

Issue: VA Workers' Compensation

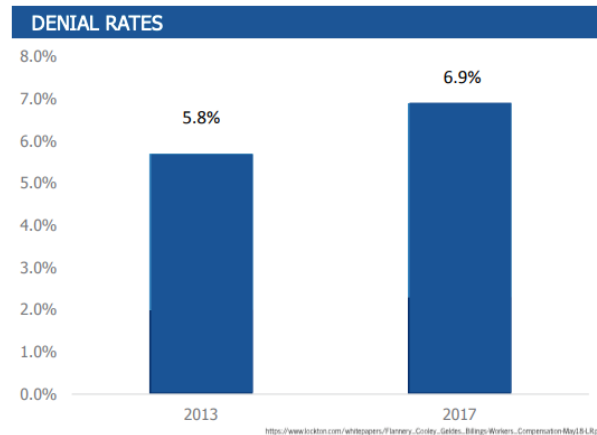
Workers' Compensation in Virginia

Workers' compensation insurance provides monetary benefits to employees who suffer work-related injuries and illnesses. In exchange for this coverage, employees waive their right to sue employers.¹ This no-fault system, however, is in critical need of reform, as a considerable percentage of eligible workers are either denied the cash and medical payments they deserve or don't apply for benefits at all. Because workers are not adequately compensated, they bear the brunt of medical expenses and earnings losses. Social safety net programs such as Medicare and Social Security Disability Insurance are also strained due to cost spillovers.

Obstacles to Securing Compensation

Burden of Proof in Legal Cases

A variety of factors complicate the legal process for securing workers' compensation benefits for workers in Virginia. In particular, employers often initially reject disease and injury claims—and evidence suggests that rejections are increasing in frequency. Between 2013 and 2017, the national denial rate for injury claims rose by nearly a fifth—from 5.8 to 6.9 percent—as illustrated in the graphic to the right.² If an initial claim is denied, the ill worker must then prove a causative connection between workplace exposure and the onset of injury or disease.



In injury cases, workers must meet a “preponderance of evidence” standard, in which they need to prove there is a greater than 50 percent chance that their claim is true.³ However, for illnesses, workers in Virginia have an even greater burden of proof to satisfy. In these cases, workers must meet a “clear and convincing evidence” standard, where it is highly and substantially probable that their claim is true.⁴

Meeting either of these evidentiary standards is challenging due to long latency periods, cumulative exposure, and statutory minimum-exposure requirements.⁵ These difficulties impede workers' efforts to secure benefits and exclude the majority of diseases from coverage. Moreover, injured workers may lack the financial means to hire an attorney to represent them, whereas large insurance companies and powerful employers may have significantly more legal resources.⁶

In response to the increasing denial rate of workers' compensation claims, Democrats in the Virginia House of Delegates sponsored HB 1748, establishing a higher burden for employers to deny claims and mandating that they inform employees of their intention to accept or deny claims.⁷ Unfortunately, this bill died in a Republican-led subcommittee.

Economic Costs of Workplace Injuries

Workplace injuries have drastic economic consequences for society. The National Safety Council estimates that in 2012, the cost of work injuries (fatal and non-fatal) was \$198 billion.⁸

Workers Earn Less Post-Injury

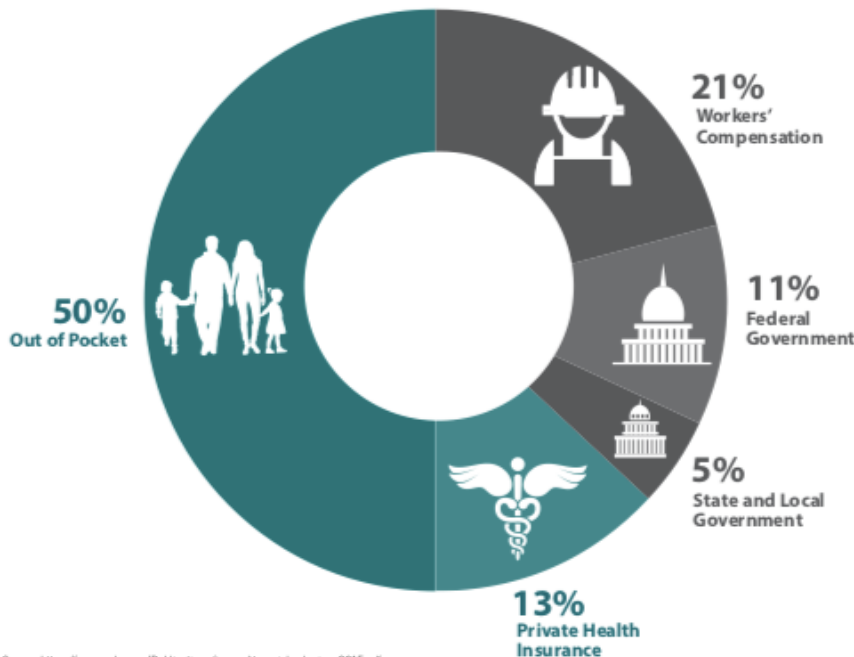
In principle, workers' compensation should completely cover medical and rehabilitation costs for workers who experience an injury or illness in the course of employment. This is intended to expedite the recovery and return-to-work process for employees. The reality, however, is far different. A 2014 study in New Mexico determined that workers who receive compensation benefits lose an estimated 15 percent of their projected earnings in the 10 years after an occupational injury.⁹ The earnings losses of workers who do not receive compensation benefits are even more substantial.



Workers Bear the Brunt of Costs

Over the past two decades, the cost of workplace injuries has progressively shifted away from employers and toward injured workers as well as social safety net programs. In 1988, for instance, the average workers' compensation insurance premium for employers in Virginia was \$1.91 for every \$100 they paid workers in wages.¹⁰ In 2014, by contrast, employers averaged \$1.17, a \$0.74 decline in their contribution.¹¹ As a result of this trend, employers now cover a mere 21 percent of the costs associated with work-related injuries.¹² Private health insurance covers 13 percent, workers and their families 50 percent, and taxpayers the remaining 16 percent.¹³ High out-of-pocket expenses have

Who bears the cost of worker injuries?



forced more working families out of the middle class and made it more challenging for these families to invest in education and job training.

Social Safety Net Programs Suffer

Taxpayer-funded social safety net programs like Medicare and Social Security Disability Insurance (SSDI) are overburdened by the mounting costs of workplace injuries. In terms of a worker's risk of becoming an SSDI recipient, a lost-time work injury is equivalent to aging 10 years.¹⁴ Consequently, occupational injury victims are more likely to request benefits at younger ages, placing a greater strain on the system as a whole.

Underreporting of Workplace Injuries

Work-related injuries and diseases are consistently underreported. In fact, the Survey of Occupational Injuries and Illnesses, an annual compilation of workplace injury statistics by the Bureau of Labor Statistics, fails to include nearly 70 percent of injuries and illnesses in the U.S.¹⁵ In 2009, only eight percent of seriously injured low-wage workers filed a workers' compensation claim.¹⁶

Employer Incentive

A primary cause of underreporting is that employers self-report, and thus have a strong incentive to misrepresent the frequency of workplace injuries. Businesses with lower injury rates are less subject to inspections by the Occupational Safety and Health Administration (OSHA), enjoy lower insurance premiums for workers' compensation, and are more likely to win government contracts.¹⁷

Employer Tactics to Discourage Reporting

The Committee on Education and Labor developed a report for the U.S. House of Representatives detailing the pervasive culture of underreporting workplace injuries across the nation.¹⁸ Drawing from reports and worker testimony, the report concludes that employers use several tactics to deter workers from seeking compensation, a few of which are described below.

Direct Intimidation: Employers may fire employees who report injuries or discipline them in the form of pay cuts, harassment, and denial of promotion. Attempting to solve this problem in Virginia, Del. Lee Carter (D-HD50, Manassas) introduced HB 1747 in 2019, which would have prevented employers from firing employees after they file for workers' compensation. Unfortunately, this bill died in a Republican-led subcommittee.

Discouraging Medical Attention: In order to avoid injury reports, employers may discourage workers from seeking appropriate medical treatment. Because OSHA does not require employers to report injuries that can be treated only with first aid, on-site medical staff can give workers minimal assistance to lower recorded injury rates.

Misclassification of Workers: Worker misclassification is the practice of falsely labeling employees as independent contractors, who are self-employed and receive a 1099-MISC form instead of a W-2. This allows employers to bypass paying workers' compensation insurance premiums and recording injuries because self-employed individuals are not subject to OSHA health and safety guidelines.¹⁹ [See Local Majority paper [Employee Misclassification in Virginia](#)].

Presumption of Compensability for Certain Illnesses

“Presumption of compensability” laws stipulate that certain diseases are presumed to be work-related.²⁰ This relieves ill workers of the burden to prove that their disability was directly caused by a specific incident during their employment, thereby facilitating access to medical and rehabilitation benefits. Such laws typically apply to firefighters, police officers, and emergency medical personnel.

Legislation in Virginia

In 2019, Del. John Cosgrove (R-SD14, Chesapeake) introduced SB 1030, adding presumptions for brain, colon, and testicular cancers to the Virginia Workers’ Compensation Act.²¹ This bill passed the Senate on a 39-1 vote. Previously, firefighters had to determine the specific toxin with which they came in contact to secure compensation benefits, an impossible task given that “once it’s burned down we don’t look for those toxins afterwards,” according to one firefighter.²² Moreover, a growing body of evidence suggests that firefighters contract certain cancers at significantly higher rates than the general population.²³ Thus, the General Assembly passed this legislation to ensure timely and adequate benefits for first responders.

While more cancers were included in the list of presumptions, legislation which proposed adding post-traumatic stress disorder (PTSD) to the list failed. HB 2281, introduced by Del. Eileen Filler-Corn (D-HD41, Springfield), died in the Republican-controlled Commerce and Labor Committee in February of this year.²⁴ Without a presumption that PTSD is compensable for the first responder community, it will be tremendously more difficult for those who risk their lives to keep us safe to receive compensation benefits.

Without any federal oversight or standards for workers’ compensation insurance programs, it is incumbent on states to patch up their dysfunctional compensation systems. To protect workers’ rights and provide adequate support for workers who suffer injuries and illnesses on the job, it is imperative that the Virginia General Assembly takes steps to address these issues.

¹ <https://fas.org/sgp/crs/misc/R44580.pdf>

² https://www.lockton.com/whitepapers/Flannery_Cooley_Geldes_Billings-Workers_Compensation-May18-LR.pdf

³ <https://cpollardlaw.com/virginia-workers-compensation/hearings-trial/>

⁴ Ibid

⁵ https://www.osha.gov/Publications/inequality_michaels_june2015.pdf

⁶ <https://www.injuredworkersbar.org/assets/docs/2017.06.20%20IWBA%20Fee%20Comments.pdf>

⁷ <https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB1748>

⁸ <http://www.mhi.org/downloads/industrygroups/ease/technicalpapers/2013-National-Safety-Council-Injury-Facts.pdf>

⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5223776/>

¹⁰ <https://www.propublica.org/article/the-demolition-of-workers-compensation>

¹¹ Ibid

¹² See note 5

¹³ Ibid

¹⁴ <https://www.ssa.gov/policy/docs/ssb/v72n3/v72n3p1.html>

¹⁵ <https://www.bls.gov/iif/laborcommreport061908.pdf>

¹⁶ <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>

¹⁷ See note 15

¹⁸ <https://www.bls.gov/iif/laborcommreport061908.pdf>

¹⁹ Ibid

²⁰ <https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/posts/the-role-of-presumptions-within-the-workers-compensation-arena>

²¹ <http://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+sb1030>

²² <https://www.wavy.com/news/local-firefighters-call-on-va-lawmakers-to-pass-cancer-bill/>

²³ <https://www.ncci.com/Articles/Documents/Insights-Research-Brief-Presumptive-Coverage.pdf>

²⁴ <https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+HB2281>