

# WORKERS' COMPEN- SATION

A view of **workers'**  
**compensation:**  
past, present  
and future

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# Workers' compensation

Workers' compensation began as a system in the U.S. for injured workers in the early 1900s. The first comprehensive law was passed in Wisconsin in 1911, with the final state passing its legislation in 1948. In his treatise on workers' compensation, Professor Arthur Larson provided the following two explanations as to the purpose of workers' compensation:

- It is a mechanism for providing cash — wage benefits and medical care to victims of work connected injuries and placing the cost of these injuries ultimately on the consumer, through the mediation of insurance, whose premiums are passed on in the cost of the product.
- The sum total of these ingredients is a unique system which is neither a branch of tort law nor social insurance... but which has some characteristics of each. Like tort, but unlike social insurance, its operation mechanism is unilateral employer liability, with no contribution by the employee or the state; like social insurance, but unlike tort, the right to benefits and amount of benefits are based largely on a societal theory of providing support and preventing destitution.”

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*What was established has been termed the “Grand Bargain” through which employees relinquished rights under tort law for statutory benefits under workers’ compensation.*

The events and activities of the last few years have caused society to pause and consider many things from a cultural and political standpoint. Although workers' compensation is generally not one of the headline considerations, the question remains as to what we can and should learn from past events and how it can influence the construct or functioning of workers' compensation in the future. Specifically, this paper will focus on the aspects of workforce changes, healthcare and legislative/regulatory reform.



## Workforce

For the last several years, there has been significant discussion on the impact of having five distinct generations (traditionalists, baby boomers, Generation X, millennials and Generation Z) within the workforce. Pundits have supplied an abundance of instruction on how to understand, train, communicate with, manage expectations, and inspire these different generations. The one consistent theme appears to be that applying the same business practices and techniques to all will not generate the best results.

Additionally, the largest percentage group of the workforce, the baby boomers, is the one that is retiring most rapidly. Again, pundits have provided a great deal of analysis on the impact of this transition, the most critical aspects of which are the loss of skills this workforce group represents and the need to have “trained up” the necessary talent to fill the void.

The COVID-19 pandemic brought on an exacerbation of these situations, as well as others for the workforce. Consider some of the numbers:

- At its height, unemployment reached 13%
- The unemployment rate as of May 2022 had receded to 3.6%
- As of April 2022, the U.S. had 11.4 million job openings
- On average, there are roughly 6 job seekers to every 10 job openings
- It is estimated that over 3 million people have dropped out of the workforce

## What does this mean for workers' compensation?

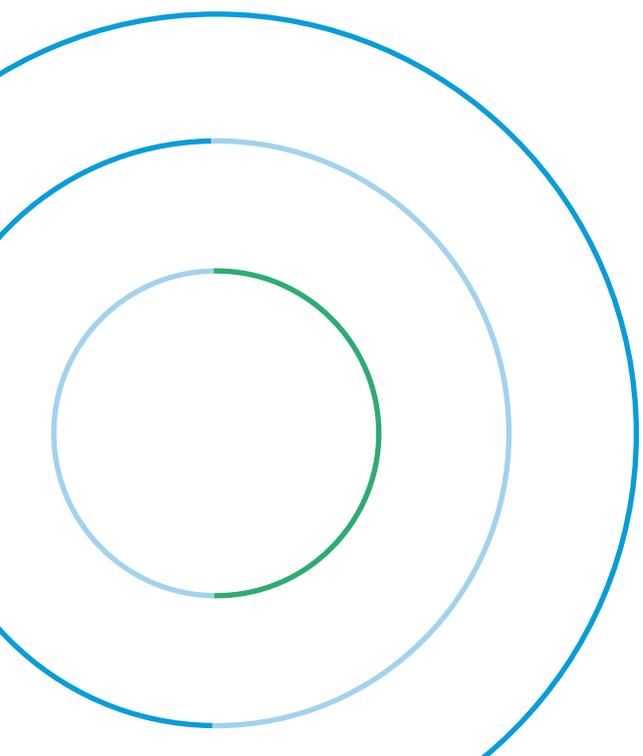
Large numbers of job openings and low unemployment generally impact employee tenure. From a workers' compensation perspective, employees with lower tenure tend to have the highest percentage of work-related injuries. (See NCCI Quarterly Economics Briefing – 2019 Q3 – How Do Recessions Impact Workers' Compensation.) Further, strong competition for employees occurs during times of low unemployment and high job openings, which can lead to a loosening of standards regarding skill set and thereby affect the quality of the hire.

There has also been a dramatic shift in employee expectations as a result of the pandemic. Although a conversation in the past, work-life balance has risen as a priority among employees. A McKinsey & Company survey in April 2021 noted that:

- 51% of employees expect an improvement in work-life balance
- 47% of employees expect an increased focus on employee well-being
- 49% of employees expect greater flexibility for day-to-day work

Pre-pandemic work patterns are no longer desirable, and this will influence how companies manage their workers' compensation exposure.

Additionally, the emotional side of work for employees has not healed from the pressures of the past two years. Gallup's State of the Global Workplace Report (2022) notes that stress among the world's workers reached an all-time high, with 44% of employees stating that they experienced a lot of stress the previous day at work. Whether this stress is because of work or carrying over into work, it is an area that employers must be focused on in considering how they manage their employees. This will naturally bleed over into the workers' compensation environment, where greater emphasis must be on the overall health of the injured worker to ensure the most beneficial outcome for the respective claim.



## Healthcare

The healthcare industry endured a tumultuous period during the pandemic. Dan Lambert, in his Forbes article “How the Pandemic has Upset Healthcare and Five Ways to Fix It” (Sept. 14, 2020), noted four problems exposed by the pandemic. COVID-19:

- Put hospitals and healthcare systems in an economic crisis.
- Caused patients to delay procedures, which can lead to more fatalities.
- Caused delays in pathology labs, which increased risks.
- Is the only health concern receiving attention from the media and government resources.

The pandemic, additionally, did not enthrall society with confidence and/or support for health-related institutions. The Robert Wood Johnson Foundation, in conjunction with the Harvard TH Chan School of Public Health, published a survey in May 2021 on the public’s perspective of the United States health system. Two points that were noted:

- Positive ratings of the public health system declined, from 42% in 2009 to 34% in 2021.
- The public currently trusts nurses, healthcare workers and doctors more than public health institutions and agencies.

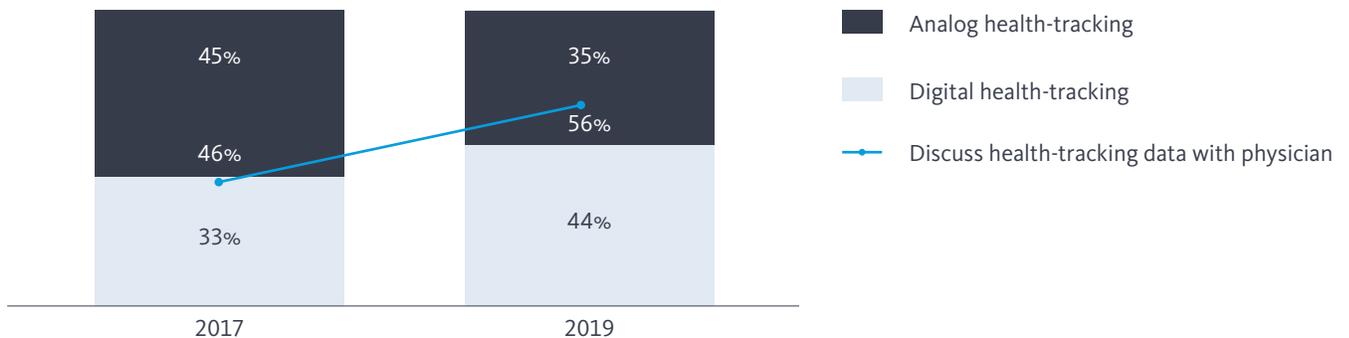
Yet throughout the pandemic, we saw a heightened focus and engagement by individuals in their overall health. According to the Deloitte 2020 Survey of U.S. Healthcare Consumers:

- Many show agency and engagement. Consumers are increasingly willing to tell their doctors when they disagree with them, are using tools to get information on costs and health issues, and are tracking their health conditions and using that data to make decisions.
- Consumers are using virtual visits more than ever before and plan to continue using them. Use of virtual visits rose from 15% to 19% from 2019 to early 2020 and jumped to 28% in April 2020.
- More consumers are using technology for health monitoring and are willing to share their data.
- A trusted clinician relationship remains paramount.

As noted in the Deloitte study, telehealth gained significantly greater visibility and usage during the pandemic. From a workers’ compensation perspective, Sedgwick saw an increase from less than 1% prior to the pandemic to a height of 17% for initial or subsequent physician visits. Although this has stabilized over the most recent 12 months, it maintains an average of roughly 10% of all initial visits.

Also, as noted in the Deloitte study, healthcare monitoring by mobile/wearable devices continues to grow, with a greater percentage of consumers expecting these devices to be incorporated into their overall healthcare.

### More U.S. consumers are tracking health metrics digitally – and more are sharing the data with docs



## Legislative/regulatory environment

The pandemic brought on heightened legislative and regulatory activity at the state and federal level. During 2020 and 2021, 18 states established COVID-19 presumptions for workers' compensation via legislation, directives, emergency rules and/or executive orders. Two additional states —Tennessee and Washington — established a more general “infectious disease presumption.” At the time of this publication, only seven states have presumptions still in effect, although this was still a topic of conversation within many states through proposed legislation even in 2022 (NCCI COVID-19 Workers' Compensation Presumption Update, June 20, 2022).

The presumption legislation and executive orders covered a myriad of situations: employees that were deemed in essential occupations; healthcare employees and first responders only; all employees working outside the home; and defining qualifications for when the law was applicable based on a definition of “outbreak.” Yet, each of the presumption states focused on expanding workers' compensation coverage beyond what was traditionally covered as an occupational disease.

At the same time, employers were working with expansions within the leave and disability arena at the municipal, state and federal level as to paid sick leave and coverage under existing employment laws for time away from work due to COVID-19.

Further, with regard to COVID-19, the U.S. Occupational Health and Safety Administration (OSHA) was determining what was recordable under its regulations, as well as safety rules to ensure that employers were conducting business in a manner that promoted a safe environment for their employees.

There were numerous other impacts, from liability limitations to vaccine/masks mandates, with which employers were contending while also working to conduct their business.

## Is workers' compensation evolving to cover risks not previously considered inherent to the employment arena?

It has been argued that “socialization of risk” occurred during the pandemic through the expansion of coverage under workers' compensation for COVID-19 by presumption legislation/executive orders. Some contend that broadening workers' compensation coverage beyond employment-related risks to those which employers have no ability to control or prevent seems not only counterproductive but also counterintuitive. Others contend that broadening such risks is supported, since society is a third interested party to the grand bargain of workers' compensation, with the role of balancing protections for the employee with the critical role of business to a well-functioning economy.

With all losses, whether work-related or not, someone must assume responsibility and pay the cost. Amid the pandemic, state governments began evaluating the balance between the interest of business/employers, employees and society and the cost of losses associated with COVID-19. As a result of those evaluations, 18 states determined the need for presumptions, effectively “socializing the risk” and shifting it to employers.

Yet, presumptions are not new to workers' compensation. Prior to the pandemic, presumptions existed in numerous states, including for cancers, post-traumatic stress disorder and respiratory and heart disease among firefighters and other emergency response personnel (NCCI Research Brief, November 2018 – Presumptive Coverage for Firefighters and Other First Responders). We continue to see proposals for coverage presumption legislation expanding these categories in other states and to additional classes of employees (CA SB 213).

## Technology's expanding role in the future of workers' compensation

Telehealth utilization increased dramatically during the pandemic, which brought to light its viability and function in supporting the continuity of medical treatment. As previously noted, telehealth gained much wider usage in workers' compensation during the pandemic, supported by many state workers' compensation agencies relaxing their regulations in this area. Telehealth's role was critical to providing some continuity of medical care during the period when in-person treatment was challenging. While telehealth is not a replacement for all in-person medical care, it does offer opportunities to supplement care and expand options for injured workers — providing more convenient access to care, potentially accelerating the treatment, and increasing adherence — all of which supports better outcomes.

Couple telehealth with the rapid development of medical technology for monitoring and directing recovery and opportunities abound for enhanced personalization of treatment. Consider how wearable and mobile devices can provide healthcare professionals with a more detailed understanding of patient conditions and treatment, as well as support the tracking of recovery progress. These connected devices are increasingly important in the delivery of modern healthcare and will continue to play an integral role in diagnosis and care.

Technology experienced major shifts during the pandemic. Although some aspects have returned to pre-pandemic patterns, the fact remains that technology has a greater use acceptance rate today.

With regard to claims administration, technology is driving the evolution of many long-established workers' compensation claims handling models. Consider the following:

- **Auto-triage systems** that evaluate early claim data elements and combine the data with historical patterns to accurately place a claim into a particular "bucket" for processing
- **Auto-adjudication systems** that allow for "simple" claims to be processed without human intervention
- **Predictive modeling** using historical data patterns to predict the future
- **Consumer self-service tools** designed to eliminate the frustrations often associated with workers' compensation claims due to lack of understanding and expectations of the process

As of April 2021, nine in 10 Americans stated that the internet has been essential or important to them personally during the COVID-19 outbreak (The Internet and the Pandemic, Pew Research Center, Sept. 1, 2021). This greater acceptance, in turn, impacts how employees perceive their ability to do their jobs, how employers accomplish their business objectives, and how consumers access information, purchase products, and conduct their lives. The industry must embrace this mindset and adjust its modes of operation to ensure that the workers' compensation process remains viable in delivering on its objectives.

## Implications for benefits integration

Integrating workers' compensation and disability/sick leave has been a topic of consideration for several years. Some employers have found ways to seamlessly integrate these benefits for their employees, yet this approach has not gained significant traction as a standard throughout the industry.

As previously noted, employers were faced with numerous regulatory and legislative changes for COVID-19 in workers' compensation, as well as in the sick leave and disability arena. Employers quickly adapted to these changes in the regulatory landscape and enhanced their focus on ensuring that employees who contracted and/or were exposed to COVID-19 were supported, regardless of the coverage arena, i.e., workers' compensation or sick leave/disability. Providing the needed support for employees and ensuring a continuing workforce for employers benefitted both parties. It also emphasized that, despite the "silos" in the division between these two areas of coverage, they could be managed simultaneously and in conjunction with each other. The focus on a compassionate and holistic approach to care ensured the safety and health of employees and provided benefits to all. As the saying goes, "necessity is the mother of invention"; COVID-19 was the driving force that pushed the need for integration.

## Conclusion

Over the past few years, we have seen many changes in the workers' compensation environment. How should we adjust, learning from what has occurred, ensuring that the industry continues to foster an environment that benefits all parties? None of the topics referenced above is new to the industry; however, the circumstances in which we find ourselves today are vastly different from where we were more than two years ago.



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