work-caused and what is due to an underlying condition (many physicians simply want no involvement in a workers' compensation claim). Fights over medical expertise have led to the introduction of higher standards to allow testimony of experts.⁷⁰ Continuing growth in the complexity of litigation has contributed to delays, frustration and criticism of the systems.

Lawyers on all sides are essential to help navigate the systems. But legislatures have enacted highly restrictive fee caps only for claimants' lawyers; there is no equivalent limitation on fees paid to lawyers who provide representation to insurance carriers and employers. Courts are now being asked to throw out these limits because of the essential need for representation, even in cases that do not yield large amounts of benefits to injured workers.

In 2016, state courts have begun to order that the fee restrictions be lifted, as lawyers have had to spend a significant amount of time representing claimants in cases involving relatively small amounts of compensation.⁷¹ All of these changes take their toll on the efficiency of the administrative system and on the availability of benefits.

The effects of these changes are also reflected in settlement of claims that involve permanent disability. Historically, many states did not permit these agreements, and they were disfavored by the National Commission. Now, all but seven states generally allow agreements that fully settle claims; several states have authorized settlements since 1990.⁷² Studies of these settlements (often called compromise and release agreements) have demonstrated that workers have felt pressured by insurers, employers, or their own attorneys to sign the agreements in which they both compromise the amount of their present benefits and give up their rights to future benefits; those who accepted these settlements often came from families of lower socio-economic status and were sometimes in dire financial straits.⁷³ According to a 1993 study in New York State, the workers who settled their claims tended to receive lower benefits than workers who continued to receive periodic payments.⁷⁴ Despite the concerns raised by these findings, administrative law judges and others believe that settlements contribute to a more efficient and fair system, particularly in light of the litigious character of workers' compensation, and that they help workers bring closure to a process that can be absorbing and disturbing.⁷⁵

These settlements not only may substantially discount the long term economic effects of workplace injury, they also include provisions that terminate medical care and often bar the injured worker from seeking to return to work with the pre-injury employer. There has been no recent careful study of the long term economic impact of these settlements on workers – nor on the likelihood that the costs of the injury in settled cases may later be paid by alternative disability benefit programs, particularly through Social Security Disability Insurance.

- **Elimination of Second Injury and other special funds adds to additional holes in the fabric of insurance and coverage**

Employers fund their workers' compensation obligations through the purchase of insurance from private insurance carriers or from state funds, or they self-insure; there is now also an option for employers to purchase high deductible insurance policies.⁷⁶ In the past, special funds were available to ensure that compensation would be available to injured workers, even if the impairment might have complex causation—and even if the employer failed to purchase workers' compensation insurance. These funds were generally financed through a surtax on insurance payments and administrative charges to self-insured employers.

For example, “Second Injury Funds” were specifically designed to provide compensation to workers whose conditions were caused by a combination of current work and previous (work or non-work) factors and who therefore were at risk of being left without access to benefits within the traditional workers' compensation program or with inadequate benefits. Initially created in order to promote the employment of people with disabilities after World War II, many states eliminated these funds in the more recent period, arguing that they were no

longer necessary with the development of laws prohibiting discrimination against people with disabilities. In several states, these funds were closed out except for injuries or claims prior to a specified date.⁷⁷

The combination of elimination of these funds and the exclusion of conditions with multiple causes means that an increasing number of workers with conditions that are related to – though perhaps not wholly or principally caused by – their current work cannot obtain benefits.

A second type of special fund is designed to cover injured workers whose employers fail to carry the requisite insurance. Like uninsured motorist funds, these funds step in to protect victims in the absence of what is supposed to be universal insurance coverage. Without these funds, workers are left effectively without recourse. There are substantial penalties for employers who do not carry insurance, including elimination of immunity in tort, substantial fines and stop-work orders. From the perspective of the injured worker, however, none of these penalties can substitute for a guarantee of no-fault wage replacement and medical care provided in a timely fashion. In states with funds, the compensation will be paid from the fund, and it is up to the state to recover from the employer. But in almost half of the states, there is no fund to provide this cushion for workers – and when employers have shut down or become insolvent, it is the injured worker who may be left out in the cold.

- **Opting Out: New efforts to restrict benefits and increase employer control over benefits and claim processing**

Proposals for statutory amendments that restrict workers' benefits or rights have become increasingly bold. In the most recent successful legislative effort to increase employer control and reduce costs, Oklahoma passed a law in 2013 that substantially limited benefits and included a provision that allows employers to "opt-out" and largely design their own compensation plans; the plans had to provide the same "forms of benefits" provided under the state's compensation system, with limits on payments that are at least equal to those provided under the state's compensation system.⁷⁸ Nevertheless, there was considerable latitude in the design of the plans: while complying with the specific directive of the law, the plans included provisions that excluded payment for specific injuries, required 24 hour or end of shift reporting of injuries, allowed no review of claims except by employer-chosen physicians, and so on.⁷⁹ This scheme might significantly reduce costs to employers⁸⁰ but it would also vastly decrease protections for workers – including eliminating any protection against retaliation for workers who file claims – while allowing employers to retain their immunity from civil negligence legal actions. The Oklahoma Supreme Court recently ruled that these opt-out provisions of the state law are unconstitutional under the Oklahoma state constitution.⁸¹

Opting out of workers' compensation is not entirely new. Starting in the 1990s, 12 states developed "carve out" options under which employers and unions are authorized to negotiate an alternative workers compensation system, arguably to speed up claims administration and dispute resolution.⁸² These options were primarily supported and utilized by the construction industry, where injuries are frequent and workers' compensation costs are generally high, and were subject to negotiation with the trade unions.

- **Changing work organizations result in added barriers to workers' compensation for workers**

Changes in the labor market also are contributing to the failure of workers' compensation to provide a safety net for all injured workers.⁸³ Misclassification of workers as independent contractors is a growing phenomenon and results in their exclusion from much of the U.S. social safety net, including workers' compensation.⁸⁴ Employers evade the payment of all payroll taxes as well as workers' compensation insurance premiums when they inappropriately classify their workers as non-employees, and the workers themselves are not covered when they are injured. Workers who are hired by staffing or temporary work agencies often are unsure about their rights – to the point that new “right to know” laws for temporary workers have been enacted, and specifically require that a worker be told who the workers' compensation carrier is, in case they are injured.⁸⁵ As new work organizations expand, the protections of the workers' compensation laws become more difficult to enforce.

Unstable employers may also not be obtaining workers' compensation coverage at all. This is an old problem, mentioned above, but one that may be exacerbated by new forms of employment.

We are not at the end of the story.

State legislatures continue to attempt to reduce workers' compensation costs, and so the race to the bottom continues. Opt out statutes have been proposed in Tennessee and South Carolina, although neither state legislature has acted on the proposals. Currently pending proposals in other states, while not including opt-out provisions, are also extensive; many focus on limiting the availability of benefits. For example, in Illinois, legislation considered in 2016 would exclude injuries resulting from hazards or risks to which the general public is also exposed or medical conditions resulting from personal or neutral risks, and would add the “major contributing cause” requirement for any workplace injury. Other similar provisions are under consideration elsewhere. While these kinds of provisions may successfully limit the scope of workers' compensation liability and result in reduction of costs to employers, they also transfer the costs of injuries to workers, families, communities and other social benefit programs.

Recently, constitutional challenges to workers' compensation limitations have been brought in multiple states, and arguably with unprecedented success. Here are a few examples. In New Mexico, the exclusion of farmworkers was held to be unconstitutional on equal protection grounds.⁸⁶ In Florida, both claimants' attorneys' fee restrictions⁸⁷ and the duration limit on temporary total disability have been invalidated.⁸⁸ In Utah, restrictive attorneys' fees schedules were overturned.⁸⁹ In addition to overturning the opt-out provisions of the 2013 amendments to the Oklahoma workers' compensation law, the Oklahoma Supreme Court has found a number of other provisions to be unconstitutional under the Oklahoma constitution, including a provision that barred a claimant from obtaining any workers' compensation remedy because she had not worked a continuous 180-day period for her employer.⁹⁰ Other cases are pending around the country.

Not surprisingly, not all courts are embracing these challenges, and the trend is not consistent. In 2001, the Oregon Supreme Court had held that if injured workers were denied workers' compensation benefits under a provision that excluded diseases with multiple causal factors, then they could not constitutionally be denied the right to bring a civil action.⁹¹ This decision was reversed on May 5, 2016.⁹²

Cause for Alarm: The Current State of Workers' Compensation and the Consequences

Controversy has surrounded state workers' compensation laws since their inception 100 years ago. The battles have always pitted questions about benefit adequacy against concerns about employers' costs. The costs raise concerns not only in absolute terms, but also because higher costs in workers' compensation are deemed by the business community to threaten the economic competitiveness of a state. Although no studies have found that workers' compensation is a significant determinant for business location decisions – and in fact there is evidence that this is not true⁹³ – this concern is alive in political debates today. But only in the last quarter century has there been a confluence of political and economic forces to allow for what appears to be a steady erosion of workers' benefits.

In 1972, the National Commission identified five major objectives of a successful workers' compensation program: (1) broad coverage of employees and of work-related injuries and diseases (2) substantial protection against interruption of income (3) provision of sufficient medical care and rehabilitation services; (4) encouragement of safety; (5) an effective system for delivery of the benefits and services.

These objectives are still valid. They are not being met in many, and an increasing number, of states. Of course, many limitations of workers' compensation are not new, and issues of causation of injury or illness have always presented challenges. But there is substantial cause for growing concern.

We know that the way the systems are designed does not meet the needs of workers. For example, when an injured worker who is off work due to an injury or illness, and the workers' compensation claim is disputed, cash benefits and health care may be delayed until the dispute is resolved; leaving the injured worker with no income and putting tremendous pressure on them to settle claims for lesser amounts. A few states have come up with solutions for these kinds of problems: for example, Massachusetts has a "pay without prejudice" provision that allows insurers to make initial disability payments without accepting full liability in the claim;⁹⁴ Maine has created mechanisms for payment of medical bills pending resolution of the workers' compensation claim, to ensure the availability of immediate medical care,⁹⁵ and New Jersey has enacted an expedited procedure to resolve compensability issues when the worker needs expedited medical care. A few states have state-run short term disability programs that are not linked to work-related disabilities;⁹⁶ in New Jersey, if a workers' compensation claim is contested, this program will provide weekly cash benefits that are reimbursed if the workers'

compensation claim is found to be compensable. But even in these states, these solutions are the exception, not the rule: stories are pouring in from across the country about the challenges that workers are facing in getting claims approved, obtaining medical care, and about the inadequacy of benefits they are receiving. Workers generally report unhappiness and frustration with state workers' compensation systems.⁹⁷

We are increasingly far from universal compliance with many of the 1972 National Commission's 19 essential recommendations – and these recommendations do not address some of the new issues that have arisen. New features of workers' compensation systems, such as higher burdens of proof for injured workers, serve to reduce access to benefits. Using the historical consensus of replacement of two-thirds of pre-injury earnings reflected in the National Commission report, indemnity benefits are inadequate in many – perhaps most – jurisdictions. Workers who file for compensation are blocked from receiving benefits because of the combination of higher evidentiary bars, and exclusion of conditions that do not meet standards like “major contributing cause.” States have enacted arbitrary limits on the number of weeks that benefits can be paid; some have enacted caps on medical payments as well.

Low benefits and transfers of costs adversely affect the social and psychological environment for working people who already face many challenges in the current economy. Distrust – on all sides, in individual claims, with regard to systemic issues and in the political process – characterizes almost every state program and undoubtedly contributes to workers' decisions not to file claims and to employers' decisions to fight claims.

Overly complicated procedures are frustrating for workers and employers, mystify the processes and increase worker-employer animosity. Changes in proof requirements and procedures have resulted in ever-increasing levels of complex and expensive litigation, often involving expert testimony.

The combination of unfiled legitimate claims, benefit caps, barriers to accessing medical care, and potentially inadequate settlements of permanent disability claims together mean that the direct costs of worker morbidity and death are transferred away from employers, decreasing any direct economic incentive to invest in safety. Employers that are committed to their workers' health and safety – and there are many of them – may nevertheless not be providing adequate benefits to their workers.^{59,98} State legislatures (and governors) lack any incentive to increase benefits, while at the same time continuing to grapple with the “specter of the disappearing employer”⁹⁹ – a specter that the National Commission viewed as unproven, and that remains unproven to this day.⁹³ States are battlegrounds for unending political and legal fights that divide workers and employers and deflect attention from the mutual benefits of promoting health and safety in the workplace.

All of these issues result in the transfer of the economic cost of occupationally-caused or aggravated injuries and illnesses to families, communities and other benefit programs. If workers' compensation programs are not covering the expenses (medical care, lost wages) of injured workers, then where are the costs going? Someone must be paying for them. In large part, workers and their families are bearing a major component of these costs.¹⁰⁰

Some of these costs are also being shifted to other benefit programs, such as the Medicare and Social Security Disability Insurance programs. As permanent disability benefits are eroded, workers with significant permanent disabilities that make it difficult for them to function in the labor market turn to SSDI. While studies vary in their conclusions regarding the specific effects of recent changes in workers' compensation, all agree that a substantial number of SSDI claims involve at least one work-related chronic condition, often simultaneously with other conditions; some show an increasing reliance on SSDI as workers' compensation programs tighten eligibility standards.¹⁰¹

The shifting of costs from state workers' compensation programs to the federal Medicare and Social Security program is much more than an accounting anomaly. These state and federal programs were designed and intended to serve very different purposes. States designed workers' compensation as a non-adversarial alternative for providing medical care related to work injuries and illnesses, and to compensate injured employees for their short- and long-term earnings losses. Under workers' compensation, medical care is (theoretically) unlimited, so long as it is directly related to the claimed injury or illness, and the cash benefits paid are (theoretically) directly related to the job held at the time of injury and the earnings losses that accrue. Costs under the workers' compensation program are paid by employers that are related to the risk of the industry and the past experience of the employer. Congress intended both Medicare and Social Security as social insurance programs that provide medical care and cash benefits, respectively, to insure all Americans have a defined level of medical and financial security. We finance these programs through mandatory contributions from wages paid by employers and employees, under a social contract where current workers pay for the benefits of those no longer able to work and thereby gain insurance protection for themselves and their families.

Shifting costs from workers' compensation to Social Security also places additional strains on these programs at a time when they are already under considerable stress. In 2015, SSDI only narrowly averted a shortfall beginning in 2016 that would have allowed its trust fund to pay only 80 percent of benefits. The Bipartisan Budget Act of 2015 that President Obama signed into law on November 2, 2015, provides for a temporary reallocation of tax rates from the Old-Age and Survivors Insurance (OASI) fund to the Disability Insurance (DI) fund that enables DI to pay full benefits until 2023. Currently the combined Social Security trust funds are fully financed until 2034, and are three-quarters financed for the rest of the 75-year projection period.¹⁰² Changes will be needed to adequately finance Social Security for the long term. Costs that are shifted from workers' compensation exacerbate these long-term financing challenges for Social Security. For a more detailed discussion of the relationship between workers' compensation and Social Security, see Appendix C.

Finally, these changes have an impact on the prevention of workplace injuries and illnesses. The workers' compensation premium costs for many employers are experience-rated. More injuries result in higher premiums, which may provide a financial incentive to prevent injuries from occurring. The failure of the workers' compensation system to provide adequate benefits to injured workers, shifting the costs of injuries and illnesses from employers and carriers to workers and their families, and to Social Security and Medicare, creates subsidies that reduce employer financial incentives to invest in safety and prevent future injuries and illnesses.

Where Do We Go from Here?

There have undoubtedly been some sincere efforts to address the real concerns of workers and employers through disability management and return-to-work programs. Nevertheless, there is indeed cause for alarm. Concerns have been raised on multiple fronts. A number of state courts are seriously considering constitutional challenges to systems that have left workers with inadequate recourse for workplace-caused injuries.⁸⁶⁻⁹² A gathering of diverse workers' compensation experts in a self-styled Summit concluded that benefit adequacy, system failures, and delays in medical treatment were the three foremost issues requiring action.¹⁰³ Another gathering of academic researchers titled a recent 2016 symposium, "The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century."¹⁰⁴ In a letter to Secretary of Labor Thomas E. Perez, 11 members of Congress raised the alarm: "the erosion of workers' protections has snowballed as states reduced workers' compensation...the race to the bottom now appears to be nearly bottomless..."¹⁰⁵

The question is: How are we going to address this downward spiral?

Policy Options and Areas for Consideration

The current situation warrants a significant change in approach and action at the national, state and private sector level. The focus of these activities should be on investigating causes of the inadequacies and identifying best practices to provide better benefits to injured workers, increasing the likelihood that workers with occupational injury or illness successfully enter the workers' compensation system and reduce costs to employers.

In addition, the most effective means to reduce workers' compensation costs is to prevent work injuries and illnesses from occurring. Workers' compensation is not simply another disability program; participation in the program is the direct result of the work environment. It is important to strengthen the link between workers' compensation and efforts to prevent work-related injuries and illnesses.

The following are areas that should be explored:

- Whether to increase the federal role in oversight of workers' compensation programs. Options include:
 - Appointment of a new National Commission to study the workers' compensation system, following on the work of the National Commission of State Workmen's Compensation Laws that was created by the OSHAct.
 - Reinstitution of federal tracking of changes in state workers' compensation programs.
 - Establishment of standards that would trigger increased federal oversight if workers' compensation programs fail to meet those standards.

- Development of an easily accessible on-line dashboard that allows stakeholders and the public to examine the progress of their state toward achieving adequacy, equity and efficiency
- Creation of a web-based clearinghouse to disseminate best practices, submitted by stakeholders and the public.
- How to strengthen the linkage of workers’ compensation with injury and illness prevention. Options include:
 - Facilitating data sharing among state compensation systems, insurance carriers, OSHA and state health and safety agencies, and state health departments. These data sharing activities would improve both the targeting of state and federal enforcement and compliance assistance resources, and the loss control efforts of carriers.
 - Encouraging the efforts of workers’ compensation insurance carriers to assist client employers to prevent injuries and illnesses through implementation of comprehensive safety and health management programs.
- Whether to develop programs that adhere to evidence-based standards that would assist employers, injured workers, and insurers in addressing the long-term management of workers’ disabilities to improve injured workers’ likelihood of continuing their productive working lives.
- Whether to update the coordination of SSDI and Medicare benefits with workers’ compensation, in order to ensure, to the extent possible, that costs associated with work-caused injuries and illnesses are not transferred to social insurance programs.

Research Recommendations

There is a remarkable amount that is not known about the functioning of state workers’ compensation systems and the experience of injured workers in these systems. Much of the current research on workers’ compensation focuses on limiting and reducing employer costs rather than analyzing coverage, health care quality, or benefit adequacy. It is clear that focused research is needed— both to develop a better strategy for linking claims to issues of primary health and safety prevention, and develop better assessment tools for the provision of benefits.

However, there is currently very little funding available for research into the functioning of state workers’ compensation systems and the experience of workers with occupational injury or illness in these systems. Beyond lack of funding, research into these areas is made more difficult by the inaccessibility of compensation system data, much of which is held by private entities which are hesitant or unwilling to share data that they claim to be proprietary/sensitive. Further, because many workers with work-related injuries and most workers with work-related illnesses never enter the compensation system, it is particularly challenging to conduct research into the impact of their conditions on their lives, their families, and society.

There are many ways in which additional research would provide valuable data and insight into ways to improve the functioning of workers' compensation systems and the experience of injured workers. It will be necessary to develop or identify additional funding sources to accomplish much of this badly needed research.

The Department of Labor once devoted significant resources into the oversight and analysis of state workers' compensation systems. However, as described in Appendix A, those federal efforts to compile, describe and analyze changes in state law and administrative policy ceased some years ago. As a result, there is currently little federal institutional presence to provide a central repository of data, analysis of changes in systems or minimum standards, or to encourage states to improve or increase inadequate benefits. Increased federal interest in this area could be an important spur to develop a national workers' compensation research effort.

The following are some components of an expanded research agenda that, if undertaken, could be particularly beneficial:

- Workers' compensation injury and illness benefits and the relationship of these benefits to the health and wellbeing of workers and their families, and to primary prevention.
- Access, adequacy and quality of medical care for injured workers.
- Identification of evidence-based approaches to improve the effectiveness of workers' compensation systems.
- The impact of experience rating on injury and illness prevention.
- The impact of the success or failure of workers' compensation on inequality and other social problems, including poverty, opioid abuse, homelessness and suicide.
- The labor market experience of injured workers, including both subsequent work and earnings.
- The impact of the injury and compensation claim on other aspects of injured workers' lives, including the psycho-social effects.
- The full economic impact on employers, workers, families, state economies and other benefit programs of reducing employers' workers' compensation costs through benefit reduction and eligibility restrictions.
- The characteristics of workers with work-related disabilities who are applying for SSDI, and exploration of potential interventions that would assist them to remain in the labor market.
- The relationship between medical impairments and the impacts on workers' lives, including exploration of the development of evidence-based mechanisms for conversion of impairment ratings to work disability and economic losses among different groups of workers.

Appendix A: A History of Federal Involvement in State Workers' Compensation Programs

Workers' compensation was, and remains, a state-based program. Federal involvement has always been limited. Nevertheless, in the first half of the 20th century, there was considerable interest in encouraging the development of adequate state programs. Francis Perkins, who served as Secretary of Labor for President Franklin Roosevelt and previously as Chair of the New York Industrial Commission and as President of the International Association of Industrial Accident Boards and Commissions, was particularly concerned about the prevention of work injuries and illnesses, and the provision of benefits to injured workers. Perkins had previously served as Labor Commissioner of New York State, and described astonishment when, in initiating federal focus on state workers' compensation, she learned that there were still 10 states without worker's compensation laws.¹⁰⁶ In 1939, the Department of Labor's Bureau of Labor Standards noted that its mission included setting guiding principles for programs, including compensation for occupational injuries.¹⁰⁷ A 1943 Department of Labor publication outlined existing workers' compensation legislation.¹⁰⁸ In 1950, President Harry Truman asserted that the Department of Labor had "taken leadership in promoting standards for workmen's compensation programs throughout the country"¹⁰⁹ – though it is unclear the extent to which this was true. In the Eisenhower Administration, Arthur Larson, the leading legal scholar on workers' compensation in the 20th century, served as Secretary of Labor and sponsored the drafting of a model workers' compensation law. Starting in the 1960s, the Department of Labor produced an annual publication evaluating state programs. All of this activity represented interest and oversight, but not direct involvement, in the state systems.

The most significant federal foray into the workings of state workers' compensation systems occurred when Congress ordered the creation of the National Commission through the OSHA Act of 1970. As discussed in the body of this Report, the National Commission was disbanded under a sunset provision in the enabling legislation 90 days after the Report was issued. As a result, the most knowledgeable national oversight group – with representation from employers, employees, unions, insurers, administrators, judges, lawyers and academics – was not available to oversee implementation of its Report.

In 1974, President Ford established the Interdepartmental Workers' Compensation Task Force, which issued nine volumes of research reports, culminating in a publication in 1977 entitled "Workers' Compensation: Is There A Better Way? A Report on the Need for Reform of State Workers' Compensation."¹¹⁰ The Task Force noted that compliance with the 19 essential recommendations had increased by 44 percent, and called for more emphasis on rehabilitation and reemployment.

During President Carter's Administration, Donald Elisburg, Assistant Secretary of Labor for Labor Standards, convened an advisory committee to draft federal standards with an enforcement mechanism similar to that used in the unemployment insurance program. This effort was abandoned by the Reagan Administration.

In recent years, few federal agencies other than the Department of Labor's Office of Workers' Compensation Programs (OWCP), which administers federal compensation programs, have paid

much attention to the economic hardships faced by workers who suffer work-related injuries and illnesses. Notably, both the National Commission in 1972 and the Interagency Task Force in the 1980s endorsed continuation of a state-based system of compensation – although the National Commission made this continuing endorsement contingent on compliance with its essential recommendations.

Federal activity regarding state workers' compensation programs essentially ceased after the 1980s, with the exception of publications that reported on state legislative developments. Articles published annually in the *Monthly Labor Review* from 1980 until 2004 charted major legislative enactments in the state systems. The Department of Labor conducted its last review of compliance with the National Commission's recommendations in 2004, after which federal tracking of state workers' compensation programs stopped. Thus there has been no reporting or analysis as state legislatures have passed, and governors have signed, significant legislation affecting the availability and adequacy of workers' compensation for more than a decade. A bill to create a new national commission was introduced in Congress in 2009, but it was not enacted.¹¹¹ No further action has been taken.

Of course, as noted in this Report, there are several federal compensation programs that are under OWCP's direction. The enabling statutes include the Federal Employees' Compensation Act (FECA); Longshore and Harbor Workers' Compensation Act; the Black Lung Benefits Act; and the Energy Employees Occupational Illness Compensation Program Act. These laws are essentially unrelated, however, to any developments in state workers' compensation systems, except to the extent the Black Lung and EEOICPA compensation programs target specific diseases and are a reflection of the failure of state systems to adequately compensate occupational illness.

Appendix B: State Compliance with National Commission's 19 Essential Recommendations, as reported by the U.S. Department of Labor: 1972, 1980, 2004

STATE	Number of Essential Recommendations in which State Has Complied		
	1972	1980	2004
AL	2	9	13
AK	5.5	14	14.25
AZ	7.5	11.5	13
AR	2.5	7.5	7.5
CA	7	12	12
CO	10	16	12.75
CT	10.5	13.75	14
DC	11	14	15.75
DE	8	11	12
FL	5	10.5	9.75
GA	5	9.5	8.75
HI	12	14.5	14.75
ID	9	9	12
IL	4	14	15
IN	7	11	11.5
IA	8.5	14.5	15.5
KS	1	9.5	12.5
KY	6	11.5	14.25
LA	1.5	11.25	10.25
ME	9	13.5	10.75
MD	8.5	14.25	14.25
MA	6.5	11.5	12.75
MI	11	10	9.75
MN	6.75	12.75	9.5
MS	7	7	7.25

MO	6	10.75	13.75
MT	3	15.5	12.75
NE	10.25	13.5	17
NV	3	14	14.75
NH	11.75	18.5	15.75
NJ	10.5	10.5	12.5
NM	2	12.5	14
NY	9	10	10.75
NC	3	12.5	14
ND	8.75	13.75	14.5
OH	8.5	16.5	15.5
OK	4.5	9.75	13.75
OR	10.5	13.5	15.75
PA	8	13	13.75
RI	10	13.5	14
SC	3	11	13
SD	6.5	13.25	13.25
TN	2	8.5	12
TX	4.5	9.5	12.5
UT	8	12	12
VT	5	13.75	15
VA	3.5	10.5	10.75
WA	10	9	13.75
WV	6	14.75	13.75
WI	10.5	15	15
WY	7	9	9.25
AVERAGE COMPLIANCE			
	6.79	12.10	12.85

Appendix C: Overlapping Coverage – the Social Security Administration and Workers’ Compensation

Workers’ compensation as a source of disability benefits is exceeded in size only by Social Security Disability Insurance, or SSDI. In 2013, workers’ compensation paid \$63.6 billion in total benefits to U.S. workers, with about half of that dollar amount going to medical care and half to cash benefits.¹¹² DI and Medicare combined were about three times the size of workers’ compensation in 2013, with 8.9 million disabled-worker beneficiaries receiving a total of \$123 billion in cash benefits, and Medicare health-care benefits for disabled workers under age 65 totaling \$68 billion.¹¹³

While both SSDI and workers’ compensation provide important protections to workers, the two programs were designed to protect against different risks, and they have many differences in eligibility and benefits. Workers’ compensation was designed to provide medical care related to work-related injuries and illnesses, and to compensate such employees for their short-and long-term earnings losses. Employees are covered from their first day on the job, and benefits are paid for both short-term and long-term disabilities, and for partial as well as total disabilities. Cash benefits are paid after a few days’ waiting period, and medical coverage is available immediately, though it covers only the work-related condition. In contrast, SSDI was designed as partial income replacement to workers with significant work histories who experience a severe disability that makes them unable to perform not only their own past job, but any job in the national economy. Benefits are paid only to workers with long-term severe impairments that preclude any substantial work (whether or not the impairments were caused on the job). SSDI does not provide benefits for partial disabilities or for those expected to last less than a year. SSDI benefits are provided only after a significant waiting period: five months for cash benefits and 29 months for the related Medicare coverage. Not all workers are covered, due to the work history requirements. As a consequence of these eligibility differences between the programs, SSDI and Medicare should not be considered substitutes for workers’ compensation, which was expressly created to address the medical and financial compensation needs of workers who become ill or injured on the job.

Some workers are eligible for both workers’ compensation and Social Security Disability Insurance. In those cases, one or both programs must offset (reduce) benefits so that the combined benefit amount does not exceed 80 percent of the worker’s average earnings before the disability. In most states, Social Security benefits are reduced for the offset; in the remaining 15 “reverse offset” states, the workers’ compensation benefit is reduced. The Social Security Administration (SSA) administers this offset in most states; because SSA must rely on beneficiaries to self-report their workers’ compensation benefit receipt, the offset presents administrative challenges. Similarly, Medicare rules emphasize that workers’ compensation entities are prohibited from “shifting the burden” to Medicare. This often results in workers’ compensation entities seeking Medicare’s approval of the total amount of money that would be associated with medical care that the beneficiary would require after settlement occurs. This review and approval process is recommended but voluntary.

SSA data indicate that 1.4 million individuals – or 12.4 percent of current SSDI disabled worker beneficiaries – were dual beneficiaries of workers’ compensation or other public disability benefits in 2013 or prior years. About half of those individuals were currently receiving both benefits, and about 115,000 were receiving reduced SSDI benefits because of the offset provision.¹¹⁴

However, the actual impact of workers’ compensation – or work-related injuries – on SSDI may be much more significant than just the formal offset. Survey research has found that work-related disabilities are much more common than might previously have been thought, both among older persons in general and among recipients of Social Security disability benefits in particular.¹¹⁵ Some workers who do not receive workers’ compensation, or whose workers’ compensation benefits do not fully cover their costs, may end up applying for SSDI.

While comprehensive national data are lacking, multiple studies indicate that the cumulative effects on SSDI and Medicare are significant. One study found that seven percent of new SSDI beneficiaries in New Mexico in 2010 were due to workplace injuries; extrapolating to the rest of the country, the study estimated that workplace injuries contribute nationally about \$12 billion each year to the cost of the SSDI program.¹¹⁶ That estimate doubles to \$23 billion each year when the cost of Medicare coverage for SSDI beneficiaries is included.

Other studies have examined whether changes in workers’ compensation laws directly affect SSDI or other programs. While results are sometimes mixed, most find evidence of cost-shifting to SSDI and other programs. For example, a 2015 study suggested that a fifth of new SSDI awards can be attributed to cuts in workers’ compensation.¹¹⁷

It is important to note that workers’ compensation costs are largely paid by employers, with experience-rating to encourage employers to ensure workplace safety. SSDI, on the other hand, is funded largely by payroll contributions from nearly all workers and employers; contributions from the current workers and employers – along with interest on the program’s reserves and a small amount of revenue from income taxes on benefits – fund the benefits of the current beneficiaries. From a standpoint of system efficiency, then, it may be preferable to cover the costs of workplace injuries and illnesses through the workers’ compensation system, where those costs would be squarely in the hands of employers, who are in the best position to prevent workplace injuries and occupational diseases.

Other programs beyond SSDI and Medicare may also be affected by workplace injuries or by changes in workers’ compensation laws. This is particularly true for workers and their families who are pushed into or near poverty by their work-related injuries or illnesses. In particular, Supplemental Security Income (SSI) pays means-tested federal benefits (and some state supplements) to individuals who are disabled or elderly and who have low incomes and limited assets. To the extent that people who experience work-related conditions become disabled and end up in poverty, SSI payments may be involved as a safety net. Most individuals on SSI are also eligible for Medicaid coverage.

It is clear that workplace injuries have significant crossover effects on Social Security Disability Insurance, Medicare, and other programs. While further study will be needed to expose the specific effects of changes in workers’ compensation laws, evidence suggests that the costs of workplace injuries are being shifted not only to injured workers and their families, but also to federal programs.

ENDNOTES

¹ Howard C. Workers' compensation, federalism, and the heavy hand of history. *Studies in American Political Development* 2002;16:28-47. Howard's research led to the conclusion that "workers' compensation was not left at the state level because it was functioning well or because policy makers wanted to encourage flexibility and innovation. Instead, the program became entrenched politically and riddled with problems. National officials expected that comprehensive reform to workers' compensation would entail too large a battle and endanger other policy objectives. In effect, workers' compensation laws in the states created a 'preempted policy space,' one that remained unusually resilient to national involvement."

² Fatal work injuries rose in 2014, as reported by the Bureau of Labor Statistics (BLS). News Release: Census of Fatal Occupational Injuries Summary 2014 published September 17, 2015, available at: <http://www.bls.gov/news.release/foi.nr0.htm>. Serious injuries that involve days away from work or need for transfers or job accommodation, though declining, remain high. BLS. News Release: Employer-Reported Workplace Injury and Illness Summary 2014 published October 19, 2015, available at: <http://www.bls.gov/news.release/osh.nr0.htm>

³ The prevalence of this problem was discussed in Spieler E, Burton JF Jr. The lack of correspondence between work-related disability and receipt of workers' compensation benefits. *American Journal of Industrial Medicine* 2012;55:487-505; U.S. Department of Labor, Occupational Safety and Health Administration Adding inequality to injury: The costs of failing to protect workers on the job, 2015, available at: <https://www.dol.gov/osha/report/20150304-inequality.pdf>. That Report cited the following: Rosenman KD, Kalush A, Reilly MJ, et al. How much work-related injury and illness is missed by the current national surveillance system? *Journal of Occupational and Environmental Medicine* 2006;48:357-365; Boden LI, Ozonoff A. Capture-recapture estimates of nonfatal workplace injuries and illnesses. *Annals of Epidemiology* 2008;18:500-506. To begin to understand the workplace injury undercount, BLS has commissioned a series of studies that match the work injuries recorded by employers with those that have led to a workers' compensation award or that can be identified through hospital or clinic records. These studies suggest that the BLS estimates do not include a substantial proportion of workplace injuries identified in other data sets, with a capture rate ranging between 40 and 70 percent of the injuries reported in other data sources, depending on the type of establishment and nature of the injury. For the mechanisms through which injuries and illness fail to be recorded by employers, see Azaroff LS, Levenstein C, Wegman DH. Occupational injury and illness surveillance: Conceptual filters explain underreporting. *American Journal of Public Health* 2002;92:1421-1429. For more on the efforts of BLS to examine the injury undercount, see Ruser JW. Examining evidence on whether BLS undercounts workplace injuries and illnesses. *Monthly Labor Review* 2008:20-33; Wiatrowski WJ. The BLS survey of occupational injuries and illnesses: A primer. *American Journal of Industrial Medicine* 2014;57:1085-1089; and Spieler EA, Wagner GR. Counting matters: Implications of undercounting in the BLS survey of occupational injuries and illnesses. *American Journal of Industrial Medicine* 2014;57:1077-1084. For estimates of the total number of work injuries occurring annually, see: Leigh JP. Economic burden of occupational injury and illness in the United States. *Milbank Quarterly* 2011;89:728-772, who estimates more than 8.5 million non-fatal work injuries occurred in 2007; see also Smith GS, Wellman HM, Sorock GS, et al. Injuries at work in the U.S. adult population: Contributions to the total injury burden. *American Journal of Public Health* 2005;95:1213-1219.

⁴ See U.S. Department of Labor, Occupational Safety and Health Administration. Regional Emphasis Programs for Poultry Processing Facilities, DIRECTIVE NUMBER: CPL 02-02-030 I EFFECTIVE DATE: 10-26-2015; Serious injuries that involve days away from work or need for transfers or job accommodation, though declining, remain high. BLS. News Release: Employer-Reported Workplace Injury and Illness Summary 2014 published October 19, 2015. <http://www.bls.gov/news.release/osh.nr0.htm>.

⁵ Employer costs have steadily increased each year after the Great Recession but cash and medical benefits paid out have not followed a similar pattern. In 2014, total benefits paid, including both indemnity benefits paid to workers and medical benefits paid to health care providers, were \$62.3 billion, down from \$62.5 billion in 2013. Baldwin ML, McLaren CF. *Workers' Compensation: Benefits, Coverage, and Costs*. Washington, DC: National Academy of Social Insurance, 2016. This annual report, published by the National Academy of Social Insurance, provides yearly aggregate data on costs and benefits. Of the \$62.3 billion paid in benefits in 2014, \$30.9 billion was paid in cash benefits to injured workers and \$31.4 billion was paid to health care providers who provided medical care for the injuries. The report compares benefits paid in a particular year with employers' insurance costs, and therefore a portion of the remainder is attributable to the benefit costs in future years of claims that have already been approved; the rest was paid to insurance carriers and state administrative agencies for administrative costs.

⁶ FY 2017 DOL Budget in Brief:42, 44.

⁷ National Safety Council Injury Facts 2015:9.

⁸ Leigh JP, Marcin JP. Workers' compensation benefits and shifting costs for occupational injury and illness. *Journal of Occupational and Environmental Medicine* 2012;54:445-450.

⁹ See O'Leary P, Boden LI, Seabury SA, et al. Workplace Injuries and the Take-Up of Social Security Disability Benefits, *Social Security Bulletin* 2012; (72)3; Guo X, Burton JF Jr. The Growth in Applications for Social Security Disability Insurance: A Spillover Effect from Workers' Compensation. *Social Security Bulletin* 2012; (72)3; and Guo X, Burton JF Jr. The Relationship Between Worker's Compensation and Disability Insurance 2008, LERA 60th Annual Proceedings.

¹⁰ Somers H, Somers A. *Workmen's Compensation: Prevention, Insurance, and Rehabilitation of Occupational Disability*. John Wiley and Sons New York: 1954:7-9; Friedman L, Ladinsky J. Social change and the law of industrial accidents. *Columbia Law Review* 1967;67:50-82 citing Downey E. History of Work Accident Indemnity in Iowa State Historical Society of Iowa, Iowa City: 1912 "Accidents were about 2.5 per 100 railway employees in 1889 and 5 per 100 in 1906. Calculated from ICC figures reported in 1909-1910 Wis. Bureau of Labor and Industrial Statistics fourteenth biennial rep 1911:99".

¹¹ Employers were, in particular, protected by what came to be called the "unholy trinity" of legal defenses to workers' lawsuits: assumption of risk, contributory negligence, and the fellow servant rule. With these defenses, it was a rare worker who could successfully hold an employer liable for an injury.

¹² Friedman L, Ladinsky J. Social change and the law of industrial accidents. *Columbia Law Review* 1967;67:50-82 (noting "industrial accident litigation dominated the docket of the Wisconsin Supreme Court at the beginning of the age of workmen's compensation; far more cases arose under that heading than under any other single field of law").

¹³ For histories of the early passage of the workers' compensation laws and the surrounding context see Witt JF. *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law*. Cambridge, MA: Harvard University Press, 2004; Fishback PV, Shawn EK. *A Prelude to the Welfare State: The Origins of Workers' Compensation*. Chicago: University of Chicago Press, 2000; and Friedman L, Ladinsky J. Social change and the law of industrial accidents. *Columbia Law Review* 1967;67:50-82.

¹⁴ Roosevelt T. Sixth Annual Message. December 3, 1906, available at: <http://www.presidency.ucsb.edu/ws/?pid=29547>. Although President Roosevelt's conclusion that occupational fatalities are inevitable would be more controversial if made today, the logic of his basic point that employers should bear the cost of occupational fatalities and injuries remains applicable.

¹⁵ See *Lochner v. New York*, 198 U.S. 45 (1905) (abrogated by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937))

¹⁶ *Ives v. S. Buffalo Ry. Co.*, 201 N.Y. 271, 272 (1911) (concluding that the statute mandating coverage authorized the "taking of the employer's property without his consent and without his fault."); *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180 (1911) (miners' compensation act singled out a particular hazardous industry and allowed miners to retain their common law rights and therefore violated equal protection); *Kentucky State Journal Co. v. Workmen's Comp. Bd.*, 161 Ky. 562 (1914) (compulsory statute limiting damages violated right to remedy under Kentucky Constitution).

¹⁷ The Supreme Court noted, "In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises." Some feel this leaves open the question as to whether there is a level that the court would consider "unreasonable" today. *New York Cent. R. Co. v. White*, 243 U.S. 188, 205-207 (1917).

¹⁸ Fishback PV, Shawn EK. *A Prelude to the Welfare State: The Origins of Workers' Compensation*. Chicago: University of Chicago Press, 2000 (providing specific accounts of the political process in several states).

¹⁹ For further discussion of the federal role in workers' compensation over the last century, see Appendix A.

²⁰ For a listing of laws and comparisons across key variables see Workers' Compensation Research Institute (May 2016) *Workers' Compensation Laws as of January 1, 2016*. This compilation is produced through a joint effort of the International Association of Industrial Accident Boards and Commissions (IAIABC) and the Workers' Compensation Research Institute (WCRI).

²¹ Tanabe R. *Workers' compensation laws as of January 1, 2016*. Workers' Compensation Research Institute May 2016. This annual report builds on work done by the U.S. Department of Labor, which suspended production of the report after January 1, 2006. It is now prepared by the Workers' Compensation Research Institute in partnership with the International Association of Industrial Accident Boards and Commissions (IAIABC).

²² As of January 1, 2016, five states have exemptions for firms with less than five employees, two states exempt firms with less than 4 employees, and eight states exempt firms with less than three employees.

²³ Between 1993 and 2010, permanent partial disability cases accounted for between 32 percent and 41 percent of total cases in which indemnity benefits were paid, but were responsible for between 65 and 58 percent of benefits paid. Sengupta I, Baldwin M, Reno V. *Workers' Compensation: Benefits, Coverage, and Costs*, 2011. Washington, DC: National Academy of Social Insurance, 2013.

²⁴ Grabell M, Berkes H. *The Demolition of Workers' Compensation 2015*. ProPublica and NPR, available at: <http://www.propublica.org/article/the-demolition-of-workers-compensation>. See also Rousmaniere P. *Series on the Uncompensated worker: the financial impact of workers' comp on injured workers and their families*, available at: <https://www.workcompcentral.com/news/special-reports/>

²⁵ Currently, a full-time, year-round worker paid the federal minimum wage of \$7.25 per hour would earn \$15,080 a year, below the current poverty level guidelines for families, which are set at \$16,020 for a family of two, \$20,160 for a family of three, \$24,300 for a family of four. Workers' compensation does not fully replace immediate income losses, and workplace injuries have long-term deleterious effects on life time earnings of workers, even when they receive compensation. See notes 53 and 55 (need to check these) for references regarding workers' economic losses after a work-related injury.

²⁶ A number of researchers have found that legislated changes have had an impact on the availability of benefits. See Thomason T, Burton JF Jr. *The effects of changes in the Oregon workers' compensation program on employees' benefits and employers' costs*. *Workers' Compensation Policy Rev* 2001;1:7-23 (changes in the Oregon statute reduced the number of claims by 12-28 percent and benefits by 20-25 percent between 1987 and 1996); Boden L, Ruser J. *Workers' compensation 'reforms,' choice of medical care provider, and reported workplace injuries*. *Review of economics and statistics* 2003;85: 923-929 (compensability restrictions accounted for 7-9 percent of the decline in DART injuries reported to BLS in 1991-97); and X G, Burton JF Jr. *Workers' compensation: Recent developments in moral hazard and benefits payments*. *Industrial and Labor Relations Review* 2010;63:340-354 (changes in eligibility rules explain more of the decline in cash benefits during the 1990s than the decline in the BLS injury rate).

²⁷ *Achievements in public health: Improvements in workplace safety -- United States, 1900-1999*. *MMWR*. June 11, 1999;48:461-469.

²⁸ *Report of the National Commission on State Workmen's Compensation Laws*. July 1972. The National Commission was composed of 15 non-governmental individuals, appointed by President Nixon, representing all facets of workers' compensation (employers, insurers, academics, lawyers, injured workers and unions, members of the medical profession) and three ex-officio members. Many histories and descriptions of the work of the Commission have been written. See Burton JF Jr. *The National Commission on state workmen's compensation laws: Some reflections by the former chairman*. *IAIABC Journal* 2003;40:15-32; Burton JF Jr. *The National Commission 33 years later: What have we learned?* *IAIABC Journal* 2005;42:21-38; Burton JF Jr. *The National Commission 33 years later: What have we learned? Part two*. *IAIABC Journal* 2006;43:17-34; and Barth P. *Some reflections on the National Commission and its legacy* 2005. In Burton JF Jr., Blum F, Yates EH (eds). *Workers' Compensation Compendium 2005-2006*. Princeton, NJ: Workers Disability Income Systems, 2006; Elisburg DE. *The national commission on state workmen's compensation laws: reflections on the thirtieth anniversary – plus two and counting*, in Burton JF Jr., Blum F, Yates EH (eds). *Workers' Compensation Compendium 2005-2006*. Princeton, NJ: Workers Disability Income Systems, 2006.

²⁹ §27 (d)(1) of the Occupational Safety and Health Act, Public Law 91-596, 84 Stat. 1591.

³⁰ 29 U.S.C.A. § 653 (4)

³¹ *Report of the National Commission on State Workmen's Compensation Laws*. July 1972. The 19 essential recommendations were summarized in the *Social Security Bulletin*. October 1972;35:31-36.

³² *Report of the National Commission on State Workmen's Compensation Laws*. July 1972.

³³ *An Interim Report to Congress on Occupational Diseases*. Submitted to Congress June 1980 by Secretary of Labor Ray Marshall and Assistant Secretary for Policy Evaluation and Research Arnold H. Packer. This report was prepared as a result of amendments to the Black Lung Act in 1977 that required the Department of Labor to conduct studies regarding occupational disease compensation. In the wake of the National Commission's recommendations, the additional studies focused specifically on the problems of the difficult area of occupational disease compensation and made recommendations that were never implemented.

³⁴ Burton JF Jr. *The National Commission 33 years later: What have we learned?* *IAIABC Journal* 2005;42:21-38.

³⁵ Burton JF Jr. "Should there be a 21st century national commission on state workers' compensation laws?" Paper presented at American bar association workers' compensation section midwinter seminar and conference March 16, 2013, available at:

http://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/workers_compensationcommittee/winter_seminarandmeeting/21st_burton_authcheckdam.pdf

³⁶ Grabell M, Berkes H. The Demolition of Workers' Compensation 2015. ProPublica and NPR, available at: <http://www.propublica.org/article/the-demolition-of-workers-compensation>.

³⁷ Medical and cash benefits per \$100 of covered wages rose from 1972 to 1980, declined somewhat in the early 1980s, and then, after 1984, began to rise again. Baldwin ML, McLaren CF. Workers' Compensation: Benefits, Coverage, and Costs, 2012. Washington, DC: National Academy of Social Insurance, 2014.

³⁸ For a review of the 1990s history of this race to the bottom, see the following two contemporaneous law review articles: Spieler EA. Perpetuating risk? Workers' compensation and the persistence of occupational injuries. *Houston Law Rev.* 1994;31:119-264; McCluskey MT. The illusion of efficiency in workers' compensation "reform". *Rutgers Law Review* 1998;50:657-788

³⁹ See <http://projects.propublica.org/graphics/workers-comp-reform-by-state>

⁴⁰ Baldwin ML, McLaren CF. Workers' Compensation: Benefits, Coverage, and Costs, 2012. Washington, DC: National Academy of Social Insurance, 2014. Total workers' compensation benefits per \$100 of payroll declined from \$1.65 in 1990 to \$0.98 in 2013. Wage replacement benefits for workers fell substantially over the same time period from \$0.99 per \$100 in 1990 to \$0.50 per \$100 of payroll in 2007, and have remained essentially steady since 2003. *Id.* Note that benefits per \$100 of payroll may not be a good measure of benefit adequacy, as this number will be affected by numerous variables; benefit levels set by statute are only one of these variables. Others, for example, will include changes in injury rates due to increased safety, changes in injury rates due to different industrial mix, changes in wage rates, or changes in rates of claims filed by injured workers.

⁴¹ Aggregate employers' costs have not shown the same level of reduction as the decline in benefit payments, although this varies substantially among the states. In contrast to the decrease in benefits per \$100 of payroll, employer costs per \$100 of payroll increased overall by \$0.07 between 2010 and 2014; increases were seen in 25 jurisdictions while costs remained steady or declined in the remainder. Sengupta I, Baldwin M, Reno V. Workers' Compensation: Benefits, Coverage, and Costs, 2011. Washington, DC: National Academy of Social Insurance, 2013.

Not surprisingly, states that have combined statutory limits on benefits with declining employment in dangerous industries have shown the greatest decline in employers' costs; states with expansion of dangerous industries show the largest increases in employers' costs. Variance among states for the period 2009-2013 for employers' costs and benefits paid varies considerably. For example, Montana and West Virginia had the biggest declines in employer costs per \$100 of payroll between 2010 and 2014. Both states had enacted legislation to limit benefits and medical care; West Virginia changed from an exclusive state fund to a private carrier system after 2008; Montana instituted a cap of 260 weeks on medical benefits in 2011. In addition, West Virginia employment has been lagging behind the country, and lost jobs are largely in hazardous industries. Benefits per \$100 of payroll also declined significantly in these states over the same time period. Baldwin ML, McLaren CF. Workers' Compensation: Benefits, Coverage, and Costs, 2012. Washington, DC: National Academy of Social Insurance, 2014.

Employer's costs are also affected by insurance industry rates and profitability; the workers' compensation insurance industry was at near-record levels of profitability in 2013. Burton JF Jr. Workers' Compensation Resources Research Report, November 2014;8. In very high hazard industries with significant numbers of claims that involve permanent disability, costs for individual employers can be quite expensive. For example, in Washington State, rates are published annually; the 2016 base rate for roofing is \$ 7.6753 and is for logging \$18.5728; this contrasts with clerical office work, \$ 0.1449 (all per \$100 of covered payroll). 2016 Composite Base Rates by Risk Classification available at:

<http://www.lni.wa.gov/ClaimsIns/Files/Rates/2016RatesBusTypeClassCode.pdf> .

⁴² The six studies funded for this project were published as a group in the *American Journal of Industrial Medicine*: Boden LI, Ozonoff A. Capture-recapture estimates of nonfatal workplace injuries and illnesses. *Annals of Epidemiology* 2008;18:500-506; Wuellner SE, Bonauto DK. Injury classification agreement in linked Bureau of Labor Statistics and workers' compensation data. *American Journal of Industrial Medicine* 2014;57:1100-1109; Joe L, Roisman R, Beckman S, et al. Using multiple data sets for public health tracking of work-related injuries and illnesses in California. *American Journal of Industrial Medicine* 2014;57:1110-1119; Davis LK, Grattan KM, Tak S, et al. Use of multiple data sources for surveillance of work-related amputations in Massachusetts, comparison with official estimates and implications for national surveillance. *American Journal of Industrial Medicine* 2014;57:1120-1132; Wuellner SE, Bonauto DK. Exploring the relationship between employer recordkeeping and

underreporting in the BLS survey of occupational injuries and illnesses. *American Journal of Industrial Medicine* 2014;57:1133–1143; Tak S, Grattan K, Boden L, et al. Impact of differential injury reporting on the estimation of the total number of work-related amputations. *American Journal of Industrial Medicine* 2014;57:1144–1148. This issue of the journal also included a commentary regarding the undercounting problems in the Bureau of Labor Statistics Survey of Occupational Injuries and Illnesses (Spieler EA, Wagner GR. Counting matters: Implications of undercounting in the BLS survey of occupational injuries and illnesses. *American Journal of Industrial Medicine* 2014;57:1077-1084.) and an explanation of the BLS SOII system (Wiatrowski WJ. The BLS survey of occupational injuries and illnesses: A primer. *American Journal of Industrial Medicine* 2014;57:1085–1089).

⁴³ Spieler E, Burton JF Jr. The lack of correspondence between work-related disability and receipt of Workers' compensation benefits. *American Journal of Industrial Medicine* 2012;55:487-505; Rosenman KD, Kalush A, Reilly MJ, et al. How much work-related injury and illness is missed by the current national surveillance system? *Journal of Occupational and Environmental Medicine* 2006;48:357-365; Morse T, Dillon C, Warren N, et al. Capture-recapture estimation of unreported work-related musculoskeletal disorders in Connecticut. *American Journal of Industrial Medicine* 2001;39:636-642; Galizzi M, Miesmaa P, Punnett L, et al. Injured workers' underreporting in the health care industry: An analysis using quantitative, qualitative, and observational data. *Industrial Relations: A Journal of Economy and Society* 2010;49:22-43; Fan ZJ, Bonauto DK, Foley MP, et al. Underreporting of work-related injury or illness to workers' compensation: individual and industry factors. *Journal of Occupational and Environmental Medicine* 2006;48:914-922; Dong XS, Fujimoto A, Ringen K, et al. Injury underreporting among small establishments in the construction industry. *American journal of industrial medicine* 2011;54:339-349; Xiang H, Shi J, Lu B, et al. Medical expenditures associated with nonfatal occupational injuries among immigrant and U.S.-born workers. *BMC public health* 2012;12:678; Boden LI, Ozonoff A. Capture–recapture estimates of nonfatal workplace injuries and illnesses. *Annals of Epidemiology* 2008;18:500-506.

⁴⁴ Spieler E, Burton JF Jr. The lack of correspondence between work-related disability and receipt of workers' compensation benefits. *American Journal of Industrial Medicine* 2012;55:487-505; Spieler EA, Wagner GR. Counting matters: Implications of undercounting in the BLS survey of occupational injuries and illnesses. *American Journal of Industrial Medicine* 2014;57:1077-1084; Azaroff LS, Levenstein C, Wegman DH. Occupational injury and illness surveillance: Conceptual filters explain underreporting. *American Journal of Public Health* 2002;92:1421-1429.

⁴⁵ Strunin L, Boden LI. The workers' compensation system: Worker friend or foe? *American Journal of Industrial Medicine* 2004;45: 338-345.

⁴⁶ Dong X, Ringen K, Men Y, et al. Medical costs and sources of payment for work-related injuries among hispanic construction workers. *Journal of Occupational and Environmental Medicine* 2007;49:1367-1375.

⁴⁷ The Occupational Safety and Health Administration has indicated that incentive programs may discourage reporting, and has indicated these types of programs are unlawful both under the whistleblower laws (see Memorandum from Richard E. Fairfax, Employer Safety Incentive and Disincentive Policies and Practices, March 12, 2012, available at: <https://www.osha.gov/as/opa/whistleblowermemo.html>) and recent amendments to the OSHA reporting requirements (29 C.F.R. 1904.35).

⁴⁸ The question is how much the filing behavior of workers is responsive to changes in benefit levels. For many years, researchers argued that claims filing increased when benefits rose, terming this a form of 'moral hazard.' See Butler RJ, Worrall JD. Claims reporting and risk bearing moral hazard in workers' compensation. *Journal of Risk & Insurance* 1991;58:191-204. For a review of the empirical literature, see Burton JF Jr. The Economics of Safety. *International Encyclopedia of The Social & Behavioral Sciences* 863, 864 (James D. Wright ed., 2nd ed. 2015). A recent study found, however, that workers may not be responsive to changes in benefit levels, contradicting some previous research. Guo X, Burton JF Jr. Workers' compensation: Recent developments in moral hazard and benefit payments. *Industrial and Labor Relations Review* 2010;63:340-55.

⁴⁹ This has always been true. See Barth PS, Hunt HA. Workers' Compensation and Work-Related Illnesses and Diseases; An Interim Report to Congress on Occupational Diseases 1980. Submitted to Congress June 1980 by Secretary of Labor Ray Marshall and Assistant Secretary for Policy Evaluation and Research Arnold H. Packer. See also Leigh JP, Marcin JP. Workers' Compensation Benefits and Shifting Costs for Occupational injury and illness. *Journal of Occupational and Environmental Medicine* 2012;54:445-450.

⁵⁰ Notably, most state courts that have addressed the issue of undocumented workers for workers' compensation have ruled that they are eligible. See 5-66 Larson's Workers' Compensation Law § 66.03 (2015). For a trade article referencing the tort liability concerns, see Roberto Cenicerros, Workers' Comp Laws Regarding Illegal Immigrants See Little Change Will renewed calls to ban workers' compensation benefits for illegal immigrants follow rising immigration worries? *Risk & Insurance*, July 15, 2014.

⁵¹ In Oregon, the state supreme court held that an injured worker retained his right to bring a negligence action in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001). The state legislature responded by passing an amended statute; the Oregon Supreme Court again held the employee was constitutionally entitled, under the remedy clause, to proceed with his negligence claims in 2013, *Alcutt v. Adams Family* (2013). These cases were, however, overruled in May 2016 in *Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168 (2016).

⁵²Hunt AH. Adequacy of Earnings Replacement in Workers' Compensation Programs 2004. Kalamazoo, MI WE Upjohn Institute for Employment Research.

⁵³ Hunt AH. Adequacy of Earnings Replacement in Workers' Compensation Programs 2004. Kalamazoo, MI WE Upjohn Institute for Employment Research.; Boden LI, Reville RT, Biddle J. "The Adequacy of Workers' Compensation Cash Benefits" 2005, in Roberts K, Burton JF Jr, Bodah MM, (eds), *Workplace injuries and diseases: Prevention and compensation: Essays in honor of Terry Thomason*, Kalamazoo, MI: WE Upjohn Institute for Employment Research:37-68 (at 60:the studies indicate that replacement rates for the 10 years after injury were 46 percent in New Mexico, 41 percent in Washington, 37 percent in California, 36 percent in Oregon and 30 percent in Wisconsin. The authors concluded the "replacement rates do not approach the benchmark for adequacy."; Boden LI, Galizzi M. Economic consequences of workplace injuries: Lost earnings and benefit adequacy. *American Journal of Industrial Medicine* 1999;36:487-503; Seabury SA, Scherer E, O'Leary P, et al. Using linked federal and state data to study the adequacy of workers' compensation benefits *American Journal of Industrial Medicine* 2014;57:1165-1173; Hunt HA, Dillender M. Benefit Adequacy in state and provincial workers' compensation programs. *Employment Research* 2014;21:1-4, available at: http://research.upjohn.org/empl_research/vol21/iss4/1.

⁵⁴ Compscope™ Benchmarks: The Databook April 2015;(15):Table 2.12. Data for claims with 2013 injuries.

⁵⁵ Hunt HA, Dillender M. Benefit adequacy in state and provincial workers' compensation programs. *Employment Research* 2014; 21:1-4, available at: http://research.upjohn.org/empl_research/vol21/iss4/1; Seabury SA, Scherer E, O'Leary P, et al. Using linked federal and state data to study the adequacy of workers' compensation benefits. *American Journal of Industrial Medicine* 2014;57:1165-1173.

⁵⁶ For example, *see* the following research regarding California: Peterson MA, Reville RT, Kaganoff Stern R, et al. *Compensating permanent workplace injuries: A study of the California system*, Santa Monica, Calif.: RAND Corporation, MR-920-ICJ, 1998, available at: http://www.rand.org/pubs/monograph_reports/MR920.html; Reville RT. "The Impact of a Disabling Workplace Injury on Earnings and Labor Force Participation," in John Haltiwanger J, Lane J (eds.). *Contributions to Economic Analysis*, Amsterdam, London, and New York: Elsevier Science, North-Holland 1999:147-173; Reville T, Polich S, Seabury SE, et al. *Permanent disability at private, self-insured firms: A study of earnings loss, replacement, and return to work for workers' compensation claimants*, Santa Monica, Calif.: RAND Corporation, MR-1268-ICJ, 2001, available at: http://www.rand.org/pubs/monograph_reports/MR1268.html; Seabury SA, Scherer E. *Identifying Permanently Disabled Workers with Disproportionate Earnings Losses for Supplemental Payments Prepared for the California Commission on Health and Safety and Workers' Compensation*. 2014, available at: http://www.rand.org/pubs/research_reports/RR425.html.

⁵⁷ For example, California, Florida, North Dakota, Pennsylvania and West Virginia limit these benefits to 104 weeks; Massachusetts, Minnesota and Texas limit them to 156, 130 and 105 weeks, respectively. *Workers' Compensation Research Institute Workers' Compensation Laws as of January 1, 2016*. May 2016;Table 4.

⁵⁸ *Westphal v. City of St. Petersburg*, No. SC13-1930, 2016 WL 3191086 (Fla. June 9, 2016) (statutory limitation of 104 weeks on receipt of temporary total disability benefits, in a case where the worker was totally disabled and incapable of working but had not been deemed to have reached the maximum medical improvement needed to be eligible for permanent total disability benefits, unconstitutionally deprived the claimant of his right of access to the courts; the court further held that the proper remedy for unconstitutional denial of claimant's right of access to courts was revival of prior statute that provided for a limitation of 260 weeks of temporary total disability benefits.)

⁵⁹ Wilson R. *The Workers' Comp Conversation: When States Punish Good Intent*. 2016, available at: <http://www.workerscompensation.com/compnewsnetwork/from-bobs-cluttered-desk/23898-the-workers-comp-conversation-when-states-punish-good-intent.html>.

⁶⁰ Cal. Lab. Code § 4663 - 4664 (Apportionment of permanent disability; causation; physician's report and apportionment determination); *see* Swezey CL. *Understanding the Effect of SB 899 (Stats 2004, Chap 34) on the Law of Apportionment*, Prepared for CHSWC April 2007. The revised Section 4663 provides that "apportionment of permanent disability shall be based on causation."

⁶¹ Baldwin ML, McLaren CF. *Workers' Compensation: Benefits, Coverage, and Costs*, 2012. Washington, DC: National Academy of Social Insurance, 2014: "Permanent total disability and fatality claims are relatively rare, accounting for less than 1 percent of cases involving cash benefits and 7-13 percent of total payments."

⁶² These age cutoffs include Florida (cut off is at age 75); Minnesota (age 67 with a rebuttable presumption of retirement); Montana (until retirement); North Dakota (until retirement); Oklahoma (payable for 15 years or until claimant reaches retirement, whichever is longer); Tennessee (until Social Security retirement benefits eligibility or for 260 weeks where the date of injury is on or after age 60); West Virginia (until age 70). Workers' Compensation Research Institute (May 2016) Workers' Compensation Laws as of January 1, 2016:Table 5

⁶³ These include: D.C. (500 weeks with ability to petition for an additional 67 weeks); Indiana (500 weeks); Kansas (maximum of \$155,000); Mississippi (450 weeks or until total compensation equals \$210,883); North Carolina (500 weeks, but can be extended); South Carolina (500 weeks); Wyoming (80 months, but can be extended). Workers' Compensation Research Institute (May 2016) Workers' Compensation Laws as of January 1, 2016:Table 5

⁶⁴ Michaels D. Fraud in the workers' compensation system: Origin and magnitude. *Occupational Medicine State of the Art Reviews* 1998;13:439-442. State-wide campaigns to identify workers making fraudulent injury claims found identified extremely small numbers of fraudulent claimants. In contrast, premium fraud by employers, involving underpayments to carriers, appears to be rampant. A 2014 report by the Grand Jury of the Supreme Court of the State of New York of New York State estimates that each year, the financial loss from premium fraud in the construction industry in New York City alone approaches half a billion dollars, available at:

<http://manhattanda.org/sites/default/files/Workers%27%20Comp%20GJ%20Report.pdf>.

⁶⁵ Spieler E, Burton JF Jr. The lack of correspondence between work-related disability and receipt of workers' compensation benefits. *American Journal of Industrial Medicine* 2012;55:487-505.

⁶⁶ Title XXXI, §440.102Drug-free workplace program requirements.

⁶⁷ Morantz AD, Mas A. Does post-accident drug testing reduce injuries? Evidence from a large retail chain. *American Law and Economics Review* 2008;10:246-302, available at: SSRN: <http://ssrn.com/abstract=1318092> or <http://dx.doi.org/ahn012>

⁶⁸ Baldwin ML, McLaren CF. Workers' Compensation: Benefits, Coverage, and Costs, 2012. Washington, DC: National Academy of Social Insurance, 2014.

⁶⁹ A description of these changes can be found in Workers' Compensation Research Institute (May 2016) Workers' Compensation Laws as of January 1, 2016:Table 3; and in Belton SE, Dolinschi R, Radeva E, et al. WCRI CompScope™ Benchmarks, 14th Edition. Oct. 2013, WC-13-25 to 38.

⁷⁰ Some states now apply the rules for qualification of experts who testify before juries in civil cases (established in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)) to workers' compensation claims. See e.g. *Case of Canavan*, 432 Mass. 304, 316 (2000); *Perry v. City of St. Petersburg*, 171 So. 3d 224 (Fla. Dist. Ct. App. 2015). Concerned about this level of complexity in workers' compensation proceedings, the New Mexico court refused to follow the reasoning of the Massachusetts court in *Banks v. IMC Kalium Carlsbad Potash Co.*, 133 N.M. 199 (Ct. App. 2002), *aff'd*, 134 N.M. 421 (2003).

⁷¹ See *Richardson v. Aramark/Sedgwick CMS*, 193 So. 3d 880 (Fla. 2016) (holding the Florida fee statute unconstitutional when a claimant's attorney was awarded an amount of \$19.44 per hour for 90 hours of reasonably expended work reasonably expended by claimant's attorney as a result of a fee statute that set attorneys' fees at a fixed percentage of the award to the claimant). The Utah court reached a similar result in *Injured Workers Ass'n of Utah v. State*, 374 P.3d 14 (Utah 2016).

⁷² In the 1990s, Pennsylvania, New York and West Virginia all amended their statutes to allow settlements. As of 2005, the remaining states that limited or prohibited settlements were Delaware, Kentucky, Minnesota, Nevada, New Mexico, Texas and Washington. David Torrey, *Commentary on and Analysis of Compromise and Release Agreements under State Workers' Compensation Laws*, Fall 2005. *IAIABC Journal*; 42(2):91-118. See also Torrey D. *Commentary on and Analysis of Compromise and Release Agreements under State Workers' Compensation Laws (Part Two)*. *IAIABC Journal* 43 Spring 2006;(1):73-114; Hunt HA, Barth PS. "Compromise and Release Settlements in Workers' Compensation: Final Report." 2010. Report prepared for State of Washington, Department of Labor and Industries, available at: <http://dx.doi.org/10.17848/rpt178>. Note that current settlements are subject to review by the Centers for Medicare and Medicaid Services that require set-asides in order to address possible cost-shifting to Medicare. See Appendix C of this report for further discussion of the cost-shifting issues.

⁷³ See Morgan JN, Snider M, Sobol MG. *Lump Sum Redemption Settlements and Rehabilitation*. Ann Arbor, MI: University of Michigan Press 1959; Thomason T, Burton JF Jr. Economic effects of workers' compensation in the United States: Private insurance and the administration of compensation claims. *Journal of Labor Economics* 1993;11(1)(Part 2). See also Galizzi M, Boden LI, Liu TC. The workers' story: Results of a survey of workers injured in Wisconsin, Workers' Compensation Research Institute December 1998;WC-98-5. (finding that overall, workers' whose claims were settled through compromise and release agreements in Wisconsin had the worst outcomes); Cheit EF. *Injury and Recovery in the Course of Employment*. New York: Wiley, 1961.

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- ⁷⁴ Thomason T, Burton JF Jr. Economic effects of workers' compensation in the United States: Private insurance and the administration of compensation claims. *Journal of Labor economics* 1993;11(1)(Part 2).
- ⁷⁵ Torrey D. Commentary on and analysis of compromise and release agreements under state workers' compensation laws. *IAIABC Journal*. Fall 2055; 42 (2) 91-118; Torrey D. Commentary on and analysis of compromise and release agreements under state workers' compensation laws (Part Two). *IAIABC Journal*. Spring 2006; 43(1)73-114.
- ⁷⁶ Four states do not allow private insurance, and employers purchase insurance from an exclusive state fund or self-insure. North Dakota, Washington, Wyoming and Ohio (also P.R. and Virgin Islands). For a list of the insurance options in each state, see Workers' Compensation Research Institute (May 2016) Workers' Compensation Laws as of January 1, 2016; Baldwin ML, McLaren CF. Workers' Compensation: Benefits, Coverage, and Costs, 2012. Washington, DC: National Academy of Social Insurance, 2014.
- ⁷⁷ Workers' Compensation Research Institute (May 2016) Workers' Compensation Laws as of January 1, 2016; Table 16.
- ⁷⁸ These benefits are taxable, however, unlike benefits under the traditional workers' compensation plans.
- ⁷⁹ For a summary of provisions in the Oklahoma opt-out plans, see Grabell M, Berkes H. October 14, 2015. Inside corporate America's campaign to ditch workers' comp, available at: <https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp>. These plans were generally similar to the Texas plans of employers that choose not to opt into the state-administered workers' compensation system in that state; the Texas plans are described in Morantz AD. Rejecting the Grand Bargain: What Happens When Large Companies Opt-Out of Workers' Compensation? (March 18, 2016). Stanford Law and Economics Olin Working Paper No. 488, available at: SSRN: <http://ssrn.com/abstract=2750134>
- ⁸⁰ A careful review of the opt-out option was written by Gregory Krohm for the IAIABC. Krohm G. Understanding the Opt-Out Alternative, Approved by the IAIABC Board of Directors April 18, 2016.
- ⁸¹ Vasquez v. Dillard's, Inc., No. 114810, __ P.2d __ (Okla. Sept. 13, 2016).
- ⁸² Torrey DB. Workers' Compensation "Carve-Outs": Law, Background, Criticism, and a Twelve State Table, available at: http://www.nawcj.org/docs/Comparative_Law/NAWCJ.carve.outs.finalconsolidated.pdf; Levine DI, et al. Carve-outs in workers' compensation: An analysis of the experience in the California construction industry. Upjohn Institute. 2002; Levine DI, Neuhauser FW, Reuben R, et al. Carve outs in workers' compensation: An analysis of the experience in the California construction industry. Kalamazoo, MI: W.E. Upjohn Institute for Employment Research. 2002; Moscowitz E, Van Bourg V. Carve-outs and the privatization of workers' compensation in collective bargaining agreements. 46 *Syracuse Law Review* 1995:46:1.
- ⁸³ Katz LF, Krueger AB. The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015. 2016, available at: http://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_v3.pdf ("The percentage of workers engaged in alternative work arrangements – defined as temporary help agency workers, on-call workers, contract workers, and independent contractors or freelancers – rose from 10.1 percent in February 2005 to 15.8 percent in late 2015. The percentage of workers hired out through contract companies showed the sharpest rise increasing from 0.6 percent in 2005 to 3.1 percent in 2015. Workers who provide services through online intermediaries, such as Uber or Task Rabbit, accounted for 0.5 percent of all workers in 2015.")
- ⁸⁴ Carre F. (In)dependent Contractor Misclassification, Economic Policy Institute. EPI Policy Brief 413. Washington DC: 2015. Available at: <http://www.epi.org/files/pdf/87595.pdf>
- ⁸⁵ See Mass. Gen. Law ch. 149 § 159(c).
- ⁸⁶ Rodriguez v. Brand W. Dairy, No. S-1-SC-35426, 2016 WL 3611041 (N.M. June 30, 2016).
- ⁸⁷ Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016) (fee schedule).
- ⁸⁸ Westphal v. City of St. Petersburg, No. SC13-1930, 2016 WL 3191086 (Fla. June 9, 2016).
- ⁸⁹ Injured Workers Ass'n of Utah v. State, 374 P.3d 14 (Utah 2016).
- ⁹⁰ Torres v. Seaboard Foods, LLC, 373 P.3d 1057 (Okla. 2016), as corrected (Mar. 4, 2016).
- ⁹¹ Smothers v. Gresham Transfer, Inc., 332 Or 83, 23 P3d 333 ((2001).
- ⁹² Horton v. Oregon Health & Sci. Univ., 359 Or. 168, 175 (2016) This case did not involve a workers' compensation claim, but did involve the same constitutional issue that is raised when workers' compensation laws preclude compensation but still provide tort immunity to employers. The issue in these cases was whether the state constitution's remedies clause places any substantive limit on the legislature's authority to design (or limit) remedies. The court in this later case found that the legislature could limit remedies, overruling Smothers.
- ⁹³ Bartik TJ. Business location decisions in the United States: Estimates of the effects of unionization, taxes, and other characteristics of states. *Journal of Business & Economic Statistics* 1985;3:14-22; Bartik TJ. Small business start-ups in the United States: Estimates of the effects of characteristics of states. *Southern Economic Journal*

1989:1004-1018; Erickson RA. Business climate studies: A critical evaluation. *Economic Development Quarterly* 1987;1:62-71.

⁹⁴ See Massachusetts General Laws c. 152, § 7.

⁹⁵ See Maine Rev. Statutes, Title 39A Chap 5 § 222.

⁹⁶ These states are California, Hawaii, New Jersey, New York, Rhode Island, as well as Puerto Rico.

⁹⁷ For the stories from workers, also see Grabell M, Berkes H. *The Demolition of Workers' Compensation* 2015. ProPublica and NPR. available at: <http://www.propublica.org/article/the-demolition-of-workers-compensation>. Studies have shown significant worker dissatisfaction with the workers' compensation systems. See Strunin L, Boden LI. The workers' compensation system: Worker friend or foe? *American Journal of Industrial Medicine* 2004;45:338-345; Allen IW, Hill SA, Reynolds AM. The workers' compensation system as a quality of life problem for workers' compensation claimants. *Advances in Medical Sociology* 1994; 5:181-200; Keogh J, Nuwayhid I, Gordon J, et al. The impact of occupational injury on injured worker and family: Outcomes of upper extremity cumulative trauma disorders in Maryland workers. *American Journal of Industrial Medicine* 2000;38:1-9; Morse T, Dillon C, Warren N, et al. The economic and social consequences of work-related musculoskeletal disorders: the Connecticut upper-extremity surveillance project (CUSP). *International Journal of Occupational and Environmental Health* 1998;4:209-216. In contrast, WCRI studies suggest relative satisfaction among workers with regard to the medical care received. Rick Victor, founder and former President of the Workers' Compensation Research Institute, recently indicated in a blog: "By an overwhelming majority, most workers were satisfied with medical care received (workers with more than 7 days of lost time): 75-85 percent reported somewhat or very satisfied; 85-90 percent reported no problems or small problems getting desired care; 80-90 percent reported being somewhat or very satisfied with the time to first nonemergency care," citing to Belton S, Liu T. Comparing Outcomes For Injured Workers In Michigan. *Workers Compensation Research Institute* June 2009;Table SA.52. Date for claims from various years, Table SA.52, available at: http://www.sedgwickinstitute.com/victors-view/#_fn8. This is consistent with a nine state study conducted by WCRI published in 2007 that concluded that workers are about as satisfied with the care they receive through workers' compensation as are patients drawn from outside the workers' compensation arena. Belton SE, Victor RA, Liu T-C. Comparing Outcomes for Injured Workers in Nine Large States. WCRI May 2007;WC-07-14.

⁹⁸ In some states, employers are fined for providing benefits above that which are required by law.

⁹⁹ National Commission Report 1972:125.

¹⁰⁰ U.S. Department of Labor, Occupational Safety and Health Administration Adding inequality to injury: The costs of failing to protect workers on the job, 2015, available at: <https://www.dol.gov/oshareport/20150304-inequality.pdf>

¹⁰¹ For specific research regarding the relationship between SSDI and workers' compensation, see Burton JF Jr. Guo X. Improving the interaction between the SSDI and workers' compensation programs in SSDI solutions: Ideas to strengthen the social security disability insurance program April 2016; O'Leary P, Boden LI, Seabury SA, et al. Workplace injuries and the take-up of social security disability benefits. *Social Security Bulletin* 2012;72:1-17; McNerey M, Simon K. The effect of state workers' compensation program changes on the use of federal social security disability insurance. *Industrial Relations* 2012;51:57-88. Guo X, Burton JF Jr. The growth of applications for Social Security Disability Insurance: A spillover effect from workers' compensation. *Social Security Bulletin* 2012;72:69-88. Although the question of the extent to which this phenomenon has grown in recent years is disputed, the fact that these transfers occur is not.

¹⁰² Summary of the 2016 Annual Social Security and Medicare Trust Fund Reports, available at: www.ssa.gov/OACT/TRSUM.

¹⁰³ This summit – an on-going private enterprise – met for the first time in Dallas-Fort Worth in June 2016. Representatives of agencies, including judges, insurance carriers, claimants and defense lawyers, academics, health care vendors, and others gathered for an initial discussion, and then continued the discussion at a meeting in August 2016 in Orlando, Florida. In response to a survey questionnaire distributed after the first meeting, which asked participants to indicate their ranking of a wide range of issues, the participants indicated a disparity of views, but these three issues were identified as meriting the greatest concern. Information regarding the Summit can be obtained from Workerscompensationcentral.com.

¹⁰⁴ Symposium co-sponsored by the Pound Civil Justice Institute, Northeastern University School of Law and Rutgers Center for Risk & Responsibility September 23, 2016, available at: <http://poundinstitute.org/content/2016-academic-symposium>.

¹⁰⁵ Letter signed by Senators Murray, Sanders, Wyden, Franken, Brown and Reps Scott, Van Hollen, Levin, Wilson and Becerra. 10/20/2015.

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- ¹⁰⁶ US Department of Labor, Bureau of Labor Standards. A Report on the Bureau of Labor Standards 30th Anniversary, Washington: 1965, available at: <http://digitalassets.lib.berkeley.edu/irle/ucb/text/lb000067.pdf>.
- ¹⁰⁷ US Department of Labor, Bureau of Labor Standards. A Report on the Bureau of Labor Standards 30th Anniversary, Washington: 1965, available at: <http://digitalassets.lib.berkeley.edu/irle/ucb/text/lb000067.pdf>.
- ¹⁰⁸ “Workmen’s compensation; an outline of legislation in the United States and territories as of January 1, 1943,”
- ¹⁰⁹ President Harry S. Truman. Special Message to the Congress Transmitting Reorganization Plan 19 of 1950.
- ¹¹⁰ Interdepartmental Workers’ Compensation Task Force. 1977. Workers’ Compensation: Is There A Better Way? A Report on the Need for Reform of State Workers’ Compensation.
- ¹¹¹ The National Commission on State Workers’ Compensation Laws Act of 2009, HR 635 in the 111th Congress introduced by Congressman Joe Baca.
- ¹¹² Sengupta I, Baldwin M, Reno V. Workers’ Compensation: Benefits, Coverage, and Costs, 2011. Washington, DC: National Academy of Social Insurance, 2013.
- ¹¹³ SSA, [Annual Statistical Report on the Social Security Disability Insurance Program, 2014, Table 3](#) (for DI workers/amounts); and SSA, [Annual Statistical Supplement, 2015:Table 8.B2](#) (for Medicare amount).
- ¹¹⁴ Sengupta I, Baldwin M, Reno V. Workers’ Compensation: Benefits, Coverage, and Costs, 2011. Washington, DC: National Academy of Social Insurance, 2013:Table 19.
- ¹¹⁵ Reville RT, Schoeni RF. [The fraction of disability caused at work](#). Social Security Bulletin 2004;65:31-37. The researchers examined self-reporting data from the 1992 Health and Retirement Study and found that more than one third (36 percent) of 51-61 year olds whose health limits the amount of work they can do became disabled because of an accident, injury, or illness at work. Of those receiving Social Security disability insurance, a similar portion (37 percent) attributed their disability to an accident, injury or illness at work.
- ¹¹⁶ O’Leary P, Boden LI, Seabury SA, et al. Workplace injuries and the take-up of social security disability benefits. Social Security Bulletin 2012;72:1-17.
- ¹¹⁷ Buffie N, Baker D. [Rising Disability Payments: Are Cuts to Workers’ Compensation Part of the Story](#). Center for Economic and Policy Research. Washington: 2015, *see also* Guo X, Burton JF Jr. “The Relationship Between Workers’ Compensation and Disability Insurance.” In AE Eaton, ed. Proceedings of the 60th Annual Meeting of the Labor and Employment Relations Association. Champlain, IL: Labor and Employment Relations Association, 2008; *and* McInerney M, Simon K. The effect of state workers’ compensation program changes on the use of federal social security disability insurance. Industrial Relations 2012; 51: 57-88.



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