



# The Critical Need to Reform Workers' Compensation

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## Abstract

*State-based workers' compensation programs, one of the oldest types of social insurance programs in the United States, provide critical medical and income support to workers injured or made sick on the job. More than 129 million U.S. workers are covered by workers' compensation. Every state regulates its own program, and there are no federal minimum standards that guide these programs as there are for other state-based insurance programs. Changes in state workers' compensation programs over the past 20 years have made it increasingly difficult for injured workers to receive the full benefits to which they are entitled. Furthermore, exclusions in many state programs exempt many work-related injuries and illnesses and many workers in high-hazard occupations from receiving workers' compensation. The result is that employers now provide only a small percentage (about 21%) of the overall financial cost of workplace injuries and illnesses through workers' compensation. Instead, the costs of workplace injuries are borne primarily by injured workers, their families, and taxpayer-supported components of the social safety net. States are engaged in a race to the bottom over workers' compensation benefits, and as a result working people are at great risk of falling into poverty from work-related injuries. Reforms are needed to ensure that workers with occupational injuries and illnesses can access the medical and wage replacement benefits they need until they can go back to work.*

## Relationship to Existing APHA Policy Statements

- APHA Policy Statement 20097: Workers' Compensation Reform
- APHA Policy Statement 20039: Workers' Compensation Insurance—Increased Funding for Prevention of Occupational Disease and Injury

## Problem Statement

Workers' compensation is part of the social safety net of programs that insure workers against income losses associated with both expected and unexpected life events. These programs also include unemployment insurance (for unanticipated job loss due to economic conditions), Social Security Disability Insurance (for permanently disabled people who have been in the workforce), and Social Security old age assistance (for people over retirement age), as well as programs

specifically targeted to helping people pay medical bills (such as Medicare).

In the United States, workers' compensation emerged in each state as a political compromise in the early 20th century, when occupation-related deaths and disability were alarmingly common. Medical bills and lost wages resulting from a work-related injury can place an enormous economic and psychosocial burden on workers and their families, and losing a family member to a work-related death can have devastating

consequences for the family's financial security. The basic principle of workers' compensation is that employers assume responsibility for providing insurance that offers cash and medical benefits for workers injured on the job without regard to fault; in return, employers are protected from personal injury or other liability for workplace injuries or illnesses. More than 129 million workers in the country are covered by workers' compensation programs.[1]

With the exception of a few national programs administered by the U.S. Department of Labor's Office of Workers' Compensation Programs (e.g., programs for federal workers and workers covered by the Longshore and Harbor Workers' Compensation Act), workers' compensation has evolved as a state-based decentralized program. Between 1911 and 1948, every state developed some form of workers' compensation program.[2]

Workers' compensation benefits include coverage for medical care and rehabilitation, reimbursement for a portion of lost wages due to work-related injuries, and compensation for permanent impairment or functional loss. Workers' compensation also provides benefits to families of workers who die from work-related causes. Ultimately, workers' compensation systems should help prevent workplace injuries, which in turn will reduce costs for employers.[2]

Each state regulates its own workers' compensation system. There is no federal oversight of these state programs, and they vary substantially with regard to the specifics of coverage, benefit levels, financing, and administration.[2] In addition, there are no federal minimum standards for state-run workers' compensation programs (as there are for state-run unemployment insurance programs).[2]

Workers' compensation is generally financed by employers either through insurance purchased from private insurers or through a state insurance fund; large employers may choose to self-insure.[3]

In four states, a state-run program is the exclusive provider of mandatory insurance. In all others, employers choose an insurance carrier, generally on the basis of premium costs. As a result, prevention and claims services may be undervalued, or risk management may focus more on reducing claims costs (often through denial of benefits) than on primary prevention. Shifting of coverage among carriers means that there is generally no consistent or long-term effort directed at injury and disease prevention. Premium levels often fluctuate because of macroeconomic changes rather than because of an individual employer's attention to and success in reducing injury and illness.[1]

Each state system is unique and varied in its coverage and in the benefits offered to workers.[3] States differ, often dramatically, on many issues, including determination of permanent disabilities and coverage of work-related illnesses (such as repetitive trauma disorders and stress-related disorders).[3] As an example, the national average maximum compensation for losing an index finger is \$11,343, as compared with \$79,759 in Oregon and \$2,065 in Massachusetts.[4] Some state workers' compensation systems cap the benefits offered to permanently disabled workers at 450 weeks. Others allow benefits to continue for life.[3] Some state laws contain strong language to prohibit retaliation against employees if they file for workers' compensation, while others do not.[2]

Recent changes in many state-based workers' compensation programs have made it increasingly difficult for injured workers to receive the benefits to which they are entitled.[5] For example, some states have established shorter time limits to file claims, some have taken away workers' right to use a health care practitioner of their choice, and some have added provisions allowing employers to conduct mandatory post-injury drug testing even when there is no nexus between injury and impairment. Others have reduced protections against retaliation aimed at individuals

filing for workers' compensation, allowed selective enforcement of safety policies, excluded illnesses such as repetitive strain injuries, and altered the criteria regarding injury or illness causation so that claims that may previously have been approved are no longer covered.[2]

Historically, workers' compensation has covered not only new work-related injuries or illnesses but also workplace events or exposures aggravating a preexisting condition. However, many states no longer cover these incidents despite the fact that workers were able to perform their job prior to the injury or exposure.[2] The number of weeks that injured workers can receive disability benefits, irrespective of their medical status, has also been limited in some states. Cutbacks on attorney fees allowed for claimants, which are paid only if a claim is successful, have hampered workers' ability to obtain legal representation, while insurance company legal fees are not regulated. In addition, in many states there are no funds to cover injured workers whose employers illegally fail to carry workers' compensation insurance.[2] Also, many states are allowing the use of different versions of guidelines prepared by the American Medical Association for determination of partial or total impairment even though these are guidelines are not evidenced based and do not consider physical and mental impairment in the context of an individual worker's education and ability.[2]

Because of the weaknesses in state laws, employers now provide, on average, only a small percentage (about 21%) of the \$198 billion estimated annual cost of occupational injuries, illnesses, and fatalities. Instead, the costs of workplace injuries are borne primarily by injured workers, their families, and taxpayer-supported components of the social safety net.[6] Workers, their families, and their private health insurance pay for nearly 63% of lost wages and medical costs related to work-related injuries and illnesses, with other public program sources (i.e., taxpayers) shouldering the remaining 16%.[5]

The failure of state workers' compensation programs to provide adequate benefits has increased workers' risk of falling into poverty as a result of workplace injuries.[6] Studies have also shown that even when injured workers have a successful claim, when the benefits for that claim expire, these workers on average never achieve the earning potential they had prior to the injury.[7]

Moreover, only a fraction of injured workers ever receive any benefits through state workers' compensation programs. Several studies have shown that fewer than 40% of eligible workers apply for workers' compensation benefits.[8] The workers' compensation system functions especially poorly in the case of low-wage and immigrant workers. Many face additional barriers to filing, including concern about retaliation for reporting a job injury and requesting medical care. A landmark study of more than 4,000 low-wage workers in Chicago, Los Angeles, and New York revealed that among those workers experiencing a serious injury on the job, fewer than one in 10 (8%) filed for workers' compensation benefits.[9]

Doubts about the adequacy of workers' compensation programs are not new. More than 60 years ago, concerns about the inadequacy of state-based programs were raised with the Department of Labor. In 1970, Congress called for a review of state laws and established the National Commission on State Workmen's Compensation Laws. In 1972, the commission issued a consensus report noting that "the protection furnished by workmen's compensation to American workers presently is, in general, inadequate and inequitable"; in addition, the commission unanimously endorsed 84 recommendations, including 19 that members regarded as "essential." [10]

After the commission's report, states began to comply with the essential recommendations. For example, weekly statutory benefit rates increased substantially between 1970 and 1985 and continued to grow, although more modestly, between 1985 and 1990.[11] However, Congress did not

adopt the commission's unanimous recommendation to require full compliance, and beginning in the mid-1980s and early 1990s states began to roll back the already weak safety net that workers' compensation provided to workers.[4] Not surprisingly, benefits have greatly decreased since the early 1990s.[1] A 2015 report indicated that, since 2003, 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.[4]

In addition, in many states certain worker groups are explicitly excluded from coverage, such as agricultural, home health care, and domestic household workers. Furthermore, many workers in the emerging on-demand gig and alternative economy (e.g., Uber or Lyft workers) are denied workers' compensation protections because they are not properly classified as "employees," and this is true even for those who work in dangerous jobs.[12]

Workers' compensation programs generally fail to cover most diseases or illnesses.[2] Experts estimate that only one of 20 occupational disease victims receive workers' compensation benefits; in the case of occupational cancer, the figure is less than one in 100.[13,14] Severely disabled occupational disease victims are 10 times more likely to receive Social Security Disability Insurance or early retirement benefits than they are to receive workers' compensation benefits. This situation is perpetuated by systematic employer and health care practitioner underreporting of occupational injuries and illnesses to the Occupational Safety and Health Administration and the Bureau of Labor Statistics.[15–17] There are also major obstacles to accessing coverage in occupational disease claims. Determination of work relatedness is more difficult in illness cases, particularly those with long latency periods or those caused by cumulative exposures across multiple employers. In competitive private insurance systems, wherein coverage over time may be provided by several companies, there may be controversy

about degrees of responsibility among different parties.[2]

The most comprehensive legislative development in terms of cutting benefits to workers was the 2013 Oklahoma statute that both substantially cut benefits within the state-administered system and created a new system that allowed employers to "opt out" of the requirement and provide workers' compensation benefits while retaining immunity from lawsuits brought by injured workers. Employers that chose the opt-out option were also allowed to define for themselves what injuries were covered, determine what benefits would be paid to workers, and design their own review process, leaving very narrow oversight for the state agency responsible for workers' compensation. Investigative reporters found that "the plans almost universally have lower benefits, more restrictions and virtually no independent oversight." [18] In September 2016, the Oklahoma Supreme Court, citing the discrepancy in worker rights, declared the opt-out system unconstitutional, noting that the policy "1) constituted an unconstitutional special law; 2) denied equal protection to Oklahoma's injured workers; and 3) denied injured workers the constitutionally protected right of access to courts." [19] Although no other states have introduced similar opt-out options since the Oklahoma decision, such efforts are indicative of attempts by employers to limit their legal and financial obligations.

Other states continue to cut benefits, however. In 2017, for example, Iowa severely limited the benefits available to workers and increased the hurdles workers must go through to obtain benefits under workers' compensation, despite evidence that business costs were decreasing.[20]

The erosion of benefits for injured workers has resulted in a significant shift of the cost of occupational illnesses and injuries onto injured workers and taxpayer-supported programs. Reforms are urgently needed to ensure that workers with occupational injuries and illnesses can

access coverage for their medical care and adequate wage replacement benefits until they can return to employment. There has been no federal oversight of this state-run program for more than a decade. And because there are no federally mandated minimum requirements for benefits, each state continues to weaken and reduce benefits for injured workers.

### Evidence-Based Strategies to Address the Problem

Social insurance programs in other countries have demonstrated that fundamental change is possible in workers' compensation. In these countries, workers' compensation is subsumed by broader social insurance systems. New Zealand, for example, has had a comprehensive accident insurance system since 1974 that provides compensation to all victims of injury (but not disease) regardless of whether the injuries are work related.[21] Emphasis is placed on injury prevention and, when necessary, on the rehabilitation of injured individuals. Public hospitals provide medical treatment, and the system offers timely compensation to injured workers. The Netherlands goes even further, providing wage replacement to those disabled by both injuries and diseases, regardless of cause.[21] Wage replacement schemes consist of social insurance covering loss of earnings stemming from age, unemployment, temporary sickness, or permanent disability.

In the United States, the cost of medical care is a major driver in workers' compensation costs. This is not true in other countries, however, where publicly funded universal health insurance covers occupational and nonoccupational impairments alike. In these countries, medical care expenses constitute a markedly smaller share of total workers' compensation costs.[22] Many Canadian provincial systems operate nonprofit workers' compensation programs that emphasize injury and illness prevention incentives and focus public attention on the nature and scope of the problem as well as the tragedy of the many preventable

injuries that occur. Examples of such programs include WorkSafe Saskatchewan ([www.worksafesask.ca](http://www.worksafesask.ca)) and WorkSafeBC (<https://www.worksafebc.com/en>).

Calls for reform in the United States have outlined a program of change consistent with reforms in other countries. Experts propose the integration of workers' compensation health care into a national health service system. Many states have passed reforms to include formerly excluded workers such as home health care, domestic, and agricultural workers. In addition, there are now state systems in place to provide workers' compensation for workers in the so-called gig or alternative economy. In New York, for example, the legislature added a surcharge of 2.44% on fares for transport network companies to fund workers' compensation payments for their drivers.[12]

The Department of Labor issued a recent report recommending (1) reinstitution of federal tracking of changes in states' workers compensation programs, (2) appointment of a new national commission to study the workers' compensation system, (3) establishment of minimum standards that would trigger increased federal oversight if workers' compensation programs fail to meet them, (4) adoption of policies to strengthen the linkage of workers' compensation with injury and illness prevention, and (5) further coordination of Social Security Disability Insurance and Medicare benefits with workers' compensation to ensure, to the extent possible, that costs associated with occupational injuries and illnesses are not shifted to social insurance programs.[2]

In addition, the Department of Labor report included possible solutions to some of the issues involved in workers' compensation. As an example, when the workers' compensation claims of employees who are off work due to an injury or illness are disputed, cash benefits and health care may be delayed until the dispute is resolved, leaving these injured workers with no income and putting tremendous pressure on them to settle claims for lesser amounts. A few states have come

up with solutions for such problems: for example, Massachusetts has a “pay without prejudice” provision that allows insurers to make initial disability payments without accepting full claim liability; Maine has created mechanisms for payment of medical bills, pending resolution of claims, to ensure the availability of immediate medical care; and New Jersey has enacted an expedited procedure to resolve compensability issues when workers need expedited medical care. In addition, a few states have short-term disability programs that are not linked to work-related disabilities; in New Jersey, if a workers’ compensation claim is contested, the state program will provide weekly cash benefits that are reimbursed if the workers’ compensation claim is found to be compensable.[2]

### Opposing Arguments/Evidence

Driven by pressure from employers and their advocates to reduce workers’ compensation costs, state legislatures continue to limit benefits to workers, restrict the kinds of occupational injuries and illnesses covered by workers’ compensation, increase barriers to accessing benefits, and restrict eligibility requirements. However, as noted in a recent landmark Department of Labor report, although “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.”[2] Many of these changes to state workers’ compensation laws have been challenged on constitutional grounds, with unprecedented success.

Employer and insurer advocates often argue that the workers’ compensation “grand bargain” that offered workers quick, sure, and adequate benefits for occupational injuries in exchange for restricting workers’ rights to sue their employers for negligence causing disability has “gone too far.” Some argue that workers’ compensation was begun in the United States 100 years ago, in the

midst of the industrialization era, to address “life-changing events” such as severe burns, amputations, and fatalities. They contend that a clear and convincing link to a specific event protects against fraud, abuse, and other attempts to gain compensation for a disability that was not directly and wholly caused by working conditions. They see workers’ compensation as a system designed only to address traumatic events traceable to a specific date, time, and place. They believe that the system should cover traumatic injuries and acute conditions only when a work connection is precise and identifiable.

Some claim that the system has gone beyond its origins if it also covers conditions related to chronic pain or other chronic disease conditions such as heart disease, cancer, or respiratory illness caused by repetitive hazardous exposures or repetitive trauma when there is not a clear relationship to an “injury.” In this view, the compensation bargain was never intended for coverage of cumulative strains, and the focus should be narrowed so that ordinary diseases of life and natural degenerative conditions are not covered. They argue that injury frequency rates are holding steady or declining and that hazardous factory and industrial conditions are mostly a thing of the past. In their view of the problem, the “exclusive remedy” of workers’ compensation has eroded over time to favor workers over employers. They believe that legislation allowing lawsuits against employers by victims of grave injury in instances in which employer negligence is found or unsafe conditions are not addressed is outside the scope of the bargain and that exclusive remedies should be strong and universal.

Some jurisdictions use “presumptions” to grant benefits to segments of workers who may, as a group, have increased rates of certain illnesses. Often these benefits are restricted to specific public-sector safety personnel who contract cancer or heart disease. Presumptions grant benefits to those who can show that they have a certain disease and have a requisite level of a

hazardous exposure that is linked to that illness, such as lung cancer among firefighters or heart disease among police officers.

Employers and insurers maintain a legislative agenda that addresses several issues. The cost of workers' compensation insurance (premiums for those who are not self-insured) is a constant target of employer-based reform. To address cost increases, employer organizations often cite their relative premium as a reason to cut benefits or reform their systems to be competitive regarding price of compensation. One employer spokesperson maintains that addressing well-known deficiencies in his state's permanent disability benefit, the lowest in the United States, without reducing another area of the system would be problematic. According to Charles Carr, who is also executive director of the Alabama Self-Insurers Association, a group of companies large enough to pay their own claims without buying policies from insurance companies, "This state has got to remain competitive. We're not going to be able to attract industry if our overall workers' compensation costs are out of control." [23] (However, in May 2017, an Alabama judge found these low benefit rates and the low cap of attorney's fees to be unconstitutional.) [24]

The governor of Illinois has called for medical fee schedule reductions, higher causation standards for conditions to be found compensable, and attempts to legislatively scale back court decisions leading to cracks in exclusive remedy provisions or expanded benefits. [25] In New York, employers have pushed for limits on the time before a disabled worker reaches maximum medical improvement, which triggers a 10-year cap on benefits. [25] Employers paying for workers' compensation coverage, either through an insurer or by self-insuring, are advantaged if they are not charged for the full costs of injuries to which they contributed only partially.

Increasing access to workers' compensation for those not currently receiving the benefit has both upsides and downsides. As it is currently

operating, workers' compensation in complicated cases engenders claims rejections and often results in disputed liability, leading to the very litigation that was supposed to be eliminated by the system. Adding new groups of workers previously denied coverage will require states to handle more cases and develop new operating procedures.

One possible downside of increasing access to compensation for previously uncovered workers is that employers will choose to seek and adopt options creating carved out systems that statutorily limit coverage or that incentivize employers to reduce the number of employees they hire or turn their workers into independent contractors and deny them workers' compensation, safety and health protections, other job-dependent benefits such as sick or family leave, and other labor law decrees that apply only in employer-employee relationships.

Putting more cases into the workers' compensation system through covering more workers will marginally increase the costs to employers that had previously depended on subsidized disability from governmental or individual worker payments for uncovered work-related injury and disability. However, the imposition of such costs on those with the ability to address their prevention will motivate more attention to problems.

## Action Steps

APHA supports the following elements of a workers' compensation reform proposal:

1. Congress should appoint a new national commission to study the inadequacies of state-run workers' compensation programs and update recommendations regarding coverage, benefit adequacy, and compensability of injuries and illnesses as well as how workers' compensation programs can increase incentives to increase workplace safety efforts that prevent injuries and illnesses.



2. The U.S. Department of Labor's Office of Workers' Compensation Programs should reinstate its publication (suspended in 2004) of periodic evaluations of states' compliance with the essential recommendations of the National Commission on State Workers' Compensation Laws.
3. State government agencies should follow the lead of states such as Massachusetts and Maine that have enacted regulations on medical care payments for work-related injuries pending resolution of workers' compensation claims to ensure availability of immediate medical care.
4. State government agencies must ensure universal coverage in their workers' compensation laws and make sure that special categories of workers, such as migratory and seasonal agricultural workers, home health care workers, domestic workers, part-time workers, contractors, immigrant workers, and employees of small companies, are removed from exclusionary language.
5. State government agencies should ensure that employees who work for temporary and staffing agencies can receive benefits through requirements that contracting firms be held responsible for the failure of these agencies to carry workers' compensation policies.
6. State government agencies should increase their efforts to prosecute employers for failure to provide workers' compensation.
7. State governments should ensure that assessments of disability under workers' compensation occur through an evidence-based system that considers physical and mental impairments in the context of an individual worker's education and abilities and the available job market. Use of the American Medical Association's guidelines on evaluating permanent impairment does not meet this standard.
8. State governments must strengthen anti-retaliation protections for workers and make it

illegal for any worker to be retaliated against for filing a workers' compensation claim.

9. State governments should ensure that workers can select their own health care practitioner for medical treatment under workers' compensation.
10. State governments should ensure that workers' compensation systems do not require or approve employer-mandated post-injury drug testing unless there is a proven nexus between the incident and impairment. However, all work-related injuries must be compensated regardless.
11. State governments should repeal any language that apportions blame for injuries to workers unless there is an equal decrease in the scope of exclusivity that results in expansion of tort remedies.

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