

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
SAN DIEGO, CALIFORNIA
MARCH 10, 2023
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at The Westin San Diego Gaslamp Hotel on Friday, March 10, 2023 at 11:15 a.m.

Senator Bob Hackett of Ohio, Chair of the Committee, presided.

Other members of the Committee present were:

Rep. Brenda Carter (MI)
Sen. Pauk Utke (MN)

Rep. Brian Lampton (OH)
Rep. Ryan Mackenzie (PA)

Other legislators present were:

Sen. Jesse Bjorkman (AK)
Sen. Justin Boyd (AR)
Rep. Denise Ennett (AR)
Sen. Ricky Hill (AR)
Asm. Tim Grayson (CA)
Rep. Rod Furniss (ID)
Rep. Rita Mayfield (IL)
Sen. Win Stoller (IL)
Sen. Robert Mills (LA)
Rep. David LeBoeuf (MA)
Rep. Kelly Breen (MI)
Rep. Kevin Coleman (MI)
Rep. Kristian Grant (MI)
Sen. Mark Huizenga (MI)

Rep. Mike McFall (MI)
Rep. Helena Scott (MI)
Rep. Lori Stone (MI)
Sen. Lana Theis (MI)
Sen. Michael Webber (MI)
Sen. Nellie Pou (NJ)
Rep. Tim Barhorst (OH)
Rep. Forrest Bennett (OK)
Rep. Mark Tedford (OK)
Rep. Cameron Parker (MO)
Rep. Carl Anderson (SC)
Rep. Kirk White (VT)

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Will Melofchik, NCOIL General Counsel
Pat Gilbert, Manager, Administration & Member Services, NCOIL Support Services, LLC

QUORUM

Upon a Motion made by Sen. Paul Utke (MN), NCOIL Secretary, and seconded by Rep. Brian Lampton (OH), the Committee voted without objection by way of a voice vote to waive the quorum requirement.

MINUTES

Upon a Motion made by Sen. Utke and seconded by Rep. Brenda Carter (MI), the Committee voted without objection by way of a voice vote to adopt the minutes of the Committee's November 18, 2022 meeting in New Orleans, LA.

PRESENTATION ON DEVELOPMENTS IN CALIFORNIA WORKERS' COMPENSATION INSURANCE MARKETPLACE

Mitch Steiger, Legislative Advocate for the California Labor Federation (CLF), thanked the Committee for the opportunity to speak and stated that for those who are not familiar with CLF we are essentially a private nonprofit that represents affiliated union locals in California. We represent about 1,400 affiliated union locals as well as over 2 million workers that are members of those locals and through that structure we do our best to provide a unified voice for both union and non-union workers across the state. And so obviously with that being our perspective, workers compensation is definitely an issue that's near and dear to our hearts and arguably this broader issue of how we keep workers safe at work and what we do after injuries happen is maybe more than anything else the reason why there is a labor movement and why it is something that is so important to so many workers. You don't have to go very far back in the history of the state in this country to find a time when workers were openly seen as expendable, when workers died frequently, when workers suffered horrific crippling injuries and the response was basically step aside and make room for more workers. And through years of organizing and some very bloody struggle we now have things like a strong labor movement and a strong workers compensation system here in California and that's why we focus so much on trying to keep it as strong as possible to make sure that we don't slide back into the way things used to be. Very broadly speaking, I think it's safe to say that for the majority of workers the California workers comp system works very well. The vast majority of workers who do file claims in the system do get the medical and indemnity benefits to which they are entitled and we want to make sure that we protect the aspects of the system that work but there is a very significant minority of workers for whom the system does not work and for whom the system can pretty quickly become, no exaggeration to say, a nightmarish experience where it can take the worst pain they've ever suffered in their life and turn it into something that runs their entire life into the ground. That can end with homelessness or a crippling injury that follows them around for the rest of their lives or losing their families or death. We see this sort of thing happen all the time.

And so most of the time when we work on the workers comp system those are the cases that we're focused on. We're focused on those thousands and thousands of workers across the state that are struggling with the system that do have a really tough time getting the benefits that they're entitled to. And so we're very committed to doing what we can to make sure that the system works better for them. And so I'll group my comments into three main areas. I'll start with kind of a general state of the system with apologies to the Workers' Compensation Insurance Rating Bureau of California (WCIRB) for stealing the phrase that they use for their annual report but we'll very quickly go over how the system looks to us as workers. I'll briefly touch on some recent legislation in California that's affected the workers comp system and then conclude by going through what we see as the need for reform and some of the key areas within that. So for workers though we are doing what we can to manage the pandemic and transition out of it and as much as we can get back to normal, COVID really does continue to dominate. We hear this from a lot of workers - it's not uncommon for workers in some industries such as grocery to have been infected with COVID three, four, or five times and the evidence at this point is pretty clear that subsequent infections increase the risk of long COVID and the outcomes get worse and worse for workers and so we are still very worried about COVID and where it's going to go in the future it doesn't appear to be going anywhere. So we want to do what we can to make sure that our workers comp system accounts for that.

There are still very significant difficulties in securing medical care for a lot of workers. I'll get more into this a little bit later but this is independent of COVID by far the biggest complaint that we hear from workers about the system that whatever the issues are with benefits, whatever the

issues are with other areas of the system, it's those workers who need medical care in a timely fashion and struggle to get it that are the ones having the worst outcomes and the ones that we think we should focus on the most. And there's also a rising fear of retaliation. Again, most workers probably don't need to deal with this but where it does exist it is very real and it is not at all uncommon for workers to be fired or have their schedules changed or otherwise face some sort of very significant retaliation simply for the crime of having been injured at work and so that's another one that we really like to focus on. Cost, generally speaking, does continue to decline and AB863 is probably pretty familiar to the California workers comp people in the room. It was a very significant overhaul of the system, probably the biggest piece of it was an entirely new way of dealing with disputed treatment requests and it made a lot of other changes to the system that arrested some of the very out of control cost increases that we were seeing across our system and turned them back generally speaking in the right direction. And while far from perfect it has, we think, overall been a great success and has turned the system into one that overall works better for workers and employers and insurers and everyone else given that the costs do continue to decrease. But a little bit later we'll get more into what's generating the savings and whether or not that's a victory for workers or is a little bit more of a mixed bag.

So for recent legislation probably the most significant one of the last few years was SB1159 that was a joint bill between the Senate Labor Committee and the Assembly Insurance Committee that created a COVID presumption. Early in the days of the pandemic when we saw just waves of workers getting sick with this and really having a hard time convincing their employers that they got it at work, no one really knew how this thing operated, everyone was kind of stabbing in the dark. But there were massive denials even more so than there are now and we fought very hard to implement a COVID presumption across the board for workers. We weren't able to get what we were trying for and covering everyone but it did have a few different pieces that made an extremely significant difference for affected workers. It created a first responder presumption that covered police, fire, and healthcare. That we think has worked pretty well. Basically if you are a worker and one of those injuries and you get COVID the system presumes that you got it at work unless the employer can demonstrate, I think the evidentiary standard is clear and convincing evidence. But the employer can still if they have some compelling evidence that it was not the result of work related exposure they can escape the presumption. But by doing that it makes it much easier for the worker to win the benefits that we believe that they're entitled to. So that the good news. The bad news is that also created an outbreak presumption that we don't think has worked very well at all. It was the result of some I guess I'll call it intense negotiations between all stakeholders and everyone walked away pretty unhappy. But basically what it does is for everyone who isn't covered by the first responder presumption they're only covered by the outbreak presumption and the first thing that it does is exempt all workers who are employed by businesses with fewer than five employees, which is most businesses in California. So out of the gate most employers are exempted and then everyone else the presumption only applies if there is an outbreak in the workers workplace and that's defined as if there are fewer than 100 workers, 4 workers have to test positive within a 14 day span. If there are more than 100 workers, 4% of all the workers have to test positive in a 14 day period. And the test has to be a PCR test which is extremely difficult to find in some places across the state.

And there is no disclosure to the workers. So they don't know if their employer's in outbreak status or not. They don't even have a clear right to ask their employer or claims administrator if there is an outbreak happening. So it's all kind of on the honor system and hoping that this information is volunteered by those who know it and our experience has been that basically doesn't happen. The only time we've ever heard of anyone benefiting from this presumption was a union that kept very close track of the COVID disclosures from the employer independent of SB1159 and they were able to apply that presumption in some cases. But other than that, we

haven't heard of any group of workers that have benefited from that presumption and the bill was set to sunset on 1/1/2023 which brings us to AB1751 which was an extension of the COVID presumption last year. And for the first responder presumption, the original plan was two years but that had to get negotiated down to one year so that absent any other future action will expire at the end of this year. And we also made a pretty serious effort at fixing what was wrong with the outbreak presumption proposed and we had a few different versions of that. Those were all rejected. So the outbreak presumption continues for the rest of this year. I haven't seen any legislation this year that would extend it any further than that but the deadlines are approaching and passing as we speak. So it's not outside the realm of possibility but I think it's looking less and less likely that gets extended beyond the end of this year. There was also legislation last year that created a system whereby workers can receive their indemnity benefits on prepaid debit cards. This is an issue that primarily affects unbanked workers. So those who, there are still a very large number of workers who either won't or can't access traditional bank accounts and so they have to take advantage of a variety of other forms of banking products that are out there to get the money and get the benefits that they're entitled to. And so this bill created a system where they could get prepaid debit cards. We always watch this issue pretty closely because some of these cards can come with some pretty predatory fees and we've seen some workers lose even double digit percentages of their income or benefits to these fees depending on how bad the fee schedules were. But we went neutral on this bill given that the cards themselves actually came with a pretty good fee schedule outline and statute that we would actually like to see applied to all of the prepaid debit cards, maybe even the ones that are used to pay wages. This one sunsets on 1/1/2024. There's also an effort underway to extend this one either a certain number of years or indefinitely. We're waiting for a report from the Commission on Health and Safety and Workers Compensation in California that will basically let us know how well this program is working. We don't really know yet. So we at CLF at least are kind of reserving our judgment on an extension until we learn more about whether or not the system is working that well from this report.

Probably the biggest bill last year was SB 1127 by CA Senate pro Tempore Toni Atkins from lovely San Diego and this bill dealt primarily with presumptions that affect first responders. It was a huge priority for the California professional firefighters, the main union of firefighters here in California, where they had seen a pretty common problem. Employers who have this 90 day span of time that they can use to accept or deny a claim, the employers would wait until day 88 or 89 and then deny the claim and then start doing everything that they could to fight it and we heard quietly from some employers and employer groups that it really didn't take that long that this was kind of a negotiating tactic and that definitely lines up with how we think the system works. And so the effort was to lower that from 90 to 60 days. It ended up going down to 75 days which is still a step in the right direction but we believe it should still be less time that workers shouldn't have to wait that long for an answer from employers regarding causality. For certain cancer claims the amount of time by which workers can receive those temporary benefits increased from two years to 240 weeks. This is a big deal because with a lot of these cancer claims it takes longer than that to basically figure out what's going on to deal with all the disputes around causality and treatment requests and reach that stationary level. And so that's an important reform to make sure that workers can continue getting the benefits that they're entitled to. And then also increased penalties for unreasonable delays in the system. This is another problem that we see not just obviously with firefighter claims but all across the system there are a wide variety of tactics that some employers or insurers or third party administrators (TPAs) can use to delay things for workers that in the long run cause a lot of harm throughout the system.

CA AB 5, this is one that is very well known to most of us here in California. This does not have to do with first responder presumptions. This one has only to do with employment status,

whether someone is an employee versus an independent contractor and this codified a state supreme court decision called the *Dynamex* decision that clarified the test that's used to determine whether or not someone's an employee or an independent contractor. We were very strong supporters of this bill. We think it was one of the biggest victories for workers in California in generations. The explosion of misclassification touches virtually every industry out there and workers who are misclassified lose access to just about every single protection under the labor code and this bill was a major step in the right direction in cutting off the access that some employers believe they had to cut costs by misclassifying workers. Proposition 22 has a workers component to it where it's not really legislation but it was a ballot measure to the people that's essentially throughout the existing workers comp system for gig economy workers and created another one with all sorts of different problems and all sorts of different concerns. And given the constitutional nature of our workers comp system that has largely been the basis for the struggles that Prop 22 has had in the court system as it stands right now it has been thrown out. We'll see where it goes from here but we are obviously major opponents of this proposition and did not support in any way what it did for those workers in terms of throwing out their workers comp system and we hope that it stays thrown out by the different levels of courts.

And I'll just try to briefly touch on the need for reform. As far as indemnity benefits the temporary disability process here we think tends to work pretty well. The benefits are indexed. They replace a fairly significant portion of lost wages. The permanent disability benefits are a totally different matter as they are capped at \$290 a week which doesn't really even cover rent in most of the state and we strongly believe that there should be a major increase in that soon. The biggest issue for us and I'll really focus on this one is the need for better medical care for workers. We see delays and denials and problems all across the system, not just for workers but for employers and insurers it makes it hard for everyone to know how much to reserve and how much the system's going to cost in the future. But obviously we think the biggest issue here is that when workers are getting their care delayed their care gets worse, their injuries get worse, it makes it harder for them to get back to work and in many different ways raises cost throughout the system and generates the need for massive reform in the future that I'm sure we're all hoping to avoid. My email is up there on the screen if anyone would like to reach out and I'm happy to talk more about these issues with anyone who'd like to discuss them.

Kristen Marsh, Senior Vice President and Chief Legal Officer for the WCIRB thanked the Committee for the opportunity to speak and stated that WCIRB is the California Department of Insurance designated statistical agent with respect to workers compensation insurance. When I'm speaking with groups I like to put into context where we kind of fit in. You're familiar with the National Council on Compensation Insurance (NCCI) who collects data with respect to 35 states. This is the share of workers comp direct earned premiums based on National Association of Insurance Commissioners (NAIC) data from 2021. So you can see down at the bottom, California we are actually 19% of the overall 51% covered by what is considered the independent bureau with NCCI having the 35 states and the 43%. Mr. Steiger actually did go through a lot of the legislation pieces. The one thing I was going to mention is with respect to the COVID presumptions that is something that we have been closely watching obviously for impact on cost. As mentioned, that is extended to January 1, 2024 and as of right now there's no legislation to extend it. Another bill to mention was SB216. In California roofing contractors are required to have workers compensation insurance even if they do not have any employees. The idea being that you can't really do roofing work as a solo endeavor. This was expanded to include some other types of licensed contractors and then in January, 2026 it will expand to all licensed contractors will be required to have workers comp in the state of California.

As mentioned, SB 1127, that was an interesting bill and it did have quite a bit of back and forth and one of the things that they are hoping to do is to be able to collect some additional data. So the division of workers compensation is going to be amending their data collection process in order to collect the date when claims are being denied or accepted so that we can look into the issue that Mr. Steiger discussed. And then the last two bills are actually bills that were vetoed. And so in California we have the first responder presumptions that are in place and every year we have additional bills that extend it to additional different peace officers or firefighters in the state and you can see here this particular one got vetoed. It has actually been introduced already again for next year. And then with respect to the post-traumatic stress presumptions, this was put into place in 2020 and it sunsets in 2025. Last year there were some bills hoping to expand it to additional firefighter and peace officers. That was vetoed. It didn't extend out the sunset date, it just expanded it to some additional people. Bills have been introduced this year already to try to expand it to some additional people and also move it into private employers with respect to nurses in particular. Nurses have been introducing bills for quite a few years working to introduce a presumption for all different types of injuries but as of now they have not been successful. If they were that would be the first permanent presumption that goes into place that does impact private employers. So some of the things that we are watching and some different areas that we're focused on, Mr. Steiger did mention SB863 which was a large reform that happened back in 2012. California has kind of this cycle of reforms every so often. We have a downturn and then as costs start to rise we have a new reform package come into place. So what would kind of caused that reform to come to fruition? As you can see for the last 30 years we've had a real steep decline in the number of indemnity claims in the state but you can see for the last 10 to 15 years that decline has plateaued. Same for SB863, those reforms did impact frictional costs. It did reduce costs quite a bit in the system but those also have plateaued. So we're starting to see hitting that bottom and moving into more of a hard market for workers comp in California and what balanced out and kept that from happening is the increase in wages.

We had something like an 11% wage inflation rate and because workers comp is based on how much you pay in payroll, that additional wage level was able to offset some of those costs without needing to raise the rates in California. But next year I don't think we're going to see an 11% inflation rate for wages. So at some point that will start to not cover those additional costs and I do think we will start to see costs increasing in the system. I would also like mention cumulative trauma claims. This is another area that we watch. It's specific to California and a California phenomenon but the percent of cumulative trauma claims of indemnity claims has slowly been increasing and why this matters is cumulative trauma claims are reported much later in the life cycle. They have a lot of medical care. They are expensive claims. We do keep an eye on this factor when we're looking at the market in general. Also on our watch list is medical inflation. Medical deflation actually drove a lot of our reductions the past 10 years. The elimination of a lot of opioids and different things out of the system kept medical costs low but the past five years those also too along with frequency have been starting to creep back up. You'll also see the inflation in the economy and when will that hit workers comp and when will that hit medical care in the state? So far because of the drug formularies and different things that we have in place, costs have been relatively stable but at some point that inflation will find its way into the medical care system. And then long COVID is just something we don't know enough about yet. It is an area that we're starting to study. You can see we do have a significant number of claims, this is based on California Department of Public Health Data in the state with respect to workers comp claims for COVID. And they are continuing to be a significant amount and when you look at the shares of treatment for long COVID, this is based on our 2020 preliminary data but even with mild cases you're seeing 11% of those cases requiring care four months after. That goes up to 40% when you have someone in the Intensive Care Unit (ICU) or someone who had a critical care situation with respect to COVID.

So at this point we just don't know really what we're going to see with long COVID in the future and the impacts that is going to have. The WCIRB does a lot of research, it's one of our main focuses and these are some of our highlights that we're going to be researching in 2023. We are going to be looking at long COVID and we're partnering with the California Department of Public Health to take a look at the claims and see what we can tease out of the data. We're also partnering with John Hopkins on workplace violence and how that will impact workers compensation. And then the other one I would mention is the employee tenure and claims frequency study. That's a real interesting one especially as we start to come out of this kind of COVID recession. We're back to the point now where job losses have been recovered but when you have such a significant increase in jobs in such a short amount of time you do see an uptick in claims because we believe and we're going to study to see if it's true that employee tenure, an employee who's been in a job for a shorter amount of time is likely to have more injuries and be injured just because they don't know the job as well. So those are some of the things that we are going to be looking at. We're always happy to answer any questions. All of our research is publicly available on our website wcirb.com and please let us know if you would like to hear anything further on any of our research.

Sen. Hackett stated to Mr. Steiger that he was a commissioner about almost 20 years ago and I would ask the question how many providers in my county, which is next to Columbus, did workers comp? And people would guess and the answer was zero and when I talk to their people, and Ohio has improved their systems and it's a state run system and it's working really well, there were three main reasons and one was paperwork was intense and two was they couldn't get a decision made and three was just actually getting paid took a long time. We worked really hard on that and I think Ohio now has a really got a good system with good costs. But that's the thing, I always thought the private insurance companies would work a little quicker than that but it seems that's the problem you have is getting decisions made by the company. Is that it in a nutshell? Mr. Steiger replied yes, you took the words right out of my mouth in pointing out those as the main issues. One of the first things that I do before I give a presentation like this is I go to the division of workers compensation website and I look at the independent medical review (IMR) reports, the second level appeal system here and usually within the first one or within the first one two or three you will see one that to me just exemplifies exactly what's wrong with our workers comp system. The most recent one I looked at was someone who needed six physical therapy visits and it was denied as not medically necessary because he still had two left from his initial six and they said "well let's wait and see how these two go and see if you need more." We probably spent \$1,000 denying those claims and six physical therapy visits probably cost more than \$1,000 but now that worker's going to go have to go back through that again, deal with that whole process if those two don't work, and it probably won't, and there is just example after example after example. The one I brought up last time I did one of these presentations was someone who needed a heating pad that cost \$200 and it was denied and probably \$1,000 was spend denying that \$200 heating pad.

And we hear from doctors over and over again that they just don't have to deal with this in group health and they have enough of these experiences and they eventually just throw up their hands and they're like "you know what I've got enough patience I'm just not going to deal with the workers comp system anymore." And that creates all sorts of other problems throughout the system. But it's the hassle, it's the paperwork, it's the second guessing. Even when they're in the employer's medical provider network it still happens and it's a major problem that we really need to take a serious look at and we'll see how Ohio does it because we certainly got plenty of room for improvement and are looking for any great ideas that are out there. Sen. Hackett stated that Ohio realizes getting people back to work as quick as possible is still the best thing.

Sen. Mark Huizenga (MI) asked Ms. Marsh, you mentioned opioids and I'm just curious if you have noticed claims for opioids, since the injunctive relief with the federal courts, have started to interfere with state medical and pharmacy practice? Have you noticed that recipients are struggling to find acute opioid therapy? Ms. Marsh stated that we do not necessarily look at whether they're able to get the care. We're simply tracking what care is already provided so I wouldn't be able to directly respond to your question if there is a difficulty with access to opioid care. If you do look at the data though the amount of opioids just being prescribed in the system has dramatically decreased and you are seeing that replaced with anti-inflammatories and other types of treatment in its place and really that came about as part of the SB 863 reforms. We did put in a drug formulary and I think also at the same time just the general practice of moving away from the significant amount of opioids that were being prescribed.

Rep. Tim Barhorst (OH) asked if someone could tell him the process you use in California for getting your doctors and access and how they're reimbursed? In Ohio it's based off of a Medicare plus 14% rate. And then you talked about your formulary and your preferred drug list do you coordinate that through any other agencies or do you see any opportunity to benefit if you would or could do that? Ms. Marsh stated that we don't - we're not in charge of the formulary, that is the division of workers compensation. We're just collecting the data associated with it so I can't really speak to that portion of your question but yes, it is tied to Medicare in California. Mr. Steiger might know better than me on that but yes it is tied to that rate which is what keeps it relatively low and why we have seen that medical deflation.

DISCUSSION ON PROPOSED U.S. DEPARTMENT OF LABOR (DOL) WORKER CLASSIFICATION RULE

Sen. Hackett stated that next on our agenda is a presentation on the proposed U.S. Department of Labor worker classification rule which has some really important implications for us as policymakers and our constituents as it deals with whether a worker is an employee or an independent contractor. In your binders on page 67 is a news release from the U.S. Department of Labor that provides a little more background on the rule. It is also on the website and an app along with the text of the proposed rule.

Michael Lotito, Co-Chair of the Littler Workplace Policy Institute and Shareholder at Littler Mendelson P.C. thanked the Committee for the opportunity to speak and stated that the rule's origin really started during the Trump Administration where a rule was promulgated and I think most people would say it was favorable from the standpoint of management in being able to support their position that an individual was an independent contractor based on the different control and entrepreneurial aspects of the test. That rule was certainly opposed, for example, by organized labor and others as not being correct. When President Biden was elected and Secretary Walsh took over, there was an effort to withdraw the Trump Rule and while it's complicated and I'd be happy to put you all to sleep to explain it all, a lawsuit was filed by us saying that it was improper to withdraw the rule for different reasons under the Administrative Procedure Act and a federal district judge agreed with us and as a result said that the Trump rule was the appropriate rule which is still in effect despite the fact that this Department of Labor has tried to withdraw it. So this Department of Labor then issued proposed rules that would reverse the Trump Rule and provide a new rule that would make it much easier to find that a worker was an employee. The fact that they did that stayed the appeal of the decision from the district judge until the new rule was finalized. There were 54,400 filed to this proposed rule. Having read them all since I have no life I can assure you that our comments were absolutely the best. We are waiting for the final rule to be issued which we thought according to the regulatory agenda

would be the April time frame. Rumors are starting to emerge that that's going to be delayed based upon the complexity of Mr. Walsh leaving as Secretary of Labor and Ms. Su being the Acting Secretary having been nominated to become the secretary.

So, the bottom line is the Trump rule is in effect but there is a lot of uncertainty because we know that this Administration wants to reverse that rule but that's only part of the story because the National Labor Relations Board also has a rule and under the National Labor Relations Act (NLRA) if an individual is an independent contractor that person cannot be unionized because that individual is not an "employee." Organized labor obviously does not like that because it diminishes the total number of people that they may get as members so there has been protracted efforts before the board dealing with this same issue. There's a case called *Atlantic Opera* where the board asked for *amicus* briefs where tons were filed about a year ago and when we're still waiting for a decision that will set the issue up for the board to define in their view how an independent contractor should be determined for purposes of the NLRA. That decision could come down anytime now and it's a foregone conclusion that this board will issue a decision that's going to be very favorable to finding the individual to be an employee but that's only part of the story because then you have to get to the states. So Prop 22 was already mentioned today and as noted it has been highly contested and based upon technical constitutional issues and the process that we have in California with respect to initiatives. Oral argument was held some time ago for the intermediate court. They have 90 days to issue a decision. The 90th day is Monday. I was scared to death that they would issue a decision this morning so I'd have to read the decision in order to be able to tell you what it meant but that didn't happen. That would be an extraordinarily important decision and whatever the decision is, to either reform or reverse, that would be appealed to the California Supreme Court and sometime either later this year probably early next year the California Supreme Court will issue a decision.

But that's only part of the story, because Illinois is about to drop an AB5 piece of legislation. Colorado has legislation that doesn't deal with the ABC test but is going to force the transportation network companies (TNCs) and the delivery network companies (DNCs) to reveal a lot of information and there will be a challenge if that passes with respect to compulsory First Amendment speech. There's an issue in Massachusetts where they attempted to have a Prop 22 type of referendum that was contested as to whether or not the process was correct and the Massachusetts Judicial Court found that it was not so we're waiting for decisions on different cases that are filed in Massachusetts with the likelihood of another initiative process beginning in 2024, an election year. New York has a situation involving a compromise with the Black Car Fund. There's another one like that in the state of Washington between the state and Teamsters Local 117 where the individuals are still classified as independent contractors but through various mechanisms unions receive money usually as a result of those individuals that are paying the fare for you to the delivery of the TNC for the transportation. There are other states that are considering legislation along these lines. So what do we have? We have a bloody mess because nobody knows under the state rules which vary depending upon wage and hour versus workers comp and you don't know the rules with respect to the feds and you don't know the rule from the Department of Labor and you don't know the level of enforcement which will intensify if Ms. Su becomes Secretary of Labor and you don't know for sure what the board is going to do and whether that case can even be appealed.

Which gets us to I think my main point. Yesterday the Financial Times had an interesting insert called "why employment is a work in progress." COVID dismantled outdated practices but what replaces them remains contested. And that's true. And it's worth reading. We're in a workforce transformation right now like we have never seen in the U.S. including when we went from agricultural to industrial. We have approximately 5.9 million people looking for work and we have

approximately 10.9 million open jobs. We have an enormously serious problem with a skill gap. We have companies that are starting, for example, to build some of the factories that were authorized under the federal legislation and they can't find workers to do the work. I've spoken to the last three secretaries of labor about putting together a nationwide plan so that we can create a 21st century workforce because if you don't have a 21st century workforce then the 21st is not going to be the next American Century. Which is why I founded the Emma Coalition named after my granddaughter because I have no intentions of taking a long dirt nap with my last thought being that my granddaughters are living in China-century. So we tend to get very distracted by all of this weedy stuff as opposed to taking a look in my view of the broader picture and that is how do we recognize that people want to work independently? Because maybe working for the "boss" didn't work out so well because maybe the "boss" wasn't great. Maybe we need to find common ground with a compromise so we can have portable benefits that workers can utilize and make contributions to. Maybe we need to standardize some of these tests so that there's certainty for everybody involved and recognize the possibility of even preemption so that we do have national standards. But most of all we have to have a national plan and the person that comes up with the national plan that deals with the number of people that have been disenfranchised as laid out in the great book Deaths of Despair which was published a few years ago by two notable economists from Princeton. There are too many people that have felt left out. There are too many people that don't have the skills that are necessary and there are too many people that don't have hope. And that's a shame. So we can talk about independent contractors for as long as you want and a lot of people will like 54,400 that filed a comment on the rule but let's not lose sight of the broader issue. There's a lot at stake here for individuals, for the country, for the companies.

Sen. Hackett stated that I agree with you and Ohio is really at a crossroads right now. We have more jobs than we've ever had and they're going to grow tremendously but I say we can't blow this. And in the second issue is a lot of these companies that are coming and we've got a lot of companies from California that have come in the last year, one of the things that we really worry about is these companies say well if we can't find employees in Ohio we'll bring other employees. But then we have housing issues and it's hard to change that overnight. We have to find places for these people to live in a lot of areas of Ohio. So I agree with what you said that these next three years are not only key for this country, they are especially key for Ohio.

Mr. Lotito stated to Sen. Hackett that former Congressman Steve Stivers and I along with the CEOs of eight other state chambers will be meeting in a couple of weeks. They issued a report last year that we helped support that talked about what the states are doing in order to develop these plans and with those states we're forming a task force that Congressman Stivers is part of in order to address these issues in a holistic way.

Rep. Kelly Breen (MI) stated that one of the first things they teach you in law school is never ask a question you don't already know the answer to. Nevertheless, Rep. Breen asked Mr. Lotito if he could explain the difference between the Trump Rule and what is being proposed under the FLA and the IRS 20 factor test from a practical application so we can understand how this is going to be applied? Mr. Lotito stated that on the IRS 20 factor test it would be a lot easier if that was the test that everybody followed. Essentially it comes down to the way you determine control and the way you determine entrepreneurial opportunity. And the rules give you examples of how they will interpret those two standards and essentially if it's very easy to make out the fact that there's control by the company over the way the manner of work is being done and if there is a limited opportunity for that worker to not only make money from that company but from other companies doing the same or substantially similar work that will make the determination. The IRS test doesn't look at those factors in the same way. So I appreciate the fact that you've asked

a question that you didn't know the answer to but I spent a lot of time on this stuff and I don't think I know the answer either. Rep. Breen stated that makes her feel better. Mr. Lotito stated that I'd be more than happy to talk to you offline but in the interest of time it's so weedy and it's just a function of how do you want to interpret it? And I think that in all fairness we want to say that everybody's paying attention to the law but that's not true as people have a preordained vision as to whether or not the individual law is A or B and they're going to come to that conclusion. That's the way it works.

PRESENTATION ON EMERGING ISSUES IN WORKERS' COMPENSATION

Susan Donegon, Chief Regulatory Officer at NCCI, and former Vermont Insurance Commissioner thanked the Committee for the opportunity to speak and stated that 2023 is NCCI's 100th anniversary and for a century we have been a licensed rating advisory and statistical organization for all things workers comp. We work with 38 state insurance and labor and work comp commissions and departments as well as state legislatures. We provide research, education, thought leadership supported by the data that we collect from carriers. We also work with various federal counterparts, Congress, Congressional committees, federal agencies, national trade groups, the insurance trade groups as well as national organizations like NCOIL, NAIC, Southern Association of Workers' Compensation Administrators (SAWCA), International Association of Industrial Accident Boards and Commissioners (IAIABC). And we also cooperate with the other independent bureaus, California is obviously one of them and Ms. Marsh is a colleague. Our research and basically education supports what we understand about workplace trends and we deliver insights so that stakeholders like you are able to make informed decisions. Often folks only have contact with our local NCCI state relation folks so people are often surprised to know that we have over 900 employees including 100 actuaries and 200 data professionals located in our Boca Raton headquarters. We also have folks scattered around the country, more now since remote working is more prevalent. One of the things my regulatory division does is that we track all the work comp legislation that you folks introduce every year depending on how energetic you all are and we consider legislative sessions to start in January and they run through June for the most part although we recognize that many states have different time and duration of sessions and actually some states don't even meet every year.

So, it's not unusual for us to track about 1,000 workers' comp bills over the course of a year and obviously the vast majority of those bills don't pass but we watch to see what the topics and activities are for the most prominent ones and we look at the trends. And we're interested in what might be the most impactful topics to either a specific jurisdiction or to the work comp system as a whole and when I say that we're watching the whole landscape, what I'm saying is we're trying to see what an impact would be on the system. Financial consequences. Good or bad. Changes to the structure of work comp itself. Is the grand bargain still relevant? And what's the possibility of even the elimination of workers compensation? NCCI doesn't take a position on any legislation or regulatory matter. We do not lobby but we do provide data and information to help policymakers understand their nuances of their proposals that are pending in state houses. That usually involves some kind of a cost impact analysis if we're able to do it. And also we help policymakers understand consequences intended or otherwise. So let me point out a few of what I consider to be the hot topics at this point and some of this will be a little familiar to you as some issues have been tagged today but that's a California point of view and I'm going to bring it up about 40,000 feet because I do more than California and I want to give you a taste of what we're seeing nationally.

Single-payer health is one. Independent contractors, gig economy, marijuana legislation, hallucinogens and psychedelics are others. There can also be issues about PTSD, firefighter

and first responder presumptive benefit bills. So there are 10 states that have legislation right now about single-payer healthcare or some states call it universal healthcare. It's the counterpart to "Medicare for all" at the federal level and what's important about that for workers compensation is - is it going to be included or excluded from a particular possible single-payer program? Some legislatures have put in studies for cost benefit analysis of what's going on with the ability to pay for such a program. As a former commissioner in a state that attempted this a while ago in Vermont, we understand the question of how are you going to pay for it? It didn't pass then but we've got 10 states that are still trying to chew on that issue. Minnesota for example is saying that the medical expense portion is going to be included of workers comp but not the liability portion in what they're considering. In New Hampshire workers comp is not mentioned in their pending bill. Texas has committee conversations going on about what's going to relate to workers comp and group accident and health.

So one of the things I want to remind you through my comments is that when you hear of one state's approach to workers compensation, keep in mind it's one state's approach. The nuances and differences among the states can be dramatic depending on many factors. Socioeconomic, geopolitical, the types of clusters of states around, and the jobs around the state. And so when you hear about California many of the issues are the same but the details often vary. I'm not going to talk too much more about independent contractors and the gig economy because as just noted we're in a bloody mess so we'll sort of leave it at that and just let me remind you that it's an important issue in workers comp because job classification is at stake. And risk is identified in workers compensation in jobs which then drives premiums so that's a very important thing to remember is that a job classification properly done then identifies the risk so that the carrier and the employer and the employee are all in sync with the correct coverage and the premium. Now let's turn to the fun part. So marijuana legalization, and that's both recreational and medical, but let's leave the recreational aside. That's a little bit too much fun today. And I just want to warn everybody that I still understand that marijuana is a class A schedule 1 drug that still is illegal at the federal level. That has not changed under the Controlled Substances Act but our states, you all got us out ahead of the federal government. So we have 22 states where medical and recreational marijuana is legal, 15 where it's med only, 10 where CBD or non psychoactive are legal. And then we have three states where it's all forbidden. So what's the issue for workers compensation right now? The issue is whether or not on the medical side medical marijuana is covered by workers compensation insurance. Should there be reimbursement for the use of medical marijuana? And if you think that the independent contractor and gig economy situation is a hot mess, just take a look at the legislation for marijuana. We've got many different versions of this around the country now. Kentucky has a bill pending where they're saying medical marijuana is not required to be covered. Same with North Carolina. Massachusetts has a bill that says it does because in 2020 the state Supreme Court said in a case that neither the plain language of Massachusetts language or the regulatory environment required a carrier to reimburse for that expense.

Now you know why it's being debated in the legislature. And same with Maine. They're saying, no, not right now. But we've got a Connecticut review board that says wait a minute, perhaps a reasonable and necessary treatment would require that it be covered. So we've got situation at the federal level, situations at the state level, legislative issues, legal case issues. Somebody's got to start making some decisions here. So while we're on drugs let's stay on drugs. So hallucinogens and psychedelic legalization, that's a new one for us this year. We had not been following that very closely because it hadn't really been on the radar. So we now have 11 states that have legislation pending in some form about the legalization of psychoactives and it ranges everything from simple lawful possession and use of such things like LSD and mescaline. Natural medicine is what it's also called in Colorado. We also have simply legalization in states.

Then we have a middle ground where we're seeing states allowing there to be supervised usage for medicinal and therapeutic purposes, physical and mental. And then we're seeing some states saying, well wait a minute I think we're going to put in some pilot programs so that we can evaluate the use and the results of those types of programs. Utah's the only state I've seen where the word workers compensation has been put into a bill and it's not what you think. It mentions that workers compensation may be a coverage that carriers can issue to a psilocybin production company. So it's to cover the employees that are working in the production and that happens similarly in Utah in a bill about covering workers who are in marijuana production plants and so that's the only place I've seen the workers compensation word.

But what's interesting about psychoactives is that in many ways this is one of the first breakthroughs in some research for things like severe depression and PTSD. And I said there was overlap, so talking about PTSD what we've seen is we've seen research coming from veterans who have been in supervised use of LSD for things like PTSD and severe depression with some very good results. And I think that this is people are saying this may be a new way for us to think about those very serious conditions and to help people who are in need. So stay tuned for that. Turning to firefighter and first responder presumptive bills, there's a lot of activity going on around the country right now for that and we've had firefighter presumptions since 1970 in some shape or form in many states but now it's not only firefighters but first responders as you heard about in California and the expansion of the types of conditions covered. We're knowing more about medicine and about health and about the causes and so we're seeing that is becoming something that the states are really taking on quite aggressively. I'm going to point you to our website. We've got a great deal of information there. We have an interactive map of all legislation around the country. All you have to do is hit your state or your next door neighbor's state and you'll see what's pending. We also have a white paper on firefighter and first responder presumption that you can take down that goes into great detail about that topic too.

ADJOURNMENT

Hearing no further business, upon a motion made by Sen. Utke and seconded by Rep. Ryan Mackenzie (PA), the Committee adjourned at 12:30 p.m.