

WORKERS' COMPENSATION POLICY REVIEW

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This issue is being distributed in November 2006. A deluge of issues will shortly follow.

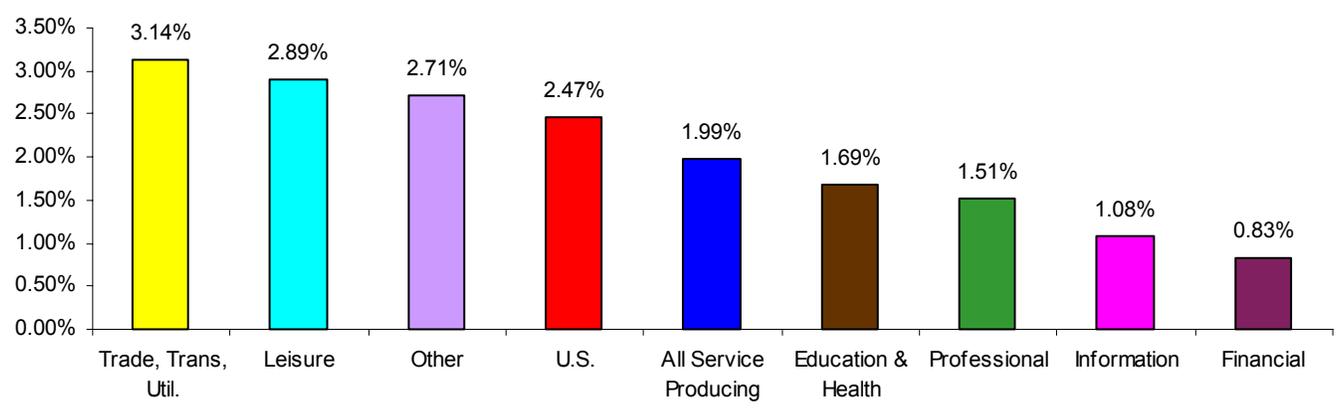
Summary of the Contents

Workers' compensation costs vary considerably among employers due to factors such as a firm's geographical location and industry. Florence Blum and John Burton analyze the Bureau of Labor data on employers' costs in 2005. As shown below, the workers' compensation costs for all employers in the private section averaged 2.47 percent of payroll. In all service-providing industries, costs averaged 1.99 percent of payroll, but the range among specific service industries was substantial, varying from 3.14 percent of payroll in trade, transportation, and utilities to 0.83 percent of payroll in financial industries.

Constitutional law has provided the basis for challenges to the design of federal and state workers' compensation laws since the inception of the program in the early 1900s. Since a 1917 decision by the U.S. Supreme Court, the constitutionality of the crucial elements of the workers' compensation principle – liability without fault for employers and limits on recovery for employees – has been accepted. In recent years, however, some challenges to workers' compensation statutes have been successful based on state constitutional provisions, including guarantees of equal protection. John Burton also examines recent efforts to challenge statutes eliminating both workers' compensation and tort remedies for some workplace injuries and diseases.

A recent article by Kenneth D. Rosenman and his colleagues is summarized. The authors compared the estimates of the number of workplace injuries and diseases in Michigan for 1999 to 2001 based on the annual survey of employers by the U. S. Bureau of Labor Statistics with four other sources of data. They report the BLS data missed more than two-thirds of workplace injuries and illnesses that actually occurred in Michigan during those years.

Workers' Compensation Costs as a Percentage of Gross Earnings by Industry for Service-Producing Industries



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Workers' Compensation Costs In 2005: Regional, Industrial, and Other Variations

by Florence Blum and John F. Burton, Jr.

The employers' costs of workers' compensation vary among industries and occupations, according to 2005 data published by the Bureau of Labor Statistics (BLS), which is part of the U.S. Department of Labor.¹ The BLS data also indicate that workers' compensation costs differ by establishment size, by union-nonunion status, and by geographical location within the United States.

The BLS data used in this article provide information on the employers' costs per hour worked for wages and salaries and for benefits (including workers' compensation and other legally required benefits). The BLS data are published every quarter, and we calculated the 2005 annual average by averaging the BLS results for March, June, September, and December of 2005. The BLS data are based on samples that varied in the quarter surveys in 2005 from 9,500 to 11,300 establishments in the private sector and 800 establishments in the state and local government sector.²

Cost Differences by Region

Workers' compensation costs as a percentage of wages and salaries are shown for the four census regions and the United States in Figure A and Table 1. (The states that comprise the four census regions are shown in the Notes to Table 1.) The Employers' workers' compensation costs are above the national average in one region, and below the national average in three regions.³ What is perhaps surprising is the ranking of the regions, and in particular the finding that the Northeast is the region with the lowest workers' compensation costs (as a percentage of gross earnings).

The derivation of the national and regional figures shown in Figure A helps explain these findings. The BLS data used to construct Figure A are shown in Table 1. *Total remuneration* per hour worked averaged \$24.37 for employers in private industry throughout the United States in 2005 (row 1).⁴ The \$24.37 of total remuneration includes *gross earnings* that averaged \$19.54 per hour (row 2) and *benefits other than pay* that averaged \$4.84 per hour (row 6).

The gross earnings figure includes wages and salaries as well as paid leave and supple-

mental pay. The terms *gross earnings* and *payroll* are used interchangeably in this article.

Benefits other than pay include employer contributions for insurance, retirement and savings, legally required benefits, and other benefits.⁵ *Workers' compensation*, which averaged \$0.48 per hour worked (row 9A), is one of the *legally required benefits* that are included in the BLS's total figure of \$2.13 per hour for that category (row 9).

We used the BLS data in rows (1), (2), and (9A) of Table 1 to compute the figures listed in rows (11) and (12) of that table. For the private sector in the United States in 2005, workers' compensation expenditures (\$0.48) were 1.98 percent of total remuneration (\$24.37) and 2.47 percent of gross earnings (or payroll) (\$19.54).

The same procedure used to calculate workers' compensation as a percentage of gross earnings (row 12 of Table 1) for the United States -- namely, to divide the workers' compensation expenditures per hour (row 9A) by gross earnings per hour (row 2) -- was used to calculate the regional results for workers' compensation as a percentage of gross earnings shown in Figure A and in row (12) of Table 1. Thus, for the Northeast, workers' compensation expenditures of \$0.45 per hour were divided by gross earnings of \$21.87 per hour to produce the figure of 2.06 percent -- which is workers' compensation costs as a percentage of gross earnings in the Northeast in 2005.

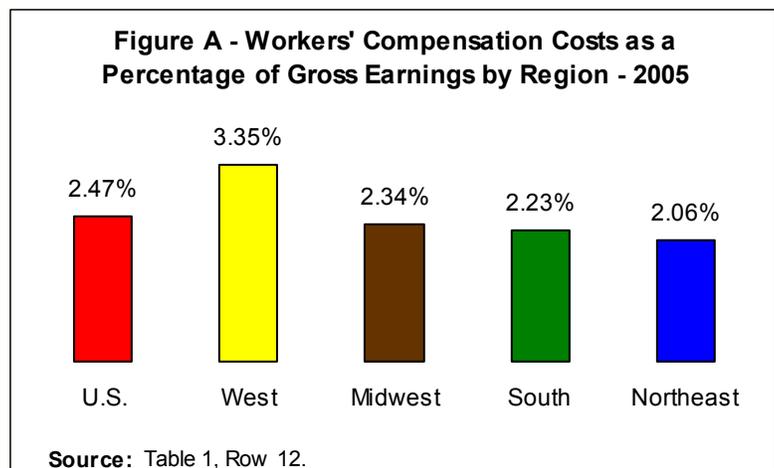


Table 1
Workers' Compensation Costs by Census Region in 2005
for Employers in Private Industry
(In Dollars Per Hours Worked)

		U.S.	Northeast	South	Midwest	West
(1)	Total Remuneration	24.37	27.25	21.73	24.23	26.19
(2)	Gross Earnings	19.54	21.87	17.59	19.20	20.96
(3)	Wages and Salaries	17.28	19.17	15.68	16.91	18.58
(4)	Paid Leave	1.56	1.88	1.35	1.53	1.65
(5)	Supplemental Pay	0.70	0.82	0.56	0.76	0.73
(6)	Benefits Other Than Pay	4.84	5.38	4.14	5.03	5.23
(7)	Insurance	1.78	2.00	1.55	1.93	1.77
(8)	Retirement Benefits	0.89	1.01	0.71	0.98	0.97
(9)	Legally Required Benefits	2.13	2.32	1.85	2.07	2.47
(9A)	Workers' Compensation	(0.48)	(0.45)	(0.39)	(0.45)	(0.70)
(10)	Other Benefits	0.04	0.05	0.03	0.05	0.02
(11)	Workers' Compensation As Percentage of Remuneration	1.98%	1.65%	1.81%	1.86%	2.68%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.47%	2.06%	2.23%	2.34%	3.35%

Notes: See Notes for Tables 1 - 6.

For Table 1:

The **Northeast** Census Region is comprised of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

The **South** Census Region is comprised of Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

The **Midwest** Census Region is comprised of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

The **West** Census Region is comprised of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

Source: *Employer Costs for Employee Compensation - March 2005*, News Release USDL: 05-1056 (June 16, 2005), Tables 5 and 7.

Employer Costs for Employee Compensation - June 2005, News Release USDL: 05-1767 (September 21, 2005), Tables 5 and 7.

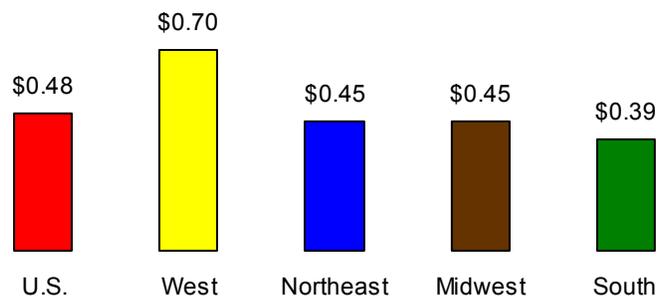
Employer Costs for Employee Compensation - September 2005, News Release USDL: 05-2279 (December 9, 2005), Tables 5 and 7.

Employer Costs for Employee Compensation - December 2005, News Release USDL: 06-456 (March 14, 2006), Tables 5 and 7.

An alternative way to measure regional differences in workers' compensation costs is shown in Figure B. Workers' compensation is measured as costs per hour worked, as shown in row (9A) of Table 1. In contrast to the results presented in Figure A -- which indicated that the Northeast had the lowest workers' compensation costs (as a percentage of gross earnings) -- the results presented in row (9A) of Table 1 and in Figure B indicate that the Northeast's workers' compensation costs (\$0.45 per hour) were the same as the Midwest's (\$0.45 per hour) and greater than the South's (\$0.39 per hour) workers' compensation costs per hour worked.

Appendix A examines how the regions can switch their relative costs compared to the United

Figure B - Workers' Compensation Costs
Measured as Employer Expenditures per Hour
Worked by Region - 2005



Source: Table 1, Row 9A.

States, depending on which measure of workers' compensation costs is used. That interregional differences in workers' compensation can vary depending on which measure of workers' compensation costs is used leads to an obvious question: Which is the "proper" measure that should be used to compare regions in terms of their workers' compensation costs: workers' compensation costs as a percentage of gross earnings (as shown in Figure A) or workers' compensation costs per hour worked (as shown in Figure B)?

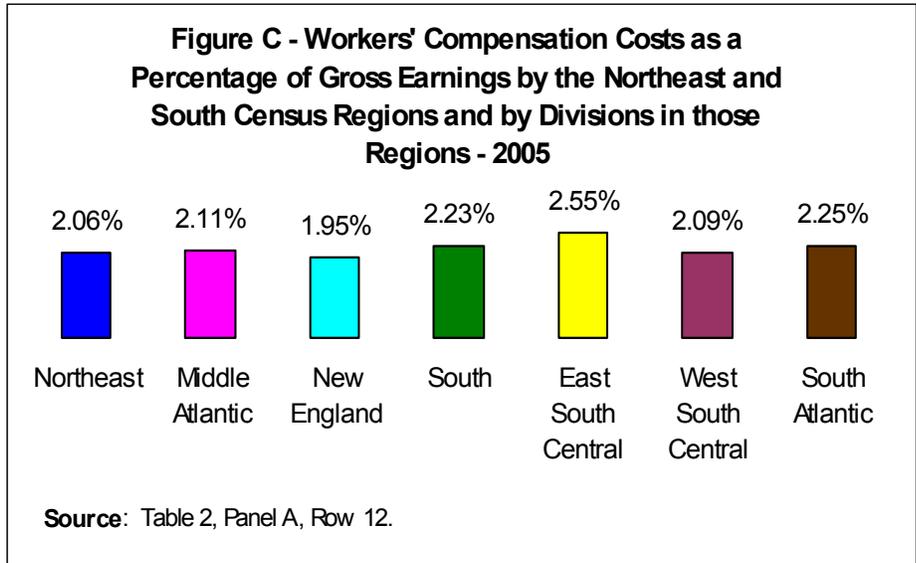
In our view, no measure of workers' compensation costs is invariably preferable for all comparisons. Rather, the choice of measurement depends on the purpose of the comparison. For example, an employer seeking a state or region with the least expensive operating environment may decide that workers' compensation costs per hour is the best measure of costs. In contrast, a policymaker concerned about adequacy of benefits may decide that workers' compensation costs as a percentage of payroll is the best measure.⁶

In the remainder of this article, we confine our discussion to workers' compensation costs as a percentage of gross earnings (or payroll). This format reflects the most common approach in workers' compensation studies. The reader who wishes to make comparisons in terms of workers' compensation costs per hour will be able to do so, however, because hourly cost data are also presented in all of the tables in this article.

Cost Differences by Census Division

The BLS data on the employers' costs of workers' compensation are available for the nine census divisions shown in Table 2 and in Figures C and D. The four census regions analyzed in the previous sections are composed of the nine census divisions examined in this section. (The states that comprise the nine census regions are shown in the Notes to Table 2.)

Panel A of Table 2 and Figure C provide data on the employers' costs of workers' compensation in the



Northeast region and its two components (the New England and Middle Atlantic divisions) and the South region and its three components (the South Atlantic, East South Central, and West South Central divisions). One interesting result is that the census regions with the highest employers' costs as a percent of payroll (East South Central and South Atlantic) are part of the South Region and the census region with the lowest employers' costs (New England) is part of the Northeast region.

Panel B of Table 2 and Figure D provide data on the employers' costs of workers' compensation in the Midwest region and its two components (the East North Central and West North Central divisions) and the West region and its two components (the Mountain and Pacific divisions). One interesting result shown in Figure

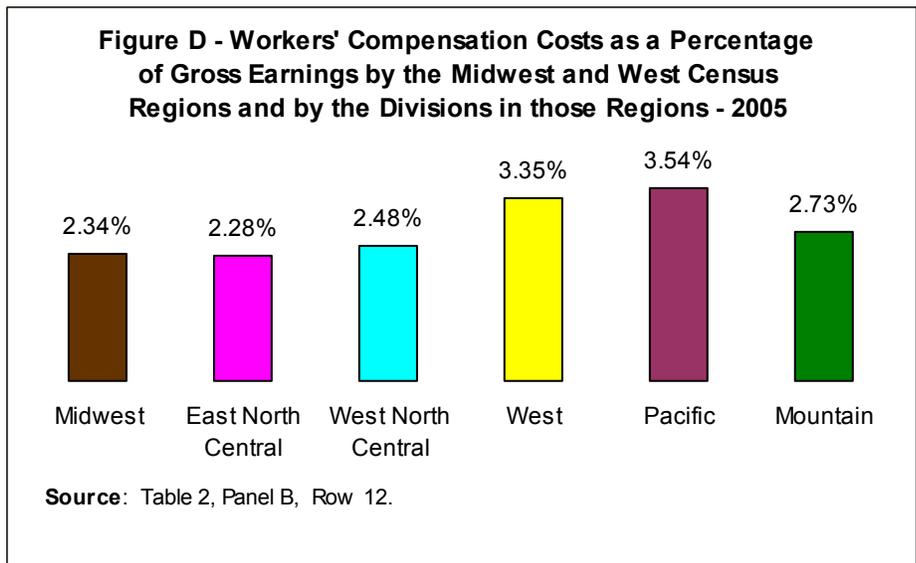


Table 2
Workers' Compensation Costs by Census Region and Division in 2005
for Employers in Private Industry
(In Dollars Per Hours Worked)

Panel A: Northeast and South Regions

		U.S.	U.S. Northeast	New England	Middle Atlantic	South Atlantic	South Atlantic	East South Central	West South Central
(1)	Total Remuneration	24.37	27.25	26.33	27.63	21.73	22.35	20.18	21.44
(2)	Gross Earnings	19.54	21.87	21.27	22.12	17.59	18.15	16.15	17.34
(3)	Wages and Salaries	17.28	19.17	18.74	19.34	15.68	16.20	14.30	15.48
(4)	Paid Leave	1.56	1.88	1.75	1.93	1.35	1.42	1.17	1.32
(5)	Supplemental Pay	0.70	0.82	0.77	0.85	0.56	0.53	0.69	0.55
(6)	Benefits Other Than Pay	4.84	5.38	5.07	5.51	4.14	4.19	4.04	4.09
(7)	Insurance	1.78	2.00	1.79	2.08	1.55	1.55	1.61	1.52
(8)	Retirement Benefits	0.89	1.01	0.98	1.03	0.71	0.72	0.61	0.76
(9)	Legally Required Benefits	2.13	2.32	2.27	2.34	1.85	1.90	1.80	1.79
(9A)	Workers' Compensation	(0.48)	(0.45)	(0.42)	(0.47)	(0.39)	(0.41)	(0.41)	(0.36)
(10)	Other Benefits	0.04	0.05	0.04	0.06	0.03	0.02	0.03	0.03
(11)	Workers' Compensation As Percentage of Remuneration	1.98%	1.65%	1.58%	1.69%	1.81%	1.82%	2.04%	1.69%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.47%	2.06%	1.95%	2.11%	2.23%	2.25%	2.55%	2.09%

Panel B: Midwest and West Regions

		U.S.	U.S. Midwest	East North Central	West North Central	West Mountain	Pacific
(1)	Total Remuneration	24.37	24.23	25.24	21.93	26.19	27.96
(2)	Gross Earnings	19.54	19.20	19.92	17.55	20.96	22.31
(3)	Wages and Salaries	17.28	16.91	17.46	15.66	18.58	19.75
(4)	Paid Leave	1.56	1.53	1.63	1.31	1.65	1.80
(5)	Supplemental Pay	0.70	0.76	0.84	0.59	0.73	0.76
(6)	Benefits Other Than Pay	4.84	5.03	5.32	4.38	5.23	5.66
(7)	Insurance	1.78	1.93	2.06	1.64	1.77	1.88
(8)	Retirement Benefits	0.89	0.98	1.05	0.81	0.97	1.08
(9)	Legally Required Benefits	2.13	2.07	2.15	1.90	2.47	2.68
(9A)	Workers' Compensation	(0.48)	(0.45)	(0.46)	(0.44)	(0.70)	(0.79)
(10)	Other Benefits	0.04	0.05	0.06	0.03	0.02	0.03
(11)	Workers' Compensation As Percentage of Remuneration	1.98%	1.86%	1.80%	1.99%	2.68%	2.82%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.47%	2.34%	2.28%	2.48%	3.35%	3.54%

Notes: See Notes for Tables 1 - 6.

For Table 2:

The **New England** Census Division is comprised of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

The **Middle Atlantic** Census Division is comprised of New Jersey, New York, and Pennsylvania.

The **South Atlantic** Census Division is comprised of Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

The **East South Central** Census Division is comprised of Alabama, Kentucky, Mississippi, and Tennessee.

The **West South Central** Census Division is comprised of Arkansas, Louisiana, Oklahoma, and Texas.

The **East North Central** Census Division is comprised of Illinois, Indiana, Michigan, Ohio, and Wisconsin.

The **West North Central** Census Division is comprised of Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

The **Mountain** Census Division is comprised of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

The **Pacific** Census Division is comprised of Alaska, California, Hawaii, Oregon, and Washington.

Source: *Employer Costs for Employee Compensation - March 2005*, News Release USDL: 05-1056 (June 16, 2005), Tables 5 and 7.

Employer Costs for Employee Compensation - June 2005, News Release USDL: 05-1767 (September 21, 2005), Tables 5 and 7.

Employer Costs for Employee Compensation - September 2005, News Release USDL: 05-2279 (December 9, 2005), Tables 5 and 7.

Employer Costs for Employee Compensation - December 2005, News Release USDL: 06-456 (March 14, 2006), Tables 5 and 7.

Table 3A
Workers' Compensation Costs by Major Industry Groups in 2005
for Employers in Private Industry
(In Dollars Per Hours Worked)

		All Workers	All Goods- Producing	Construction	Manufacturing
(1)	Total Remuneration	24.37	28.92	28.30	28.96
(2)	Gross Earnings	19.54	21.96	21.60	21.97
(3)	Wages and Salaries	17.28	18.94	19.43	18.58
(4)	Paid Leave	1.56	1.75	0.95	2.11
(5)	Supplemental Pay	0.70	1.27	1.23	1.28
(6)	Benefits Other Than Pay	4.84	6.96	6.69	6.99
(7)	Insurance	1.78	2.52	1.98	2.75
(8)	Retirement Benefits	0.89	1.60	1.38	1.65
(9)	Legally Required Benefits	2.13	2.77	3.32	2.48
(9A)	Workers' Compensation	(0.48)	(0.90)	(1.42)	(0.64)
(10)	Other Benefits	0.04	0.08	*	0.11
(11)	Workers' Compensation As Percentage of Remuneration	1.98%	3.11%	5.01%	2.20%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.47%	4.10%	6.56%	2.90%

Notes: See Notes for Tables 1 - 6.

For Table 3A: **Goods-Producing** includes mining, construction, and manufacturing. The agriculture, forestry, farming, and hunting sector is excluded.

Source: *Employer Costs for Employee Compensation - March 2004*, News Release USDL: 04-1105 (June 24, 2004), Tables 5 and 6.
Employer Costs for Employee Compensation - June 2004, News Release USDL: 04-1805 (September 15, 2004), Tables 5 and 6.
Employer Costs for Employee Compensation - September 2004, News Release USDL: 04-2490 (December 15, 2004), Tables 5 and 6.
Employer Costs for Employee Compensation - December 2004, News Release USDL: 05-432 (March 16, 2005), Tables 5 and 6.

D is that workers' compensation costs as a percent of payroll are higher in both of the census divisions that are part of the West region than in either of the census divisions that are part of the Midwest region.

Among the nine census divisions included in Figures C and D, a striking and somewhat surprising result is that the two census divisions with the highest workers' compensation costs as a percent of payroll (namely the Pacific and Mountain divisions) are both in the West census region, while the census division with the lowest workers' compensation costs as a percent of payroll (namely the New England division) is in the Northeast census region. The Pacific census division is distinguished by having both the highest workers' compensation costs measured as dollars per hour worked (\$0.79) and the highest workers' compensation costs as a percent of payroll (3.54 percent) among the nine census divisions (Tables 2A and 2B, lines (9A) and (12)). A snap quiz: does the presence of California in the Pacific census division have anything to do with these results?

Cost Differences by Industry

The BLS data for 2005 also reveal that employers' costs of workers' compensation as a percentage of gross earnings vary among industries in the private sector (Figures E and F and row 12 of Tables 3A and 3B). The national average for employers' workers' compensation costs was 2.47 percent of gross earnings in 2005. (This all-industry average, in row 12 and the

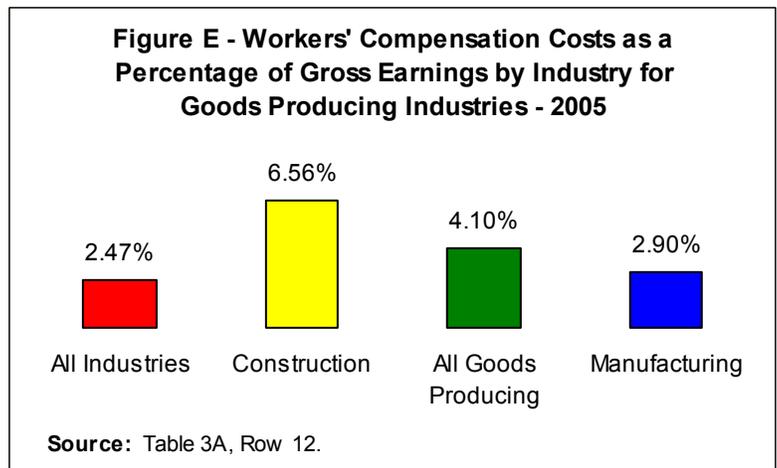


Table 3B
Workers' Compensation Costs by Major Industry Groups in 2005
for Employers in Private Industry
(In Dollars Per Hours Worked)

	All Service Providing	Trade Transportation & Utilities	Information	Financial Activities	Professional & Business Services	Education & Health Services	Leisure & Hospitality	Other Services
(1) Total Remuneration	23.25	20.47	35.12	32.84	28.10	26.03	10.78	20.55
(2) Gross Earnings	18.94	16.31	28.41	26.49	23.42	21.25	8.99	16.72
(3) Wages and Salaries	16.87	14.69	24.60	22.63	20.74	18.94	8.51	15.09
(4) Paid Leave	1.51	1.17	2.90	2.36	1.96	1.86	0.35	1.35
(5) Supplemental Pay	0.56	0.46	0.91	1.50	0.72	0.45	0.14	0.28
(6) Benefits Other Than Pay	4.32	4.15	6.71	6.35	4.68	4.76	1.79	3.83
(7) Insurance	1.60	1.56	2.82	2.53	1.62	1.91	0.45	1.34
(8) Retirement Benefits	0.72	0.69	1.23	1.50	0.76	0.75	0.10	0.60
(9) Legally Required Benefits	1.97	1.90	2.54	2.23	2.26	2.11	1.24	1.89
(9A) Workers' Compensation	(0.38)	(0.51)	(0.31)	(0.22)	(0.35)	(0.36)	(0.26)	(0.45)
(10) Other Benefits	0.03	0.01	0.13	0.10	0.03	0.00	0.00	0.00
(11) Workers' Compensation As Percentage of Remuneration	1.62%	2.50%	0.88%	0.67%	1.25%	1.38%	2.41%	2.20%
(12) Workers' Compensation As Percentage of Gross Earnings	1.99%	3.14%	1.08%	0.83%	1.51%	1.69%	2.89%	2.71%

Notes: See Notes for Tables 1 - 6.

For Table 3B: **Service-Providing** includes utilities; wholesale trade; transportation and warehousing; information; finance and insurance; real estate and rental and leasing; professional and technical services; management of companies and enterprises; administrative and waste services; educational services; health care and social assistance; arts, entertainment and recreation; accommodation and food services; and other services, except public administration.

Source: *Employer Costs for Employee Compensation - March 2004*, News Release USDL: 04-1105 (June 24, 2004), Tables 5 and 6.

Employer Costs for Employee Compensation - June 2004, News Release USDL: 04-1805 (September 15, 2004), Tables 5 and 6.

Employer Costs for Employee Compensation - September 2004, News Release USDL: 04-2490 (December 15, 2004), Tables 5 and 6.

Employer Costs for Employee Compensation - December 2004, News Release USDL: 05-432 (March 16, 2005), Tables 5 and 6.

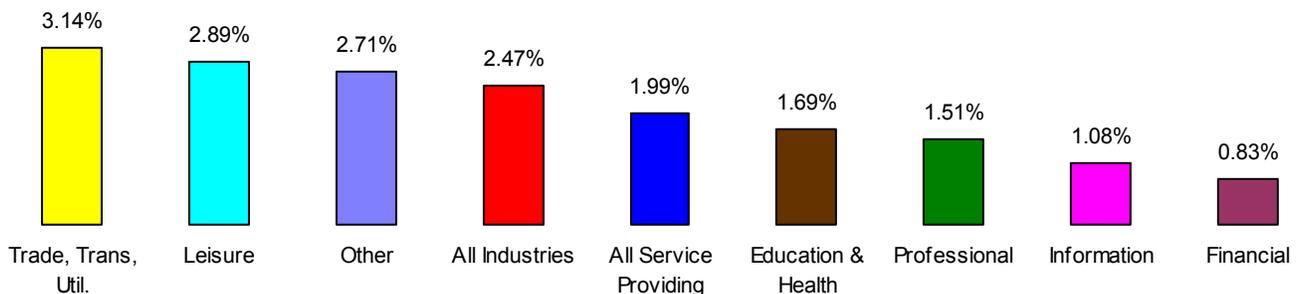
"all workers" column of Tables 3A and 3B, is the same as the U.S. average in Table 1.)

Workers' compensation data on industries throughout the United States can be compared at two levels of disaggregation. First, a distinction can be made between "goods-producing" industries (mining, construction, and manufacturing) and "service-providing" industries (including transportation, communication, and public utilities; wholesale and retail trade; finance, insurance, and real estate; services; and other service industries as shown in the notes to Tables 3A and 3B). In 2005, national workers' compensation costs were, on average, 4.10 percent of gross earnings (payroll) for all

goods-producing industries and 1.99 percent of gross earnings (payroll) for all service-providing industries (see row 12 of Tables 3A and 3B and Figures E and F).

Workers' compensation data on industries can be further disaggregated to show employers' costs for specific goods-producing industries and specific service-providing industries. As shown in Figure E and Table 3A, the employers' costs of workers' compensation for all goods-producing industries was 4.10 percent of payroll, and for specific goods-producing industries ranged from 6.56 percent of payroll for the construction industry to 2.90 percent of payroll for the manufacturing industry.

Figure F - Workers' Compensation Costs as a Percentage of Gross Earnings by Industry for Service-Providing Industries - 2005



Source: Table 3A and 3B, Row 12.

Table 4
Workers' Compensation Costs by Major Occupational Groups in 2005
for Employers in Private Industry
 (In Dollars Per Hours Worked)

	All Workers	Management Professional & Related Occupations	Sales & Office Occupations	Service Occupations	Nat. Resources Construction & Maintenance Occupations	Production Transportation & Material Moving Occupations
(1) Total Remuneration	24.37	42.61	19.51	12.13	27.57	21.01
(2) Gross Earnings	19.54	35.10	15.77	9.86	20.96	15.93
(3) Wages and Salaries	17.28	30.38	14.16	9.19	18.75	13.93
(4) Paid Leave	1.56	3.37	1.19	0.50	1.32	1.21
(5) Supplemental Pay	0.70	1.35	0.43	0.18	0.90	0.79
(6) Benefits Other Than Pay	4.84	7.51	3.73	2.27	6.61	5.07
(7) Insurance	1.78	2.62	1.55	0.76	2.20	1.99
(8) Retirement Benefits	0.89	1.76	0.55	0.18	1.34	0.88
(9) Legally Required Benefits	2.13	3.05	1.62	1.32	3.05	2.16
(9A) Workers' Compensation	(0.48)	(0.38)	(0.25)	(0.32)	(1.23)	(0.75)
(10) Other Benefits	0.04	0.08	0.02	*	0.04	0.05
(11) Workers' Compensation As Percentage of Remuneration	1.98%	0.90%	1.26%	2.66%	4.46%	3.56%
(12) Workers' Compensation As Percentage of Gross Earnings	2.47%	1.09%	1.55%	3.27%	5.87%	4.69%

Notes: See Notes for Tables 1 - 6.

Source: *Employer Costs for Employee Compensation - March 2004*, News Release USDL: 04-1105 (June 24, 2004), Table 5.
Employer Costs for Employee Compensation - June 2004, News Release USDL: 04-1805 (September 15, 2004), Table 5.
Employer Costs for Employee Compensation - September 2004, News Release USDL: 04-2490 (December 15, 2004), Table 5.
Employer Costs for Employee Compensation - December 2004, News Release USDL: 05-432 (March 16, 2005), Table 5.

In a similar manner, as shown in Figure F and Table 3B, the employers' costs of workers' compensation for all service-providing industries was 1.99 percent of payroll, and for specific service-providing industries ranged from 3.14 percent of payroll for trade, transportation, and utility industries to 0.83 percent of payroll for financial industries. There is a wide disparity of workers' compensations costs for employers within the service sector. Of particular interest, three specific service-producing industries (trade, transportation, and utilities, with workers' compensation costs at 3.14 percent of payroll; leisure, with costs at 2.89 percent of payroll; and other services, with costs at 2.71 percent of payroll) have higher workers' compensation than the average for all employers (namely 2.45 percent of payroll).

Cost Differences by Occupation

The employers' costs of workers' compensation as a percentage of payroll also vary among major occupational groups in the private sector, as shown in Figure G and in Table 4. The national average cost of employers' workers' compensation was 2.47 percent of payroll in 2005. (See Table 4, row 12, "All Workers" column. The U.S. average is the same in all tables in this article.) Three occupational groups had, on average, workers' compensation costs that exceeded the

national average: natural resources, construction, and maintenance workers, for whom workers' compensation costs averaged 5.87 percent of payroll; production, transportation, and material moving workers, for whom workers' compensation costs averaged 4.69 percent of payroll; and service workers, for whom employers' workers' compensation costs averaged 3.27 percent of payroll. In sharp contrast, employers' workers' compensation costs for sales and office workers were, on average, only 1.55 percent of payroll, and workers in management positions had workers' compensation costs that were only 1.09 percent of payroll in 2005. (See Table 4, row 12 and Figure G). These substantial cost differences presumably reflect the differences in the

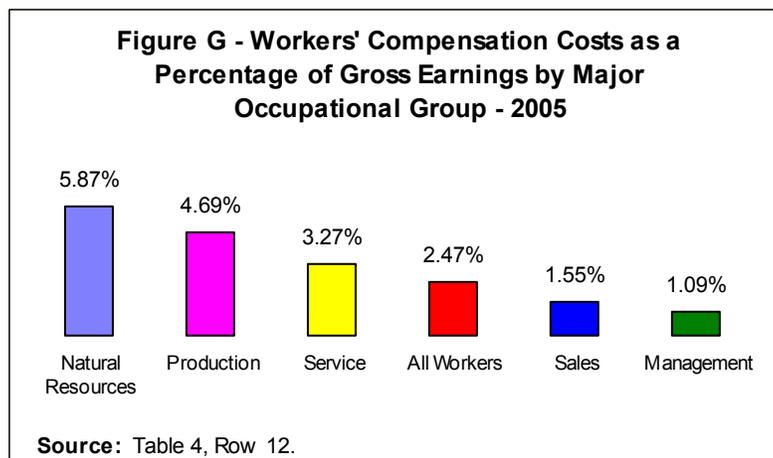


Table 5
Workers' Compensation Costs by Establishment Employment Size in 2005
for Employers in Private Industry
(In Dollars Per Hours Worked)

	All Workers	1-49 Workers	50-99 Workers	100-499 Workers	500 or More Workers
(1) Total Remuneration	24.37	20.03	20.94	24.89	34.80
(2) Gross Earnings	19.54	16.43	16.85	19.84	27.25
(3) Wages and Salaries	17.28	14.87	15.11	17.50	23.32
(4) Paid Leave	1.56	1.03	1.20	1.63	2.80
(5) Supplemental Pay	0.70	0.53	0.53	0.72	1.13
(6) Benefits Other Than Pay	4.84	3.59	4.08	5.05	7.56
(7) Insurance	1.78	1.20	1.53	1.99	2.86
(8) Retirement Benefits	0.89	0.47	0.56	0.89	1.98
(9) Legally Required Benefits	2.13	1.93	2.00	2.15	2.60
(9A) Workers' Compensation	(0.48)	(0.50)	(0.53)	(0.48)	(0.43)
(10) Other Benefits	0.04	0.00	0.00	0.03	0.12
(11) Workers' Compensation As Percentage of Remuneration	1.98%	2.50%	2.52%	1.91%	1.22%
(12) Workers' Compensation As Percentage of Gross Earnings	2.47%	3.04%	3.13%	2.40%	1.56%

Notes: See Notes for Tables 1 - 6.

Source: *Employer Costs for Employee Compensation - March 2004*, News Release USDL: 04-1105 (June 24, 2004), Tables 5 and 8.
Employer Costs for Employee Compensation - June 2004, News Release USDL: 04-1805 (September 15, 2004), Tables 5 and 8.
Employer Costs for Employee Compensation - September 2004, News Release USDL: 04-2490 (December 15, 2004), Tables 5 and 8.
Employer Costs for Employee Compensation - December 2004, News Release USDL: 05-432 (March 16, 2005), Tables 5 and 8.

number and severity of workplace injuries and diseases experienced by workers in these occupations.

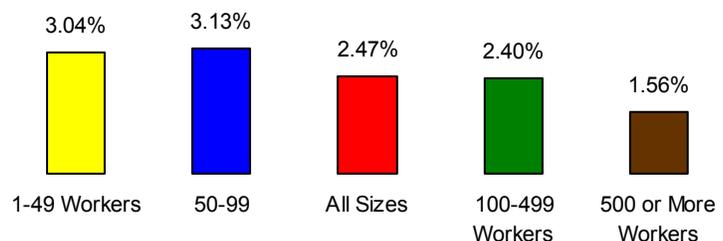
Cost Differences by Establishment Size

An establishment is defined as an economic unit that: 1) produces goods or services at a single location (such as a factory or store) and 2) is engaged in one type of economic activity.⁷ Many firms (or companies) thus consist of more than one establishment.

The BLS data on the employers' costs of workers' compensation allow comparisons among establishments of various sizes (as measured by number of employees). As shown in Figure H and in Table 5, there is a general tendency for workers' compensation costs to decline with increasing establishment size. The national average for employers' workers' compensation costs across all establishments was 2.47 percent of payroll. Those establishments with fewer than 50 employees had workers' compensation costs that, on average, were 3.04 percent of gross earnings in 2005, and workers' compensation costs in establishments with 50 to 99 employees were 3.13 percent of payroll -- both figures above the national (all-establishments) average. In contrast,

those establishments with 100 to 499 workers had workers' compensation costs that averaged 2.40 percent of payroll and establishments with 500 or more workers had costs that averaged 1.56 percent of payroll -- both figures below the national (all-establishments) average.

Figure H - Workers' Compensation Costs as a Percentage of Gross Earnings by Establishment Employment Size - 2005



Source: Table 5, Row 12.

Table 6
Workers' Compensation Costs by Bargaining Status in 2005
for Employers in Private Industry
(In Dollars Per Hours Worked)

		All		
		Workers	Union	Nonunion
(1)	Total Remuneration	24.37	33.51	23.28
(2)	Gross Earnings	19.54	24.38	18.96
(3)	Wages and Salaries	17.28	21.01	16.83
(4)	Paid Leave	1.56	2.26	1.48
(5)	Supplemental Pay	0.70	1.11	0.65
(6)	Benefits Other Than Pay	4.84	9.14	4.32
(7)	Insurance	1.78	3.68	1.55
(8)	Retirement Benefits	0.89	2.37	0.72
(9)	Legally Required Benefits	2.13	2.99	2.02
(9A)	Workers' Compensation	(0.48)	(0.91)	(0.43)
(10)	Other Benefits	0.04	0.11	0.03
(11)	Workers' Compensation As Percentage of Remuneration	1.98%	2.70%	1.86%
(12)	Workers' Compensation As Percentage of Gross Earnings	2.47%	3.71%	2.28%

Notes: See Notes for Tables 1 - 6.

Source: *Employer Costs for Employee Compensation - March 2004*, News Release USDL: 04-1105 (June 24, 2004), Table 5.
Employer Costs for Employee Compensation - June 2004, News Release USDL: 04-1805 (September 15, 2004), Table 5.
Employer Costs for Employee Compensation - September 2004, News Release USDL: 04-2490 (December 15, 2004), Table 5.
Employer Costs for Employee Compensation - December 2004, News Release USDL: 05-432 (March 16, 2005), Table 5.

Cost Differences by Bargaining Status

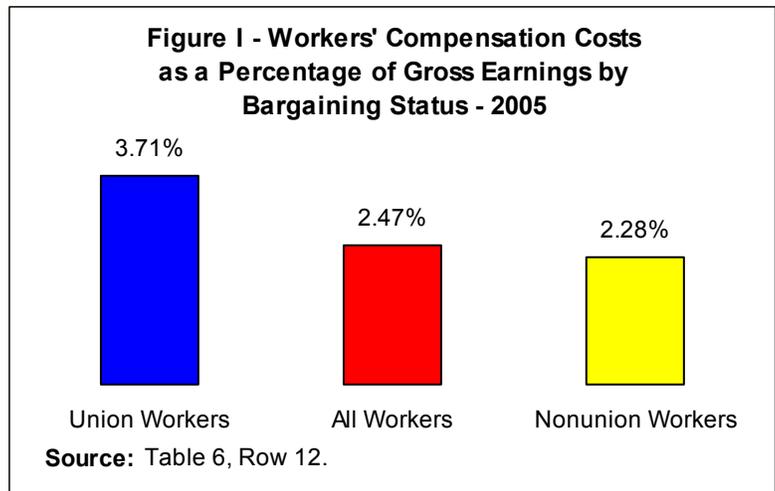
The employers' costs of workers' compensation as a percentage of gross earnings also vary between unionized and nonunionized workers, as shown in Figure I and in Table 6. The employers' costs of workers' compensation for unionized workers in 2005 was 3.71 percent of payroll and the comparable figure for nonunionized workers was 2.28 percent. The national average (unionized and nonunionized workers) was 2.47 percent. (See Table 6, row 12.)

One possible explanation for these cost differences between nonunionized and unionized workers is that unions have been more successful in organizing workers in relatively hazardous industries, such as mining, construction, and manufacturing, than they have been in organizing other industries that have relatively fewer workplace injuries and diseases. Thus, the higher costs are not due to unions, but are instead a reflection of the elevated risks of workplace injuries and diseases found in the industries that unions have organized. Another possible explanation is that unions provide information and assistance to members who are injured on the job, thus increasing the likelihood that unionized members will receive workers' compensa-

tion benefits, which in turn increases the employers' costs of workers' compensation for those workers.

Conclusions

The employers' costs of workers' compensation measured as a percentage of payroll (or measured as costs per hour) vary systematically by region and census division, by industry group, by occupational, by establishment size, and by bargaining status. The infor-



mation derived from the BLS data should be useful to firms trying to place their own workers' compensation costs in perspective and to policymakers attempting to assess the costs of the workers' compensation programs in a particular jurisdiction relative to costs elsewhere. Ideally, the BLS data will be expanded in future years to present even greater detail by industry, occupation, and (in particular) by individual states.

ENDNOTES

1. The BLS data used in this article were published in U.S. Department of Labor 2005a, 2005b, 2005c, and 2006. The national 2003 data for private industry employees, state and local employees, and all non-federal employees were analyzed in Burton 2006. The previous article analyzing regional, industrial, and other variations is Blum and Burton 2005.

2. The numbers of private sector establishments in the quarterly samples were approximately 9,600 in March 2005; 9,500 in June 2005; 9,500 in September 2005; and 11,300 in December 2005. The number of establishments in the state and local sector was approximately 800 for each of the quarterly samples in 2005.

3. Generally, two regions will be above the national average and the remaining two regions will be below the national average. However, in 2005 workers' compensation costs in one region (the West) were very high compared to the national average, while the costs in the other three regions were only moderately lower than the national average. As a result, three regions had costs below the national average and only one region had costs above the national average in 2005.

4. The BLS uses the term "total compensation" for wages and salaries plus total benefits. We have instead used the term "total remuneration," lest the references to "total compensation" and to "workers' compensation" (one of the BLS's subcategories under "total benefits") become too confusing.

5. Specifically, the gross earnings figure includes wages and salaries; paid leave (vacations, holidays, sick leave, and other leave); and supplemental pay (premium pay, shift pay, and nonproduction bonuses). The benefits other than pay figure includes insurance (life insurance, health insurance, sickness and accident insurance); retirement and savings (pensions, savings and thrift); legally required benefits (Social Security, federal unemployment, state unemployment, and workers' compensation); and other benefits (includes severance pay and supplemental unemployment benefits).

6. The latter decision reflects a judgment that, since workers' compensation benefits are generally tied to workers' preinjury wages, and thus benefits and costs ought to increase proportionately with wages, costs as a percentage of wages and salaries should be the same across states and regions.

For example, suppose that in all regions, for every 1,000 hours worked, there are work injuries that result in the loss of

50 hours of work. Also suppose that two-thirds of lost wages are replaced by workers' compensation benefits in all regions. (A two-thirds replacement rate is a commonly used measure of adequacy.)

Using the data on hourly gross earnings shown in Table 1, the total payroll in the South for 1,000 hours worked is \$17,590 ($\$17.59 \times 1,000$ hours); the total amount of workers' compensation benefits is \$586 ($\17.59×50 hours \times 2/3 replacement rate); benefits (assumed to be the same as costs for this example) as a percentage of gross earnings in the South are 3.33 percent ($\$586$ divided by $\$17,590$).

Using the data on hourly gross earnings shown in Table 1, the total wage bill in the Northeast for 1,000 hours worked is \$21,870 ($\$21.87 \times 1,000$ hours); the total amount of workers' compensation benefits is \$729 ($\21.87×50 hours \times 2/3 replacement rate); benefits (assumed to be the same as costs for this example) as a percentage of wages and salaries in the Northeast are 3.33 percent ($\$729$ divided by $\$21,870$).

7. U.S. Department of Labor, 2004, "Notes on Current Labor Statistics," 111.

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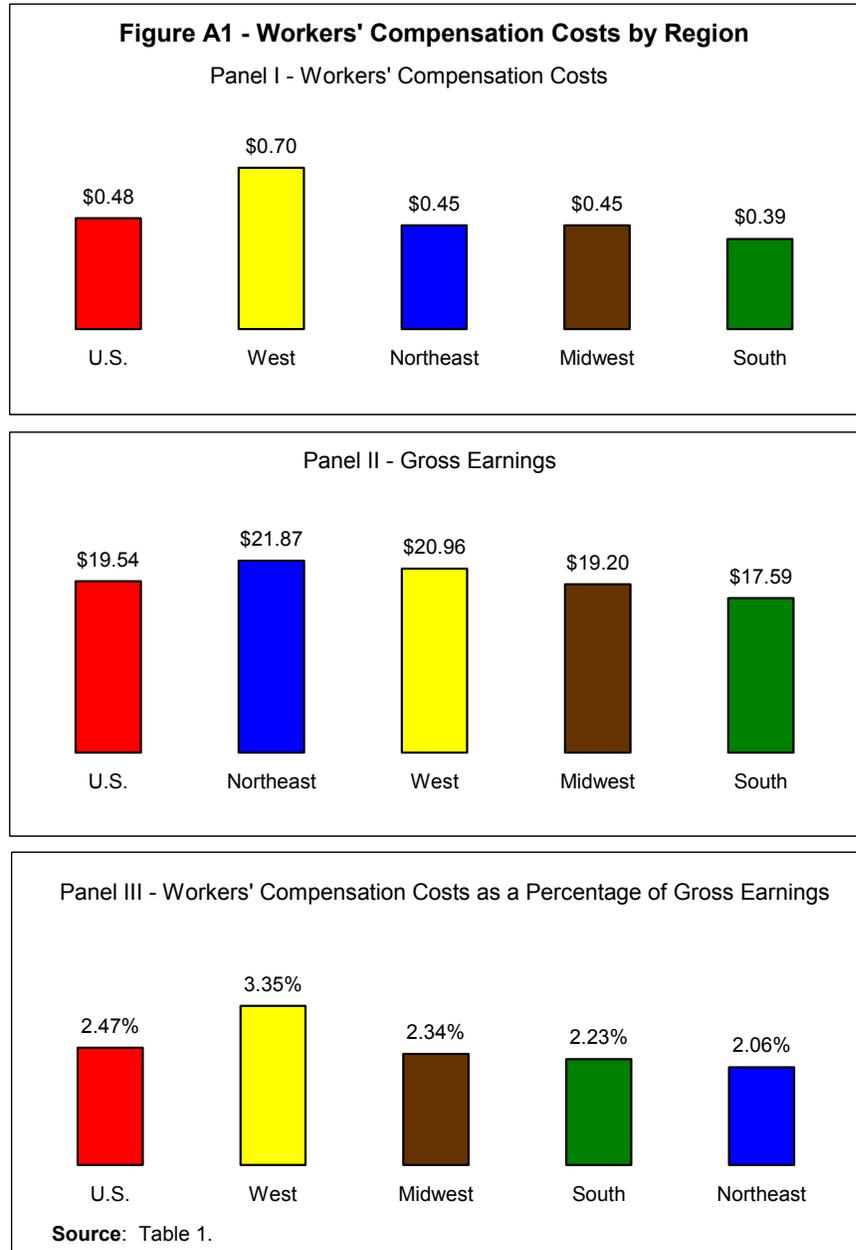
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APPENDIX A

Alternative Ways to Measure Regional Differences in Workers' Compensation Costs

This appendix examines how regions can switch their relative costs compared to the United States depending on which measure of workers' compensation costs is used. The explanation is provided by a closer examination of the arithmetic procedure used in computing workers' compensation costs as a percentage of gross earnings. The workers' compensation costs per hour (row 9A of Table 1 and Appendix Figure A1: Panel I, which is the same as Figure B in the article) have to be divided by gross earnings per hour (row 2 of Table 1 and Appendix Figure A1: Panel II) in order to produce the figures on workers' compensation costs as a percentage of wages and salaries (row 12 of Table 1 and Appendix Figure A1: Panel III, which is the same as Figure A in the article). The relationships between these numerators and denominators for the four regions account for the fluctuations in rankings between Figure A and Figure B in the article.

Consider the Northeast. Workers' compensation costs per hour in the Northeast (\$0.45 per hour) are six percent below the national average for workers' compensation costs (\$0.48 per hour). Nonetheless, in terms of workers' compensation costs per hour worked, the Northeast tied for second with the Midwest among the four census regions. Of importance is that the hourly gross earnings in the Northeast (\$21.87 per hour -- row 2 of Table 1) are 12 percent more than the national average for gross earnings (\$19.54 -- row 2 of Table 1). As a result of these high wages, the Northeast's workers' compensation costs as a percentage of gross earnings (2.06 percent -- which is \$0.45 divided by \$21.87) is 0.41 percentage points less than the national average of workers' compensation costs as a percentage of gross earnings (2.47 percent -- or \$0.48 divided by \$19.54). And the Northeast's combination of workers' compensation



costs that were less than the national average and wages that were well above the national average means that workers' compensation costs as a percent of payroll are lower in the Northeast than in the other three census regions.

Notes for Tables 1 - 6.

1. The text and all tables in this article use the term "remuneration" in place of the term "compensation" which is used by the BLS.
2. Total remuneration (row 1) = gross earnings (row 2) + benefits other than pay (row 6).
3. Gross earnings (row 2) = wages and salaries (row 3) + paid leave (row 4) + supplemental pay (row 5).
4. Benefits other than pay (row 6) = insurance (row 7) + retirement benefits (row 8) + legally required benefits (row 9) + other benefits (row 10).
5. Workers' compensation (row 9A) is one of the legally required benefits (row 9).
6. Workers' compensation as percent of remuneration (row 11) = workers' compensation (row 9A) / total remuneration (row 1).
7. Workers' compensation as percent of gross earnings (row 12) = workers' compensation (row 9A) / gross earnings (row 2).
8. Results in rows (2), (6), (11), and (12) were calculated by Florence Blum and John F. Burton, Jr.
9. Individual items may not sum to total remuneration because of rounding in BLS data.
10. * means cost per hour worked is \$0.01 or less
11. The data in Tables 1-6 are annual averages of the quarterly data presented in the quarterly surveys conducted by the Bureau of Labor Statistics. We calculated the annual averages, which are not weighted to reflect changes in employment among quarters.

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Workers' Compensation and Constitutional Law

by John F. Burton, Jr.

This article provides an introduction to the impact of constitutional law on the design and implementation of workers' compensation programs in the United States. Although the vast majority of workers' compensation cases do not involve litigation over constitutional law principles, federal and state constitutions nonetheless provide a framework within which state and federal workers' compensation programs must operate.¹

CONSTITUTIONAL LIMITS AT THE ORIGINS OF WORKERS' COMPENSATION

The Law Prior to Workers' Compensation²

Until the early twentieth century, the only remedy available for a worker injured at work was a common-law negligence suit against the employer. If the employee was successful in the suit, the recovery could be

Initial efforts at reform took the form of employer liability acts, which eliminated some of these employer defenses.

substantial since the damages could include compensation for lost wages and for such non-pecuniary consequences as pain and suffering. However, even if the worker could prove that the employer was negligent, a negligent employer had several defenses that were often insurmountable legal hurdles for many workers. An example was the fellow servant rule, which absolved the employer from any liability if the worker was injured due to the negligence of a fellow employee.³

Initial efforts at reform took the form of employer liability acts, which eliminated some of these employer defenses. Nonetheless, employees still had to prove negligence, which remained a significant obstacle to recovery.⁴ The conventional wisdom is that in the early twentieth century, the average award in negligence suits was low. However, the occasional large award meant that employers were not entirely satisfied with this legal remedy. Moreover, the negligence suits also were time consuming and often involved significant legal expenses.

The Workers' Compensation Principle⁵

Workers' compensation statutes, which provide cash benefits and medical care to injured workers, were designed to overcome the perceived deficiencies of the common law and employer liability acts. The statutes incorporated the workers' compensation principle, which has two elements. Workers benefit from a no-fault system, which enables them to recover in many situations in which tort suits would be unsuccessful. Employers benefit from limited liability, which means that the limited benefits provided in the workers' compensation statute are the only liability of the employer to its employees.

Initial State Constitutional Challenges to Workers' Compensation

The fate of the initial workmen's compensation statutes (as the program was known until the 1970s) was described by Williams and Barth (1973):

In 1910 New York became the first state to adopt a workmen's compensation act of general application which was compulsory for certain especially hazardous jobs and optional for others. "Although most corporate leaders and politicians of prominence, such as Theodore Roosevelt and President Taft, had publicly endorsed workmen's compensation, there was a residue of conservative opposition to such 'radical' social legislation." This conservative view was expressed by the courts who felt that these acts were plainly revolutionary by common law standards. Thus, in 1911 in *Ives v. South Buffalo Railway Company* [, 94 N.E. 431 (N.Y. 1911),] the Court of Appeals of New York held the New York act unconstitutional on the grounds of deprivation of property without due process of law. This decision was met with an explosion of criticism from all sides. Theodore Roosevelt was so angry that he openly advocated the passage of laws which would permit the recall of judicial decisions. While even the

supporters of compensation legislation considered this measure too extreme, fear of its passage prompted many conservatives to support compensation legislation by more traditional means.

Following the *Ives* decision many state courts adopted a more liberal attitude toward compensation. Unfortunately, this decision had residual effects on the system. The “fear of unconstitutionality impelled the legislatures to pass over the ideal type of coverage, which would be both comprehensive and compulsory, in favor of more awkward and fragmentary plans ... [to] ensure [their] constitutional validity.” Elective or optional statutes became the rule, and several states limited their coverage to hazardous employment. By the time the U.S. Supreme Court held in 1917 that compulsory compensation laws were constitutional, the pattern of elective statutes had been set....

The U. S. Supreme Court and the Constitutionality of State Workers’ Compensation Laws

The landmark case dealing with the constitutionality of state workers’ compensation laws is *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917).⁶ Subsequent to the *Ives* decision, the New York constitution was amended to permit the legislature “to enact laws

...the provision did not violate the Fourteenth Amendment so long as the benefits were reasonable.

for the protection of the lives, health, or safety of employees” The Court of Appeals in New York, which is the state’s highest court, upheld the constitutionality of the state law.

The law then challenged before the U.S. Supreme Court on the grounds that the Fourteenth Amendment of the U.S. Constitution was violated. The Fourteenth Amendment provides, in part, that “nor shall any State deprive any person of life, liberty, or property, without due process of law” The workers’ compensation statute was challenged in part because it prohibited

agreements in which employees waived their rights to worker’s compensation benefits. The Supreme Court had previously found state efforts to limit agreements between workers and employers unconstitutional under the Fourteenth Amendment. However, the Court approved the workers’ compensation statute as a reasonable exercise of the police power of the state because the purpose of the restriction involved “compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare”

The Court also considered whether the Fourteenth Amendment was violated because employers were required to provide benefits even though they were not at fault. The Court turned back this challenge and pointed out that liability without fault was used in other areas of the law, such as the liability of common carriers or innkeepers for damages resulting from activities within their domain, even if they had not committed fault. In addition, the workers’ compensation statute was challenged because it limited the recovery of injured workers to the benefits prescribed by statute, rather than the amount of damages available in a common law suit. Again the Court held the provision did not violate the Fourteenth Amendment so long as the benefits were reasonable. (The requirement that benefits must be reasonable is examined in more detail in the final portion of this article.)

Constitutional Limits on Federal Workers’ Compensation Programs

The Fourteenth Amendment to the U.S. Constitution was the basis for the challenge to the New York workers’ compensation statute. Another significant constitutional limitation on the design of the initial workers’ compensation statutes was the Supreme Court’s interpretation of the Commerce Clause of the U.S. Constitution. (U.S. Const. Art. I, § 8, cl. 3.) Prior to the 1930s, the interpretation of this clause by the Supreme Court meant that the authority of Congress to regulate private sector employers was quite limited. As a result, workers’ compensation statutes dealing with most private-sector employees had to be enacted at the state level. The Congress was able to enact a workers’ compensation program for federal workers, which occurred in 1908 with the Federal Employees’ Compensation Act (FECA). Also, because railroads were literally engaged

in interstate commerce, Congress was able in 1908 to enact the Federal Employers' Liability Act (FELA), which is applicable to workplace injuries for railroad workers.

The Supreme Court changed its interpretation of the Commerce Clause in the 1930s. Thus in the landmark case, *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1

The Supreme Court changed its interpretation of the Commerce Clause in the 1930s.

(1937), the constitutionality of the National Labor Relations Act was upheld. The Congress consequently has the constitutional authority to enact a federal workers' compensation statute applicable to private sector employers. However, despite the efforts of some well-meaning reformers who argue that there should at least be federal standards for state workers' compensation programs, the state-based system established in the early 1900s as a result of constitutional limits on federal action has persisted even though those limits are no longer applicable.⁷

CURRENT CONSTITUTIONAL LIMITS ON WORKERS' COMPENSATION

Challenges to Distinctions Among Classes of Beneficiaries

Constitutional issues occasionally arise in workers' compensation cases when states treat different classes of beneficiaries unequally. In New Mexico, the workers' compensation statute limited compensation for mental disabilities to 100 weeks while compensation for physical impairments could last up to 700 weeks. The state's Supreme Court, in *Breen v. Carlsbad*, 120 P.3d 413, (N.M. 2005), held this provision violated the equal protection guarantees of the New Mexico Constitution. A similar fate eviscerated the Montana statute that limited a claimant to \$10,000 because her disability resulted from a disease, while her benefits would have been \$27,027 if the cause had been an injury. In *Stavenjord v. Montana*, 67 P.3d 229 (Mont. 2003), the state's supreme court held the limitation violated the equal protection provision in the Montana constitution.

In *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003), a Colorado statute requiring an injured worker to pay \$675 for an independent medical exam if the employer-selected physician makes an initial decision to terminate benefits was held to violate the due process guarantee of the U.S. Constitution as applied to indigent workers. Alas, at least for the attorneys among our subscribers, a New Mexico statute that imposed a \$12,500 limit on attorney fees, which the Workers' Compensation Judge described as "miserly," was held not to violate the state's constitutional rights to equal protection and due process in *Wagner v. AGW Consultants*, 114 P.3d 1050 (N.M. 2005).

Challenges to Efforts to Eliminate Workers' Compensation Benefits

The Arizona constitution mandates that an employee receive workers' compensation if the workplace injury [interpreted as including occupational diseases] "is caused in whole, or in part, or contributed to, by a necessary risk or danger of such employment..." Grammatico admitted he had smoked marijuana and ingested methamphetamine in the two days prior to his workplace injury and his post-accident urine test

Alas...a New Mexico statute that imposed a \$12,500 limit on attorney fees...was held not to violate the state's constitutional rights to equal protection and due process...

showed positive results for these substances plus amphetamine. He was denied benefits under a statute that disqualifies a worker who fails to pass a drug test unless the employee proves the use of the unlawful substance "was not a contributing cause of the employee's injury." The Arizona Supreme Court, in *Grammatico v. Industrial Commission*, 117 P.3d 786, 791 (Ariz. 2005) held the statute "cannot be constitutionally interpreted to require proof that the disease was *solely* or *exclusively* caused by the industrial exposure."

Challenges to Statutes That Eliminate All Remedies⁸

Can states eliminate all remedies – workers' compensation as well as tort suits -- for workers who experience workplace injuries or diseases? There are several variations of answers to this question, of which only a few involve constitutional issues. However since the

answers are related, all are considered in this discussion.

1. No Remedy Anywhere I? Injuries or Diseases Are Covered but Not the Consequences. Normally, an employee injured at work will receive workers' compensation benefits and, because of the exclusive remedy doctrine that is part of the workers compensation principle, the worker will be barred from a tort suit against the employer. There are, however, two situa-

There are, however, two situations in which an employee may not qualify for workers' compensation benefits and may also not be able to bring a tort suit against the employer.

tions in which an employee may not qualify for workers' compensation benefits and may also not be able to bring a tort suit against the employer. In the first situation: the worker meets all of the legal tests for workers' compensation coverage, but the workers' compensation statute does not provide benefits for the adverse consequences of the injury or disease experienced by the worker. In *Livitsanos v. Superior Court*, 828 P.2d 1195 (Cal. 1992), the California Supreme Court held that claims for intentional or negligent infliction of emotional distress at the workplace are preempted by the exclusivity provisions of the workers' compensation law so long as "the employer's conduct neither contravenes fundamental public policy nor exceeds the risks inherent in the employment relationship." This decision is illustrative of the general rule that "if the injury itself comes within the coverage formula, an action for damages is barred although the particular element of damage is not compensated for, as in the case of disfigurement in some states, impotency, or pain and suffering." Larson and Larson (2006: 100-1)

2. No Remedy Anywhere IIA? Injuries or Diseases Are Not Covered: Statutory Challenges. The second situation where there may be no remedy is when the injury or disease is not covered by the workers' compensation statute, and the state also seeks to preclude the worker from bringing a tort suit. Kleinhesselink, who was a safety coordinator, experienced mental and physical conditions resulting from mental stress at the workplace because his safety recommendations were ignored, resulting in deaths and injuries. The case

arose in a state that (1) made workers' compensation the exclusive remedy for work-related injuries and diseases, and (2) excluded the type of conditions Kleinhesselink experienced from coverage because their cause was mental rather than physical. The employee filed a tort suit alleging two counts of negligence against the employer. In *Kleinhesselink v. Chevron*, 920 P.2d 108 (Mont. 1996), the Montana Supreme Court held that the employer could not have the counts dismissed because of the exclusive remedy provision. The court concluded that the trade-off of no-fault recovery for employees in return for protection from large damage awards for employers means that "it is axiomatic that there must be some possibility of recovery by the employee for the compromise to hold".

A similar result occurred in Oregon in response to the 1990 enactment of SB 1197, which provided *inter alia* that permanent benefits were compensable under the state's workers' compensation statute only if work was the "major contributing cause" (MCC) of the permanent disability.⁹ In *Errand v. Cascade Steel Rolling Mills, Inc.*, 888 P.2d 544 (Or. 1995), the court essentially held that when the Oregon legislature restricted access to the workers' compensation program by enacting the

...the logical implication was that the exclusive remedy provision did not apply to the conditions that were no longer compensable, and so therefore the worker affected by the MCC provision was eligible to file a tort suit.

MCC provision, the logical implication was that the exclusive remedy provision did not apply to the conditions that were no longer compensable, and so therefore the worker affected by the MCC provision was eligible to file a tort suit.

A contrasting decision is *Bias v. Eastern Associated Coal Corp.*, 2006 W. Va. LEXIS 43 (W. Va.). The workers' compensation statute excludes mental injuries with a non-physical cause ("mental-mental injuries"), which precluded Bias from bringing a workers' compensation suit. The statute also provided immunity to employers from damage suits for work-related injuries unless (1) the employer defaulted on payment of workers' compensation premiums, or (2) deliberately intended to produce injury or death to the employee, or (3) the Legisla-

ture expressly provides an employee a private remedy outside the workers' compensation system. Since none of these exceptions was applicable, Bias had no remedy.

3. No Remedy Anywhere IIB? Injuries or Diseases Not Covered: State Constitutional Challenges. The Oregon legislature reacted to the Errand decision, discussed above, by amending the Oregon workers' compensation statute to make clear that workers who experience work-related injuries for which the workplace was not the major contributing cause (MCC) were eligible for neither workers compensation nor a tort suit. The Oregon Supreme Court responded in *Smother's v. Gresham Transfer, Inc.*, 23 P.3d 333 (2001). Essen-

Does this "ancient" pronouncement of a constitutional principle...have any continuing validity as the basis for a challenge to the exclusivity doctrine...

tially, the court held that the Oregon Constitution protected the right of every person who suffers an injury to have a remedy at law, and therefore if Smother's was not entitled to workers' compensation benefits because of the restrictions imposed by the Oregon legislature, he had a constitutional right to bring a tort suit. This provocative and interesting case is worth reading as an example of a successful constitutional challenge to the exclusivity doctrine.

Another recent example of a successful constitutional challenge to a state's effort to eliminate all remedies for a workplace injury or disease is *Automated Conveyor Systems v. Dooley*, 362 Ark. 215 (Ark. 2005). The Arkansas Supreme Court held that disallowing a tort suit for injuries not expressly covered by the workers' compensation act "is not in line with its stated purpose and, in addition, would contravene ... the Arkansas Constitution."

Such examples are rare, however. Indeed, Larson and Larson (2006: §100.02) state that "Exclusiveness clauses have consistently been held to be constitutional, under the equal protection and due process clauses of both federal and state constitutions. Attacks based on specific state constitutional provisions, such as those creating a right of action for wrongful death, have fared no better." An example of an unsuccessful

constitutional challenge is *Shamrock Coal v. Maricle*, 5 S.W.3d 130 (Ky. 1999). The Kentucky legislature amended the law to eliminate workers' compensation benefits for workers who had less than a 20 percent respiratory impairment as a result of black lung disease. The employer subsequently laid off nineteen workers who would have been entitled to workers' compensation benefits under the prior law but who were not entitled to benefits because of the new impairment threshold. The Kentucky Supreme Court in a 4-3 decision held that the employer could rely on the exclusive remedy provision even though the workers had no remedy.

4. No Remedy Anywhere IIIB? Injuries or Diseases Not Covered: Challenges Based on the U.S. Constitution. The first section discussed the seminal case by the U.S. Supreme Court upholding the constitutionality of the New York workers' compensation statute, *New York Central Railroad Co. v. White*, 23 U.S. 188 (1977). One part of the Supreme Court's rationale was as follows (at 205-06):

Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability to cases of negligence.

This, of course is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable.

Does this "ancient" pronouncement of a constitutional principle involving the Fourteenth Amendment of the U.S. Constitution have any continuing validity as the basis for a challenge to the exclusivity doctrine in a state workers' compensation statute when, as in Kentucky, the state does not provides a remedy "to every disabled employee"? While I make no pretense of being a specialist in constitutional law, the recent movement of states to eliminate workers' compensation as a remedy for workplace injuries and diseases while protecting employers from any other liability for these workplace conditions appears to stretch the boundaries of what the Supreme Court would accept as a supportable scale of compensation.¹⁰

ENDNOTES

1. The article is largely based on material in Willborn et al. (2007). The volume was at the printer when this article was written in November 2006 and the page numbers cited here may be slightly different in the volume when published.

2. The discussion of the law before workers' compensation is based on Burton and Mitchell (2003).

3. The fellow servant rule was one of the three common law defenses – know as “the unholy trinity” -- that severely limited the ability of workers to recover from their employers for workplace injuries at the beginning of the twentieth century. The other two were contributory negligence and assumption of the risk, which are discussed at Willborn et al. (2007: 851).

4. As a result of necessity for the employee to prove employer negligence, the employers' liability approach was abandoned in all jurisdictions except the railroads, where it still exists.

5. The workers' compensation principle is examined by Willborn et al. (2007: note 2 at 859-60).

6. *New York Central Railroad v. White* is abstracted at Willborn et al. (2007: 855-859).

7. The unsuccessful effort by the National Commission on State Workmen's Compensation Laws to promote federal standards for state workers' compensation programs is discussed in Burton (2005).

8. The discussion of challenges to statutes that eliminate all remedies is based on Willborn et al. (2007: 880-889).

9. The Oregon efforts to limit compensability of workplace injuries and diseases are examined in several articles reprinted in Burton, Blum, and Yates (2005: 371-405).

10. I am unaware of any recent challenges involving the Fourteenth Amendment of the U.S. Constitution to changes in state workers' compensation laws described by Spieler and Burton (1998) that have eliminated or substantially reduced benefits for some workers. I would welcome correspondence on this topic.

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Williams, C. Arthur, Jr. and Peter S. Barth. 1973. *Compendium on Workmen's Compensation*. Washington, DC: National Commission on State Workmen's Compensation Laws.

A Book of Possible Interest to Subscribers

Workplace Injuries and Diseases: Prevention and Compensation: Essays in Honor of Terry Thomason has recently been selected as one of the **Noteworthy Books in Industrial Relations and Labor Economics, 2005** by the Industrial Relations Section of Princeton University. The volume, edited by Karen Roberts, John F. Burton, Jr., and Matthew M. Bodah, is based on a conference held at the University of Rhode Island in honor of Terry Thomason, who was a distinguished scholar of workers' compensation, workplace safety, and collective bargaining before his untimely death in 2002.

The book contains 11 chapters, including “Economic Incentives and Workplace Safety” by Terry Thomason, which is an insightful review of the literature on topics such as the effect of experience rating in workers' compensation on safety. “The Adequacy of Workers' Compensation Cash Benefits” by Leslie I. Boden, Robert T. Reville, and Jeff Biddle documents the inadequacy of permanent partial disability benefits in California, New Mexico, Oregon, Washington, and Wisconsin. “Health Care and Workers Compensation” by Cameron Mustard and Sandra Sinclair examines the relatively low cost of health care for injured workers in Canada compared to the U.S. Peter Barth, in “Revisiting Black Lung: Can the Feds Deliver Workers' Compensation for Occupational Disease?”, examines the role of the Federal Government in providing benefits to workers who arguably have not been well served by state workers' compensation programs. Karen Roberts explores “The Structure of and Incentives from Workers' Compensation Pricing” in her chapter. John Burton, in “Permanent Partial Disability Benefits,” proposes five criteria for evaluating PPD benefits, including delivery system efficiency and affordability.

301 Pages. \$20.00 paper. ISBN 0-88099-324-3. Published July 2005. Available from the W. E. Upjohn Institute for Employment Research, 300 S. Westnedge Avenue, Kalamazoo, MI 49007-4686. Phone: 888-227-8569. Fax: 269-343-7310. Online: <http://www.upjohninstitute.org/publications/titles/wid.html>

Summary of an Important Publication: How Much Work-Related Injury and Illness is Missed By the Current National Surveillance System?

by Kenneth D. Rosenman, Alice Kalush, Mary Jo Reilly, Joseph C. Gardiner, Mather Reeves, and Zhewui Luo.

Published in the *Journal of Occupational and Environmental Medicine*, Vol. 48, No. 4, April 2006, pp. 357-365.

Digest. The article compares the number of workplace injuries and illnesses in Michigan in 1999, 2000, and 2001 in five data bases. The *BLS Annual Survey (BLS)* is conducted annually by the Bureau of Labor Statistics of the Department of Labor for a sample of employers. The resulting statistics on occupational injuries and illnesses are the basic measure of workplace safety for the United States.¹ The *BLS Annual Survey* excludes the self-employed, farms with fewer than 11 employees, private households, federal employees, and in 27 states (but not Michigan) public employees. The information collected includes *inter alia* counts of total injuries and total illnesses, and of injuries and illnesses with restricted workdays.

The *Occupational Safety and Health Administration (OSHA) Annual Survey* is an annual survey of employers with similar exclusions to the *BLS Annual Survey*. OSHA uses the survey results for enforcement purposes.

The *Michigan Bureau of Workers' Disability and Compensation First Injury and Illness Reports (WC)* must be filed by employers for injury and diseases that result in workers' compensation claims for: 1) disability of more than seven days, 2) death, or 3) specific losses. The Michigan workers' compensation program includes public and private sector employers with some exclusions, including employers with fewer than three employees, some agricultural employers, and federal employees.

The *Michigan Occupational Diseases Reports (OD)* must be filed by all health care providers, including hospitals, clinics, laboratories, and employers, for all known or suspected work-related illnesses (but not injuries).

The *OSHA Integrated Management Information System (IMIS)* includes information on the number of injuries and illnesses shown in a log maintained by the employer when an OSHA inspection is conducted.

The data from all five databases were compared. Person-to-person matching was done for the three data bases with names of individuals (*BLS*, *WC*, and *OD*). Company level matching was done for all five data bases. The final estimates calculated the undercount

of worker injuries and illnesses "by applying standard capture-recapture methodology."

The authors estimate the number of Michigan workers with work-related injuries and diseases that resulted in greater than seven days of disability is three times greater than the official estimate derived from the *BLS Annual Survey*. The annual averages shown in Table 11 were 869,034 injuries and illnesses per year in Michigan from 1999 to 2001, not the 281,567 estimated by the BLS, which represents a 67.6 percent undercount in the *BLS Annual Survey*. This meant that the equivalent of one in five Michigan workers had a work-related injury or illness each year, not one in 15 as indicated in the *BLS Annual Survey*. (The actual incidences are less since some workers had more than one injury or illness during a year.)

The extent of undercounting varied by industry and by type of injury or illness. Undercounting, however, was similar for injuries and illnesses. Table 7 indicated that the capture-recapture analysis using *BLS* and *WC* annual data resulted in a 67.3 percent undercount of injuries (26,292 *BLS* and 80,399 total) and a 69.2 percent undercount of illnesses (4,508 *BLS* and 14,634 total).

Editor's Comment. The authors report that a 1987 National Academy of Sciences report, which showed that BLS national estimates missed 50 percent of acute work-related deaths, caused BLS to abandon the *BLS Annual Survey* as a source of information on workplace deaths. Instead, the BLS began the *Census of Fatal Occupational Injuries (CFOI)*, which uses multiple data sources and which is not dependent on employer responses to a survey as the sole source of information. Although the authors do not explicitly recommend such a comprehensive approach to measuring workplace injuries and diseases, the results of this and other studies documenting the serious deficiencies of the *BLS Annual Survey* suggest that an approach similar to the *CFOI* should be adopted if we are to have confidence in the national data on workplace injuries and illnesses.

1. Data from the BLS Annual Survey for 1972 to 2003 are included in Table 12 of the *Workers' Compensation Compendium 2005-06 Volume Two*.

WORKERS' COMPENSATION COMPENDIUM 2005-06

The **Workers' Compensation Compendium 2005-06** is the first edition of an annual publication designed to serve several audiences:

(1) *workers' compensation practitioners*, such as state and federal administrators and adjudications, employers, union officials, insurers, attorneys, who need current information about the benefit levels, coverage provisions, costs, and other aspects of workers' compensation programs in various states;

(2) *workers' compensation policymakers* who want analyses of significant issues, such as the policies that may control workers' compensation medical costs and the challenges to the exclusive remedy provision, which limits the right of injured workers' to bring tort suits against their employers; and

(3) *researchers* who need information about recent studies and program developments in order to improve their own analyses.

The *2005-06 Compendium* consists of six parts published in two volumes.

Volume One contains Parts I and II of the 2005-06 Compendium.

Part I includes reprints of significant articles from the first 26 issues of the *Workers' Compensation Policy Review*, spanning the issues from January/February 2001 through March/April 2005, as well as some material that appeared in subsequent issues.

Part I also includes significant articles, chapters, and reports that were originally published elsewhere but that warrant reprinting in the *2005-06 Compendium*. The articles originally appeared in the *Monthly Labor Review*, *The Millbank Quarterly*, the *Journal of the American Medical Association*, the *Journal of Occupational and Environmental Medicine*, and the *IAIABC Journal*. The chapters and reports originally appeared in the *International Encyclopedia of Business & Management* and in publications of the Workers Compensation Research Institute, the Labor and Employment Relations Association (formerly the Industrial Relations Research Association), the RAND Institute for Civil Justice and Health, and the California Commission on Health and Safety and Workers' Compensation.

Part II contains a detailed Subject Index plus a Jurisdiction Index to the articles, chapters, and reports contained in Part I.

Volume One Examines a Variety of Topics Pertaining to Workers' Compensation.

There are 45 separate entries (articles, chapters, and reports) and 422 pages in Part I. The Table of Contents can be examined at the Web site www.workerscompresources.com under *Workers' Compensation Compendium*. A brochure with more information on the *Compendium* can be obtained by calling 732-274-0600 or by faxing a request to 732-274-0678.

The *Workers' Compensation Compendium* Volume One can be ordered through any bookstore using the 10-digit ISBN: 0-9769257-0-2 or the 13-digit ISBN: 978-0-9769257-0-5 at the price of \$69.95. An order form is included on the back page of this issue of the *Workers' Compensation Policy Review*, which includes a special rate for subscribers to the *Policy Review*.

Volume Two contains Parts III to VI of the 2005-06 Compendium.

Part III, Section A contains *The Workers' Compensation Policy Review Guide to U.S. and Canadian National and Multi-Jurisdictional Data and Information on Workers' Compensation Programs*. The *Guide to Data and Information* includes a catalogue of sources of available data and information on eleven topics, including *inter alia* coverage of employees and employers, cash benefits prescribed by statute, medical benefits prescribed by statute, the costs of workers' compensation, and workers' compensation insurance arrangements.

The *Guide to Data and Information* also contains detailed information on the sources from which data can be obtained.

Part III, Section B includes a set of 13 tables with extensive information on workers' compensation programs, including extensive historical data on the costs of workers' compensation insurance and on the statutory adequacy of cash benefits.

Part III, Section C includes selected tables from the latest report by the National Academy of Social Insurance on the coverage, benefits, and costs of U.S. workers' compensation programs.

Part III, Section D includes information on state workers' compensation agencies.

Part III, Section E provides information on special funds that operated as part of the workers' compensation programs in many states.

Part III, Section F documents the extent of state compliance with the 19 essential recommendations of the National Commission on State Workmen's Compensation Laws.

Part III, Section G includes excerpts from the Model Workers' Compensation Law published by the Workmen's Council of State Governments.

Part IV reproduces the 20 tables from the January 2005 edition of *State Workers' Compensation Laws*, which is published by the Office of Workers' Compensation Programs, Employment Standards Administration of the U.S. Department of Labor. We have found this to be the most reliable and comprehensive source of information on current U.S. workers' compensation programs. We appreciate the assistance of Shelby Hallmark of the U.S. Department of Labor in making this publication available to us on a timely basis.

Part V provides descriptions of three organizations that conduct and sponsor research on workers' compensation and workplace safety and health. They are the Workers Compensation Research Institute, the California Commission on Health and Safety and Workers' Compensation, and the Institute for Work and Health.

Part VI is an index to the material contained in Parts III to V.

Volume Two provides a plethora of information and data on workers' compensation programs.

There are 319 pages in Parts III to V plus the index on Part VI. The Table of Contents can be examined at the Web site www.workerscompresources.com under *Workers' Compensation Compendium*. A brochure with more information on the *Compendium* can be obtained by calling 732-274-060 or by faxing a request to 732-274-0678.

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