On the question of federalization of workers’ compensation

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2017 Workers’ Compensation Midwinter Seminar and Conference - March 17, 2017
ABA Section of Labor and Employment Law & Tort, Trial and Insurance Practice Section

Introduction

Despite the title of this panel, federalization of workers’ compensation is unlikely to be in the cards in the next few years. In 2015 and 2016, President Obama’s Department of Labor attempted to raise concerns about the status of these state programs and initiated a conversation regarding the appropriateness of federal minimum standards. But it is not at all likely that President Trump’s Department of Labor will follow the same path.

In view of this, we return now to a conversation about what is happening in the states. This is not the first time in the history of workers’ compensation that federal standards were considered and then abandoned. The National Commission on State Workmen’s Compensation Laws issued consensus recommendations in 1972, including 19 “essential recommendations,” with a suggestion that federal intervention might be appropriate if states did not move toward compliance. In the wake of the National Commission’s Report, many states did, in fact, improve access to workers’ compensation benefits (both indemnity and medical) and raise weekly benefit levels. It became clear in the ensuing decades, however, that federal intervention would not occur, and this liberalizing trend was reversed. Since then, the pattern in many states has been to reduce access to benefits in order to lower costs for employers, with the hope of attracting more business development to the state. Thus has ensued a downward spiral in benefit adequacy in many – though certainly not all – states.

The following two excerpts are from a draft of an article that will be forthcoming in the Rutgers University Law Review later this year. The complete article will provide a full description of the history of U.S. workers’ compensation from 1900 to 2016; a review of external forces that have affected these programs; and an evaluation of the current status of workers’ compensation across the country. The excerpts here focus on the more recent historical period and on the failure of workers’ compensation to provide compensation to many workers injured or made ill by their work. These excerpts provide food for thought as we contemplate a world of workers’ compensation without federal intervention – and without a shared consensus regarding minimum standards.

The following are excerpts from the December 2016 draft of this paper:

… Recently, workers’ compensation emerged as a focus in discussions about workplace safety and treatment of workers: from scathing investigations by journalists of the current status and declining adequacy of the program;¹ to a call by ten U.S. Senators and Representatives for the U.S. Department of Labor to demonstrate renewed interest in the program;² to Department of Labor reports that focused on inequality caused by work injury and the inadequacies of the workers’ compensation system;³ to ad hoc gatherings of experts in self-styled “summits” to discuss the future of the program;⁴ to a national forum convened by the Department of Labor and the National Academy of Social Insurance to examine the status of the program;⁵ to the inclusion of occupational safety and compensation issues in current worker organizing efforts.⁶ …

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The political environment changed rapidly starting in 1980, and the trend toward expansion of benefits faded away... The likelihood of federal regulation of state-based

⁵ See https://www.dol.gov/asp/WorkersCompensationSystem.
compensation programs evaporated. Attacks on workers’ compensation heated up through the 1990s – and have continued unabated. The political strength of workers and their allies waned: private sector unions were declining steadily in membership, amid declining numbers of jobs in traditionally organized sectors. Meanwhile, costs of workers’ compensation were rising, fed by increasing benefits for workers, growing medical costs, and changes in the insurance market.

Compliance with the Commission’s essential recommendations slowed, and then states began to retreat from attempts to comply with the National Commission’s recommendations. By 2015, only seven states followed at least 15 of the recommendations, and four states were complying with less than half. Costs rose and interest rates declined; carriers applied for rate increases; insurance regulators attempted to hold back these increases in response to political pressure, largely from employers. Employers’ desire for reduced costs and carriers’ desire for rate adequacy –


MARJORIE L. BALDWIN AND CHRISTOPHER F. MCLAREN, WORKERS’ COMPENSATION: BENEFITS, COVERAGE AND COSTS, 2014 DATA, Figure 1 at 3 (National Academy of Social Insurance, October 2016). See also Barry Lipton & Karen Ayres, Workers’ Compensation Cost Drives Through the Years, in WORKERS’ COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? (Richard A. Victor & Linda L. Currubba, eds.) (2010) 21, 24 (noting that costs to carriers increased as benefits and claim frequency rose in the wake of the report of the National Commission, affecting the insurance market for workers’ compensation); Emily A. Spieler, Perpetuating Risk: Workers’ Compensation and the Persistence of Occupational Injuries, 31 Houston L. Rev 119, 152-54 (1994) (describing the changes in the insurance market generally, including the alarming growth of the residual market).

DOL Workers’ Compensation Report, supra note 3, Appendix B (studies by the Department of Labor showed average compliance in the states with the 19 essential recommendations of the Commission was only 6.79 in 1972 and grew to 12.10 in 1980; then compliance slowed, so that in 2004 the compliance rate was only 12.85.)


See Lipton & Ayres, supra note 9, at 24.

Id.

Id. at 27. See also, Robert J. Malooly, Workers’ Compensation Insurance Markets and the Role of State Funds, in WORKERS’ COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? (Richard A. Victor & Linda
neither a new phenomenon – became dominant political issues in states.\textsuperscript{15} Carriers pressed for the tightening up of compensability criteria.\textsuperscript{16} The stigmatization of claimants – similar to that of welfare recipients but now turned on people who were workers – grew.\textsuperscript{17}

Fears of business flight became an increasingly central political focus, although these concerns were certainly not new. The National Commission had concluded that the “specter of the disappearing of employer”\textsuperscript{18} was pure myth - and, in fact, there has never any persuasive evidence that workers’ compensation plays a significant role in business location decisions.\textsuperscript{19} This nevertheless became the leading justification for legislative decisions that cut benefits in order to cut costs. State legislators looked to the statutes of neighboring states to find whether their own system was “too generous” – and then amended their laws to match the less liberal provisions of their neighbors.\textsuperscript{20} Changes were made to basic components of the system in many states, reducing workers’ access to benefits and medical care.\textsuperscript{21} State after state enacted “reforms” that reduced the availability of cash benefits and access to claimant-chosen medical care.\textsuperscript{22}

A remarkable number of states have played this game, and the downward spiral has been inexorable. The number of states that cut availability of benefits significantly outnumbers those that have increased or maintained benefits in the period 2002 to 2014.\textsuperscript{23}

\textsuperscript{15} L. Currubba, eds.) (2010) 39,41 (noting that when states began to implement the recommendations of the National Commission, costs increased but workers’ compensation premium rates were tightly regulated by state insurance departments: “it is much easier politically to agree to raise benefits than to raise costs.”); McCluskey, supra note 7, at 691-97; Emily A. Spieler, Assessing Fairness in Workers’ Compensation Reform: A Commentary on the 1995 West Virginia Workers’ Compensation Legislation, 98 W. VA. L. REV. 23 (1995) (describing the particular history of rate-making in West Virginia, where insurance rates were reduced by one-third for political reasons without an actuarial basis, sending the monopolistic state fund into a downward spiral that ended with the elimination of the state fund and reductions in benefits between 1995 and 2005.)

\textsuperscript{16} Rate adequacy concerns could be addressed, in part, by deregulation of the workers’ compensation insurance market, and this was done in many states. Lipton & Ayres, supra note 9, at 27 (noting that approved rate levels were below actuarial indications, resulting in a growth in the residual insurance market, and destabilizing the workers’ compensation insurance market).

\textsuperscript{17} Id., at 29.

\textsuperscript{18} See Boden & Spieler, Workers’ Compensation in U.S. SOCIAL POLICY, supra note 7, at 461.

\textsuperscript{19} THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS 125 (1972) [hereinafter National Commission Report].

\textsuperscript{20} Evidence to the contrary, on the other hand, is available. See e.g. Timothy J. Bartik, Business location decisions in the United States: Estimates of the effects of unionization, taxes, and other characteristics of states, 3 J. BUS. & ECON. STATISTICS 14-22 (1985); Timothy J. Bartik, Small business start-ups in the United States: Estimates of the effects of characteristics of states, 1989 SOUTHERN ECON. J. 1004-1018 (1989); RA Erickson, Business climate studies: A critical evaluation, 1 ECON. DEV. QUARTERLY 62-71 (1987).

\textsuperscript{21} DOL Workers’ Compensation Report, supra note 3, at 13.

\textsuperscript{22} See Grabell & Berkes, Demolition, supra note 11 (providing a state by state analysis of legislative changes that impact benefits during the more recent period of 2002-2014)

\textsuperscript{23} Id.
This story was reported in comprehensive detail in “The Demolition of Workers’ Comp” by reporters Michael Grabell (ProPublica) and Howard Berkes (NPR) in 2015.

Many of these changes are insidious – they occur without being obvious to observers because they do not involve bright line changes such as a reduction in the weekly benefit rate paid to an injured worker. The changes vary from one state to another. Here are some examples:

- Some states have abandoned the liberal standard that was used to approach all questions of interpretation, including in individual claims. Historically, the majority of states, as well as the National Commission, endorsed a rule of liberality: all things being equal, the claimant would win. States have reversed this language, or instead adopted rules requiring that claimants win their cases by preponderance of the evidence – or, in some limited situations, by clear and convincing evidence.

- States have abandoned the long accepted rule regarding aggravation of pre-existing injuries. In the past, employers ‘took workers as they found them.’ This rule is being supplanted in one state after another with rules that require a worker to demonstrate that the workplace event was the “major contributing cause” - or

24 Id.
25 See DOL Workers’ Compensation Report, supra note 3, 13-19 (describing these statutory changes). These changes are also described in several other sources, see supra note 7.
26 No state has adopted all of these changes. References provide an example rather than an exhaustive list of states that have made or rejected these changes.
27 SAMUEL B. HOROVITZ, INJURY AND DEATH UNDER WORKMEN’S COMPENSATION LAWS (HOROVITZ ON WORKMEN’S COMPENSATION) (1944) (noting that “the great majority of state courts have taken the cue from the legislative mandate – the command of broad and liberal construction”) (emphasis in original). See also, National Commission Report, supra note 18, at 50-51 (“…. As the basic purpose of workmen’s compensation is to protect the employee, we believe in the traditional practice of resolving doubts in favor of the employee.) Some states have retained this standard. See e.g. E.I. Du Pont De Nemours v. Eggleston, 264 Va. 13, 17 (2002) (the “Act is remedial legislation and should be liberally construed in favor of the injured employee” citing Byrd v. Stonega Coke & Coal Co., 182 Va. 212, 221, 28 S.E.2d 725, 729 (1944)).
28 See e.g. Tenn. Code Ann. § 50–6–116 (workers’ compensation law shall not be remedially or liberally construed).
29 See e.g. W.Va. Code . § 23-4-1g (“For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution…. A claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.”).
30 For example, in Alabama in occupational disease claims involving gradual deterioration or cumulative physical stress disorders, claimants must prove their cases by clear and convincing evidence. Ala. Code §25-5-81(c); Williams v. Union Yarn Mills, Inc., 709 So.2d 71 (Ala. Civ. App. 1998).
equivalent language - to the disability. 32 Workers who cannot meet this standard are excluded from obtaining benefits – despite the fact that it was the workplace injury that precipitated the inability to continue to work. These workers are sometimes also dually excluded: unable to obtain compensation, but also barred from bringing negligence actions.33 This essentially nullifies, for these workers, the generally accepted historical rule that if an injury is not covered by workers’ compensation, the worker retains the right to bring a tort action.34

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32 See e.g. Mo. Ann. Stat. § 287.020 (“In this chapter the term ‘injury’ is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. ‘The prevailing factor; is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.”); Or. Rev. Stat. Ann. § 656.005 (“If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition.”); Fla. St. § 440.09 (“...the accidental compensable injury must be the major contributing cause of any resulting injuries.”).

33 Generally, injuries that are clearly excluded from workers’ compensation are not covered by the limitation on negligence actions. For example, states that have excluded “mental-mental” claims have allowed litigation outside of workers’ compensation for these claims. See e.g. Stratemeier v. Lincoln Cty., 276 Mont. 67, 71 (1996). The question posed by the issue of dual denial in cases involving aggravation – where there is no explicit exclusion of the injury by type – has drawn more controversy. According to John F. Burton, Jr., states that have implemented this heightened standard (including “major contributing cause” or “primary cause”) include Illinois, Missouri, Kansas, Oklahoma, Tennessee, Oregon, Oklahoma and Florida; it is currently under consideration in Illinois. Email from John F. Burton, Nov. 15, 2016, 11:16 a.m. Note that this is a partial list.

Challenges have been brought to these limitations when they leave workers with no remedy, but their success has been mixed. The history in Oregon is emblematic of this. See Smothers v. Gresham Transfer, Inc., 332 Or. 83 (2001). Smothers was a response to a 1995 legislative change that extended exclusive remedy to situations in which the worker’s underlying health condition was aggravated by workplace exposures; under the amended statute, the condition was deemed not compensable, but nevertheless covered by the expansive tort immunity for employers. The Oregon Appeals Court again held that an employee was constitutionally entitled, under the remedy clause, to proceed with negligence claims in 2013. Alcutt v. Adams Family Food Servs., Inc., 258 Or. App. 767 (2013). The constitutional premise underlying Alcutt and Smothers was overruled in May 2016 in Horton v. Oregon Health & Sci. Univ., 359 Or. 168 (2016), a medical malpractice case. But the Oregon legislature had already acted to ensure that workers denied workers’ compensation could pursue negligence claims. See OR. REV. STAT. ANN. § 656.019(1)(a) (West 2001) (“An injured worker may pursue a civil negligence action for a work-related injury that has been determined to be not compensable because the worker has failed to establish that a work-related incident was the major contributing cause of the worker's injury only after an order determining that the claim is not compensable has become final.”).

Litigation in other states has been variable. E.g. compare Gillispie v. Estes Exp. Lines, Inc., 361 P.3d 543 (Okla. Civ. App. 2015) (claimant appealed administrative order that he had no compensable injury because he had a previous injury to the same part of the body; held that an aggravation of a pre-existing condition is a new injury and therefore compensable) and Bias v. Eastern Associated Coal Corp., 220 W. Va. 190; 640 S.E.2d 540 (2006) (holding that an employer cannot be sued, despite the fact that there was no remedy under the state’s workers’ compensation law for mental-mental claims).

34 See 9-100 Larson's Workers' Compensation Law § 100.04 (2015) (“employer should be spared damage liability only when compensation liability has actually been provided in its place) See also J.T.W., Workmen's compensation act as exclusive of remedy by action against employer for injury or disease not compensable under act, 121 A.L.R. 1143 (Originally published in 1939) (noting “workers’ compensation acts did not constitute an exclusive remedy so as to bar an action at common law, or under a statute, to recover for an injury or disease which was not compensable under the act.”)

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States are taking a similar approach to injuries that may be partially attributable to aging, with equivalent results.\(^{35}\)

Other states have moved to apportionment between the work and non-work-related impairment. For example, in California, a physician must indicate what percentage of the impairment is attributable to the work event; the rest of the impairment is excluded from consideration for benefits.\(^{36}\) Similarly, in Kansas, awards are reduced “by the amount of functional impairment determined to be preexisting,”\(^{37}\) and the Wisconsin Worker’s Compensation Act that took effect on March 2, 2016, requires physicians to apportion permanent disability ratings between the percentage caused by a work injury and the percentage attributable to other factors.\(^{38}\)

Some states simply fail to compensate specific (common) conditions, including musculoskeletal injuries resulting from cumulative trauma and mental health claims resulting from stress.\(^{39}\)

Second injury funds, initially developed to assist in the employment of disabled veterans after World War II, have been closed.\(^{40}\) The underlying justification for

\(^{35}\) See e.g. Wyo. Stat. § 27-14-102(a)(xi)(an injury does not include any “injury resulting primarily from the natural aging process or from the normal activities of day-to-day living, as established by medical evidence supported by objective findings”).

\(^{36}\) See Cal. Lab. Code § 4663-§ 4664 (evaluating physician “shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries” and “employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.”)


\(^{39}\) See RAMONA P. TANABE, WORKERS’ COMPENSATION LAWS AS OF JANUARY 1, 2016, at 52-55, Table 9 (Workers’ Compensation Research Institute 2016) (annual report providing detailed information regarding state laws, building on work done by the U.S. Department of Labor, which suspended production of the report after January 1, 2006, and now prepared by the Workers’ Compensation Research Institute in partnership with the International Association of Industrial Accident Boards and Commissions (IAIABC); here showing coverage for mental stress, cumulative trauma, hearing loss and disfigurement and demonstrating that 14 states do not compensate claims in which the harm is caused by stress or other non-physical injuries resulting in mental health claims, generally referred to as mental-mental claims); 4-56 Larson’s Workers’ Compensation Law § 56.04D (2015) (noting that mental-mental claims are commonly excluded from compensation.) After the Virginia court excluded job-related impairments resulting from cumulative trauma caused by repetitive motion as a matter of law from compensability, Stenrich Grp. v. Jemmott, 251 Va. 186 (1996), the legislature amended the state statute to require proof by clear and convincing evidence rather than preponderance of the evidence. Tanabe, supra Table 9, note 22.

these funds was that the cost of the pre-existing impairment should not be added to the responsibility of the newly hiring employer.\footnote{The Report of the National Commission on State Workmen’s Compensation Laws 83-84 (1972) [hereinafter National Commission Report].} When combined with the adoption of ‘major contributing cause’ standards, workers with preexisting conditions are more likely to be shut out of the workers’ compensation system entirely.

- Various rules that are designed to put the onus of the injury onto the worker have been devised and codified: some states require or strongly encourage post-injury drug testing;\footnote{See e.g. Fla. Stat. Ann. § 440.102 (Drug-free workplace program requirements creating incentives for employers to adopt drug testing programs by offering discounts on insurance premiums; including within the definition of “reasonable suspicion” that will justify performing a drug test that an employee has “been involved in an accident while at work”; and allowing employers to deny medical and indemnity benefits if an injured worker tests positive for a drug. Compare Grammatico v. Industrial Comm’n, 211 Ariz. 67 (2005) (finding that the Arizona drug-free policy introduced fault into the compensation and holding the Ariz. Rev. Stat. § 23-1021 unconstitutional to the extent it imposed a restriction on access to benefits guaranteed under the Arizona state constitution, Art. 18, § 8).} others encourage workplace policies that may result in selective enforcement of safety policies if a worker is injured.\footnote{See e.g. Tenn.Code Anno. § 50-6-110(a)(1) (exclusion if worker deliberately violates a safety rule). The problem is not that employers want to enforce safety rules; rather, the problem arises when a safety rule is not regularly enforced, but is used in a manner that targets workers who are injured and apply for compensation.} Some of these provisions are not new. These kinds of policies are likely to have the effect of discouraging workers from reporting injuries or filing claims.\footnote{See Alison D. Morantz & Alexandre Mas, Does Post-Accident Drug Testing Reduce Injuries? Evidence from a Large Retail Chain, 10 (2) AM.LAW & ECON. REV. 246-302 (2008), available at http://ssrn.com/abstract=1318092 or http://dx.doi.org/ahn012 (finding that claims are reduced when post-accident drug testing is implemented and “we find some ‘circumstantial evidence’ that a portion of the observed decline could be caused by employees’ reduced willingness to report workplace accidents.”)} They also strengthen and expand policies that focus on worker-fault, damaging the basic no-fault principles built into the workers’ compensation scheme.\footnote{See 3-32 Larson's Workers' Compensation Law § 32.01 (2015) (explaining the basic rule that ‘employee fault of any character is irrelevant’ but noting that some statutes have allowed a defense based on “wilful failure to use safety devices or violation of law”).}

- Permanent partial disability benefits are increasingly linked to impairment evaluations performed with use of one of the recent editions of the AMA Guides to the Evaluation of Impairment.\footnote{Robert D. Rondinelli et al., AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (2012) (latest edition of the Guides). See also Tanabe, supra note 39, at 37-44, Table 6 (showing that a total of 30 jurisdictions mandate use of the AMA Guides; of these, 21 jurisdictions specify use of the 5th or 6th edition or the most recent edition).} The use of the Guides as a tool to evaluate
permanent partial disabilities is controversial and has been shown to lead to reductions in cash benefits for workers.

- The duration of temporary total disability has been limited to a specific number of weeks, without regard to whether the injured worker has reached maximum medical improvement or is able to return to work. According to a 2016 report from the U.S. Department of Labor, employers in some states are actually forbidden to provide longer benefits even if they are willing, under threat of audit and fine.

- Requirements to qualify for disability benefits have become increasingly stringent, and these benefits are often cut off at retirement age despite the fact

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48 ROBERT MOSS, DAVID MCFARLAND, CJ MOHIN & BEN HAYNES, IMPACT ON IMPAIRMENT RATINGS FROM SWITCHING TO THE AMERICAN MEDICAL ASSOCIATION’S SIXTH EDITION OF THE GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, 3 (July 2012), available at https://www.ncci.com/Articles/Documents/II_Impact_of_AMA_Guides.pdf (In a study of claims in Kentucky, Georgia, Montana, Tennessee, and New Mexico, all states that transitioned from the Fifth to the Sixth editions of the Guides without any other legislative or procedural changes, the National Council on Compensation Insurance (NCCI) found in a report, “For the states studied, a decrease in the average impairment rating is observed in the years immediately after the implementation of the sixth edition.” An earlier study looked at the relationship between impairment ratings and economic loss under a prior edition of the AMA Guides. Sandra Sinclair & John F. Burton, Jr., *Development of a Schedule for Compensation of Noneconomic Loss: Quality-of-Life Values vs. Clinical Impairment Ratings*, in RESEARCH IN CANADIAN WORKERS’ COMPENSATION 123-140 (Terry Thomason & Richard P. Chaykowski, eds. 1995).

49 See Tanabe, *supra* note 39, Table 4 (showing that at least eight states limit temporary total disability benefits to a specified number of weeks). But see 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 held unconstitutional, 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).


51 See Tanabe, *supra* note 39, at 27-31, Table 5 (showing age cutoffs at 75 in Florida, 67 in Minnesota with a rebuttable presumption of retirement, at retirement in Montana and North Dakota, limited to 15 years or until claimant reaches retirement whichever is longer in Oklahoma, until 70 in West Virginia, until Social Security retirement eligibility or for 260 weeks if the date of injury is after age 60 in Tennessee; and also showing the following jurisdiction with length limitations: 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).] As noted elsewhere in this article, the duration limitations on permanent total disability are likely to result, for some people, to an application for Social Security Disability Insurance benefits.
that the worker’s retirement savings or pension would have been reduced as a result of his or her time away from work. Notably, permanent total disability benefits are rare in workers’ compensation.\textsuperscript{52}

- Strict limits have been put on attorneys’ fees for claimants, despite the increasing complexity of the litigation.\textsuperscript{53} Not surprisingly, these provisions are being challenged aggressively.\textsuperscript{54}

- Multiple efforts have been made to contain medical costs that restrict claimant choice of physician, set specific rules regarding treatment modalities, and create roadblocks through utilization review for prompt delivery of medical care.\textsuperscript{55} Workers’ primary care doctors are mistrusted and often excluded as a result of increasing levels of requirements of expertise in evaluation of injuries. In truth, some of these changes were designed to reduce costs and improve the quality of care; costs have continued to escalate\textsuperscript{56} and injured workers and their lawyers complain consistently about the problems with the delivery of care.

- Growing requirements for “objective” medical evidence,\textsuperscript{57} undoubtedly fueled in part by the development of new diagnostic techniques, have resulted in rejection

\textsuperscript{52} Baldwin & McLaren, \textit{supra} note 9, at 9.

\textsuperscript{53} See Tanabe, \textit{supra} note 39, at 79-85, Table 14 (showing the fee formulae for all jurisdictions; 16 states limit the fee to 25\% or less of the award to the claimant).

\textsuperscript{54} These provisions have been held unconstitutional in at least two states. Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016); Injured Workers Ass’n of Utah v. State, 374 P.3d 14 (Utah 2016). The National Council on Compensation Insurance (NCCI), a national rating bureau, is proposed a large rate increase for employers’ insurance as a result of the decision in Florida. See \url{http://www.insurancejournal.com/news/southeast/2016/07/05/418940.htm}. On November 23, 2016, a trial court has just ruled this proposal inadequately transparent under the Florida ‘sunshine law.’ Michael Moline, Judge voids 14.5 percent workers’ comp rate increase, available at \url{http://floridapolitics.com/archives/227843-workers-comp?utm_content=buffer50399&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer}.

\textsuperscript{55} See Tanabe, \textit{supra} note 39, Table 3 (showing medical benefits and method of physician selection). \textit{See also} Richard A. Victor, Peter S. Barth & David Neumark, \textit{The Impact of Provider Choice on Workers’ Compensation Costs and Outcomes}, Workers’ Compensation Research Institute (2005) (workers’ satisfaction rates were higher with similar perceived recovery of physical health when workers selected physicians; costs were generally higher and return-to-work outcomes poorer when the worker selected the provider, where return-to-work outcomes were measured by one month duration).

\textsuperscript{56} See Baldwin & McLaren, \textit{supra} note 9, at 5 and Figure 3 (showing the continuing escalation of medical costs in workers’ compensation).

\textsuperscript{57} See e.g. Fla. Stat. Ann. § 440.09 (“The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings.”); Mont. Code Ann. § 37-71-116 (“Objective medical findings” means medical evidence, including range
of claims for common and debilitating injuries, including back injuries. Insurance carriers, physicians and administrators distrust claims involving soft tissue injuries that involve pain and restricted movement but may not be visible through visible measurable findings. These injuries are also particularly prone to exclusion under the major contributing cause standard given the common nature of spinal and other abnormalities, particularly in aging workers.

- States enacted enhanced fraud provisions, particularly focused on potential worker fraud in the 1990s.\(^\text{58}\) And this focus on worker fraud spawned a new industry of video surveillance, watching workers at home to ascertain whether they are engaging in activities that might be inconsistent with their claimed level of disability.

- Although disfavored by the National Commission, settlement of claims has now become ubiquitous. All but seven states allow agreements that fully settle claims, irrespective of the severity of the disability; several states have authorized settlements since 1990.\(^\text{59}\) These lump sum settlements cut off future benefits, may not provide sufficient funds to replace lost earnings, and generally eliminate any right of the injured worker to return to work with the pre-injury employer.\(^\text{60}\)

- The number of states with exclusive state funds has declined. The only remaining monopolistic funds are maintained in Ohio, North Dakota, Washington and Wyoming. While the exclusion of private carriers is undoubtedly controversial, the conversion to private insurance was generally opposed by trade unions and is

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\(^\text{58}\) See Boden & Spieler, Workers’ Compensation in U.S. SOCIAL POLICY, supra note 7, at 462-62.

\(^\text{59}\) See DOL Report on Workers’ Compensation, supra note 3, at 18 (noting “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). See also David Torrey, Commentary on and Analysis of Compromise and Release Agreements under State Workers’ Compensation Laws, 42(2) IAIABC J. 91-118 (Fall 2005); David Torrey, Commentary on and Analysis of Compromise and Release Agreements under State Workers’ Compensation Laws (Part Two), 43(1) IAIABC J. 73-114 (Spring 2006). Currently, settlements in all states 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.

\(^\text{60}\) As noted by the DOL Report on Workers’ Compensation, supra note 3, at 18, studies have shown that workers may feel pressured to enter into settlement agreements; that this is particularly true for workers of lower socio-economic status; and that settlements tended to yield lower benefits in claims than were received without settlements. See JAMES N. MORGAN, MARVIN SNIDER, MARION G. SOBOL, LUMP SUM REDEMPTION SETTLEMENTS AND REHABILITATION: A STUDY OF WORKMEN’S COMPENSATION (2013); Terry Thomason, John F. Burton Jr., Economic effects of workers’ compensation in the United States: Private insurance and the administration of compensation claims, 11(1)(Part 2) J. LABOR ECON. ___ (1993); MONICA GALIZZI, LESLIE I. BODEN, T.C. LIU, THE WORKERS’ STORY: RESULTS OF A SURVEY OF WORKERS INJURED IN WISCONSIN, WCRI WC-90-5, xvii (1998) (finding that workers whose claims were settled had the worst outcomes, were more likely to work in lower wage, nonunion, temporary, physically demanding and service sector jobs); EARL F. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT (1961).
illustrative of the declining political power of the unions in states such as West Virginia, which moved to a private insurance system in 2005.

This is just a partial list. As of this writing, legislation that would reduce the availability of benefits are pending or proposed in state legislatures around the country.61

Many of these changes are directly contrary to the essential recommendations that were made in 1972 by the National Commission. Not surprisingly, total benefits paid to workers have been declining steadily.62 While complex changes in work and safety may also contribute to this decline, there is little doubt that these statutory changes are one cause.63 Meanwhile, the workers’ compensation line of insurance is becoming more profitable.64 In Texas, following 2005 legislative changes, insurers hit their highest profit margins in eight years, and employers are flocking back into the only remaining elective workers’ compensation system.65

61 See e.g. Matt Dietrich, Illinois, Indiana work comp law: Same words, different results, Politifact Illinois (Dec. 19, 2016), http://www.politifact.com/illinois/statements/2016/dec/19/david-menchetti/illinois-indiana-work-comp-law-same-words-differen (Governor Bruce Rauner of Illinois has proposed a compensability standard under which benefits would not be granted unless the workplace is more than 50 percent responsible for the injury compared to all other causes, after suggesting that he was following Indiana’s lead on this issue).

62 See Baldwin & McLaren, supra note 9, Figure 1 at 3 and Figure 2 at 4. Total workers’ compensation benefits per $100 of payroll declined from $1.65 in 1990 to $0.91 in 2014. 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, declining to $0.45 in 2014. Id. Note that benefits per $100 of payroll may not be a good measure of benefit adequacy, as this number will 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.

63 A number of researchers have found that these legislated changes have had an impact on the availability of benefits, irrespective of changes in the economy and labor market. See e.g. Terry Thomason and John F. Burton, Jr., The effects of changes in the Oregon workers’ compensation program on employees’ benefits and employers’ costs, 1(4) WORKERS’ COMPENSATION POLICY REV (2001) 7–23 (changes in the Oregon statute reduced the number of claims by 12–28% and benefits by 20–25% between 1987 and 1996); Leslie I. Boden and John W. Ruser, Workers' Compensation 'Reforms,' Choice of Medical Care Provider, and Reported Workplace Injuries, 85(4) REV. ECON. & STATS. (2003) 923–929 (compensability restrictions accounted for 7-9% of the decline in DART injuries reported to BLS in 1991-97); Xuguang (Steve) Guo and John F. Burton, Jr., Workers’ Compensation: Recent developments in moral hazard and benefits payments, 63 (2) IND. LAB. REL. REV. 340–354 (2010) (changes in eligibility rules explain more of the decline in cash benefits during the 1990s than the decline in the BLS injury rate).

64 See NCCI STATE OF THE LINE GUIDE, https://www.ncci.com/Articles/Documents/II_AIS-2016-SOL-Guide.pdf (showing that in 2015 the workers compensation combined ratio for private carriers declined 6 percent from 2014 to to 94%—an indicator of improved profitability of the insurance line; also showing that lost-time claims declined, indemnity costs increased by one percent, and medical costs decreased by one percent).

65 See Texas Department of Insurance, Div. of Workers’ Compensation, Biennial Report to the 85th Legislature (Dec. 2016), http://www.tdi.texas.gov/reports/dwe/documents/2016dwebienlrpt.pdf (noting that the legislative changes in 2005 led to reduced costs per claim, lower insurance premiums and higher employer participation for employers opting in to the state workers’ compensation system, and attributing much of this to the substantial reduction in reported injuries in the same time period and the aggressive management of medical care and costs as a result of the 2005 amendments).
The statutory changes also have troubling secondary effects. For example, the evidentiary requirements, when combined with exclusions or apportionment for preexisting conditions and increasing diagnostic and evaluative criteria together lead inevitably to more and more complex litigation. Proof of expertise is required, and Daubert standards, originally designed to decide what evidence should be heard by a jury, are now used in workers’ compensation administrative processes.

But the most disturbing legislative development – from the vantage point of benefit adequacy and fairness – 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” while retaining immunity from tort. Employers who chose the opt-out option were allowed to design their own benefits and their own review process, leaving very narrow review 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.” The early elective systems – like the Texas opt-in system today – required employers to choose between tort liability and workers’ compensation coverage. Oklahoma offered an opt-out with tort immunity. Noting the discrepancy in rights, the Oklahoma Supreme Court found the statute to be unconstitutional.

67 Some states now apply the rules for qualification of experts who testify before juries in civil cases that were 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).
69 For a thorough discussion of these plans, see Michael Grabell & Howard Berkes, Inside Corporate America’s Campaign to Ditch Workers’ Comp (October 14, 2015), https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp
70 Id.
71 Although for several years in Texas, companies that did not opt in to the workers’ compensation system required their new employees to sign pre-injury agreements waiving their right to sue their employer if they were injured and agreeing to accept insurance offered by the employer outside of workers’ compensation; this was no doubt a model for the Oklahoma statute. See Lawrence v. CDB Servs., Inc., 44 S.W.3d 544 (Tex. 2001) (allowing voluntary pre-injury employee elections to participate in nonsubscribing employees’ benefit plans in lieu of exercising common-law remedies does not violate public policy). Ten weeks after the decision in Lawrence, the Legislature amended the state Labor Code to prohibit pre-injury waivers, Tex. Lab Code Ann. § 406.033(c); the new statute was cited as authority abrogating Lawrence in Storage & Processors, Inc. v. Reyes, 134 S.W.3d 190, 192 (Tex. 2004). According to one investigative report, however, many large meat and poultry companies, such as Tyson Foods, Cargill and Pilgrim’s Pride, continued to use post-injury waivers. See Grabell & Berkes,Inside Corporate America, supra note 69.
72 Vasquez v. Dillard’s, Inc., 381 P.3d 768 (Okla. 2016). In a 7-2 decision, Justice Watt wrote for the majority: “The core provision of the Opt Out Act, 85A O.S. Supp. 2015 §203 creates impermissible, unequal, disparate treatment of a select group of injured workers. Therefore, we hold that the Oklahoma Employee Benefit Injury Act, 85A O.S.
The opt-out plans could have been generous and provided better benefits and more protection to workers. But that was not what happened. The plans that were adopted – largely developed by and hyped as great successes by their vendor, PartnerSource, and its President, Bill Minick – were not covered by state law provisions that forbid retaliation for filing claims. Provisions in these plans included the following: requirements for 24 hour or end of shift reporting of injuries for an injury to be considered compensable; cut off of benefits if the employee is no longer employed (and a specific right to discharge if the employer believes the worker has violated a safety rule, reviewable only through employer-controlled arbitration processes); medical review performed only by reviewers selected by the plan; cut off of medical treatment after a set period of time; specific limitations on treatments or costs of treatments; requirements that workers allow employer representatives to accompany them when they visit the plan-selected physicians; exclusion of conditions that might be common in the particular workplace.

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2014 §§201-213, is an unconstitutional special law under the Oklahoma Constitution, art.2, §59.” The decision was scathing with regard to the nature of the plans: “the clear, concise, unmistakable, and mandatory language of the Opt Out Act provides that, absent the Act’s express incorporation of some standards, such employers are not bound by an provision of the Workers’ Compensation Act for the purpose of: defining covered injuries; medical management; dispute resolution or other process; funding; notices; or penalties…This Court has previously made it clear we will not accept the invitation of employers to find a discriminatory state statute constitutional by relying on the interests of employers in reducing compensation costs.” The challenges to the Oklahoma 2014 law are largely due to the extraordinary energy of one lawyer, Bob Burke, who had previously served as Commerce Secretary for the State of Oklahoma and as Chairman of the Fallin Commission on Workers’ Compensation Reform in the 1990s. See http://bobburkelaw.net/about_us/as_an_attorney.


74 The Oklahoma general workers’ compensation act prohibits retaliation against workers for filing workers’ compensation claims, 85A O.S. Supp. 2015 §7, and, under the general workers’ compensation law, benefits would survive after the employment relationship ends. In contrast, this provision was not included in the Opt Out Act, Oklahoma Employee Injury Benefit Act, Okla. Stat. Ann. tit. 85A § 200 et seq., which in fact permits qualifying employers to adopt plans that terminate an employee’s benefits when the individual’s employment ends. This was true in Dillard’s plan that was the specific focus of the recent case, see supra note 72. But see Nesvold v. Tulsa Promenade LLC, Case No. CJ-2016-2223, District Court for Tulsa County, State of Oklahoma, Oct. 16, 2016 (creating a common law cause of action when a plaintiff alleges retaliation for filing for workers’ compensation benefits).

75 Not all of these provisions are in every one of the plans. Note that the Oklahoma opt-out plans, and the non-participating employer plans in Texas, are very similar. The Texas plans are described in Alison D. Morantz, 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

76 Moreover, according to Grabell & Berkes, Inside Corporate America, supra note 69, “[i]n many cases, ProPublica and NPR found, the medical director charged with picking doctors and ultimately reviewing whether injuries are work-related is Minick’s wife, Dr. Melissa Tonn, an occupational medicine specialist who often serves as an expert for employers and insurance companies.”

77 Such as exclusion of bacterial infections in a large chain of assisted living facilities. Id.
arbitration as the preferred mechanism for dispute resolution, with employer control of the arbitration process. 78

Proponents called the plans “ERISA plans,” suggesting that state law would be preempted under the Employee Retirement Income Security Act’s broad preemption of state regulation of employee benefit plans; they would thereby escape the state’s regulatory reach. 79 But a federal court concluded that ERISA preemption does not apply, remanding cases to the state courts. 80 and, as noted above, the Oklahoma Supreme Court found the law to be unconstitutional on September 13, 2016. 81 Other provisions of the 2013 law have also been successfully challenged. 82

Not surprisingly, the plans that are designed outside the traditional workers’ compensation system save employers a lot of money. 83 Their success is touted: not only are they cheaper, according to Minick, but they exhibit shorter “average duration of

78 For a very careful review of the opt-out system, prepared for the IAIABC, see GREGORY KROHM, UNDERSTANDING THE OPT-OUT ALTERNATIVE, prepared for the IAIABC Board of Directors, April 18, 2016, available at //C:/Users/e.spieler/Downloads/Understanding-the-Opt-Out-Alternative_06-03-2016_Final.pdf (also comparing the proposed opt out legislation in Tennessee and South Carolina to the enacted legislation in Oklahoma).

79 ERISA, 29 U.S.C.A. § 1144, provides that ERISA supersedes all state laws insofar as they relate to any employee benefit plans but exempts any employee benefit plan “maintained solely for the purpose of complying with applicable workmen’s compensation laws or unemployment compensation or disability insurance laws.” 29 U.S.C. § 1003(b)(3). The question here is whether the opt-out plans are plans that fit within this savings clause. For a more detailed discussion of this issue, see Michael C. Duff, Worse Than Pirates or Prussian Chancellors: A State’s Authority to Opt-Out of the Quid Pro Quo, 17 MARQ. BEN. & SOC. WEL. L. REV. 123 (2016). Note that all state regulation would be preempted, raising the perplexing question of why proponents thought that the enabling statute that defined these opt-out plans would survive an ERISA preemption challenge.

80 See e.g. Vasquez v. Dillard’s Inc., No. CIV 15-0861-F, 2015 WL 9906300, at *2 (W.D. Okla. Sept. 30, 2015) (“The court concludes that the OIEBA is part of Oklahoma's statutory scheme governing occupational injuries and workplace liability; in other words, the OIEBA is part of Oklahoma's statutory scheme governing workmen’s compensation. The court further concludes that this action arises under the workmen's compensation laws of Oklahoma. Accordingly, 28 U.S.C. § 1445(c) makes this action nonremovable. The fact that the plan under which plaintiff claims may be (and is presumed to be, for present purposes) an ERISA plan, does not change these conclusions. Judge Joe Heaton reached the same conclusions in Davina Cavazos v. Harrah Nursing Center, CIV 15–0366–HE. That action, like this one, was a removed action in which the employer contended it had elected to be exempt from the Oklahoma Administrative Workers' Compensation Act …”).


82 See e.g. Torres v. Seaboard Foods, LLC, 373 P.3d 1057 (Okla. 2016), as corrected (Mar. 4, 2016) (180 day predicate for cumulative trauma claims held to violate due process requirements); Maxwell v. Sprint PCS, 369 P.3d 1079 (Okla. 2016) (scheduled members are exempt from the AMA Guides, and permanent partial disability deferral provision of Workers’ Compensation Act was an unconstitutional violation of due process under Oklahoma Constitution); Carluck v. Workers’ Comp. Comm’n, 324 P.3d 408 (Okla. 2014) (adjudication of claims for injuries occurring prior to February 1, 2014, are governed by the law in effect at the time of the injury).

83 See Morantz, Rejecting the Grand Bargain, supra note 75. See also Krohm, supra note 78.
disability, and both the initial and sustained return to work rates are much higher.”84 But
the only data available to assess his claims comes from PartnerSource.85 Moreover, critics
suggest that these findings, if true, may result from the cutting off of benefits, resulting in
highly problematic outcomes for workers and, potentially, transfer of costs to other
programs.86 No study by researchers unconnected with PartnerSource regarding the
outcomes for workers has been done.

Opt-out approaches similar to the Oklahoma law are being promoted by the Association
for Responsible Alternatives to Workers’ Compensation (ARAWC),87 a membership
organization in which the senior executives come from Walmart, Nordstrom, Lowe’s and
other large employers.88 The ‘opt-out solution’ has been proposed in other states, but has
not yet advanced to full consideration anywhere.89 Opposition to this approach has been
voiced broadly, creating remarkable unanimity among insurers, rating bureaus, some
employers, claimants’ attorneys, unions and advocates for injured workers.90

The clamor to turn the clock back to an elective system is not limited to the Oklahoma
opt-out scheme, however. Developments in Florida in 2016 are instructive. Cutbacks in
the availability of benefits led to litigation challenging the basic reasonableness of the
system.91 Legislation substantially cut the availability of claimants’ attorney fees,92 thereby reducing the likelihood that claimants would have effective representation on
claims. The Florida Supreme Court found this restriction to be unconstitutional.93 Almost
immediately, the National Council on Compensation Insurance announced the need for
substantial insurance rate increases, and these were approved by the Florida Office of

84 See Bill Minick, Cost Shifting: Candy Stores and Scapegoats, Risk & Insurance, June 15, 2016,
85 Grabell & Berkes, Inside Corporate America, supra note 69.
86 Id.
87 See http://araworkers’compensation.org/
88 Grabell & Berkes, Inside Corporate America, supra note 69.
89 As of the time of this writing, opt-out had been introduced in Tennessee and South Carolina but had not advanced
out of committee. Information provided to author by Malcolm Crosland, Jr., Chair, Opt-Out Taskforce, Workplace
Injury Litigation Group, May 4, 2016. See Gloria Gonzalez, Proponents say workers comp opt-out could make a
comeback, BUSINESS INSURANCE, Dec. 13, 2016,
http://www.businessinsurance.com/article/20161213/NEWS08/912310956/Proponents-say-workers-comp-opt-out
could-make-a-comeback/
90 For example, at the annual meeting of the Workers’ Compensation Research Institute, held March 20–11, 2016, in
Boston, Massachusetts, speakers from the Property Casualty Insurers Association of America, the American
Insurance Association, and the Workplace Injury Litigation Group all raised serious concerns about this approach to
workplace injury compensation. (author was present at this meeting)
91 See e.g. Stahl v. Hialeah Hosp., 160 So. 3d 519 (Fla. Dist. Ct. App.), reh’g denied (Apr. 14, 2015), review granted,
182 So. 3d 635 (Fla. 2015), and review dismissed, 191 So. 3d 883 (Fla. 2016), and cert. denied, No. 16-98, 2016
WL 3937154 (U.S. Oct. 31, 2016) 016
93 See Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016)
Insurance Regulation, litigation was brought challenging the rate increases, and a bill was written that would make workers’ compensation coverage elective for employers. As of the time of this writing, the bill has not yet been introduced and the litigation is pending.

Meanwhile, other litigation that challenges the constitutionality of restrictive workers’ compensation provisions appears to be increasing. For the first time, the exclusion of farmworkers from workers’ compensation coverage was successfully challenged in New Mexico. Statutory fee limits for claimants’ attorneys have been rejected on constitutional grounds in Utah, as well as Florida. Limits on duration of temporary benefits were thrown out in Florida as well. A 180 working days requirement before qualifying for benefits for carpal tunnel syndrome did not pass due process muster in Oklahoma. A case is pending attacking the California statute on gender-bias grounds.

The year of 2016 has now been described by one workers’ compensation expert as the year of ‘equal justice under the law.’ It is possible that the pendulum has indeed now

94 See “It’s Official: Florida Workers’ Comp Rates Going Up Nearly 15%,” Insurance Journal, Oct.11, 2016, http://www.insurancejournal.com/news/southeast/2016/10/11/428955.htm. Note that attorneys’ fees are generally taken from awards to claimants; this is not a fee-shifting statute. Any increase in rates would assume that larger awards would be won by claimants if there was better compensation for their attorneys.
95 See “Judge Halts Florida’s 14.5% Workers’ Compensation Hike Set for Dec. 1,” Insurance Journal, Nov. 27, 2016 (“A Florida circuit judge has blocked a 14.5 percent workers’ compensation rate increase due to go into effect Dec. 1 after finding that the insurers’ rating organization and state officials did not comply with the state’s Sunshine Laws and open meeting requirements in setting the new rate.”). This ruling is under appeal as of this writing. See “Florida Appeals Judge’s Order Halting 14.5% Workers’ Comp Rate Increase” Insurance Journal Nov. 29, 2016. [NOTE to Rutgers students - this will need to be updated before publication]
96 See https://ww3.workcompcentral.com/fileupload/uploads/2016-12-08-023010FL%20new%20bill%20to%20allow%20opt%20out.pdf. As of 12/21/2016, this bill has not been introduced.
97 Rodriguez v. Brand W. Dairy, 378 P.3d 13, 22 (N.M. 2016) (applying a rational basis equal protection test, the New Mexico Supreme Court concluded “that there is no unique characteristic that distinguishes injured farm and ranch laborers from other employees of agricultural employers, and such a distinction is not essential to accomplishing the Act's purposes.”). Compare Haney v. N. Dakota Workers Comp. Bureau, 518 N.W.2d 195 (N.D. 1994) (rejecting an equal protection challenge to the exclusion of farmworkers in North Dakota).
98 Injured Workers Ass’n of Utah v. State, 374 P.3d 1057 (Okla. 2016), as corrected (Mar. 4, 2016) (180-day requirement imposes predicate for filing a cumulative trauma claim, and violated due process as applied to claimant.)
100 Thomas A. Robinson, The Year of Equal Justice and Due Process, THE WORKCOMP WRITER, NOV. 4, 2016, available at http://www.workcompwriter.com/the-year-of-equal-justice-and-due-process (reviewing the state constitutional law decisions of 2016 and noting that equal justice under the law “more or less encapsulates the common thread that seems to wind its way through all the important 2016 court decisions” and asking, rhetorically, “Can state legislatures—often at the bidding of well-heeled employers—carve out special laws that eat away at the original workers’ compensation bargain and yet continue to provide immunity from suit for employers?”)
swung too far away from a commitment to adequacy of benefits, at least from the point of view of some courts. With the increasingly low likelihood of federal intervention, it is likely that state court challenges will continue.

In many states, this shift is likely to be a reflection of the dramatically declining strength of the union movement. Much as income levels have reflected union density over time, the degree of union density is largely correlated with the adequacy of workers’ compensation benefits and with the nature of the legislative changes that are adopted. In states where unions were strong, they were a dominant force throughout the 20th century in protecting injured workers’ benefits: from the initial passage of legislation in terms of benefit levels and creation of exclusive state funds, to protecting workers’ wage rates when non-union wages fell as a result of workers’ compensation insurance costs, ensuring that unionized workers were able to file for benefits – or raise safety concerns – without suffering retaliation. The decline in labor union density and strength has meant that unions have lost much of their influence in state legislative battles. The effects of this can be seen in a wide variety of state-based labor legislation, the decline in workers’ compensation benefits reflects this shift in power.

As union strength has waned, interest in workers’ compensation from non-traditional workers’ advocacy groups has grown. But these groups lack the political clout of

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103 Emin Dinlersoz & Jeremy Greenwood, The Rise and Fall of Unions in the U.S., CES 12-12, June 2012, available at https://www2.census.gov/ces/wp/2012/CES-WP-12-12.pdf (noting that union membership displayed a U-shaped pattern over the 20th century, while the distribution of income sketched a U.)


105 Id. at 55 (noting that wages did not decline in workplaces with unions in response to workers’ compensation costs for employers).

106 See Barry T. Hirsch, David A. MacPherson, and J. Michael Dumond, Workers’ Compensation Recipienti in Union and Nonunion Workplaces, 50(2) IND. & LABOR REL. REV. 213 (1997); Tim Morse et al, The Relationship of unions to prevalence and claim filing for work-related upper-extremity musculoskeletal disorders, 44 AM. J. IND. MED. 83-93 (2003); Tim Morse et al., Trends in work-related musculoskeletal disorder reports by years, type, and industrial sector, 48 AM. J. IND. MED. 40-49 (2005); Glenn Pransky et al., Under-reporting of work-related disorders in the workplace: A Case study and review of the literature, 42 ERGONOMICS 171-182 (1999) (all showing that union members are substantially more likely to receive workers’ compensation benefits than non-union workers); David Weil, Enforcing OSHA: The role of labor unions, 30 (1) INDUS. REL. 20-36 (Winter 1991) (showing the enhanced ability of unionized workers to raise safety complaints).

107 For example, state legislatures in states that previously had high union density passed “Right to Work” legislation in West Virginia (2016), Wisconsin (2014), Michigan (2012), and expanded the legislation to the private sector in Indiana (2012).

unions in the almost annual debates over workers’ compensation in state legislatures. This means that the entire calculus of political compromise – the calculus that led to the initial “Grand Bargain” – has been upset: with the loss of traditional manufacturing jobs and the tremendous drop in union strength and influence, there is no effective organized voice for injured workers. The balance of power between business, focused on costs, and labor, focused on benefits, has simply shifted. Injured workers lose as a result.

[end of first excerpt]

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Here is a second excerpt from the draft paper, focusing on the fact that many injured workers never make it into the workers’ compensation system at all:

In theory, workers’ compensation provides medical care and benefits to all workers who suffer injuries and illnesses that arise out of their employment. But the adequacy of the system cannot be assessed without acknowledging that large numbers of American workers do not in fact receive these benefits, even when their injuries and illnesses are clearly caused or exacerbated by their work.\(^{(109)}\) This is rarely considered in the discussions of the internal adequacy of the system. In fact, it is estimated that only 20 percent of the costs of occupational illnesses and injuries are now being borne by employers.\(^{(110)}\) Instead, costs are being transferred to the workers themselves, to their families and communities, and to other benefit programs.\(^{(111)}\)

is also active in this area. See http://www.coshnetwork.org/. Individual workers’ centers also advocate in this arena, including safety-focused organizations such as WorkSafe (http://www.worksafe.org/) in California and MassCOSH (http://masscosh.org/) in Boston, as well as more general workers’ centers focused on low wage and immigrant workers’ rights.

\(^{(109)}\) See Spieler & Burton, The Lack of Correspondence, supra note 25, at 7-9 (describing the various ways in which workers with work-caused disabilities may be excluded from workers’ compensation).


\(^{(111)}\) See DOL Workers’ Compensation Report, supra note 3, at 6, 23. For studies showing transfer of costs to the Social Security Disability Insurance Program (SSDI), see Xuguang (Steve) Guo & John F. Burton, Jr., The Growth of Applications for Social Security Disability Insurance: A Spillover Effect from Workers’ Compensation, 72(3) SOC. SEC. BULL. 69-88 (2012); Xuguang (Steve) Guo & John F. Burton, Jr., Improving the Interaction Between the SSDI and Workers’ Compensation Programs, in SSDI SOLUTIONS: IDEAS TO STRENGTHEN THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM (April 2016); Paul O’Leary et al., Workplace Injuries and the Take-up of Social Security Disability Benefits, 72(3) SOC. SEC. BULL. 1-17; Melissa McInerney and Kosali Simon, The Effect of State Workers’ Compensation Program Changes on the Use of Federal Social Security Disability Insurance 51(1) IND. REL. 57-88 (2012). The question of the extent to which this phenomenon has grown in recent years is disputed; the fact that SSDI is paying the costs of people whose disability is rooted in work injuries is not disputed. See also Robert Reville & R Schoeni, The fraction of disability caused at work, 65(4) SOC SEC. BULL. 31–37 (2003/2004) (using the 1992 Health and Retirement Study, a nationally representative study of the U.S. population aged 51 to 61, authors found that among those whose health limits the amount or kind of work they can do, 36 percent became disabled because of an accident, injury, or illness at work; among people of this age group who are receiving Social Security Disability Insurance, 37 percent are disabled because of an accident, injury, or illness at work.).
There are three ways in which workers with work injuries or occupational illnesses end up outside the workers’ compensation system: the statute explicitly excludes them or their employers from coverage; they never file claims; or they are arguably covered by the statute, file claims, but their claims are rejected as non-compensable. For all of these workers, no benefits are paid. None of these workers are counted when assessments are done of the benefits that are paid in the system – or of the costs that are paid by employers.

1) Statutory exclusions

Despite the urging by the National Commission, groups of workers and employers are still explicitly excluded by statute. Some states do not require workers’ compensation insurance for small employers. Domestic workers are excluded almost universally. Coverage for farm workers is still very limited in many states. Independent contractors, a growing segment of the labor force, as well as casual workers, are outside the scope of social insurance programs entirely. So are many of the workers in Texas, the only remaining state in which employers can elect workers’ compensation coverage. The National Academy of Social Insurance estimates that 97 percent of workers in wage and salary jobs that are covered by the UI system are also covered by workers’ compensation. This is an underestimate of the total effect of these exclusions, as it does not consider the workers who do not fit into the classic employee-employer model.

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112 See Tanabe, supra note 39, at 16-20, Table 2.
113 See id.
114 See id. See also Baldwin & McLaren, supra note 9, 58-59, Table A.
115 See Lawrence F. Katz & Alan B. Krueger, 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?m=1459369766 (noting that “[t]he 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.”). No data are available on the extent of misclassification, although some commentators believe it to be rampant. See e.g. Sarah Leberstein, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (updated August 2012) available at http://www.nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf.
116 See Baldwin & McLaren, supra note 9, 58-59, Table A (estimating non-covered workers in Texas at 2.2 million).
117 See Baldwin & McLaren, supra note 9, at 58-59, Table A.
118 Id.
2) Failure to file

The data are startlingly clear: many workers who work in jobs covered by the workers’ compensation laws simply do not file for benefits.\textsuperscript{119} Studies have reached the alarming conclusion that large numbers of people who sustain injuries at work as clearly compensable as amputations (amputations!) do not file claims.\textsuperscript{120}

In a recent article, *Transmitting the Costs of Unsafe Work*, Professor Charlotte Alexander describes the results of two worker surveys: the 2008 Three Cities Survey of 4,387 low-wage workers in New York, Chicago, and Los Angeles who were drawn from a variety of industries and occupations, including cooks and dishwashers, maids and housekeepers, cashiers, garment workers, teachers’ assistants, and security guards; and a 2011 survey of


\textsuperscript{120} See the six studies referenced supra note 119 that were published in 2014 in the American Journal of Industrial Medicine.
286 non-supervisory poultry workers in Alabama. These surveys provide illuminating information regarding low wage workers and workers’ compensation filing rates. In the 2008 urban survey, 607 workers reported they had been seriously injured in the prior three years; of these, 537 informed their employer. The most frequent employer reactions to the reports “were attempts to deter or dissuade workers from filing a workers’ compensation claim and/or outright acts of retaliation… Of those 537 workers who notified their employers, sixty-six (twelve percent) then went on to file a workers’ compensation claim. And of the filed claims that had been resolved by the time of the survey, fifty-three (eighty percent) were granted benefits.” That is, of the sample of 607 injured workers, only 53 workers, or less than nine percent, actually received benefits. Analysis of the results determined that “workers who lacked legal immigration status, whose employers were not ‘high road,’ and who lacked legal knowledge, were all less likely to have filed a workers’ compensation claim.” Among the poultry workers, approximately fifty-nine percent of their occupational injuries were reported. Reasons given for not reporting fell into two primary categories: “fear of retaliatory termination, suspension, or discipline” and “a belief in the ineffectiveness of the system.” Of those workers who did report their illnesses and injuries, only nine workers actually received workers’ compensation benefits.

The reasons that people do not file for benefits are varied and complex, reflecting both the power relationships within the employment relationship, the level of knowledge of workers (and their doctors), and the nature of the system. More specifically, empirical research has shown that these reasons include the following: ignorance about the system or about the work-relatedness of a condition; fear of retaliation; concern

122 Id.
123 Id.
124 Id.
125 Id.
126 Id. See also Spieler & Burton, The Lack of Correspondence, supra note 25; L.S. Azaroff, Charles Levenstein, David H. Wegman, Occupational injury and illness surveillance: Conceptual filters explain underreporting, 92 AM.J. PUBLIC HEALTH, 1421-1429 (2002) (describing mechanisms through which injuries and illness fail to be recorded by employers).
127 Spieler & Burton, The Lack of Correspondence, supra note 25 at 10 (citing various studies)
128 Id. at 11 (citing various studies)
129 Id. See also Dong X, Ringen K, Men Y, et al. Medical costs and sources of payment for work-related injuries among Hispanic construction workers, 49 J. OC. & ENVIRON. MED. 1367-1375 (2007) (showing that undocumented workers are particularly unlikely to file for this reason.); WORKERS COMPENSATION RESEARCH INSTITUTE (WCRI), PREDICTORS OF WORKER OUTCOMES IN TENNESSEE (Jan. 2015) (45 percent of workers who responded to survey reported they were somewhat or very concerned that they would be fired or laid off if they were injured).
about stigma;\textsuperscript{130} failure of the physician to link the injury or illness to work;\textsuperscript{131} belief that the injury is inadequately severe to merit a claim;\textsuperscript{132} administrative and procedural hurdles that can be demeaning or, at best, time consuming;\textsuperscript{133} or a decision to seek coverage under alternative payment systems.\textsuperscript{134} Policies and practices of employers that discourage reporting of injuries or filing of claims, such as offering incentives to reduce reporting of injuries, are now outlawed by the Occupational Safety and Health Administration, which responded to persistent stories of “safety bingo” programs that led to unreported injuries and claims.\textsuperscript{135} The rate of underreporting of injuries varies, but ranges as high as 77%, according to a recent study of agricultural workers.\textsuperscript{136}

The implications of these findings are important for workers’ compensation policy: reductions in the number of claims may be a reflection of external factors – including both the nature of the employment relationship as well as the generosity and the perceived fairness of the system – rather than a reflection of changing injury rates.\textsuperscript{137}

\textsuperscript{130} See Lee Strunin & Leslie I. Boden, \textit{The workers’ compensation system: Worker friend or foe?} 45 AM. J. IND. MED. 338-345 (2004).


\textsuperscript{132} Spieler & Burton, \textit{The Lack of Correspondence, supra} note 25, at 11 (citing various studies).

\textsuperscript{133} Id.

\textsuperscript{134} Id.

\textsuperscript{135} The Occupational Safety and Health Administration has indicated that incentive programs may discourage reporting and that these types of programs are unlawful under both the whistleblower laws (see Memorandum from Richard E. Fairfax, Employer Safety Incentive and Disincentive Policies and Practices, March 12, 2012, available at \url{https://www.osha.gov/recordkeeping/modernization_guidance.html}), and in regulations issued in 2016 governing record-keeping requirements for employers that prohibit various policies that might depress the willingness of employees to report hazards and injuries. See 29 C.F.R. §§ 1904.35–1904.36 (2015). In 2016, the new rule was further explained on the OSHA website (\url{https://www.osha.gov/recordkeeping/modernization_guidance.html}) (last visited Dec. 28, 2016) and in a memorandum issued by Deputy Assistant Secretary Dorothy Dougherty to Regional Administrators on October 19, 2016, Memorandum from Dorothy Dougherty, Deputy Assistant Secretary, Occupational Safety & Health Admin. (Oct. 19, 2016) \url{https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html} (noting that amended 29 C.F.R. 1904.35 adds “two new provisions: section 1904.35(b)(1)(i) makes explicit the longstanding requirement for employers to have a reasonable procedure for employees to report work-related injuries and illnesses, and (b)(1)(iv) incorporates explicitly into Part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses under section 11(c) of the OSH Act, 29 U.S.C. § 660(c)”).

\textsuperscript{136} J. Paul Leigh, Juan Du, Stephen A. McCurdy, \textit{An estimate of the U.S. government’s undercount of nonfatal occupational injuries and illnesses in agriculture}, 24 ANNALS OF EPIDEMIOLOGY 254 (2016). Underreporting of injuries by employers, and failure to file workers’ compensation claims, appear to have some correlation, although both systems of counting display significant levels of underreporting. See Spieler & Wagner, \textit{supra} note 119 (discussing findings regarding underreporting and the implications for public health).

\textsuperscript{137} Notably, underreporting is not new. Fishback & Kantor, \textit{supra} note 104, at 39, notes with regard to the pre-workers’ compensation negligence system, “If there was little chance of compensation, a worker had little incentive to report an accident under the negligence system because doing so may have jeopardized his job by signaling to the employer that he was either accident-prone or a malcontent. Similarly, employers had little incentive to report accidents for which they did not compensate workers because they might alert factor inspectors and others to dangerous working conditions.” Workers with more experience at their firms were more likely to receive compensation. \textit{Id.} at 44. Fishback does not acknowledge in his discussion of moral hazard that the same...
In addition, occupational disease claims are rarely filed and often not compensated once they are filed, despite the fact that all states nominally provide compensate qualifying diseases. There is strong evidence that diseases caused by work exposures are common. But statutes of limitations in some states bar claims for diseases with long latency periods, and other states exclude diseases that may be confused with ordinary diseases of life that exist outside of work. Workers may have retired, moved on and been treated by physicians who never think to ask about their occupational history; or they may think it is not worth the trouble to file; or they may be far from the jurisdiction in which they would be expected to file and pursue their claims. The disease claims that show up in workers’ compensation – or in the reporting system of the Bureau of Labor Statistics – simply do not reflect the prevalence of disease. Responding to these troubling gaps and moments of particular political pressure, federal laws have been passed to compensate coal miners for black lung disease, first responders to the 9-11 attacks, people exposed to radiation and who worked as civilians in the nuclear disincentives may persist in workers’ compensation schemes. [Note that the full article, of which this is an excerpt, provides additional references regarding this issue in another section.]


139 See 4-52 Larson’s Workers’ Compensation Law § 52.01 (2015).


141 See e.g. Ala. Code § 25-5-117 (statute of limitations for filing occupational disease claims runs from the date of last exposure). See also 4-53 Larson’s Workers’ Compensation Law § 53.04 (2015) (discussing this issue and noting that eight states continue to have statute of limitations restrictions on occupational diseases irrespective of latency periods).

142 See 4-52 Larson's Workers' Compensation Law § 52.03 (2015).

143 See Spieler & Wagner, Counting Matters, supra note 119.

144 Black Lung Benefits Act (BLBA), 30 U.S.C. § 901 (Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. § 801 et seq.). The BLBA has been amended several times since its initial passage in 1969, most recently by Section 1556 of the Affordable Care Act that restored several presumptions that had been removed from the law.


146 Radiation Exposure Compensation Act, 42 U.S.C. § 2210 (established an administrative program for claims relating to atmospheric nuclear testing and to uranium industry employment).

3) Failure to compensate claims that are filed

For those injured workers who do file claims, there is no guarantee that they will receive benefits. The conceptual framework of workers’ compensation is to provide benefits to workers whose injuries or illnesses arose out of and in the course of their employment. In essence, this requires proof of causation. In many claims, particularly those involving acute traumatic events, causation is not questioned. Questions and litigation over causation may arise, however, in cases that are less clear. These include, for example, conditions arising from multiple exposures over time or aggravation of a worker’s preexisting health conditions.

New provisions in state laws that exclude aggravation of preexisting conditions or require higher standards of evidentiary proof are likely to decrease the approval of claims that have been filed, and, as a consequence, to further discourage injured workers from filing claims. These changes, described earlier in this article, particularly focus on the exclusion of injuries where work may not be the major contributing cause of the condition (though it may be the straw that broke the camel’s back, causing work-related disability) or specifically exclude or limit compensation for particular conditions (such as some musculoskeletal or stress-related disorders).

The boundaries of what is – or should be – considered compensable have never been crystal clear. The question of where to draw the line was debated by the National Commission and has been addressed by the various state adjudicatory bodies. Ultimately, the policy question is: who should pay the costs of a worker’s impairment, displacement from work or long term loss of earnings losses? If claims are denied – or

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148 See McLaren & Baldwin, supra note 9, at 64, Table B3 (excluding administrative costs, benefit costs for black lung in 2014 were $309,048,000); Id. at 65, Table B4 (costs for EEOICPA benefits in 2014 were $1,039,859,000); Id. at 66, Table B5 (total benefits paid as of 2014 under the Radiation Exposure Compensation Act were $1,960,299,000).
150 See supra note 63 (listing empirical studies showing that these compensability rules have affected the availability of benefits). Notably, there appears to be no available data that provide good insight into the numbers of claims that are filed but not compensated, despite the growing concern that recent legislative changes may result in rejections of claims.
151 National Commission Report, supra note 18, at 50-51 (“The question is how to construct a practical application of the phrase ‘arising out of and in the course of employment’ in a test for compensability of injuries or disease…. As the basic purpose of workmen’s compensation is to protect the employee, we believe in the traditional practice of resolving doubts in favor of the employee. At the same time, we do not believe that workmen’s compensation should be converted into a general insurance scheme: its function is not to protect against all sources of impairment or death for workers.”)
152 See 3 Larson’s Workers’ Compensation Law § 3.01 (2015).
pre-existing conditions are not compensated through an apportionment process – then workers themselves, or other benefit systems, bear these costs. It seems logical that workers who go to work and are able to do their jobs in the morning, who are unable to continue to work at the end of the day, should be among those eligible for compensation. The trend toward dual denial, in which workers have no legal recourse at all for injuries\textsuperscript{153} – whether or not their employers’ have been negligent or reckless – is a complete abrogation of the initial ‘bargain.’ The alternative, of course, is that workers’ compensation should be more inclusive, in which case costs of the program would inevitably rise.

[end of second excerpt]

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\textsuperscript{153} See supra note 33 and accompanying text (discussing issue of dual denial).