“Other States” Coverage on Workers’ Compensation Policies
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NAIC
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"OTHER STATES" COVERAGE ON WORKERS’ COMPENSATION POLICIES

Background

The Workers’ Compensation (D) Task Force of the National Association of Insurance Commissioners (NAIC) and the Administration Committee of the International Association of Industrial Accident Boards and Commissions (IAIABC) have investigated a problem with “Other States” coverage on workers’ compensation policies. This problem was initially identified by the Independent Insurance Agents of America (IIAA) through the IIAA Technical Affairs and State Government Affairs units. The NAIC task force provided forum for discussion of this issue during 1995 and at its September 1995 meeting the task force acknowledged that a serious problem does exist for employers that will require a legislative remedy. Since issues of coverage impact both insurance regulators and workers’ compensation administrators, the task force sought input and assistance from the IAIABC. This paper is a result of those discussions and jointly presents the findings of the NAIC task force and the IAIABC committee.

Other States Coverage

The standard workers’ compensation policy issued by insurers recognizes that there may be circumstances where an employee is traveling in a state other than the one where the employer’s place of business is located. It accommodates out-of-state travel or employees working temporarily in other states by providing what is known as “Other States” coverage. The contract language provides coverage for an employer’s traveling employees by extending coverage for an employer’s liability under the workers’ compensation law of another state, other than a state listed in the “Declarations” or “Information Page” of the policy. The “Other States” coverage is designed to address situations arising in other states that were unanticipated when the policy was written. If an employer regularly has employees working in a state, the employer must notify the insurer so that appropriate coverage may be provided.

While the voluntary insurance marketplace recognizes and provides a mechanism to address employers incidental exposures due to employees working temporarily in other states, insurers with a license in only one or just a few states, state funds, single state statutorily authorized mutual companies and certain residual market mechanisms are not able to provide the same level of protection. Employers in most states, when insured with entities that are not able to provide workers’ compensation coverage in all states, face an unknown, uncovered, and in many cases an uncoverable exposure to loss under the workers’ compensation laws. In addition, agents face an errors and omissions exposure for failure to secure adequate coverage to protect employers against loss or to warn employers when coverage is not provided.

The Shortcomings of Other States Coverage

The following example will illustrate the coverage problems that may occur when an employer is insured with an entity that is unable to provide workers’ compensation coverage in all states. An Mississippi employer, who only has workplaces in Mississippi, and only does work in Mississippi, permits an
employee to travel to a convention in Louisiana. The employer purchases workers’ compensation coverage through the assigned risk plan in Mississippi (a NCCI administered state) and the “Other States-Item 3C”, in accordance with Mississippi rules excludes coverage for the workers compensation act in Louisiana.

The employee, in the course and scope of his or her employment, is seriously injured in an automobile accident while at the convention. The injury is reported to the employer who promptly reports it to the workers’ compensation insurer. The workers’ compensation insurer accepts coverage and begins to pay Mississippi benefits in accordance with Mississippi law. The employee or employee’s family hires a lawyer who advises that the benefits in the state in which the injury occurred are higher than Mississippi benefits. Further, under Mississippi law the employee is entitled to seek the benefits in either the state in which the injury occurred or Mississippi. Obviously, since the benefits of the state of injury are higher, the employee seeks those benefits.

When the workers’ compensation insurer discovers that Louisiana benefits have been selected by the employee, it advises that its policy excludes coverage in Louisiana, the state of injury, and ceases paying benefits, thereby denying coverage to the employer. The employer is now faced with paying those benefits as no insurance coverage applies. Further, because the employer is uninsured for workers’ compensation in Louisiana, the state of injury, the employer is faced with a tort action as well. The employer will not be extended the protection from tort actions extended by the exclusive remedy provisions of the Louisiana workers’ compensation laws. The employer can not even look to its employer’s liability coverage because employer’s liability coverage does not extend to jurisdictions not listed in the Declarations or Information Page.

The employer will likely ask its agent why appropriate coverage was not provided for the exposures when employees are temporarily working in another state. It is also likely that neither the employer nor the agent knew about the uncovered exposure before the accident. Why did the agent not willingly provide necessary coverage? The agent was unable to provide coverage as the residual markets in states like Louisiana require a workplace in that state in order to provide coverage.

This example demonstrates clearly the unknown, uncovered, and unconverable exposures that exist not only in Louisiana and Mississippi, but in other areas of the country as well. A similar scenario could be developed for a state fund or a single state mutual insurer. As a result, employers are unnecessarily placed at risk of having an unfunded liability. Employees are unnecessarily placed at risk of experiencing delays in receiving benefits or having to sue the employer for damages.

Workers’ compensation laws differ in each state. The workers compensation crisis of the last ten years has led to many statutory and market changes, particularly in the residual market. While NCCI used to administer the residual markets in most non-state fund states, today many states have changed the residual markets mechanism, either through the creation of state funds or similar mechanisms or by utilizing other methods of administration, thus limiting the scope and effectiveness of NCCI’s ability to effect a countrywide solution. While “Other States” coverage once was provided routinely for all states except the exclusive state fund states, today “Other States” coverage is either very limited or non-existent. This is particularly true for residual market mechanisms, state funds and other single state workers’ compensation providers. As a result, employers and employees are at risk.
What Can be Done to Address “Other States” Coverage Problems?

The workers compensation laws in the various states have not, for the most part, changed to recognize the limitation or removal of coverage that was previously routinely provided to employers. Workers’ Compensation laws need to be amended in order to protect employers from this unknown, uncovered, and uncoverable exposure, while continuing to provide appropriate benefits to injured employees. Only a legislative solution can address these coverage concerns.

The problem for single state insurers, residual market mechanisms and state funds lies in the inability to control which state’s benefits will be granted to an injured employee. The choice of which benefits will apply lies with the employee. Simple legislation could be developed to address this problem. If legislation were developed to require that an employee, who is injured in the course and scope of his employment, and who lives in, is hired, and paid in the state of the domicile of his employer is entitled only to benefits and protections of the state’s workers compensation law, regardless of the location of his injury, the problem would be solved. Employers are entitled to know what benefits are payable to injured employees, and to tort immunity when the employer is in compliance with applicable statutes. Employees are entitled to know that they will receive appropriate and adequate benefits in a timely fashion in a non-adversarial setting. Legislation can be developed to meet the needs of both employers and employees.

Findings and Recommendations of the NAIC Task Force and the IAIABC Committee

The NAIC Workers Compensation (D) Task Force and the IAIABC Administration Committee have analyzed and discussed the “Other States” Coverage issue and acknowledge that a serious problem exists for employers and employees. The task force and the committee believe that a legislative remedy is necessary because:

1. The Workers Compensation laws in the various states permit this condition to exist.

2. The problem is employee driven, in that Worker’s Compensation laws permit employees to make a choice without regard to existence or availability of coverage.

3. The employer, who has made a good faith effort to cover its statutory obligations under the Workers Compensation laws and has in fact paid the appropriate premium based on the payroll of the employee, has no coverage and has no way to obtain it.

The task force and the committee believe that employers who have workplaces in other states should purchase coverage in each state in which they operate through the appropriate mechanism in that state. The issue being addressed, and for which a legislative remedy is being proposed, involves temporary and incidental activities of employees in states other than the normal state of hire.

The task force and the committee believe that this legislative solution should include the following elements:

1. The legislation should specify that injured employees will receive the benefits of the state of regular employment, regardless of where the injury occurs. In effect, this will remove employee choices over which state’s benefits will apply.
2. The legislation should provide that employees from other states, temporarily or incidentally working in that state, are not subject to the laws of the state in which they are temporarily or incidentally working. In effect, this will establish the benefits for which the employer is responsible regardless of the location of the injury.

3. The legislation should specifically provide that if an employer has valid workers compensation coverage in the state of domicile, which provides domiciliary state benefits to an employee injured in the course and scope of his employment while temporarily or incidentally located in another state, and has complied with the coverage requirements of the law of the state of domicile, that the employer will maintain the exclusive remedy provisions afforded by the workers’ compensation law.

4. The legislation should specify that this limitation is available only to employers domiciled in states which have passed similar legislation.

While a few states have begun the process of passing such legislation, it is necessary that all states have similar provisions in order to assure employers have the coverage they believe they already have. One such state is Maine. Legislation passed in the State of Maine in 1995 (H.P. 12 - L.D. 6) addresses the problems outlined in this report. It is attached for the convenience of the reader. It amends Maine’s workers’ compensation laws to provide an exemption from coverage requirements for nonresident employees. The task force and the committee believe that the Maine law amendment or similar legislation, if adopted by other surrounding states, will address concerns over the availability of “Other States” coverage. As such, the task force and the committee believe that it would be inadvisable for them to develop a model law as neither the NAIC nor the IAIABC have a model workers’ compensation act to amend. The task force and the committee recommend that states consider adopting the Maine law or similar legislation to address the very real concerns of employers, employees, insurers and agents.
STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY-FIVE

H.P. 12 - L.D. 6

An Act to Amend the Workers’ Compensation Laws to Provide
an Exemption from Coverage Requirements for Nonresident
Employees

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 39-A MRSA § 113 is enacted to read:

§ 113. Exemption for nonresident employees: reciprocity

1. Exemption. An employee who is employed in another state and that employee’s employer are exempt from this Act with respect to that employee while the employee is temporarily in this State doing work for that employer if:

   A. The employee is not a resident of this State and was not hired in this State;

   B. The employer does not have a permanent place of business in the State;

   C. The employee’s presence in this State for purposes of conducting employment activities does not exceed any of the following periods:

      (1) Five consecutive days;

      (2) Ten days in any 30-day period; or

      (3) Thirty days in any 360-day period;

   D. The employer and employee are covered by the provisions of the workers’ compensation laws or similar laws of the other state and that law applies to them while they are working in this State;

   E. The employer has furnished workers’ compensation insurance coverage under the workers’ compensation laws or similar laws of the other state so as to cover the employee’s employment while in this State;
F. The extraterritorial provisions of this Act covering employees in this State temporarily working in the other state are recognized in the other state; and

G. Employers and employees covered in this State are exempt from the application of the workers’ compensation laws or similar laws of the other state under legislation comparable to this section.

2. Other state’s laws prevail. If the exemption provided in subsection 1 applies, the workers’ compensation laws or similar laws of the other state are the exclusive remedy against the employer in that state for any injury, whether resulting in death or not, received by an employee while working for that employer in this State.

3. Certificate of compliance. A certificate from a duly authorized official of the workers’ compensation board or similar department or agency of the other state certifying that an employer is insured in that other state and has provided extraterritorial coverage insuring the employer’s employees while working within this State, is prima facie evidence that the employer carries such compensation insurance.

4. Reciprocal agreements. The board may enter into reciprocal agreements with workers’ compensation agencies of other states adopting legislation similar to this section to ensure efficient administration of the Act.