

May 24, 2022

Dear Workers' Compensation Advisory Council Members:

I am writing to provide information to the Workers' Compensation Advisory Council supporting Senator Nesiba's proposal to expand the number of days workers have to file a workers' compensation claim in South Dakota. This past legislative term, Senator Nesiba introduced a bill to expand the time period from three business days to 30 days.

My input is based on 30 years' experience as an occupational health nurse employed by six Fortune 500 companies in different types of manufacturing, both union and non-union, at sites ranging from 200 to 3000 employees, across three states. Although my job position placed me in the management chain of command, I sometimes found myself advocating on behalf of injured employees who were wrongfully denied their workers' compensation benefits.

First, I would like to point out that the **employer** and the **State** have different priorities in this matter. An **employer's** first priority, after first managing the immediate medical and safety issues of an on-site injury or illness, is to determine whether or not the injury or illness arose out of and in the course of employment. Most employers have written policies requiring IMMEDIATE reporting, or AS SOON AS an employee recognizes a medical condition that IS or MAY BE caused by the work environment. There are multiple reasons for this requirement: 1) to ensure prompt first aid or medical treatment; 2) to correct any workplace hazards that caused or contributed to the injury/illness; 3) to allow for prompt accident investigation; 4) to determine if the employer is responsible for the condition, thus entitling the employee to workers' compensation benefits, or if the employee's condition is a personal medical condition not attributable to work, thus falling under the purview of private medical insurance or personal responsibility. Requiring prompt reporting serves to prevent an off-the-job injury or illness (such as an after-hours or weekend injury) from being falsely reported as work-related.

The **State's** priority is to ensure that employees whose injuries or illnesses are caused by work receive the benefits (medical treatment, rehabilitative therapy, lost time wage compensation, permanent partial or total disability, etc.) they are entitled to under the state workers' compensation statutes. A three-day time limit on injury reporting can serve to unjustly disenfranchise employees who would otherwise be entitled to workers' compensation benefits.

Following are some valid reasons for employees to delay reporting beyond the current three-day limit:

- Non-existent or inadequate training of employees by their employer regarding occupational injury/illness reporting. This is especially true in work places where many employees don't speak English as a first language and where employee turnover is high.
- Employees may not recognize the work-relatedness of a disorder.
- Some injuries and illnesses do not become evident right away; onset of illness may not occur until days, months or even years after exposure.

- Some injuries and illnesses are not accurately diagnosed right away.
- The medical condition is diagnosed but the causal relationship to the employee's occupation is not recognized by the health care provider or the employee.
- Particularly in the case of occupational illnesses, the medical work-up (exams, labs, diagnostic tests) may take a number of weeks to be completed to establish a diagnosis and to determine causation.
- The organizational culture of the workplace discourages reporting incidents and/or filing claims.

Here are a few examples:

- Where language barriers exist, employees may not understand training on injury reporting, or they may fail to inform the correct person in time.
- Repetitive strain / repetitive motion injuries such as tendinitis, carpal tunnel syndrome, medial and lateral epicondylitis, all typically occur over time and their cause may not immediately be clear.
- Occupational respiratory conditions such as asbestosis, silicosis, black lung, pneumonitis, COPD and mesothelioma, likewise develop over periods of years.
- Occupational asthma may be diagnosed as asthma long before the causative agent in the workplace is identified.
- Occupational skin conditions are the most prevalent work-related illness. There is no occupation or industry without potential exposure to the diverse agents that cause allergic and irritant dermatitis, yet determining cause and effect often requires an allergist or dermatologist knowledgeable in environmental toxicology and willing to get to the root cause, and an employer willing to provide worksite samples or allow workplace environmental testing.
- Occupational hearing loss usually occurs over a period of years and may go unrecognized by the employee for quite some time.

A common root cause for late reporting of work injuries is that the organizational culture of the workplace discourages reporting incidents or filing workers' compensation claims through incentive measures, retaliation and other business practices. Although employers are not supposed to retaliate against injured workers, this occurs even in companies whose policies dictate otherwise. An injured employee may delay reporting to avoid punitive action, hoping that the injury will resolve on its own without being detected by the company. Often the accident investigation process leads to blaming the employee rather than considering business practices such as excessive overtime work causing fatigue and overuse, time pressures to complete a job, understaffing, lack of proper equipment, lack of safety training, failure to recognize and remediate job hazards, and failure to rotate workers through strenuous or repetitive tasks. Some companies have competitive "safety" contests between departments or company locations with prizes for the best safety record, which discourages injury reporting and creates peer pressure from coworkers not to report.

Employees should be protected from having valid workers' compensation claims denied by their employer due to extremely short time constraints for reporting and should not be forced to hire attorneys to defend their valid claims. Most states have much longer reporting periods or less-defined reporting periods than SD. Nine states designate ASAP. SD has the shortest reporting period at 3 business days, followed by Colorado at 4 days and Alabama at 5 days. Other states range from 7 days (Nevada and ND) to 2 years (New Hampshire). Sixteen states and the District of Columbia have set the period at 30 days (Alaska, California, DC, Florida, Georgia, Indiana, Louisiana, Maine, Mississippi, Montana, New York, North Carolina, Oklahoma, Rhode Island, Texas, Virginia, and Wisconsin). Iowa has a reporting period of 90 days and a WC claim filing period of 2 years. Minnesota allows up to 180 days. Extending the reporting period to 30 days would bring South Dakota law into alignment with the most common reporting time limit among the U.S. states.

Extending the reporting period to 30 days does not preclude employers from having policies that require prompt, "ASAP" reporting of injuries, with implementation of corrective actions if workers do not comply. Employers have good reasons to expect and require prompt injury reporting: to avoid being held responsible for injuries that actually occur outside of the workplace; to ensure prompt medical treatment so a medical condition does not worsen; and to correct any unsafe work conditions. However, valid claims could not be denied after three days if the state statute set a 30-day reporting period.

The first situation above is the one many employers will likely cite as a reason to oppose a longer reporting period. However, well-written and well-communicated policies regarding timely accident/injury reporting, well-supervised workers, and a thorough accident investigation process can prevent this type of fraud and abuse of the workers' compensation system.

The **state** is responsible to ensure that injured workers receive the benefits they are entitled to under workers' compensation. **Employers** are responsible to manage the injury reporting and investigative process to verify that the injury or illness arose in and out of the course of employment. Extending the injury reporting time period to 30 days supports the former and does not impinge upon the latter.

I urge you to support increasing the time for an employee to report an injury to their employer for which they intend to file a workers' compensation claim from three business days to at least 30 days. Changing the statute would not impact employers' policies requiring prompt injury reporting, but it would serve to protect employees from having their rights to workers' compensation unfairly denied.

Regards,

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