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The Impact of the Affordable Care Act on Workers' Compensation: Opportunities and Considerations

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THE IMPACT OF THE AFFORDABLE CARE ACT ON WORKERS' COMPENSATION: OPPORTUNITIES AND CONSIDERATIONS

David A. North[†]

I.	INTRODUCTION.....	1445
II.	BACKGROUND	1447
III.	LIMITED ACCESS TO MEDICAL CARE FOR JOB-RELATED INJURIES AND ILLNESSES	1450
IV.	MEDICAL PROVIDER SHORTAGE.....	1451
V.	COST SHIFTING BETWEEN WORKERS' COMPENSATION AND GENERAL HEALTHCARE	1454
VI.	EMERGING HEALTHCARE MODELS.....	1456
VII.	HEALTHCARE TECHNOLOGY ADVANCEMENTS	1460
	A. <i>Wearable Monitoring Devices</i>	1460
	B. <i>Telehealth</i>	1460
	C. <i>Google Glass</i>	1461
	D. <i>3-D Printing</i>	1461
	E. <i>Internet-Connected Sensors</i>	1462
	F. <i>Robotic Devices</i>	1462
	G. <i>Additional Technological Advancements</i>	1462
VIII.	EMPLOYER CONSIDERATIONS AND RESPONSE	1463
IX.	EXPANDED HEALTH, WELLNESS, AND SAFETY PROGRAMS ...	1464
X.	ADDITIONAL CONSIDERATIONS	1466
XI.	CONCLUSION	1468

I. INTRODUCTION

“And we have now just enshrined, as soon as I sign this bill, the core principle that everybody should have some basic security when it comes to their health care,” President Barack Obama proclaimed, moments before signing the historic Patient Protection and Affordable Care Act (ACA) on March 23, 2010.¹

[†] President and CEO, Sedgwick Claims Management Services, Inc.

1. Press Release, The White House Office of the Press Sec'y, Remarks by the

And with a stroke of the pen, the face of healthcare in the United States was changed forever.

There is no doubt this was, and continues to be, one of the most widely debated public policy issues in recent history. Regardless of an individual's political views, the passage of this legislation has "changed . . . the dialogue and dynamics [surrounding] healthcare in this country."²

In his comments at the 69th Annual Workers' Compensation Educational Conference and 26th Annual Safety and Health Conference on August 19, 2014, Dr. Dean Hashimoto outlined the basic structure of the ACA. Some of the more well-known components of the ACA include: the expansion of Medicaid coverage to millions of low-income Americans, the individual shared responsibility provision calling for individuals without insurance to purchase health coverage that satisfies essential minimal requirements, and the phase in of the "pay or play" provision that requires employers to either provide healthcare coverage for employees who work thirty hours a week or pay a penalty.³ It also encourages wider expansion of Accountable Care Organizations (ACOs), eliminates the "pre-existing medical condition exclusion," and encourages a broader use of "health promotion and wellness" programs.⁴

From a business perspective, the passage of the ACA is an issue that will impact virtually all employers and is one that organizations must confront head-on. Those who are able to identify and capitalize on emerging opportunities will thrive; those who do not

President and Vice President at Signing of the Health Insurance Reform Bill (Mar. 23, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill>. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

2. Kimberly George, *Advancements in Healthcare Technology and What They Mean to Workers' Comp*, WORKCOMPWIRE (May 19, 2014), <http://www.workcompwire.com/2014/05/kimberly-george-advancements-in-healthcare-technology-and-what-they-mean-to-workers-compensation/>.

3. See Dr. Dean Hashimoto, Chief of Occupational and Envtl. Med., Partners HealthCare Sys., Presentation at the Workers' Compensation Institute's 69th Annual Workers' Compensation Educational Conference and 26th Annual Safety and Health Conference: The Affordable Care Act's Projected Impact on Workers' Compensation (Aug. 19, 2014), available at https://www.wci360.com/files/uploads/2014/WCI_-C4E_-ACA_Session.pdf (see fourth presentation slide). See generally *2014 Workers' Compensation Educational Conference*, WORKERS' COMP. INST., <http://www.wci360.com/conference> (last visited Apr. 9, 2015).

4. Hashimoto, *supra* note 3, at 2.

acclimate to the new environment may struggle to maintain their own financial health.⁵

Although extensive in its page count, potential effects and outcomes on workers' compensation are barely referenced in the actual ACA legislation.⁶ While direct references are minimal, the legislation's impact on workers' compensation is significant. The ACA will impact the medical care injured employees receive for on-the-job injuries and illnesses.⁷ Ultimately, human capital is the driving force behind the country's productivity, and the health and well-being of the workforce is paramount to the nation's economic performance.

The ACA has not been in effect long enough to know precisely how it will affect businesses or where the greatest opportunities and challenges will lie.⁸ However, it is not too soon to begin anticipating where some of those opportunities may surface and how to overcome some of the challenges that will undoubtedly appear along the way.

II. BACKGROUND

The ACA is not the country's first attempt at healthcare reform. In 1993, the Clinton administration introduced healthcare reform that favored integrating workers' compensation medical care with mainstream general healthcare.⁹ While the legislation did not pass,¹⁰ it did initiate conversations around healthcare, and its influence can be seen in some of the reform measures being implemented under the ACA.¹¹

5. See *infra* Parts VIII–X.

6. See NAT'L COUNCIL ON COMP. INS., WORKERS COMPENSATION 2014 ISSUES REPORT 16 (2014), available at <https://www.ncci.com/Documents/IR2014-Complete.pdf>.

7. See *id.* at 17; see also *infra* Part II.

8. Owen Gallagher, *An Unknown Quantity: The Effect the Affordable Care Act Will Have on Worker's Compensation Systems*, AGENCY CHECKLISTS: MASS. INS. NEWS (Mar. 16, 2014), <http://agencychecklists.com/2014/03/16/an-unknown-quantity-the-effect-the-affordable-care-act-will-have-on-workers-compensation-systems-10985/>.

9. See Hashimoto, *supra* note 3, at 2.

10. See, e.g., W. John Thomas, *The Clinton Health Care Reform Plan: A Failed Dramatic Presentation*, 7 STAN. L. & POL'Y REV. 83, 84 (1996) (“[B]y late August [1994], the White House publicly conceded that Congress would not enact the [healthcare reform] [p]lan or any other major health care reform legislation.”).

11. See *id.*

The State of Massachusetts enacted healthcare reform in 2006.¹² Some look to this state initiative as a way to project the impact that the ACA will have on the workers' compensation system on a national level. One of the most well-known studies on the Massachusetts' healthcare reform was released in 2012 by the RAND Institute for Civil Justice.¹³

While a true comparison is difficult, the RAND research suggested some reason for optimism. The results of the study showed a forty percent reduction in the number of uninsured people accessing emergency rooms.¹⁴ It also revealed a seven percent reduction in workers' compensation emergency room bill volume.¹⁵ Such findings suggest that the Massachusetts healthcare reform may reduce workers' compensation "billing volume and costs."¹⁶

However, there were factors unique to Massachusetts that may limit its application on a national basis.¹⁷ Massachusetts had "low medical reimbursement [rates] and low workers' compensation injury rates."¹⁸ Also, the study was limited to emergency room and hospital inpatient billings as opposed to overall workers' compensation costs.¹⁹ Additionally, the study was not able to isolate the impact of the economic recession.²⁰ Nonetheless, the RAND research is valuable in highlighting key considerations for future analyses and provides beneficial insight to those studying the implementation of the ACA.

The Workers' Compensation Research Institute (WCRI) has been actively tracking the development and implementation of the ACA and how it might impact various components of the overall workers' compensation system. Richard Victor, PhD, executive director of the WCRI, has suggested that predicting the effect of

12. See, e.g., Arthur Birmingham LaFrance, *Healthcare Reform in the United States: The Role of the States*, 6 SEATTLE J. SOC. JUST. 199, 230 (2007).

13. See PAUL HEATON, RAND INST. FOR CIVIL JUSTICE, THE IMPACT OF HEALTH CARE REFORM ON WORKERS' COMPENSATION MEDICAL CARE: EVIDENCE FROM MASSACHUSETTS iii (2012), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1216.pdf.

14. See *id.* at xi.

15. *Id.*

16. *Id.* at xii.

17. *Id.* at xi.

18. Hashimoto, *supra* note 3, at 7.

19. HEATON, *supra* note 13, at xi.

20. NAT'L COUNCIL ON COMP. INS., *supra* note 6, at 21.

the ACA on “workers’ compensation [is] comparable to forecasting the path of a hurricane.”²¹ According to Dr. Victor, both “possess[] uncertain elements and . . . the impact of those events may vary among different geographic areas.”²² However, Dr. Victor notes that unlike a hurricane, it is possible that the ACA could have desirable effects on workers’ compensation in some areas.²³

As the implementation of the ACA continues to unfold, industry changes are anticipated. Some projected industry trends and developments include:

- Limited access to medical care for job-related injuries or illnesses,²⁴
- Medical provider shortages,²⁵
- Cost shifting between workers’ compensation and the general healthcare system,²⁶
- Emerging healthcare delivery models,²⁷
- Rapid advancement of healthcare technology,²⁸ and
- Expansion of health, wellness, and safety programs.²⁹

With the increasing pressure on organizations to achieve high levels of productivity, employers must find ways to ensure their employees receive timely and appropriate medical care when they are injured on the job. Understanding industry trends and

21. John Stahl, *Hurricane Obamacare: Experts Attempt to Forecast Impact of Affordable Care Act on Workers’ Compensation*, LEXISNEXIS LEGAL NEWSROOM WORKERS COMPENSATION L. (Mar. 24, 2014 9:29 PM), <http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2014/03/24/hurricane-obamacare-experts-attempt-to-forecast-impact-of-affordable-care-act-on-workers-compensation.aspx>.

22. *Id.*

23. *Id.*

24. See Elizabeth B. Luzuriaga & Brian P. McElreath, *The Potential Ramifications of the Patient Protection and Affordable Care Act (ACA) on Workers’ Compensation*, NAT’L SHIPBUILDING RES. PROGRAM pt. II, http://www.nsrp.org/6-Presentations/RM/111313_ACA_and_Workers_Compensation.pdf (last visited April 7, 2015).

25. See Kimberly George, *Understanding and Simplifying ACA’s Projected Impact on Workers’ Compensation*, WORKCOMPWIRE (May, 12, 2014), <http://www.workcompwire.com/2014/05/kimberly-george-understanding-and-simplifying-acas-projected-impact-on-workers-compensation/>.

26. Luzuriaga & McElreath, *supra* note 24, pt. II.

27. See George, *supra* note 25.

28. *Id.*

29. Luzuriaga & McElreath, *supra* note 24, pt. II.

developments is important because employers have a chance to shape the evolving healthcare system in this country. It is imperative that businesses take advantage of these opportunities and play an active role in this process. Each of these issues will be explored in more detail in the pages that follow.

III. LIMITED ACCESS TO MEDICAL CARE FOR JOB-RELATED INJURIES AND ILLNESSES

One of an employer's primary objectives is to maintain a fully engaged and healthy workforce. When an unforeseen workplace accident occurs, it is important for the injured employee to receive the medical care needed for a full and speedy recovery. Otherwise, the position on the assembly line or the desk at the office will be vacant and productivity will decline. This disruption will continue until the injured employee returns to work.

The implementation of the ACA will impact the speed and availability of medical services for related injuries and illnesses. One of the primary goals of the ACA is to reduce the number of Americans without health insurance.³⁰ According to the Congressional Budget Office, an estimated twenty-six million newly insured individuals are expected to gain increased access to the healthcare system by 2017.³¹ An influx of this magnitude will impact how and when a disabled worker receives medical treatment.³² Some sources project waiting times could increase by as much as fifty percent.³³ Similarly, the follow-up times between medical appointments could also increase significantly.³⁴ Longer disabilities translate into reduced productivity and higher costs.³⁵

30. See Robert Pearl, *Doctor Debate: Too Many American Physicians or Too Few?*, FORBES (Feb. 6, 2014), <http://www.forbes.com/sites/robertpearl/2014/02/06/doctor-debate-too-many-american-physicians-or-too-few/>.

31. CONG. BUDGET OFFICE, U.S. CONG., PUB. NO. 4930, UPDATED ESTIMATES OF THE EFFECTS OF THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT 3 (2014), available at https://www.cbo.gov/sites/default/files/45231-ACA_Estimates.pdf.

32. Pearl, *supra*, note 30.

33. MARK NOONAN, INTEGRO, HOW THE AFFORDABLE CARE ACT AFFECTS WORKERS' COMPENSATION: PART ONE 2 (2014), available at <http://www.integrogroup.com/data/File/white-papers/WORKERSCOMPENSATION-AffordableCareAct-PartI-MarkNoonan-Aug2014.pdf>.

34. *Id.*

35. Stahl, *supra* note 21.

IV. MEDICAL PROVIDER SHORTAGE

Some industry observers question whether the existing supply of medical providers can meet the increased demand for services.³⁶ Health care services are already in great demand. Many in the United States suffer from obesity,³⁷ heart disease,³⁸ or some other chronic condition caused by unhealthy lifestyle choices such as lack of exercise, poor nutrition,³⁹ or smoking.⁴⁰ According to the Health Research and Services Association (HRSA), an estimated fifty-five million Americans already live in areas with an inadequate supply of primary care doctors.⁴¹

Further, as the population ages, people are using more healthcare services. The U.S. Census Bureau projects a thirty-six percent growth in the number of Americans over the age of sixty-five by the year 2020.⁴² The U.S. Department of Health and Human Services estimates that the supply of physicians will increase by only seven percent during this same timeframe.⁴³ Chronic health conditions, coupled with an aging population, exacerbate the concern over a medical provider shortage.⁴⁴

36. Pearl, *supra* note 30.

37. *Obesity and Overweight*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/obesity-overweight.htm> (last updated Jan. 14, 2015).

38. *Heart Disease*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/heart-disease.htm> (last updated Apr. 8, 2015).

39. A good example is diabetes. *Diabetes*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/diabetes.htm> (last updated Apr. 21, 2015).

40. See *Chronic Obstructive Pulmonary Disease (COPD) Includes: Chronic Bronchitis and Emphysema*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/copd.htm> (last updated Feb. 6, 2015).

41. George, *supra* note 25.

42. Tom Hebson, *How Will the Affordable Care Act Affect Workers' Compensation*, INS. BUS. AMENDMENT (Feb. 12, 2014), <http://www.ibamag.com/news/how-will-the-affordable-care-act-affect-workers-compensation-17195.aspx>.

43. *Id.*

44. Rick Victor, Exec. Dir., Workers Comp. Research Inst., Presentation at the Workers' Compensation Institute's 69th Annual Workers' Compensation Educational Conference and 26th Annual Safety and Health Conference: The Affordable Care Act's Projected Impact on Workers' Compensation (Aug. 19, 2014), available at https://www.wci360.com/files/uploads/2014/WCI_-_CAE_-_ACA_Session.pdf (see eleventh presentation slide).

Existing research supports the notion that there already is, or soon will be, an inadequate supply of physicians.⁴⁵ The Association of American Medical Colleges projects a physician shortage of more than 90,000 by the year 2020.⁴⁶ This deficiency is expected to grow to as many as 131,000 by 2025.⁴⁷ Further, some industry experts note that many physicians currently practicing are older and that there is not an adequate supply of younger doctors in the pipeline to take their places.⁴⁸ This observation is supported by the Organization for Economic Co-operation and Development, which reports that “the U.S. ranks 30th in total medical graduates and 20th in practicing physicians per 1000 people.”⁴⁹ However, the United States ranks first in its proportion of specialists to general practitioners.⁵⁰

The ACA includes provisions to increase career interest in the healthcare profession. The legislation intends to expand the

45. Pearl, *supra* note 30. Robert Pearl, MD, offers health care comment and insight to Forbes on a regular basis. *Id.* In the February 6, 2014, edition, he comments on the debate as to whether the country has too many physicians or too few. *Id.* He believes that there is very little conclusive evidence to answer this question. *Id.* Those who claim the country has too few physicians often point to the aging population and their growing medical needs. *Id.* In particular, he mentions the rural and inner city areas. *Id.* He cites the Association of American Medical Colleges’ projection of a physician shortage in excess of 90,000 by 2020. *Id.* Those on the other side of the debate point out that medical specialists outnumber primary care physicians and argue that there is a need to eliminate unnecessary care and improve productivity. *Id.* They believe in moving away from fee for service solo practices to group practices, away from manually kept records to electronic medical records, and away from avoidable office visits to increased virtual visits. *Id.* They also believe physicians could make increased use of both licensed and unlicensed staff and encourage patient self-care where appropriate. *Id.* Dr. Pearl also cites the Organization for Economic Co-operation and Development which states that among the 34 member countries, the U.S. ranks 30th in total medical graduates and 20th in practicing physicians per 1000 people. *Id.* However, the U.S. ranks first in the proportion of specialists to generalists. *Id.* A source of confusion in this debate stems from not all licensed physicians practice clinical medicine and there is no way to know the number of hours spent in clinical practice from those who do. *Id.* Also, the distribution of licensed physicians varies significantly within and across the states. *Id.* In the absence of conclusive evidence, Dr. Pearl concludes it is difficult to determine if the U.S. has too many physicians or too few. *Id.*

46. *Id.*

47. Hebson, *supra* note 42.

48. Victor, *supra* note 44, at 11.

49. Pearl, *supra* note 30.

50. *Id.*

healthcare workforce as a means of improving access and delivery of healthcare services. The ACA does this by “fund[ing] grants, scholarships and [the] modification of loan repayments for the training of healthcare faculty, primary care physicians, nurses, mental and behavioral health professionals and oral health professionals.”⁵¹

Additionally, there are payment incentives to encourage individuals to pursue a career in primary care. For example, the ACA provides a ten percent bonus payment to primary care physicians offering Medicare services. Also, Medicaid payments to primary care physicians were raised to one-hundred percent of Medicare rates.⁵²

At the 2014 Annual Workers' Compensation Research Institute (WCRI) Conference, Executive Director Richard Victor, PhD, speculated that the ACA would have different effects of varying degrees among workers' compensation jurisdictions.⁵³ In other words, different states could experience variations in provider shortages, improved worker health, and cost shifting both to and from workers' compensation.⁵⁴ Dr. Victor also talked about the response of healthcare providers to the disruption in traditional revenue streams and reimbursement models under the ACA and about the motivations of providers to find new means to increase revenues.⁵⁵ He further commented that the competitiveness of a workers' compensation fee schedule compared to the revenue available through the general healthcare system could affect the ability to recruit providers that would treat injured or ill workers.⁵⁶

Workers' compensation payers, such as insurance companies and self-insured employers, may elect to pay more than the fee schedule to ensure that their injured employees are seen on a priority basis.⁵⁷ Payment incentives will likely be realigned toward the delivery of quality care and improved outcomes. Higher

51. *National Healthcare Reform Legislation Passed in March 2010: What Will National Healthcare Reform Mean for Workers' Compensation?*, WORKERS' COMP SPOTLIGHT (Sedgwick Claims Mgmt. Servs., Memphis, Tenn.), 2010, at 1.

52. *Id.*

53. Stahl, *supra* note 21.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

payments can be offset by increases in workplace productivity and having injured employees back on the job faster.

Some sources suggest physician shortages will vary by geographic region and state, while others project shortages will only surface among certain specialties and types of care. For example, *Forbes* reports that the number of active physicians per 100,000 people in Massachusetts is estimated to be twice that of Mississippi.⁵⁸ By way of illustration, the greater Bay Area in California has “approximately 30% more medical specialists than Los Angeles.”⁵⁹

While it is still too early to understand the full scope and impact a provider shortage may have, employers should begin analyzing the availability of facilities and physicians practicing near their locations and begin forging relationships and agreements to provide quality care for their workforce. The availability of physicians should also be a factor employers consider when contemplating a move or expansion into a new geographic location. Over time, employers are advised to actively monitor these conditions to see how the supply of physicians adjusts to market conditions and tailor their strategies accordingly.

V. COST SHIFTING BETWEEN WORKERS' COMPENSATION AND GENERAL HEALTHCARE

Another hot topic surrounding the ACA is the potential for cost shifting between workers' compensation and the general healthcare system.⁶⁰ Workers' compensation is a no-fault system in which one-hundred percent of an injured employee's medical expenses are paid—regardless of who is at fault for the accident. There are usually no deductibles or co-payments associated with filing a workers' compensation claim. This arrangement is a stark contrast to the deductibles and co-payments associated with many consumer healthcare plans purchased through employers or insurance companies.

Cost shifting occurs when claims involving non-work related injuries or conditions are filed under workers' compensation or vice versa.⁶¹ For example, an ankle injury that occurred at a

58. Pearl, *supra* note 30.

59. *Id.*

60. Stahl, *supra* note 21.

61. Sam Friedman, *Comp Carriers Brace for Impact of Healthcare Reform*, in

Saturday afternoon softball game might be reported on Monday morning as a sprain incurred while unloading boxes in the warehouse. This action would avoid any deductibles or co-payments associated with a group health plan and soften the economic blow for an individual without insurance.

Some speculate that the ACA and the expansion of Medicaid could reverse this tendency and diminish cost shifting.⁶² Presumably, the availability of general health insurance for medical treatment would lessen the need to file a work-related claim potentially lowering overall workers' compensation costs.⁶³

Medical reimbursement rates can also influence cost shifting among providers. When the WCRI compared workers' compensation reimbursement rates with group health insurance and Medicare rates, the workers' compensation rates were substantially higher overall. This difference in pricing was particularly evident when looking at outpatient surgeries.⁶⁴ That study showed that in many of the states studied, workers' compensation hospital outpatient payments for common surgeries were often much higher than those paid by group health.⁶⁵ In half of the study states, workers' compensation paid at least \$2000 (or forty-three percent) more for a common shoulder surgery.⁶⁶ "The amount by which workers' compensation payments exceeded group health payments . . . was highest in study states with either no fee schedule or a charge-based fee schedule."⁶⁷ These higher payments were often justified by what is referred to as the "hassle factor" in treating work-related injuries such as more alleged paper work or longer payment delays.⁶⁸

WORKERS COMPENSATION 2014 ISSUES REPORT 17, 18 (2014), available at <https://www.ncci.com/Documents/IR2014-Complete.pdf>.

62. *See id.*

63. *See id.*

64. *See* Richard Victor & Olesya Fomenko, *Workers Compensation and Group Health Hospital Outpatient Payments: A Comparison*, in WORKERS COMPENSATION 2014 ISSUES REPORT, *supra* note 61, at 22, 22–23.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 24–25. Victor and Fomenko describe "hassle factors" as factors that are special to workers' compensation and are not found for the group health patient. *Id.* Other common examples include, "longer payment delays, higher nonpayment rates . . . more missed appointments, lower patient compliance with provider instructions, and so on." *Id.*

Cost shifting is a complicated phenomenon that can travel both ways and hinges on many factors.⁶⁹ Monitoring its activity is necessary to modify and refine existing operational strategies as the new healthcare landscape evolves.

VI. EMERGING HEALTHCARE MODELS

Existing healthcare delivery models are evolving and new forms of healthcare delivery are emerging as the ACA continues its rollout. Undoubtedly, these changes will impact the way injured or ill employees are treated.

One of the solutions being proposed because of the potential shortage of physicians is an increased reliance on physician assistants and nurse practitioners for the administration of routine care.⁷⁰ Physician assistants are already an important component of the workers' compensation system as many doctors use them in their private practice to see patients, perform surgeries, or extend the availability of their practice to a greater number of patients. A report issued by the Institute of Medicine of the National Academies offers evidence that the primary care provided by nurse practitioners has been shown to be as safe and effective as care offered by licensed medical doctors.⁷¹

One of the potential challenges to this solution is the variation in state regulations and how they recognize nurse practitioners with respect to workers' compensation treatment and payment. For example, the states below have the following regulations:

- Arizona allows nurse practitioners to authorize an injured employee's inability to work.⁷²
- California allows nurse practitioners to cosign a first report of injury and authorize up to three days of time off from work for an occupational injury.⁷³

69. See Kathy Antonello, *Thinking about the Affordable Care Act and Workers Compensation*, in WORKERS COMPENSATION 2014 ISSUES REPORT, *supra* note 61, at 19, 19–20.

70. Victor, *supra* note 44, at 12.

71. NOONAN, *supra* note 33, at 5 (citing INST. OF MED. OF THE NAT'L ACADEMIES, THE FUTURE OF NURSING: LEADING HEALTH, ADVANCING HEALTH (2013)).

72. *Id.* at 4.

73. *Id.*

- Montana includes advanced practice registered nurses as providers for workers' compensation.⁷⁴
- Ohio continues to reimburse certified nurse practitioners, certified registered nurse anesthetists, and clinical nurse specialists.⁷⁵
- Oregon allows nurse practitioners to provide compensable medical services and authorize temporary disability payments for 180 consecutive calendar days.⁷⁶

Nurse practitioners likely will become even more important sources of treatment for injured and ill employees as projected physician shortages materialize in the coming years.⁷⁷ The American Association of Nurse Practitioners reports that there are seventeen states that give nurse practitioners autonomy in forming and managing their own medical practices.⁷⁸

Healthcare delivery models are also transitioning from managed care to quality care when it comes to treating injured or ill employees.⁷⁹ A few years ago, the claims industry began to realize that less emphasis should be placed on negotiating discounts and processing paperwork and more emphasis should be focused on securing the right treatment at the right time from the right provider.⁸⁰

Massive national networks stocked full of competing physicians offering volume discounting began to be replaced by a limited number of physicians focused on delivering high quality care and meeting healthcare objectives.⁸¹ This emphasis on quality care resulted in the adoption of tools such as provider benchmarking in workers' compensation.⁸² These tools help ensure that providers

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. WCI, *Conference Keynote Preview: Sedgwick CEO David North Talks Workers' Comp Challenges*, PROPERTY CASUALTY 360° (June 20, 2013), <http://www.propertycasualty360.com/2013/06/20/conference-keynote-preview-sedgwick-ceo-david-nort>.

80. *Id.*

81. *Id.*

82. *Id.* Provider benchmarking is an incentivized approach to paying medical providers for rendering quality medical care and achieving desired outcomes. Sedgwick's provider benchmarking program is structured such that medical providers are scored on a scale of one to five. Those earning four or five stars are ranked as top performing providers. Results achieved when initial treatment is

are paid based on their ability to achieve desired outcomes.⁸³ The resulting increase in productivity generally offsets any increases in medical provider compensation.⁸⁴

Physicians are undoubtedly one of the key factors to controlling the cost and quality of care delivered to injured employees.⁸⁵ It is the physician who primarily determines what services are needed on a case-by-case basis.⁸⁶ Research has shown that physicians control eighty-seven percent of healthcare spending.⁸⁷

According to claims data captured by Sedgwick Claims Management Services, Inc., claims where the initial treating provider is closely aligned with achieving successful outcomes—such as the delivery of effective medical care and timely return to work—are sixty-eight percent lower in costs versus claims that involve medical providers associated with poorer outcomes such as higher costs, longer durations of care, or extended disability durations.⁸⁸ Access to physicians that provide better outcomes could be limited with a significant influx of patients or a shortage of physicians as projected.⁸⁹ These factors could have a notable impact on claims costs.⁹⁰ Further, the Sedgwick claims data shows that timely medical care is an important component of the equation.⁹¹ Otherwise, even high quality medical providers are challenged to manage costs or disability durations.⁹²

Patient advocacy is also essential among some of the newer healthcare delivery models. When someone is sick or injured, there is an active attempt to ensure the individual understands the

provided by top performing providers include: faster claims resolutions, lower incurred loss totals, faster return to work, lower incurred medical costs, and/or lower expense charges.

83. See discussion *supra* note 82.

84. WCI, *supra* note 79.

85. ALAN SAGER & DEBORAH SOCOLAR, HEALTH COSTS ABSORB ONE-QUARTER OF ECONOMIC GROWTH, 2000–2005, at 30 (2005).

86. *Id.* at ii.

87. *Id.*

88. *Care Management Solutions, Provider Benchmarking—the Voice of the Industry, WORKERS' COMP SPOTLIGHT* (Sedgwick Claims Mgmt. Servs., Memphis, Tenn.), 2014, at 1.

89. *Id.* at 3.

90. *Id.* at 2–3.

91. *Id.*

92. *Id.* at 1–3.

diagnosis, treatment options, expected outcomes, and costs. Greater education and awareness have been shown to produce improved outcomes and faster recovery times. This approach also fosters healthier lifestyle choices in the future and encourages preventative care.⁹³

Consolidation among medical service providers is accelerating in response to new demands and challenges.⁹⁴ Hospital and healthcare systems have already begun acquiring physician practices and diagnostic testing facilities in an attempt to provide an expanded breadth of services. It will be interesting to see whether the new hospital and healthcare system leadership values the provision of occupational health services and is willing to accept the hassle that sometimes accompanies the treatment of work-related injuries and conditions.⁹⁵

The formation of Affordable Care Organizations (ACOs) is encouraged by the ACA as a means of reducing costs and fostering improved outcomes. The purpose of ACOs is to help eliminate some of the inefficiency in the healthcare system by rewarding providers for keeping patients healthy as opposed to delivering more, but often unnecessary, healthcare services.⁹⁶ With a primary care physician at the heart of each patient's care, the network providers share both financial and medical responsibility for their patient population.

ACOs have received a great deal of publicity as they have reportedly saved the Medicare program money. According to *Kaiser Health News*, an estimated four million Medicare beneficiaries are treated using the ACO model.⁹⁷ *Kaiser* estimates that fourteen percent of the U.S. population is currently being served by an ACO.⁹⁸ Employers offering ACO models as part of their benefit plans may want to consider ACO network physicians as part of their workers' compensation network solutions.

93. See WCI, *supra* note 79.

94. George, *supra* note 2.

95. *Id.*

96. Jenny Gold, *FAQ on ACOs: Accountable Care Organizations, Explained*, KAISER HEALTH NEWS (Apr. 16, 2014), <http://kaiserhealthnews.org//news/aco-accountable-care-organization-faq/>.

97. *Id.*

98. *Id.*

VII. HEALTHCARE TECHNOLOGY ADVANCEMENTS

While the digital health movement has been underway for several years, the passage of the ACA is increasing development of, and reliance on, advanced healthcare technology.⁹⁹ This technology saves physicians time and enhances treatment practices.¹⁰⁰ Some of the more popular examples of digital health solutions and their applications include: wearable monitoring devices, telehealth, Google Glass, 3-D printing, internet-connected sensors, and robotic devices.¹⁰¹ Each is discussed in more detail below.

A. *Wearable Monitoring Devices*

These popular devices often take the form of wristwatches or bracelets. They monitor metrics such as steps taken, calories burned, blood pressure level, heart rate, and sleep patterns.¹⁰² They are very effective in helping raise awareness of healthy activities and behaviors that relate to exercise and nutrition.¹⁰³ Over time, it is expected that these devices will transmit information directly to a treating physician, allowing for more customized treatment plans.¹⁰⁴

B. *Telehealth*

Telehealth relies on telecommunications technology to transmit information and facilitate the delivery of healthcare services to remote locations.¹⁰⁵ As an example, telehealth can be used in the nurse-triaging process.¹⁰⁶ An on-site plant nurse could communicate with a physician in a medical office or metropolitan hospital via teleconference, sharing real-time data.¹⁰⁷ This technology could assist in the determination of whether self-care is appropriate or whether a more extensive medical evaluation is needed.¹⁰⁸ Additionally, a physician could use telehealth to consult

99. George, *supra* note 2.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

with a specialty physician almost instantaneously, thereby reducing the downtime that often occurs between appointments.¹⁰⁹

C. *Google Glass*

While Google Glass is no longer available¹¹⁰ due to further development, in the future it may be used to bring high-level expertise to remote areas and expand the medical options available to injured individuals throughout the country.¹¹¹ Using Google Glass, a surgeon on the East Coast could work with a surgical team in the Southwest and “show them precisely where to make an incision for a given procedure.”¹¹² Another application for Google Glass would be to display personal medical records directly on the device.¹¹³ This might include medical history, current symptoms, and medications to allow for the creation of an effective and efficient evaluation and treatment plan.¹¹⁴

D. *3-D Printing*

This new advancement in printing offers great potential in treating occupational injuries. Replicas of human hearts have been created using 3-D printing, allowing surgeons to practice and perfect a given procedure before performing the actual surgery on a patient.¹¹⁵ The technology has also been used to produce human skin, which could be a significant benefit to burn victims in the future.¹¹⁶ It has also aided those suffering from back injuries that require surgery.¹¹⁷ Traditionally, “titanium plates were inserted between disks and the bone grows around them.”¹¹⁸ But with 3-D printing, cellular structures can be produced, and these can become part of the bone growth itself.¹¹⁹

109. *See id.*

110. Nick Bilton, *Broken Glass*, N.Y. TIMES, Feb. 5, 2015, at E1, available at LEXIS.

111. George, *supra* note 2.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

E. Internet-Connected Sensors

Sensors allow for monitoring of an individual's conditions in real time.¹²⁰ For example, sensors in a patient's shoes may detect instability, thereby communicating an increased risk of falling.¹²¹ Sensors may also trigger an alert to a smartphone or other device, communicating an individual's need for assistance.¹²² These and other types of internet-connected sensors are likely to become more prevalent in the future as a way to better deploy medical resources.¹²³

F. Robotic Devices

Robots are being used in hospital settings today and are expected to become more common in the future.¹²⁴ For example, as a nurse is gathering a patient's vital signs, a robot may be used to retrieve routine supplies.¹²⁵ This allows the nurse to provide more focused and attentive care to the individual.¹²⁶

G. Additional Technological Advancements

Other healthcare technology advancements include: a centralized web-based system that collects, organizes, and stores health information to help individuals become more engaged and manage their healthcare; a conversion device for a smartphone that allows a person to send images to a medical provider to check for an ear infection; and video conferencing with touchscreen features for individuals to record and send vital signs to their physicians, allowing healthcare providers to conduct house calls and examinations from their clinical settings or offices.¹²⁷

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Kimberly George, *6 Technologies that Connect Providers with Patients, Drive Down Workers' Comp Costs*, PROPERTY CASUALTY 360° (Aug. 18, 2014), <http://www.propertycasualty360.com/2014/08/18/6-technologies-that-connect-providers-with-patient>.

There are a number of other digital health solutions that are currently being used or are under development.¹²⁸ With the accelerated pace of the digital health movement, the speed and accuracy in which data can be collected and used for the care of injured and ill employees is pivotal to improving health and productivity outcomes. The progress in connected health technology is just the beginning of what is to come.¹²⁹

A potential barrier worth noting is the variance in state laws with respect to the use and application of these healthcare technology solutions. Currently, forty-three states and the District of Columbia provide some form of Medicaid reimbursement for telehealth services.¹³⁰ Twenty states and the District of Columbia now require private insurance plans to cover telehealth services.¹³¹ Workers' compensation has been slower in using this cost-effective alternative relative to traditional face-to-face consultations and examinations. This is an area that employers should watch closely when devising their overall strategies.

VIII. EMPLOYER CONSIDERATIONS AND RESPONSE

In the coming months, employers should closely monitor their own claims data to establish and refine their strategies as legislation around the use of emerging healthcare technology unfolds. Identifying and selecting metrics that convey program performance is paramount to being able to capitalize on current opportunities. Metrics can reveal changes to longstanding patterns following ACA implementation.¹³² Sample metrics that employers should consider watching include:

- *Claim duration:* Monitor whether claims remain open longer due to delays in treatment as more people become insured and seek medical services.

128. *Id.*

129. *Id.*

130. *State Coverage for Telehealth Services*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/state-coverage-for-telehealth-services.aspx> (last updated Jan. 2014).

131. *Id.*

132. Mark Denesevich, Dir. Risk Mgmt., Verizon, Comments at the 69th Annual Workers' Compensation Educational Conference and 26th Annual Safety and Health Conference: The Affordable Care Act's Projected Impact on Workers' Compensation (Aug. 19, 2014).

- *Medical*: Monitor workers' compensation medical costs to determine if advancements such as electronic medical records, emerging medical delivery models, or advanced healthcare technology impact costs.
- *Indemnity payment*: Watch indemnity payments to see if they rise due to injured employees being off work longer because of extended wait times for medical appointments or reduced access to medical care.
- *Lost time days*: Note if lost time days increase due to longer wait times for treatment or, conversely, if emerging health delivery models improve coordination of care so that employees return to work faster.
- *Reopened claims*: See if fewer claims are reopened as a way of assessing effectiveness and efficiency of care.
- *Litigation rates*: Monitor litigation rates to see if there is a downward trend due to improved communication and an increase in quality of care.
- *Survey Tools*: Consider using survey tools to obtain claimant and administrator feedback.¹³³

The actual metrics selected should be specific to any given employer program and reflective of specific goals and objectives.¹³⁴

IX. EXPANDED HEALTH, WELLNESS, AND SAFETY PROGRAMS

It is possible that a healthier population will emerge as a result of more people having access to insurance plans that allow for medical treatment and preventative care. The ACA encourages health promotions and wellness programs.¹³⁵ To the extent that there is an increase in the use of such programs, this could have a positive impact on workers' compensation.¹³⁶

Healthy workers tend to be productive workers.¹³⁷ Employees need to achieve physical, mental, and emotional well-being to meet

133. *Id.*

134. *Id.*

135. *Fact Sheet: The Affordable Care Act and Wellness Programs*, U.S. DEP'T LAB., <http://www.dol.gov/ebsa/newsroom/fswellnessprogram.html> (last visited Apr. 22, 2015). Generally speaking, health and wellness programs are designed to help individuals achieve well-being by encouraging such activities as proper diet, exercise, and healthy lifestyle choices.

136. Friedman, *supra* note 61, at 18.

137. *Workplace Health Promotion: Increase Productivity*, CENTERS FOR DISEASE

the daily demands of the workplace.¹³⁸ Health promotions and wellness programs can help employees achieve better health by emphasizing the benefits of exercise, nutrition, and healthy lifestyle choices.¹³⁹

There are studies that show that employees with comorbidities, such as obesity, high blood pressure, heart disease, and other chronic conditions, are more likely to be injured on the job, and their injuries are generally more severe than an employee facing the same injury without these conditions.¹⁴⁰ For example, the National Council on Compensation Insurance reports that the medical costs of treating an injury of an obese employee are three times higher twelve months after an injury, and five times higher after a sixty month period, than treating the same injury of an employee at a healthy weight.¹⁴¹

Communication and training programs can, and should, address both occupational and non-occupational hazards. For example, back strengthening and back safety programs can prevent and mitigate both occupational and non-occupational injuries. Extreme weather safety, both hot and cold, is prudent for both on-the-job and off-the-job safety and well-being. Weight management has been shown to benefit those at home and at work.

If the ACA causes employers to implement or enhance their existing health, wellness, and safety programs, positive benefits will arise. This can be achieved by encouraging exercise through activities like sponsoring recreational sports programs, offering subsidies for gym memberships, creating walking clubs, or holding exercise classes onsite. Offering healthy food selections at the company cafeteria, holding weight loss classes at the workplace, and providing educational programs and materials can improve nutritional habits and help employees achieve a healthy weight.¹⁴²

CONTROL & PREVENTION, <http://www.cdc.gov/workplacehealthpromotion/businesscase/benefits/productivity.html> (last updated Oct. 23, 2013).

138. Friedman, *supra* note 61, at 17–18.

139. WCI, *supra* note 79.

140. HARRY SHUFORD & TANYA RESTREPO, NCCI HOLDINGS, HOW OBESITY INCREASES THE RISK OF DISABLING WORKPLACE INJURIES 3 (2010), available at https://www.ncci.com/documents/obesity_research_brief.pdf; see also Eric Finkelstein, Ian Fiebelkorn & Guijing Wang, *The Costs of Obesity Among Full-Time Employees*, 20 AM. J. HEALTH PROMOTION 45–51 (2005).

141. *Id.*

142. *Workplace Health Promotion: Health-Related Programs*, CENTER FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/workplacehealthpromotion>

Similar steps can be taken with smoking cessation programs. Many employers are strengthening their employee assistance programs (EAPs) to ensure employees receive the personal support and life coaching they need.

The ACA promotes employee wellness by allowing employers to reward employees who participate in workplace wellness programs.¹⁴³ EAPs will likely expand in their breadth of service offerings. More employers will look for improved solutions for both childcare and eldercare through concierge services to assist and alleviate stress associated with everyday responsibilities.

All of these efforts are collectively aimed at creating and maintaining a healthier and more productive workforce. The bottom line is a healthier population will lead to a more productive workforce and produce savings. This is an area where employers can take action and capitalize on the opportunities at hand.

X. ADDITIONAL CONSIDERATIONS

It is important to be aware of how and when the ACA references workers' compensation in order to fully understand its impact on the system. The legislation's reference to workers' compensation is minimal, with only two direct references to the century old social system.¹⁴⁴ The first reference to workers' compensation can be found in section 2401 where it states that providers of home- and community-based attendant services are covered by workers' compensation.¹⁴⁵ The second reference is in section 10109 where the legislature seeks guidance "regarding whether standards and operating rules described in section 1173 of the Social Security Act (SSA) should apply to the healthcare transactions of automobile insurance, workers' compensation and other such programs."¹⁴⁶

There are additional provisions in the legislation expected to influence workers' compensation. For example, the ACA calls for the establishment of "procedures [designed] to prevent and reduce fraud, waste, and abuse in the healthcare system," and provides

/implementation/programs.html (last updated Oct. 23, 2013).

143. See Luzuriaga & McElreath, *supra* note 24, pt. II.

144. *National Healthcare Reform Legislation Passed in March 2010: What Will National Healthcare Reform Mean for Workers' Compensation?*, *supra* note 51, at 2.

145. *Id.*

146. *Id.*

funding aimed at achieving this objective.¹⁴⁷ It also stiffens penalties for those caught defrauding the system.¹⁴⁸ To the extent fraud, waste, and abuse within the healthcare system are reduced, this could have a positive impact on workers' compensation by lowering costs.¹⁴⁹ Additionally, the legislation contains a provision that affects the Black Lung Benefits Act.¹⁵⁰ It "restore[s] the presumption that black lung disease is due to employment in the mines if the [employee] has worked in the mines for at least 15 years" and does not smoke.¹⁵¹

The legislation also imposed a 2.3% excise tax on certain medical devices effective January 2013.¹⁵² This tax is projected to bring in \$20 billion over ten years to help fund the Act.¹⁵³ Many injured employees are prescribed and use such devices, and it is anticipated that "[m]anufacturers and importers are expected to pass on the cost of this [increased] tax to payers like workers' compensation insurance carriers and self-insured employers."¹⁵⁴ As a result, the excise tax will increase the cost associated with work-related injuries and have a negative impact on the system.¹⁵⁵

The ACA also contains a number of references to health care cost containment, greater efficiency and affordable services. The establishment of ACO pilot programs to provide services for Medicare and Medicaid is one example.¹⁵⁶ These types of strategies

147. *Care Management Solutions, Provider Benchmarking—the Voice of the Industry*, *supra* note 88, at 3.

148. *Id.*

149. *Id.*

150. *Id.* The ACA

amended the Black Lung Benefits Act to restore the presumption that black lung disease is due to employment in the mines if the miner has worked in the mines for at least 15 years. The presumption is rebuttable if the miner did not work in the mines for 15 years or is a smoker.

The United States Supreme Court Recently Upheld the Constitutionality of the Affordable Healthcare Act: Will Workers' Compensation Be Impacted?, WORKERS' COMP SPOTLIGHT (Sedgwick Claims Mgmt. Servs., Memphis, Tenn.), Sept. 14, 2012, at 3.

151. *Care Management Solutions, Provider Benchmarking—the Voice of the Industry*, *supra* note 88, at 3.

152. *Id.* at 4.

153. *Id.*

154. *Id.*

155. *See id.*

156. *Id.*

and arrangements should be watched closely to determine how effective they could be within the workers' compensation arena.¹⁵⁷

Examples of other provisions within the legislation that could affect workers' compensation indirectly call for the establishment of a "trauma center program," a "national strategy for quality improvement in healthcare," and the provision of grants to "small [businesses] that establish wellness programs."¹⁵⁸ While the outcomes of these specific programs are unknown, if such considerations enter the mainstream conversation, change will take place. Employers and other interested industry constituents have the opportunity and ability to influence what the future of workers' compensation will look like.¹⁵⁹

XI. CONCLUSION

Upon signing the signature legislation, known to many as Obamacare, President Obama declared, "We are done."¹⁶⁰ And yet, it will be a long time before the impact of the ACA comes into clear focus.

In recent months, there has been a tremendous amount of attention focused on what is in the legislation and the resulting requirements on employers and employees. However, business leaders must now engage in a more meaningful conversation focused on what the ACA means in operational terms and how U.S. companies can keep employees healthy and productive in the years to come.

Access to care, the quality of care, and the cost of care will undergo change. New healthcare delivery models will emerge, and technology advancements will be introduced. Health, wellness, and safety programs will become a conversation centerpiece. A very real opportunity currently exists to influence the long-term impact that the ACA will have on businesses.

Continued implementation will not be without its challenges. Lawsuits targeting parts of the ACA will likely continue. The United States Supreme Court recently heard arguments on a new challenge to the ACA regarding the federal government's right to

157. *Id.*

158. *National Healthcare Reform Legislation Passed in March 2010: What Will National Healthcare Reform Mean for Workers' Compensation?*, *supra* note 51, at 3-4.

159. *See id.*

160. Press Release, The White House Office of the Press Sec'y, *supra* note 1.

subsidize the health insurance premiums of Americans who buy health insurance through the federal exchange set up by the ACA.¹⁶¹ Additionally, congressional action has commenced, although no major change to the ACA can overcome a presidential veto unless a two-thirds majority of both houses of Congress vote to do so.¹⁶² To the extent that organizations can influence and capitalize on potential opportunities, this reform can lead to a more healthy and productive workforce that will benefit both employers and employees.

It will be a long time before the ultimate impact of the ACA is known and businesses see how the legislation will affect their operations. Joining the conversation, influencing the reform, and capitalizing on newfound opportunities can help employers sustain success over the long term. It is still early and employers should remain agile in their response to the new operating environment.

161. *King v. Burwell*, 759 F.3d 358 (4th Cir.), *cert. granted*, 133 S. Ct. 475 (2014) (argued Mar. 4, 2015).

162. *Complaint, U.S. House of Representatives v. Burwell*, No. 14-cv-01967 (D. D.C. Nov. 21, 2014).