

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
SAN ANTONIO, TEXAS
NOVEMBER 12, 2015
DRAFT MINUTES

The National Conference of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at the Hilton Palacio del Rio in San Antonio, Texas, on Thursday, November 12, 2015, at 9:45 a.m.

Sen. Jerry Klein of North Dakota, Chair of the Committee, presided.

Other members of the Committee present were:

Rep. Matt Lehman, IN	Sen. James Seward, NY
Rep. Joe Fischer, KY	Rep. Mike Henne, OH
Rep. Steve Riggs, KY	Sen. Roger Picard, RI
Rep. Bart Rowland, KY	Rep. Bill Botzow, VT
Rep. George Keiser, ND	Rep. Sarah Copeland Hanzas, VT
Sen. David O'Connell, ND	Rep. Kathie Keenan, VT
Rep. Don Flanders, NH	Rep. Warren Kitzmiller, VT

Other legislators present were:

Assem. Ken Cooley, CA	Rep. Mike Huval, LA
Rep. Janak Joshi, CO	Rep. Joe Atkins, MN
Rep. Romy Cachola, HI	Rep. Don Gosen, MO
Rep. Martin Carbaugh, IN	Assem. Maggie Carlton, NV
Sen. Travis Holdman, IN	Assem. Kevin Cahill, NY
Rep. Kevin Mahan, IN	Rep. Robert Hackett, OH
Rep. Peggy Mayfield, IN	Rep. Maureen Dakin, VT
Rep. David Ober, IN	Sen. Jan Angel, WA
Rep. Ronald Crimm, KY	Rep. August Tyler, WI
Rep. Jim Gooch, KY	Sen. Mike Hall, WV
Rep. Tommy Thompson, KY	Del. Steve Westfall, WV

Also in attendance were:

Susan Nolan, Nolan Associates, NCOIL Executive Director
Candace Thorson, Nolan Associates, NCOIL Deputy Executive Director
Andrew Williamson, Nolan Associates, NCOIL Director of Legislative Affairs

MINUTES

Upon a motion made and seconded, the Committee unanimously approved the minutes of its July 16, 2015, meeting in Indianapolis, Indiana.

REPORT ON TEXAS WORKERS' COMPENSATION SYSTEM

Comm. Ryan Brannan of the Texas Division of Workers' Compensation reported that Texas enacted significant workers' compensation reforms in 2005, followed by further reforms in 2011 and by recent establishment of a drug formulary. He said that since 2005, workers have

returned to work more quickly, access to care has improved, employer rates have decreased by more than 50 percent, and the number of workplace injuries has gone down, though Comm. Brannan noted that on-the-job fatalities have become more frequent. He said that insurers now enjoy an approximately ten (10) percent underwriting profit, not including investment gains. Misclassification of employees, he said, was not a problem.

Comm. Brannan reported that 40 percent of active healthcare providers in Texas now treat injured workers. As a result of the new drug formulary, he said, prescription drug costs have declined by approximately 15 percent and use of “N” drugs, which are outside the formulary, has decreased by more than 75 percent.

Comm. Brannan noted that Texas is a “non-subscriber” state in which employers are not required to participate in the workers’ compensation system. He said the approach has worked well for more than 100 years, though there were some issues regarding non-subscriber compliance with form-filing requirements.

In response to questions from the Committee, Comm. Brannan said, among other things, that:

- The high fatality rate in Texas was due to economic growth and job creation in the state, particularly in the transportation, oil and gas, and construction industries.
- Texas recently was ranked as the state with the most improved workers’ comp rates.
- Non-subscribing employers are at risk of being sued by their injured employees, since the traditional workers’ compensation contract does not apply.
- Return-to-work outcomes have improved because of the state’s drug formulary.
- As a result of the 2005 reforms, the number of employers without workers’ compensation dropped from approximately 45 percent to roughly 20 percent.

OPT-OUT WORKERS’ COMPENSATION SYSTEMS, PROPOSED FEDERAL INTERVENTION

Frank O’Brien of the Property Casualty Insurers Association of America (PCI) distinguished between the opt-in (non-subscriber) approach that exists in Texas and an emerging approach, known as “opt-out,” that Oklahoma recently enacted and that states including South Carolina and Tennessee were considering. Mr. O’Brien commented that opt-out systems do not protect injured workers, private and public payers, and other entities. He also said that opt-out allows employers to deny benefits and leads to cost-shifting, and that state workers’ compensation systems should ensure employee protections and fair competition, among other things.

In response to a question from Rep. Keiser regarding costs paid by employers, Mr. O’Brien said, among other items, that opt-out systems go too far in trying to lower premiums.

Ron Jackson of the American Insurance Association (AIA) echoed Mr. O’Brien’s concerns and further distinguished between opt-in and opt-out. He said there was discussion in Tennessee as to whether opt-out employers should maintain the exclusive remedy aspect of workers’ compensation. He also said that AIA insurers did not oppose opt-out because they would lose business but, rather, because opt-out creates a separate, unequal system for employers and employees and raises regulatory issues.

Responding to a question from Rep. Fischer regarding employer liability, Mr. Jackson said that employees in Texas can sue their non-subscribing employers but that employees of opt-out companies in Oklahoma do not have that right because the exclusive remedy applies to both opt-out and traditional workers' compensation in the state.

Tim Tucker of the National Council of Compensation Insurance (NCCI) then spoke to federal workers' compensation activity, which he said was unprecedented. He overviewed an October 28 letter from ten members of the U.S. House and Senate to Department of Labor Secretary Perez that requested a DOL review of benefits adequacy, opt-out approaches, and other state-level developments. Mr. Tucker reported that the Federal Insurance Office (FIO) had been expressing interest in workers' compensation issues (e.g., incorporating in a September 2015 FIO annual report to Congress that FIO has concerns regarding the appropriateness of local workers' comp standards). In addition, Mr. Tucker said, the relationship between opt-out plans and Social Security Disability Insurance (SSDI) has led to controversy.

EMPLOYEE MISCLASSIFICATION

Julie Gackenbach of Confrere Strategies said that the DOL in early 2015 had issued "interpretative guidance" as to what DOL would consider an "independent contractor," and she noted that the guidance would result in more workers being classified as employees rather than independent contractors. She said there were significant repercussions to this change.

Ms. Gackenbach noted that pending federal legislation would allow the IRS to write guidance on the tax implications of independent contractor v. employee status. Regarding the "sharing" economy, Ms. Gackenbach said that stakeholders recently began meeting with officials to discuss options to address worker classification.

In response to a question from Rep. Keiser regarding state v. federal "independent contractor" criteria, Ms. Gackenbach commented that DOL may have been compelled to issue standards because of pressure from employers and employees and because there are separate tax rules.

PROFESSIONAL EMPLOYER ORGANIZATIONS (PEOs), NCOIL MODEL

Comm. Ted Nickel (WI), speaking on behalf of the National Association of Insurance Commissioners (NAIC), reported on NAIC efforts regarding large deductibles. He offered background on the NAIC initiative, which he said included an analysis of PEOs, and noted that, as per NAIC staff request in early 2015, interested parties were working with regulators to update a 2006 NAIC large deductible study and would participate in development of any regulatory actions emanating from it. He said that participants were working on modules that addressed different aspects of the issue and that would be compiled into the final draft of the study. Comm. Nickel then summarized the timeline of 2015 activity and potential next steps.

Mona Carter of NCCI, noting that NCOIL had expressed interest in updating its *Model Act Regarding Workers' Compensation Coverage in Professional Employer Organization (PEO) Relations* to make it more relevant, suggested that NCOIL add provisions related to large deductibles. She said the industry was very concerned about the potential for insolvencies related to large deductible policies and had possible recommendations for NCOIL consideration. She also said that revisions to the model's definitions section might be helpful.

Robyn Crosson with ADP spoke as an interested party involved in development of the NAIC large deductible study. She said the document addressed large deductible issues “across the board,” including the unique concerns related to PEOs, and that state officials and others might turn to the document as potential best practices. Ms. Crosson said drafters of the study had received 120 comments and had worked with the International Association of Industrial Accident Boards and Commissions (IAIABC). She then commented on recent Illinois legislation related to large deductibles.

PROPOSED 2016 COMMITTEE CHARGES

The Committee considered the following proposed 2016 charges:

- advance consideration of proposed amendments to the NCOIL PEO model act
- examine costs/benefits related to opt-out workers’ compensation systems and, as appropriate, respond to calls for federal intervention
- explore dynamics of the changing workforce (e.g., trends indicated by Bureau of Labor Statistics data, meaning of “contingent workforce,” issues regarding to increased use of telecommuting, sharing economy impacts, changing definitions of “employer” and “at work”)
- analyze developments regarding classification of independent contractors (e.g., Department of Labor guidance, state activity)
- continue effort to educate states pursuing opioid-related insurance reforms, i.e. NCOIL best practices (*in conjunction with the Health, LTC & Health Retirement Issues Committee*)

After a motion was made and seconded, the Committee unanimously adopted the charges.

ADJOURNMENT

There being no other business, the Committee adjourned at 10:45 a.m.