

National Trends and Developments in Workers' Compensation

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Over the last 25 years, injured and ill workers' rights have been rolled back in many states. At the same time, employers are emboldened by today's economy to pressure workers not to exercise the few rights they are still afforded once injured, with workers facing increasing retaliation at every turn. While each state's workers' compensation system is unique, and changes to legislation are often very technical and complex, there are at least SEVEN destructive trends and developments that must be addressed:

1. More workers' health conditions excluded from coverage;
2. Increased procedural barriers to workers' claims;
3. Reduced income support for disabled workers;
4. More employer control over workers' medical treatment;
5. End to a universal mandate that employers carry workers' comp insurance;
6. Bans on workers suing insurers for dishonest and misleading practices; and
7. Reduced access to injured workers' attorneys.

These seven legislative trends and developments in workers' comp undermine workers' human rights to health and work with dignity by creating or enabling:

- » **Barriers to access:** All workers who are hurt or made ill by their work need guaranteed access to medical care and income support, but legislatures are erecting barriers to accessing the system.
- » **Inadequate income support:** Workers who are ill or injured and cannot work to their full capacity need income support to allow them and their families to live in dignity for as long as their earnings are reduced, but legislatures are lowering the amount of and applying time limits to workers' wage replacements.
- » **Inadequate health care:** Workers and their doctors must be able to make private decisions about workers' health needs and how workers should receive that care, but legislatures are giving employers and insurers more control over workers' medical treatment, limiting workers' access to medical care.
- » **Undignified treatment:** Injured and ill workers must be treated with dignity and respect, but legislatures are passing laws that cause workers to suffer through an adversarial and humiliating process to get the care and income support they need.
- » **Poor accountability:** State governments have an obligation to ensure injured and ill workers' human rights are enforced, but are passing laws that reduce responsibility for, oversight and monitoring of workers' compensation.

Trend #1 More Workers' Health Conditions Excluded from Coverage	Barriers to Access	Inadequate income support	Inadequate health care	Undignified treatment	Poor accountability
Pre-existing conditions	✓			✓	
Specific conditions	✓			✓	
Conditions related to aging	✓			✓	

Pre-existing conditions: Many states have passed laws that effectively prevent workers from accessing workers' comp for injuries and illnesses that arise from on-the-job aggravation of pre-existing health conditions. Historically, a central principle of workers' comp was that employers took workers as they found them. That is, when workers developed work-related injuries and illnesses, they would get workers' comp, regardless of workers' pre-existing conditions or predispositions for particular health problems. States are moving away from this founding notion, allowing employers and insurers to challenge workers' comp claims based on pre-existing conditions and requiring workers to prove work is a "major" or "predominant" cause of their injuries or illnesses. Since this is particularly difficult for workers with pre-existing conditions, this policy trend is causing the delay and denial of their claims.

Specific conditions: A growing number of states are excluding workers with specific injuries and illnesses from access to workers' comp. Some states explicitly exclude workers' claims for mental injuries and emotional stress. Other states have created new barriers for workers with repetitive motion injuries, hearing loss, and back diseases, requiring these workers to produce additional evidence linking their condition to work. Because these conditions have multiple and complex causes, this extra burden of proof makes it virtually impossible for impacted workers to succeed in their claims. Additionally, some states require doctors to use obsolete and inaccurate medical tests to determine if certain health conditions, such as back diseases, are work-related, which is also arbitrarily preventing workers from receiving the care and income support they need.

Conditions related to aging: Some states have made it more difficult and burdensome for aging workers to access workers' comp. These states have passed laws that require older workers to identify a distinct work event that "caused" their injury or illness, if it involves a possible underlying factor attributable to "the natural aging process". The result is that many older workers with work injuries and illnesses are experiencing delays and denials of their claims.

Trend #2 Increased Procedural Barriers to Workers' Claims	Barriers to Access	Inadequate income support	Inadequate health care	Undignified treatment	Poor accountability
Employers, not workers, have the benefit of the doubt	✓			✓	
Workers are required to produce complex proof of eligibility	✓			✓	
Arbitrary use of drug and alcohol testing	✓			✓	

Employers, not workers, have the benefit of the doubt: Arguably, workers' comp was set up to ensure workers receive certain and timely care and wage replacements for work-related health conditions, regardless of whether their injuries or illnesses were "caused" by actions for which they or their employer were responsible. By paying into a workers' comp insurance system, employers gained immunity from lawsuits related to injuries and illnesses that occurred at work, while workers, though no longer able to sue their employers for negligence, were guaranteed access to medical treatment and some replacement of lost wages. Thus, when considering whether workers were eligible for workers' comp, the state gave workers the benefit of the doubt. Yet, states have passed laws that explicitly prohibit this "liberal construction" assessment of workers' eligibility, which historically protected the "no fault" nature of the system. This has opened the door to more challenges of workers' claims, and their delay and denial.

Workers are required to produce complex proof of eligibility: Many states have enacted laws that make it more difficult for workers to establish their eligibility for workers' comp after a work injury or illness. A basic premise of the comp system is that, to receive the care and income support it provides, work must have caused the injury or illness. States are increasing the different kinds and amounts of evidence required to prove causation. The complexity of evidence that workers must now present results in not only more challenges of workers' claims by insurers and employers, but also the involvement of more lawyers and medical experts. Moreover, for nearly all people who suffer and die from toxic exposure at work and other occupational diseases, the unjust legal requirements for proving job-relatedness preclude access to workers' comp. Diseases such as cancers and asbestosis can go unnoticed for years after exposure and can also have non-occupational causes, leaving ill workers no way to prove the connection of their disease to their exposure at even the most obviously dangerous workplaces.

Arbitrary use of drug and alcohol testing: An increasing number of states allow employers to demand that workers submit to drug and alcohol testing after a job injury. Based on either a positive test or a refusal to take the test, insurers can deny or reduce workers' comp claims, in some cases even when drug and alcohol use did not cause the injury or illness. Furthermore, in some states, if a worker refuses the test, insurers and courts can presume they were under the influence.

Trend #3 Reduced Income Support for Disabled Workers	Barriers to Access	Inadequate income support	Inadequate health care	Undignified treatment	Poor accountability
Amount of support not based on workers' needs		✓			
Cuts and caps in amount of support		✓			
Time limits on support		✓			
No support for older workers		✓			

Amount of support not based on workers' needs: Many states have moved away from determining the level of income support for permanently disabled workers based on actual loss of wages, ability to work, the availability of alternative employment, and other clearly relevant factors. Instead, they are misusing the American Medical Association's *Guides to the Evaluation of Permanent Impairment* for rating disability and determining income support, despite the AMA advising against its use in this way. The approach is so arbitrary that some workers who cannot work at all have been denied income support while others who are working receive it.

Cuts and caps in amount of support: A number of states have kept low or lowered the amount of income support available to disabled workers through workers' comp. Even prior levels of support failed to meet needs, so these further reductions place workers in severe economic distress and further endanger their health.

Time limits on support: Some states have begun to impose strict and arbitrary limits on how long disabled workers receive income support. Under these limits, after a fixed number of weeks, insurers can stop providing disabled workers with support, regardless of their continued need. In some states, insurers can also cut off disabled workers' income support if a doctor says they are capable of performing any work, even at minimum wage, regardless of a particular worker's age, previous income, skills, experience, or whether jobs are available.

No support for older workers: Some states are systematically terminating wage replacements for disabled workers when they turn 65 years old, even if they are not eligible for social security and are permanently disabled.

Trend #4 More Employer Control Over Workers' Medical Treatment	Barriers to Access	Inadequate income support	Inadequate health care	Undignified treatment	Poor accountability
Employers, not workers, have the right to choose doctors		✓	✓	✓	
Employers can challenge doctors' decisions about workers' health conditions		✓	✓	✓	
Doctors' prescriptions of certain medications restricted			✓		
Employers can control the management of workers' health care			✓	✓	

Employers, not workers, have the right to choose doctors: Across various states, employers and insurers have gained control over the doctors who make key decisions determining whether or not workers get access to the care, wage replacements and other services they need. Workers' "treating doctors" identify and treat their injuries, and make judgments about whether they are work-related, result in a disability, and when workers are able to return to work. Historically, many states gave workers the right to choose their treating doctor. Yet, today, a growing number of states are giving that right to employers and insurers, who can "direct" workers to a particular doctor or pool of doctors. By selecting the doctors and paying them, employers and insurers are often able to influence important medical decisions that impact the health and well being of workers.

Employers can challenge doctors' decisions about workers' health conditions: Since much of workers' comp turns on medical evaluations, in many states, employers and insurers have pushed to institutionalize practices, such as dangerously restrictive treatment guidelines, that allow them to challenge treating doctors' choices around workers' medical care. Employers and insurers can have an "independent medical examiner" (IME) re-examine the worker. If the IME, who is paid by the insurer, believes a worker's disability is not related to work, for instance, the insurer can use that opinion to deny the worker's claim and refuse payment. In many states, IMEs, some of whom have questionable credentials, are increasingly used to deny valid claims.

Doctors' prescriptions of certain medications restricted: Some states have imposed limits on doctors prescribing certain medications, including how much and how long doctors can prescribe them. These medical decisions are often based on insurers' cost estimates, not medical need.

Employers can control the management of workers' health care: Many states have passed laws that mandate employers (or give them the option to) contract with a managed care organization (MCO). MCOs are private companies that monitor and control key decisions and payments related to workers' comp claims. Though the details vary somewhat from state to state, employers or insurers can usually contract directly with MCOs. The basic features of a typical MCO include: a specific number and type of doctors; mandatory use of treatment guidelines; an independent medical exam function; an internal dispute resolution function; and case management. Essentially, managed care gives employers broad control over all aspects of the health care received by injured and ill workers.

Trend #5 End to Mandate that Employers Carry Workers' Comp Insurance	Barriers to Access	Inadequate income support	Inadequate health care	Undignified treatment	Poor accountability
End to mandate that employers carry workers' comp insurance	✓				✓

Oklahoma recently passed a law that allows employers to "opt out" of carrying workers' comp insurance and create their own alternative plans for injured workers. This new development gives Oklahoma employers significant control over the care and income support workers receive for a work injury or illness. Unlike Texas, which has never required employers to carry comp insurance and allows injured workers to sue employers for negligence, Oklahoma has not revived workers' access to the courts.

Trend #6 Ban on Workers' Suing Insurers for Dishonest and Misleading Practices	Barriers to Access	Inadequate income support	Inadequate health care	Undignified treatment	Poor accountability
Ban on workers' suing insurers for dishonest and misleading practices					✓

Many states prohibit workers from suing workers' comp insurance companies for their bad faith mishandling of claims. Courts in a few states have allowed workers to bring these lawsuits. In response, insurers have pushed state legislatures to eliminate this means for workers to hold them accountable. This ban on workers' "bad faith" lawsuits enables insurers to systematically delay and deny workers' claims with relative impunity. This is particularly alarming because insurers, who are paid by employers, have an incentive to keep costs down, which is often in direct conflict with the needs of workers to receive adequate care and income support after a workplace injury. A few states have administrative fines to deter insurers from handling injured and ill workers' claims in bad faith, but the fines often do not include relief or compensation for harmed workers and can be too small to provide a deterrence.

Trend #7 Reduced Access to Injured Workers' Attorneys	Barriers to Access	Inadequate income support	Inadequate health care	Undignified treatment	Poor accountability
Reduced access to injured workers' attorneys	✓				✓

Many states have cut attorneys' fees for workers' comp cases. The fees allow attorneys to take injured workers' cases with the expectation that, if they win, they can charge the employer or insurer for the costs of their services. These fees enable many injured workers to get the legal representation they need to succeed in their claims and navigate an increasingly complex system without having money up-front. Eliminating these fees prevents many workers, who lack the resources of their employers and insurance companies, from establishing their claims for medical care and basic income.

Conclusion

In the last 25 years, state legislators have passed a seemingly endless wave of workers' comp laws, not limited to those listed above, that have put up barrier after barrier for injured and ill workers who are trying to get the care and income support they and their families need. Employers and insurers exert ever-greater control over workers' comp systems and over doctors, who function as "gatekeepers" to workers' compensation. The new ways in which workers' claims are denied, delayed, and limited as a result of these changes exacerbate inadequacies that already existed in state workers' comp systems. For instance:

- » Certain groups of workers have always been excluded from workers' comp in many states, such as domestic workers, farm workers, employees of small businesses, and self-employed workers;
- » Workers' comp systems consistently fail to deliver care and income support to the vast majority of workers with occupational diseases; and
- » Many workers' comp systems have always provided inadequate income security to workers unable to work after an occupational injury or illness.

The clear lack of accountability to workers' needs and rights is echoed in the tones of state legislators who see workers' comp as an unnecessary cost for businesses rather than a critical health care and social insurance program.

When any of us is injured or falls ill, no matter the cause, we need two things: health care and, if we are unable to work, monetary and other supports to meet our needs and allow us to live in dignity. Human rights offers a framework that starts with these basic human needs and places clear obligations on governments and private actors to ensure they are adequately met. From a human rights perspective, everyone has a right to health care and economic security without any kind of discrimination, such as whether an injured person is wealthy or employed, or their injury is "work-related". Workers' comp is one of a number of distinct systems created through public policy to offer social protection and health care to some people in certain scenarios. Altogether, this scattered approach is failing to guarantee everyone has access to health care and income support when they need it most. It is ultimately the government's responsibility to guarantee and enable all people to enforce their rights to universal health care and a basic income.

The dire consequences of the roll back on workers' comp rights require immediate correction by the government to ensure, rather than narrow, injured and ill workers' access to health care and income support. That is, everyone who is injured or made ill by work must have full, prompt and guaranteed access to the health care, income support, retraining and rehabilitation they need. Additionally, public oversight, monitoring and evaluation systems need to be put in place to support workers' full participation in the enforcement of rights-based standards in workers' comp. It is the responsibility of public agencies to ensure that the design and operation of these systems are transparent and support a meaningful role for workers in decisions that affect how their human rights are met.