Workers' Compensation Legislative & Regulatory Update

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The Florida Legislature concluded the 2008 regular session without making any substantial changes in the workers' compensation system. Lawmakers only addressed four issues including one proposal sought by the Division of Workers' Compensation (division or DWC) that completed a statutory transfer of the Agency for Health Care Administration Workers' Compensation Medical Services Unit to the division. Chief Financial Officer Alex Sink largely prevailed in her move to block a proposed transfer of $129.5 million from the Workers' Compensation Administrative Trust Fund (WCATF) to the state's general revenue fund. On the insurance front, lawmakers passed one minor bill that allows the state's four current self-insurance funds to distribute policyholder dividends without gaining prior approval by the Office of Insurance Regulation. On the issue of workplace safety, lawmakers created the Florida Public Task Force on Work Place Safety, which will be housed in the University of South Florida's Safety Consulting Program. Rejected by lawmakers were several bills addressing insurance coverage requirements of professional employer leasing organizations and their client companies. The legislative activity comes as the system awaits a Florida Supreme Court ruling in *Emma Murray v. Mariner Health/ACE USA (SC07-244)*, which could strike down part or all of the claimant attorney fee provisions enacted in the 2003 reforms.

DWC and AHCA

Lawmakers signed-off on the one legislative proposal recommended by the DWC, which codifies an interagency agreement that brought AHCA's Workers' Compensation Medical Services Unit under the division's umbrella. The law change reverses a move made by the legislature in the late 1990s that transferred the medical services unit from the DWC to AHCA. At the time, the rationale for the transfer was that it would streamline the regulatory process necessitated by a mandate that all workers' comp medical services must be delivered through a managed care network. Lawmakers later lifted the requirement of mandatory managed care in favor of a voluntary system for providing medical services. With the mandate removed, regulators maintained it created an unnecessary split in the regulatory and rulemaking process.

Under Chapter 440.13, Florida Statutes, AHCA oversees the certification of health care providers, expert medical advisors, and maintains the database of certified providers. The unit also handles medical reimbursement and utilization disputes between health care providers and insurers. The bill doesn't affect the internal operations of the DWC with respect to the medical services unit, which has been fully integrated into the division. The main impact of the bill is a change in the rulemaking process. Under the current process, many of the DWC and AHCA rules either overlap or to some extent affect similar areas. For example, AHCA has the statutory authority to set out fines in cases where providers are engaged in improper business practices, while the DWC has the ability to levy fines against insurers for not complying with the law. The bill removes all references to AHCA in Chapter

440, Florida Statutes, bringing all laws and rules under the DWC's purview.

Sink on Trust Fund

Chief Financial Officer Alex Sink scored a victory when lawmakers failed to go along with a budgetary proposal supported by Governor Charlie Crist, which would have appropriated $129.5 million from the WCATF to help fund other state projects. Department of Financial Services Spokesperson Kevin Cate said the department had identified only $7 million that lawmakers swept out of the fund.

The WCATF is set up to pay the costs for the regulation of the workers' compensation system. Assessments for the Fund are based on a percent of carriers' net written premiums and is passed through to employers as part of the annual rate filing. As of January, the trust fund had a balance of $271 million, which reflects a significant surplus that was set aside in case the state was required to reimburse carriers for potential overpayments into the fund dating back to the 1990s. The courts have since ruled in the state's favor making the money available only to pay the annual cost of operating the state's workers' compensation system.

If the legislature had approved Crist's recommendation, it would have left the trust fund with substantially less funds. The trust fund's total obligations equal $93 million annually, of which the DWC accounts for $25 million. The current assessment rate is .25 %, which the division projects will raise $23 million. The trust fund's remaining $70 million liability would be drawn from the fund's current balance. Under this scenario, the current .25 % assessment rate could be maintained into 2009, after which Sink maintains the WCATF assessment would have to be increased.

The WCATF assessment covers the administrative costs of the DWC and also supports the Office of Judges of Compensation Claims. The monies also cover certain workers' compensation programs in the Agency for Health Care Administration, the Department of Education, the Division of Insurance Fraud Workers' Compensation Bureau, and the Department of Business and Professional Regulations.

Lawmakers made no change in the Special Disability Trust Fund, which is funded by a 4.52 % assessment on carriers' net written workers' comp premiums. The current assessment rate covers the fund's obligations for fiscal-year 2008-2009, beginning on June 30. Since the fund was closed to new claims after 1997, its liabilities have steadily declined. The latest actuarial study projects that as of the end of this fiscal year, the fund will have a liability balance of $1.9 billion on an undiscounted basis and $980 million on a discounted basis. The 4.52 % assessment is expected to raise $250 million.

SIF Dividends

The one workers' compensation insurance issue that drew lawmakers' attention addressed the distribution of policyholder dividends by the state's four group self-insurance funds. Under current law, the trustees of a group self-insurance fund can decide to pay a dividend to policyholders if the fund's surplus exceeds the fund's financial obligations. First, however, the fund must obtain permission from the Office of Insurance Regulation. There are four group self-insurance funds operating in the state including the Florida Retail SIF, the Florida Rural Electric Fund, FUBA Workers' Comp –which sponsors the Florida Citrus, Business, and Industries SIF—and the Florida Roofers, Sheetmetal Workers, and Air Conditioning Contractors' SIF.

Under the bill, the four existing self-insurance funds would not have to secure prior regulatory approval to distribute the dividends, but must inform OIR within 10 days of doing so. The distribution of the dividends, however, could not negatively effect a fund's solvency or exceed the total amount of dividends declared unpaid under the fund's most recently filed financial statement. Funds created after June 1 would have to gain prior approval from the OIR for a period of seven years before they too could distribute dividends without prior regulatory approval.

The bill is aimed at preventing a potential tax problem with the Internal Revenue Service. The funds take a tax deduction for all income since it is either used to pay claims, expenses, or is returned to policyholders. Under the current regulatory scheme, however, the IRS might decide to consider those dividends as income and therefore the funds would carry a tax liability.

Workplace Safety

Lawmakers created a Florida Public Task Force on Work Place Safety, which

will be housed in the University of South Florida's Safety Consulting Program. The task force will be comprised of 15 members, five appointed by the governor, five by the Senate President, and five by the Speaker of the House. Three members must be representatives of the various statewide business organizations, two members must be selected from organized labor, and one member each must represent the Florida League of Cities and Florida League of Counties. The remaining members must be safety professionals from a number of associated specialties. The task force members shall be appointed by July 15 and the first task force meeting must be held on or before August 15.

Among other things, the task force is charged with coming up with recommendations to ensure that all state agencies, counties, and cities comply with the appropriate Occupational Health and Safety Administration standards. Other topics to be discussed include the different workplace safety needs of the private and public sector. Additionally, the task force is required to study the effect of public sector workplace programs on the state's economic development.

PEO Legislation Fails

There was some movement in the legislature to consider a variety of law changes to ensure that professional employment organizations and their client companies were meeting the terms of the state's workers' compensation compliance law and that workers were informed of their coverage status. Among other things, PEOs would have been required to provide written notice to workers stating whether the PEO or the client company were responsible for providing workers' comp coverage. PEOs would have been required to inform a leased employee by mail when a PEO/client agreement ends. Further, the PEOs would have been required to notify leased employees of the termination of their workers' comp coverage if the PEO terminates the employee and defined the terms under which the leased employee would be considered to be notified. And finally, the PEO would be required to offer the client company the records necessary for calculating an experience modification factor. There was a general consensus that the law would have been difficult to implement and even more difficult to monitor for compliance. Accordingly, these offered bills failed.

Murray v. Mariner Health/ ACE USA

Employer/carriers are awaiting a Florida Supreme Court ruling that could strike down part or all of the claimant attorney fee changes made in 2003. In *Emma Murray v. Mariner Health/ACE USA (SC07-244)* a judge of compensation claims found that an on-the-job accident resulted in Murray needing surgery and that she also qualified for indemnity benefits. Those medical and indemnity benefits were determined to be in the amount of $3,224.21. The attorney who represented Murray, indicated that he spent 84.4 hours on the case, which under the current contingency fee schedule allowed for an attorney fee of $648.84 or $8.11 per hour. By comparison, the defense attorney who represented the employer/carrier, acknowledged that she spent 135 hours on the case and was paid $16,050, which equaled $125 per hour. It was argued that this statutory attorney fee provision for calculating claimant's attorney fees was unconstitutional.

If the Florida Supreme Court rules in the claimant's attorney's favor, a problematic issue arises as to how to calculate rates going forward, assuming that both attorney fees and overall claims increase. When the legislature enacted the 2003 reforms, the estimated first year savings of the law changes was a minus 14 percent, of which only two percent was attributed to the changes in the attorney fees statute. In subsequent years, however, it is statistically difficult to say how the changes in attorneys fees have quantifiably affected costs. For example, the driving force behind the 2008 rate reduction is due almost entirely to a decline in claims' frequency, which some would attribute to the change in attorney fee reimbursements. A decision by the court is likely to be issued sometime this Summer.