

State workers' compensation legislation enacted in 1996

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Charles A. Berreth

Last year, 37 State legislatures amended their workers' compensation laws, with Kentucky, New York, Pennsylvania, South Carolina, and Tennessee enacting comprehensive changes.

Kentucky redefined "injury" as a traumatic work-related event, including cumulative trauma, causing harmful bodily change; removed the harmful effects of aging from the criteria; removed references to wage-earning capacity from the definition of disability; allowed arbitrators, now a part of the adjudication procedures, to refer employees for evaluation to State medical schools, and gave ensuing reports presumptive weight in claims resolution; gave American Medical Association guidelines greater emphasis in permanent partial disability ratings; and revised the limitations on attorney's fees.

New York applied the exclusive remedy doctrine to third-party suits when the employee is acting within the scope of employment, unless the third party is severely injured. A new workers' compensation inspector general now investigates fraud. The larger insurers must set up full-time special investigation units with trained personnel. Insurers may not contract with preferred provider organizations for employee medical care.

Pennsylvania established procedures to allow compromise and release settlements; increased the earnings and duration of employment test for agricultural workers; provided offsets for Social Security benefits, severance pay, and employer funded pension plans; and permitted deductible and retrospective rating plans for groups of five or more employers.

South Carolina redefined "injury"; now allows an employer to pay benefits for up to 150 days without waiver of any grounds for good faith denial; prohibited health care providers from instituting collection proceedings against a claimant prior to adjudication of a claim; provided coverage

for school-to-work participants; and adopted criteria for reporting injuries.

Tennessee employers may now suggest using health maintenance and preferred provider organizations for employee medical care. Other amendments provide criteria for payment of plaintiff's attorney fees; establish conditions under which temporary disability payments continue when an injured employee reaches maximum medical improvement; set new penalties for fraud; and provide means for dealing with increased membership in the assigned risk pool.

In Idaho, farmworkers are now covered, for the first time, under the State's workers' compensation statute, as are farm labor contractors.

Wisconsin now exempts employers from insuring workers whose religious beliefs oppose accepting payments for death, disability, old age, retirement, or medical bills. However, the worker must request the exemption and the religious order must agree to pay reasonable financial and medical aid.

Georgia repealed a requirement that bodily loss ratings be based on American Medical Association guidelines, while Pennsylvania increased its reliance on these measures. Maryland increased the threshold earnings test for coverage of domestic servants in a private home. Wyoming imposed a 2-year cumulative maximum on temporary total disability payments for any one accident. Georgia increased maximum weekly benefits to \$300 for temporary total disability. Wisconsin increased maximum weekly benefits for total disability and death to \$509 for injuries occurring after January 1, 1997. Wisconsin also raised permanent partial and weekly supplemental maximum benefits. Maximum burial allowances were increased to \$6,000 in Michigan and Wisconsin, to \$5,000 in South Dakota, and to \$5,500 in Vermont.

Following is a summary of significant legislation enacted by individual States.

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Alabama

An individual who performs services as a product demonstrator is now considered a self-employed independent contractor (and not an employee) for purposes of workers' compensation coverage.

Arizona

"Independent contractor" was redefined to clarify coverage situations. Also, the words "therefore, I am not entitled to workers' compensation benefits" were added to the form for sole proprietors to waive workers' benefits as independent contractors.

An injury or death is not compensable if the employee's use of alcohol or unlawful use of any controlled substance was a substantial contributing cause, unless the employer knew of, permitted, or condoned the use.

California

Tuberculosis is now a compensable injury for prison and jail guards and correctional officers. The presumption previously applied only to police officers and firefighters.

The term "physician" included acupuncturists until January 1, 1997. The enactment extended the provision for 2 years, until January 1, 1999.

The employer is permitted to notify injured employees that acceptance of employment with a different employer that requires performance of activities the worker has stated he or she cannot perform because of the injury could constitute fraud and result in criminal prosecution.

The Division of Workers' Compensation Appeals Board were exempted from procedures under California's Administrative Procedure Act relating to the adoption, review, approval, and judicial review of regulations; and the application of provisions relating to the filing and publication of regulations were limited to only the rules of procedure of these agencies.

Colorado

New procedures authorize primary care physicians who are not accredited at the advanced level (level II) to make determinations that an employee has no permanent medical impairment resulting from an injury. On the other hand, insurers are not liable for the cost of any impairment evaluation in which there is permanent medical impairment, when such an evaluation is made by a physician who is not accredited at level II.

The following procedures apply when maximum medical improvement determinations are made by primary care physicians who are not accredited at level II: (1) permanent impairment determinations must be made within 20 days of the maximum medical improvement determination; (2) employees residing in Colorado and having any permanent impairment must be referred to a physician accredited at level II within 40

days after the determination of maximum medical improvement; and (3) independent medical examiners, selected by the parties to the dispute or by the Division of Workers' Compensation, must review disputed impairment ratings. A level II accredited physician must be selected by the insurer when requested by an employee who has not reached maximum medical improvement.

A five-member Workers' Compensation Classification Appeals Board was created to hear grievances brought by employers against insurers concerning experience modification factors and classification assignment decisions. Employers must first exhaust all review procedures provided by the insurer before appealing to the Board.

The Workers' Compensation Medical Care Accreditation Commission is repealed. Its function, overseeing the accreditation training for physicians, continues with the Division of Workers' Compensation, until July 1, 2003, pursuant to a sunset law.

Corporate officers and members of limited liability companies may elect not to be covered by workers' compensation insurance if they meet certain ownership requirements.

An amendment allows an injured worker or other interested party, at any time, to request an independent medical examination if either party disputes a finding by the worker's authorized treating physician that the worker has or has not reached maximum medical improvement. Prior to the amendment, such a request was allowed only upon a finding that the worker had reached maximum medical improvement.

If an authorized treating physician has not determined that the worker has reached maximum medical improvement, the employer or insurer may request an independent examination only if at least 18 months have passed since the injury, the authorized treating physician has been asked in writing to make a finding of maximum medical improvement, and a physician other than the authorized treating physician has determined that the worker has reached maximum medical improvement.

A "temporary help contracting firm" is defined as a business employing individuals and, for compensation from a third party, providing those individuals to perform work for and under the supervision of the third party.

If a worker is employed by a temporary help contracting firm, temporary disability payments may be terminated when the injured worker refuses to accept modified employment. The initial offer of modified employment must be in writing and workers must be allowed at least 24 hours to respond.

A maximum civil penalty of 365 days of compensation may be imposed on employers or insurers for failure to admit or deny liability within 20 days of injury notice. Penalties may not be assessed after 7 years of the alleged violation. The Division of Workers' Compensation must retain original claim records for at least 7 years after closure of a case. After a case has been closed for more than 7 years, original claim records may be used only for reopening a settlement on grounds of fraud or mutual mistake of material fact.

Connecticut

The provision was repealed which required that not less than two workers' compensation commissioners reside in each congressional district.

If an employer does not provide proof of solvency and financial ability to pay workers' compensation benefits, an injured employee may bring suit against the employer for the injury. However, if the employer was led to believe that the employee was an independent contractor, the employer is not liable.

New legislation defines a nonprofit "workers' compensation self-insurance group" as 15 or more employers who have been in a similar type of business for at least 5 years. Self-insurance groups must obtain approval from the insurance commissioner, have at least \$5 million of combined net worth, a working capital of more than \$250,000, and a minimum surety bond of \$500,000. The groups otherwise will not be regulated as insurers.

All employer claims for injuries prior to July 1, 1995, must qualify to be transferred to the second injury fund prior to July 1, 1999; otherwise the claims become the responsibility of the employer. To qualify, the employer or insurer must have met all transfer requirements, including benefit payments for 104 weeks.

New legislation allows cost-saving methods within the prescription drug program, but forbids forcing claimants to use mail order pharmacies.

Delaware

Paid employees of volunteer fire companies and ambulance companies are now covered by the State's workers' compensation law.

An employer can challenge experience modification factors and classifications assigned to it by an advisory organization or insurer.

An amendment provides detailed fiduciary requirements for self-insurance groups to be enforced by the insurance commissioner. Requirements include but are not limited to (1) having a combined net worth of at least \$1 million, (2) assuring the payment of compensation obligations for merging and discontinued groups, and (3) assessing the group membership to make up deficiencies.

Georgia

The prior experience of a formerly self-insured employer is now considered in determining the employer's insurance rate experience modifier. A member who is terminated from a group self-insurance fund must be provided with the data necessary for the replacement workers' compensation insurer to determine or have determined an experience modifier for the former member. (Previously, the former member would carry the same experience modifier promulgated by the fund.) Funds must maintain a loss reserve equal to 45 percent (previously, 40 percent) of earned premiums written during the 3 years prior to reporting, less all loss and loss expense pay-

ments made in connection with the claims under policies written in those 3 years. Each fund's fidelity bond, which previously could not be less than \$100,000, is now established by the insurance commissioner.

A stroke is not a compensable injury without a preponderance of evidence, including medical evidence, that the injury was work-related. The requirement that disability or bodily loss ratings be based on the American Medical Association's Guides to the Evaluation of Permanent Impairment was repealed. New criteria were established for determining whether a person is an independent contractor, rather than an employee. Up to five members of a limited liability company may elect to be exempt from workers' compensation coverage.

The willful breach of any rule or regulation adopted by the employer, of which the employee has knowledge prior to the accident, is no longer grounds for denial of injury or death benefits.

The current section relating to guardianship was replaced with a new section providing that the only person capable of representing a minor or legally incompetent claimant entitled to benefits is a guardian appointed and qualified by the probate court.

The maximum weekly temporary total disability benefit was increased from \$275 to \$300.

The Subsequent Injury Trust Fund is not liable for any interest on sums due to claiming parties, or fees due to attorneys of claiming parties, except if a preponderance of evidence proves that the fund refused to accept a valid claim for reimbursement without reasonable grounds. In these circumstances, the party seeking reimbursement may be entitled to attorney fees.

Hawaii

A resolution requested a management audit of the Special Compensation Fund to determine if the fund could function more effectively independent of the Department of Labor and Industrial Relations. The audit and recommendations will be completed prior to the 1997 legislative session.

A clarifying statement was added to the workers' compensation law declaring original jurisdiction for the Department of Labor and Industrial Relations in disputed situations, and affirming appeals of Department decisions to the appellate board and the State supreme court.

Real estate salespersons and brokers whose earnings are solely commissions are exempt from workers' compensation coverage.

A unit was established within the Department of Labor and Industrial Relations to assist injured workers in filing claims, and also to assist insurers, employers, and providers.

Ceilings on medical charges are tied to medicare rates in the current law. If the medicare rates appear unreasonable or do not cover a particular treatment or service, an additional fee schedule may (instead of shall) be established. The Department of Labor and Industrial Relations now has the option of

updating its fee schedules every 3 years, instead of annually.

An amendment removed statutory limits on the number of treatments for an injury without authorization.

Workers' compensation coverage was provided for voluntary police chaplains in an authorized chaplain program.

Beginning February 1, 1997, workers' compensation insurance premiums for all policyholders must be reduced to reflect overall cost savings realized from reform legislation enacted in 1995. An insurer can petition for relief from the premium reductions if the insurer's solvency is jeopardized.

The assigned risk pool was replaced with a statutorily established nonprofit corporation, Hawaii Employers' Mutual Insurance Company, which will operate as a domestic mutual insurance company and not as a State agency. The company will operate competitively but will also serve as the workers' compensation insurer of last resort.

Idaho

Workers' compensation protection is now provided for those who receive public assistance benefits and participate in unpaid work experience and training.

Minimum premiums included in workers' compensation insurance rate filings must not be less than \$150 or more than \$300. Premiums for partnerships and sole proprietorships are based on a presumed annual salary of \$13,000. The provision sunsets on July 1, 2001.

A custom farmer was defined as a person who contracts to supply operated equipment to a proprietor of a farm for the purpose of performing part or all of the activities related to raising or harvesting agricultural or horticultural commodities. The custom farmer is considered an independent contractor under workers' compensation law. A farm labor contractor (meaning one who, for a fee, recruits and employs farmworkers) is now a covered employer.

The coverage exemption for agriculture pursuits was removed, thus covering farmworkers for the first time under Idaho's workers' compensation law.

Domestic reciprocal insurers that only insure workers' compensation risks are not required to participate in the assigned risk pool, and thus are treated like self-insured employers.

The classification of third parties is further limited by excluding the owner or lessee of a premise, or other person who is virtually the proprietor or operator of a business, but who, by reason of their being an independent contractor or for any other business reason, is not the direct employer of workers employed there.

Iowa

Members of limited liability companies, while now exempt from workers' compensation coverage, may elect to be covered.

Kansas

The exemption was removed that relieved an employer of liability for an injury which does not prevent the employee from earning full wages for at least 1 week. The change does not apply to claims that have been fully adjudicated.

The definition of "arising out of and in the course of employment" now specifies that an employee is not construed as being on the way to assume duties if the employee is a provider of emergency services responding to an emergency.

The provision was repealed that permitted the injured employee to apply for a benefit review conference if the employee was unable to obtain satisfactory services from any of the health care providers submitted by the employer. Now, either party can request the Division of Workers' Compensation to select a treating health care provider.

Amended rules provide that if the employer and employee cannot agree on the employee's functional impairment, and if at least two medical opinions disagree as to percentage of functional impairment, the matter may be referred by the administrative law judge to an independent health care provider.

Lump-sum payments may not be approved until 9 months (previously, 2 years) after the employee has returned to work at a comparable wage with the same employer.

A civil penalty equal to twice the annual premium that the employer should have paid, or \$25,000 (whichever is greater) may be levied against an employer who fails to provide workers' compensation coverage. Besides, the offense was upgraded from a Class C to a Class A misdemeanor. The penalty for falsifying a claim to obtain compensation of \$500 or less also was upgraded to a Class A misdemeanor.

A volunteer officer, director, or trustee of a nonprofit organization may elect workers' compensation coverage.

Procedures for mediation conferences to assist the parties in reaching agreement on disputed issues were added to replace benefit review conferences.

A corporation previously qualified as a self-insurer that subsequently merged with another entity, now can apply for renewal as a self-insurer under its new name as long as its liabilities have not increased beyond the financial review requirements to qualify as a self-insurer.

Kentucky

In mid-December, a special session of the legislature enacted major changes to its workers' compensation law. The new law, which affects new and reopened claims and injuries after December 12, 1996, began by redefining key terms. Injury is a traumatic work-related event or series of events, including cumulative trauma, causing harmful bodily changes demonstrated by objective medical findings, but does not include the effects of the natural aging process. Disability is redefined to delete references to wage earning capacity and add perma-

nent partial and permanent total. Permanent total disability is irrebuttably presumed to exist for loss of sight in both eyes, loss of or permanent paralysis of both feet, both hands, or one foot and one hand, incurable insanity, and total loss of hearing.

Liability of the special fund is limited to injuries and exposures prior to December 12, 1996, and a new State black lung fund was established.

Generally, the period for reopening claims was limited to 4 years and the basis for reopening was limited to fraud, new evidence, mistakes, or a change of disability. Two additional years of continuous employment are required to reopen a black lung case.

Settlement agreements require approval of an arbitrator or administrative law judge. After March 3, 1997, no agreement for a commuted lump-sum payment of future income benefits over \$10 a week will be approved unless there is reasonable assurance that the employee will have an adequate source of income while disabled. The special fund has the option of settling its liability on the same terms as the employer.

When an application for resolution of a claim is filed by an employee, the employee must join all causes of action against an employer.

Eight arbitrators, appointed by the Governor, conduct necessary proceedings and may refer employees for evaluation to the University of Kentucky or University of Louisville. Ensuing reports are given presumptive weight in claims resolution, and rejection requires specific reasons. Arbitrator determinations must be written within 90 days, and may be appealed to an administrative law judge within 30 days.

Application procedures for black lung benefits were revised. For exposures after December 12, 1996, miners may file claims but may not receive benefits while working. Benefits also are not payable to employees who have no pulmonary impairment unless progressive massive fibrosis is present. Black lung income benefits under the new law are payable half by the employer and half by the new Kentucky Coal Worker's Pneumoconiosis Fund, financed by coal employer assessments.

Permanent partial disability ratings are now a multiplication factor (0.75 to 2.50) of the American Medical Association impairment ratings. An employee whose physical capacity prevents return to the type of work done at the time of injury is entitled to 1.5 times the benefit to which the employee would otherwise be entitled. When an employee returns to work for the same or greater wages, benefits are reduced by one-half for each week such work continues. The duration of permanent or permanent partial disability benefits remained unchanged.

All income benefits terminate when an employee qualifies for normal old age Social Security benefits. Employer funded disability or sickness and accident plan payments covering the same disability are offset against worker's compensation benefits; unemployment benefits are also offset.

The maximum fee for plaintiff's attorney is 20 percent of the award up to \$2,000 for ser-

vices up to the date of the arbitrator's determination. Upon appeal by an employee from an arbitrator's determination, plaintiff's attorney fee is fixed by the administrative law judge, not to exceed 20 percent of the first \$25,000 of awarded benefits, 10 percent of the next \$15,000, and 5 percent of any remainder up to maximum fee of \$10,000. When any employer's appeal is unsuccessful, the employer is responsible for employee attorney fees, up to a maximum of \$5,000 per level of appeal, in addition to the fees described above. Non-attorney representation of claimants is allowed. Attorney contracts dated prior to December 12, 1996, are not subject to the amendments.

Workers' compensation specialist positions are created to assist workers in filing claims and obtaining medical reports and other pertinent materials.

Three separate guaranty funds, financed by self-insurers, were created to meet insolvency obligations. Proof of workers' compensation is now a requirement for obtaining a building permit.

Enrollees in a bona fide training program may elect to accelerate income benefits up to 100 percent of the State's average weekly wage. After training, accelerated benefits will be deducted from remaining weekly benefits.

If death occurs within 4 years of date of injury, a lump-sum additional payment of \$25,000 is made to survivors, from which burial expenses must be paid.

Employee leasing and temporary help services are required to provide worker's compensation coverage for all leased employees.

Hearing impairment must be greater than 8 percent, using American Medical Association guidelines, to be eligible for benefits.

The Kentucky Employers' Mutual Insurance authority is expressly defined as the "insurer of last resort."

Penalties for fraud are increased and owners or corporate officers who knowingly violate workers' compensation law are liable for the actions of their companies. An insurance carrier or self-insured employer engaging in unfair claims settlement practices is liable for fines of \$1,000 to \$5,000 for each violation.

A coverage exemption is provided for members of any religious group conscientiously opposed to acceptance of public or private death, retirement, disability, or medical expense payments including Social Security, and which group has for more than 10 years made provision for its dependent members.

Members of limited liability companies are now included within the meaning of the term "employee," and may be covered by workers' compensation if they so elect.

Any professional athlete, coach, or trainer hired in another State by an out-of-State employer is exempt from the workers' compensation law while temporarily working in Kentucky. For the exemption to apply, the employer must have workers' compensation coverage under the laws of the State where hired, which becomes the exclusive remedy for injury or death while working in Kentucky.

An amendment states that the records of the Department of Workers' Claims are not open to the general public.

An appeals program to settle benefit entitlement disputes was established; however, the mediator's recommendations are not binding unless incorporated into a settlement agreement by the parties.

Appeal decisions of the Workers' Compensation Board are due within 60 days (previously, 30 days) after the last appellate brief.

Employees may not be required to waive their rights to workers' compensation as a condition of employment.

Louisiana

In a lawsuit, fault is to be apportioned to all parties contributing to an employee's injury, including those who are immune from suits. Fault may not be shifted to another party. Any employer subrogation lien is reduced by the percentage of fault attributed to the employer.

The Louisiana Workers' Compensation Corporation is authorized to issue policies for out-of-State workers' compensation coverage for employers located or incorporated in Louisiana; and to provide coverage under the Federal Longshore and Harbor Workers' Compensation Act and the Jones Act for maritime employment.

Additional benefits of \$30,000, payable 1 year after injury and not subject to an offset for other workers' compensation benefits are provided for catastrophic injuries. Such injuries are defined as paraplegia or quadriplegia; anatomical (not functional) loss of both hands, arms, feet, legs, eyes, one hand and one foot, or any two thereof; or third-degree burns over 40 percent or more of the body.

Maine

A group of employers may not operate a self-insurance plan in the form of a corporation, partnership, or limited liability company.

In determining membership in the Self-Insurance Guarantee Association for the purposes of assessments, a successor employer approved for continuing self-insurance authority, or qualifying and receiving a refund, is deemed to be a member of the association from the date of the former employer's initial self-insurance authorization. Further, for assessment purposes, an employer that ceases to be an approved self-insurer at the time an insolvency occurs, or during the 36-month period preceding an insolvency, continues to be a member for the purposes of the assessments. If the Maine Self-Insurance Fund drops below \$2 million, and if the Guarantee Association determines it to be necessary, the Association is authorized to levy annual assessments against its membership.

Maryland

A principle contractor is not obligated for workers' compensation to corporate officers, mem-

bers of limited liability companies, partners in partnerships, and sole proprietors not electing workers' compensation coverage.

For domestic servants in a private home, the quarterly earnings test for workers' compensation coverage increased to \$750 (previously, \$250).

Independent contractors on farms, other than migrant workers, are not covered by workers' compensation law. Owner-operators of large tractor trailer vehicles also were excluded from coverage. Volunteer advanced life support unit members were added to the list of firefighting and rescue personnel who can be presumed to have an occupational disease. The presumption of compensability for disability or death due to hypertension and heart disease was extended to Prince George's County deputy sheriffs, while volunteer firefighters in Howard County were given coverage.

A Committee on Workers' Compensation Benefits and Insurance Oversight was created.

Massachusetts

The definition of "employer" was modified to exclude nonprofit entities exclusively staffed by volunteers. New rules permit a party filing a claim or complaint to inspect and copy any medical notes, treatment reports, and employment records.

Michigan

The maximum burial expense allowance was increased from \$1,500 to \$6,000. Administrative changes were made to the uninsured employers' security fund. An amendment to the insurance code made false representation of material facts by employers to obtain insurance or employees to receive benefits a 4-year felony.

Minnesota

Independent construction contractors are considered employees of the employer for whom they are performing service, unless all of certain conditions exist.

Mississippi

A new member of the Self-Insurers Guaranty Association is required to pay the 2-percent assessment for 4 years before being entitled to have assessment suspended when the fund reaches a maximum balance of \$2 million.

New Hampshire

The definition of "employee," with respect to public employment, now includes welfare recipients. However, local governments may exempt participants in local welfare programs.

An amendment establishes conditions under which nonresidents and certain employees working temporarily in New Hampshire are not covered by the workers' compensation law.

Any employee entitled to receive benefits must submit to independent medical examinations from a health care provider certified by standards of the American Board of Medical Specialties.

Failure to pay an approved medical bill within 30 days of receipt may result in a civil penalty of up to \$2,500.

New Jersey

A rebuttable presumption was created, stating that an employer is considered uninsured when the employer fails, at the time of trial, to produce proof of authorized workers' compensation insurance coverage for employees. An employer who willfully fails to provide coverage is guilty of a disorderly person's offense and a crime of the fourth degree. Upon finding that an employer has failed for a period of not less than 10 consecutive days to provide for the payment of compensation, the Division of Workers' Compensation shall impose, in addition to all other penalties, an assessment of up to \$1,000. When the period exceeds 20 days, an additional assessment of up to \$1,000 for each period of 10 days thereafter will be assessed. Failure to provide workers' compensation protection could also result in the assessment of a penalty up to \$1,000 for each offense, which shall be deposited in the uninsured employer's fund.

Emergency management volunteers are provided workers' compensation coverage, subject to an offset for other workers' compensation benefits to which they are entitled.

Witness fees increased for medical witnesses in workers' compensation cases.

New Mexico

The State's second-injury fund is discontinued. The legislation repeals most subsequent injury provisions immediately, but covers pending cases and administrative expenses until July 1, 1999. (The State Corporation Commission had determined that the second injury fund no longer served a purpose with the enactment of the Federal Americans With Disabilities Act.)

New York

An employer is not liable to a third person for injuries to an employee acting within the scope of employment, unless the third person sustains a "grave injury," defined as death, permanent and total loss of an arm, leg, hand or foot, loss of more than one finger or toe, paraplegia or quadriplegia, permanent total blindness or deafness, loss of nose or ear, permanent severe facial disfigurement, loss of an index finger, or permanent brain injury.

Employers whose most recent annual payroll exceeds \$800,000 and whose most recent experience rating is above the level of 1.2, must arrange for a compulsory workplace safety and

loss prevention program, developed by the State workers' compensation authorities.

A new position, workers' compensation fraud inspector general, appointed by the governor, is created to investigate possible fraud, with subpoena authority. An employer who makes a false statement to obtain insurance is guilty of a Class E felony. A claimant who falsifies information to obtain compensation may be disqualified from receiving such compensation or fined; and an employer's experience rating may be readjusted if increased based on a false claim.

Insurers writing more than 3,000 policies annually in New York (workers' compensation, automobile, and health) must file a fraud detection and prevention plan with the Superintendent of Insurance. The plan must include provisions for a full-time special investigations unit, staffed with either trained company personnel or under contract with a private investigative service.

Workers' compensation insurers and self-insurers may now contract with preferred provider organizations to deliver medical services, provided the insurer or employer has no financial interest in the preferred provider organization. The preferred provider organizations used must be licensed by the Commissioner of Health, and must have at least five doctors in every medical specialty and at least three hospitals from which the employee may choose.

An employee dissatisfied with initial treatment by a managed care organization may choose another certified managed care organization after 21 days, or after 30 days if so provided by a collective bargaining agreement.

Employers who are unsure of the extent of their liability for a claim, may make compensation payments for up to 1 year without prejudice or admission of liability.

Compromise and release agreements are now allowed.

North Carolina

Reimbursement fees for inpatient medical treatment by a hospital participating in the State plan shall not be less than 90 percent nor more than 100 percent of the same itemized charges for like services for other hospitals. (This provision expires June 30, 1997.)

An indigent claimant appealing an award is exempt from depositing the security provided by law.

Subcontractors with no employees are no longer required to obtain workers' compensation coverage.

Ohio

Every person who performs labor or provides services under a construction contract is an "employee" if at least half of 20 stated criteria are met. Also, rules were established to permit a self-insured employer to self-insure its own construction projects.

Oklahoma

If injured by assault or during a school disturbance, public school teachers and other employees have the option of supplementing temporary total disability benefits with any available sick or personal leave.

The definition of "certified workplace medical plan" was amended to include providers entering into a contractual agreement with an insured, including any member of an approved group self-insured association, policyholder, or public entity, regardless of whether such entity is insured by the State Insurance Fund. An employer may now contract directly with a certified plan when the insurer (excluding the State Insurance Fund) has not done so.

The employer's defense that an accident was caused by intoxication or drug or chemical abuse now includes abuse of prescription drugs. This defense applies only when the use or abuse renders the employee incapable of doing what an ordinarily prudent and cautious person would have done.

Workers who elect not to participate in the certified workplace medical plan must designate, at the time of election, physicians with whom they have a documented history of treatment. The designations may be updated annually during the enrollment period of the certified workplace medical plan. The plans must use treatment guidelines and protocols substantially similar to those established by the Workers' Compensation Court's Physician Advisory Committee.

Any medical benefits claim under \$500 in a year paid by the employer under the law's medical deductible provisions is excluded from the employer's experience modification calculation. Willful failure to keep required records on employees and wages or falsification of such records is now a felony instead of a misdemeanor.

The penalty for misrepresentation to obtain insurance is now a felony, rather than a misdemeanor.

The percentage of compensation awards used in estimating future compensation obligations for local governments increased from 3 percent to 5 percent.

Pennsylvania

An executive officer of a nonprofit corporation or a for-profit association who serves voluntarily and without pay may elect not to be covered by workers' compensation.

New legislation provided offsets, which are not retroactive, against workers' compensation benefits for 50 percent of Social Security old age and retirement benefits, and 100 percent of severance pay and employer funded pension plans.

The earnings test for agricultural employee coverage in a calendar year increased to \$1,200 (previously, \$150). Also, the amount of time an agricultural employee must work to be covered increased to 30 or more days (previously, 20 days). A spouse or a child of an agricultural

employer under age 18 is not considered an employee unless hired under an express written contract.

A group of employers wishing to self-insure must post sufficient bond.

After 104 weeks of total disability benefits, an employee must have a medical examination to determine the degree of impairment, if requested by the insurer within 60 days. If the impairment is greater than 50 percent, using guidelines of the American Medical Association, the employee is presumed to be totally disabled with continued benefits. If there is less than a 50-percent impairment, partial disability benefits will begin 60 days after the determination.

At any time during the 500-week maximum period of partial disability, an insurer or the employee may submit evidence of a change in earning power. An employee may appeal a change at any time, provided that the employee meets the threshold impairment rating of 50 percent for partial disability. Total disability payments will continue until adjudicated or agreement is reached that total disability has ceased or the condition has become partial.

Employees must submit to independent medical examinations requested by the insurer, but not more than two examinations per year.

"Impairment" is defined as an anatomic loss that results from a compensable injury and is reasonably presumed to be permanent. Earning power is based on the work an individual is capable of doing, taking into account the jobs available in the employment area.

If the insurer receives medical evidence that the claimant is able to return to work, the insurer must notify the claimant of the change and the claimant's obligation to look for work. The employer may require the employee to be interviewed by an expert selected by the insurer to determine earning power and employability. Insurers may also require employees to complete verification forms twice a year to establish entitlement to benefits, and suspend benefits if the employee refuses.

Generally, injured employees must use the doctors designated by the employer for 90 days (formerly, 30 days). Employees may seek a second opinion from the doctor of their choice if invasive surgery is prescribed by the employer-designated physician. If the additional opinion differs, the employee may determine which course of treatment to follow. If the employee chooses to follow the second opinion, the procedures will be performed by physicians selected by the employer within 90 days of the second opinion.

An individual may not receive a combination of benefits and wages that exceeds the current wages of fellow employees in a similar job. Further, benefits are not paid if an individual is employed and earning more than pre-injury wages. If an employee's wages are not fixed by the week, month, or year, average weekly wages are established based on the three highest quarters during the year preceding an injury, instead of the highest earnings in one quarter. The amendment also provides instructions for com-

puting average weekly wages in various situations, including seasonal work and consideration of tips, bonuses, and vacation pay.

Licensed real estate salesworkers and insurance agents are excluded from coverage as independent contractors.

An informal conference, held within 35 days, may be requested by joint agreement in any action in which a claim petition has been filed. At the conference, an employer may be represented by an attorney only if the employee is also represented by an attorney. Recommendations of the judge or hearing officer are not binding unless accepted in writing by both parties. If the dispute is not resolved, the case is reassigned to a different judge, unless the parties agree to continue with the same judge.

The maximum time for payment of temporary compensation was extended to 90 days (previously, 6 weeks). The period during which insurers are permitted to commute future installments of compensation without discount was extended to 52 weeks (previously, 25 weeks).

The statute of limitations on fraud cases is 5 years. Penalties based on the amount awarded may be increased 50 percent (previously, 20 percent) for unreasonable or excessive delays.

Deductible and retrospective rating plans are permitted on workers' compensation policies for groups of five or more employers.

Compromise and release settlements are allowed with the approval of a workers' compensation judge after an open hearing and the filing of a vocational evaluation of the claimant. Before approval, the judge must first determine that the claimant understands the full legal significance of the settlement. The agreement must be explicit about the payment of any medical expenses.

Any employer and the recognized collective bargaining representative may agree to a negotiated compensation plan for an employee. However, the agreement may not diminish an employee's entitlement to benefits.

The insurance commissioner is required to issue a plan for employers who do not qualify for uniform experience ratings. The plan must include a 5-percent discount for employers who have no lost-time injuries during the most recent 2 years, and a 5-percent surcharge for employers with two or more compensable lost-time injuries within 2 years.

Rhode Island

Employers are required to disclose to all job applicants whether or not they are subject to the workers' compensation law.

South Carolina

The average weekly wage must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred, as reported to the State Employment Security Commission, divided by 52, or by the actual number of weeks for which wages were paid, whichever is less.

The definitions of "injury" and "personal injury" now provide that stress resulting in mental illness, but unaccompanied by physical injury, is not a personal injury unless it is established that the stressful conditions were extraordinary and unusual in comparison to normal employment conditions. Further, stress unaccompanied by physical injury is not compensable if the result of events incidental to normal employer/employee relations, except when taken in an extraordinary and unusual manner.

An amendment repealed certain waivers of workers' compensation coverage for employers and employees if prior notice is given.

If an employee has been out of work for 8 days because of a work-related injury or occupational disease, the employer may start temporary disability payments immediately and continue payments for up to 150 days without waiver of any grounds for good faith denial. Temporary disability payments may be terminated or suspended during the 150-day period under specified criteria. An employee whose payments have been terminated by the above provisions may request a hearing to have the payments reinstated. Also, an employer is entitled to a hearing to address the termination of temporary disability payments if an employee has reached maximum medical improvement. Furthermore, an employer may request a hearing at any time to address termination or reduction of temporary disability payments.

It is now unlawful for a health care provider to pursue collection procedures against a claimant prior to final adjudication. Violation of the provision carries a penalty of \$500, payable to the claimant.

Any person other than a lawyer who accepts a fee or gratuity for services rendered on a claim or award is guilty of a misdemeanor and subject to a fine up to \$500, or imprisonment up to 1 year, or both, for each offense.

Payment to a health care provider must be made no later than 30 days from the billing date, unless the Workers' Compensation Commission has been asked to review the bill.

Injuries involving compensable lost time, excessive medical treatment, or the possibility of permanency must be reported within 10 business days after the occurrence and knowledge of the injury.

A contractor on a construction project is not liable in a third party suit for a compensable injury resulting from an employer's failure to comply with safety standards, unless the contractor specifically assumes responsibility for safe practices. The exemption from liability does not apply to negligent preparation of design plans or specifications.

Participants in Tech Prep, or other school-to-work programs in South Carolina, who are injured while working for a sponsoring employer may receive compensation at 50 percent of the State's average weekly wage.

A contractor or subcontractor submitting insurance documentation is considered a statutory employer and responsible for employee injuries. If the employer is uninsured, the higher tier subcontractor, contractor, project owner,

or insurance carrier must pay all awards and medical benefits, but may then file a petition to transfer responsibility to the Uninsured Employer's Fund. The law provides penalties for falsifying information, and for a contractor or subcontractor who refuses to reimburse the Fund for a claim paid because of falsely documented insurance.

South Dakota

The provision was repealed which permitted employers to provide an alternative benefits plan in lieu of workers' compensation insurance.

New provisions regulate and establish procedures for organizing a "captive insurance company" (a company that insures risks of its parent and affiliated companies).

Educational cooperatives were allowed to offer pooled services for certain payroll functions, workers' compensation, and group health insurance.

A party to a contested case now has a one-time opportunity to request that a hearing examiner be disqualified and another appointed. The requesting party need not give reasons for the request.

The maximum burial allowance was increased from \$3,000 to \$5,000.

The reproduction of medical and hospital information was referenced as a type of fee controlled by the Department of Labor.

A grouping for permanent partial injuries in excess of 60 weeks of compensation was eliminated from the awards schedule.

The benefits for those receiving minimum weekly payments for temporary total disability were lowered to the employee's weekly earnings after deductions for Federal and State taxes and Social Security. Prior to the amendment, employees earning less than 50 percent of the maximum weekly benefit received their gross weekly wage.

Tennessee

The legislature enacted the "Workers' Compensation Reform Act of 1996," with an eight-member joint committee to monitor its implementation until June 30, 2001, and a new advisory council to provide annual reports to the legislature.

Employers may suggest, but not require, the use of health maintenance and preferred provider organizations for employee medical care. The previous threshold amount of \$5,000 for case management will be revised annually to reflect changes in the cost of medical care. Health care providers may not use a collection agency or report to a credit bureau concerning a private claim against an employer or insurer for unpaid employee medical costs until all administrative remedies are exhausted.

The Commissioner of Labor must review the role of chiropractic and physical therapy services in workers' compensation costs to determine whether these services should be included in the utilization review system. The

Commissioner also is required to begin a program to make the public more aware of fraud.

The amendment includes measures for the protection of employees who are presented with settlement agreements, but who do not have the advice of an attorney.

Fees for employee attorneys are subject to approval by the Commissioner of Labor or the court, and generally must not exceed 20 percent of the award. Fees for employer attorneys are subject to review, and if in excess of \$10,000, require court approval. Beginning July 1, 1997, the \$10,000 threshold will be adjusted annually. Medical costs voluntarily paid by an employer or insurer are not to be included in determining the award amount for the purpose of calculating the attorney fee.

In accident cases resulting in an employee's death, the plaintiff's attorney fees shall not exceed reasonable payment for actual time and expenses incurred when the employer makes a voluntary settlement offer in writing within 30 days of the employee's death, if the employer offers to provide all required benefits.

Physician fees and hospital charges to employees are subject to administrative or court approval. A benefit review conference may not be scheduled until the employee reaches maximum medical recovery.

Temporary disability payments continue when the injured employee reaches maximum medical improvement, a permanent impairment rating is given, and compensability is not contested by the employer until the employee either accepts or rejects an offered job at a wage equal to or greater than the position within medical restrictions, the parties agree to waive the holding of a benefit review conference, or a benefit review conference is held and the report is filed, whichever occurs first.

When the Labor Department receives a request for a benefit review conference or a court-mandated conference, it must notify the parties of the length of time required to make available a specialist to conduct a conference. If the time period is 30 days or less, the conference is mandatory. Disputes may be resolved in whole or in part by the conference.

Medical records relating to benefit review conferences are confidential and are not to be considered as public records. An employer or insurer must initiate disability and medical payments no later than 21 days after a compensable injury that would entitle the employee to receive benefits.

If, by July 1, 2000, the membership of the assigned risk pool exceeds 10 percent of the eligible employer market, excluding self-insured employers, then the Commissioner of Commerce and Insurance may elect to either activate the State workers' compensation insurance fund, or institute a plan of random placement of all assigned risk plan policies among the State's workers' compensation insurers.

A new "Workers' Compensation Fraud Act" provides misdemeanor penalties if the value of the property or services obtained is \$10,000 or less. Fraud is a class E felony if valued at \$10,000 to \$60,000, and a class B felony if val-

ued at more than \$60,000. Anyone guilty of insurance fraud will have to make monetary restitution for any financial loss or damages. The restitution may be imposed in addition to, but not in lieu of, a fine. Furthermore, anyone economically injured by a person committing fraud may recover any profit, benefit, compensation, payment received, and reasonable legal expenses and court costs.

If an employer has implemented an approved drug-free workplace plan, it is now presumed that a work-related injury was caused by the consumption of drugs or alcohol when tests show a concentration level of 0.10 percent for nonsafety-sensitive positions, and 0.04 percent for safety-sensitive positions.

Insurance rating plans must give identifiable consideration to drug-free workplace programs. Furthermore, employers who have safety programs that include certain criteria are eligible for insurance credits, as developed by the Department of Labor.

An injured employee may be reimbursed for reasonable travel expenses when required by the employer to travel to an authorized medical facility outside the community.

An employer is allowed to offset disability payments made to an employee under an employer-funded disability plan for the same injury. However, the offset may not result in a lesser amount than the workers' compensation entitlement.

Utah

Workers' compensation insurers may issue a policy to a sole proprietorship, corporation, or partnership that elects not to include any owner, corporate officer, or partner as an employee under the policy even if, at the time the policy is issued, the proprietorship, corporation, or partnership has no employees. Partners, corporate officers, or owners must personally waive entitlement to workers' compensation benefits from the policies issued.

Vermont

The burial and funeral allowance increased from \$2,000 to \$5,500, plus expenses not to exceed \$1,000, for out-of-State transportation of the decedent to place of burial.

Virginia

Officials at high school and college sporting events and amateur sports events sponsored by a public entity or private nonprofit organization are not covered by workers' compensation.

A statutory dependent receiving workers' compensation benefits must immediately disclose information about remarriage or change in status as a full-time student.

Washington

Children aged 18 to 21 and living and working on a family farm may be excluded from mandatory workers' compensation coverage by their parents.

The exclusion was removed which prohibited the payment of survivor's benefits to a spouse or child who is not a resident of the United States at the time of an injured worker's death.

Rehabilitation benefits now include up to an additional \$5,000 for necessary medical and job accommodations to allow participation in a retraining plan.

An employer providing a certified drug-free workplace and employee assistance and rehabilitation programs may receive a 5-percent premium discount on workers' compensation insurance. The requirements of certification include employee drug and alcohol testing (under confidentiality standards) if the employer reasonably believes the employee caused or contributed to an injury. This provision sunsets January 1, 2001.

Under certain circumstances, including natural disasters, the Department of Labor and Industries can bill employers insured by the State fund who are delinquent in paying premiums or submitting payroll reports.

A 1911 law was repealed which allowed penalties against employers or employees injured because of the absence of "safeguards," which were undefined.

Wisconsin

The Wisconsin legislature enacted legislation in mid-December 1995 which increased maximum weekly compensation rates. Maximum weekly benefits for temporary total disability, permanent total disability, and death increased from \$479 to \$494; and for injuries after January 1, 1997, to \$509 per week. Permanent partial disability maximums increased from \$164 to \$169 per week; and for injuries after January 1, 1997, to \$174 per week. The weekly supplemental benefits rate was increased from \$125 to \$150. The maximum burial expense allowance was raised from \$4,000 to \$6,000.

In addition, the 1995 legislation exempts employers from the obligation to insure workers whose religious beliefs oppose accepting private or public insurance payments for death, disability, old age, retirement, or medical bills. The worker must request the exemption and the religious order must agree to pay reasonable financial and medical aid. A volunteer for a nonprofit organization exempt from Federal income taxes is not covered by workers' compensation. Until January 1, 1998, school districts may accept workers' compensation liability for certain work experience students.

All medical reports now must be certified and filed at least 15 days before a hearing. Pre-

viously, some medical reports were required to be verified, a higher standard of authenticity than certification.

The workers' compensation law now contains principles to determine whether a successor business is liable for penalties the prior business accrued for being uninsured.

Wyoming

The legislature continued the process of going from coverage based on what were termed extrahazardous occupations to coverage based on industry classifications under the workers' compensation law.

A conforming change was made in the designation of automobile dealers as extrahazardous employment. Insurance rates determined for automobile dealers will be based separately for sales and other personnel, other than clerical.

The definition of "employer" now includes any qualified employer participating in an approved school-to-work program, any local school or community college district board of trustees, or the State Department of Education.

There is now a maximum 2-year cumulative period for the payment of temporary total disability benefits for any one accident.

Prisoners and those on probation do not qualify for benefits from injuries occurring while participating in school-to-work program activities.

Separate "small claims" hearing procedures were established for disputed amounts under \$2,000 that do not involve the issue of compensability. Either party to a small claims hearing may object to the procedure within 15 days, in which case the hearing officer reviews the case and rules on the appropriateness of holding a small claims hearing. Attorney fees and other reimbursements are not permitted in connection with a small claims hearing, which may be in person or by telephone. As with contested case hearings, small claims decisions may be appealed. Contested case hearings involving \$2,000 or more are held as before. Unless parties agree to a different location, hearings are held in the county where the injury occurred; hearings on out-of-State injuries are held in the county of the employer's business.

The Workers' Compensation Division was authorized to adopt a separate fee schedule for pre-authorized surgery and hospitalization.

A new law clarified legislative intent that the Medical Commission was to have jurisdiction over all cases commencing January 1, 1994, regardless of the date of injury.

The farm loan board now can issue revenue bonds secured by and payable from the workers' compensation program. □