

THE FEDERAL ATTEMPT TO TAKEOVER WORKERS' COMPENSATION

NATIONAL COUNCIL OF SELF INSURERS ANNUAL
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Federal Takeover on Multiple Fronts

- Workers' Compensation is under siege
 - Trial lawyers and worker advocates upset with state limitations.
 - Progressives and allied academics and “news” outlets favoring a national single payer system.
 - Federal programs under stress looking for ways to improve federal trust fund solvency without cutting benefits or increasing taxes.

Federal Takeover on Multiple Fronts

- Medicare
- Social Security
- Medicaid
- OSHA
- ERISA
- Affordable Care Act
- State Single Payer Proposals – Colorado
- Federal Budget
- Law Suit Challenges

Federal Takeover on Multiple Fronts

- Basic points of argument from the Workers' Injury Law and Advocacy Group (WILG) in its Report on the Status of Workers' Compensation released November 30, 2015.
 - Worker benefits under the state workers' compensation system since 1972 have been eroded by more restrictive definitions of coverage and compensability.
 - The restrictions are so great as to be inconsistent with the US Supreme Court decision standard that upheld the New York WC law in 1917.
 - Restrictions are inconsistent with state constitutions.
 - Employers and states have violated the "Grand Bargain".
 - The effect of restrictions has been to shift costs to Medicare, Medicaid, and Social Security.

Federal Takeover on Multiple Fronts

- On October 20, 2015 Ten Democrat House and Senate Ranking Members (including Bernie Sanders) sent a letter to Tom Perez, Secretary of Labor.
- The letter asks the US Department of Labor to assert federal oversight over the state workers' compensation programs.
- Clearly there was careful coordination of messaging starting with the NPR and ProPublica series, a WILG report, an OSHA Report, the sign-on letter from members of Congress and a John Burton proposal to reduce SSDI costs by increasing coverage and compensability in state workers' compensation plans.
- Starting point for political advocacy in the Fall of 2016 and policy in the next administration and congress in 2017.

Threat of Increasing Medicare Overreaching

- Imposition of federal standards for all WC payments and settlements involving potential medical expense (e.g. apply MSP to all individuals).
- Apply HIPAA confidentiality restrictions to health information (notwithstanding confidentiality needs for WC)
- Expansion to national Single Payer system with subrogation to benefit federal programs over state workers' compensation.

Medicaid

- Increasing number of individuals receiving Medicaid also covered for WC.
- States beginning to administer state based “Medicaid” with secondary payer requirements.
- Budget agreement in 2013 expanded subrogation to include “any payment from a third party that has a legal liability to pay for care and services”, including workers’ compensation.

Medicaid

- Effective date of budget agreement expansion, October 1, 2014 was pushed to October 1, 2016 by HR 4302.
- Trial lawyers and others continue to argue for repeal of the effective date as the statutory language expanded subrogation of settlement dollars to Medicaid.
- Increased federal and state budget concerns pressing Medicaid to reduce net costs, and states becoming more aggressive in requiring subrogation.
- The issue will continue to grow with the increasing Medicaid case load, the increasing chance that Medicaid recipients will be in the workforce, and state and federal budget pressures.

Social Security

- John Burton Proposal to
 - Enact federal standards for workers' compensation programs
 - Create Social Security Secondary Payer set aside arrangement procedure for cash payments similar to Medicare Secondary Payer provisions and process
 - Establish firm level experience rating for SSDI to reduce “cost shifting” from workers' compensation – if costs shifted the employer FICA cost would increase
 - Eliminate the “reverse offset” in 15 states.
- The Burton proposal is included on the list of potential solvency measures in the SSDI Solutions Initiative from the well respected Committee for a Responsible Federal Budget.
- It is a creative way to seek support from federal officials seeking to improve SSDI solvency without increasing taxes or cutting SSDI benefits.
- So far, no traction for Burton proposal because 1) it was released after SSDI solvency measures were recently enacted; 2) UWC and others opposed it; 3) it would impose increased costs on employers; 4) the current House majority does not favor federal standards over state based programs.
- Changes in the majority in the House and/or Senate could result in this being taken seriously.

Social Security

- Obama FY 2017 Budget proposal
 - Required reporting of workers' compensation information from states and private insurers to correctly offset and reduce SSDI payments.
 - Require monthly wage reporting instead of annual to enhance tax administration and improve SSI program integrity.
 - Cross-matching Office of Workers' Compensation Program records with Social Security to reduce improper payments in FECA, Black Lung and EEOICPA.

Social Security

- SSA ongoing proposals
 - Change in SSDI/WC offset percentage.
- SSA implementation of Bipartisan Budget Act of 2015
 - Exclusion of certain medical sources of evidence.
 - Stronger penalties for fraud.
 - Effective 11/2/2016 authorizes SSA to obtain data on beneficiary earnings from payroll providers and other commercial sources of earnings data through a data exchange. This would exempt individuals from reporting their own earnings. Regulations should be published soon to address specifics.
 - Requires medical review for SSDI with SSA making reasonable effort to ensure that a qualified medical professional provides the review.

OSHA

OSHA updated its recordkeeping rule to expand the list of severe injuries

- As of January 1, 2015, all employers must report:
 - 1. All work-related fatalities within 8 hours
 - 2. All work-related in-patient hospitalizations, all amputations and all losses of an eye within 24 hours.

OSHA views its role as federal oversight that includes “systematic access to hospitalization data from state workers compensation programs”. OSHA report released in March 2015 was designed to demonstrate inadequacy of workers’ compensation and cost shifts to federal programs.

Current OSHA assumes that there is under reporting due to safety incentive programs and employers discouraging reports because of workers’ compensation liability and compensability.

Focus groups at National Institute for Occupational Safety and Health (NIOSH) indicated a desire to

- Increase OSHA reporting to include initial statements in WC claims
- Crossmatch WC claims with OSHA report to identify injuries that “should” have been reported
- Plan for Continued Analysis of Existing Rules and Expanded Authority.

Legislative authority for the National Commission on State Workmen’s Compensation was enacted through OSHA in 1970 and would likely be pursued again through OSHA.

Affordable Care Act

- Potential inclusion of state WC health records as part of national health information data base.
- Potential loss of WC exclusion from HIPAA.
- Subrogation issues to shift cost from ACA health insurance plans to workers' compensation.
- Health care providers more likely to serve customers with fee for service plans and higher payments for providers. (WCRI research)

ERISA

- Opt Out debate has raised the profile of ERISA as an alternative to WC plans.
- Trial lawyers have suggested that ERISA might be amended to preempt states from using ERISA plans to meet state workers compensation obligations.
- Expanded use of ERISA plans may prompt the Administration and/or Congress to increase oversight of coverage and compensability to assure adequacy.

Federal Budget

- Medicare, Social Security, and Medicaid suffer from projected federal and state budget shortfalls.
- Congress seeking methods to reduce spending and/or increase revenue to address budget shortfalls.
- Also, Congress is searching for “pay fors” for priority discretionary spending.
- Shifting costs from federal programs to state workers’ compensation is easier politically than increasing taxes or premiums or cutting coverage or benefits.

Single State Payer Proposals - Colorado

- Colorado Amendment 69 would create single payer system that would replace the medical part of state WC with new state payroll tax funded health insurance program.
- Terms of the program incorporate ACA minimum coverage in the state plan.
- Leaves wage replacement part of state WC disconnecting injured workers from rehabilitation and return to work.
- On the Colorado ballot in November.

Law Suit Challenges and Federal Legislation

- US Supreme Court decision in *New York Central Railroad v. White* (1917) permitted exclusive remedy if benefit amounts were reasonable, according to reasonable definite scale, by way of compensation for the loss of earning power incurred in the common enterprise.
- Florida case of *Padgett v. State of Florida* cited *New York Central* case, John Burton and challenged constitutionality of Florida exclusive remedy provisions in light of recent restrictions in compensation.
- Similar arguments being made in other states in challenging limitations on compensability.

MSA Reform Legislation Pushes Back HR 2649 and S 1514

- Bi-partisan with support from committees with jurisdiction (Reichert/Thompson and Portman/Nelson).
- Pushes back on Medicare overreach in defining Medicare's interest in future medical in WC settlements.
- Requires application of state WC law in determining future medical amounts in settlement.
- Establishes timeframe for CMS to make determinations – submission of set-aside optional.
- Direct payment of set-aside amount optional.
- Permits pro-rata allocation of settlement proceeds.
- Provides administrative appeal.

The Challenge of the Federal Takeover in 2017

- The multi-pronged campaign for the federal takeover has been successful in shaping the public debate and calling for federal intervention through
 - “Investigative reporting” by NPR and ProPublica
 - “Research” to show cost shifting from state WC to taxpayers and the federal budget by John Burton
 - Broad support for federal oversight from democrat congressional leaders
 - Policy support from OSHA based on the costs of health and safety
 - Federal and state based legal analysis and suits by WILG to set the stage for further litigation.
- But for the current majority in the House and Senate and opposition to a federal takeover from the business community the likelihood of significant new federal legislation to set federal standards for state workers’ compensation would have been likely.
- The results of the 2016 election will have a profound impact on the direction of workers’ compensation and whether it survives in its current form or is significantly modified moving forward.