A workers' compensation system for the 21st century

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EXECUTIVE SUMMARY

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Illinois' workers' compensation system was created at the turn of the 20th century; it was introduced at a time when a growing number of workers found themselves in dangerous industrial jobs. Although the American workplace has changed drastically since the early 1900s, Illinois' workers' compensation system has barely evolved from its original form. Today, workers find themselves with radically different needs – such as flexible work hours and the option of telecommuting – but employers' efforts to find innovative solutions to meet those needs have been stymied by an outdated government program.

Workers' compensation was originally designed to treat the rising number of severe workplace accidents that arose under Industrial Revolution work practices. But since the introduction of workers' compensation, the manufacturing and mining industries have become far safer and employ far fewer Americans. The introduction of health and safety regulations has undermined much of the original rationale. A separate system for workplace injury means that many workers who now have employer-sponsored health coverage cannot see their usual doctors.

More importantly, the needs of the modern American worker have changed significantly, too. Today, Americans find themselves balancing work with child or elder care. Employers have sought to facilitate these changes by innovating new working practices such as telecommuting, flexible hours or results-based employment contracts that allow workers to balance work and home responsibilities as they need. But the workers' compensation system remains rigidly wedded to outdated working practices and penalizes employers who try to accommodate workers' changing needs.

It's time for Illinois' workers' compensation system to evolve

The workers' compensation system is designed around a 19th century workplace that has become irrelevant in the 20th century. At the start of the 21st century, the American workplace is changing again. Innovations such as the sharing economy and other changes that cannot be predicted require a dynamic response. Illinois needs a system that is as dynamic and innovative as the 21st century workplace.

Opponents of reform have focused on the conflicts between employers and employee interests, but evidence suggests that employers have been far more responsive to the needs of workers than the government programs designed to protect those workers. In fact, special interests have been able to capture the system for their own benefit, leaving employer and employee equally disadvantaged. And those same special interests have been able to combine with bureaucratic inertia to successfully block meaningful reforms.

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Developing a 21st century workers' compensation system means putting more power in the hands of the people directly affected by the system. In Texas, for example, employers are able to privately establish an alternative system to workers' compensation – an option that makes sense for many small businesses. But the system is not designed purely for the interests of businesses: Employers have to attract and retain the best employees, and finding innovative ways to make the state's workers' compensation system work better for modern employees is a cost-effective way of doing that. The most effective way government can protect workers in the century to come is not by expanding a cumbersome bureaucracy, but by getting out of the way of innovations that benefit those workers.

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Introduction

The state of Illinois has one of the oldest workers' compensation systems in America, dating to 1911.[1] Wisconsin's first-in-the-nation system predates Illinois' by mere months.[2]

While Illinois' system made sense in the early 20th century, the workplace has changed radically since then: Fewer Americans work in heavy industry; women are now a much larger portion of the workforce; and employees are much more likely to balance work with responsibilities to children and elders in their care.[3] And as the 21st century progresses, the emergence of the sharing economy may again radically alter the way American workers sell their labor.

New solutions such as flexible workdays and telecommuting have evolved to meet the demands of modern workers, but workers' compensation has remained mostly the same for more than 100 years. Today, that system no longer effectively serves the needs of workers in Illinois or across America. And the history of the past century offers little indication that workers' compensation will naturally evolve to meet the changing demand in the present century. If the system is to evolve into something that makes sense for the modern workplace, lawmakers must evolve workers' compensation rules so they meet the needs of today's workforce and are dynamic and innovative enough to keep up with changes in the future.

The genesis of workers' compensation

The 19th and early 20th centuries saw Americans moving from farms and small businesses to cities and large industrial employers.[4] Illinois felt this change acutely, as it began the 19th century as a rural farm state, but with the expansion of railroads and the emergence of Chicago as an industrial center, it ended that century as a predominantly urbanized state.[5] As work changed, risk and injury in the workplace also changed. Workmen's compensation, now renamed workers' compensation, was introduced as a response to the rapidly changing workplace.

Before workmen's compensation, the only remedy available to an injured worker was to sue his or her employer for negligence. The tort system, though, is designed to punish bad behavior, not provide insurance for workers. A successful negligence claim not only forced the employer to cover expenses such as lost wages and medical bills, but could also include severe punitive penalties.[6] For this reason, it was not sufficient that a worker was injured: There had to be actual wrongdoing on the part of the employer. A worker would not receive compensation if the injury resulted in part from his own negligence, that of another employee or where an employee had willingly accepted a job he knew to be inherently hazardous.

At the turn of century, increasing numbers of Americans found themselves in inherently dangerous jobs. Workers suffered serious, and sometimes fatal, injuries in accidents in which no one was at fault or when the worker had made a mistake. Theodore Roosevelt, writing shortly after his presidency ended in 1909, described one such worker – Sarah Kinsley, who lost her hand when it was crushed by a cogwheel. She sued, but the court found no evidence that the employer had been negligent.[7]

It makes sense that employers only should be punished if they are at fault, but at the time, the then-growing ranks of industrial workers were left with the possibility of becoming injured and being unable to provide for themselves or their families. And if the worker had a legitimate claim, he or she still had to pursue that claim through a costly and time-consuming legal process throughout which time the worker received nothing.

Nor was the system ideal for employers. In theory it makes sense to punish employers only if they are negligent, but in a hazardous workplace, negligence is an inherently arbitrary standard. Risk never can be completely eliminated, and there is no bright line for determining when acceptable risks become negligence.[8] As the Industrial Revolution progressed, it became harder for courts to rule on the increasingly complex and technical problems surrounding risk. Not until the 1970s would the federal government introduce regulators with specialist expertise in safety. In the early 20th century, courts had to second-guess the judgment of employers.[9] And instead of focusing their technical expertise on how to best manage risk, the employer had to also consider how a decision would look to a lay court.

Workmen's compensation addressed the problem through a "grand bargain." Workers would sacrifice their ability to sue in return for guaranteed compensation if they were injured at work. In the strict liability, or "no fault," system, adopted under workmen's compensation, it did not matter how the worker was injured: If he or she was injured at work, the employer was responsible for the cost. In return, employers were granted immunity from punitive damages except in rare cases of recklessness or intentional injury. The system provided workers with a form of insurance that guaranteed their medical costs and lost wages in the event of an accident.

Workmen's compensation did more than just compensate injured workers. Even though employers might not have been negligent, in many hazardous occupations they still had a lot of control over the risks workers faced. Employers typically have the greatest technical expertise in how to keep workers safe. Now, they also had an increased incentive to make the workplace safer and the freedom to use their expertise without being second-guessed by the court.[10] Thus, the system as it originally was conceived could not only compensate employers for injuries, but also reduce injuries. As such, it provided the new breed of industrial employers with a better way to manage risks and compensate workers.

First adopted in Western Europe, which industrialized earlier than the United States,[11] workmen's compensation arrived in America through the first half of the 20th century, beginning in the most heavily industrialized states such as Illinois.[12] Legislators did not presume that the system was appropriate for every worker and initially made workmen's compensation optional.[13] In 1917, Illinois made coverage mandatory, but only for workers in hazardous industries.[14] Only later did the state require all employers to carry workers' compensation, although an exemption remains for small farms, and even then Illinois is unusual in having such a restrictive policy. The majority of states do not require workers' compensation for a domestic employee such as an au pair, and many also have exceptions for small businesses.[15]

Workplace changes in the 20th century

Although few states are as restrictive as Illinois, all but one – Texas – expanded mandatory coverage during the 20th century to cover most employees.[16] Yet at the same time as states expanded the scope of workers' compensation, the nature of work in America shifted away from the more hazardous types of employment the system was designed to handle. And the emergence of health and safety regulation in the late 20th century once again had taken decisions about risk out the hands of employers. The changing nature of the workplace has slowly eroded the original purpose of workers' compensation. The modern workers' compensation system transformed into something that is increasingly bureaucratic and more resembles a welfare program, and has not reflected the changing nature of the workplace.

The decline in accidents

Since the introduction of workers' compensation, the workplace has become safer. Safety improved in part because fewer Americans now work in the hazardous industries for which workers' compensation was designed, and in part because all industries have seen an increased emphasis on safety. Workers are less likely to suffer the catastrophic injuries common at the turn of the century, but are more likely to be diagnosed with cumulative injuries (known as occupational diseases) incurred over many years and multiple employers.

In 1913, a year after Illinois' workers' compensation law came into effect, the federal Bureau of Labor Statistics estimated 61 deaths for every 100,000 workers in the United States.[17] In 1933, at the beginning of the Great Depression, the National Safety Council estimated 37 deaths per the same, and by 1997 that number had fallen 90 percent to just four deaths per 100,000 workers.[18] The decline was so substantial that by the end of the 20th century, homicide had become the second leading cause of workplace death behind only automobile accidents.[19]

In the coal mining industry there were 3,329 mining deaths each year in the United States in the years surrounding the introduction of workers' compensation in Illinois. By the end of the 20th century, though, there were just 89 fatalities. Fewer miners died in part because of a 13-fold reduction in the fatality rate and in part because of a two-thirds decline in the number of workers employed in mines.[20] While goods-producing industry (including mining and manufacturing) and services both employed 31 percent of the American workforce in 1900, by 1999 goods-producing industry employed just 19 percent while services grew to 78 percent.[21]

Alongside changes in the composition of the workforce and improved incentives created by the workers' compensation system itself, rising productivity and wages helped drive the decline in worker injury.[22] Numerous economic studies have confirmed that workers demand higher wages for more dangerous jobs and are willing to accept lower pay for safer ones. Workers treat safety like any other economic good and will weigh improved safety against other benefits.[23] As wages increased steadily throughout the 20th century, workers put a higher premium on safety and demanded more compensation to take on risky work. Employers responded by making the workplace safer.

Occupational disease

At the same time the workplace became safer, states expanded the workers' compensation system to include a range of injuries outside the employers' control. In doing so states not only increased costs but undermined the fundamental principle of workers' compensation. Traditionally, the system compensated accidents that could be clearly and easily traced back to the workplace (such as a hand being crushed by a cogwheel). By contrast, "occupational diseases" have no single cause, but emerge over time through cumulative damage. For example, a worker who performs repetitive forceful work or uses vibrating power tools throughout his or her career is vulnerable to carpal tunnel syndrome resulting in numbness or tingling of the hand.

By 1971, every state workers' compensation law included occupational diseases, although not every disease was covered.[24] Because occupational diseases emerge over time, employers no longer controlled the circumstances leading to injury. Furthermore, the gap between employer action and cost widened significantly over the past four decades for two reasons. First, other types of accident and injury declined while the cost associated with occupational diseases grew; and second, average employee tenure declined significantly from the early post-war period to the present day.[25] While all businesses are affected by its declining influence on a major cost driver, the evolution of claims most acutely impacts employers outside the hazardous industries for which workers' compensation was designed.

The creation of the Occupational Safety and Health Administration

In 1971, the changing nature of workplace injury combined with federal regulation to substantially alter the dynamic of safety at work. In that year, the Nixon administration created the Occupational Safety and Health Administration, known as OSHA.

Although OSHA was created to improve health and safety, there is relatively little evidence the administration had any significant effect on worker safety.[26] Most of the 20th century's reductions in fatalities preceded the federal agency's birth, and studies frequently fail to find evidence the administration contributed to any of the subsequent declines in injury.[27] The agency itself recognizes that businesses have an economic incentive to implement efficient safety procedures without regulatory oversight.[28] Yet it is possible that businesses would adopt the same level of safety, but also adopt a different approach to achieving that end. Thus, while OSHA might not have made a significant impact toward improving overall safety, the existence of the regulator nonetheless undermines a key benefit of the workers' compensation system.

By implementing a safety code with penalties for noncompliance, the federal government effectively reintroduced a negligence standard. In doing so, OSHA undermined the grand bargain between workers and employers while simultaneously weakening employers' discretion to manage risk. As originally conceived, the workers' compensation system applied a strict liability, or no fault, rule to not only provide workers with insurance, but also introduce an incentive for employers to direct their experience and expertise toward improving safety. With federal safety and health requirements, that incentive becomes redundant as employers are forced to replace their own judgment with the technical standard or process mandated by the regulator.

Intercompatibility with health care

In the second half of the 20th century, health and safety regulation, increased administrative costs and the changing nature of workplace injury combined to convert workers' compensation from its original purpose to something more akin to an employer-sponsored welfare system. Yet, this evolution occurred against a backdrop of declining injury and, just as significantly, the expansion of employer-provided health care. When workers' compensation originally was introduced few employers provided workers with health insurance. However, during and immediately after World War II, employers began providing the benefit as a means of circumventing government wage controls.

It might surprise many visitors to the United States, and even some Americans, to learn that while employers typically provide health insurance, the package usually excludes injuries in the workplace. With the exception of some employees who are outside the workers' compensation system who may have a combined plan, this adds an additional inconvenience as an employee's usual doctor might not treat workers' compensation patients and an employee's workers' compensation doctor might not be available through the employer's health network.[29] The failure to integrate workers' compensation with employer health coverage might also lower the quality of care by making it harder to coordinate treatment.[30]

Employers also suffer from the artificially imposed dichotomy. Duplication of many of the components of health care is costly. Workers' compensation includes greater overhead and reporting requirements than group health plans. One study in California found that group health plans spent approximately $1.25 to provide a dollar's worth of medical care under group health, but $2.65 to provide the same under workers' compensation.[31] And employers cannot apply the discounts they negotiate under group health plans to treatment under workers' compensation.[32] Instead they must rely on a government-established fee schedule that for some surgeries in Illinois costs 200 to 300 percent more than under Medicare.[33]

While integrating the two systems would both improve workers' access to health care and cut costs for employers, it is difficult for employers to move forward without substantial regulatory and legal changes. It also would require separating insurance for lost wages from the health insurance aspect of workers' compensation. But this too is valuable for many employees. Workers' compensation imposes strict caps on total payments, which for high earners can mean payments that are too low to cover costs such as mortgages or supporting their families during prolonged sicknesses. In fact, some doctors and lawyers carry separate insurance for lost wages above the workers' compensation limit, meaning workers must carry three separate types of insurance.[34]

The emergence of small businesses

While the final quarter of the 20th century saw an increase in the size and complexity of regulatory burdens, the century's trend toward increasingly larger employers went into reverse.[35] The large conglomerates broke up or collapsed, and smaller, more nimble businesses began to take their place. Those businesses, though, are less able to afford the legal costs of absorbing and implementing complex regulatory codes. Combined with declining employee tenure, the reversal ended the expectation that a person might spend his or her entire career with a single large employer.

Start-up businesses must bear the risk of recruiting a staff member who already suffers from past injuries that might develop into an occupational disease, but small businesses might be affected by another aspect of workers' compensation: experience modifications. Every business in the system has the opportunity to reduce its workers' compensation costs by acquiring an experience-rated modification to its insurance premium. These modifications only can be acquired over time, meaning that start-up businesses are excluded through their early years. It is also likely that small businesses find it harder to negotiate with health care providers to obtain lower costs. For these reasons many states, but not Illinois, permit smaller businesses to opt out of the workers' compensation system entirely.[36]

The current state of workers' compensation

The inability of workers' compensation to adapt results in large part from a system of governance that affords little decision-making power to the two key parties: workers and employers. Rather than protect workers, the system has grown in cost and complexity as a result of outside influences that have expanded inefficiencies and raised the cost of delivering meaningful reform.

More expensive, more inefficient

One of the original motivations behind workers' compensation was to eliminate the cost and delays associated with pursuing a legal claim. That benefit never was fully realized because although the court no longer had to review whether the employer's actions were negligent, the added caseload from making employers responsible for all injuries rapidly overwhelmed the courts. In 1913, the Illinois General Assembly shifted authority to a three-person arbitration panel and limited courts to an oversight role.[37] While the administrative system was intended to reduce costs, it has become both expensive and time-consuming.

Despite penalties for late payment, a little more than 38 percent of all claims in the Illinois workers' compensation system are settled within the 14 days required by law.[38] Illinois underperforms its Midwestern neighbors in this respect, but even in the more efficient systems little more than half of all claims are paid within the 14 days, and most states underperform even that benchmark.[39] In some cases, payment can take considerably longer.

As the law stands, if there is a dispute of the employer's obligation, the matter is referred to an arbitrator where the matter can sit for up to three years before either party must act.[40] Once the arbitrator decides the case, it can be appealed to a panel of three commissioners. The decision can be further appealed first to the county Circuit Court and then to the Appellate Court. The latter can make its decision final if at least four of the five members of the appellate panel agree; otherwise the decision may be appealed to the state Supreme Court.[41]

The growth in the complexity and cost of workers' compensation, while apparently undirected, is consistent with economic findings that once a bureaucracy is established it is likely to expand in size and scope, becoming more expensive and inefficient over time.[42] Special interest groups representing the interests of medical providers and lawyers have a vested interest in expanding the scope of the system.[43]

Workers' compensation incentivizes overprescription

Beyond growing bureaucratic costs, medical providers have successfully lobbied for fee schedules that can exceed the cost of the same procedure under Medicare by 200 percent to 300 percent.[44] But these fee schedules do not only raise costs for employers, they also lead to overtreatment of patients and workers needing more time away from work.

Under workers' compensation in Illinois, doctors can prescribe and dispense drugs themselves. Under these perverse incentives, doctors not only dispense drugs at mark-ups of 60 percent to 300 percent over pharmacists, but they prescribe substantially more of those drugs. As a result, workers can find themselves receiving unnecessary prescriptions for strong pain medications including opioids, a family of drugs that includes morphine and heroin. Patients not only spend longer off work because of these unnecessary prescriptions, but evidence implies overprescription might lead to addiction.

Because the system is wasteful, the benefits to workers and employers of reform are likely much greater than the benefits to special interest groups of preserving it in its current form. While there are many more employers and workers than medical providers and lawyers, the former only infrequently interact with the details of workers' compensation, while the latter interact with the system on a far more regular basis. Consequently, special interests have better knowledge of the system. Moreover, the broader interests of employers and workers are spread across a diverse section of society, making it far more difficult to organize these diffuse groups than to organize the smaller, narrowly focused special interests.

While the workers' compensation system assumes that employee and business interests are at odds, it often might be the case that workers' interests are more closely aligned with those of their employer than with the incentives in the political system. Even where there is apparent disagreement between those interests, workers may be better able to negotiate with their employer than to influence the political system. Thus, although employees might not directly negotiate their health coverage, evidence indicates they do demand higher salaries to work for businesses that provide lower health benefits.[45]

When employers are given more control over employee health care, they often do not use that control to cut costs. In fact, many employers in Illinois that establish their own health networks pay doctors more than the state-mandated fee schedule. Rather than cut costs by using cheaper doctors, employers are more selective than the workers' compensation system. They will prefer higher-quality doctors who do not overtreat patients, meaning that workers recover faster and return to their jobs sooner.[46] In this case, the employer and the employee benefit.

Employers also can respond faster to changing employees' needs. Thus, as workers demanded more flexibility, businesses responded with telecommuting and other flexible work arrangements ahead of legal changes. In fact, the cost of bringing together diverse interest groups may also act as a barrier to innovation. The political process often moves slower than private businesses because of the number of interest groups that need to be involved before lawmakers enact any substantive change.[47] As a result, workers' compensation can be slow to innovate in response to the changing workplace, even when change would benefit employers and employees. As workers' compensation enters its second century, the challenge of responding to innovation becomes even more pressing and the weaknesses of the existing system become even more apparent.

Challenges facing workers' compensation in the 21st century

In the 21st century workers' compensation must adequately adapt to the rapidly changing workplace. To do so, the system must account not only for an increasingly diverse workforce, but also changes in how Americans sell their labor. The traditional workplace and contract are rapidly being replaced by new working arrangements. As the needs of workers evolve, information technology offers the freedom to set more flexible working arrangements such as telecommuting and flexible hours, while the emergence of the sharing economy may portend an even more radical shift in the nature of work.

While work is evolving, the regulatory environment, including workers' compensation, still seeks to impose a 19th century model of work on the 21st century employment contract. Although most modern workers no longer punch a time clock, the law assumes an inflexibly defined workplace and work patterns such that a worker might be telecommuting, but is still treated like he or she was injured on the factory floor. And in the sharing economy, the rigid categories of employee and independent contractor leave no room for the increasing number of workers who occupy in-between categories.

Accommodating parents re-entering the workforce after the birth of a child

Workers' compensation was introduced at a time when the traditional family dominated the American landscape. In the mid-20th century, a little more than 30 percent of all women were a part of the workforce, whereas today that number stands closer to 60 percent.[48] As a result, more parents — both men and women — must balance child care responsibilities with a job. Today, 82 percent of parents are either a single working parent or in families where both parents work.[49]

Many parents, but especially women, might find it difficult to balance work with the need to care for a young child. For those in professional occupations, taking time away from work might lead to missing opportunities or finding that their skills decline or are no longer relevant. Making it easier for women to return to work after the birth of a child, especially in high-income professions, might raise women's average pay by increasing the number of women in senior and better-paid positions.

Domestic workers such as au pairs can help parents return to work sooner, but current workers' compensation law in Illinois makes that more difficult. While most states exempt domestic work, Illinois does not.[50] And because au pairs and caregivers often live and work with a family, workers' compensation law treats much of their time in the home as "in the course of employment."[51] Those laws make sense for a worker on an oil rig who is forced to live at his or her site of employment, but not for an au pair receiving free board. And while not everyone can afford an au pair, reducing the impediments to hiring domestic workers can play a major role in helping some parents re-enter the workforce sooner.

Rather than hire someone to look after their children, some parents might prefer to take a work break after a child is born. During that time the parent might wish to work part time to either maintain his or her skills or to allow phased re-entry into the workforce. But workers' compensation, which assumes employees are working to support themselves and their families, enforces strict minimum payments for loss of income. Those mean some part-time workers can receive more money through workers' compensation than their after-tax paychecks. Forcing employers to provide payments in excess of actual losses not only creates bad incentives that could lead to misbehavior by some employees, but it can also make hiring a part-time worker more expensive and lead employers to favor employees who can work full time. Whether a parent chooses to take a break or can afford domestic help, evidence suggests that modern working parents place high value on flexibility.[52] That flexibility may be the ability to schedule work around family responsibilities or the ability to take extended absences from work after a major life event such as childbirth, or work part time to maintain skills or income while raising young children. Nearly half of all parents have turned down a job because it would conflict with family obligations.[53]

While domestic and job responsibilities are increasingly shared, women still spend an average of 17 fewer hours per week than men doing paid work, but twice as many hours as men on housework. And both men and women spend more time on child care than in 1965.[54] Further, childbirth imposes greater physical costs on women, which could require more time away from work. Thus, while all parents value flexibility, women are more likely to benefit from flexible work arrangements. Increasing flexibility for all workers might indirectly support women's progress in the workplace by removing barriers to working males sharing more responsibilities around the home.

Two-income households also benefit from the geographic flexibility made possible by telecommuting when one partner needs to move, but the other is tied to a current job. Geographic mobility declined significantly since the introduction of workers' compensation, particularly in the past three decades. Americans are now less likely to move for job opportunities or to respond to unemployment by moving.

In the past, high geographic mobility helped insulate the United States from severe recessions, but declining mobility may be a significant factor in the slow recovery after the Great Recession. While declining mobility likely has many causes, the increase in two-income households is likely a significant factor in workers being less able to travel to take new jobs. One study estimates as much as 35 percent of the total decline in family migration is because of women's increased role as financial providers.[55]

America's aging workforce

The 20th century saw the influx of women into the workforce, which, combined with the baby boomer generation coming of age, precipitated an extraordinary growth in the portion of Americans who work. The 21st century might see a reversal of that trend.[56] More jobs now require a college degree, meaning Americans spend fewer years in the workforce after school. At the same time, retirees live longer, and the baby boomers who once helped drive a growing workforce are now retiring.

Although the retirement age remains unchanged, improvements in health care and the switch from manual labor to a knowledge-based economy mean workers often can continue to contribute longer after retirement. Roughly half of all retirees used some kind of phased retirement.[57] And many more might wish to continue to work part time after retiring.

Older workers have different needs than younger workers. They might prefer part-time or seasonal work and might have motivations other than money, such as the socialization or activity associated with work. Even more than working parents, workers in phased or partial retirement suffer from a workers' compensation system that assumes employees primarily work to support themselves and their families. Older workers might find it more difficult to reach agreements with their employer for part-time work if the employer's workers' compensation costs are proportionally higher than for full-time employees.

Older workers also have different health needs. Relative to younger workers, they are more likely to have long-term degenerative issues that could be exacerbated by work leading to occupational disease. In turn, this might induce employers to favor lower-cost, younger workers. But older workers who have access to Medicare are also less in need of financial support for exacerbated injuries. While policymakers should not make taxpayers responsible for injuries caused by private enterprise, it makes little sense to make employers entirely responsible for injuries largely caused by other factors. This is especially true if the result is that some older workers are unable to find part-time work, reducing economic activity and tax revenue, and still passing the bulk of the cost on to Medicare.

An aging population also means families are more likely to care for an elderly relative. Half of all people who provide unpaid care for an elder also work full time, and two-thirds have some paid work outside of their care responsibilities.[58] As workers must increasingly provide elder or child care, employers must look to innovative new strategies such as telecommuting and flexible hours to make work compatible with obligations outside the office, and workers' compensation must adapt alongside those strategies.

The rise in telecommuting

Telecommuting allows families with child care or elder care responsibilities to work without being physically present. While the concept is not new, information technology has dramatically expanded the options to employers and workers. Members of the same family can now work in different states without separating the family unit. Military spouses, who are particularly prone to being forced to move, can live in the same state as their service-member spouses without sacrificing their careers.

Even when workers telecommute out of simple convenience, there can be considerable benefits not only to the individual worker and employer, but also to society at large. One study estimates that commuting costs the average worker $2,600 a year in gasoline, lost time and other expenses.[59] Telecommuting not only removes those costs directly from those employees who choose to work remotely, but also indirectly by reducing congestion costs to other motorists. Reducing gasoline consumption carries further social benefits including lower oil imports and significant benefits to the environment.[60]

Employers have every incentive to respond to these preferences. Workers look at their whole compensation package and not just wages: a point that has been confirmed by economic study and noted by President Barack Obama's Council of Economic Advisors.[61] For example, substantial evidence shows that workers require higher wages to work for employers who do not provide health care.[62] Similarly, workers will expect higher wages to compensate for an inflexible work environment or will accept lower wages in return for greater flexibility.

Businesses also use flexibility as a cost-effective tool to recruit and retain more talented workers. Eighty-nine percent of high-skilled working fathers consider paternity leave an important consideration in a new job if they plan to have another child. Studies indicate that firms that offer more flexible telework practices have lower turnover and higher productivity. In one case, Costco achieved a turnover rate of one-third the industry average of 65 percent.[63] In another, UPS was able to improve productivity 17 percent at its corporate headquarters.[64] A study of a Chinese firm found a 13 percent increase in productivity when employees worked from home and a 22 percent increase when employees were free to choose whether to work from home or the office.[65]

For both the benefits to productivity and the broader social benefits, the federal government has embraced telecommuting. Both the departments of Labor and Transportation, as well as the White House, have studied and adopted ways to increase telework. The federal government also has enacted its own extensive telecommuting program across every department, and in 2010 Congress passed and President Obama signed the Telework Enhancement Act.[66]

Yet despite the federal government's embrace of telework and evidence of benefits to business, the private sector has been more cautious in adopting telecommuting. Estimates of the total number of teleworkers vary, but the evidence suggests that while telecommuting is on the rise, adoption by business has been slower than early predictions. Moreover, several major corporations, including Best Buy and tech-giant Yahoo, have abandoned telecommuting programs.

Companies rarely make decisions based on a single factor, and undoubtedly companies that either have been slow to implement telecommuting or have abandoned programs have done so for multiple reasons. But legal experts caution businesses about the increased liability risks under workers' compensation to companies with a telework program.[67] While other factors also play into final decisions, any increase in cost will weigh into that decision and for some businesses will be the deciding factor.

The workers' compensation system is designed for factory workers who spend a fixed period of time at a place of work. Other types of work existed when workers' compensation was introduced, but these employers were not compelled to participate in the system. The strict liability, or no-fault, system assumes that whenever the employee is at work the employer has substantial control over the risks that employee is exposed to. Thus, even if an employer is not negligent the employer still might be able to reduce the likelihood of injury. Workers' compensation gives employers the incentive to invest in mitigating risks.

In the case of teleworkers, that assumption is entirely false. But because the employee is at work he or she still is covered by workers' compensation. A California tribunal, applying similar rules to those in Illinois, found that when a professor slipped and fell on a pile of papers in his home he was eligible for workers' compensation because the accident occurred during the course of work. It did not matter that the university had provided him with his own office and had no control over the professor's work environment at home.[68] Courts in Oregon found similarly for an interior designer who tripped over her dog while retrieving samples from her garage.[69]

Even when the law ultimately supports the employer, it can create substantial risk. In Tennessee, a woman was attacked by her neighbor while making lunch in her kitchen. Because she was telecommuting and her employer had not designated a specific work area, the lower court found that her entire home was considered her workplace.[70] The decision ultimately was overturned by the state Supreme Court, but only after extensive litigation. Litigation and the general uncertainty surrounding the regulation of novel working practices, can significantly increase costs to businesses trying to design innovative work practices.

Despite the costs and legal ambiguity surrounding telecommuting, some businesses consider the benefits great enough to implement programs anyway. Yet even where employers have proceeded with telework the legal costs and uncertainties could limit the overall value of the program. Legal experts have advised businesses allowing telework to impose arbitrary restrictions that closely resemble the workers' compensation definition of a workplace. For example, employers are advised to set rigid working hours and limit the employee's workspace to one room of the employee's home.[71]

There is no economic rationale for an employer to only allow telecommuting, as some experts advise, after an inspection of the employee's home office. In fact, such a requirement would impose an entirely unnecessary cost that likely would dissuade some employers from allowing telework. Nor is there any good reason that an employee working from home should not work from bed if he or she feels unwell or outside if the weather is pleasant. And there is no benefit to either employer or employee of preventing an employee from leaving work briefly to take a child to the doctor, but remaining available by phone and email and completing that day's work in the evening after preparing dinner.

Increased use of flexible work hours

There are significant benefits to flexible work scheduling. Parents might need flexibility to look after a sick child or leave earlier to pick up their children from school. And both flexibility and telecommuting can reduce sickness and absenteeism. Where workers might previously have felt it necessary to miss work to meet family commitments, with a flexible workplace they are more likely to reschedule work.

At one public utility, flexible work scheduling reduced absenteeism by 20 percent.[72] Other studies have found that flexible schedules can reduce worker sickness and increase productivity by 22 percent.[73] More importantly, the decline in sickness was not entirely because workers were no longer using sick leave to make time for other obligations. Academic studies indicate that reducing the stress associated with attempting to balance work with family obligations actually improved employee health. Another study found that when employees did not feel obliged to come to work or to not see a doctor, when they were sick those employees tended to be healthier.[74]

In the most extreme case of flexible work, employers have ceased to monitor employees' working hours and have focused entirely on outputs. The practice known as the Results Only Work Environment, or ROWE, allows workers complete flexibility to determine their own schedule and office attendance. Employers only set targets for performance. Relatively few employers have embraced this model to date, but ROWE offers the potential of giving employees far more flexibility to balance work and family commitments, while allowing employers to focus on monitoring outputs rather than inputs.

While few Americans work in a ROWE workplace, as many as 90 million have experienced some version of results-only work through the sharing economy.[75] A new breed of platform companies enables workers to sell their labor directly to customers through peer-to-peer networks. For example, Uber and Lyft allow drivers to sell their labor directly to passengers; Airbnb lets homeowners rent directly to short-term guests; an app called Handy lets cleaners book directly with clients; and Amazon's Mechanical Turk lets coders sell their labor piecemeal.

Platform companies offer a new opportunity for people who want more control over their working hours and practices. The sharing economy provides even more flexibility than ROWE, which simply adapts the traditional contract to allow workers discretion in how they meet their work goals. By contrast, platform companies not only do not require workers to put in a set number of hours, but they replace a contract that fixes pay and work targets with one that allows workers to decide how much work they want to do. Thus, a student could put in long hours one week and then during exams work less or not at all.

While the sharing economy might not be ideal for someone who wants the stability of a conventional employment contract, it offers some the ability to shape their working practices around their own needs. ROWE, especially when combined with part-time, job-sharing programs or peer-to-peer work might be particularly valuable to a parent or someone with elder care responsibilities who does not want to work full time or cannot commit to a fixed schedule. As the rise of the knowledge economy increases the importance of lifelong learning, these flexible contracts also give workers the ability to return to school while continuing to work and balancing both responsibilities around one another.

Sharing economy workers are classed as independent contractors, meaning they are ineligible for workers' compensation. It makes sense that Airbnb should not be responsible for an injury to a person in his or her own home or that Amazon coders should not be considered teleworkers. It would destroy much of the value to both worker and businesses to establish the terms and conditions required by law for that work relationship.

But workers might wish to participate in the sharing economy and not lose all the benefits of being an employee. Amazon or Uber might want to make contributions to a 401(k) or help workers participate in group health coverage. But the rigid definitions of worker and independent contractor do not allow businesses to offer some benefits. They must either classify the person as an independent contractor and offer no benefits or classify the worker as an employee and offer all of those benefits including workers' compensation.

Employment law forces an all-or-nothing approach in which the worker either gets all the benefits of an employment contract or is prevented from receiving any of those benefits. Giving businesses and workers more freedom to pick and choose the elements of their contract might encourage businesses to offer more sharing economy work, but also offer some benefits to sharing economy workers who previously received none. While not the only impediment, the workers' compensation system stands in the way of that flexibility.

Alternatives to the current system

Today's workers' compensation system defines the workplace according to 19th and early 20th century industrial practices. The resultant law, while aimed at protecting workers, often fails to understand 21st century work practices, and in trying to comply with it employers are sometimes prevented from giving workers valuable benefits associated with a flexible workplace. That law is entirely inappropriate for the majority of workers today who must balance a combination of responsibilities both inside and outside the home.

Legislators could reform the workers' compensation system to better reflect the needs of workers today. In a previous study, the Illinois Policy Institute detailed a range of reforms to make the system more efficient.[76] Beyond purely technical reforms, policymakers might also consider exempting domestic workers and small businesses. Legislators also can change the rules to only cover employees in the workplace where the employer can control risk, creating an exemption for telecommuters and traveling employees.

These reforms and others, while beneficial, only react to changes in work practices that have already occurred. Indeed policymakers often respond to changes in the past rather than working proactively to make laws appropriate for the future. Throughout the 19th century the rise of manufacturing increasingly necessitated a system such as workers' compensation, but the legislators did not act until the early 20th century as that need was beginning to decline. Likewise, occupational diseases were added to workers' compensation around the time average employee tenure was at its peak, but since that time rules that make employers responsible for diseases that develop over time have become increasingly inapt.

The workers' compensation system has failed to adapt to change in part because of bureaucracy, and in part because the legislative process often moves slowly. The American system of checks and balances imposes inertia by design. That inertia protects innovators by ensuring stability in the law and preventing special interests from changing the rules of the game to serve a narrow interest. But once changes are in place, those checks and balances also make it easier for special interests, such as those representing medical providers and the tort bar, to block changes that benefit both employers and workers.

While workers and employers also might be represented in the legislative process, these groups are far more diverse and more difficult to organize. Only a small fraction of the workforce is represented by unions and even less so outside of the traditional manufacturing workplace. Nor are there any prospective interest groups representing people who would telecommute if they were permitted, or sharing economy businesses that would create jobs but for the current law. Before those groups can exist, entrepreneurs must develop and implement business models that are incompatible with the current framework. And because it takes time for interest groups to organize and emerge, legislators are prone to write laws that are backward-looking.

Writing forward-looking laws is challenging for another reason: The future is unknown. Legislators can look at existing trends, but entrepreneurship largely is a process of trial and error. While experimentation does exist in law, there are limits on the extent policymakers can also be entrepreneurs without undermining legal certainty. In other words, while certainty in the law is good for innovation, when legislators write the broad rules of the game, it is harmful when the rules are too specific and prevent experimentation. What legislators must seek to do is write rules that protect workers and entrepreneurs, but are broad enough to allow experimentation.

The Texas model: Allow employers to opt out of the workers' compensation system

While the model of workers' compensation increasingly has drifted further from the needs of workers and employers, it is still possible to imagine how experimentation might shape a more dynamic 21st century system because one state, Texas, never eliminated the opt-out from the workers' compensation system. That has allowed employers to privately establish alternative systems to workers' compensation.

Texas employers that opt out of workers' compensation find themselves in the tort system. Meaning that if a worker is injured because of the employer's negligence, the employer must pay both actual costs and punitive damages. Furthermore, Texas has removed many of the legal defenses available to employers; a Texas employer cannot avoid liability because the injury results from the actions of another employee or because the employee was partially responsible, and employers cannot claim that employees simply assumed a risk by taking the job.[77] Thus, a Texas employer opting out of workers' compensation takes a significant risk if the employer fails to ensure a safe workplace.

Despite the potential legal liability, and the loss of some tax exemptions under workers' compensation, roughly a third of all Texas employers opted out of the system in 2014.[78] The majority of these employers were small businesses, which likely have higher costs under the workers' compensation system.[79] Forty-three percent of businesses with fewer than five employees opted out compared to just 19 percent of businesses with at least 500 employees. Because most employers who opt out are smaller and by definition employ fewer people, only one-fifth of all workers in Texas are outside the system.[80]

Nonsubscribers (businesses that opt out) increase their costs associated with legal liability and cannot reduce costs by cutting benefits to employees. As noted above, multiple economic studies have shown employees require higher wages to compensate for reduced benefits. In fact, even when businesses opt out, more than one-third of nonsubscribing employers provide replacement benefits and 94 percent of large employers provide benefits. Again, because bigger employers employ more people, 70 percent of employees not covered by workers' compensation still receive some benefits with the large majority of those receiving both medical and wage replacement.[81]

In some cases, the private benefit schemes not only replicated benefits under workers' compensation, but some benefits actually exceeded those under Texas' state-run scheme. One study by Alison Morantz of Stanford Law School found that employers did not impose caps on wage replacement, as workers' compensation does, and typically allowed wage replacement benefits beyond the statutory cap.[82]

Rather than find savings from cutting benefits that employees value, forcing the employer to increase wages in compensation, businesses have focused on eliminating costs that did not produce commensurate benefits. For example, employers realized that a small number of physicians were responsible for prescribing significantly larger amounts of opioids and often did so for financial reasons.[83] By removing those physicians from their network, they were able to realize significant cost savings without reducing care to workers – potentially eliminating harm from over-prescribing doctors. Nonsubscribing employers and claims executives report long-term opioid use has fallen to near zero.[84]

Patients do not gain from receiving higher doses of opioids and in some cases suffer serious medical harms. But workers and employers have an incentive to pay for higher-quality doctors who ensure a speedy recovery. Indeed, the evidence shows that when employers direct care, they are willing to spend more than the state requires.[85] Because both patients and employers gain, there is no conflict between patient and employer interests.

Nonsubscribing employers also have sought to reduce the lengthy and cumbersome dispute resolution process. Employers are able to design their own dispute resolution process. Because many employers have chosen to structure their benefit plans under the federal Employee Retirement Income Security Act, or ERISA, these plans allow a final appeal to federal courts. However, in keeping with the original workers' compensation goal of rapid and efficient dispute resolution, such appeals are rare.[86]

While employers have found considerable cost savings through providing benefits outside the workers' compensation system, and in some cases have increased benefits, this is not always the case. Some players choose to not provide coverage at all, while in other cases the coverage is less than what would have been provided under workers' compensation. An extensive report by ProPublica and NPR found multiple examples of workers being injured at work, but not being eligible for benefits.[87]

However, in all the cases reported by ProPublica and NPR where the employee was not eligible for compensation, the worker not only was not covered by workers' compensation, but the employer also was not negligent. Employers who opt out of workers' compensation are once again liable if they cause a worker to be injured. Under Texas law, they cannot use the employee's own contributory negligence as a defense.

In one case, a truck driver who climbed beneath his trailer to release an air brake, causing the truck to roll forward and drag him 16 feet, was awarded $8.59 million because the employer had failed to adequately train him. Had the worker been covered by workers' compensation, he would have received a capped settlement for actual damages that would have been significantly less. The reintroduction of negligence is one reason nonsubscribing employers in Texas often implement stringent risk management programs that significantly improve worker safety.[88]

Moreover, while employers do not always provide the same benefits under their own schemes as workers' compensation, it should be noted that these plans are adopted voluntarily. Employers provide benefit packages that cover 70 percent of employees, not because the law requires them to, but because employees value those plans.[89] If employers were able to easily eliminate benefits without having to compensate employees, then voluntary coverage would be far sparser than the evidence indicates.

The presumption that employers have an incentive to reduce valuable benefits fails to explain the bulk of employer behavior and is an inadequate explanation of why private schemes differ from those run by the state. Allowing instead that the state-run system is itself imperfect permits an understanding of the differences between the private and public systems that is far more consistent with the available evidence. In some cases, the state-run system provides benefits below the level preferred by employees, such as by imposing maximum caps on lost wages. In other cases, workers' compensation stipulates benefits above what workers would be willing to pay for.

The NPR and ProPublica report focused exclusively on areas where voluntary coverage was lighter. For example, employers might have increased authority to direct employees' treatment, many plans do not cover occupational diseases beyond two years, and accidents must be reported within 24 hours to be covered. Employees might well value benefits such as treatment for occupational disease or being able to report injuries long after accidents have occurred, but that does not mean the cost of providing the benefit exceeds the value to the employee. If allowing employees to claim workers' compensation benefits long after the accident increases the chance of fraud, then employees will still demand higher wages to compensate for the loss of those benefits, but the wage premium will be less than the cost of fraud. Employees who are unwilling to subsidize misbehavior by other employees will simply prefer higher wages to the benefit.

In other cases, where the new plans eliminated benefits an employee did value, companies responded by finding new ways to provide those benefits. Since realizing that employees might be left without medical coverage because their claims were denied, early adopters of the opt-out such as Costco have worked to integrate ordinary employee health insurance with their workers' compensation programs to eliminate that coverage gap. Again, there is no legal requirement to do so, but there is an economic incentive for businesses such as Costco to provide benefits that employees value. In this instance, employees valued medical coverage over higher pay, but preferred higher pay to wage insurance.

As with any innovative system, there is some process of trial and error. While those errors are sometimes costly to both employee and employer interests, in a dynamic economy those interests are changing constantly and a stagnant system is even more likely to produce undesirable results. The current system is both expensive and bureaucratic, and while employees might not always get the best possible deal under private bargaining, there is good reason to believe that they will receive a better deal than under the state-run workers' compensation system.

Prolonging treatment or extending the legal process for receiving claims benefits medical providers and lawyers, but not workers. As long as workers and employers are prohibited from bargaining outside the system, those interest groups will be able to impede reform. Furthermore, allowing bargains outside the system has reduced special interest opposition to reforming the workers' compensation system in Texas, and that effort has enjoyed some success in convincing employers to opt in again.

Evidence suggests the cost savings can be substantial. Some 98 percent of all companies using alternative plans reported cost savings, and one report suggests these savings exceeded 50 percent across an average of all industries.[90] Those savings do not include higher wage premiums that might have to be paid to employees, but the evidence suggests that both employers and employees can be better off.

Nevertheless, many employers, especially midsized employers, continue to opt in to the state workers' compensation system. In part, this is because policymakers reformed the system in response to the high opt-out rate. But there are other reasons: Texas requires employers to pick one of just two choices – the state scheme or the opt-out – and to apply that choice to every employee. Thus, an industrial employer cannot allow a telecommuting parent in human resources to opt out without also applying the same rule to workers in hazardous roles.

When companies have adopted telework or flexible work, they often have applied different rules to different workers.[91] Indeed, almost by definition, a business that is considering flexible work arrangements should consider the individual worker's circumstances and job requirements to create a work contract that is tailored to that employee. Workers in manufacturing roles often have to be physically present at fixed times while white-collar positions might lend themselves to greater flexibility.[92] Thus, the workers who get the most benefit out of workers' compensation (industrial workers in hazardous situations) also get the least benefit from an opt-out. But if businesses have to choose the same system for all workers, then they are prohibited from providing a tailored flexible work contract to all employees.

When employers must choose between the two options, they might reject the opt-out because of the risk of negligence suits without the protection of the grand bargain. There are mechanisms for mitigating this risk: Many businesses with voluntary coverage contract with employees to count any voluntary payouts toward a final settlement if they are later sued. Employers also make wide use of arbitration, although Texas prevents employers from requiring employees to pre-commit to arbitration. Despite these mechanisms for mitigating legal risk, it is likely that some Texas employers decline to opt out even though a private plan might ultimately provide employees with a more valuable benefits package.

Workers and employers might value the grand bargain even if they find the existing state-run workers' compensation to be costly and inefficient. Even in Texas, employers are bound to a menu with just two choices and no freedom to enter into bargains that better suit the specific needs of workers and employers. By restricting employers to either the state-run system or a complete opt-out, the Texas rule prevents businesses from exploring better ways to deliver workers' compensation benefits.

How the opt-out system works in other states

While Texas is the only state to allow all businesses to completely opt out of workers' compensation, many states have some form of opt-out and most are less restrictive than Illinois. Few states require businesses of all sizes to carry workers' compensation. Illinois is somewhat unusual in that only business owners (including board members) and their immediate families can opt out. Many states also allow industry-specific opt-outs including for domestic employees such as au pairs.

Many states, including Indiana and Wisconsin, while not permitting a general opt-out, do permit employers significantly more discretion to direct employee care similar to the alternative schemes in Texas. While employers have successfully cut costs this way, many pay doctors in excess of the state-mandated fee schedule.

As with other forms of health care, employees value the quality of medical care under workers' compensation and will demand higher wages if employers reduce quality. Therefore, rather than cut costs by hiring lower-quality physicians, employers pay for higher-quality doctors who can return patients to health and work in less time, providing both a cost savings for the employer and a benefit that employees generally value. Controlling medical costs in this way also helps eliminate conflicts of interest between doctor and patient and is associated with reduced incidents of painkiller addiction.

Giving businesses more discretion over medical costs reduces one form of bureaucracy, but leaves in place the costly and time-consuming dispute-resolution process used by workers' compensation. Eliminating that process not only provides cost savings for employers, but also ensures workers are compensated faster. And while Texas allows employers to introduce alternative dispute resolution by opting out completely, that limits the benefits to employees in hazardous industries where employers might be wary of returning to a negligence system.

Eleven states, including Illinois, operate a partial opt-out for unionized workplaces. Illinois' "carve-out" is only a trial program for two unionized construction businesses, but the program has been used more extensively in other states. The carve-out retains the principle of exclusive remedy: Employers must set benefits at the level defined by the state, but can – with union agreement – create their own system of arbitration that can be more efficient. Injured workers get treated faster while employers and employees both save the expense of the workers' compensation legal bureaucracy.

The union carve-out is the narrowest form of alternative dispute resolution and while beneficial to the small number of eligible workers, does not improve care for the system at large. Furthermore, increasingly fewer workplaces are unionized. Allowing only those companies to avoid an inefficient system risks creating a competitive imbalance where small, and particularly small minority-owned, businesses that are less likely to be unionized are put at a competitive disadvantage. Not only do those ineligible businesses suffer, but so, too, do consumers.

In Oklahoma, lawmakers have combined the principles behind union carve-outs and alternative schemes permitted by the Texas opt-out. Under the Oklahoma option, employers can opt out of the state system, but as with carve-outs they retain exclusive remedy. Oklahoma took the federal ERISA plans used to provide benefits by many Texas nonsubscribers and created an opt-out that maintained exclusive remedy. Employers must provide the same level of benefits promised by the state-run program, but also maintain immunity from negligence suits. But employers still can administer the benefits and provide their own system of arbitration as in Texas.

Oklahoma's opt-out, passed in 2013, faces two possible legal challenges.[93] The state's Workers' Compensation Commission has declared the rule unconstitutional, although it is unclear that the commission ever had the authority to do so, and the decision might not withstand appeal to the courts.[94] States also are prohibited from regulating the federal ERISA plans. The minimum benefits stipulated by Oklahoma appear to do that, but drafters believe this problem can be solved by making the plan entirely optional.[95]

Despite these concerns, two states are looking to replicate the Oklahoma option. Legislators in South Carolina and Tennessee have introduced bills that would enact similar reforms to those in Oklahoma. These reforms have proven less controversial than those in Texas by maintaining much of the principles of workers' compensation, but under a privately run program. Oklahoma's more conservative approach could encourage more businesses to make private arrangements, but the Sooner State's reforms also miss the possible benefits that stem from allowing employers to renegotiate the overall package.

While Oklahoma's compromise approach does not force employers to choose between two polar alternatives, it still reduces choice to two options that in many ways are similar. The Oklahoma and Texas options still provide more choice than is available to workers in Illinois, but both systems fall far short of giving workers the tailored options that employers increasingly try to offer employees in other work arrangements.

Like Texas, Oklahoma still requires every employee be treated the same. Just as it is not necessary that every employer in every industry have the exact same coverage, it rarely will be the case that every employee will need or want the same deal. Industrial workers might want something close to the current workers' compensation system but with greater efficiency, while a human resources manager at the same business might want an entirely different package. Yet those options are not available to employees because the state has assumed that a one-size-fits-all system is inherently better than one with even the potential for employer misbehavior.

How to make workers' compensation fit the modern workplace

The current system of workers' compensation assumes an adversarial relationship between employer and employee. Yet this assumption is not borne out by evidence. At the same time the evident behavior of the state-run program is equally at odds with its presumed intent to protect employee interests. As employees increasingly require a more sophisticated and flexible set of accommodations that adapt not only to the changing nature of work, but to the far greater diversity in the modern workplace, the current system remains steadfastly wedded to an outdated concept of work. Instead of preparing for the workplace of the future the system seeks to solve problems of the past.

As employee needs have evolved, entrepreneurs and innovators have developed new accommodations such as telecommuting and new ways to monitor work that give employees greater flexibility to manage their time. Businesses have done this not out of any legal mandate, but have acted independently out of economic interest. In other words, employers have recognized that providing employees with valued benefits is the most cost-effective way to recruit and retain talented workers.

By ignoring these incentives, lawmakers have stood in the way of innovations that would benefit employees. The one-size-fits-all system that has been imposed upon workers and employers alike not only does not allow for beneficial innovation, but also has replaced the largely hypothetical threat of employer abuse with an entirely tangible abuse by special interests. As a result, lawyers and medical providers have been able to preserve a system that unnecessarily extends convalescences, might promote addiction and can leave workers' legitimate claims unsettled for periods of years after an accident.

Freedom to contract: A path toward a 21st century workers' compensation system

In place of the current one-size-fits-all system that imposes rigid constraints on employers, policymakers should consider a system that simply establishes the basic rules of the game. With few exceptions, the government does not set wages but instead relies on competitive employment markets to protect workers from being underpaid. Employees generally are given the freedom to exchange wages for other benefits. Only in the case of workers' compensation are employees considered incapable of making those decisions despite evidence that they do indeed take the value of benefits into consideration.

The grand bargain between employer and employee first laid out by workers' compensation still holds considerable merit, but the bargain needs to be renegotiated.[96] If an employer offers to provide uncapped payment for lost wages in return for employees waiving coverage on occupational diseases or to offer workers greater flexibility provided they waive workers' compensation payments while telecommuting, then the state should endeavor to uphold those bargains. Likewise, if employers and employees should mutually agree to a system of alternative dispute resolution, then the court should presume the outcome of that arbitration to be fair and legal.

As with the Oklahoma option, more employers could be induced into offering alternative plans by giving workers the freedom to waive the right to sue in return for other benefits or higher wages. But workers should not be forced to replicate the exact benefits provided by the state. And employees should be free to accept lower benefits in return for higher pay if they choose.

Instead of implementing a specific set of rules, policymakers in Illinois and across the United States should create a legal presumption in favor of freedom of contract. Like any employment contract, the court would have the power to scrutinize the terms and would not be required to uphold a one-sided deal if such a deal was completely unfair. However, policymakers must abandon the demonstrably false assumption in workplace injury that all deals between employer and employee are exploitative.

To allow such contracts, the General Assembly would need to allow employers to opt out. However, as Texas has demonstrated, an opt-out alone is not sufficient to allow workers and employers to privately negotiate a better deal. Courts often will disallow contracts waiving tort claims on the grounds that such contracts violate public policy or are one-sided. Because OSHA now stipulates specific requirements for workplace safety, any violation of those rules would be more likely to be deemed a violation of public policy and a contract waiving tort claims would be unlikely to be upheld. However, as noted above, the grand bargain in many ways obviates the need for such regulations because the employer is financially liable for the cost of all injuries. That the bargain should be made between employer and employee should not automatically invalidate the public benefits of the arrangement.

A court rightly should be skeptical if an employee were to waive his or her right to sue and did not receive in return some compensation. In making the determination about whether a contract is fair, the court should consider the relative bargaining power of the parties. If a minimum-wage worker agreed to waive negligence in return for relatively few benefits, the court might justifiably be less likely to uphold that contract than if the employee were a highly paid manager with more negotiating power. However, modern courts tend to hold all tort waivers in employment contracts as being one-sided and thus unenforceable.[97]

When evaluating contracts that waive potential negligence claims, courts must weigh the freedom to contract against the right to make proper tort claims. While it is right that courts strike a balance, modern jurisprudence largely has eradicated that balance in favor of restricting the right to contract. But as the original workers' compensation experiment has shown, workers can benefit considerably from making bargains that waive tort claims. And the evidence contradicts the courts' presumption that workers have little or no negotiating power.

To establish a presumption in favor of freedom to contract, the General Assembly would need to pass into law a presumption that all such contracts are presumed consistent with public policy, even when the employer's actions violate health and safety rules. As with current workers' compensation law, these exemptions would not be absolute. Employers still could be sued for behavior that was reckless or if they intentionally harmed an employee. And courts still could strike down clearly unfair contracts, but courts would not presume a contract to be unfair or illegal without first presenting evidence to justify that presumption.

Conclusion

The grand bargain made between workers and employers more than a century ago is still the only bargain available to most Americans. While that bargain still holds some merit, for many workers it stands in the way of more flexible working practices that are better suited to 21st century needs. Abolishing it or creating a simple opt-out could benefit many workers in Illinois, but it is only one step toward creating a fully flexible system that is as dynamic as the workplace it must serve.

That system has yet to be created in large part because of a demonstrably false belief that businesses intend to exploit workers. Yet it is the current system that has imposed unnecessary treatments and a lengthy legal process that serves special interests. By contrast, successful businesses have found cost-effective ways to provide workers with benefits such as greater flexibility and a more personalized work contract.

Modern American workers are more diverse than the factory workers for whom workers' compensation was created. Governments cannot create through legislation a system that understands the differing needs of every worker and creates a personalized solution. But modern businesses are seeking to do just that. Eliminating the legal barriers that stand in the way of innovation in the workplace not only will not harm workers, but also will create greater competition among employers to attract workers.

The most effective way for government to protect workers is not by a restrictive one-size-fits-all system, but by creating broad rules of the game that give workers more freedom to contract with employers for a deal that is better suited to their own situation.

[1] "Fiscal Year 2006 Annual Report," Illinois Workers' Compensation Commission, http://www.iwcc.il.gov/annualreportFY06.pdf ; Arnold Weber, "Workmen's Compensation in Illinois," University of Illinois Bulletin 53, no. 17 (1955): 6, https://archive.org/details/workmenscompensa25webe

[2] The first attempted law in the United States passed in Maryland in 1902, but only covered fatal cases and was found unconstitutional by the state court ("Fiscal Year 2006 Annual Report," Illinois Workers' Compensation Commission, http://www.iwcc.il.gov/annualreportFY06.pdf). New York passed a full version of workers' compensation in 1910, but that too was found unconstitutional (Ibid.). The first constitutional law was passed in Wisconsin earlier in the same year as Illinois' law (Ibid.).

[3] "Work-Life Balance And The Economics Of Workplace Flexibility," The White House, June 2014, https://www.whitehouse.gov/sites/default/files/docs/updated_workplace_flex_report_final_0.pdf

[4] 2010 Census of Population and Housing, Population and Housing Unit Counts, CPH-2-5. U.S. Government Printing Office, Washington, DC: U.S. Census Bureau. 2012, http://www.census.gov/prod/cen2010/cph-2-1.pdf

[5] Ibid.

[6] Punitive, or noneconomic, damages are damages in excess of the actual harm caused and serve as a disincentive to wrongdoing. See generally, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981); Ronen Perry, Economic Loss, Punitive Damages, and the Exxon Valdez Litigation, 45 Georgia Law Review 407-485 (2011).

[7] Pam Clark, "The Rich History of Worker's Compensation," Business Insurance, http://www.businessinsurance.org/the-rich-history-of-workers-compensation/; Theodore Roosevelt, "Sarah Kinsley's Arm," Collier's, March 1913.

[8] The courts later adopted what become known as the Hand Rule, after Judge Learned Hand, which adopted an economic principle that the responsible party is negligent when it is less costly to take avoiding action than to allow a harm to sometimes occur (U.S. v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947)).

[9] Ibid.

[10] The principle that responsibility should be placed with the lowest-cost avoider (in this case the business) was first described by Coase, R. H. (1960). The problem of Social Cost (pp. 87-137). Palgrave Macmillan UK.

[11] Arnold Weber, "Workmen's Compensation in Illinois," University of Illinois Bulletin 53, no. 17 1955: 6, https://archive.org/details/workmenscompensa25webe

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] A list of state requirements for workers' compensation coverage in the home is available here https://gtm.com/household/resource-center/workers-comp-requirements/ (N.B. while the majority of states do not require workers' compensation coverage for a single domestic worker, in some, employing multiple domestic servants would trigger workers' compensation requirements); A survey of the workers' compensation requirements by state is available from the National Federation of Independent Business here http://www.nfib.com/content/legal-compliance/legal/workers-compensation-laws-state-by-state-comparison-57181/

[16] New Jersey also permits a general opt-out, but under conditions so restrictive that no employer uses that provision ("Workers' Compensation Opt-Out: Can Privatization Work? The Texas Experience and the Oklahoma Proposal." New Street Group, November 2012).

[17] "Morbidity and Mortality Weekly Report," Centers for Disease Control and Prevention, June 11, 1999: 48(22);461-469, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4822a1.htm

[18] Ibid.

[19] Ibid.

[20] Center for Disease Control, *Achievements in Public Health, 1900-1999: Improvements in Workplace Safety, 1900-1999*, June 11, 1999, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4822a1.htm.

[21] Donald M. Fisk, "American Labor in the 20th Century," Compensation and Working Conditions, Bureau of Labor Statistics, Fall 2001.

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