

Workers' Compensation Legislative & Regulatory Update

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Volume 7, Issue 4
May 10, 2006

The Florida Legislature adjourned after making few changes in the area of workers' compensation, which reflected legislators' outlook that the 2003 reforms are having their intended impact on the system by reducing costs and rates. Since the reforms were enacted in October 2003, employers' overall rates have dropped by roughly 30 percent. Legislators did address their top workers' compensation priority by implementing a series of changes in the Florida Workers' Compensation Joint Underwriting Association. Among other things, the provision allows the association to use the surplus from one subplan to cover deficits in other coverage plans. The FWCJUA changes are statutorily limited since the language was placed in the state's budget plan, which is only in effect between July 1, 2006 and June 30, 2007. As a result, the changes will expire forcing the legislature to readdress the issue next year.

Legislators also enacted a number of minor provisions included one addressing employers who violate a stop-work-order issued by the Division of Workers' Compensation. Currently, there are two conflicting penalties under the law per-

taining to employers who knowingly violate a stop-work-order. An administrative compliance penalty makes the violation a first-degree misdemeanor under Section 440.107, Florida Statutes. However, the Division of Insurance Fraud has the ability to charge the employer with a third-degree felony under Section 440.105, Florida Statutes. The DWC indicates that in cases where it finds an employer has violated the statute, it refers the case to the DIF within 24 hours. Based on the input of the two divisions, legislators in HB 561 passed a provision striking the reference to the misdemeanor charge. As a result, employers caught violating a stop-work-order would be subject to criminal charges of committing a third-degree felony.

Additionally, in the same bill, legislators clarified that it is unlawful for employers to not secure workers' compensation coverage. Currently, Section 440.105(4)(a), Florida Statutes, states that it is unlawful for an employer to knowingly "fail to secure payment of workers' compensation if required to do so by this chapter." The bill strikes the word "payment of compensation" to "workers compensation coverage," which clarifies the fact that the employer must have workers' comp coverage if so required by law.

And finally, legislators in a social service bill (SB 394), amended Section 440.02 to delete a provision that provided for the expiration of an exemption from the workers' comp law for certain clients enrolled in the Medicaid program that provides adult training services.

In other legislative news, legislators blocked a final vote on a bill that would have granted first responders certain rights under the workers' comp law, which would not be available to other workers. Legislators failed to bring the bill up for a final vote despite a large measure of support. Legislators also adjourned without acting on a host of other workers' comp bills, including one that would have allowed non-profit organizations to establish a self-insurance fund. Legislators also rejected a bill that would have moved the state to a loss cost rating system.

FWCJUA

House and Senate legislators spent much of the session trying to come to some agreement on how to address the FWCJUA's status. In 2003, legislators revamped the FWCJUA's coverage options to make it more feasible for small and non-profit employers to purchase

coverage. Four coverage subplans were created including subplan D coverage, which was available to small employers and non-profit organizations. 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 December 2003. Under the law, only subplan D policyholders could be assessed to pay off the deficit, a provision not deemed feasible since the subplan only had 2,500 policyholders.

In 2004, lawmakers sought to tackle subplan D's deficit and establish a new FWCJUA coverage scheme. The subplans were replaced by a three-tier plan that was designed to be more in line with an individual employer's loss ratio. 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 these 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 the FWCJUA's ability to access monies from the reserve fund will end on January 1, 2007 and its ability to levy assessments expires on July 1, 2007. The law prohibits 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 would need the ability to raise funds past the 2007 dates.

2006 Legislative Session

Both the House and Senate developed FWCJUA bills designed to address the funding issues. Among other things, the bills addressed such issues as the association's rate setting methodology and would have required FWCJUA board members and employees to meet state standards (Section 112, Florida Statutes) for disclosing a variety of financial information. The bills also contained provisions regulating the use and payment of outside counsel and vendors.

Of the House and Senate bills, only the Senate voted to pass the bill. On the House side, legislators never took up the issue. Instead, legislators addressed the FWCJUA in the state's budget (HB 5003), where it was tailored more toward gaining federal tax-exempt status for the association. Since the language was contained in the budget, it effectively could not be amended, and Gov. Jeb Bush doesn't have the veto authority to reject the spending bill. However, by placing the statutory provisions in the spending bill, the provisions will expire on June 30, 2007 unless the legislature acts in the 2007 legislative session.

The FWCJUA's statutory provisions are as follows:

- The FWCJUA must submit a request to the Internal Revenue Service no later than January 1, 2007, seeking federal tax-exempt status.
- The Financial Service Commission is required to appoint a nine-member board of governors to oversee the association's operations. There is no criteria for who may serve on the board. Currently, the statute contains a formula that ensures the board will be representative of domestic and foreign carriers and agents and other stakeholders.
- The FWCJUA's plan of operation will be subject to the approval of the Office of Insurance Regulation, which

may reject parts or the entire plan whenever OIR deems it necessary.

- The FWCJUA's rates must be implemented on a "file and use" basis, whereby regulators must approve the rates before they can be implemented. Prior to the law change, the FWCJUA implemented its rates on a "use and file" basis.
- Deficits in tier one and two and any previous subplan must first be funded using the surplus in subplan C. After the surplus from subplan C is exhausted, the FWCJUA may request monies from a contingency fund set up in the Workers' Compensation Administrative Trust Fund, which will cover the difference between the deficit and the necessary funding needed on a six-month basis.
- Once the subplan C deficit and the contingency reserve monies are exhausted, the FWCJUA can request that regulators implement a below-the-line assessment on all workers' compensation policies. However, subplan C policyholders are exempt from said assessments, due to the fact they would not face a deficit except for the decision to use the subplan's surplus to fund other subplan losses.

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