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WORKERS' COMPENSATION

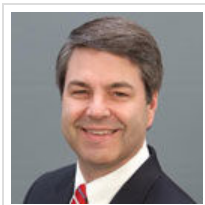
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Workers' Comp Reform Needed in Pennsylvania

By Mark A. Behrens and Joanna Vassallo All Articles

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Mark Behrens

Scores of Pennsylvania employers may soon find themselves dragged into costly lawsuits brought by former workers with occupational diseases as a result of a recent decision by the Pennsylvania Supreme Court. The court said that because the state's workers' compensation statute does not provide a recovery for occupational diseases that take many years to manifest, the legislature must have intended for personal injury litigation to fill the gap. The legislature needs to clarify or amend the statute to protect Keystone State employers from excessive tort litigation, and ultimately to protect Pennsylvania's job market.



Joanna Vassallo

In general, workers injured on the job are paid through the workers' compensation system. Workers' compensation laws provide a win-win for workers and their employers. Workers are able to receive prompt payment for medical bills and reasonable income payments. They are also relieved of the burden of proving their employer was at fault, reducing the costs, delays and uncertainties that come with personal injury litigation. Employers, in turn, are freed from the threat of court suit, providing them with some certainty in their legal affairs. In legal terms, the workers' compensation system is known as the injured worker's exclusive remedy.

Diseases that take years to develop present special issues because the passage of time can make it difficult to determine if a disease was work-related. For example, lung cancer can be caused by some workplace exposures, such as exposure to asbestos, but the Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services also lists smoking, radon, radiation therapy to the chest, family history, and possibly diet as other risk factors. If anyone who is exposed to a hazardous substance at work could bring a workers' compensation claim any time a disease develops, employers would end up paying many claims that are not their fault. The costs could be substantial and not always fair.

To address this problem the legislature built in a limit. Workers' compensation was made available to workers with personal injuries from sudden events, such as a fall, and for occupational diseases—provided that the disease occurs within 300 weeks after the person's last date of employment in the industry or occupation where the exposure occurred. No workers' compensation payments are available for diseases that manifest outside the 300-week limit. Pennsylvania employers had assumed that after 300 weeks no occupational disease claim could be brought in any forum.

In November, however, the Pennsylvania Supreme Court held otherwise. In two consolidated appeals (*Tooley v. AK Steel* and *Landis v. A.W. Chesterton*), the court held that because the legislature did not provide for workers' compensation payments on diseases manifesting outside the 300-week limit, the legislature must have intended for workers to be free to pursue recoveries for those injuries in the tort

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system. The cases before the court involved plaintiffs with mesothelioma, a rare form of cancer that is usually associated with asbestos exposure but can be idiopathic. The average latency period for mesothelioma is 30 to 50 years.

The court's interpretation means that Pennsylvania employers will face unexpected lawsuits brought by former workers with mesothelioma and other occupational diseases. Companies will face an almost impossible task trying to defend these cases. Because Pennsylvania employers assumed (incorrectly) that occupational disease claims were time-barred, they never had an incentive to keep detailed records charting where employees worked and what they were exposed to within various operations. Enormous sums will be spent on discovery. Then there are the settlements and potential verdicts that will follow. In civil actions, plaintiffs can recover pain and suffering awards and punitive damages, neither of which are provided available in workers' compensation. Judgments in mesothelioma cases can run in the millions of dollars, especially in a plaintiff-friendly jurisdiction like Philadelphia.

With personal injury lawyers taking anywhere from one-third to one-half of claimants' recoveries, the tort compensation system will be enormously inefficient. There also may be litigation as to whether insurance will be available to respond to the new lawsuits.

The legislature needs to promptly consider alternatives given the magnitude of the new liability forced on employers and the potential consequences for the state's job market. There are a number of solutions that might be considered.

One approach would be to clarify the workers' compensation statute to operate the way the employer and insurance communities had long understood the law to work—as a statute of repose on latent injury claims against employers.

Another approach would be to consider amending the workers' compensation statute to cover mesothelioma claims—these claims are relatively rare, not known to have multiple alternative causes, and are diminishing over time. Inclusion of other diseases could occur in the same piecemeal fashion. Other types of disease claims would remain in the tort system.

Many years ago, the legislature considered increasing the 300-week time limit to 500 weeks, and even repealing the limit altogether. Both proposals were rejected as too expensive at the time. These approaches, however, would seem to be far less expensive and expensive than the full-blown tort lawsuit remedy that was just created by the Pennsylvania Supreme Court's interpretation of the workers' compensation statute.

Mark A. Behrens is a partner in the Washington, D.C.-based public policy group of the law firm of Shook, Hardy & Bacon. Joanna Vassallo is an associate in the firm's Philadelphia office.

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