

Changes in workers' compensation laws in 2004

California passed a major reform package; 24 other States changed their workers' compensation coverage and services by approving a variety of new and revised legislation

Glenn Whittington

In 2004, a major legislative reform package was passed in California. The total cost of administering the Workers' Compensation Program will now be borne by the employer community through surcharges levied by the Director of Industrial Relations. Temporary disability benefits are now limited to 104 weeks within a period of 2 years from the date of commencement of temporary disability payments, but may be extended to 240 weeks for certain injuries. Beginning in 2005, employers may establish medical provider networks in an attempt to improve medical care for injured employees by providing them with a choice of physicians. The apportionment of permanent disability is now based on causation, and an employer is only liable for the portion of disability directly caused by the injury.

In Georgia, the Subsequent Injury Trust Fund will cease to reimburse self-insured employers and insurers for a claim made on a subsequent injury occurring after June 30, 2008.

Alaska

If an employer is a contractor and fails to secure the payment of compensation to its employees or the employees of a subcontractor, the project owner is liable for and shall secure the payment of compensation to employees of the contractor and subcontractor.

Glenn Whittington is Chief, Branch of Planning, Policy, and Review, Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor.
E-mail: whittington.glenn@dol.gov

Arizona

The Industrial Commission's schedule of fees has been expanded to include prescription medicines for treatment of an injured employee. If the Commission adopts a fee schedule regarding generic drugs, the provisions need to comply with current law.

California

The Workers' Compensation Administration Revolving Fund is a special account in the State Treasury, and moneys in the fund

In Louisiana, for injuries occurring between July 1, 2004, and July 1, 2007, an employer who retains in his employment an employee with a permanent partial disability shall be reimbursed from the Second Injury Fund for all weekly compensation payments payable after the first 130 weeks of payment. In New Jersey, the method for computing death benefits was changed from a sliding scale to just one benefit rate of 70 percent of wages for one or more dependents. In Washington, a licensed advanced registered nurse practitioner is now authorized to examine, diagnose, and treat injured workers covered by industrial insurance. In Wisconsin, physician assistants and advanced practice nurse prescribers have been added to the list of medical professionals authorized to conduct workers' compensation examinations of employees.

The following is a State-by-State summary of changes in workers' compensation laws.

may be expended by the Department of Industrial Relations, upon appropriation by the Legislature, for the administration of the Workers' Compensation Program. Previously, the law required that 80 percent of the costs of the program be borne by the General Fund and 20 percent of the costs of the program be borne by the employers through assessments levied by the Director of Industrial Relations. These employer assessments have been changed to surcharges and must now account for the total costs of the program.

The Return To Work Program has also been added to the operations funded by the

Workers' Compensation Administration Revolving Fund. To the extent funds are available, the program will reimburse up to \$1,250 of expenses to accommodate a temporarily disabled worker or \$2,500 to accommodate a permanently disabled worker. Only private employers with 50 or fewer full-time employees are eligible for reimbursements from the program.

Parties in collectively bargained alternative dispute resolution programs can now negotiate occupational and nonoccupational healthcare integration projects involving delivery of medical benefits and delivery of disability benefits.

The rebuttable presumption of correctness for a comprehensive medical evaluation by a pre-designated personal physician was eliminated.

Disability payments are increased by 15 percent if within 60 days of a disability becoming permanent and stationary, an employer does not offer an injured employee regular, modified, or alternative work for a period of at least 12 months. If such an offer is made, payments are reduced by 15 percent. This requirement applies to workers of employers employing 50 or more employees.

Temporary disability benefits are limited to 104 weeks within a period of 2 years from the date of commencement of temporary disability payments. These benefits may be extended to 240 weeks aggregate within the first 5 years after the date of injury for the following injuries: acute and chronic hepatitis B, acute and chronic hepatitis C, amputations, severe burns, human immunodeficiency virus (HIV), high-velocity eye injuries, chemical burns to the eyes, pulmonary fibrosis, and chronic lung disease.

The vocational rehabilitation program for injuries occurring on or before December 31, 2003, was re-instituted, subject to sunset in 2009.

Beginning in 2005, employers may establish medical provider networks in an attempt to improve medical care for injured employees by providing them with a choice of physicians. The networks need to provide adequate numbers and types of physicians and sufficient access to provide treatment in accordance with utilization controls established by the Division of Workers' Compensation. In developing a medical provider network, an employer or insurer has the exclusive right to determine the members of the network. An independent medical review can be requested by an injured worker who has had three physician opinions in the medical provider network that dispute the worker's request for medi-

cal service.

The apportionment of permanent disability is now based on causation. Each physician preparing a report on the issue of permanent disability must now address the issue of causation and determine the approximate percentage of the permanent disability that was caused by the present work-related injury, and what portion was caused by other factors, including prior industrial injuries. An employer is only liable for the portion of disability directly caused by the injury. When the last payment of temporary disability has been made, and regardless of whether the extent of permanent disability can be determined at that time, the employer is to begin payment of reasonable estimates of permanent disability.

In permanent disability claims, the number of weeks of indemnity for each percentage point of rating is increased for each percentage point of 70 percent or more, and the number of weeks of indemnity for each percentage point of rating is reduced for each percentage point under 15 percent.

With the exception of allowed contracts, the amounts paid for medical services are limited to the reasonable maximum amounts in the official medical fee schedule in effect on the date of service.

The penalty for unreasonable delay or denial of benefits is now established at 25 percent of amount of payment delayed or denied or \$10,000, whichever is less. If the employer discovers the delay prior to an employee claim of such unreasonable behavior, the employer can pay a self-imposed 10 percent penalty on the delayed payment, and avoid the larger penalty. An employer who knowingly violates this section with a frequency indicating general business practices is liable for administrative penalties of up to \$400,000.

The Administrative Director, after consultation with the Insurance Commissioner, is required to contract with a qualified organization to study the workers' compensation insurance market and the effect of the 2003 and 2004 reform legislation on workers' compensation insurance premium rates.

All workers' compensation findings of fact are required to be interpreted in an impartial and balanced manner in order that all parties are considered equal before the law.

The definition of an employee now excludes a person defined as an owner-builder who is participating in a mutual self-help housing program sponsored by a nonprofit corporation.

City attorneys, whose duties include criminal prosecutions and any law enforcement agency investigating workers' com-

penetration fraud, have been added to the definition of authorized governmental agencies to which an insurer must release information in fraud cases.

The provision for allowing nurse practitioners and physician assistants to provide medical treatment for work-related injuries, previously set to expire on January 1, 2006, was extended indefinitely.

Effective January 1, 2005, an insurer or self-insurer is required to provide a specified notice regarding workers' compensation fraud with the temporary disability benefit check.

The fine for failure to provide workers' compensation was increased to double the amount of premium that would otherwise have been due to secure the payment of compensation during the time compensation was not secured, but not less than \$10,000. A second such violation is punishable by: imprisonment for a period not to exceed 1 year; or a fine of triple the amount of premium that would otherwise have been due to secure the payment of compensation during the time payment was not secured, but not less than \$50,000; or by both imprisonment and a fine.

Colorado

The requirement to file notice of intent to pursue a workers' compensation claim for damages arising out of actions of a negligent stranger was expanded to all parties to the claim and allows the party pursuing subrogation to recover attorney fees and costs. If the insurer paying workers' compensation benefits brings a subrogation action and fails to provide notice to the injured employee, the insurer's rights to seek economic damages paid as workers' compensation benefits are limited.

In response to a Court of Appeals decision, the definition of independent contractor was changed to include a natural person.

Connecticut

Payments agreed to under a voluntary agreement or due under an award shall now commence within 20 days from the date of the agreement or award; previously, payment was to be made within 10 days.

Certain employer mutual associations are now allowed to make payments owed to the Second Injury Fund for 5 years without any penalties or interest. Starting January 1, 2005, the manner in which these associations are assessed the amount they owe to the fund has been changed.

Florida

The Workers' Compensation Administration Trust Fund, which was set to be terminated on November 4, 2004, was re-created, all current balances of the trust fund were carried forward, and all current sources and uses of the trust fund are to be continued.

Georgia

The Subsequent Injury Trust Fund will cease to reimburse self-insured employers and insurers for a claim made on a subsequent injury occurring after June 30, 2008. It will continue, however, to reimburse self-insured employers and insurers for qualifying claims for injuries on and prior to June 30, 2008.

Upon or in contemplation of the final payment of all claims for subsequent injuries for which claims are filed for injuries occurring on and prior to June 30, 2008, the Board of Trustees will begin the final dissolution of the Subsequent Injury Trust Fund. Such dissolution will become effective when all claims made for injuries occurring on and prior to June 30, 2008, have been fully paid or otherwise resolved.

A guardian for a minor or incompetent claimant entitled to workers' compensation benefits may be appointed by a court other than the probate court.

Illinois

The Illinois Industrial Commission was renamed the Illinois Workers' Compensation Commission. The Industrial Commission Operations Fund was also renamed the Workers' Compensation Commission Operations Fund.

Iowa

An employer is liable for the cost of medical care it chooses for an injured employee, except in the case of sudden emergencies if it is determined that the employee's condition for which care was arranged is not related to the employment.

An employer is no longer liable for compensating disability from injuries with prior employers or for causes unrelated to employment. For subsequent injuries occurring with the same employer, the employer is liable for compensating the combined disability of all injuries caused, but receives credit for the percentage of disability for which the employee was previously compensated by the employer.

The vocational rehabilitation benefit was increased from \$20 to \$100 per week.

The \$100 penalty for failing to file a First Report of Injury was increased to \$1,000.

Louisiana

The requirement as to when notices must be filed with the Second Injury Board was clarified to reflect that an employer or insurer must file notice within 1 year after the first payment of either compensation or medical benefits, whichever occurs first.

Whenever multiple disputes exist between a single healthcare provider and a single payor, either party has the right to have all such disputes consolidated and tried together in the proper venue.

For injuries occurring between July 1, 2004, and July 1, 2007, an employer who retains in his employment an employee with a permanent partial disability shall be reimbursed from the Second Injury Fund. Reimbursement covers all weekly compensation payments payable after the first 130 weeks of payment, provided they are submitted to the board within 180 days of approval for reimbursement or within 1 year of the payment of such weekly compensation payments, whichever occurs later.

For injuries occurring between July 1, 2004, and July 1, 2007, an employer, when retaining an employee with a permanent partial disability who then incurs a subsequent injury, shall be reimbursed from the Second Injury Fund for 100 percent of medical expenses actually paid and payable which exceed \$25,000.

Any employer who collects moneys from an employee's wages for payment of the employer's workers' compensation premium can be assessed civil penalties of not less than \$500 and not more than \$5,000, payable to the employee and reasonable attorney fees. Restitution shall also be provided up to the amount collected from the employee's wages.

Guidelines and procedures for the collection of data for the Medical Reimbursement Schedule were established. The information collected will be confidential and privileged and not a public record or subject to subpoena.

Any health insurer that contracts for healthcare benefits for an employee or dependents is responsible for the payment of all medical expenses incurred in the event the workers' compensation payor denies the employee's injury is compensable under the workers' compensation law.

The provision calling for a reduction or

offset of workers' compensation benefits payable to professional athletes was repealed.

If a law enforcement officer is killed in the line of duty, and has no surviving spouse, the sum of \$50,000 is to be paid to the surviving parent or divided equally between the surviving parents, if both survive. The provision calling for the \$25,000 to be provided to each surviving dependent child was retained.

Mississippi

For workers' compensation purposes, a self-insured group shall be comprised of employer members of the same bona fide trade association or trade group. Such trade association or trade group shall be domiciled in the State, shall have been in existence for 5 or more consecutive years as of the date of application for an approved group, and shall not be comprised solely of employer members who are affiliates of a person possessing controlling interest in such affiliates.

The Mississippi Workers' Compensation Individual Self-Insurer Guaranty Association and the Workers' Compensation Group Self-Insurer Guaranty Association were created as two separate nonprofit unincorporated legal entities. All funds previously in the Workers' Compensation Self-Insurer Guaranty Association became and remain assets of the Workers' Compensation Individual Self-Insurer Guaranty Association.

The 2-percent assessment on each individual self-insurer and on each group self-insurer is to be collected until the sum of \$2 million is accumulated by the individual association and the sum of \$1 million is accumulated by the group association, at which time assessments will be suspended.

New Hampshire

Any provision in any agreement that requires employers or the employer's insurance carrier to waive its subrogation rights is prohibited.

New Jersey

The method for computing death benefits was changed from a sliding scale (50 percent -70 percent of wages depending on the number of surviving dependents) to just one benefit rate (70 percent of wages for one or more dependents).

If an employer cannot be identified or located in an occupational disease claim resulting in injury or death from an exposure to asbestos, an application can be made to,

and an award paid by, the uninsured employer's fund. "Occupational disease resulting in injury or death from an exposure to asbestos" means asbestosis or any asbestos-induced cancer, including mesothelioma. The uninsured employer's fund will have a lien against any award received by the claimant from a third party resulting from the exposure to asbestos. Compensation will be based on the last date of exposure, if known, or if the last date of exposure cannot be determined, the judge will establish an appropriate date.

A horse racing industry employee now includes an exercise rider of a thoroughbred horse for the period of time during which he or she is employed as an exercise rider of a thoroughbred horse at a horse racetrack in the State. The rider must be licensed by the commission and have deductions and withholdings, as required or authorized by State or Federal law, taken from his/her wages.

New Mexico

The assessment on employers who are required, or elect to be covered, by the Workers' Compensation Act was increased from \$2 to \$2.30 per quarter times the number of employees that the employer has on the last working day of each quarter. Thirty cents (\$.30) per employee of the fee assessed is to be distributed to the Uninsured Employers' Fund.

New York

The funeral expenses for a police officer who dies in the line of duty will not be subject to the schedule of maximum charges allowed under the Workers' Compensation Act.

Ohio

In response to an Ohio Supreme Court decision, the conditions were revised under which chemical testing of an employee may establish a rebuttable presumption that the employee's injury was proximately caused by the use of alcohol or an unprescribed controlled substance, thus affecting the employee's eligibility to qualify for workers' compensation benefits. Whereas prior law expressly required that an employee be given written notice, present law requires only that the employer post a written notice to employees that the results of, or the employee's refusal to submit to, any chemical test described in the act may affect the

employee's ability to receive workers' compensation benefits.

An individual who is incorporated as a corporation is exempt from required workers' compensation coverage.

All professional employer organizations (employers that specialize in "leasing" employees to other employers) operating in Ohio are required to register with the Administrator of Workers' Compensation and comply with the workers' compensation law.

Rhode Island

Any partner, general or limited, or any partner in a registered limited liability partnership, or any nonmanager of a limited liability company are excluded from the definition of employee.

The maximum amount an attorney can collect in a workers' compensation claim was increased from 15 percent to 20 percent of the structured-type periodic payment reduced to present-day value.

Tennessee

The Commissioner of Labor, in consultation with the medical care and cost containment committee and the advisory council on workers' compensation, is to develop a comprehensive medical fee schedule to address fees of physicians and surgeons, hospitals, prescription drugs, and ancillary services provided by other healthcare facilities and providers.

If a workers' compensation claim is settled by the parties, the parties shall not agree to compromise and settle the issue of future medical benefits for a period of 3 years from the date on which the settlement is approved. After 3 years, if the parties mutually agree to a compromise and settlement on the issue of future medical benefits, the parties are not required to request a benefit review conference. Also, an employee who is determined to be permanently totally disabled is not allowed to compromise and settle his/her rights to future medical benefits.

In a dispute as to whether or not a claim is compensable, the parties may settle such matter; however, such settlement shall not exceed 50 times the minimum weekly benefit rate as of the date of the claimed injury and is not to include future medical benefits.

If an employer or insurer fails to pay temporary disability benefits within 20 days (previously, 15 days) of receipt of notice, a workers' compensation specialist can assess penalties of 25 percent (previously, 6 per-

cent) of the delinquent benefits.

The cap on Permanent Partial Disability awards where there is a meaningful return to work was reduced from two and one-half times the impairment rating to one and one-half times the impairment rating.

For injuries occurring on or after July 1, 2004, through June 30, 2005, the maximum weekly benefit for temporary disability benefits is 66-2/3 percent of the employee's average weekly wage up to 105 percent (previously, 100 percent) of the State's average weekly wage.

For injuries occurring on or after July 1, 2005, the maximum weekly benefit for temporary disability benefits will be 66-2/3 percent of the employee's average weekly wage up to 110 percent of the State's average weekly wage.

The Commissioner of Labor and Workforce Development is to develop and maintain an Independent Medical Examiners (IME) registry. If the parties cannot agree on an IME physician from the registry, the employer is required to request an IME panel containing the names of three physicians selected at random. The employer can strike one name from the list, and the employee is required to choose from the remaining names. All costs and fees for an independent medical examination are to be paid by the employer.

The exception to the 12-visit limit placed on chiropractic visits was extended to self-insurer pools.

Utah

An injured employee and a physician are required to comply with Labor Commission rules regarding disclosure of medical records relevant to the employee's industrial accident or occupational disease claim.

A workers' compensation claim is subject to a lien for recovery of medical assistance benefits paid by the Department of Health.

Vermont

The "weekly net income" calculation was eliminated. Workers' compensation benefits cannot exceed 90 percent of the claimant's average weekly wage, including payments for a dependent child. If compensation benefits are not paid within 21 days of becoming due and payable, 10 percent of the overdue amount shall be added and paid to the employee.

The statute of limitations for filing an initial claim for workers' compensation

benefits was reduced from 6 years to 3 years.

The Department of Labor and Industry is to adopt rules to ensure that an injured worker who requests vocational rehabilitation services or has received more than 90 continuous days of temporary total benefits is screened for benefits. If found eligible, a worker shall have an initial vocational assessment and be offered services. The rule requiring employers to refer an injured worker to vocational rehabilitation when they had received temporary total disability for 90 days was repealed.

The statutory language that created a presumption that an on-premise recreational activity is compensable was repealed.

Workers' compensation insurers are now required to file an annual report regarding cases in which temporary total benefits have been paid continuously for 2 or more years.

Medical benefits include prescription drugs and durable medical equipment. Employers are required to provide assistive devices (for example, wheelchair) and modifications to vehicles and residences to those who are or expected to be permanently disabled.

An individual in agriculture or farming does not need to purchase a workers' compensation insurance policy unless their aggregate payroll is \$10,000 or more (previously, the threshold was \$2,000 or more).

Virginia

In all matters within the jurisdiction of the Workers' Compensation Commission, it shall have the power of a court of record to administer oath, to compel the attendance of witnesses and the production of documents, to punish for contempt, to appoint guardians, and to enforce compliance of its lawful order and awards.

The Workers' Compensation Commission is now authorized to accept certificates of deposit, U.S. government bonds, letters of credit, and cash as instruments that will secure the payment of workers' compensation liabilities of self-insured employers. Previously, such employers were required to deposit an acceptable security, indemnity,

or bond.

Vocational rehabilitation services may now be provided by a person certified by the Workers' Compensation Commission on Rehabilitation Counselor Certification as a certified rehabilitation counselor or a person certified by the Commission on Certification of Work Adjustment and Vocational Evaluation Specialists as a Certified Vocational Evaluation Specialist.

Members of AmeriCorps and food stamp recipients participating in the work experience component of the Food Stamp Employment and Training Program shall be deemed to be employees of the Commonwealth for purposes of the Workers' Compensation Act. Such persons shall be eligible for reimbursement for medical costs from covered injuries, but shall not be eligible to receive weekly workers' compensation benefits.

An employer's payment of workers' compensation benefits creates not only a subrogation interest, but an actual lien against any proceeds obtained by verdict or settlement from a third party or recovered pursuant to the uninsured or underinsured motorists' provisions of a motor vehicle insurance policy carried by the employer.

Washington

A licensed advanced registered nurse practitioner is now authorized to examine, diagnose, and treat injured workers' covered by industrial insurance.

A physician assistant practicing with physician supervision may assist workers who suffer simple industrial injuries in making application for compensation. Physician assistants may not, however, rate a worker's permanent partial disability or determine a worker's entitlement to benefits.

Wisconsin

Physician assistants and advanced practice nurse prescribers have been added to the list of medical professionals authorized to conduct workers' compensation examinations

of employees.

A \$25 threshold was established for using the "reasonableness of fee" and "necessity of treatment" dispute resolution processes.

The standard deviation used in fee disputes for determining whether a charge for medical care is reasonable was reduced from 1.5 to 1.4.

Workers' compensation insurance carriers are allowed to give notice of the cancellation or termination of a policy to the Department of Workforce Development (DWD) or the Wisconsin Compensation Rating Bureau by certified mail, fax transmission, e-mail, or any other medium approved by DWD.

The maximum supplemental benefit rate paid for injuries occurring before May 13, 1980, was increased from \$202 per week to \$233 per week.

The assessment on employers and workers' compensation insurance companies, to be paid into the Work Injuries Supplemental Benefit Fund, was increased from \$5,000 to \$10,000 for injuries resulting in death and from \$7,000 to \$10,000 for injuries resulting in dismemberment.

The DWD is authorized to claim reimbursement from uninsured employers for expenses paid by DWD in administering an employee's claim.

Wyoming

In cases involving a worker's permanent total disability or death, benefits for dependent children now terminate at age 18 (previously, age of majority) or for children enrolled in an educational institution, including a post-secondary education institution, at age 21. Benefits for temporary total disability are now paid semi-monthly rather than monthly.

Temporary light-duty benefits are to be paid monthly at the rate of 80 percent of the difference between the employee's light-duty wage and the employee's actual monthly earnings at the time of injury. Temporary light duty may not exceed 1 year, and such benefits are not to be charged to the employer's claims experience rating. □