

# LEGISLATIVE REFERENCE BUREAU

## Workers' Compensation Law in Wisconsin

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## Overview

This paper summarizes recent developments in workers' compensation policy in Wisconsin. First, it outlines the historical background and significance of workers' compensation laws in Wisconsin. Next, it introduces workers' compensation programs across the country and identifies key variables that set these programs apart from each other. Then, it reviews recent trends and challenges in this policy area and summarizes legislative reforms enacted in various states. Finally, it summarizes proposed and enacted legislation in Wisconsin within the last three legislative sessions.<sup>1</sup>

## History

Throughout Wisconsin's early statehood, workers who sustained on-the-job injuries had one recourse: civil, or 'tort,' litigation against their employers. But the burden of proof of employer negligence stood insurmountably high and these injury suits were successfully countered by claims that the employee was negligent (contributory negligence), a fellow employee was negligent (fellow-servant rule), or the employee knew and implicitly accepted the dangers associated with employment (assumption of risk).<sup>2</sup> Assumption of risk prevailed even if employers had failed to adhere to statutory safety regulations. Laws pushing back against the fellow-servant rule were enacted as early as the 1870s but were repealed or undermined in subsequent years.<sup>3</sup> Against this backdrop, judges ruled against employees in a majority of cases around the close of the nineteenth century.<sup>4</sup>

At the start of the twentieth century, the tide began to turn. Laws granting some protections to injured railroad workers were enacted in 1905 and 1907, paving the way to debate similar standards for other kinds of workers.<sup>5</sup> Moreover, judges increasingly ruled in favor of injured workers, raising concern among employers around tort litigation and its results. What had prompted this about-face? Writing in 1909, Wisconsin Supreme Court Justice Roujet Marshall referred to workplace accidents as “[sacrifices] upon industry’s altar,” lamenting that “these inevitable sacrifices fall first upon the

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1. Since its inception, workers' compensation has been subject to inconsistent punctuation. This brief recognizes all three widely used variants: workers' compensation, worker's compensation, workers compensation. See *Wisconsin's Worker's Compensation Centennial, 1911–2011: The Nation's 1st Constitutional Worker's Compensation Law* (Madison, WI: State of Wisconsin Department of Workforce Development Worker's Compensation Division, 2011), 6.

2. “Worker's Compensation Brief History,” State of Wisconsin Department of Workforce Development, accessed October 30, 2017, [https://dwd.wisconsin.gov/wc/brief\\_history.htm](https://dwd.wisconsin.gov/wc/brief_history.htm).

3. Chapter 173, Laws of 1875, Chapter 438, Laws of 1889, Chapter 220, Laws of 1893, and Chapter 448, Laws of 1903 all concerned “the liability of railroad companies in relation to damages sustained by their employes [sic].”

4. Robert Asher, “The 1911 Wisconsin Workmen's Compensation Law: A Study in Conservative Labor Reform,” *Wisconsin Magazine of History* (Winter 1973–1974), 123–140: 125. Chapter 303, Laws of 1905 related to “actions brought for personal injuries occasioned by the negligent omission of employers” and Chapter 254, Laws of 1907 related to “liability of railroad companies for injuries sustained by employes [sic].”

5. Asher, “The 1911 Wisconsin Workmen's Compensation Law,” 125.

weakest members of society.”<sup>6</sup> He and others suggested that the law had not kept pace with developments in industry that endangered workers. By this point, tragic accidents had brought questions of liability to the fore. The very same year Wisconsin enacted its workers’ compensation law, the Triangle Shirtwaist Factory fire of March 25, 1911, in New York amplified calls for workplace reforms nationwide.

Most importantly, business leaders and labor advocates agreed that reform would be economically and socially beneficial for both sides. Workers’ compensation could rationalize labor and spur growth while quelling social unrest among laborers.<sup>7</sup> With these aims in mind, some Milwaukee industrial leaders had already implemented rudimentary compensation programs at their factories and plants, following the example of German businesses.<sup>8</sup> (Germany had launched its own compensation system in 1884.)

Together, these forces motivated the Wisconsin Legislature to organize an industrial insurance committee to design and introduce legislation enumerating injured workers’ compensation benefits. The bill was enacted with overwhelming support in 1911 as chapter 50, laws of 1911, or the Workmen’s Compensation Act. The resultant legislation is often referred to as the “grand bargain,” because workers forfeited the right to pursue civil action against employers and gained guaranteed benefits in exchange. Those benefits, laid out in newly created Chapter 110a of the Wisconsin Statutes, would be based on average weekly wages, as well as the type of disability.<sup>9</sup> Most importantly, determination of benefits did not take negligence into account, comprising a “no fault” system. Although New York had enacted a similar law in 1910, Wisconsin’s legislation was the first to withstand court challenges on the basis of equal protection, due process, and freedom of contract clauses. Nationwide, those challenges would be laid to rest by a unanimous Supreme Court decision in *New York Central Railroad CO. v. White* (1917), after which a wave of states passed their own workers’ compensation laws.<sup>10</sup>

A half century later, President John F. Kennedy would commemorate the state’s historic achievement, characterizing the Wisconsin Workmen’s Compensation Act as a “forward-looking action” and “one of the great landmarks of social legislation.”<sup>11</sup> In the intervening 50 years since its enactment, the law had been refined and adapted, but remained centered on its earliest principles. It would continue to evolve in the 50 years following President Kennedy’s commemoration. The 1960s saw the establishment of the Worker’s Compensation Advisory Council, tasked with developing legislation

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6. *Monaghan v. Northwestern Fuel Co.* (1909) 140 Wis. 457, 466. Cited from the original in William L. Crow, “History of the Legislative Control of Workmen’s Compensation in Wisconsin,” *Illinois Law Review* 27 (1932–1933), 137–153: 138.

7. Asher, “The 1911 Wisconsin Workmen’s Compensation Law,” 124.

8. Asher, “The 1911 Wisconsin Workmen’s Compensation Law,” 127.

9. Weekly wages were calculated based on a minimum annual wage of \$375 and a maximum annual wage of \$750.

10. For a concise and useful summary of this process, see Fallon McNally, “Opting Out of the Grand Bargain: A pathway to Poverty?” *Case Western Reserve Law Review* 67 (2017): 1375–1395.

11. “72 years of worker’s compensation since 1911” (Madison, WI: Wisconsin Worker’s Compensation Division, 1983), 30.

through the cooperation of appointed employee and employer representatives.<sup>12</sup> This governmental entity replaced an existing advisory committee established by the original 1911 law.<sup>13</sup>

At present, most related provisions of Wisconsin's workers' compensation program can be found in Chapter 102 of the Wisconsin Statutes, as well as in the Administrative Code under DWD 80–81 and LIRC 3. The Worker's Compensation Division of the Department of Workforce Development (DWD) administers most of the law, which includes collecting and tracking claims information; assessing penalties for employers who fail to comply with the law; resolving claims disputes; promoting workplace safety; and administering benefits from certain state funds.<sup>14</sup>

## Comparing state programs

Each of the 50 states has its own unique workers' compensation program. These programs are financed exclusively by employers, except in Washington, Oregon, and New Mexico, where workers contribute through direct payroll deductions or charges. In general, state programs cover the following four types of claim categories, depending on the severity of the injury and whether it incurs a work absence: medical, temporary disability, permanent disability, and death. First, programs cover injury-related **medical costs**, the most common type of claim. Second, cash benefits, which may be subject to a waiting period, are paid for temporary lost work time due to a work-related injury or illness. The rate of these cash benefits, known as **temporary total disability (TTD)**, varies by state but is generally two-thirds of a worker's pre-injury gross wage.<sup>15</sup> When injured workers return to work, TTD payments cease. However, if workers return to work before reaching maximum medical improvement and must have reduced responsibilities at lower pay, they may be eligible for **temporary partial disability (TPD)** to supplement their incomes. Third, when work injuries cause permanent impairments, workers may be eligible for **permanent partial disability (PPD)** or **permanent total disability (PTD)**. Those who receive PPD are deemed able to work in some capacity, whereas those who receive PTD are considered unable to work at all. Historically, permanent disability claims have imposed the greatest cost for most states. Finally, workers' compensation programs pay certain **death benefits** in the form of burial expenses and cash payments to dependents for fatal work-related injuries.

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12. Chapter 281, Laws of 1963 created WCAC and Chapter 327, Laws of 1967 renamed it.

13. Additionally, in 1976, the gender-neutral Worker's Compensation Law supplanted the Workmen's Compensation Act. See "72 years of worker's compensation since 1911" (Madison, WI: Wisconsin Worker's Compensation Division, 1983), 44.

14. Other agencies and organizations involved in implementation of the program include the Labor and Industry Review Commission, the Wisconsin Department of Justice, the Office of the Commissioner of Insurance, the Wisconsin Worker's Compensation Advisory Council, the Wisconsin Compensation Ratings Bureau, and the Self-Insurers Council.

15. Christopher F. McLaren and Marjorie L. Baldwin, *Workers' Compensation: Benefits, Coverage, and Costs*, (2015 data) (Washington, DC: National Academy of Social Insurance, October 2017), 6.

In all states except Texas, private-sector employers are required to maintain workers' compensation insurance for their employees, although most states grant certain exemptions from this requirement. For example, domestic employees, commissioned real estate agents, agricultural employees, and small employers are exempted from the insurance requirement in various states.<sup>16</sup> In addition, the federal government, through the U.S. Department of Labor, administers workers' compensation programs for federal civilian employees and for specific high-risk employees such as workers exposed to certain toxic chemicals or military service veterans.

In addition to differences in financing, benefits, and insurance exemptions, state programs also differ according to several key variables, discussed below.

### **Insurance providers**

One variable is which entities can provide workers' compensation coverage. In general, there are three possible sources of insurance for non-federal employers:

**Private insurance:** As with other forms of insurance, employers pay a premium in exchange for full payment of compensation benefits for injured employees. Employers may also opt for policies with a deductible in exchange for a lower premium.

**Self-insurance:** Some employers may petition the state to self-insure. This option is more feasible for larger firms with the resources to cover potential losses.

**State funds:** Created by the legislature, a state fund provides insurance to employers, and either competes with other sources of insurance (competitive state fund) or functions as the primary source of insurance within the state (exclusive state fund).

Each state regulates the sources from which employers may purchase insurance. For example, North Dakota operates an exclusive state fund, meaning that employers *must* insure through that fund.<sup>17</sup> By contrast, other states like New York operate competitive state funds that coexist with other sources of insurance. Some of these competitive state funds act as an “insurer of last resort,” meaning that they provide plans only to employers who could not access insurance by any other means.<sup>18</sup> Due to the diverse range of state funds, some of these funds provide nearly all insurance within the state (98.1% in Wyoming), a large proportion of insurance (51.1% in Oregon), or a small proportion of insurance (8.4% in California).<sup>19</sup>

In those states without mandated state funds, the proportion of private insurance

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16. Wisconsin's exemptions are outlined in [Section 102.04](#) and [Section 102.07](#), Wisconsin Statutes.

17. States with exclusive state funds as of 2015 were North Dakota, Ohio, Washington, and Wyoming. See McLaren and Baldwin, *Worker's Compensation*.

18. As of 2015, 17 states had competitive funds, and 12 of those were insurers of last resort. See McLaren and Baldwin, *Worker's Compensation*, 7.

19. McLaren and Baldwin, *Worker's Compensation*, 24–25.

to self-insurance depends in part on state policy around self-insurance. In Alabama, benefit payments for the year 2015 were largely split between private insurance (47.9%) and self-insurance (52.1%).<sup>20</sup> On the other end of the spectrum, private insurance paid 88.6% of workers' compensation benefits in Wisconsin, leaving 11.4% to self-insurance. Wisconsin employers that elect to self-insure must be assessed and approved by DWD and the Self-Insurers Council on the basis of financial viability and safety standards.<sup>21</sup> Wisconsin does not have a state fund, but DWD administers an uninsured employers fund (UEF); DWD redirects penalties it collects into the UEF to pay benefits due to injured workers whose employers failed to comply with the law.<sup>22</sup>

### Medical cost regulations

A second variable that sets state systems apart is *whether* and *how* states regulate the cost of professional medical services provided to injured workers. Most states employ a fee schedule, a set of statutorily regulated guidelines for treatment costs, often including a list of specific injuries alongside specific rates. Most states establish these figures with reference to the rates set for health care services for Medicare patients. For example, as of 2015, North Carolina calculates fee schedule rates as multipliers (140–195%) of comparable Medicare rates. In other words, a medical practitioner could charge between \$140 and \$195 for a service set at \$100 under Medicare, depending on the specific service.<sup>23</sup> A smaller subset of these states—including California, Illinois, and New York—calculate Medicare-based rates within defined geographic regions. In New York, for example, rates for a particular medical service vary depending on whether the injured worker resides in Manhattan, its northern suburbs, or localities farther upstate.<sup>24</sup>

Once Virginia's newly adopted fee schedule goes into effect on January 1, 2018, Wisconsin will be one of only six states without a fee schedule.<sup>25</sup> In absence of a schedule, insurance providers within the state may formally submit fee disputes to DWD, which uses databases of health care services and prices to determine whether contested fees are

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20. McLaren and Baldwin, *Worker's Compensation*, 24–25.

21. The Self-Insurers Council is a five-member body appointed by the secretary of workforce development to advise on the administration of the self-insurance program.

22. See the Wisconsin Worker's Compensation Guide, developed by DWD, for a more detailed description of Wisconsin's program.

23. Rui Yang and Olesya Fomenko, *WCRI Medical Price Index for Workers' Compensation, Ninth Edition (MPI-WC)* (Cambridge, MA: Workers Compensation Research Institute, July 2017), 89.

24. See Appendix 17C, Section 68.3, of the New York State Department of Financial Services, Regulation 83, for specific details pertaining to regional conversion factors in that state. WCRI's report discusses but underscores the rarity of formulas not based on Medicare; Kentucky stopped using Medicare-based rates in 2014, favoring a formula based on "state-specific relative values" calculated using healthcare databases. Yang and Fomenko, *WCRI Medical Price Index*, 19.

25. Other states without fee schedules include: Indiana, Iowa, Missouri, New Hampshire, and New Jersey, although Indiana uses a fee schedule of sorts for hospital care. Nedzad Arnautovic, Barry Lipton, and John Robertson, "Medical Cost Trends: Then and Now," research brief for the National Council on Compensation Insurance, 2017, accessed December 14, 2017, [https://www.ncci.com/Articles/Documents/II\\_Medical%20Cost-Trends-Then-and-Now.pdf](https://www.ncci.com/Articles/Documents/II_Medical%20Cost-Trends-Then-and-Now.pdf)

reasonable. Critics of this system argue that although it successfully identifies outliers charging exorbitant rates, it does little to bring costs down overall, since reasonableness is determined based on a standard deviation calculation.

### **Cash benefit benchmarks**

Another way states regulate costs is by establishing benchmarks for minimum and maximum benefits paid for TTD, PPD, PTD, and death benefits. Under these categories, most states set minimum weekly benefits in dollar amounts, though these figures range widely (e.g., \$45 in Utah for TTD to \$408 in Vermont for TTD). Likewise, maximum weekly benefits exist but also range widely (e.g., \$596 in Oklahoma for TTD to \$1,214 in North Dakota for TTD). These cost regulations cannot be examined in isolation because some states limit the number of weeks injured workers can receive benefits (e.g., 104 weeks' TTD in Texas, 500 weeks' TTD in Virginia), whereas some states do not establish limits (e.g., Colorado, Illinois, and Michigan). A maximum weekly benefit of \$661 in Arkansas seems small by comparison to the \$1,173 maximum in California, but considered against limits on the maximum duration of benefits, those figures tell a different story: Arkansas TTD benefits are capped at 450 weeks, whereas California caps them much earlier, at 104 weeks, which means that an injured worker in Arkansas might receive more benefits over time. Current Wisconsin law includes minimum and maximum benefit dollar amounts for all categories and sets caps on coverage duration based on the injury in question (e.g., 400 weeks for the loss of a hand).<sup>26</sup>

### **Claims procedures**

Another variable that sets states apart is the procedure for administering claims and adjudicating disputes. Key elements of this procedure are 1) the prescribed period within which workers may make claims; 2) whether and how workers may choose medical professionals to assess the validity of claims; and 3) the process for dealing with disputed claims. Each one of these elements varies widely among states.

Generally, an injured worker in Wisconsin must make a claim for compensation within 30 days of undergoing an injury or learning of its relation to his or her employment.<sup>27</sup> Following notification, the claimant may select an examining medical practitioner.<sup>28</sup> Disputes over claims are heard by an administrative law judge or resolved with the assistance of DWD dispute resolution staff. Depending on the type of dispute,

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26. This data reflects NASI data, as per McLaren and Baldwin, *Worker's Compensation*, 74–8. As per Chapter 102, Wisconsin Statutes, death benefits are capped, but this cap is generally calculated in dollar amounts as multipliers of average annual earnings. A 1,000 week cap exists on benefits for unscheduled injuries under PPD.

27. Section 102.12, Wisconsin Statutes.

28. Section 102.13, Wisconsin Statutes.

decisions may be appealed to the Labor and Industry Review Commission (LIRC). LIRC decisions are subject to judicial review.<sup>29</sup>

## Trends and challenges

### Nationwide

In recent decades, workers' compensation programs throughout the country have seen rising costs, particularly to employers. It is estimated that in 2015, \$61.9 billion in workers' compensation benefits were paid, up from \$47.7 billion in 2000.<sup>30</sup> The employer cost for workers' compensation increased from \$60.7 billion in 2000 to \$94.8 billion in 2015.<sup>31</sup> These developments occurred despite a steady decrease in the number of occupational injuries suffered by workers over the same period. Since 1995, the incidence of non-fatal occupational injuries in the private sector has decreased by 63%, from 8.1 per 100 full-time workers, to 3.0 per 100 workers in 2015.<sup>32</sup> Injuries and illnesses involving days away from work have also declined. As a result, the *number* of medical and cash benefit workers' compensation claims fell 56.6% between 1995 and 2013.<sup>33</sup>

Workers' compensation costs have climbed despite this decline in workplace injuries primarily as a result of rising health care costs. Prior to 2008, the national trend was that medical benefits accounted for a smaller share of workers' compensation benefits than cash benefits. However, over the last three decades, the share of medical benefits has steadily grown. By 2015, medical benefits accounted for 51.4% of benefits paid nationally.<sup>34</sup> Rising health care costs for workers' compensation patients have mirrored the broader U.S. trend of higher medical costs for all types of patients, partly due to a growing reliance on advanced medical technology and specialized services, as well as high drug prices.<sup>35</sup>

Over the long term, the federal Affordable Care Act (ACA) may affect workers' compensation costs in both positive and negative ways. On the one hand, as more workers are covered through the ACA, they may be less likely to seek workers' compensation benefits for some injuries and illnesses, which may lower workers' compensation costs

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29. "Worker's Compensation Claim Flow," State of Wisconsin Department of Workforce Development, accessed October 30, 2017, [https://dwd.wisconsin.gov/wc/workers/claim\\_flow.htm](https://dwd.wisconsin.gov/wc/workers/claim_flow.htm); Section 102.16–26, Wisconsin Statutes. The three commissioners on the Labor and Industry Review Commission are chosen for six-year terms by the governor and confirmed by the senate.

30. McLaren and Baldwin, *Worker's Compensation*, 17.

31. McLaren and Baldwin, *Worker's Compensation*, 38–39.

32. U.S. Department of Labor (DOL) Bureau of Labor Statistics, *Survey of Occupational Injuries and Illnesses*, 2015 (Washington, DC: U.S. DOL, 2016).

33. National Council on Compensation Insurance, 1997–2017, *Annual Statistical Bulletin*.

34. McLaren and Baldwin, *Worker's Compensation*, 34.

35. Peter Orszag, "Growth in Health Care Costs," testimony before the Committee on the Budget, United States Senate, January 31, 2008, accessed December 14, 2017, [https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/89xx/doc8948/01-31-health\\_testimony.pdf](https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/89xx/doc8948/01-31-health_testimony.pdf).

overall.<sup>36</sup> Further, the ACA's emphasis on digitizing medical records and identifying best practices through comparative effectiveness research and pay-for-performance payment models could lower costs for medical care.<sup>37</sup> The ACA provisions relating to preventive care and supporting employer workplace wellness programs may also improve overall worker health, resulting in fewer injury and illness claims.<sup>38</sup> Yet these potential cost savings for workers' compensation programs could be offset by other ACA changes. For example, medical providers may shift costs to workers' compensation patients to compensate for Medicare reimbursement rate reductions under the ACA.<sup>39</sup> The increasing demand for care from those newly insured as a result of the ACA coupled with the existing shortage of doctors may also result in increased wait times for injured workers, which may delay recovery and increase overall claim costs.<sup>40</sup> It is still too early to tell how these policies may affect workers' compensation costs over the long term, especially given ongoing efforts in Congress to repeal or make major legislative changes to the ACA.

Workers' compensation costs have also risen in many states as a result of the recovery from the recession. As the employment rate increases, a larger number of employees are covered under the program. Between 2011 and 2015, estimated covered employment increased by 7.7%. Other workforce demographic changes, particularly the rising obesity rate and the aging of the U.S. population, may also play a role in higher workers' compensation costs. Recent studies have found that obesity is linked to higher rates of workplace injuries, longer work absences following an injury, and higher medical cost claims.<sup>41</sup> Although older workers tend to have fewer workplace accidents than younger workers, their injuries tend to be more severe and treatment and recovery is often more complex and costly.

Finally, the current opioid epidemic in the United States has also affected the workers' compensation system. Injured workers are among the millions of Americans who have been prescribed opioids over the past decade in the course of treatment for pain. Ac-

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36. David I. Auerbach, Paul Heaton, and Ian Brantley, "How Will the Patient Protection and Affordable Care Act Affect Liability Insurance Costs?," RAND Corporation, 2014. Accessed December 18, 2017, ProQuest Ebook Central; Philip Armour, Prodyumna Goutam, and Paul Heaton, "Health Insurance and Workers' Compensation Claiming: Evidence from the Affordable Care Act," RAND Corporation, 2016.

37. Marcus Dillender, "Potential Effects of the Affordable Care Act on Workers' Compensation," *Employment Research* 23, no. 2 (2016), 1–4.

38. Julia James, "Health Policy Brief: Workplace Wellness Programs," *Health Affairs* (May 10, 2012).

39. "The Affordable Care Act and Property-Casualty Insurance," Insurance Research Council, 2014; David North, "The Impact of the Affordable Care Act on Workers' Compensation: Opportunities and Considerations," *William Mitchell Law Review* 41, no. 4 (2015), 1445–1469.

40. Barry Lipton, Dan Corro, and John Robertson, "Time From Injury to Treatment in Workers Compensation: Setting a Baseline to Monitor the Affordable Care Act" (2016).

41. Xugang Tao X, Pu-yu Su et al, "Is Obesity Associated With Adverse Workers' Compensation Claims Outcomes?," *Journal of Occupational and Environmental Medicine* 58 (2016), 880–4; Frank Schmid, Chris Laws, and Matthew Montero, "Indemnity Benefit Duration and Obesity," unpublished report from the National Council on Compensation Insurance, 2013, accessed December 14, 2017, [https://www.ncci.com/Articles/Documents/II\\_Obesity-2012.pdf](https://www.ncci.com/Articles/Documents/II_Obesity-2012.pdf).

cordingly, research groups have reexamined the intersection of workers' compensation and opioid abuse. The Workers Compensation Research Institute's (WCRI) most recent study on the subject revealed that injured workers in many states were frequently prescribed opioids in dangerous combinations with other depressants, muscle relaxers, and sedatives between 2010 and 2015. It also concluded that dangerous drug combinations were more prevalent when physicians directly dispensed opioids to patients, or when physicians and pharmacies did not manage care cooperatively. This study demonstrated that opioid use beyond the acute phase can impair function and delay return to work.<sup>42</sup>

### Wisconsin

In line with the nationwide trend, Wisconsin has experienced rising workers' compensation costs in spite of a decline in the number and severity of workers' compensation claims. Between 2011 and 2015, total benefits paid increased by 6.3%, from approximately \$1.10 billion to \$1.17 billion.<sup>43</sup> The recovery from the recession explains some of this rise. In 2015, an estimated 2,692,000 workers were covered in Wisconsin, a 5% increase since 2011.<sup>44</sup> However, much of this increase can also be explained by rising medical costs. In 2015, roughly \$903 million in medical benefits were paid, a 17.2% increase since 2011.<sup>45</sup> That year, Wisconsin paid the highest percentage of medical payments nationwide, at 77.2% of total benefits.<sup>46</sup> According to a 2017 WCRI report, Wisconsin's medical payment per workers' compensation claim was higher than the U.S. average. Although medical payments per claim in Wisconsin have slowed in recent years, they are still increasing at a rate faster than in the 17 other states studied by WCRI. Further, the report found that, compared with the other study states, Wisconsin's workers' compensation medical payments per claim were 46% higher than average for all injuries and 61% higher than the median state for injuries involving more than seven days of lost work.<sup>47</sup> WCRI attributed these higher payments per claim to substantially higher prices paid for nonhospital medical services and hospital outpatient care.<sup>48</sup> A 2017 WCRI report looking at 31 states indicated that Wisconsin had the highest prices for workers' compensation medical services, more than double the median for study states with fee schedules and 79% higher than the median for study states without fee

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42. "Spotlight: Concomitant Use of Opioids and Benzodiazepines, Other Central Nervous System Depressants," Workers Compensation Research Institute, accessed December 14, 2017, [http://www.wcrinet.org/images/uploads/files/Opioidspotlight.rev4\\_.pdf](http://www.wcrinet.org/images/uploads/files/Opioidspotlight.rev4_.pdf).

43. McLaren and Baldwin, *Worker's Compensation*, 23.

44. McLaren and Baldwin, *Worker's Compensation*, 13.

45. McLaren and Baldwin, *Worker's Compensation*, 23.

46. McLaren and Baldwin, *Worker's Compensation*, 23.

47. Sharon E. Belton, *CompScope Benchmarks for Wisconsin*, 17th Edition (Cambridge, MA: Workers Compensation Research Institute, April 2017), 8.

48. Belton, *CompScope Benchmarks for Wisconsin*, 2-9.

schedules. In addition, of the study states, Wisconsin saw the highest growth rate for medical prices between 2008 and 2016, at 32%.<sup>49</sup>

Although Wisconsin was above average in medical cost per claim in WCRI's report, total costs per injury were 18% lower than average.<sup>50</sup> According to WCRI, this lower total cost per claim is largely due to fewer workers losing time from work after an injury and a shorter average duration of temporary disability benefits, resulting in substantially lower cash benefits paid per claim.<sup>51</sup> In a 2013 report by the National Council on Compensation Insurance, Wisconsin ranked first in the nation for shortest average TTD duration.<sup>52</sup> Further, Wisconsin saw one of the largest decreases in cash benefits paid between 2011 and 2015, at 19%.<sup>53</sup> In summary, the lower-than-average cash benefit costs have largely offset the higher-than-average medical payments per claim, resulting in overall costs per claim below the national average.

In response to Wisconsin's high medical cost per claim relative to other states, many employer groups have pushed for adopting a fee schedule in Wisconsin in order to control health care costs.<sup>54</sup> Those opposed to imposing a fee schedule, including several interest groups representing health care providers, have argued that examining health payments alone is insufficient for assessing Wisconsin's workers' compensation system as a whole. Some claim that Wisconsin's lower overall cost per claim is the direct result of the quality medical care provided, which allows workers to return to work sooner and become more productive thereafter. In August 2017, the federal Agency for Healthcare Research and Quality ranked Wisconsin first in terms of health care quality, and the state has ranked among the top-three states in eight out of the past ten years.<sup>55</sup> Wisconsin's workers' compensation program also consistently ranks highly in terms of patient satisfaction, quick access to medical care, and low rates of litigation.<sup>56</sup> Compared with 17 other states in one WCRI study, Wisconsin had the second-lowest percentage of claims with defense attorney involvement, at 14%.<sup>57</sup>

Finally, although overall benefits paid increased by 6.3% in Wisconsin between 2011 and 2015, employer costs actually decreased from \$1.77 per \$100 of covered wages to

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49. Yang and Fomenko, *WCRI Medical Price Index*, 33.

50. Belton, *CompScope Benchmarks for Wisconsin*, 26.

51. Belton, *CompScope Benchmarks for Wisconsin*, 2–9.

52. Barry Lipton, John Robertson, and Katy Porter, "Workers Compensation Temporary Total Disability Indemnity Benefit Duration—2013 Update," research brief for the National Council on Compensation Insurance, 2013, accessed December 14, 2017, [https://www.ncci.com/Articles/Documents/II\\_TTD\\_Duration\\_final.pdf](https://www.ncci.com/Articles/Documents/II_TTD_Duration_final.pdf).

53. McLaren and Baldwin, *Worker's Compensation*, 31.

54. "Hearing Testimony and Materials," Wisconsin State Legislature, accessed December 14, 2017, [https://docs.legis.wisconsin.gov/misc/lc/hearing\\_testimony\\_and\\_materials/2013/ab711/ab0711\\_2014\\_02\\_03.pdf](https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2013/ab711/ab0711_2014_02_03.pdf).

55. "National Healthcare Quality and Disparities Reports: Wisconsin State Snapshot," U.S. Department of Health & Human Services, accessed December 14, 2017, [https://nhqrnet.ahrq.gov/inhqrd/Wisconsin/snapshot/summary/All\\_Measures/All\\_Topics](https://nhqrnet.ahrq.gov/inhqrd/Wisconsin/snapshot/summary/All_Measures/All_Topics).

56. Belton, *WCRI CompScope Benchmarks for Wisconsin*, 2–9.

57. Belton, *WCRI CompScope Benchmarks for Wisconsin*, 34.

\$1.74 per \$100 of covered wages.<sup>58</sup> In terms of insurance premiums specifically, Wisconsin employers have typically paid more than the national average, but premium levels have decreased over the last two years. A report released by the Oregon Department of Consumer Business Services indicated that in 2015, Wisconsin employers paid the twelfth-highest premium rate in the nation, at a cost that was 12% higher than the median rate.<sup>59</sup> However, in June 2017, the Wisconsin Commissioner of Insurance approved an overall 8.46% decrease for workers' compensation premiums for businesses, following a 3.19% decrease in 2016.<sup>60</sup>

## Recent state-by-state changes

In recent years, in response to the trends and challenges outlined above, state legislative activity pertaining to workers' compensation has increased in both volume and content.<sup>61</sup> Developing workers' compensation policies tends to be a difficult process, because of the vast array of stakeholders involved, including labor representatives, employer groups, trial attorneys, insurance companies, health care practitioners, and hospitals. Nevertheless, states have responded to these challenges with an assortment of strategies, several of which are detailed below.

### Creating fee schedules

Most commonly, states have attempted to curb costs related to medical benefits by implementing fee schedules. In its 2015 study, WCRI reported a correlation between fee schedules and lower prices paid for medical benefits overall. Against this backdrop, the number of states without fee schedules has shrunk in the past two decades. Proponents of fee schedules note that costs are considerably higher in states without these guidelines. Opponents counter that higher costs translate to superior treatment, reduced litigation, and the tendency for injured employees to get back to work sooner.<sup>62</sup> Meanwhile, experts caution that cost figures cannot tell a complete story. First, total costs not only reflect the price of medical services, but also the extent to which injured workers use

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58. Christopher F. McLaren and Marjorie L. Baldwin; (NASI) pg. 41.

59. Oregon Department of Consumer and Business Services, *Oregon Workers' Compensation Premium Rate Ranking, Calendar Year 2016* (Salem, OR: Oregon Department of Consumer and Business Services, 2016), 4.

60. Wisconsin Department of Workforce Development, "Wisconsin Sees Reduction in Worker's Compensation Rate for Second Consecutive Year," press release, June 27, 2017, accessed December 14, 2017, [https://dwd.wisconsin.gov/dwd/news/releases/2017/170627\\_reduction\\_wc\\_rate.htm](https://dwd.wisconsin.gov/dwd/news/releases/2017/170627_reduction_wc_rate.htm). Note that overall rates are calculated from the average of more than 500 different classes of work. Every year premium rates are set for different classes of employees based on estimated risk of injury as well as prior year loss experience. The rates are set by the Wisconsin Compensation Ratings Bureau and approved by the Wisconsin Commissioner of Insurance.

61. "2017 Regulatory, Legislative, and Actuarial Trends," research brief for the National Council on Compensation Insurance, July 27, 2017, accessed December 14, 2017, [https://www.ncci.com/Articles/Documents/II\\_Regulatory-Legislative-Trends.pdf](https://www.ncci.com/Articles/Documents/II_Regulatory-Legislative-Trends.pdf).

62. For details of support for and opposition to fee schedules, see hearing materials related to changes to Wisconsin's workers' compensation law proposed in 2013 Senate Bill 550: "Hearing Testimony and Materials," Wisconsin State Legislature, accessed December 14, 2017, [https://docs.legis.wisconsin.gov/misc/lc/hearing\\_testimony\\_and\\_materials/2013/sb550](https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2013/sb550).

those services (i.e., utilization). Second, medical benefits coexist with cash benefits, and the two must be measured together to grasp the larger picture within a particular state.<sup>63</sup>

While states have adopted fee schedules to rein in costs, they frequently revise those schedules to increase rates: North Carolina in 2015, Kentucky in 2014, Arizona in 2013, Texas in 2011, and Massachusetts in 2009. These changes may reflect pressure from stakeholders to keep rates in line with rising medical costs. Only one state actually cut rates during the period assessed in one WCRI study: in 2011, Illinois implemented a 30% cut. Overall, the effect of fee schedule revisions are difficult to assess. Some states that recently revised fee schedules saw considerable cost increases overall (North Carolina after July 2015 legislation), whereas some states saw no net effect on costs (Colorado after January 2016 legislation).<sup>64</sup>

### **Capping benefits**

Over the same period, states have made incremental changes with respect to dollar amount and duration of cash benefits, as well as eligibility for them. In various states, legislation has imposed more stringent limits as a means to minimize costs. However these changes are impossible to generalize on a nationwide basis, as some states have simultaneously raised dollar amounts and extended the duration of certain types of benefits, despite rising costs.<sup>65</sup>

### **Opting out**

In some instances, legislatures have enacted laws that enable employers to opt out of the program entirely. Texas is currently the sole state in which workers' compensation coverage is elective, rather than mandatory. Oklahoma recently followed Texas's lead, permitting employers to opt out of state regulations by designing their own programs. Enacted in 2013, the Opt-Out Act soon met with legal challenge, and in 2016 the Oklahoma Supreme Court ruled it unconstitutional on state procedural grounds.<sup>66</sup> Detractors argue that the risks of court challenges aside, opting out results in independently devised workers' compensation programs that unfairly restrict key medical benefits and lower indemnity payments overall.<sup>67</sup> In recent sessions, opt-out legislation has also been introduced in Florida, South Carolina, Arkansas, and Tennessee.

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63. On utilization, see Belton, *CompScope Benchmarks for Wisconsin*, 18. On the interplay of medical benefits and cash benefits, see McLaren and Baldwin, *Worker's Compensation*, 2–6.

64. Yang and Fomenko, *WCRI Medical Price Index*, 18–20.

65. Yue Qiu and Michael Grabell, "Workers' Compensation Reforms by State," ProPublica, last updated March 4, 2015, accessed October 30, 2017, <https://projects.propublica.org/graphics/workers-comp-reform-by-state?state=>.

66. For a comparison of Oklahoma and Texas law, see McNally, "Opting Out of the Grand Bargain." The Oklahoma Supreme Court case in question was *Vasquez v. Dillard's, Inc.*, 2016 OK 89, 381 P.3d 768.

67. See, for example, the series "Insult to Injury: America's Vanishing Worker Protections," National Public Radio, accessed October 30, 2017, <http://www.npr.org/series/394891172/insult-to-injury-americas-vanishing-worker-protections>.

## Modifying procedure

Beyond fee schedules, state legislatures have enacted laws with respect to various aspects of the claims procedure and resultant disputes. Over the past few years, the following procedural changes have been implemented across multiple states: raising the burden of proof of injury for workers (Kansas, 2012; Oklahoma, 2015); placing caps on attorney fees (Florida, 2003; Indiana, 2006); and altering the structure or composition of courts or committees that oversee workers' compensation disputes (Tennessee, 2013; North Carolina, 2013). Proponents of these measures say that they reduce costs and eliminate insurance fraud, while opponents allege that they raise barriers to otherwise meritorious claims.<sup>68</sup>

## Other strategies

In response to the opioid crisis, policy makers have passed legislation making it more difficult for doctors to prescribe narcotics through workers' compensation programs. For example, the Pennsylvania Legislature passed Act 184 in 2014, setting restrictions on reimbursement rates and dosages associated with physician-dispensed drugs provided under workers' compensation claims. Broader state legislation relating to the opioid epidemic has established statutory limits on prescriptions, created or strengthened prescription drug monitoring programs, regulated pain clinics, and broadened access to the anti-overdose drug naloxone.<sup>69</sup>

Additionally, state legislatures have enacted a wide range of changes that include the following: limiting which doctors injured employees may seek for treatment; mandating wholesale drug costs to keep them from continually escalating; implementing post-injury drug testing; establishing PTSD as a compensable injury for some employees; devising evidence-based medical guidelines for care; and redefining the parameters that determine which persons are covered under the law.<sup>70</sup>

## Wisconsin: recent developments

Traditionally, the vast majority of changes to Wisconsin's workers' compensation laws have been made through the "agreed bill" process, which dates back to 1911. The Work-

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68. See, for example, responses to Tennessee legislation: Tom Humphrey, "Workers' compensation law working for employers and employees?" *Knoxville News Sentinel*, October 3, 2017; "Weakening the Middle Class: Workers Suffer Worst Week at Legislature," *State News Service*, April 13, 2013; Andy Sher, "Gov. Bill Haslam's workers' comp overhaul OK'd by a Tennessee House committee," *Times Free Press*, March 12, 2013. See also Michael Grabell and Howard Berkes, "The Demolition of Workers' Comp," ProPublica, last updated March 4, 2015, accessed December 14, 2017, <https://www.propublica.org/article/the-demolition-of-workers-compensation>.

69. National Conference of State Legislatures, *Prescribing Policies: States Confront Opioid Overdose Epidemic* (Denver, CO: NCSL, August 2017).

70. For a concise list of current legislative trends, see "2017 Regulatory, Legislative, and Actuarial Trends," research brief for the National Council on Compensation Insurance, July 27, 2017.

er's Compensation Advisory Council negotiates statutory changes, which are then incorporated into a bill that has traditionally passed unanimously in the legislature without further amendment. Eleven voting members compose the Council: five employer representatives, five employee representatives, and one DWD representative who acts as the chairperson. In addition, there are three non-voting members on the Council representing insurers.<sup>71</sup> In addition to the statutory members, DWD added six other non-voting members: two ex officio legislative members and four health care organization liaisons. The secretary of workforce development appoints members of the Council. There is no statutory requirement for term length; some voting members have served for more than a decade on the Council. According to DWD, the Council was created for the purposes of “maintaining the overall stability of the workers’ compensation system without regard to partisan changes in the legislative or executive branches of government.”<sup>72</sup>

To develop the “agreed bill” each legislative session, the Council holds public hearings throughout the state to hear testimony from interested parties. This testimony is summarized and presented to the Council in the form of amendments. Final amendments are negotiated by the Council and can be incorporated into the agreed bill only if they are accepted unanimously by all voting members. The agreed bill is then traditionally referred to the labor committees in both houses of the legislature. These committees hold public hearings and discuss the bill with members of the Council before reporting it to the full legislature. Historically, agreed bills have been unanimously approved by the legislature. Until 2013, every session saw the successful passage of the agreed bill presented by the Council or its predecessor body—except the 1941 session, when the exigencies of World War II interrupted the process and no bill was recommended.<sup>73</sup>

### **2013 legislative session**

During the 2013 legislative session, the Council’s recommended changes were introduced as **2013 Assembly Bill 711** and **2013 Senate Bill 550** in January 2014. Among other changes, the Council proposed to implement a fee schedule establishing maximum rates for health services provided as part of workers’ compensation benefits. Under the bill, DWD would devise this fee schedule based on average payments under group health plans for privately insured and self-insured employers. The bill would have set rates at 110% of those averages, calculated within five distinct geographic regions of the state and revised biennially to reflect changes in the consumer price index

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71. See [Section 15.227\(4\), Wisconsin Statutes](#).

72. “Worker’s Compensation Brief History,” State of Wisconsin Department of Workforce Development, accessed October 30, 2017, [https://dwd.wisconsin.gov/wc/brief\\_history.htm](https://dwd.wisconsin.gov/wc/brief_history.htm).

73. *Wisconsin’s Worker’s Compensation Centennial, 1911–2011: The Nation’s 1st Constitutional Worker’s Compensation Law* (Madison, WI: State of Wisconsin Department of Workforce Development Worker’s Compensation Division, 2011), 123.

for medical care services. This fee schedule provision constituted the most controversial portion of the bill, eliciting strong opposition from the Wisconsin Medical Society, the Wisconsin Nurses Association, the Wisconsin Hospital Association, and other medical professionals' groups.<sup>74</sup> These groups objected to the comparison of workers' compensation rates and group health rates. In contrast to workers' compensation rates, group health rates often reflect negotiations based on larger patient pools, more prompt payment, and lower administrative costs. The bills received a public hearing but, because of strong opposition, failed to be reported out of committee before the session ended.<sup>75</sup> This failure represented a break with the agreed bill tradition.

### **2015 legislative session**

During the following session, a group of legislators introduced **2015 Assembly Bill 501** (companion bill 2015 Senate Bill 456) independent of the Council. The proposal incorporated several of the less controversial provisions included in the 2013 agreed bill as well as several novel provisions. Those provisions included barring or limiting compensation to injured employees who did the following: knowingly misrepresented their physical condition to employers at the time of application; failed to comply with safety procedures or drug and alcohol policies in ways that contributed to injury; sought and were denied workers' compensation benefits from another state; or were terminated from employment due to misconduct. According to the bill's authors, these changes were designed to discourage and reprimand abuses of the system.<sup>76</sup> Additionally, the bill proposed to restrict injured employees' choice of medical practitioners to those professionals included under the employer's group health plan, or to the employer's choice of professionals for employees not covered by a group health plan.<sup>77</sup> Ultimately, the bill did not receive a public hearing and was not placed on the floor session calendar.

Two months after the introduction of 2015 AB 501, the Council's recommended changes were introduced as **2015 Assembly Bill 724** (companion bill 2015 Senate Bill 536). This bill re-introduced various elements of 2013 AB 711, but excluded a fee schedule. It also incorporated provisions similar to those of 2015 AB 501. Those included the reduction of benefits for employees whose violation of drug and alcohol policies contributed to injury; cessation of temporary disability benefits for employees terminated

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74. Lobbying information for the bill is available through the Wisconsin Ethics Commission "Eye on Lobbying" website, accessed December 14, 2017, <https://lobbying.wi.gov/What/BillInformation/2013REG/Information/11102>.

75. David Wahlberg, "Scott Walker Oks union-approved changes to workers' comp; other changes loom," *Wisconsin State Journal*, March 20, 2016. Footage of hearings is available online through Wisconsin Eye, as well as on the legislature's webpage; "Hearing Testimony and Materials," Wisconsin State Legislature, accessed December 14, 2017, [https://docs.legis.wisconsin.gov/misc/lc/hearing\\_testimony\\_and\\_materials/2013/ab711/ab0711\\_2014\\_02\\_03.pdf](https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2013/ab711/ab0711_2014_02_03.pdf).

76. Rep. John Spiros, "Spiros: Bill benefits honest, hardworking employees," *Wausau Daily Herald*, December 13, 2015.

77. Russ Golla, "Workers' comp grand bargain at risk," *Daily Reporter*, January 5, 2016.

by reason of misconduct; revision of statutes of limitation pertaining to traumatic injury claims; and implementation of guidelines for electronic delivery of health records. In addition to these changes, the bill proposed an increase in maximum weekly compensation for permanent partial disability, as well as an increase in supplemental benefits for certain types of disability. The Wisconsin Ethics Commission reported various labor, employer, and insurance groups lobbying in favor of the bill, including AFSCME, Professional Insurance Agents of Wisconsin, and Wisconsin Manufacturers & Commerce. The bill passed with unanimous votes in both the Assembly and Senate, and was enacted as **2015 Act 180**. Critics cautioned that this legislation marked a turning point from the values of the original 1911 Workmen's Compensation Act by incorporating consideration of fault (per provisions relating to misconduct and violations of drug and alcohol policy) into the hitherto no-fault principle of the "grand bargain." The same voices warned that this and other changes would invite a wave of litigation.<sup>78</sup>

Also during the 2015 session, in his executive budget proposal, **2015 Senate Bill 21** (companion bill 2015 Assembly Bill 21), Governor Scott Walker recommended transferring oversight of the workers' compensation program from DWD to the Office of the Commissioner of Insurance and transferring related hearings to the Division of Hearings and Appeals (DHA) within the Department of Administration. The Joint Committee on Finance removed the provision transferring oversight of the program, but the final budget act, **2015 Wisconsin Act 55**, did transfer workers' compensation hearings from DWD to DHA.

### **2017 legislative session**

During the current session, Governor Walker issued **Executive Order #228** (January 5, 2017) in tandem with his call for a special session of the legislature on opioid abuse. The executive order enabled various state agencies to launch programs developed through the Governor's Task Force on Opioid Abuse. One provision called for DWD to propose statutory revisions to workers' compensation laws based on WCRI research on the intersection of opioids and workers' compensation. In addition, Governor Walker's executive budget, introduced in February as **2017 Assembly Bill 64** (companion bill 2017 Senate Bill 30), included a provision that would have eliminated LIRC and transferred its responsibilities with respect to workers' compensation to DHA. Although some members of the workers' compensation community approved of the proposed change, other members protested it, and the provision was ultimately removed.

Also in the current session, a group of legislators introduced **2017 Assembly Bill 308** (companion bill 2017 Senate Bill 235), relating to the composition of the Council. Specifically, it proposed making employee representation proportional to the number

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78. Michael H. Gillick, "Worker's Compensation: Understanding Recent Changes in the Law," *InsideTrack*, March 16, 2016.

of union member employees within the state. The bill was passed out of committee on a 5–3 vote on December 7, 2017, but has not been scheduled for the floor. A second bill, **2017 Assembly Bill 434** (companion bill 2017 Senate Bill 564), proposed changes relating to PTSD diagnoses for public safety employees. It received a public hearing in the Assembly Committee on Workforce Development in November 2017.

Most recently, the agreed bill devised by the Council was introduced in the senate on December 21, 2017, as **2017 Senate Bill 665**. The bill analysis lists key provisions, most notably that the bill provides for the creation of a fee schedule by DWD before January 1, 2019. Statewide rates would be set based on a method that compares the average costs of health services under negotiated group health plans in Wisconsin with rates used for the federal Medicare program. Rates derived from this formula would then be increased by up to an additional 10% to account for administrative costs related to workers' compensation claims. These rates would be periodically re-determined and increased annually for inflation.

The bill also includes several less controversial provisions, including increasing certain PPD payments and mandating electronic delivery of health records. It also includes new provisions related to the opioid epidemic: a seven-day dispensing limit on opiates, a requirement to post information about opiates within the workplace, and specific guidelines for ceasing opiate therapy and pursuing alternative treatments. Finally, the bill makes changes to the administration and financing of the workers' compensation law. The bill awaits action by the 2017 Legislature. ■