

# Workers' Compensation Legislative & Regulatory Update

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The Florida Legislature has convened the 2006 legislative session with both the Senate Banking and Insurance Committee and the House Insurance Committee prepared to debate a number of workers' compensation bills. Although the general mood of lawmakers is to basically leave the 2003 workers' comp reforms intact, there are several bills that lawmakers feel must be addressed this session. No workers' compensation issue has more priority than finding a way to resolve the funding woes of the Florida Workers' Compensation Joint Underwriting Association. The FWCJUA has been operating under a deficit since lawmakers changed the association's coverage structure in 2003. The Senate Banking and Insurance Committee has already drafted a proposed committee bill that marks the latest legislative effort to stabilize the residual market and avoid the possibility of policyholder assessments to pay off deficits.

Another major issue that lawmakers have begun debating is augmenting the workers' compensation law so that first responders would be granted certain

rights not available to other classes of employees. Among other things, the bill would lower the standard of proof for claimants to collect benefits due to occupational diseases, and exposures to toxic substances. The bill also would allow judges of compensation claims to disregard the statutory attorney fee schedule if the judge finds the fee schedule doesn't accurately reflect the time and expertise necessary to pursue benefits on behalf of a first responder claimant. This revised attorney fee provision only applies to cases involving exposures to toxic substances. The bill has widespread support in both the Senate and House.

Lawmakers are also advocating a proposal that would change the state's ratemaking process by moving from an administrative pricing system to a loss cost ratemaking methodology. Sen. Skip Campbell (D-Tamarac) has circulated a bill calling for the change, but this year's version of the bill is much boarder than previous versions. Specifically, the bill targets the role of the National Council on Compensation Insurance (NCCI) as the state's rating organization. Currently, NCCI gathers the loss data from all carriers providing workers' compensation insurance in the state

and submits an annual filing to regulators. Under Campbell's bill, NCCI's role as the rating organization would come to an end and each insurer would be mandated to make an annual rate filing.

A Senate bill contemplates allowing employers to opt out of the workers' compensation system in exchange for purchasing an alternative insurance program. The plan is similar to 24-hour coverage in that it would cover medical treatments due to work-related and non-work related accidents. However, the coverage would not mirror a group health plan since it doesn't cover medical conditions that are not directly attributable to an accident. Currently, no insurer markets such a policy in the state. Another bill up for consideration by lawmakers is one that would allow two or more not-for-profit corporations to form a self-insurance fund for purposes of securing workers' comp coverage, surety insurance, and other property and casualty coverage.

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## FWCJUA

The Senate Banking and Insurance Committee is set to consider a proposed committee bill (SB 2118), which is designed to resolve the FWCJUA's fund-

ing problems. Rep. Ann Gannon (D-Delray Beach) is sponsoring a similar bill (HB 1267), which is currently in the House Insurance Committee.

As a result of the insurance availability crisis leading up to the 2003 reforms, lawmakers revamped the FWCJUA's coverage options to make it more feasible for small and new employers to purchase workers' compensation insurance coverage. Lawmakers' created four subplans, including subplan D coverage, which was available to any employer that has an experience mod factor of 1.1 or less and employed 15 or fewer workers. Additionally, non-profit organizations that received at least 50 percent of their income from state contracts or endowments were eligible for coverage. To make the subplan affordable, lawmakers set rates at 125 percent above manual rates for small employers and 110 percent for non-profits. As a result of the artificially low rates, the subplan quickly amassed a deficit of \$9.9 million as of Dec. 2003. Under the law, only subplan D policyholders could be assessed to pay off the deficit, a provision deemed unfeasible since the subplan only had 2,500 policyholders.

In 2004, lawmakers once again tackled the FWCJUA's problems by establishing a new coverage structure. The subplans were replaced by a three-tier plan that was designed to be more in line with an individual employer's loss experience. Tier one coverage is available to employers that have an experience modification factor of less than 1.0 and suffered no lost-time claims prior to being rated. Tier two coverage is available to employers that have an experience modification factor of 1.0 not to exceed 1.1. The majority of subplan D policyholders qualified for

tier two coverage. Tiers one and two's rates were capped at 25 percent and 50 percent above manual rates, until the tiers developed sufficient loss history to set actuarially sound rates. Lawmakers stated the FWCJUA had to establish the actuarially sound rates no later than Jan. 1, 2007. Tier three coverage is available to employers that don't qualify for tier one or tier two coverage so this tier's rates had to be actuarially sound.

Given that subplan D had a substantial deficit and that tiers one and two rates were not scheduled to be adequate until 2007, the legislature created several methods to finance the developed deficits. For subplan D, lawmakers approved a \$15 million contingency fund in the Workers' Compensation Administrative Trust Fund. The FWCJUA could request money from the fund to cover any projected deficits on a three-month basis. As for tiers one and two, the FWCJUA could request that regulators levy a below-the-line assessment on all policyholders in the voluntary market to fund any deficits. At issue, however, is that the FWCJUA's ability to access monies from the reserve fund ends on Jan. 1, 2007 and its ability to levy assessments expires on July 1, 2007. The law prohibited the use of any surplus in a subplan or tier to help retire the deficit in another subplan or tier. Experts calculated that due to the FWCJUA's financial status, the association will need the ability to raise funds past the 2007 dates.

SB 2118 proposes several options to resolve the FWCJUA's funding requirements. They are as follows:

- Require the use of the \$30 million projected surplus in subplan C to retire the deficits in subplan D and tiers one or two. The \$30 million surplus would be used before access-

ing any money from the contingency fund or levying an assessment. The \$30 million surplus is projected to cover the currently projected \$22 million deficit in all of the other coverage categories.

- The deadline for accessing the contingency reserve fund would be extended from Jan. 1, 2007 to Jan. 1, 2011. The FWCJUA's assessment authority would be extended from July 1, 2007 to July 1, 2011.
- Require the FWCJUA to obtain prior approval of rates (file and use) before they may be implemented as of Jan. 1, 2007. The rate setting change brings the FWCJUA inline with the voluntary market.
- Require the FWCJUA to seek a ruling from the IRS in an effort to be declared a federal tax-exempt entity. In order to qualify for the tax-exempt status, the Department of Financial Services would appoint the association's nine board members.
- The bill grants the Office of Insurance Regulation greater control over the FWCJUA's plan of operation. The bill also spells out a code of ethics for FWCJUA officers; employees; and board members; the bill also states the procedures for bidding for contracts.

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## First Responders

The Senate Banking and Insurance Committee has approved SB 349, sponsored by Sen. J.D. Alexander (R-Lake Wales), which would grant first responders certain rights not available to other workers. Rep. Sandy Adams (R-Oviedo), has filed a companion bill in the House (HB 141), which currently has 50 co-sponsors.

The first responder bill has been debated over the past several years. The bill defines first responders as law enforcement officers, firefighters, and emergency medical technicians. The bill's main provision would declare compensable any adverse reaction to a smallpox inoculation. The Department of Health states that around 4,000 individuals have received the inoculations with only 14 individuals suffering an adverse reaction. The bill also would revert to pre-2003 law concerning the standard of proof necessary to establish a compensable occupational disease, repetitive exposure, and exposure to toxic substance claims. The standard of proof would be lowered from a clear-and-convincing evidence standard to a preponderance-of-evidence standard.

Other provisions would allow claimant attorneys to receive additional hourly fees in cases involving toxic exposure claims. Among other things, Section 440.34 would be modified so that in cases involving exposures to toxic substances and occupational diseases, a JCC could exceed the statutory contingency fee when considering such factors as:

- The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services.
- The fee customarily charged in the locality for similar legal services.
- The amount involved in the controversy and the benefits payable to the claimant.
- The time limitations imposed by the claimant or the circumstances.
- The experience, reputation, and ability of the attorney or attorneys performing services.

- The contingency or certainty of a fee.

NCCI estimated that based on various versions of the bill, the legislation could increase first responder rates by 6.2 percent to 6.7 percent, which amounts to approximately \$14 million. That increased cost amount, however, does not include individual self-insured entities, which include many of the state's largest municipalities and counties, and costs incurred by self-insured municipalities, which cover the majority of the state's first responders. The Florida League of Cities and the Florida Association of Counties are heavily lobbying against the bill on the basis it would create a separate workers' comp system aimed solely at them.

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## Alternative Coverage

Sen. Michael Bennett (R-Bradenton) has filed a bill (SB 1101), which would allow certain employers to forego workers' compensation coverage by purchasing an alternative insurance program. Similar to 24-hour coverage, the alternative coverage would cover medical treatments due to work-related and non-work related accidents. The coverage, however, would not cover other medical conditions that are not directly attributed to an accident. As drafted, the bill contains several unclear provisions including changes to the coverage requirements and exemptions available to both non-construction and construction employees. Under the bill, only non-construction employers with fewer than 4 employees may elect to be exempt for purposes of the workers' compensation law. All other corporate officers, sole proprietors, or partners would be considered employees under

the law and therefore would have to purchase workers' comp coverage or the alternative coverage. Currently, no insurers offer the alternative coverage envisioned under the bill. There is no companion bill filed in the House.

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## Loss Cost Rating

Sen. Skip Campbell (D-Tamarac) is once again advocating for the state to change its ratemaking method by implementing a loss cost rating methodology. Lawmakers have debated the possibility of moving to a loss cost rating system for several years. Florida is only one of eight states that calculates its rates using an administrative pricing method, which incorporates all the cost associated with providing coverage to employers. This year's version of the bill (SB 2108) repeals Chapter 627.091(4), which states that an insurer can use a licensed rating company to submit their filing. By removing that section of the law, all carriers would be mandated to submit their own filing, although it is unclear whether NCCI could continue collecting aggregate carrier data.

According to NCCI, Campbell's bill could do more than simply change the rating system. It could also put into question the use of NCCI's standardize manuals, employer classifications, and rating plans. The bill could also represent a major cost to insurers and regulators due to the administrative burden of developing individual rate filings and the time period needed for regulators to approve the over 300 insurers currently writing policies in the state. Rep. Susan Bucker (D-Lantana) has filed a companion bill (HB 1523) in the House.