

# SUMMARY OF MULTI-STATE COMPARISONS FOR WORKERS' COMPENSATION LAWS

The Department of Labor and Industry provided to the Economic Affairs Interim Committee in April 2018 a multi-state compilation of selected workers' compensation information from across the nation for use in contemplation of Montana workers' compensation laws. Members of the Economic Affairs Interim Committee had expressed interest in comparisons generally, although most analysts warn that comparisons are difficult when each state's combination of laws may not be directly comparable with another state's laws and constitution.

This summary uses information that the Department of Labor and Industry excerpted from several sources. At the end there is additional information not included in a spreadsheet provided by the department relating to enterprise and establishment size along with workers' compensation premiums for small businesses.

The department information in the attached spreadsheet lists the states and the District of Columbia according to the 2016 Oregon Study of workers' compensation, where the #1 ranking means the state with the highest premiums (California) and the #51 ranking (North Dakota) reflecting the lowest premiums. The other topics chosen by the Department of Labor and Industry for the spreadsheet shows whether independent contractors are exempted, whether the state has fee schedules for medical procedures, what types of benefits for different types of injuries, whether the state covers mental claims if no injury is present (e.g. post-traumatic stress disability), the waiting period before an injured worker qualifies for workers' compensation benefits, the number of workers covered by workers' compensation in the state, the total benefits paid in 2014, and the average of benefits divided by covered workers. The final column was the incidence rate in 2015 for nonfatal injuries and illnesses among private employers. The paragraphs below summarize the details.

## Independent Contractor Exclusions/Exemptions

Only five states provide no exclusions or exemptions for independent contractors to have workers' compensation coverage: Alabama, Louisiana, Massachusetts, Missouri, and Vermont. The state with the lowest premium rates that did not exclude independent contractors was Massachusetts at #44. Louisiana ranked 10<sup>th</sup> highest premiums in the Oregon study.

Montana, at #11 in the Oregon study, has a provision providing a presumptive exclusion for an independent contractor who has paid \$125 and answered a series of questions aimed at proving to the Department of Labor and Industry that the person doing the work has no employees and has a legitimate business from which the person works at sites other than a fixed address.

**Montana joins most states in not requiring workers' compensation for independent contractors.**

## Fee Schedule in Place

Eight states do not have fee schedules in place, including three that rank among the lowest in premiums: Virginia (#47), West Virginia (#48), and Indiana (#50). The other five without fee schedules include the state with the second-highest premiums, New Jersey, plus Wisconsin, which reportedly is considering a schedule (#12), New Hampshire (#17), Missouri (#19), and Iowa (#24). Fee schedules are thought to help control the costs of medical expenses. Workers' compensation fee schedules in Montana are governed by 39-71-704, MCA. Subsection (2)(a) states:

Montana and 41 other states plus the District of Columbia have fee schedules for medical providers and facilities.

The department shall annually establish a schedule of fees for medical services that are necessary for the treatment of injured workers. Regardless of the date of injury, payment for medical services is based on the fee schedule rates in this section in effect on the date on which the medical service is provided. Charges submitted by providers must be the usual and customary charges for nonworkers' compensation patients. The department may require insurers to submit information to be used in establishing the schedule.

Additionally 39-71-704, MCA, allows critical access hospitals to get full reimbursement of usual and customary charges. For providers other than critical access hospitals, the department compiles information from acute care hospitals, NCCI, and insurers to determine reimbursement fees. For professional services the department gathers information from group health insurers that have at least 1% of the market in Montana . The rates must be based on standards listed in the statute.

## Calculation of Indemnity Payment for Temporary Disability

An injured worker who has a temporary total disability (TTD) and is unable to work typically receives a portion of salary. That amount varies by state, but 36 states use a  $66 \frac{2}{3}$  of the preinjury wage. Some states use a variation of that (Idaho rounds up to 67%); some states base the payment on the calculation on net weekly wages.

Montana and 35 other states pay TTD indemnity at  $66 \frac{2}{3}$  of preinjury wage.

## Calculation of Indemnity Payment for Permanent Total Disability

Once an injured worker has reached maximum medical improvement and is found to have a permanent total disability (PTD) that prevents the worker from being able to physically perform regular employment, the injured worker is entitled to a PTD indemnity payment. In 34 states that is the same amount as for temporary total disability –  $66 \frac{2}{3}$  of the preinjury wage. The two states for which PTD is not applicable but that provide TTD payments are Georgia and Pennsylvania.

Montana and 33 other states pay PTD indemnity at  $66 \frac{2}{3}$  of preinjury wage.

## Calculation of Indemnity Payment for Permanent Partial Disability

In Montana a person with a permanent partial disability (PPD) has reached maximum medical healing, has actual wage loss as a result of the injury, is able to return to some form of work but has a permanent impairment that affects the injured worker's ability to work, and the impairment is listed in the American Medical Association's sixth edition *Guides to the Evaluation of Permanent Impairment*. Montana and 30 other states use 66 2/3 of the average weekly wage or preinjury wage for indemnity payments. A person with a PPD claim also may be entitled to an impairment award. Montana has a complicated calculation for an impairment award. The only variation for the indemnity award is that, regardless of the 66 2/3 of the preinjury wage, the indemnity payment may not be more than one-half of the state's average weekly wage. Half that wage of \$768.11, listed on the Department of Labor and Industry's Labor Market Information website <http://lmi.mt.gov>, would be \$384.055 in 2018.

Montana and 30 other states pay PPD indemnity at 66 2/3 of preinjury wage.

## Coverage of Mental-Stress Claims When There is No Physical Injury

Montana is one of 17 states that do not provide coverage of mental-stress claims when there is no physical injury. In the District of Columbia, the response is "not applicable." That means 33 states do provide workers' compensation coverage for mental-stress claims.

33 states cover mental-stress (post-traumatic stress) types of claims. Montana does not.

## Waiting Period Before Worker May Claim Indemnity Benefits

Although nuances affect Montana's law, the basic waiting period here is 4 days or 32 hours before an indemnity claim can be made. In 23 states, that waiting period is 3 days or 3 business days or 3 scheduled days. Twenty-two states require 7 days or 7 consecutive days. The remainder, including Montana, fall in-between.

States with a 3-day waiting period - 23  
States with a 7-day waiting period - 22  
Montana's waiting period - 4 days.

## Workers Covered, Benefits Paid, Benefits to Covered Workers, and Incidence Rate

The last four categories of the spreadsheet show the variations that population and different incident rates create. But comparisons are difficult because the years from which the data are reported differ from 2014 to 2015. Montana with an incidence rate of only 4 in 2015 for the 424,000 covered workers counted in 2014 appears to be on the higher side of average benefits to covered workers, but a comparison across states and even with the incident rate is not appropriate. Workers' compensation data in general is hard to compare because the individual state's variations may be quite significant as to the base that is being measured. For example, not all states require small businesses to provide workers' compensation insurance if payroll covers fewer than 3 workers. So workers covered is not an apples to apples comparison. Not knowing how many of the injured workers were receiving TTD as compared to PPD might skew the "benefits paid" comparison between states so that what looks like a large number in one state in one year may indicate a bad year for medical-only costs but not for permanent disability indemnity payments.

## Small Businesses – Are They Required to be Covered and at What Cost?

In Montana any employer who has employees is required to be covered by workers' compensation unless eligible for one of 26 exemptions under 39-71-401, MCA. These exemptions cover dependent family members, musicians under contract, working members of a partnership, and a range of other relationships or job types like direct sales people. In some states, however, coverage is not required for very small businesses with less than 3 employees.

Texas and New Jersey are the only states that have elective coverage, although New Jersey requires employer liability policies that the Workers' Compensation Research Institute says carriers currently do not offer.

The Workers' Compensation Research Institute, which compiles data from across the nation, separately identifies whether states allow exemptions for farmers and ranchers to provide their agricultural employees with workers' compensation. Thirty-seven states do, including Montana. Thirteen states plus the District of Columbia have no exemptions for this category. Montana's exemption is limited to situations in which a person is providing temporary help and already covered by another exemption (for example, a neighboring rancher helping with cattle who as a sole proprietor does not have to have workers' compensation insurance.)

As in Montana, many states have conditions or triggers as to when coverage is required. For example, Illinois requires coverage if an employee has 400 or more working days in a quarter in the preceding calendar year. Some states use number of unrelated employees as the trigger; Nebraska, for example, has exemptions until an employer has 10 or more full-time employees on each working day for 13 calendar weeks, according to the Workers' Compensation Research Institute.

The cost for required coverage of small businesses and agricultural workers depends on job risks as well as experience factors. Montana State Fund in the past has said that small, low-risk businesses often may have no claims until one catastrophic claim arises for which premiums will never cover the costs. That was one reason, in the past, that many small businesses were in the highest rate tier of the five tiers that Montana State Fund provides. The data at right uses policy counts and premium share for the various tiers, but the information is not specifically related to account size. As the Montana State Fund's internal actuary pointed out, a three-person roofing business may have high premiums because of risk, while a large professional office for which travel is not required may have a low account size. In general, Montana State Fund has 19,633 of its 25,467 accounts in the under \$5,000 (small account) range.

From the perspective of risk and business activities, by premium volume, the highest tier (5) represents 5.5% of the premiums at Montana State Fund but account for slightly more than one-fourth of all policies. Information provided to the Montana State Fund Board of Directors on March 9, 2018, showed that just 4.2% of policies are in the lowest-cost, lowest risk

States with small employer exclusion -- 16  
Alabama, Mississippi, and Tennessee allow the most - up to 5 employees - before requiring workers' compensation coverage. Missouri and Oklahoma say up to 5 workers, with conditions.

37 states, including Montana, exempt farmers and ranchers from having workers' compensation coverage, although Montana's exception is limited to temporary help by a person with an exemption in another category.

### Montana State Fund Tiers By Policy, Premium

	<i>Policy Count</i>	<i>Premium %</i>
Tier 1 (lowest risk)	4.2%	9.4%
Tier 2	31.4%	26.4%
Tier 3	16.2%	39.2%
Tier 4	22.3%	19.2%
Tier 5 (highest risk)	25.8%	5.5%

*Both columns are short of 100% due to rounding.*

Summary of Multi-State Comparisons for Workers' Compensation Laws  
Economic Affairs Interim Committee

tier (1) but bring in nearly 10% of all premium dollars. The highest percentage of policies, 31.4%, were in Tier 2. Tier 3 had 16.2% of policies but the largest contribution to premium volume, 39.2%. Tier 4 provided 22.3% of policies and 19.4% of premium volume. Whether Tiers 4 and 5 are indications of Montana State Fund having to serve as the guaranteed market is not certain. If Tiers 4 and 5 are indicative of policies issued that other insurers are unwilling to accept, the loss of these accounts would drop the workload by nearly half, but decrease premium income only by one-fourth.

A question under review for the Senate Joint Resolution 27 study of Montana State Fund relates to whether small businesses and agricultural employers would face larger premiums or not if Montana State Fund no longer provided a guaranteed market. Alternatives to the guaranteed market or the residual market (those not voluntarily provided insurance coverage) include assigned risk or designated carriers that are part of an insurance pool. See Appendix for information related to residual coverage and small or agricultural employers.

### Medical Costs and Frequency

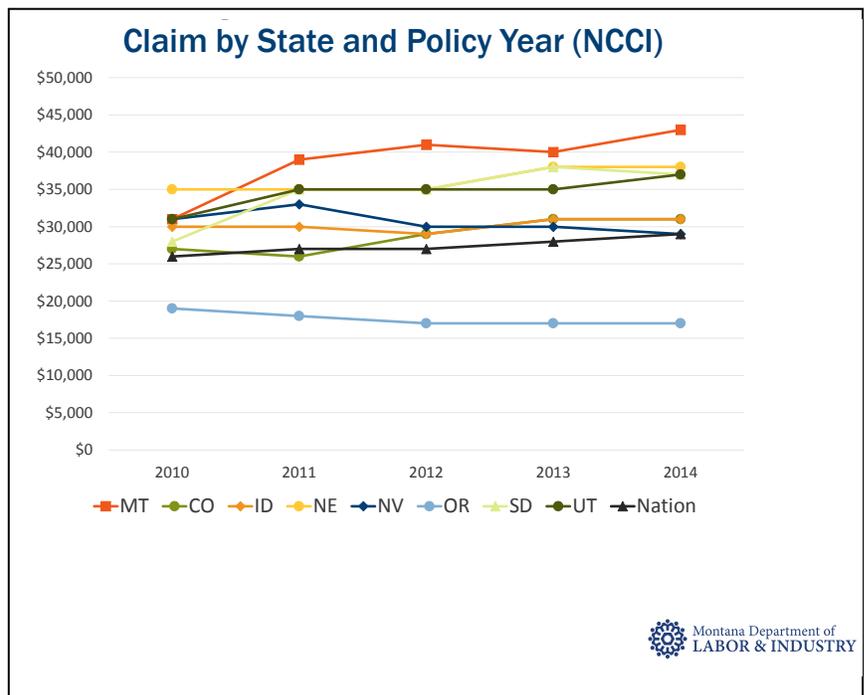
The Department of Labor and Industry provided information on medical costs for both commodities and services in the western region as well as the United States in general. The western region had lower increases in medical care services but greater increases in medical care and commodities costs than the nation in general.

The Department of Labor and Industry's analysis of medical costs show the average cost per claim is increasing as is the number of services per claim. But the analysts noted that the permission since 2017 to settle undisputed medical claims means that some of the cost increases may be short-term while the increased demand from the 2017 changes settle out. The average medical cost for a lost-time claim, usually the more serious medical claims, had grown to nearly \$45,000 in 2014, an uptick from about \$40,000 in 2011. Meanwhile, the average indemnity claim over that period has stayed roughly the same at around \$20,000.

Montana's average medical cost for a loss-time claim is significantly above most of the other states in the western region reviewed by the Department of Labor and Industry analysts, as shown in the chart.

Department of Labor and Industry analysts also noted that about 65% of the claims for which petitions have been filed are winning

<b>West Medical</b>	<b>Dec. 16</b>	<b>Dec. 17</b>	<b>Change</b>
<b>Overall Care</b>	\$474,889	\$484,898	+2.1%
<b>Commodities</b>	\$359,850	\$375,618	+4.4%
<b>Services</b>	\$511,526	\$519,234	+1.5%
<b>Nationwide</b>			
<b>Overall Care</b>	\$469,447	\$477,802	+1.8%
<b>Commodities</b>	\$371,561	\$380,087	+2.3%
<b>Services</b>	\$500,845	\$509,045	+1.6%



Summary of Multi-State Comparisons for Workers' Compensation Laws  
Economic Affairs Interim Committee

approval to reopen after a 5-year closure. These claims are those with dates of injury back to July 1, 2011, the effective date for most of House Bill 334 from the 2011 session.

In terms of medical coverage and costs, the Workers' Compensation Research Institute shows that Montana has the same or almost the same coverage as 21 other states. Among services that other states are less likely to cover (and which Montana covers) are optometrist services, home health care, and dental services. Department of Labor and Industry analysts noted that the Workers' Compensation Research Institute found that Montana's medical fee schedule was about 71% above Medicare. NCCI said other state averages ran about 55% to 60% above Medicare.

APPENDIX

State	Residual Market Mechanism	Highest Market Share	Small Employers	Agricultural Employers
Colorado	Guaranteed Market		No exclusion	Exclusion if employees paid less than \$2,000 in wages in a calendar year.
Idaho	Assigned Risk/Reinsurance Pool		No exclusion	No exclusion
Montana	Guaranteed Market	Montana State Fund	No exclusion unless exempt	No exclusion (in general)
Oregon	Assigned Risk/Reinsurance Pool		No exclusion	No exclusion