A Timely Analysis of Legal Developments

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On June 28, 2011, Illinois Governor Pat Quinn signed House Bill 1698, a comprehensive reform of the Illinois Workers' Compensation Act. The amendment, which primarily goes into effect on January 1, 2012, imposes stricter codes of conduct for arbitrators, mandates objective consideration of medical standards, and is expected to save Illinois businesses between $500 and $750 million dollars.

Illinois Overhauls Workers' Compensation Act

By Grady Murdock, Scott Summers and Milton Castro

On June 28, 2011, Illinois Governor Pat Quinn signed House Bill 1698 (HB 1698), an amendment to the Illinois Workers' Compensation Act (IWCA) that will comprehensively reform Illinois workers' compensation system. HB 1698, which primarily goes into effect on January 12, 2012 – with some provisions going into effect this year – is expected to save Illinois businesses between $500 and $750 million. The reform package also includes a complete revamping of the Illinois Workers' Compensation Commission. Upon signing the bill, Governor Quinn said, "We began this process months ago with the belief that we needed to maintain essential protections for injured workers, while ensuring that the system treats our businesses fairly . . . . This overhaul is going to improve the strength of our state's business climate and economy."

The Illinois Workers' Compensation Act

Illinois' workers' compensation system is a no-fault system of benefits paid by employers to workers who experience job-related injuries or diseases. The Act, among other things, requires employers to: procure workers' compensation insurance; post a notice in each workplace that lists the insurance carrier and explains workers' rights under the Act; and keep records of work-related accidents and report to the Commission those accidents that result in the injured employee being off work for more than three workdays. Employers are not allowed to seek reimbursement from their workers for any costs associated with workers' compensation coverage including insurance premiums as all such costs must be borne solely by the employer. Retaliation against workers for the exercise of their rights under the Act is also prohibited.

The Commission is tasked with implementing and enforcing the provisions and regulation of the IWCA. A case is first tried by an arbitrator, whose decision is subject to review by a panel of three commissioners. Any decision by the Commission is subject to further administrative review by the circuit courts of Illinois. In all cases, the burden is on the employee seeking compensation to prove the elements of his or her claim by a preponderance of the evidence. This is particularly true in the requirement that the injured worker demonstrate that the injury arose out of and was in the course and scope of the employee's employment. Courts have held that an injury arises in the course

and scope of employment when its origin is linked to a risk connected with or incidental to the injured worker's employment. In other words, the mere fact that an injury occurs at the place of employment is insufficient for a finding that it arose out of the injured worker's employment.

Reform that Affects Employers, Workers, and the Commission Itself

Opponents of Illinois' workers' compensation overhaul claim that the amendment is too "employer-friendly." Many employers argue, however, that the reform – assuming it is employer-friendly – was needed in order to balance the scales between employers and workers under the Act. Some of those changes that the Office of the Governor declares will aid employers are as follows:

- Effective September 1, 2011, fee schedule amounts (those amounts required by treating physicians, the insurance carrier, or a self-insured employer) will be reduced by 30% across the board. Employers are projected to save up to $500 million as a result.
- Illinois has adopted certain standards related to the assessment of physical impairment and total body disability set by the American Medical Association (AMA). Physicians and arbitrators must now follows those standards in their analysis of the injured worker's post-injury physical condition.
- Effective September 1, 2011, wage differential benefits will pay out for only 5 years or until the injured worker is 67, whichever is later. Under the former regime, such benefits were paid throughout the injured worker's life expectancy.
- Carpel tunnel syndrome claims, one of the most common and costly of workers' compensation claims, are now capped at 15% loss of use of the hand, except where there is "clear and convincing evidence" that the employee has sustained a more significant loss, but the total loss will still not exceed more than 30% total loss.
- Employers can now create their own PPO programs to handle workers' compensation claims, and employees must seek treatment from in-network providers where such programs are offered. An exception exists for those employees who can prove to the Commission that any care given by the in-network providers would be or is insufficient.
- Effective September 1, 2011, claims will be denied where the accident involved an intoxicated claimant. Specifically, an injured worker will not be entitled to compensation if his or her intoxication was the proximate cause of the injury or the injured worker was so intoxicated that his or her condition constituted a departure from his or her employment.
- Utilization review procedures and requirements will be clarified and more strictly applied. The Commission, however, will still consider a valid and otherwise admissible utilization review, if any, in its determination of the reasonableness and necessity of an employee's treatment.

In sum, the changes brought about by the Act's reform are significant in that employers now have the ability to more closely monitor the costs associated with the treatment of injured workers and the system for awarding benefits to injured employees are more aligned with the AMA Guidelines. Injured employees, however, were not left empty-handed. For instance, the amendment creates a process for electronic billing from medical and other providers, which will help protect workers from disruption of treatment. In addition, insurers and employers must pay providers on a timely basis, and if not so paid, pay the providers additional fees in interest and penalties. The Commission has also been further empowered to enforce the Act's requirements that all employers who employ two or more employees must maintain proper insurance coverage or face fines and penalties.

As part of the Act's reform and in an attempt to further define the often troublesome and much litigated issue of employment relationships between construction employers and their employees, Illinois will begin a "pilot collective bargaining program," in which construction employers and their employees' unions, if any, can create their own workers' compensation system, including new alternative dispute resolution procedures to address claims outside of or as a supplement to the scheme found in the IWCA. In this regard, Illinois joins a small number of states, such as Massachusetts, California and Wisconsin, who have passed laws authorizing similar types of carve-outs.

The reforms also address long-standing issues related to the Commission. Historically, the arbitrators hearing the claims filed on behalf of injured workers have garnered a reputation for arbitrariness. To address this and similar issues, HB 1698 calls for all current arbitrators'

terms to end as of July 1, 2011. All arbitrators who wish to continue in their positions will be subject to performance evaluations as a requirement to being considered for re-appointment. In addition, going forward, all arbitrators will serve terms of only three years (as opposed to the former guarantee of a 6-year term); be held to higher standards requiring objective decision making (*e.g.*, decisions must only be based on the evidence and testimony within the record of the proceedings); and be subject to the same ethical rules that apply to judges. Finally, all new arbitrators must be licensed attorneys.

Practical Considerations

With the enactment of HB 1698, Illinois takes several big steps toward a more-balanced and comprehensive system of workers' compensation. While the reform is predicted to save employers more than $500 million and can be seen – as shown above – as more employer-friendly than not, employers should still be proactive in seeking a thorough legal understanding of the Act's new provisions and regulations. To reduce exposure, employers should also review their workers' compensation policies and procedures to ensure that employees are properly notified of their rights under the reformed Act, and to guarantee that any claims brought pursuant to those rights are addressed and resolved in full compliance with the Act's requirements. Employers may also want to explore creating their own provider networks where practical.

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