

Managing Workers' Compensation Costs and Caseload

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Scope: This article provides an overview of effective management of workers' compensation costs and caseload. The article begins with a historical explanation of how the workers' compensation system came about, which is foundational to an understanding of the system today. It addresses both legal and practical aspects of workers' compensation today and likely future changes. Because workers' compensation laws vary greatly from state to state, this article is necessarily general in its coverage and does not address specific state laws.

Overview: Workers' compensation (WC) is a government-mandated benefit for employees who incur a work-related injury or illness. This article first discusses the historical and legal underpinnings of the WC system as a replacement for the common law system of assigning liability for work-related injuries. Next, it discusses the basic legal framework of WC law at the federal and state levels. Third, this article addresses practical issues of administration, including a discussion of how WC interrelates with other workplace laws, including the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and unemployment compensation programs. Fourth, attention is given to the role of various levels of HR professionals in the administration of WC: handling paperwork, dealing with claims and improving return on investment. Fifth, the article provides a general discussion about how premiums are set and tips on how employers can keep WC costs down. Finally, this article examines future trends. The article does not address WC laws of specific states.

Readers desiring a more advanced understanding of issues related to the effective management of WC are referred to the [WC Training PowerPoint presentation](#), suitable for supervisors and others who manage employees.

The Historical and Legal Foundations of the WC System

WC was originally conceived as a replacement for the English common law system, which assigned liability for work-related injuries on a case-by-case basis and offered little or no right to compensation for work-related injuries. Lawsuits could be complex and the results harsh, and employers often faced multiple costly lawsuits arising out of the same sort of injuries. It was a system that failed both parties.

As a result, the current WC system is a trade-off. Liability on the part of the employer is absolute; however, the amount of damages awarded under WC might be substantially less than would have been awarded under the old system. WC is often said to be an injured worker's "exclusive remedy" (but in certain situations employees retain their remedies against third parties and can even sue their employers). WC is founded on the policy judgment that an injured worker should not be required to bear the costs of his or her injuries—even when the worker's negligence contributed to the injury—and was designed to eliminate the delays, complexities of proof, expense and inconsistency of results that frequently occurred under the common law system.

In 1908, the United States federal government enacted the first WC system for its employees—the Federal Employers' Liability Act. Twenty years later, only eight states had not yet followed suit in some fashion. Consequently, this is an unusually old and highly developed body of employment law. It is also extremely complex due, in part, to the multiplicity of programs. In addition to the 50 states, WC laws now operate in the District of Columbia, Puerto Rico and the U.S. Virgin Islands.

Although the WC system can be frustrating for both employers and employees, it has proven to be a great improvement. Relatively speaking, the WC system is an efficient and fair mechanism and represents one of the most important advances in workplace law and relations of modern times. Nevertheless, WC is subject to constant adjustment by state legislatures and courts. See [New York Extends Claims Period for Sept. 11 Rescue Workers](#)

Relationship Between Federal and State Law

Workers' compensation laws are primarily a matter of state law for private employers. The federal and state systems are essentially separate and distinct. The federal government does not mandate that states provide a certain minimum level of WC benefits, and the federal WC laws apply only to a few specific populations. See [U.S. DOL: Workers' Compensation](#).

Federal Law

Federal government employees come under the [Division of Federal Employees' Compensation \(DFEC\)](#), 5 U.S.C. §8101, et seq. There are also federal statutes that apply to longshore and harbor workers (the [Longshore and Harbor Workers' Compensation Act \(LHWCA\)](#), 33 U.S.C. §910, et seq.); to railroad employees (the Federal Employers' Liability Act (FELA), 45 U.S.C. §51); to coal miners suffering from black lung disease (the [Black Lung Benefits Act \(BLBA\)](#), 30 U.S.C. §801); and to nuclear weapons workers (the [Energy Employees Occupational Illness Compensation Program Act \(EEOICPA\)](#), 42 U.S.C. §7384, et seq.). The details of the DFEC, FELA, BLBA and EEOICPA are beyond the scope of this article. **State Law**

The various state programs have evolved separately and differently for many decades. They are now a complex array of requirements that are particularly challenging to both HR generalists and more specialized HR professionals in multistate organizations.

Common elements among state laws

All state WC programs share common elements. Victims of industrial accidents and occupational disease (or their surviving dependents) are provided with:

- Medical treatment.
- Vocational rehabilitation.
- Wage-loss indemnification.
- Death and burial benefits on a no-fault/exclusive-remedy basis.

WC laws typically contain provisions that prohibit employers from retaliating against a worker who has filed a claim or received benefits under WC or provided evidence in a WC proceeding.

The employer is responsible for injuries and ailments that arise out of and are in the course of employment regardless of who actually caused the accident. "Arising out of employment" refers to the cause and origin of the injury. "In the course of employment" refers to the time, place and circumstances of the injury.

The benefits of WC to the injured worker include the following:

- Coverage without direct cost to the worker.
- Prompt payment of claims following a work-related injury.
- Payments based on the employee's current earnings that are generally excluded from gross income for tax purposes.
- Payments made to an employee's spouse or dependent children in the event of death.
- Anti-retaliation provisions.

Many states differentiate in wage-loss benefits in terms of "permanent total disability" (can never do any job), "permanent partial disability" (can never do some jobs), "temporary total disability (for now, cannot do any job) and "temporary partial disability" (for now, cannot do some jobs).

The injured employee is generally limited to the benefits specified in the WC law. Under this trade-off, the employer's liability is limited to providing WC insurance coverage, and the employee forgoes the right to tort action and the possibility of a larger recovery in exchange for timely and certain medical and wage-loss benefits.

Some states have different rules for firefighters and police, presuming that certain types of injuries for such employees are work-related. Such a presumption is warranted given the specialized dangers and stresses under which police and firefighters operate. Even volunteer firefighters and constables may be given WC benefits. States have different qualifiers and disqualifiers, as well as different benefits formulas. HR professionals are strongly urged to examine the particular WC laws of each state where their employer does business. See [State Workers Compensation Offices](#).

Importance of the Concept of "Employer"

The employer clearly bears responsibility for the payment of WC benefits. It may be difficult, however, to determine who the "employer" is, as every state has its own definition. See [Can I be sued by a temporary employee who is hurt at our workplace? Are they covered by workers' compensation?](#)

Conversely, it may be difficult to determine whether a person is an "employee" or a genuine independent contractor under applicable law. See [Employing Independent Contractors](#) and [With PEOs, Comp Administrators Concerned Workers Sometimes Aren't Covered](#).

Generally, most state WC protocols require that all employers with one or more workers participate in the system. Sole proprietorships may be allowed to opt out. A handful of states allow certain workers to opt out also. In some states, all government entities are subject to the WC system; in others, they are permitted to opt out. A state may draw a distinction between an ordinary government employee and a government official based on the extent of the worker's authority. A major difference between WC and unemployment compensation is that illegal aliens are generally entitled to WC benefits because even though they had no right to employment, they nevertheless were employees.

Administrative Issues

Participation in the WC system requires the employer to either obtain WC insurance or to qualify as self-insured. Otherwise, employers run the risk of being disqualified from protections from lawsuits and unlimited damages afforded by the WC system, of being subjected to statutory penalties and recovery of attorneys' fees, and of possibly facing personal liability on the part of responsible corporate officers. Nevertheless, some employers still fail to obtain the mandated WC insurance. Many states have addressed this situation through the creation of an uninsured employers fund.

It is important for employers to recognize the types of risk within their business and then to obtain appropriate insurance coverage. Standard general liability insurance policies exclude WC liability. However, the immunities afforded by a WC system may not extend to certain employment practices, including, for example, sexual harassment. Thus, employment practices liability insurance (EPLI) can be an essential component of an organization's armor against liability for work-related injuries. See [What is employment practice liability insurance?](#)

There are three methods of obtaining required WC coverage:

- Through an approved private carrier.
- Through self-insurance on state approval of an employer's application.
- Through a state-funded insurance plan.

Relationship with Other Workplace Laws

It is possible for a single work-related injury to afford an employee rights under the applicable WC statute, the Family and Medical Leave Act (FMLA) or state counterpart, and the Americans with Disabilities Act (ADA) or state counterpart. See [The New Bermuda Triangle](#) and [Interplay of ADA, FMLA and Workers' Compensation Training for Supervisors](#).

All of the applicable statutory regulations must be consulted. A work-related injury may create a disability as defined by the ADA. It may also constitute a serious health condition as defined by the FMLA. But the two are not the same thing. If more than one statute applies to the situation, then the injured worker must be afforded all the rights under each applicable statute.

The best practice is to first determine the employee's WC rights, then separately determine the employee's FMLA rights and, finally, separately determine the employee's ADA rights. The fact that an employee might be eligible for WC does not affect eligibility for FMLA leave. It is the failure to keep these analyses separate that frequently leads to confusion.

Ordinarily, WC benefits and unemployment compensation (UC) benefits will be mutually exclusive. To be eligible for WC benefits, one must be unable to work. To be eligible for UC benefits, one must be available for work.

The Role of the HR Professional in WC

The role of the HR professional in relation to WC depends greatly on the size of the employer, the number of claims being filed, and the education and specialization of the HR professional.

An HR generalist in a small company is occupied mostly with:

- Developing and implementing WC policies and procedures in coordination with FMLA and ADA policies and procedures.
- Developing and implementing a workplace safety program.
- Communicating with employees having WC claims.
- Communicating with carrier representatives and legal counsel.
- Conducting workplace investigations. See [How to Conduct an Accident Investigation](#).
- Supplying information to upper management to resolve WC litigation or to address systemic issues beyond the HR generalist's scope of authority.

These are important and challenging tasks made more difficult in a small company.

A larger organization may need to employ an HR professional as a specialist in handling WC issues. In such an organization, the WC specialist would likely have all the duties of the generalist described above but also have the time to delve deeply into ways to reduce WC costs while improving organizational productivity and morale. However, in a larger organization with a greater number of claims to administer on a daily basis, the sheer volume of paperwork would tend to push the more strategic concerns to the background.

A large organization in a business in which the incidence of WC claims is high may find it useful to employ an HR professional who has specialized knowledge in all aspects of WC. Such a person's job may be essentially to search out ways to make the organization's WC compliance more effective both in terms of direct costs (such as lost labor hours and WC premiums) and indirect costs (administration, product quality and customer satisfaction). Here, the HR professional might have one or two levels of subordinates acting as specialists or generalists.

WC Insurance Rates and How to Keep Them Down

WC premiums are determined by a number of factors, but one of the most important is the National Council on Compensation Insurance (NCCI) Experience Rating Modifier, commonly known as MOD or ERM. The MOD can significantly increase or decrease the total premium. A reserve is a calculated guess, based on historical data, as to what will be spent on a claim.

Employers are often surprised to learn that a reduction in rates does not automatically mean a reduction in costs. The MOD tailors the cost of WC insurance to the individual loss performance of an employer. Employers should recognize that WC is more than a necessary expense; it is a controllable aspect of business that, if managed properly, will have a

measurable and positive return on investment (ROI). Employers should also recognize that WC costs include indirect costs of administration, production delays, unhappy customers, increased stress and so on. Accordingly, it may be a big mistake to shop for a WC carrier based solely on price, because having an agent and carrier with good understanding of WC is very important. See [How to Avoid Workers' Comp Premium Overpayments](#) and [Understanding Workers' Compensation Premium Fraud](#).

Ways to reduce WC premiums

To understand the importance of keeping low WC reserves, organizations first need to understand how the MOD is calculated. The MOD is the difference between what the insurance carrier expects a company to spend on claims and what the company actually spends—a figure skewed by reserves. By understanding how the MOD is calculated, the employer can take proactive steps to achieve a favorable MOD, thereby saving money on WC premiums:

- The first step in reducing reserves is to keep the initial reserve from being set too high. Employers should describe an injury with care on the First Report of Injury (FROI), using the least severe and the most specific wording possible, especially before the doctor's initial evaluation. For example, employers should not report simple wrist pain as "carpal tunnel syndrome" and should use "fracture" instead of "crushed" or "broken" and "right index finger" instead of "hand."
- Second, employers can greatly reduce reserve amounts by allowing the injured employee to return to work in a different role, such as transitional, modified or light-duty work. When an employee returns to work, the WC carrier may not have to pay wage replacement (assuming that regular wages are paid for the light-duty work).
- Third, lump-sum settlements can wipe out reserves completely, but they also add to the total cost of the claim. There is also a chance that the employee will be awarded future medical expenses. When considering lump sum settlements, organizations should consult with legal counsel because of the complex issues involved.
- Finally, employers should keep the WC adjuster informed about the injured employee's progress, especially when the news is good. If the employee returns to work, quits or is fired, the employer should ask that the reserve be adjusted to reflect the fact that wages for lost time will no longer be paid.

Effective communication with the injured worker can help fend off misunderstandings that can lead to unfulfilled expectations and unnecessary aggravations in receiving WC benefits. Such problems make it more likely that an ordinary WC claim will be elevated to a lawsuit outside the WC process or lead to a malingering employee. See

One effective communication tool is a WC "procedure sheet," which provides reviewable documentation of the company's policies and procedures. The document should cover several points to give injured workers a level of understanding that will quell their or their family's desire to sue:

- How to return to work.
- Where to send medical bills.
- What to do if the worker cannot make an appointment.
- When the worker can expect the benefits.
- How prescriptions work.
- Whom to contact with questions.

These statements should coincide with the employee handbook, existing policies and procedures, and the state WC regulations. For this communication device to be effective in combating litigation, it needs to be given to the employee at the time of injury or shortly thereafter. See [Workers' Comp: The Myth of the Bad Employee](#).

Malingering can also be a problem in the WC area. All too often the injured employee is avoided after his or her injury. As such, the employee's only contact with the company or insurance carrier is the weekly receipt of the compensation check. In this manner, injured employees may become deconditioned and lose all motivation to return to work. WC laws in many states now provide disability benefits that more than meet the financial needs of the injured employee, further reducing the motivation to return to work. The most fundamental approach to gaining control over costs and claims is to monitor and control each case after the initial injury. It is critical that employers keep in touch with injured workers and monitor their progress until they return to work. Hospital visits, calls to the home and handwritten notes are all good examples of such follow-up. All such measures provide a personal touch and reassure the worker that the organization cares and is concerned about his or her well-being. Such communications also give the employer the chance to verify that the employee is at home recuperating and not working at another job or participating in activities that might inhibit recovery.

Good administrative practices in documenting work-related injuries and return to work are also important in reducing WC premiums:

- Prompt accident reporting is one of the most crucial control elements in any claims management program. See [We have an employee who suffered a minor injury at work and missed a few days. Could we just pay the person for time missed instead of filing a workers' compensation claim?](#)
- All accidents, regardless of their severity, should be recorded with an [incident report](#). A small scratch or laceration can go on to become a more serious infection. Consult with the WC carrier regarding expectations for submitting "report only" incident reports that have not yet resulted in lost time or medical bills.
- It is imperative that employers communicate with physicians and emergency clinics both before and after injuries occur to prevent fraud and abuse of the WC system and also to maximize benefits to the injured worker and employer interests in a speedy and cost-effective recovery. Of course, such medical information should be kept confidential within an organization on a need-to-know basis.
- Once the employee recovers, the organization should document the return to work and subsequent duty status.
- Employers should also coordinate benefits by investigating what other sources the employee may have for recovery, such as the automobile insurance policy of another driver or the manufacturer of a defective product that injured the worker. Ordinarily, the WC carrier takes the lead in such matters, but it is good for employers to keep that option in mind because it is the employer that will be paying future premiums.

Communication such as described above helps reduce disputed claims and opens up opportunities for return to work and modified-duty programs. In addition, employers should maintain good communications with their insurance carriers or third-party administrators.

Establishing a return-to-work/light-duty program can be effective in minimizing lost time after a workplace injury or illness. Studies show the longer an employee remains out of work, the less likely the employee is to return to work, which results in higher costs to both the employer and the carrier. See [How to Create a Return-to-Work/Light-Duty Program](#).

Preventing fraud is also important in managing WC costs. Bogus claims are often authorized for payment when, in fact, they occurred off duty. For example, an employee injured lifting furniture at home or participating in a sporting event may be tempted to falsely claim that the injury occurred doing heavy lifting on the job—especially if the employee otherwise would not have health or disability insurance coverage. Nevertheless, it is advisable to treat every WC claim as legitimate until clear and convincing evidence shows otherwise.

Lastly, and most important, compensation costs are controlled by good safety and loss control programs. See [OSHA: Employer Responsibilities](#). Today, most WC carriers require some sort of safety and loss control program as a condition of extending coverage. Effective safety and loss control programs are characterized by management commitment, along with positive incentives to promote safety and accident prevention. To prevent accidents, management must

understand where, when and how injuries are likely to happen. A good tool in this regard is the use of an incident/near-miss report. Exit interviews can also be used to help prevent future accidents.

Challenging a WC Claim

Because WC law is state-specific (and fact-specific if an employer is considering challenging a claim), it is not possible for this article to state much in the way of general guidance on whether to challenge a WC claim or how to go about presenting a challenge. This decision should be discussed with a representative of the employer's carrier and, possibly, independent legal counsel. Generally, however, employers can challenge the reasonableness of treatment and medical bills for errors or charges in excess of state guidelines. When an organization strongly suspects WC fraud by an employee or medical provider, it may find it helpful to enlist the services of a private detective to ferret out further evidence. However, such steps should be taken with caution and only after consultation with the WC carrier and experienced WC legal counsel.

Trends and New Developments in WC

WC is one of the oldest reforms in the employment law area, and it works remarkably well in comparison with the common law system it replaced. However, the kinks are still being worked out.

Moreover, new kinks are presented by modern developments in disease and disease prevention and new technologies in the fields of machinery, chemical science, weaponry and even terrorism. The states and federal government attempt to address these needs as they arise, creating a gradual accretion of new law and new administrative strategies for dealing with the issues.

HR professionals should be aware of several developments as possible trends, such as the increasing cost of prescription drugs, technological and medical advancements changing the medical field, and the legalization of medical marijuana.