States of Confusion
Workers Compensation Extraterritorial Issues
By: Maureen Gallagher

Introduction

The focus of the paper is to give the reader a better understanding of the considerable overlap and conflict between varying state and federal jurisdictional remedies and how to navigate through the extraterritorial maze for the best possible coverage and claims result. While there is no definitive solution to all the workers compensation coverage, claims overlap and conflicts as well as other issues between jurisdictions, knowledgeable workers compensation stakeholders can minimize and/or avoid many of the common pitfalls.

The term "jurisdiction" used throughout this white paper refers to the legal authority that enforces the workers compensation laws. The jurisdiction is most often a state but can also be a territory (e.g., Puerto Rico), or a federal act (e.g., Longshore and Harbor Workers Compensation Act.)

Peter M. Lencsis is the author of *Workers Compensation, A Reference and Guide*. While Published in 1997, it remains my favorite workers compensation primer. Lencsis wrote in the book's introduction: "Note: The National Council on Compensation Insurance, Inc. and a number of other organizations have adopted the practice of spelling the terms "workers compensation" and "employers liability" without any apostrophes. That practice is generally followed in this book." I too, have adopted this practice in this white paper.

States of Confusion

As states passed workers compensation laws starting in the early 1900s (Wisconsin 1911) through 1949 (Mississippi), each state established its unique workers compensation system. This resulted in a mishmash of laws, benefits, compensability and eligibility from state to state. Determining what benefits apply is complicated because the varying states focus only on what *their* laws require. Courts have ruled that a state has the right to apply its own workers compensation rules and standards to each case. Hence, most states simply don't care what other states allow, only what is required under their workers compensation laws. There is little meaningful cooperation or coordination among states. Whereas we have a Uniform National Plumbing Code to protect the health of the nation and Uniform Commercial Code enacted in all 50 states for a standard method of dealing with business law questions involving commerce, no such code exists for our nation's stakeholders in workers compensation. Is it time for a Uniform Workers Compensation Code? Explore in my upcoming April, 2014 white paper. I suggest that many/most of the extraterritorial issues can be resolved by states harmonizing their interpretations of employees traveling to, through, working in or living in a state(s) other than their home state.

Challenges for agents, employers, insurance companies and adjusters include:

- Understanding when coverage is required in jurisdictions where the employer has operations or employees working, living or traveling in or through other jurisdictions.
- How coverage is provided for various jurisdictions under the workers compensation policy.
- Understanding what jurisdictional benefits an employee can collect.
- Determining what rates — which determine the premium paid — will apply. This subject mirrors in its complexity the coverage and benefit structures of the various state and federal laws. Pricing is discussed only as it relates to extraterritorial issues in this white paper.

The state and territorial laws, which exist in all states, Puerto Rico and the U. S. Virgin Islands, are especially non-uniform in terms of dollar amounts of benefits payable for different kinds and degrees of disability. The difference in what is paid to an employee for a serious injury (e.g., lost finger) can vary by $50,000. Lost wages and treatment are inconsistent throughout the country. The only consistency in workers compensation from state to state is the inadequacy of benefits. While the negative perception of workers compensation can lead one to think workers compensation benefits are a paid vacation for employees, the reality is that the vast majority of workers compensation reforms and/or legislative changes have resulted in *lowering* benefits and *reducing* eligibility to workers. This trend continues and has contributed to the extraterritorial issues where employees have become well informed and savvier in seeking other jurisdictional workers compensation benefits where they qualify.

The Workers Compensation Insurance Policy

It should be noted that the workers compensation policy does not apply to the states of Ohio, North Dakota, Washington and Wyoming as these are what are called “monopolistic” states. In monopolistic states, coverage may only be purchased from the state. While larger employers may self-insure in Ohio and Washington (but not North Dakota or Wyoming), no private insurance carrier can write workers compensation coverage for an employer.

The two items which reference what states are insured under a workers compensation policy are 3.A. and 3.C. Federal coverage can only be added by endorsement. It is important to understand how the workers compensation policy affords coverage for various states and federal acts. A sample “Information Page” from a workers compensation policy is included below. In most other policies, we call the Information Page, the Declaration Page. It is the first page of the policy.

Workers Compensation and Employers Liability Insurance Policy WC 00 00 01

Information Page

ABC Insurance Company   Policy No. xxxxxxxxxxxxxx

1. The Insured:

   Mailing address: ____ Individual ____ Partnership

   Other workplaces not shown above: ____ Corporation or __________________________

2. The policy period is from ________________________ to __________________________ at the insured's mailing address.

3. A. Workers Compensation Insurance: Part One of the policy applies to the Workers' Compensation Law of the states listed here:

   B. Employers Liability insurance: Part Two of the policy applies to mark in each state listed in Item 3.A The limits of our liability under Part Two are:

   Bodily Injury by Accident $_______________ each accident

   Bodily Injury by Disease $_______________ policy limit

   Bodily Injury by Disease $_______________ each employee

   C. Other States insurance: Part Three of the policy applies to the states, if any, listed here:

   D. This policy includes these endorsements and schedules:

4. The premium for this policy will be determined by our Manuals of Rules, Classifications, Rates and Rating Plan. All information required below is subject to verification and change by audit.

Classifications	Code No.	Premium Basis Total Estimated Annual Remuneration	Rate Per $100 of Remuneration	Estimated Annual Premium

Premium for increased limits Part Two, if applicable
Total premium subject to the experience modification
Premium modified to reflect experience modification of __________
Other premium charges
Total Estimated Standard Premium
Premium Discount, if applicable
Expense Constant Charge
Total Estimated Premium
Second Injury Fund Surcharge
Uninsured Employers Fund Surcharge

3. A. is fairly simple. The insurance agent for the employer instructs the insurance carrier to list the states the employer operates in at the inception of the policy. It is clear from the restrictions under 3.C. that if work is taking place in a state when the policy goes into effect or renews, that state needs to be listed in Item 3.A.

3. C. is a safety net – at least most of the time. States are listed where an employer expects it may have employees traveling to or through or working in but, the work in those states will begin after the effective date or renewal date of the policy. If an employer begins work in any state listed in 3.C. after the effective date of the policy, all provisions of the policy apply as though the state were listed in 3.A. of the Information Page. 3. C. also requires notice to be given "at once" if work begins in any state listed in 3.C. although "at once" is not defined in the policy. If the employer has work on the effective date of the policy in any state listed in 3.C., coverage will not be afforded for that state unless the carrier is notified within 30 days.

The *Badger Scaffold, Inc. V. Hartford Insurance Company* decision is an excellent illustration of how 3.C. applies. Hartford Insurance Company (Hartford) denied benefits to Badger Scaffold, Inc. (Badger) employee, David Brassard, arising out of a scaffold accident that occurred in Michigan. Brassard was hired in Michigan to work at a Michigan construction site for Badger, a Wisconsin corporation. Brassard was working in Michigan when the policy was placed in effect.

Wisconsin was listed in 3.A. and Michigan was listed in 3.C. of the policy. The policy requires Badger to notify Hartford within 30 days of the effective date of the policy if they had work in a state listed in 3.C. on the effective date or renewal date of the policy. After the claim was denied, Badger sued Hartford for coverage. Badger made several arguments, including that Hartford knew — through their auditor's review of their payrolls — that Badger had payroll in Michigan. Badger acknowledged it was not "specific" notification but Harford *did* know within 30 days that Badger had work in Michigan. The court ruled that Hartford's audit of Badger's payroll records did not necessarily inform Hartford of Badger's Michigan activities. The audit was for the prior year's activity. The court also ruled Badger failed to notify Hartford within 30 days of the effective date of the policy that it conducted Michigan operations; therefore, 3.C. did not extend coverage to a Michigan workers compensation claim for Badger's employee. The employee was working in Michigan when the policy went into effect; therefore notice was required within 30 days for coverage to be afforded.

Badger then tried to secure Wisconsin benefits for the employee, but the court ruled that because Brassard was hired in Michigan and never worked for Badger in Wisconsin, he was not eligible for Wisconsin benefits. He did not qualify as an employee under Wisconsin workers compensation laws.

It should be noted the insurance policy does not determine what law applies at the time of injury. **The law determines what is payable.** The Information Page of the workers compensation policy says, *Part One or Part Three of the policy applies to the Workers Compensation Law of the states listed here:* The states are then listed.

Nowhere in the policy does it tell an adjuster what benefits will be paid to an injured employee. When a state is listed on the workers compensation policy, essentially hundreds of pages of workers compensation statutes and laws and thousands of pages of case law for that state have been attached to the policy. Add multiple states and there is a fair argument that — although the basic workers compensation policy is only about six pages long — the addition of statutes and case law make the workers compensation policy the largest and most complex policy an employer purchases.

While the policy does not determine what is payable, the policy does determine *who pays* (Insurer or Insured.) In the case of Badger's employee, David Brassard, he is still entitled to Michigan workers compensation benefits under the law; Badger just has no insurance coverage for these benefits and must pay them out of pocket. In this instance, Badger also sued its agent for improperly placing workers compensation coverage. Michigan should have been listed in 3.A. on renewal and Badger's Michigan employee would have been covered.

It would seem the safe bet is to add all states except monopolistic states to 3.A. However, most underwriters are unwilling to do this or even add the ideal wording for 3.C.: *"All states, U S territories and possessions except Washington, Wyoming, North Dakota, Ohio, Puerto Rico and the U.S. Virgin Islands and states designated in Item 3.A. of this Information Page."* The exceptions noted are due to the monopolistic status of these jurisdictions. The reason for the underwriters' reluctance/unwillingness varies. Common reasons underwriters provide include:

Licensing Issue

The insurer is not licensed in all states. Many regional insurers are only licensed in a handful of states while other carriers may only be licensed in one state…often for strategic reasons. Carriers frequently assert it is impossible — and possibly illegal — to list a state they are not licensed in. However, the policy is quite clear under Part Three — Other States Insurance, A. How This Insurance Applies, 3. It says, *"We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them."* This wording was lifted from the now extinct "Broad Form All States Endorsement" that used to be attached to workers compensation policies to provide coverage for all states' exposures. Clearly, the intent of the wording is to allow carriers to pay benefits even in states where the carrier may not be licensed.

Underwriting Considerations

Several insurance carriers are unwilling to provide this broad wording as they have an interest in understanding where the employer they are insuring may be operating. This could be because the insurance carrier does not want to provide insurance in certain states they consider more challenging from a workers compensation standpoint or because carriers do not want to write in states where they have little or no claims adjusting experience, established provider networks and knowledge of the nuances of the law.

Underwriters' Lack of Awareness or Knowledge

Underwriters are not claims adjusters and do not always have a full understanding of workers compensation jurisdictional complexity and the employers risk (no coverage) and agents risk (errors and omission claim) for not securing coverage for all states with potential exposure. Agents are often told the employer does not need coverage in the state in which the agent is requesting coverage — which the home or primary state benefits will pay. However, the chance that an employee will be successful in securing another state's benefits — even if the employee is only there temporarily — is just too much of a risk. If the underwriter says their policy will pick up "incidental exposures" and pay the benefits of other states without having in the state listed in 3.A., then secure this in writing from the underwriter. Clearly this is not as desirable as having a state added to the policy.

State Fund and Monopolistic States Conundrum

Workers compensation insurance in the United States of America is a combination of private and/or governmental programs. The governmental programs include monopolistic jurisdictions where an employer may only purchase workers compensation from the state jurisdiction (Ohio, North Dakota, Washington, Wyoming, Puerto Rico and the U. S. Virgin Islands) and/or competitive state funds. The state funds are insurance facilities created by the state legislature to compete with private insurers. Public and private workers compensation insurance options have co-existed peacefully for almost 100 years. Several funds date back to the early 1900s (California, Idaho, Maryland, Montana, New York, Oregon, Pennsylvania and Utah) but most state funds were formed in the early 1990s in a response to high workers compensation premium costs. Today 21 states operate funds that were started by the state and are — to varying degrees — still controlled by it. Many of the state funds started as or have transitioned to a private mutual insurer but continue to have legislative oversight. In 14 of the 21 states, the fund is the insurer of last resort - usually called the *assigned risk pool*. Since workers compensation is compulsory in most states, states have to provide a solution for employers that are unable to find coverage in the voluntary market, hence the "assigned risk." The assigned risk typically has high rates coupled with severe penalties compared to the voluntary market rates.

State Fund Size - Approximate % of Market	Arizona State Compensation Fund (44%)
Colorado: Pinnacol Assurance (65%)	California State Compensation Fund (22.6%)
Idaho Insurance Fund (54.7%)	Hawaii Employers' Mutual Ins. Co (22.3%)
Louisiana WC Corporation (26.5%)	Kentucky Employers' Mutual Ins. (24.3%)
Maryland Injured Workers' Ins. Fund (23%)	Maine - MEMIC (62%)
Missouri Employers' Mutual Ins. (16%)	Minnesota State Fund Mutual Co. (11%)
New Mexico Mutual Casualty Co. (28.6%)	Montana State Fund (70%)
Compsourse Oklahoma (35%)	New York State Insurance Fund (38%)
Pennsylvania State WC Fund (11%)	Oregon: SAIF Corporation (47.2%)
Texas Mutual Insurance Company (36%)	Rhode Island: Beacon Mutual Ins. (61%)
Utah: The Workers Compensation Fund (48.9%)	West Virginia: BrickStreet (50%)

State funds play a significant role in insuring small to medium-sized employers. The Conning Research and Consulting study titled "Workers Compensation State Funds: Evolution of a Competitive Force" notes that state funds control a quarter of the insured workers compensation market, despite the fact that they only write in 25 states (21 states with state funds and 4 monopolistic states). Many employers only operate primarily in one state and insure with the state fund as it is frequently the most competitive option. However, these employers often have employees traveling to or through other states and/or working temporarily in other states.

A common scenario is an employer that is insured with a state fund that only writes in its state. The state fund cannot or will not extend coverage to other states. A few state funds have made arrangements with insurance carriers for this situation. Argonaut and Zurich are two carriers that have agreed to this arrangement with various state funds in the past, but usually only if the exposure is incidental. Other state funds have expanded their reach beyond their state and will write in other states (e.g., Minnesota, Utah and West Virginia) but usually these are limited to a handful of bordering states. Most state funds have remained state-specific. A noted exception is Maine's MEMIC which has expanded far beyond its Maine borders and will write in many states. The employer/agent often wants to leave the primary/home state coverage with the competitive state fund and have a separate carrier write the out-of-state exposures. It is difficult to get a private carrier to take on the out-of-state exposure as the premiums are small relative to the exposure. When a loss occurs under a separately placed out-of-state or non-home/primary state policy — because of the lower premiums — just about any loss has an adverse affect on the loss ratio. This makes it unattractive for insurance carriers to cover the out-of-state exposures without the home or primary state's coverage.

The employer options include:

- Moving to a carrier that can write in all states even if more expensive. The cost may be higher than state fund but certainly not as high as an uncovered claim. Often the premium of the primary home state is needed to make it worthwhile for a carrier to write all the states required.
- Having the employer's agent leverage relationships with carriers to do a favor and write for the employer.
- Placing each state separately with private carriers or other state funds if the state has a state fund. The more states involved, the more impractical this becomes due to the administrative issues.
- The employer could request its agent/broker market heavily to see if a private carrier that writes in all the states required will write the entire exposure as competitively as the state fund.

Physical Location

Carrier underwriters frequently cite the "physical location" — actually needing an address — as a roadblock to adding a state to 3.A. of the workers compensation policy. The National Council for Compensation Insurance (NCCI) has rules on this issue. Most states that follow NCCI rules allow entry of "no business location" — but not all. States that follow NCCI rules (including the independent bureaus like TX) will often modify some rules for their state. Arizona, Kentucky, Montana and Texas do not allow "no business location." It is a regulatory reporting issue. Workers compensation coverage is "filed" with the states included on the policy by the insurance carrier. When a carrier is no longer writing coverage, they "file" off and a new carrier must replace them or the employer will receive an inquiry from the state to verify coverage. If the employer does not verify coverage they can be fined and will ultimately receive a "stop work" order. Arizona, Kentucky, Montana and Texas require an address to "file." In addition to the states that follow NCCI, there are also 13 independent workers compensation bureaus (California, Delaware, Hawaii, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, North Carolina, Texas and Wisconsin). Most of the independent bureaus have similar rules to NCCI. The bureaus that are mostly unlike NCCI include California, Delaware, Hawaii, Michigan and Pennsylvania.

Because the four NCCI states (Arizona, Kentucky, Montana and Texas) require physical addresses, carrier underwriters have gotten into the habit of asking for the physical street address for all employers in all states all the time. It has become so ingrained in underwriters' checklists that some underwriters may actually believe the physical address is a requirement for all states. In addition, some carriers have system constraints that do not allow them to add a location without an address.

Possible solutions for physical address to secure 3.A. coverage include:

- Providing an entry of “Any Street, Any Town” or “No Specific Location, Any City” for the state. Many carriers will use this.
- Using an employee’s home address in the state if there is an employee working from his or her home there.
- Using the agent/brokers address if they have an office there.

The Wisconsin bureau does not reject addresses that have “no business location.” However, if the insured has payroll over a million dollars or if the insured’s operation is at a fixed location (e.g., a machine shop) the state of Wisconsin will request a specific Wisconsin location. If there truly is no location or it is the employee’s residence, Wisconsin just requires notification of same. The Wisconsin Bureau will communicate any additional information that is needed by issuing a “Notice to Carrier.” The carrier then responds to the Bureau and clears the notice within the appropriate timeframe allowed by the notice.

Guide for when 3.A. is Required

Christopher J. Boggs, Underwriting Technical Specialist at Selective Insurance, wrote an excellent piece on extraterritorial issues. He provides a checklist for when a particular state should be assigned 3.A. status. Here is the link: http://www.mynewmarkets.com/articles/92718/wc-extraterritorial-jurisdiction-problems-when-to-add-3-a-states-continued .

Limited Other States Insurance Endorsements

Be careful with these endorsements; they usually do not fully protect an employer for out-of-state exposures. NCCI (endorsement WC 00 03 26 A) and other independent bureaus have endorsements sometimes used in conjunction with the residual (assigned risk) market or a state fund. The NCCI endorsement is used exclusively with the residual market. These are limited in scope of coverage in that they usually require a significant connection to the insured state in 3.A. and that the claimant/employee was in another state on a temporary basis. For example, the Texas Mutual endorsement (Limited Reimbursement for Texas Employees Injured in Other Jurisdictions TM-LRC-2008) — that applies automatically to all policies at no additional charge — requires that the injury would have had to be compensable in Texas. In addition, the employee would have to have significant contacts with Texas or the employment is located in Texas. Also, the employee would have to be injured not later than one year after the date of hire or would have to have worked in Texas for at least ten working days during the twelve months preceding the date of injury.

Self Insurance and Large Deductible Programs

Employers that are self-insured and taking on the first $250,000 to $1,000,000 for each claim and employers under large deductible plans — to a lesser extent — do not have the 3.A. or 3.C. issues like employers purchasing first dollar or small deductible ($500 to $2,500) plans. This is because the self-insured employers for all intents and purposes are paying all their own claims and can decide whether or not they will pick up a claim. Under a large deductible plan ($50,000 to $1,000,000) the carrier is generally providing excess and may have an opinion on compensability if the claim has the potential to exceed the deductible.

Compliance

The term "compliance" refers to what an employer must do or not do under the law. Only Texas and New Jersey have workers compensation laws that are elective. All other state laws are compulsory. In effect, New Jersey employers cannot go without workers compensation insurance despite the elective law. In Texas, any employer can "unsubscribe" to the workers compensation system and "go bare" and be subject to the tort system. Oklahoma SB 1062 does not allow employers to "opt out" of Oklahoma's workers compensation system, but it allows employers an alternative way to administer benefits for on-the-job injuries. The benefits provided in the alternative plan must be equal to benefits included in the Workers Compensation Act. Like Texas plans — when an employer has a plan in Texas — Oklahoma employers must offer injured employees an alternative benefit system. All other states require employers to purchase workers compensation insurance for their employees or qualify for self insurance in the state to meet the statutory requirements under the workers compensation rules. Compliance with the workers compensation laws varies from jurisdiction to jurisdiction.

Summary of Extraterritorial Issues

In the world of workers compensation — which operates under non-uniform and contradictory jurisdictional laws — extraterritorial issues are especially troublesome for several reasons, including:

- An employee may have a selection of remedy – so determining what jurisdiction benefits apply varies from claim to claim.
- Piggybacking benefits – multiple jurisdictional benefits may apply.
- Jurisdiction-specific statutes or extraterritorial rules, case law, common law and tests may limit or expand benefits.
- Reciprocity – agreements among jurisdictions may influence what benefits apply.
- Workers compensation exemption for small employers or classes of employees.
- Mandatory 3.A. or state coverage.

- Jurisdictions requiring disability in addition to workers compensation insurance.
- The need for foreign coverage for employees traveling out of the country.
- State and federal laws may respond to the same claim in many instances and the employer must defend in both jurisdictions.

Which Benefits Apply?

One of the most important factors is that an employee injured outside of their state of residence may have selection of remedies (benefits). Therefore, it is important to have the states of current operation listed in 3.A. as well as any states employees ***regularly travel to, travel through, live in or are working in for an extended period of time.*** If an employer has employees traveling on a limited basis from their home states, their headquarters state may have established a time limit on coverage for out-of-state injuries. The most common limit is six months. This may be written into the statute or may be silent, but over time case law has made determinations in this area. In other words, if an employee usually worked in Michigan but spent three months working on assignment in Kentucky and was injured in Kentucky, the employee would most likely still be eligible for Michigan benefits. In states with a timeline, an employee working in another state for more than the designated duration is no longer entitled to benefits in the home state, but the employee is probably entitled to the compensation in the state in which he or she is currently working.

There are many situations where employees live in one state and work in another. This is particularly prevalent in the Northeast and Midwest. The aforementioned injured Michigan employee may want to opt for Kentucky benefits because Kentucky has lifetime medical and Michigan does not; however, just because the employee is eligible for Michigan benefits doesn't mean he or she wants them. Conversely, just because the employee wants another state's benefits doesn't mean they will qualify for them.

An employee might seek to recover another jurisdiction's benefits for a variety of reasons. Laws of one state may not apply to the accident at all if, for example, the employee is not covered as in an "arising-out-of" or "in-the-course-of" employment problem (a prerequisite in all jurisdictions to be eligible for workers compensation). For example, an employee may have been injured on the way to work and the state where they were injured does not allow for workers compensation in this circumstance even though this would be a compensable injury in the employee's headquarters state.

Or perhaps there is a disqualification in one state due, for example, to an employee's intoxication that would not be a disqualifier in another state. In addition, the maximum amount of income benefits available to employees varies considerably from state to state. All other factors being equal, an injured employee will normally seek coverage under the state law that provides the highest income benefits unless a disqualifier exists in the state with higher benefits.

Piggybacking Benefits

Piggybacking occurs when an employee files in one state and then in another state where he or she qualifies for additional benefits. What is allowed in additional workers compensation payments will depend on the circumstances of the claim and the states involved. This has become particularly dangerous for employers with operations in one state where they have arranged workers compensation coverage for states of operation but have not arranged coverage in other states as they are unaware there is an exposure in another state. The employer then becomes liable for the benefits due in the uninsured state including all costs to adjust and defend the claim if litigated. Typically, if an employee collects benefits in one state and is successful in perfecting a claim in another state with higher benefits, the benefits collected in the first state are offset from the second state's benefits payment. For example, assume an employee collects $10,000 from Indiana then files in Illinois, which grants $18,000. Only the difference between $18,000 and $10,000 or an additional $8,000 would be paid. The unique wage-loss versus impairment state loophole allows 100% of both states' benefits to be paid.

Although it is impossible to describe the workers compensation disability benefits in very simple terms, understanding the piggybacking issue requires a basic understanding of benefits and the variances between states. The two systems states are commonly referred to as "impairment versus wage-loss" states.

Impairment States:

Wage loss is paid initially in all states. This includes impairment states. The wage loss can be for a total disability (Temporary Total Disability or TTD) or partial with light duty return-to-work with a possible differential benefit if working fewer hours or for a lower wage. This is called Temporary Partial Disability or TPD. In an impairment state, wage loss benefits continue until the injured worker's condition has stabilized. The stabilized condition is typically referred to as "maximum medical improvement" (MMI). This means the employee has recovered as much as he or she possibly can from the effects of the occupational injury.

In an impairment state an assessment would be made of the extent of the worker's physical or mental impairment at the time of MMI — the precursor to ending the claim. This assessment varies from state to state. It can be called an "impairment rating", "percent of disability", or "loss of earning potential". The assessment is generally made by a physician and would be based upon the physical or functional limitations that resulted from the injury.

The assessment, often called PPD (Permanent Partial Disability), can be a certain number of weeks of benefits, a percentage of the injured body part, or BAW (body as a whole), or other rating categories that, again, vary from state to state. Once the assessment is completed, a payment is made to the employee based on what is required under the state statute for the "impairment". All states place a maximum limit on the amount of benefits. This is often the end of the claim in an impairment state.

Wage-Loss Systems

At the opposite extreme from an impairment-rating system is a wage-loss system. In a pure wage-loss system, the benefits are based entirely upon the extent of the worker's wage loss. Benefits are ordinarily paid weekly and the amount of the wage loss is calculated based on prior wages. As long as there is a wage loss related to a compensable injury, benefits are paid. This can go on for the rest of the employee's life or the claim may be settled for full and final settlement.

In wage-loss states, <u>"wage loss = disability".</u> Michigan, Pennsylvania and Massachusetts are the only wage-loss states where there is no impairment rating. To further confuse matters, most wage-loss states appear to be an impairment state as they make allowances for an employee's reduced earning capacity due to an injury (e.g., lost finger) which is often paid in a lump sum and can be characterized as an "impairment rating." These states are a hybrid incorporating both wage-loss and impairment systems into their laws.

Claim Scenario Involving Piggybacking

This is an Ohio-based truck driver that drove on occasion through Pennsylvania. Upon incurring a work-related injury the driver collected benefits through the Ohio Bureau of Workers Compensation (BWC) system until he reached the magic "maximum medical improvement" (MMI) as determined by a doctor. The doctor also determined the required future medical care at this time. Once MMI is reached, wage loss benefits stop. There may or may not be permanent partial disability due.

After collecting all benefits due in Ohio through meeting MMI and settling his Ohio workers compensation claim, the employee successfully argued that he was entitled to benefits in Pennsylvania. The determination that the driver was entitled to Pennsylvania benefits was due to the duration of driving time through Pennsylvania. (The employer had GPS in his truck and tracked his mileage.) An Ohio employer, located in an impairment state, is often faced with employees attempting to piggyback benefits from the neighboring wages-loss states like Michigan, Illinois, Kentucky and Pennsylvania. The impairment versus wage-loss state system creates a unique opportunity for an employee to collect benefits in both states without any offset.

The employee may be entitled to the following:

- The difference between the TTD paid in Ohio and Pennsylvania's wage loss for the entire period that the TTD was paid. Pennsylvania has determined the driver is an employee under their workers compensation laws. Pennsylvania only allows another state's benefits if they are equal to Pennsylvania's benefits. Our fictitious truck driver made $1,000 per week. He would have been paid the maximum rate in Ohio until reaching MMI. The maximum rates in Pennsylvania (as well as Michigan and Illinois) are higher than in Ohio. In this case it was $150 per week more. Therefore, $15,600 would be due to the employee immediately. This represents the difference between the Ohio and Pennsylvania benefit levels for weekly wage loss for the two years Ohio paid benefits.

- The employee is not entitled to any additional wage loss in Ohio as he has reached MMI but he is entitled to wage loss in the wage-loss state until he is placed in a job earning his pre-injury wages (no maximum period of time). Even if PPD was paid on the Ohio claim (which is an impairment state's way of taking care of "future wage" loss or "loss of function" if they cannot come back to work) the wage-loss state cannot offset because it is not wage loss; it represents an impairment the wage-loss state does not recognize. Our truck driver has had difficulty finding a job — due to the economy and his disabling workers compensation injuries — so the Pennsylvania wage-loss state begins paying benefits. Assuming a maximum weekly rate of $750 that would equate to $39,000 every year into the future in addition to any medical care the treating doctor has determined the employee needs.

- If the truck driver was able to work but was earning less, he would be owed the difference between what he used to make and the new earnings. In this case, assume our driver was able to find a job paying $500 per week. In this instance the employee would be paid differential benefits somewhere around $300 weekly or $15,600 per year for life. It should be noted that workers compensation benefits are free from most federal and state taxes.

Another common piggybacking scenario is where an employee that travels to two different states, one with higher TTD or wage-loss and the other with higher impairment ratings. States have benefits levels written into their statutes so it is easy to determine this. Because he or she is entitled to benefits in states, the employee files in both and collects the highest amounts of benefits paid from each state. The employee is paid the higher wage loss in the first state and then goes to the second state he or she qualifies for benefits in to collect his or her impairment rating payment that is more favorable than the first state.

Piggybacking is common and dangerous for employers who do not understand the nuances of the laws. Remember, determining whether or not an employee can obtain another state's benefits rests on whether or not the claimant is an employee under that state's workers compensation act. Courts have ruled that a state has the right to apply their own workers compensation rules and standards to each case. Most states don't care what other states have allowed, only what is required under their workers compensation laws. If the employee collected under another state's law but qualifies in our state for *additional* benefits, well, so be it. If an employee has traveled to, through or lived or worked in another state to create a "substantial" relationship with the state, there is a very good chance he or she will be granted workers compensation benefits in that state.

In the truck driver example, the employer did not arrange for coverage outside the state of Ohio because it did not know it needed to. Ohio employers often secure their own coverage on-line with the Ohio BWC and do not use an agent. Ohio employers are often lured into a false sense of security by having their employees sign the C-110 Ohio form which states the employee will accept Ohio workers compensation benefits if injured on the job. Unfortunately, Indiana is the only state that recognizes this form besides Ohio. Although this truck driver signed the form to accept Ohio benefits it is not valid in Pennsylvania. All the Pennsylvania state benefits owed as well as the legal bills to defend were the *employer's* responsibility as there was no insurance coverage for any state's benefits but Ohio.

Common language referred to in decisions relating to employees attempting to secure benefits from other states "*a state does not allow an employee to waive their rights to benefits"*. The employee is free to seek additional or exclusive benefits from another state if they can qualify in that state. The employee can do this at the onset of the claim or after all the first state's benefits — Ohio benefits in this case — have been exhausted.

There are numerous examples of case law where benefits have been paid in one state then allowed in another. Frequent multiple state benefits paid include but are by no means limited to the following states:

- Kentucky and Tennessee
- Ohio and Michigan, Pennsylvania or Arkansas
- Kansas and Missouri
- Wisconsin and Indiana
- Michigan, Illinois and New York and just about any other state
- California has become the poster state for professional athletes' abuse of workers compensation benefits. Any professional athlete that has played even one game in California can collect California benefits.

The above discussion is an over simplification of a very complex system. The point is not to understand this issue on the level of a workers compensation claims adjuster but to highlight just how many ways other states' benefits can come into play. An employer must arrange for coverage in all states they have an exposure in, no matter how small.

State Statutes, Case Law, Common Law and Tests

State statutes, case law or the common law in a jurisdiction may influence what benefits an employee may collect. These may be limited in terms of the geographical scope of their application.

In addition to the state statutes, various jurisdictional industrial commissions and/or courts have also developed tests to assist in sorting out what jurisdiction's benefits apply. Various criteria that may apply to the situation include:

- State of hire
- State of residence
- State of primary employment
- State of pay
- State of injury
- State in agreement between employer and employee (Unique to Ohio and only Ohio and Indiana recognize the agreement)

James J. Moore, J&L Insurance Consultants, Inc. argues the best test for multi jurisdictions is the "WALSH" test and I agree. It is a good guide and is in line with many state statutes/tests and case law decisions. Judges have cited it and many carriers use this method for jurisdiction determination. It is not perfect, but an excellent starting point. *In this order*:

W Worked - Where did the employee work most of the time?
A Accident – Where did the accident occur?
L Lived – Where is the employee's home?
S Salaried – Where is the employee getting paid from?
H Hired – Where was the contract of hire initiated?

The "W" carries the most weight and the "H" the least. *Just about all jurisdictions indicate an employee is entitled to the benefits of their state if the employee was working principally localized in the state; working under a contract of hire made in the state, or was domiciled in the state at the time of the accident.* This is why "worked" and "accident" are given the most weight.

Reciprocity

Several states will reciprocate another state's extraterritorial provisions, which basically is a way of "honoring" workers compensation coverage from another jurisdiction for workers of that other jurisdiction in their jurisdiction on a temporary and incidental basis. What many reciprocal agreements do is limit the employee's choice of jurisdictional benefits to either the home state or the state to which the employee is primarily assigned. For example, Utah has reciprocity agreements with 13 states. Here is what the Utah Workers Compensation Fund has on their website: "An employee injured while temporarily working in another state may be allowed to collect benefits under the other state's workers compensation laws. However, states which have a reciprocal agreement with Utah will not take jurisdiction over a Utah employee injured while temporarily working in their state."

The link is here: www.wcfgroup.com/basic-workers-compensation-law . A Utah employee temporarily working in California – a state with much more robust benefits than Utah – may file for California benefits, but California would deny the claim due to the reciprocity agreement with Utah.

Each state has its own reciprocal agreements and they may be limited to as few as a half a dozen states they reciprocate with or up to as many as 30 states. For as many states that cooperate with reciprocity just as many states will not recognize another state's extraterritorial provisions. They simply don't care what another state law provides. In addition, not all reciprocity agreements address the "claims" aspect of compliance in the state like Utah. In other words, the reciprocity means the employer does not have to secure "coverage" in their state for an employee from their home state temporarily in their state; however, it does not mean that the employee could not pursue a claim in that state. Utah's reciprocity addresses the "claim" issue but more reciprocity agreements do not address the "claim" adjudication but rather whether or not "coverage" is required. .

The employer might be "legal" in the state from a workers compensation coverage standpoint but the employee could be successful in seeking jurisdiction in the state they are temporarily working in. In this circumstance, if the employer was relying on the reciprocity provisions of the state law and did not secure coverage in the state his employee was temporarily working in, the employer may be without coverage for that state and may also become "non-compliant" with the state and be subject to fines. Arizona and Virginia are good illustrations of this. An employee can be in these states temporarily and the employer would not have to secure coverage in the state. The employer (or its agent) has decided to rely on the employee accepting his home state benefits and not seeking benefits in the state where he or she was injured while there on a temporary or incidental basis. If the injured employee goes back to their home state for benefits, no harm, no foul.

However, if the employee perfects a claim in Virginia or in the case of Arizona, simply chooses to file an Arizona claim – whether or not the employee is successful in obtaining Arizona benefits - then the employer would be considered a non-complying employer and could be subject to penalties. If coverage for either state were in 3.A. or 3.C., the employer would have been fine from a coverage and compliance standpoint. However, if the employer or agent did not recognize the state needed to be added even for temporary or incidental situations, both penalties and coverage could be a problem. This situation reinforces the need to obtain broad wording in 3.A. or 3.C by listing all potential states that may expose the employee to work-related activities.

Also, although many states accept another state's benefits being paid on an injured employee working on a temporary basis in their state, there are usually time limits to the temporary status, which would require the employer to arrange for coverage in the state the employees are working in when the temporary status expires. For example, Alabama will only allow a temporary employee 90 days of another state's coverage. Coverage must then be secured in Alabama. Maine allows a temporary worker in their state for 5 consecutive days; 10 days in a 30-day period; or, 30 days in any 360-day period. The state law should be checked. Virtually all states have terrific websites with frequently asked question sections that provide this information.

Oregon has great information on extraterritorial reciprocity for all 50 states on their website. The link is here: http://www.cbs.state.or.us/wcd/compliance/ecu/etsummary.html

Other Unique State-Specific Extraterritorial Rules

Connecticut, like New Jersey, does not address extraterritorial issues, but their definition of employee does. Under *Section 31-275. Definitions: (B) "Employee" shall not be construed to include: (vi) Any person who is not a resident of this state but is injured in this state during the course of his employment, unless such person (1) works for an employer who has a place of employment or business facility located in this state at which such person spends at least fifty per cent of his employment time, or (ll) works for an employer pursuant to an employment contract to be performed primarily in this state.* If the worker does not fit this definition of employee, he or she will not collect Connecticut benefits.

Washington does not reciprocate in construction employment unless there is a reciprocity agreement in place. Washington has these agreements with Oregon, Idaho, North Dakota, South Dakota, Montana, Wyoming and Nevada. All other jurisdictions require Washington-specific coverage for construction employment. Otherwise, Washington will reciprocate.

Ohio — as a monopolistic state — recognizes the difficulties this creates for multi-state employers and has attempted on more than one occasion to create rules and clarification of what benefits apply. Ohio's legal department issued a memorandum regarding extraterritorial issues and when Ohio benefits apply. http://www.ohiobwc.com/downloads/blankpdf/InterstateJurisdictionLegalMemo.pdf While we applaud Ohio (and other states efforts) to clarify coverage and benefits, the problem with state rules, clarifications and guidelines is other states do not coordinate or cooperate with another states laws, rules, memoranda etc.

Small Employers Workers Compensation Exemption

Thirteen states (Alabama, Arkansas, Florida, Georgia, Michigan, Mississippi, Missouri, New Mexico, North Carolina, South Carolina, Tennessee, Virginia, and Wisconsin) exempt an employer from workers compensation law if it has fewer than a specified number of employees (usually 3 but sometimes 2,4 or 5). However, North Carolina is not exempt for exposure to radiation. Arkansas, Florida, Mississippi, New Mexico Ohio and Tennessee are not exempt for the construction industry. Numerical exceptions are not the only exemptions. Many states exempt domestic employees and states are almost evenly split on whether or not they exempt agricultural employees. Exempted employments are separate and distinct from an employee traveling to another state. Exempted employments typically address permanent employments in the state, not employees from another state traveling to the state on a temporary or incidental basis.

On a side note, just because the employer is exempt from purchasing workers compensation coverage does not make the employer any less liable for an employee's injury in the event the employer is found negligent. The employee would have the same legal rights as the general public and could sue their employer for medical, lost wages, pain and suffering.

Whether or not an employer is required to purchase coverage or has to have a state listed in 3.A. or 3.C. does not diminish the fact that an employee can allege he/she should be covered. All jurisdictions allow an employee to file a litigated workers compensation action. Without the coverage afforded by the workers compensation policy, the employer pays all the legal defense bills, and possibly the judgment from a legal decision.

States requiring Workers Compensation coverage listed in 3.A. or purchased from their state (Monopolistic)

Massachusetts, Nevada, New Hampshire New Mexico, New York, Montana, and Wisconsin require coverage in 3.A. and Ohio and Washington from their state - always or in certain circumstances. Kentucky requires employers with one or more workers maintain workers compensation coverage. There are no exceptions for family members, temporary, part time or out-of-state employers performing any work in the state of Kentucky. Kentucky does not accept the Ohio C110 form.

New York made a significant change in its workers compensation law [Section 6 of the 2007 Reform Act (A.6163/S.3322)] that impacted employers if they conducted any work in New York or employed any person whose duties involve activities that took place in New York. As a matter of policy, effective 2-1-11 the NY board clarified coverage requirements.

Detailed information can be found on the New York Workers Compensation Board's website:
http://www.wcb.ny.gov/content/main/onthejob/CoverageSituations/outOfStateEmployers.jsp

Essentially, an employer must buy New York coverage — that is list New York under item 3.A. on the Information Page — if:

- The employer (as defined in the WCL) is required to register with the NYS Department of Labor and pay Unemployment Insurance for any period in question.
- The employer has a permanent physical location in New York or has employees whose primary work location is there.
- The employer is operating in New York under a permit, contract, or license granted by the State of New York, its counties or any municipality as defined under §57 of the Workers Compensation Law.
- The employer is working as a contractor/general contractor/subcontractor on a construction project in New York.
- In the previous year, the employer had employees physically in New York for at least 40 hours of every week for a period of longer than 2 consecutive weeks; or had employees present in New York for 25 or more individual days (e.g., 5 employees working for 5 days in New York equals 25 individual employee days).

Otherwise, listing New York under item 3.C. will suffice.

Florida, Nevada and Montana require all employers working in the construction industry have specific coverage for their state in 3.A. Ohio and Washington, monopolistic states, requires employer purchase coverage from the state for all employers working in the construction industry. Otherwise, Florida, Nevada, Montana, Ohio and Washington will honor coverage for temporary work from other jurisdictions.

Florida also requires the coverage be written with a licensed Florida carrier. In other words, Texas Mutual could not provide Florida coverage even if they were willing to pay Florida benefits and place coverage in 3.A. as they are not a licensed carrier in Florida. Severe penalties can result. Usually the Division of Workers Compensation will assess a penalty equal to 1.5 times the amount the employer would have paid in premium within the preceding three-year period. Link to Florida rules here:
http://www.myfloridacfo.com/wc/employer/swo.html

Link to finding approved Florida carriers here: http://www.floir.com/companysearch/

3. A. coverage status is required for any employer having three or more employees in New Mexico and Wisconsin even on a temporary basis.

States Requiring Disability and Workers Compensation

The five states listed below and the Commonwealth of Puerto Rico requires employers to provide short-term disability insurance benefits in addition to workers compensation insurance. Employers can be fined if they do not have this coverage in conjunction with the workers compensation insurance. A disability policy is required in New York when an employer is required to secure New York workers compensation coverage even for incidental exposures (see above.)

- California State Disability Insurance (SDI)
- Hawaii Temporary Disability Insurance (TDI)
- New Jersey Temporary Disability Insurance (TDI)
- New York Disability Benefits
- Rhode Island Temporary Disability Insurance (TDI)

Sedgwick Insurance Services annually prepares and updates an excellent summary of each jurisdiction's requirements for disability. The link is here: https://www.vpaweb.com/about/pdf/SDI.pdf

Insurance Policy Pricing/Premium Determination

The vast majority of workers compensation coverage is priced using a classification system and a rate for each classification that describes the employer's business. Employers who are self-insured or insured under high deductible programs are priced differently. Although payroll may be a basis for cost in these programs, it is not a "classification" system. The rates vary from state to state and often from carrier to carrier as well. The employer's payroll (per $100 in payroll) is the basis used to determine the premium with the classification/rate system. An estimated payroll is determined at the inception of the policy by classification and state. At the end of the policy term, an insurance company auditor will audit the employer's books to determine the actual payroll and correct classifications.

The Employer/Agent Perspective

Many times, the employer/agent wants the "best deal" in premium. Many agents feel pressure to "fit" employees in the cheapest state's classifications/rates, whether or not it is correct. This pressure can come from the employer who already feels workers compensation is prohibitively expensive or other competition. The agent may feel it is the only way he/she can retain the account. Often the agent will do this knowing he or she will have an argument at audit or an uncovered or inadequately covered claim. Agents may be reluctant to let a carrier know about travels or jobs in other states as the rates in the headquarter states may be more attractive. An agent may feel listing states in 3.A. or 3.C. will surely send the auditor on a fishing expedition at the year-end audit looking for payroll in those states and move payroll into those state classifications; thus charging the client an additional premium at audit.

This is a dangerous practice by which the employer is being done a disservice. Should the employer have a claim and their employee files for benefits in a state that is not covered by the policy, the insurance carrier will have several options:

1. Add the state to the policy (3.A. or 3.C.) and pick up the payroll on audit. Pay the benefits of the state the employee filed in.
2. Pay the benefits of the state in question, but charge back to the employer any benefits in excess of benefits for the state listed on the policy.
3. Deny the claim. The state was not covered. The employer pays the claim.

The outcome is usually determined by a few factors as follows:

1. The size of the claim. If it is a routine or midsized claim, the carrier may step up and pay. If the employee's injury resulted in his becoming a paraplegic, well, there might be pause on the insurance carrier's part…after all, it wasn't a covered state.
2. The size of the employer's premium and the importance of the employer's business to the insurance carrier.
3. The relationship with the agent.

Claims challenges are frequent. Part of an agent's job is to educate an employer and reduce that challenges by clarifying intent up front and making sure the right coverage is in place. Intentional or unintentional errors in extraterritorial issues can result in devastating financial consequences for the employer and an errors and omissions claim for the agent.

Insurance Company Perspective

Insurance carriers know that most often an employee injured outside of his or her state of residence may have selection of remedies (benefits).

Benefits levels are usually reflected in rates of the state; therefore, if an insurance carrier pays higher benefits, the insurance carrier wants to charge the higher rates.

Contractors Extraterritorial Guidelines from National Council for Compensation and Insurance (NCCI)

In light of the fact that contractors operating in several states are most affected by extraterritorial issues, NCCI has issued some guidelines on where the payroll of employees should be recorded for premium purposes. The rules are as follows:

- Payroll of employees of contractors who have their place of business in a given state and operate also in an adjoining state and who are constantly crossing states lines, but usually return to their home each night, should be assigned to their headquarters' state.

- The payroll for executive supervisors who may visit a job but who are not in direct charge of a job should be assigned to the state in which his or her headquarters is located.

- For those contractors that maintain a permanent staff of employees and superintendents in another state other than their headquarters' state, either for the duration of the job or any portion thereof, their payroll should be assigned to the highest rated of either the state in which the job is located or the headquarters' state.

- The payroll of employees who are hired for a specific job project should be assigned to the state in which the job is located.

Foreign Workers Compensation and Employers Liability

The standard workers compensation policy *exclusion for bodily injury occurring outside the US*, its territories or possessions, and Canada *does not apply to bodily injury* to a citizen or resident of the US or Canada *who is temporarily outside these countries*. State workers compensation will apply, however, for those employers that have employees regularly traveling out of the country, the Foreign Workers Compensation and Employers Liability endorsement should be added to their workers compensation policy. This endorsement is used for US-hired employees who are traveling or residing temporarily outside the US and expands coverage. The coverage is limited to 90 days and includes 24-hour coverage, excess repatriation coverage and endemic disease (diseases contracted that are particular or native to an area or region). Exclusions include war, revolution, rebellion and insurrection. The cost to include this endorsement in general is small. In many cases the insurance carrier does not charge for the endorsement at all. For employees out of the country for long periods of time or permanently, coverage needs to be arranged under an International Policy.

Longshore and Harbor Workers Compensation Act Coverage

There are several federal forms of workers compensation required by various federal acts, including:

- Merchant Marine Act of 1920 (sometimes referred to as the Jones Act) which covers the American masters or crews of American vessels on navigable waters.
- Federal Employees Liability (FELA) covering workers on interstate railroads.
- Federal Employees Compensation Act (FECA) covering employees of the Federal government (e.g., postal workers, employees of the Veterans Administration)
- Outer Continental Shelf Land Act extends Longshore to non-seaman injuries arising out of or in connection with any operation conducted on the outer continental shelf. Basically, these are employees working on offshore "fixed" platforms, such as oil well drilling platforms.
- Longshore and Harbor Workers Compensation Act which typically uses "status" and "situs" to determine if an employee is covered by the Act.

Most of these Acts are relatively unambiguous as to what types of employment are covered under the Act, with the exception of the Longshore Act and to a lesser extent The Marine Act of 1920. Longshore Act is usually the only Act involved in extraterritorial issues. This paper only addresses the Longshore Act.

Longshore "status" is defined as land-based workers in maritime employments on navigable waters. The worker must be an "employee" as defined in the act. The usage of employee has become overly broad to include anyone who works on or alongside the water unless specifically excluded.

Longshore "situs" is defined as any employee working on any adjourning pier, wharf, dry dock, terminal, marine railway or other areas customarily used for loading, unloading, repairing or building a vessel. The injury must occur in a "location under the jurisdiction." Courts have been liberal in interpreting "adjourning area customarily used". Adjourning really means neighboring or in *the vicinity of.* The nearer and more often an employee frequents a shore side "situs," the more likely Longshore Act benefits will be granted. When analyzing what is a covered adjoining area, the courts have not required physical proximity, but rather have sought to determine whether the area has a sufficient functional relationship to a maritime activity on navigable waters.

The Longshore Act is administered by the U.S. Department of Labor, which has the responsibility to ensure that injured workers are compensated. The Department of Labor errs in favor of the worker (by definition of their title). Typically, if there is any doubt, it will be ruled in favor of the employee. The Department of Labor's Longshore Procedure Manual reads: *"In the absence of **substantial** evidence to the contrary"* (emphasis added) *"That the claim comes within the provisions of the act. That sufficient notice of such claim has been given. That in injury was not occasioned solely by the intoxication of the injured employee. That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another".* This shifts the burden to the employer to rebut the provisions with ***substantial*** evidence.

If for any reason state workers compensation benefits are not available to the injured employee pursuing concurrent jurisdictions, then the employee becomes subject to the act. Federal Acts are excluded from standard workers compensation policies. Federal Acts coverage has to be added to the workers compensation policy by endorsement.

The extraterritorial issues arise because many states — Alabama, Alaska, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee and Wisconsin — permit *concurrent jurisdiction between State and Longshore coverage*, Some states — notably Florida, Louisiana, Maryland, Mississippi, New Jersey, Texas, Virginia and Washington — do not permit this concurrent jurisdiction and Longshore becomes the sole remedy. *In concurrent jurisdictions the employee can file in both state and federal court and the employer must defend both*.

Employers can face both criminal prosecution and be subject to imprisonment and/or fines for failure to secure coverage for longshore exposures. Fines and penalties are imposed by the United States attorney, not an individual state's insurance department or commissioner. Due to the complexity of the legal issues of whether an employee is subject to the Longshore Act, even the U.S. Department of Labor — Office of Workers Compensation recommends an employer discuss coverage questions with an experienced maritime insurance agent/broker or attorney in order to evaluate any potential liability.

Note that most state funds and monopolistic states do not write longshore coverage. A notable exception is the Ohio Bureau of Workers Compensation (BWC.) The BWC offers this coverage to Ohio employers through the Marine Industry Fund. Ohio employers can obtain from the BWC, private insurance carriers or an employer can apply to the U.S. Department of Labor for self-insurance. Many private carriers do not like to write unless it is very minimal exposure. Therefore, coverage must be purchased under a separate policy with a carrier approved to write coverage under the Longshore and Harbor Workers Compensation Act (USL&H). List of approved carriers here:
http://www.dol.gov/owcp/dlhwc/lscarrier.htm

The best resource for knowledge and coverage placement is LIG Program Managers, an insurance wholesaler specializing in combined workers compensation, longshore and incidental maritime employers liability classes of business. Their website link is www.ligpm.com Additional information can be found here: http://www.dol.gov/compliance/laws/comp-lhwca.htm

Summary

- Recognize that having employees that work, live or are temporarily traveling to or through other states creates premium and coverage challenges for employers and agents.
- Take time to understand the rules of the state of potential exposure to properly comply with what is required.
- States requiring coverage in 3.A. for some or all situations tend to be strict and impose severe penalties for non-compliance. Be careful to comply with all requirements. Many carriers are often aware of the challenges these states present and will work with the agent/employer and add on an “if any” exposure basis.
- Always attempt to secure the broadest coverage possible under the workers compensation policy with as many states with even minimal exposure added to 3.A. As a fall back, get the state in 3.C.
- Obtain coverage for operations in monopolistic states separately.
- Address out-of-state exposures when insured by a state-specific state fund or regional carrier that only writes in one or a few states. Remember, the 3.C. wording is designed to pay benefits — via reimbursing the employer — if the carrier cannot pay directly to the employee (not licensed.)
- Check for employees traveling out of the country and arrange to expand coverage with the foreign endorsement or through an international policy.
- Purchase disability policies where required.
- Check with a marine expert to assess the exposure to the Longshore Act and whether or not coverage is required. Longshore is very employee-friendly. The chance that an employee will qualify for longshore benefits is in the employee’s favor. Due to the significant criminal and civil penalties and robust benefits under longshore, do not overlook adding this coverage to the insurance policy by endorsement or purchase separate coverage even if the exposure is remote.

Information in this white paper is provided as a reference only. While I strive for accuracy, the workers compensation world is constantly changing. Consultation with the governing authority or an attorney for verification is advised.