

MARKET INSIGHTS

BARGAINING POWER

How is the 'grand bargain' of workers comp standing up?
We asked experts on both sides to weigh in



EMPLOYERS' RIGHTS

Court rulings erode protections against employee lawsuits

BY DAN O'BRIEN AND SCOTT GEDEON

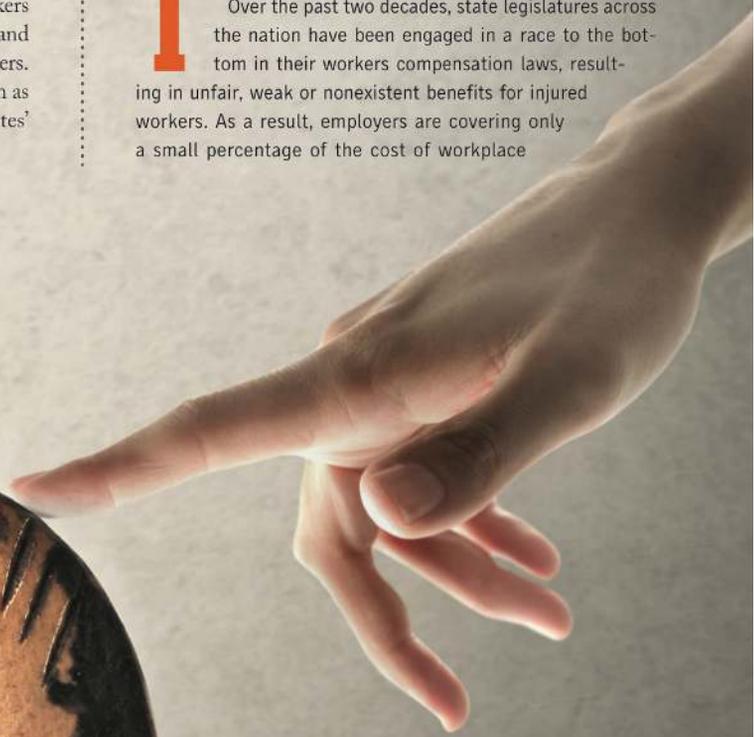
Bargain." When was the last time you heard that word used to describe workers compensation? A century ago, the pairing of bargain and workers compensation was common because the workers compensation system was designed to be a "grand bargain" between employees and their employers. The bargain was used to create what later became known as the "exclusive remedy provisions" written into most states' workers compensation statutes.

WORKERS' RIGHTS

Comp system fails to offer adequate benefits

BY DEBORAH BERKOWITZ

The workers compensation system is in a deeply troubled state, with enormous financial and social costs for America's workers. Over the past two decades, state legislatures across the nation have been engaged in a race to the bottom in their workers compensation laws, resulting in unfair, weak or nonexistent benefits for injured workers. As a result, employers are covering only a small percentage of the cost of workplace



Under this grand bargain, a no-fault insurance system was developed where employers would be shielded from personal injury lawsuits brought by injured employees. In exchange, employers would give up the defenses of contributory negligence and assumption of the risk commonly used by businesses to defend these types of cases. Historically, the only exception to the grand bargain allowed employees to sue employers when they failed to secure workers compensation coverage.

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Despite the trade-off of the grand bargain, courts and legislatures have chipped away at the mutual protections afforded as a result of the grand bargain. Erosion of these protections has usually been in favor of employees and against the interests of employers. This erosion has traditionally fit into three categories: employer intentional tort, the dual capacity doctrine and third-party over action liability.

About two-thirds of states now recognize a cause of action for an employer intentional tort. In this context, an employee may bring a personal injury lawsuit against the employer alleging the employer intended to cause injury to the employee. While the burden of proof for these cases is generally high, the practical effect of the employer's intentional tort theory is that it provides a theory for plaintiffs and their attorneys to circumvent the grand bargain and maintain a direct cause of action against an employer for a personal injury sustained in the workplace.

Courts have also recognized the doctrine of dual capacity. Under this concept, the employer may be found liable in tort where an injured employee was "wearing more than one hat" at the time of injury. The most common example of this is when an employee sustains a workplace injury using a product manufactured by the employer. In this scenario, the injured worker is not

injuries, forcing injured workers to rely on their own savings and on taxpayer-funded programs to pay most of the costs.

Reforms and federal oversight are needed to ensure that workers with occupationally related injuries and illnesses are provided with the medical and wage-replacement benefits they need. We must do better in taking care of injured workers and their families.

Workers compensation is the oldest social insurance program in the nation. It emerged over 100 years ago with the passage of the first state workers compensation law; today, this state-based system covers more than 129 million workers. The bedrock principle upon which every state workers compensation system was founded is the no-fault principle: Employers assume responsibility for providing insurance to cover medical treatment, rehabilitation, reimbursement for lost wages, and death benefits for workers injured or killed on the job — without regard to fault. Workers gave up their right to sue their employer for negligence, and employers gave up their right to blame the worker in what became known as the "grand bargain." But today's workers compensation system is failing workers — especially low-wage workers in dangerous industries.

People get hurt at work. Data from the Bureau of Labor Statistics shows that nearly 5,200 workers were killed on the job in 2016 in the United States, and more than 3 million suffered a serious work-related injury — and these numbers do not include the many workplace injuries that are never reported to the federal government.

Although these numbers have declined dramatically over the past four decades since passage of the Occupational Safety and Health Act, workplace safety hazards continue to cause serious and often fatal injuries and diseases. From the construction worker who fell from the roof because he was not provided fall protection to the young woman working in an assisted-living facility who was attacked by a patient, occupational hazards persist and continue to endanger workers.

A work-related injury can cause serious physical suffering and have enormous financial consequences for workers and their families. But due to recent changes in workers compensation laws in many states, the financial burden of work-related injuries now falls on the worker. As a result, injured workers are often at great risk of falling into poverty.

According to a 2015 report from the U.S. Department of Labor, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job*, almost 80% of the costs of workplace injuries — including medical bills, time missed on the job, and the loss of income to a household when a worker is killed on the job — are rapidly shifting from employers and insurers to workers, their families and the taxpayer-funded social safety net.

Further, an increasing number of studies confirm that only a fraction of injured workers apply to receive any benefits under workers compensation. A landmark study of more than 4,000 low-wage workers in Chicago, Los Angeles and New York published nine years ago found that among those workers experiencing a



only an employee for workers compensation purposes, but also a consumer for product liability purposes. This scenario is commonly found in a manufacturing setting where a company fabricates a piece of equipment to carry out its business operations. An employee injured using that equipment may simultaneously bring a workers compensation claim against the employer as well as a personal injury action against the employer.

Finally, courts have recognized that employers can assume liability to its employees through a contract with a third party, also known as “third-party over action” liability. This concept is commonly found in the construction industry where a subcontractor’s employee is injured, files a workers compensation claim, and then files a personal injury lawsuit against an upstream contractor and/or general contractor for failure to maintain a safe workplace. Third-party over action liability is premised upon a contract existing between the employer and a negligent third party that requires the employer to hold a third party harmless in the event of an injury.

There is of course no indemnification under any insurance policy for an intentional act. Moreover, the question of whether an insurer will cover the costs of defense under a stop gap, Coverage B or other employer’s liability policy continues to be a gray area. Defense costs can be governed by the individual facts of each case and the language contained in the policy.

The insurance industry has responded to these developments by providing dual coverage in standard workers compensation policies. Under these policies, there are generally two parts. Part one, also referred to as Coverage A, provides traditional workers compensation coverage that pays all compensation and medical benefits the company is obligated to pay under the state’s workers compensation statute. Part two, also known as Coverage B, provides employer liability coverage to potentially cover the gaps that may exist because of the erosion of the grand bargain due to employer intentional tort developments and the dual capacity doctrine.

For third-party over action liability, an employer may have coverage under their commercial general liability policy. Under a standard CGL policy, claims by employees are excluded from coverage. An exception to that exclusion is usually liability assumed by contract. Employers should be cautious about the CGL’s protection, as many insurers in recent years have been altering their policies and adding what is referred to as an “absolute employer’s liability exclusion” that may void coverage for a third-party over action. At that point, you will need to look to your employer’s liability policy for coverage.

Employers from monopolistic jurisdictions such as Ohio, where there are no insurance policies for workers compensation — only a state fund, should recognize the gap in their coverage. Because there is no insurance policy, there is no Coverage B. Employers in monopolistic jurisdictions should look at purchasing a “stop gap” policy to fill that employer’s liability void.

Keep in mind that, given the erosion of employer immunity,

serious injury on the job, fewer than 1 in 10 (8%) filed for workers compensation benefits. These workers face an increasing number of barriers to filing a claim, including fear of retaliation from their employer and the current reality that a worker needs to have a lawyer to file a claim.

Many state compensation laws also continue to exclude entire occupations, such as farm workers and domestic workers — jobs often held by women and people of color. And many workers are in alternative work arrangements that put them outside the reach of workers compensation because they are considered by their employers to be independent contractors.

With no federal oversight or minimum standards, every state has a unique workers compensation law and system. The fairness of these state systems differ, often dramatically, on many issues that are critical to workers. Restrictions, often recently enacted, can include shortening of the length of permanent-disability benefits and coverage of work-related illnesses. For example, some states such as Mississippi cap benefits for permanently disabled workers at 450 weeks, while many others allow benefits for life or until the worker reaches the age for Social Security benefits. Some states exclude illnesses such as repetitive trauma disorders. And some states have strong laws to protect workers against retaliation or discrimination for filing a workers compensation claim, while others have none.

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Overall, recent changes in many state workers compensation laws have made it harder for injured workers to receive adequate benefits, which are paltry when they are awarded. Some states have compromised the no-fault foundation of the system, for example, by enacting clauses that if a worker was found to violate a safety rule, he or she can be denied workers compensation — yet when a company violates a safety rule, the employer cannot be held liable. And some states have added provisions encouraging employers to conduct mandatory post-injury drug testing without regard to whether there is a nexus between the injury and impairment.

Others have increased the criteria regarding injury or illness causation so that claims that previously would have been approved are no longer covered. Historically, workers compensation covered not only new work-related injuries or illnesses, but also workplace events or exposures that aggravated a pre-existing condition. Currently, many states no longer cover these incidents despite the fact that the worker was able to perform the job prior to the injury or exposure.

There have also been cutbacks on attorney fees for claimants,

employees can file for and collect workers compensation benefits while at the same time maintaining a lawsuit against their employer. This requires employers, their attorneys and their insurers to coordinate the defense of simultaneous litigation with the same set of facts, witnesses and basic evidence. If you include actions by administrative agencies such as the U.S. Occupational Safety and Health Administration, you have a recipe for litigation in one of these areas having detrimental impact in other related litigation. Coordination toward a global resolution of all of these potential liabilities is crucial, and difficult, as there are often multiple sets of lawyers defending the employer in each of these different actions.

In addition, with the saturation of variable employers such as staffing, leasing, temporary service and professional employer organizations, employers and variable employers will need to carefully examine their respective insurance policies to determine whether they have coverage that will provide defense and indemnity for both workers compensation claims and tort claims that might be filed against them by injured employees.

Employers and insurers are often frustrated by the general tendency of courts to deny the admissibility of collateral source benefits. For example, courts routinely deny the admissibility of workers compensation benefits paid by an employer or its insurer as part of the damage calculation during an employer intentional tort trial, or in a trial where the dual capacity doctrine or third-party over action liability is applicable. Oftentimes, an employer or its insurer will feel as if the injured worker has “double dipped,” and the jury should hear that the injured worker should not be compensated twice for the same injury. State legislatures and courts have taken steps to allow injured workers to seek to be made whole while stifling employer or insurer rights to put on testimony and evidence to demonstrate the injured worker has already been fully compensated for their injury.

This area of the law remains dynamic. While many jurisdictions recognize these exceptions to the exclusive remedy provision, how these exceptions are defined remains subject to not only legislative changes, but decisions by state and federal courts. Employers are encouraged to review their coverage and to make any necessary changes to ensure that the coverage is current and broad enough to cover the eroded protections attained by the “grand bargain.”



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which make it difficult for workers to get legal representation, while insurance company legal fees are not regulated. And many states are allowing the use of different versions of guidelines prepared by the American Medical Association for determining the degree to which a worker is impaired, even though these guidelines are not evidenced-based and do not consider physical and mental impairment in the context of an individual worker's education and ability.

Benefits are so low or so restrictive in some states that several courts have recently ruled the state laws are unconstitutional. In both Florida and Alabama, courts have ruled that not only were benefits too low, but the states' 15% caps on attorneys fees were unconstitutional. In New Mexico, the courts found that excluding agricultural workers from workers compensation violated the state's equal protection clause.

Recent successful campaigns by industry and insurers to reduce workers compensation benefits also highlight a sad anomaly. The costs of workers compensation to employers are not rising. In Kentucky, for example, the legislature just passed a bill weakening workers compensation benefits, even though Kentucky businesses already pay 18% less than the national median for workers compensation premiums and Kentucky premiums are solidly in the bottom half of the state premium rankings. Further, despite inflation, there has been no increase in Kentucky's workers compensation benefits for injured workers since 2000.

Iowa offers another unfortunate example. In 2017, the Iowa legislature cut workers compensation benefits for injured workers. Iowa business groups had pushed to weaken benefits, claiming the state's workers compensation system was weighted unfairly to injured workers and raised employer costs. The facts show otherwise. Data from the National Council of Compensation Insurance showed no large increase in premium costs to employers, claims, or medical costs associated with workplace injuries. Iowa employers, in fact, saw their workers compensation premiums decrease in 2016.

Workers compensation is part of the social safety net of programs in our country that ensures most workers against income losses associated with expected and unexpected life events. These programs include unemployment insurance, Social Security Disability Insurance, Social Security Old-Age Assistance and Medicare. But unlike all these other programs, the workers compensation system has no federal oversight nor any federal minimum standards. Clearly, federal oversight and possibly federal minimum standards are necessary to ensure that this system works for those most in need of help. We need to do better.



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