

# Workers Compensation Reform



# NYSAC

NEW YORK STATE  
ASSOCIATION OF COUNTIES

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*The New York State Association of Counties is a bipartisan municipal association serving all 62 counties of New York State including the City of New York. Organized in 1925, NYSAC's mission is to represent, educate and advocate for member counties and the thousands of elected and appointed county officials, including county executives, legislators, supervisors, administrators, commissioners and other county employees who deliver essential state and local services to the public.*

## **Summary**

Reform of the New York State Workers Compensation Law has been a NYSAC legislative priority for the past decade. Estimates developed by the Office of the State Comptroller indicate that workers compensation costs counties outside the City of New York almost \$145 million in 2005.

The Governor, legislative leaders and representatives of the New York State AFL-CIO and the Business Council of New York State had been involved in negotiations on the aspects of the law's reform since mid December. An agreement on an overall reform package was announced at the end of February.

The bill to implement the agreed upon reforms, **S3322 Bruno/A6163 Silver**, was introduced on Saturday March 3, passed by both houses on March 6, and signed into law by the Governor on March 13, indicating the importance all of the parties placed on workers compensation reform.

In the short term, counties will be affected differently by its provisions, depending upon whether the county is self insured or purchases worker's compensation insurance from the State Insurance Fund, or from a private insurance carrier.

In the long term, all employers, both public and private, will benefit from cost savings contained in the reform bill's provisions.

This law is not the end of discussion on workers compensation reform. Several issues are still to be agreed upon, including establishment of medical guidelines and determination of a rate setting process, issues which were set aside for further study and report to the legislature and the Governor by September of this year.

It is significant, however, that the legislation does set forth a process for arriving at consensus on these issues, since they had been major stumbling blocks in all prior reform discussions that have occurred over the past 10 years.

NYSAC will continue to follow developments on these outstanding issues and their affects on county government. This report details the provisions of the new workers compensation law and provides you with an indication of what impact it will have on counties and all employers.

## ***Benefit Increase***

Benefits paid to injured workers will be raised for the first time in over 15 years, under the bill's provisions. The minimum payment of \$40 per week will be raised to \$100 per week. The current maximum benefit level of \$400 per week will be raised according to the following schedule:

- July 1, 2007                      \$500
- July 1, 2008                      \$550
- July 1, 2009                      \$600
- July 1, 2010                      2/3 of the state's average weekly wage

From July 1, 2010, and each year thereafter, the maximum compensation level will be established by using the state's average weekly wage as determined by the New York State Department of Labor for that year. This provision will trigger automatic compensation level adjustments without requiring further legislation.

Claimants will receive a 25% increase in benefits effective July 1, 2007 for injuries occurring on or after that date. Self insured counties will have to adjust their adopted county budgets accordingly to pay for this unanticipated cost increase since their budgets for this year were adopted last December with compensation projections based on the existing benefit levels.

Injured workers who make less than \$100 per week will be compensated for their entire wages for injuries occurring on or after July 1, 2007.

Claimants currently receiving benefits under the existing statute for injuries incurred prior to July 1, 2007, will continue to receive benefits at existing levels and will not be subject to the benefit increase.

## ***Permanent Partial Disability***

Under existing statute, injured workers can receive cash payments for permanent partial disability. This payment rate is determined to be 2/3 of the difference between the injured employee's average weekly wage at the time of the accident and the difference for their wage earning potential thereafter in the same employment. These payments could last for the employee's entire working life, depending on the nature of the disability.

This benefit program has been the major subject of contention during all prior workers compensation reform discussions. This section of the program is the most expensive part of the overall program, yet affects a relatively small percentage of injured workers. This is seen as being a major reason for soaring employer benefit costs for workers compensation insurance.

Under the provisions of the law, permanent partial disability payments will be capped at a maximum of 525 weeks, just over 10 years. Payments will also be capped depending on the severity of the permanent disability according to the following schedule:

- 95% 525 weeks
- 90% < 95% 500 weeks
- 85% < 90% 475 weeks
- 80% < 85% 450 weeks
- 75% < 80% 425 weeks
- 70% < 75% 400 weeks
- 60% < 70% 375 weeks
- 50% < 60% 350 weeks
- 40% < 50% 300 weeks
- 30% < 40% 275 weeks
- 15% < 30% 255 weeks
- < 15% 225 weeks

*This schedule will be in place for all injuries sustained on or after July 1, 2007.*

Workers who have sustained injuries prior to that date and are receiving permanent partial disability payments will receive benefits under the existing statute and will not be subject to these benefit duration limitations.

Injured workers who surpass their period of maximum benefit weeks will be entitled to continued medical services regardless of the fact that they have completed their benefit period. The burden of proof will lie with the insurance carrier or the self insurance provider to apply to the workers compensation board to discontinue medical benefits.

The board is also to promulgate regulations to establish independent review and appeal of any administrative law judge's determination to discontinue or suspend medical benefits before a final determination is made by the Worker's Comp Board.

### ***Medical Treatment***

The existing statute is amended to include language requiring employers to pay the costs of dental services and prosthetic devices the injured worker may require. The statute is also amended to more clearly define the authority of the Chair of the Workers Compensation Board to establish fee schedules for all medical treatment and care under the law.

The Chair is authorized to establish a pharmaceutical fee schedule which will establish a maximum fee for prescription drugs. The bill requires dispensing generic

equivalents unless the physician specifically provides otherwise. The fee schedule is modified on April 1 of each year.

The law allows any employer to contract to a specific pharmacy for dispensing prescription drugs. If the pharmacy is not within a reasonable distance from the claimant and does not have mail order capability, the worker can obtain prescription drugs from another pharmacy subject to reimbursement under the fee schedule.

The bill amends the statute to increase the amount that can be claimed for special services such as consultations, operations, occupational therapy, etc., without prior approval, to \$1,000 from its current level of \$500.

The law also allows any carrier, self-insurer or the state insurance fund to contract with networks to perform diagnostic tests, x-ray examinations, MRIs or other radiological examinations or tests for claimants. The claimant can be required to obtain testing from the contracted network unless the injured worker's residence or place of employment is not a reasonable distance from service provider.

The bill amends the existing law to allow a preferred provider organization to offer at least 2 providers in each medical specialty from which a claimant may choose, down from the existing 5. The preferred provider may also designate 2 hospitals rather than 3 as under existing law.

The enacted bill also amends the statute to allow an employer to initiate temporary payments for prescription drugs as well as compensation payments for up to a year without prejudice, when it is unsure of its extent of liability for the claim of compensation.

The law strengthens penalties against self insurers and carriers who do not pay medical bills. It also allows medical providers and claimants to sue for unpaid awards of compensation and medical care.

### ***Safety and Loss Prevention Program***

The existing statute is amended to provide employers with the ability to receive credits against workers compensation premiums if they implement one of several program initiatives. Existing law allows an employer to receive a premium credit if they implement a safety incentive plan recommended by a safety and loss management specialist certified by the State safety panel.

The new law allows for a credit on workers compensation premiums if the employer implements a safety program, a drug and alcohol abuse prevention program or a return to work program which conforms to regulations issued by the Department of Labor. The amount of the credit will be determined by regulation of the Superintendent of Insurance and will require re-certification on an annual basis.

Self insurers can receive a credit for reduction of the security deposit required by the board to secure a self-insured employer's compensation liability.

### ***The Workers Compensation Rating Board***

The law allows the Workers Compensation Rating Board to sunset on February 1, 2008. This board, which is widely viewed by its critics as simply a network of insurance carriers, determines what workers compensation premium increase can be imposed on all of the state's employers. In effect, a board widely perceived as representing the interests of the insurance industry was regulating itself when it came to the imposition of premium increases.

The law requires the Superintendent of Insurance to report to the Governor and the legislature by September 1, 2007, on whether the Board is needed or if its work can be conducted by a more appropriate entity. The report will also detail the superintendent's recommendation for the institution of a new rate setting process.

### ***Special Disability Fund***

The law closes the special disability fund to new claims for any injury or accident which takes place after July 1, 2007. No claim for reimbursement against the fund for injuries occurring prior to that date can be made against the fund after July 1, 2010.

This fund was originally created to serve as an incentive for employers to hire disabled veterans and other disabled individuals following World War I and was subsequently expanded after WW II.

Current civil rights laws and other non-discrimination statutes provide ample protections for disabled individuals. These laws were not on the books when the fund was established. Now they have been expanded with greater protections.

The special disability fund reimburses carriers for expenses paid to disabled individuals who suffer an additional injury on the job, which compounds the seriousness of their existing condition after 5 years of disability.

The fund is financed by assessments levied on self insurers, the state insurance fund and private insurance carriers, who in turn pass these assessments along to all employers. The assessment is based upon 150% of the prior year's disbursements from the fund.

Critics of the fund's administration have maintained that carriers were utilizing the fund to minimize their exposure for payment of workers compensation costs, by looking to the special disability fund for reimbursement. This action spreads the costs across the entire insurance industry and all employers. Assessments on employers for this fund have increased 200% since 1995. Since that time, the fund's liabilities have grown from \$45 million to over \$1.3 billion.

Closing this fund is seen as one of the major employer cost reducing aspects of the workers compensation reform law. The law establishes a bond issuance by the State Dormitory Authority to secure the fund's future liabilities. Future assessments on employers will be based on the costs of debt service on the existing liability, rather than the 150% of the prior year's disbursements as it is currently constituted.

### ***Safety Net***

The Commissioner of Labor is directed to report to the Governor and the Legislature by December 1, 2007, on recommended steps to ensure that individuals categorized by the workers compensation board as permanently partially disabled return to gainful employment. The report is to examine best practices by providers, other states, relevant state programs, provide recommendations on legislative and administrative changes, and detail the projected costs associated with their implementation. An advisory board will be appointed by the Governor and the legislature to assist in the report's preparation.

Total industrial disability is maintained as under existing statute and nothing in the law in any way restricts a claimant from filing for a determination of total industrial disability.

Any claimant determined to have suffered a permanent partial disability of greater than 80% may apply to the workers compensation board for reclassification to total industrial disability during the year prior to exhaustion of the benefit period for reasons of extreme hardship.

The Commissioner of Labor, in conjunction with the Superintendent of Insurance, is required to track all individuals classified as permanently, partially disabled and report each year to the Governor and legislature on the number of claimants who have:

- Returned to employment
- been re-categorized as being totally industrially disabled
- remain subject to benefit duration limitations
- become benefit duration expirees and have not returned to work or been recategorized as being totally disabled

The report is also to provide recommendations on the steps necessary to minimize the number of individuals who are not reclassified or do not return to work.

### ***Claims Processing***

The law creates new procedures for claims review designed to decrease the time required to settle claims. The board must schedule a pre-hearing conference within 45 days after receipt of a notice of controversy, (a party contesting a claim or award) down from the current 60 day period. Times are also reduced for appeals. A special

part of the workers compensation board is also established to conduct expedited hearings if a case is not settled within one year.

The law also doubles penalties on parties who are found to be extending appeals or hearings for issues of a frivolous nature.

### ***Criminal Penalties***

Criminal penalties for employers who do not obtain workers compensation coverage or who intentionally understates employee payrolls or duties are significantly strengthened. Employers of more than 5 individuals who fail to provide coverage or deliberately misrepresent the size and duties of their workforce can be charged with a class E felony and can be subject to fines of up to \$50,000.

An individual convicted under this provision, who is charged with a subsequent violation in a 10 year period, will be subject to prosecution under a class D felony.

Fines are also increased for failure to provide or keep adequate business records. These offenses are classified as misdemeanors, subject to fines of between \$5,000 - \$10,000. Citation for violations more than once during a 10 year period will be treated as a class E felony.

The Chair of the Board can also assess additional fines of \$1,000 for each 10 days of non-compliance, up to an amount not to exceed twice the cost of compensation for its payroll, during the period of non-compliance.

The statute is also amended to allow the board or a court having jurisdiction which finds that a case is instituted or continued without reasonable grounds, to assess administrative costs and attorney fees against the party who continued the proceedings.

### ***Civil Enforcement***

The statute gives broad new authority to the Chair of the Workers Compensation Board to enforce the law. The Chair or the Chair's designees will have the power to:

- Enter and inspect any place of business
- Exam and copy business records
- Administer oaths
- Specify by rule what records need to be maintained
- Issue and serve subpoenas
- Institute action in state supreme court against businesses who fail to obey a subpoena to testify or produce business records
- Issue stop work orders for non-compliance
- Take action in state supreme court against employers who violate stop work

orders. Any judgments obtained will constitute a lien against all assets of the employer

### ***Suspension and Debarment***

Any person subject to assessment of civil fines or penalties, subject to a stop work order, or convicted of a misdemeanor for violations of the law will be ineligible to submit a bid or be awarded any contract for a public work by any public agency, including all local governments, for a period of one year.

Any person convicted of a felony will be ineligible to bid on or receive any contract for public works for 5 years.

All municipal employers will be responsible for implementing steps to ensure that suspended and debarred contractors do not receive public works contracts.

### ***Fraud***

The law increases the efforts of the state to combat workers compensation fraud. The law authorizes sharing of information between the Department of Tax and Finance, the Workers Compensation Board, the Department of Motor Vehicles and the Department of Labor. This includes sharing of employer tax information and wage reporting data.

The sharing of wage reporting data is particularly significant, since it is the most detailed information available on individual employee wages. Access to this data is extremely limited due to confidentiality issues. The information can be utilized to identify individuals who are working, but also collecting workers compensation benefits. This information can also be shared with any government jurisdiction if it is involved in a fraud investigation.

The law also creates new penalties for medical providers who file false, altered or misrepresent the level of injury of a claimant. The chair is given authority to remove the provider from the eligible provider list, assess fines of up to \$10,000, and to forward the case to the attorney general for prosecution.

The chair is also empowered to remove any physician found guilty of professional or other misconduct from the list of eligible medical providers. The chair can also remove any physician investigated by the Department of Health, which results in the determination or a consent order that includes findings of professional or other misconduct.

The law also makes individuals incarcerated for commission of a felony, ineligible for workers compensation benefits.

## ***Impacts***

The law is projected to result in a reduction of employer premiums for workers compensation of between 10% - 15%. Additional savings are anticipated through the closing of the special disability fund, which has become a substantial factor in rising employer workers compensation assessments.

Employers will be assessed for payment of debt service on the bonds that will be floated by the Dormitory Authority to secure the existing liabilities of the special disability fund, but this should be significantly less than the current assessment based upon 150% of the prior year's disbursements.

The cap on the length of time allowable for receipt of permanent partial disability benefits will result in lower compensation rates for employers in the long term. The cap on permanent partial disability payments does not kick until July 1, 2007 and only affects claims for injuries occurring on or after that date. Existing payments under the provisions of the old law will continue.

Expanded fraud investigation powers and the sharing of wage reporting data should lead to greater efficiencies in fraud investigation and prevention but it is difficult to judge what financial impact these new powers will have on overall employer costs.

Costs for payment of recipient benefits will rise as benefit levels increase, but the business community believes that this is more than offset by overall savings received from other areas of the law.

County self-insurers will see an immediate financial hit since they will have to increase benefit payments for injuries occurring on or after July 1, 2007, midway through the county budget year. Counties will realize savings in assessments for the special disability fund and from the capping of permanent partial disability benefits in the long term.

## ***Remaining Issues***

There are 2 remaining issues that need to be resolved before the Workers Compensation reform package is fully in place: determination of a rate setting process and adoption of fact-based medical guidelines.

These two issues will be studied over the coming months, with a report on recommendations to the Governor and the legislature due in September of this year.

Establishment of firm medical guidelines will be utilized to determine the extent of injury and classification of permanent partial disability levels. Litigation over these issues adds significant time and cost to resolution of compensation claims. This could

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be a contentious area, particularly among trial lawyers, who stand to be significantly affected by the standardization of disability determinations.

The Superintendent of Insurance also needs to develop a rate setting procedure to replace the workers compensation ratings board. Carriers and medical providers will weigh-in heavily on these discussions when legislation is introduced next session.



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