
2013 Codification of Oklahoma Administrative Workers' Compensation Act (Section 1 of Title 85A, et seq.)

On May 7, 2013, Governor Mary Fallin signed into law Senate Bill 1062, instituting sweeping changes to the existing Oklahoma workers' compensation law. The law is effective February 1, 2014, but some provisions have different operative dates.

This document discusses the significant changes to the Act. Although it will take some time to implement the full system, moving to an administrative system should result in reductions in litigation costs. Long term, there may be some positive impact on employers' loss experience.

Major Changes to Oklahoma Workers' Compensation Law

Senate Bill 1062 consists of three separate sections.

1. The "Administrative Workers' Compensation Act" in Sections 1 through 106 and 150 through 168;
2. The "Oklahoma Employee Injury Benefit Act" in Sections 107 through 120; and
3. The "Workers' Compensation Arbitration Act" in Sections 121 through 149.

The Administrative Workers' Compensation Act (AWCA)

- Facilitates the move from a court-based adjudicative system to an administrative system.
- Insurance coverage or qualified self-insured status is still required, unless the employer "opts out" of the Act using an approved benefit plan.
- Indemnity benefits are expected to move slightly lower since the cap on maximum TTD benefits has been lowered from 100% to 70% of the state average weekly wage.
- PPD benefits are deferred if the employee returns to work, and are reduced by 70% of the employee's average weekly wage for each week the employee works in the pre-injury or equivalent job.
- Medical benefits are expected to remain the same.
- Vocational rehabilitation has been expanded.

The Oklahoma Employee Injury Benefit Act (OEIBA)

- Permits employers to "opt out" of the workers' compensation administrative system if certain requirements are met.
- Creates two new funds to protect injured workers in the event of default by a self-insured employer or insurer.
- Is intended to re-create the same benefits the employee would be eligible to receive under the AWCA.
- Provides limited judicial review for injured employees aggrieved by a benefit plan decision.

The Workers' Compensation Arbitration Act (WCAA)

- Permits parties to enter into arbitration agreements to resolve benefit disputes.
- Provides for limited appellate review of arbitration decisions.

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The Administrative Workers' Compensation Act

Administrative Changes

- Moves Oklahoma from a court-based adjudicative system to an administrative law system. The existing Workers' Compensation Court shall be renamed the Workers' Compensation Court of Existing Claims, and current judges' terms shall expire on a staggered basis.
- Codifies exclusive remedy provisions, with certain qualifications and exceptions.
- Creates specific anti-fraud provisions, including the creation and funding of a Workers' Compensation Fraud Investigation Unit.
- Prohibits discrimination or retaliation against an employee for pursuing a claim, retaining counsel, or providing testimony.
- Creates the Oklahoma Workers' Compensation Commission, consisting of three full-time commissioners serving staggered six-year terms, with associated powers to flesh out the administrative system, including appellate procedure, appropriate rulemaking, etc.
- Establishes licensing fees "for the privilege of qualifying with the commission for the writing of compensation insurance."
- Creates and provides funding and administrative rules for the Multiple Injury Trust Fund, the Workers' Compensation Fund, and the Self-Insured Guaranty Fund.
- Provides for hearings, including a preliminary conference procedure, with requisite notice to the parties. The commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has proved his or her case by a preponderance of the evidence. The Act is to be strictly construed, and the evidence must be weighed impartially.
- The Commission is provided contempt powers and the authority to preserve and enforce order during any proceeding before it, as well as to require subpoenas, testimony of witnesses, and production of documents. Failure to adhere to the Commission's lawful order or process may result in a contempt finding and a fine not to exceed \$10,000.
- Establishes an appellate procedure from the ALJ to the WCC, subject to a filing fee. The Commission may reverse or modify only if it determines that the decision was against the clear weight of the evidence or contrary to law. The aggrieved party may then appeal to the Oklahoma Supreme Court within 20 days of the judgment being sent to the parties. Such review may be subject to one or more levels of judicial scrutiny, including error of law, clearly erroneous, arbitrary or capricious, missing findings of fact, or if the order was procured by fraud.
- Under limited circumstances, the Commission may review any compensation judgment, award or decision within six months of termination of the compensation period fixed in the original compensation judgment or award, on the Commission's own motion or on the application of any party in interest, on the ground that there has been a change in physical condition or on proof of erroneous wage rates. The Commission may also correct any clerical error in any compensation judgment or award within one year from the date of its issuance.

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Insurance Coverage

- Obligates all employers to insure or self-insure, or opt out through the use of an approved plan, including some exemptions, fines and penalties for failure to secure compensation, etc.
- Permits certain persons (officers, sole proprietors) to exclude themselves from coverage.
- Creates a statutory employer provision.
- Creates a statutory lien amounting to two thirds of the recovery against a third party for “the amount paid and to be paid by them as compensation to the injured employee...”

Compensability

- Limits compensability of mental-mental injuries to victims of a crime of violence.
- Limits compensability of cardiovascular, pulmonary and similar enumerated claims.
- A hernia is not compensable unless it meets certain enumerated conditions.
- Employer is assigned specific notice requirements, subject to civil penalties for failure to comply.
- Occupational disease claims are not compensable if the employee “falsely represented himself or herself in writing as not having previously been disabled, laid off, or compensated in damages or otherwise, because of the disease.”
- Limits compensability of contagious diseases to those contracted in the course and scope of employment in or immediately connected with a hospital or sanatorium treating persons suffering from the disease.
- Liability for a compensable occupational disease is limited to the employer (and its carrier, if any) in whose employment the employee was last injuriously exposed to the hazards of the disease, in an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the period of such employment. AWW shall be calculated based on date of last injurious exposure. Written notice must be provided within six months after manifestation of the disease or cumulative trauma, or within six months after death.
- Limits compensability for asbestosis and silicosis claims.
- Creates a rebuttable presumption that an injury is not work-related if the employee fails to give oral or written notice within 30 days.
- Creates a rebuttable presumption that the occupational disease or cumulative trauma injury did not arise out of and in the course of the employment if the employee fails to give oral or written notice to the employer within 30 days of the employee’s separation from employment.
- Employee must file a claim within one year of the date of injury for accidental injury claims, or within two years of the date of last injurious exposure for occupational disease or occupational infection claims. Death claims must be filed within two years of the date of death. The failure to obtain benefits in the one year period following the filing of the claim, or a failure to prosecute the claim in that time period, will result in dismissal.
- Establishes schedules and limitations on attorneys’ fees.

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- Establishes the means and methodology for controversion of claims, including a process for requesting extensions.
- When there is a dispute between carriers as to which is responsible for payment of benefits, the Commission shall require benefits to be paid by equal shares until the responsible carrier's liability is ultimately established.

Medical

- Specifies the use of the Official Disability Guidelines - Treatment in Workers' Compensation (ODG).
- Reauthorizes a nine-member "Physician Advisory Committee" (PAC) to assist and advise the Commission regarding a number of medical issues.
- The PAC "may recommend the adoption of a method or system to evaluate permanent disability that shall deviate from, or be used in place of or in combination with the Guides." The Commission may adopt the recommendations in whole or in part, subject to further confirmation by the Legislature.
- Forbids balance billing injured workers for medical treatment, except for not compensable injuries.
- Employer has right to choose treating physician within five days of actual knowledge of injury. Sets limits on continuing medical maintenance or pain management treatment outside certain parameters, and requires prior approval unless previously ordered by the Commission. Employee is entitled to seek one change of physician.
- Employee must submit for an IME, and failure to do so bars employee's right to further prosecute any proceeding under the Act.
- The Commission shall create a fee schedule, subject to biannual review, to set the maximum rate at which medical providers shall be reimbursed for medical care. The Commission shall also create a reasonable stoploss provision for certain catastrophic injuries. Provides for attorney fees to the party that prevails in full in a claim for reimbursement.
- Employer is not liable for payments if the Commission determines there was no compensable injury.
- The employer may submit a fee dispute to the Commission for determination.
- Permits utilization of medical networks via a "certified workplace medical plan." Sets forth requirements for application and approval of such Plans. Provides for reductions in premium to non-experience-rated employers. Certification is good for five years, and is subject to review.
- Under certain circumstances, missing two or more scheduled appointments for treatment may forfeit the injured employee's eligibility to receive benefits under the Act, unless otherwise excused.
- Healthcare service providers must provide access to medical records, and a person providing such access in good faith in accordance with the Commission's rules shall not incur legal liability for disclosure.
- Provides for award of prosthetic devices for lifetime of the claimant, unless there is an intervening injury to the part of the body for which a prosthetic device is provided.

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Indemnity

- TTD set to 70% of the injured employee's average weekly wage, not to exceed 70% of the state average weekly wage, capped at 104 weeks, but the ALJ may extend an additional 52 weeks.
- Provides rules for termination of TTD and adjudication of same. Not payable during those weeks for which the worker receives unemployment insurance benefits.
- Establishes PPD rates and schedules, permanency to be determined pursuant to the AMA Guides, with reductions for prior injuries. PPD not to exceed 100% to the body as a whole, maximum of 350 weeks.
- PTD set to 70% of the injured employee's AWW, not to exceed 70% of the state AWW, payable for 15 years or until claimant reaches the age of maximum SSI retirement benefits, whichever is longer. Claimants must file an annual affidavit confirming they have not been gainfully employed and are not capable of gainful employment, and benefits may be suspended for failing to provide the affidavit.
- Establishes a vocational rehabilitation program, with the primary goal of returning the injured worker to pre-injury or equivalent position. Presumption in favor of ordering VR services for certain eligible injured employees. Subject to 52-week VR period.
- With some exceptions, AWW is based on dividing the employee's gross earnings by the number of full weeks of employment with the employer, up to a maximum of 52 weeks. AWW for certain enumerated voluntary or uncompensated workers shall be determined by using the wages of the employee in his or her regular occupation.
- TTD for "nonsurgical soft tissue injury" (sprains, strains, contusions, tendinitis and muscle tears, including cumulative trauma) is limited to eight weeks, which may be extended by the Commission. Failure to undergo recommended surgical treatment within 30 days of approval of surgery by the employer or insurer may bar further benefits, if the delay was caused by the injured employee.
- With certain limited exceptions, claims for additional compensation must be filed within one year from the date of last payment of disability compensation or two years from the date of the injury, whichever is greater, and must be accompanied by a bona fide request for hearing within six months of the date of filing.
- Compensation for occupational disease is subject to apportionment, by reducing the number of weekly or monthly payments to the extent the pre-existing disease increases the disability of the compensable injury.
- Advances against future benefits are to be reimbursed from any unpaid installments of compensation due. Awards of past-due compensation benefits are subject to interest from the date an award is made by the ALJ or WCC.

Miscellaneous

- Public entities must also provide workers compensation to their employees and elected officials through CompSource Oklahoma[®]. Also provides for certain exceptions, particularly in the event CompSource Oklahoma becomes a mutual insurance company, CompSource Oklahoma refuses to insure the risk, or insurance can be purchased on the open market from a licensed carrier for a lower cost.

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- A claimant may pay a filing fee to the WCC to dismiss *without prejudice* any claim brought by the claimant at any time before final submission of the case to the Commission for decision.
- The Act creates an ombudsman program to assist injured workers, employers and beneficiaries.
- The WCC shall develop an ADR program to promote an informal dispute resolution process. Participation shall be voluntary and is not a prerequisite to filing a claim for benefits under the act.
- Requires that a claim for benefits shall be commenced with the filing of the Employee's First Notice of Claim for Compensation, and shall be signed by the claimant and the claimant's agent, if any. "Any person who signs the statement or causes another to sign the statement noted the statement to be false shall be guilty of perjury." Provides for controversion of the claim, and for requesting a prehearing conference or an administrative hearing.
- The WCC will compile and maintain a list of qualified independent medical examiners, and provides for the use of such experts by the Commission.
- Provides for appointment of case management for cases not covered by a certified workplace medical plan and the employer or insurer do not provide case management.
- The parties may settle all or part of the claim via "Joint Petition" filed with the Commission, and the approved Joint Petition is presumed to be valid and binding on the parties.
- Reauthorizes the Advisory Council on Workers' Compensation, consisting of nine members, which shall meet quarterly. The Advisory Council is charged with analyzing and reviewing the workers compensation system, the reports of the commission, and trends in the field of workers' compensation.
- Any form, claim, answer or report filed by anyone with the WCC pursuant to the Act must contain a written declaration that the information is true and made under the penalty of perjury.

Effective dates:

- The law goes into effect February 1, 2014.

The Oklahoma Employee Injury Benefit Act (OEIBA)

Opt-Out Provisions

- Establishes procedures by which an employer may voluntarily elect to be exempt from the Administrative Workers' Compensation Act and become a "qualified employer" under the OEIBA.
- The employer must establish a written benefit plan under 85A O.S. 203 that provides for the same form of benefits included in the AWCA, including indemnity, permanency, death benefits, vocational rehabilitation, medical, etc.
- The benefit plan applies to an occupational injury on a no-fault basis, subject to the same limitations and schedules under the AWCA.
- Payments from the benefit plan must pay without regard to whether the covered employee, qualified employer or third-party caused the injury, and without cost to the employee.

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- Optional: the benefit plan may also pay out in lump sum and/or provide for settlement agreements.
- The employer may self-fund or insure such benefits, and may be required to purchase a surety bond to secure its obligations. The Commissioner shall maintain any required securities and shall use them in the event of default.
- Creates two guaranty funds that will pay in the event of default by an insurer or self-insured plan: The Oklahoma Option Insured Guaranty Fund and the Oklahoma Option Self-Insured Guaranty Fund.
- Requires premium assessment against insurers and self-insured employers to fund the two guarantee funds.
- The benefit plan becomes the injured employee's exclusive remedy, except for intentional torts. However, it also provides for a set-off against any other award against a qualified employer for an intentional tort. Establishes a statute of limitations of two years.
- The qualified employer or its insurers must comply with federal law in the administration of the benefit plan and claims for benefits under the plan.
- In anticipation that part or parts of this Act will be found unconstitutional, the legislature created two appellate procedures, the first to be used in the event the Act is found to be constitutional, and the second in the event parts of the Act are found to be unconstitutional. The "constitutional" procedure provides for a limited internal review, followed by review in the WCC sitting *en banc*, from which the aggrieved party may appeal to the Oklahoma Supreme Court. The "unconstitutional" procedure provides for a limited internal review, followed by review in District Court.
- Unlike the administrative system, the OEIBA is to be "liberally construed" and is meant to prevail in the event of a conflict with other law.
- Challenges to all or part of the OEIBA are to be appealed directly to the Supreme Court. Provides for severability in the event parts of the Act are found unconstitutional or unenforceable. If the Act is found unconstitutional or unenforceable, a qualified employer would have 90 days after the final decision in which to comply with the insurance/self-insurance requirements under the Administrative Act.

The Workers' Compensation Arbitration Act (WCAA)

Arbitration Agreements

- Permits employers to enter into arbitration agreements on or after February 1, 2014, or to amend pre-existing arbitration agreements in writing to come within the scope of the WCAA.
- Establishes the circumstances under which the agreement to arbitrate is enforceable.
- The parties to an arbitration agreement may establish the terms of the agreement, including waiving requirements of the WCAA to the extent permitted by law.
- Provides the procedure by which the parties may apply to the commission for relief, establish the validity of an agreement to arbitrate, determine whether the parties entered into an enforceable arbitration agreement, hear disputed motions to compel arbitration, and assess costs against the party opposing the motion if the opposition was not brought in good faith.

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- The moving party initiates the arbitration proceeding by giving written notice to the commission and other parties to the arbitration agreement.
- Unless the agreement to arbitrate prohibits consolidation, the Commission has authority to consolidate separate arbitration proceedings in multiparty disputes involving common issues of fact or law.
- The parties are free to choose the method by which they will select an arbitrator, and the WCC has the right to appoint an arbitrator in the event the parties fail to do so. Arbitrators should avoid conflicts of interest and may be removed for such conflicts upon timely notice by a party.
- The parties may select multiple arbitrators. The powers of the arbitrator shall be exercised by a majority of the arbitrators, but all of them shall conduct the hearing.
- Arbitrators are immune from civil liability, even for failure to properly disclose a conflict, to the same extent as a judge of the state court acting in a judicial capacity.
- Arbitrations are to be conducted fairly and expeditiously. The arbitrator has all necessary judicial powers, including the right to call conferences of the parties, rule on evidence, hold hearings, require discovery, and question witnesses.
- An arbitrator may also decide a matter summarily upon proper request and notice of a party or by agreement of all parties.
- Parties may retain counsel to represent them at arbitration. Each party is responsible for payment of his or her own legal fees incurred, except the arbiter may award reasonable attorney fees if the arbitrator finds that a party was not acting in good faith throughout the arbitration.
- An arbitrator may issue a subpoena for attendance of witnesses or production records, may permit a deposition of any evidence to be taken for use as evidence, may permit such discovery as the arbitrator decides is appropriate, may order a party to comply, and may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets or other sensitive information.
- The arbitrator must make a record of the award and must provide notice of the award to each party. The award must also be made within the time specified by the agreement to arbitrate, or within the time ordered by the Commission, but may be subject to extension. Objections that an award was not timely made are waived unless the objection was raised prior to receiving notice of the award.
- The arbitrator has power to modify or correct an award under certain circumstances and within a limited timeframe.
- The arbitrator has the power to award temporary partial or total disability, permanency, death benefits, vocational rehabilitation, disfigurement, amputation and permanent total loss of use, medical expenses, and such other and further remedies, even remedies the Commission could not or would not have provided in the same case.
- The arbitrator's expenses and fees, together with other expenses, shall be paid by the employer.
- If an arbitrator awards benefits, the award must specify the basis in fact and the basis in law authorizing the award.

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- On application and motion by a party for judgment on the award, the commission shall issue a confirming judgment unless the award is modified or corrected, or vacated.
- On application or motion to the court by a party, the commission shall vacate an award if it was procured by corruption, fraud or other means; if there was evidence of partiality by an arbitrator who was appointed as a neutral arbitrator; if there was evidence of corruption by arbitrator; the arbitrator conducted the arbitration unfairly or exceeded his or her powers under the act; or the arbitrator failed to disclose a conflict. Certain appeal rights are waived unless timely raised.
- Motions to modify or correct an award must be made to the Commission within 30 days after receipt of the award. The commission may modify or correct the award. Otherwise, unless motion to vacate is pending, the commission shall confirm it.
- Once it confirms or vacates the order, the Commission shall enter judgment in conformity with its decision. The Commission retains exclusive jurisdiction to enforce and enter judgment confirming, vacating, correcting or modifying an arbitration award.
- An aggrieved party may appeal certain enumerated decisions to the District Court, including a final judgment entered under the WCAA.