

WORKERS' COMPENSATION (C) TASK FORCE

Workers' Compensation (C) Task Force March 21, 2022, Minutes

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Draft Pending Adoption

Draft: 3/30/22

Workers' Compensation (C) Task Force
Virtual Meeting (*in lieu of meeting at the 2022 Spring National Meeting*)
March 21, 2022

The Workers' Compensation (C) Task Force met March 21, 2022. The following Task Force members participated: Alan McClain, Chair, and Jimmy Harris (AR); John F. King, Vice Chair (GA); Lori K. Wing-Heier represented by Anna Latham (AK); Jim L. Ridling represented by Jennifer Brown, Jimmy Gunn, Yada Horace, and Erick Wright (AL); Ricardo Lara represented by Yvonne Hauscarriague, Giovanni Muzzarelli, and Sarah Ye (CA); Andrew N. Mais represented by George Bradner and Amy Waldhauer (CT); Trinidad Navarro represented by Lucretia Prince (DE); David Altmaier represented by Greg Jaynes (FL); Colin M. Hayashida represented by Kathleen Nakasone and Grant Shintaku (HI); Doug Ommen represented by Travis Grassel (IA); Dean L. Cameron represented by Katie Deaver, Michele MacKenzie, and Randy Pipal (ID); Vicki Schmidt represented by Julie Holmes and Craig VanAalst (KS); James J. Donelon represented by Warren Byrd and Tom Travis (LA); Gary D. Anderson represented by Caleb Huntington and Matthew Mancini (MA); Eric A. Cioppa represented by Brock Bubar, Sandra Darby, and Robert Wake (ME); Grace Arnold represented by Sandra Anderson, Tammy Lohmann, and Phil Vigliaturo (MN); Chlora Lindley-Myers represented by Jo LeDuc and Rebecca Shavers; (MO); Mike Causey represented by Fred Fuller (NC); Marlene Caride represented by Mark McGill and Carl Sornson (NJ); Barbara D. Richardson represented by Erin Summers (NV); Michael Humphreys represented by Michael McKenney and Eric Zhou (PA); Elizabeth Kelleher Dwyer represented by Beth Vollucci (RI); Raymond G. Farmer represented by Will Davis (SC); Larry D. Deiter (SD); Jon Pike represented by Tracy Klausmeier and Reed Stringham (UT); Michael S. Pieciak represented by Mary Block, Isabelle Turpin Keiser, Karla Nuissl, Pat Murray, and Marcia Violette (VT); and Allan L. McVey, Tonya Gillespie, Erin K. Hunter, and Juanita Wimmer (WV). Also participating were: Tom Zuppan (AZ); Kevin Dyke and Tina Nacy (MI); Mike Chaney (MS); Bob Biskupiak (MT); Connie Van Slyke (NE); Bogdanka Kurahovic and Jennifer Catechis (NM); Cuc Nguyen and Andrew Schallhorn (OK); Brian Hoffmeister (TN); Marianne Baker and Nicole Elliott (TX); Rebecca Nichols (VA); David Haushalter (WI); Danie Capps (WY).

1. Heard an Update on Federal Legislation

Brooke Stringer (NAIC) said the Democrats in the U.S. House of Representatives (House) are concerned by a decline in the adequacy of benefits provided to injured workers under the state-based workers' compensation system. She said House Democrats believe the costs for disabling workplace injuries are being shifted to federal programs, such as Social Security disability insurance, due to reduced workers' compensation coverage under state laws.

Ms. Stringer said that in an earlier version of the Build Back Better Act, the House Committee on Education and Labor included language and funding for the U.S. Department of Labor (DOL) Office of Workers' Compensation Programs (OWCP) for "monitoring of state workers' compensation programs." The property/casualty (P/C) trade associations opposed this provision in the Build Back Better Act, and the specific reference was ultimately removed.

In November 2021, the House passed a \$1.7 trillion Build Better Act. While the updated bill provides \$121 million for the DOL's OWCP activities, it did not include a specific reference to oversight of the state workers' compensation programs, which was included in previous versions. The outcome of the bill in the U.S. Senate remains uncertain.

Ms. Stringer said last week during a markup at the House Committee on Education and Labor, ranking member Virginia Foxx (R-NC) offered an amendment to prohibit monitoring of the DOL on the adequacy of state workers' compensation programs; this amendment was defeated along party lines.

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Ms. Stringer said in December 2021, the Workforce Protections Subcommittee held a hearing on “Strengthening the Safety Net for Injured Workers,” which also touched on the DOL’s authority to reinstitute monitoring and reporting on state workers’ compensation programs. She said it is anticipated that there could be continued congressional oversight and that attention to this issue moving forward. Ms. Stringer said she will keep the Task Force informed of any updates.

Commissioner King asked Ms. Stringer to report back to the Task Force if she sees any movement in the Senate regarding the monitoring of workers’ compensation. He said state insurance regulators will want to talk to their congressional delegation in the event there is any movement toward the monitoring of workers’ compensation.

Commissioner McClain said the monitoring of workers’ compensation does go across all regulatory lines. He said adjudication and benefits are typically the responsibility of the workers’ compensation agencies in the various states and usually not within the departments of insurance (DOIs). Commissioner McClain said the impact of these items affects the rating and loss costs, and these are the items affecting the DOIs.

Commissioner McClain said there have been several reforms in the past 20 to 30 years, as well as mechanization and employers paying more attention to worker safety. The combination of these items has lowered the frequency and severity of accidents in the workplace, and has affected workers’ compensation rates in a positive way.

2. Heard an Update on Cannabis, Independent Contractor, and Single-Payer Health Insurance Legislation Regarding Workers’ Compensation

Susan Donegan (National Council on Compensation Insurance—NCCI) said there is huge crossover potential between state activities, especially in the legislatures, and what is going on in Congress. She said at the end of last year, the NCCI tracked more than 1,000 state and federal bills.

Ms. Donegan said there were approximately 164 of these bills enacted. She said another 182 bills enacted were COVID-19-related.

Ms. Donegan said approximately 350 workers’ compensation regulations were proposed throughout the states and of those, approximately 162 were adopted. Ms. Donegan said many of these regulations were COVID-19-related. She said legislatures were looking at extensions of presumptions or making permanent laws about infectious or contagious diseases that may happen in the future, whether they include a pandemic or not.

Ms. Donegan said there have been COVID-19 vaccination-related bills being introduced during the current legislative sessions. These bills are generally falling into two categories. The first category is a private right of action against employers regarding certain injuries or death occurring from receiving a mandated vaccination as a condition of employment. She said there were approximately 12 states that have been looking at this issue. To date, some of these bills have died, and some of these bills are still in committee.

Ms. Donegan said state and federal cannabis-related legislation has the potential to intersect. She said there have been inconsistencies between state and federal laws regarding cannabis, including items such as the criminal justice impact on current law, expungements, and criminal records related to cannabis.

Ms. Donegan said one bill that has seen a lot of activity federally is the SAFE Banking Act. This Act has passed in the House six times, but the Senate has remained opposed to passing a stand-alone measure for cannabis and the banking sector. Ms. Donegan said this bill will need to pass the Senate if it is going to help businesses unable to open a bank account or obtain loans at a reasonable rate. She said 23 state governors (19 Democrats and four Republicans) have sent a letter to Congress urging the passage of the SAFE Banking Act.

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Ms. Donegan said a broader proposal, “The Cannabis Administration and Opportunity Act,” was not introduced, but it unveiled in July 2021. This Act would remove cannabis from the list of controlled substances, which would empower states to implement their own cannabis laws. This Act would also provide access for insurance services to cannabis-related businesses. Ms. Donegan said there is some interest in using a broader approach than to simply focus on the banking sector.

Ms. Donegan said there are two cases currently on petition for a Writ of Certiorari to the U.S. Supreme Court in Minnesota. She said the issue is whether the Controlled Substances Act (CSA) preempts any order under a state workers’ compensation law, requiring an employer to reimburse an injured employee for the cost of buying medical cannabis to treat a work-related injury. Ms. Donegan said there is a mature split in the states’ supreme courts regarding whether preemption is valid. She said 11 states have said a preemption is valid, while 16 states have said preemption is not valid.

Ms. Donegan said there is a conflict between federal and state jurisdictions regarding cannabis. She said cannabis has been a Schedule I substance since 1970. Ms. Donegan said this complication, as well as the differing opinions regarding preemption, is confusing. She said she hopes that one day soon, there will be more continuity regarding medical cannabis legislation and regulations to alleviate insurers concerns regarding the risk to insure cannabis businesses.

Ms. Donegan said the NCCI has been watching federal activities and state level activities regarding who is an employee versus who is an independent contractor. She said South Dakota just signed a bill establishing a test for determining whether a delivery facilitation contractor is an independent contractor or an employee. Ms. Donegan said that there are several types of contractors and that states have different ways of describing this particular focus.

Ms. Donegan said in March 2021, the U.S. House of Representatives passed the “Protecting the Right to Organize Act.” This act focuses on the right to form and join unions. However, there are a couple of provisions in the Act that affect worker classification. Ms. Donegan said an independent contractor could be deemed an employee for purposes of federal law, which would allow unions to organize and then protect people who might have earlier been classified as an independent contractor. She said this bill has gone to the Senate. However, there has been no action in the Senate to date.

Ms. Donegan said earlier this month, a U.S. district court judge in the district of Eastern Texas ruled that the DOL violated the Administrative Procedures Act (APA) by delaying and then withdrawing the Trump administration rule that made it easier for businesses to classify workers as independent contractors. This invalidated the DOL’s actions and reinstated the Trump administration rule siding with the coalition of workforce Innovation, which represents the gig economy businesses such as Uber and Lyft. Ms. Donegan said the Biden administration has not yet indicated how it is going to respond to this ruling.

Ms. Donegan said the NCCI is following legislation regarding single payer health insurance, as this could be a game changer for workers’ compensation. She said it is unknown as to whether workers’ compensation would be included in a single-payer system or whether workers’ compensation would have its own carve out.

Ms. Donegan said health care reform is still getting some attention in Congress. In February, the representatives of the House Committee on Education and Labor held a hearing on health care reform titled “Exploring Pathways to Affordable, Universal Health Coverage.” She said it examined mechanisms to transition private health coverage to a federal system. Those who gathered discussed the considerations of a Medicare for all approach. Ms. Donegan said the Committee did not have any questions regarding the potential impacts to injured workers, nor was anything discussed regarding workers’ compensation presented in the hearing.

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Ms. Donegan said there are approximately nine bills at the state level addressing some type of single payer mechanism, ranging from creating a study group to study a single payer system to how to finance a single payer system. She said four of the nine bills did not include workers' compensation. However the remainder did reference workers' compensation. Ms. Donegan said one of the questions needing answered regarding single payer legislation that includes workers' compensation is how this would affect workers' compensation.

Having no further business, the Workers' Compensation (C) Task Force adjourned.

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