

Task Force on Civil Justice
Spring Task Force Summit
Pittsburgh, PA
May 6, 2016

Task Force on Civil Justice Tentative Meeting Agenda

2016 Spring Task Force Summit | Pittsburgh, PA
Friday, May 6, 2016
12:30 - 5:00 PM

- 12:30 PM** Civil Justice Task Force Luncheon
- 1:30 PM** Break
- 2:00 PM** Civil Justice Task Force Meeting Call to Order
Welcome and Introductions
Approval of Minutes from States and Nation Policy Summit
- 2:10 PM** ALEC and Civil Justice Task Force Update
- 2:20 PM** State Legal Reform Activity Update
- 2:30 PM** Law Professor Presentation Series: The Battle of the Forums: Lawsuit Jurisdiction between Federal and State Courts and How Some Attorneys Try to Override the Rules
- 2:50 PM** **Model Policy Consideration:** ALEC Statement of Principles on Workers' Compensation
- 3:10 PM** Asbestos Litigation Reform in the States: How States are Fighting Fraud and Considerations for Future Reform
- 3:40 PM** Innovator Liability: The San Andreas Fault Line for Novel Tort Theory
- 3:55 PM** Responsible Alternatives to State Workers' Compensation
- 4:10PM** Considering Possible Future Model Policy: Civil Remedies against Terrorism
- 4:25 PM** **Model Policy Consideration:** The Actual Harms Act
- 4:45 PM** For the Good of the Order
- 5:00 PM** Adjournment

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<http://www.alec.org/task-forces/civil-justice/>

Workers' Compensation Subcommittee Tentative Meeting Agenda

2016 Spring Task Force Summit | Pittsburgh, PA
Friday, May 6, 2016
9:30 - 10:30 AM

9:30 AM **Welcome and Introductions**

9:40 AM **Discussion and Vote: Draft ALEC Statement of Principles on State Workers' Compensation Reform**

In addition to going over the reworked Statement, we will consider submitted amendments and, if so moved, take a vote on the finalized Statement to send it to the Civil Justice and Commerce, Insurance and Economic Development Task Forces for consideration.

10:30 AM **Adjourn**

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Actual Harms Act

Section 1 [Title]

The Actual Harms Act

Section 2 [Purpose]

The purpose of this Act is to assure that the [state] civil justice system is reserved for individuals who have experienced real injuries and actual losses.

Section 3 [Findings]

Allowing civil claims for damages when an individual has not shown an actual economic loss as a result of a physical harm, emotional harm with an objective symptom, or damage to property dissipates resources that should be preserved for persons suffering actual harm, results in highly speculative litigation, and leads to an unnecessary expenditure of judicial time and resources.

Section 4 [Actual Injury Required for Damages]

(a) To state a viable civil claim for damages, a plaintiff must assert that a defendant's wrongful acts caused the plaintiff:

- (1) physical harm, emotional harm, or damage to property; and
- (2) economic loss.

(b) A court shall dismiss a claim that fails to assert facts meeting this requirement or where plaintiff cannot provide evidence of such facts after a reasonable opportunity for discovery.

(c) No court shall certify a class action that includes an uninjured member.

Section 5 [Definitions]

As used in this Act, the term:

(a) "Economic loss" means an actual monetary loss.

(b) "Emotional harm" means severe emotional distress manifested by objective symptomology.

(c) "Physical harm" means a present, existing and diagnosable physical disease, illness, or injury manifested by objective symptomology.

(d) "Uninjured member" means an individual who has not alleged a loss of money or property as a result of the defendant's conduct that is likely to be redressed by a favorable decision.

Section 6 [Exceptions]

(a) This Act shall not apply to the following intentional torts: assault, battery, false imprisonment, or trespass to real property.

(b) This Act shall not alter principles of contract law.

Section 7 [Rule of Construction]

This Act provides minimum requirements for a civil claim for damages where not otherwise specified by statute. The Act shall not be construed to reduce or eliminate any requirement for a civil claim recognized by statute or common law. This Act does not create a cause of action.

Section 8 [Effective Date]

This Act shall apply to all civil claims pending on the effective date and thereafter regardless of when the claim arose.

ALEC DRAFT Statement of Principles on State Workers' Compensation Reform

Preamble

Government policy should encourage fair and sustainable workers' compensation laws that provide quality medical care and benefits to injured workers, and focus on workplace safety and successful return-to-work programs.

In many states, injured workers are receiving inconsistent treatment that is not in-line with solid evidence-based medical guidelines and are, at times, becoming trapped in a system that discourages workers from returning to work in an expeditious manner. Innovative reform of workers' compensation laws is necessary to restore a system intended to protect workers and return them to the workforce in a fair and timely manner.

Effective solutions must be directed at delivering quality recovery to injured workers, enabling workers to return to work quickly, and inherently controlling key cost drivers. To ensure speedy and meaningful return to work, employees unable to perform preinjury jobs need access to temporary alternate work with the same employer, reemployment assistance when viable work options don't exist with their employer, and vocational rehabilitation only when substantiated and reasonable necessity can be shown.

Because of the variance of state workers' compensation laws, there is no one-size-fits-all solution; thus, ALEC has opted to develop this Statement of Principles to identify major areas of concern and offer guidelines for reform. Many of the primary needs for reform can be categorized into four areas: Appropriate Medical Care, Agency Red Tape, Unnecessary Litigation, and Court Interpretations of the Law.

Section 1. Appropriate Medical Care.

The Problem: Under workers' compensation systems, employers cover 100% of an employee's medical and pharmaceutical costs. Employer coverage is key to ensuring the worker gets appropriate medical care and can return to work as quickly as advisable. But for the system to function well in a state economy, the injured must get the right care at appropriate market rates rather than inflated rates. For many years, workers' compensation medical costs have increased at a greater rate than generic medical costs without increasing benefits to the injured worker. Medical care reform should minimize the cost of transferring maximum benefits to the injured worker. Excessive medical procedures, legal actions and regulatory burdens increase transaction costs for the employer without also increasing benefits to the injured.

Recommended Solutions: Solutions to such problems must be state specific and begin with identifying the areas of greatest concern. Important issues to explore include:

- **Evidence-based Medicine Guidelines.** These established, nationally-recognized guidelines rely on a critical appraisal of available scientific evidence for diagnosis, treatment, causation, and other aspects of healthcare decision making. When combined with appropriate tools governing precertification and

utilization review, and incorporated into a system that is deferential to treatment within the guidelines, the use of nationally-recognized evidence-based medicine can deliver the most appropriate medical treatment while avoiding wasteful and unnecessarily costly treatment. Evidence-based medicine guidelines also contribute to the speedy resolution of medical disputes thereby minimizing litigation.

- **Elimination or strict regulation of physician-dispensed prescriptions.** Studies have not been able to show that physician dispensing of medications offers any real benefit to the patient. Rather, physician-dispensed or -compounded medications cost more money and may be associated with longer work absences than pharmacist-dispensed medications.
- **Drug Formularies.** Nationally-recognized formularies list appropriate prescription drugs chosen based on evaluations of efficacy, safety, and cost effectiveness and are used by medical practitioners to identify those drugs that offer the greatest overall value and are approved for prescription. Formularies help the physician avoid prescription medications, particularly certain opiates, for patients at high risk of developing drug dependence. **Medical Fee Schedules.** A medical fee schedule is a listing of fees, typically the maximum amount of allowable charges, payable to reimburse for various medical services. A number of states now use some form of medical fee schedule as a benchmark control for the pricing of medical services covered by their workers' compensation programs. When fee schedules are reasonable and used in conjunction with treatment guidelines, they can be an effective means of controlling escalating medical costs.
- **Minimizing Doctor Shopping.** Rather than returning to work when recommended by their original treating physician, workers may be encouraged by their attorney to get a second, third and fourth opinion until that opinion recommends additional medical treatments and time away from work. Doctor Shopping, as allowed by many state regulators and eagerly pursued by claimant attorneys, thwarts the original intent of workers' compensation laws and invariably results in additional litigation and increased cost.

Section 2. Agency Red Tape.

The Problem: Where a state's workers' compensation agency has excessive rules and regulations, it can be a significant cost driver in the system. When the state agency unnecessarily interjects itself between the employer and the employee, delays ensue, medical care suffers, satisfaction dwindles, and costs increase.

Recommended Solutions: Solutions to problems of regulatory inefficiency are, of necessity, state specific. Generally, however, statutory reforms that bring agency rule-making in line with legislative intent can result in a much improved and more cost-effective workers' compensation system. Problem points to consider include:

- Regulations that increase medical costs unnecessarily
- Regulations that delay return to work

- Regulations with inefficient paperwork requirements that impose excessive time constraints and fines
- Regulations that may create the problems mentioned in the medical care and litigation sections.
- Outdated paper-only record systems. Legislators should consider shifting to electronic records and communications compatible with existing electronic frameworks.

Section 3. Unnecessary Litigation.

The Problem: All Workers' Compensation laws provide no-fault coverage to employees whose injuries arise out of and in the course of their employment. Despite there being no need in a no-fault system to litigate over fault, the systems are often still plagued by needless litigation resulting in millions of dollars in increased costs.

Recommended Solutions: Solutions will focus on more efficiently delivering care without excessive litigation. While each state workers' compensation law is different, solutions to this problem must begin with identifying the specific areas within a state's law that foster excessive litigation. Consider:

- **Liberal Construction Provisions:** Many state statutes provide that workers' compensation laws must be liberally construed in favor of the employee. As enacted, the provisions were intended to protect the employee by liberally construing the laws in their favor. However, these provisions are often used to justify liberal constructions of the facts in a case, allowing cases with little proof of injury to recover and encouraging abuse. Needless litigation can be substantially reduced by simply eliminating that statutory provision, and in its place, provide for strict construction of the law and a preponderance of the evidence test for burden of proof.
- Court decisions or statutory provisions that expand the opportunity for litigation in a no-fault system that should provide appropriate medical care for injured workers with minimal transfer costs

Section 4. Court Interpretations of the Law.

The Problem: In many states, a commonsense reading of the workers' compensation law would not suggest the need for statutory reform. However, activist judiciaries in some states have taken great liberties in interpreting workers' compensation laws and many statutes now greatly broaden their original intent.

Recommended Solutions: States wishing to reform their laws will have to evaluate relevant judicial decisions and identify the areas where courts have broadened the scope of workers' compensation laws thereby inflating costs. Solutions may:

- **Reform liberal construction provisions.** As mentioned above, liberal construction provisions are often used to liberally construe the facts rather than the law. Where this method is employed, pay great attention to any subsequent expansions of the law as they may lack merit.

- **Reaffirm statutes of limitations.** Where courts allow actions after the statute of limitations has expired, it's important to consider the implications of the decision and offer statutory reversals.
- **Uphold Subrogation limitations.** Decisions greatly limiting or even denying employers or their insurance carrier their statutory right to subrogate against a third party responsible for causing injury to their employee result in greatly increased cost to employers and double recovery by the worker.
- **Strengthen the Exclusive Remedy.** As workers' compensation systems are no-fault, they are also generally the exclusive remedy for those injured in the workplace. However, the exclusive remedy tenet is continually threatened by excessive litigation.
- **Reaffirm Meaningful Causation Standards.** Several states have enacted a commonsense requirement that any physical impairment or disability must have arisen out of and in the course of employment.