

**“OTHER STATES INSURANCE”:
EXTRATERRITORIAL INSURANCE COVERAGE
UNDER THE WORKERS COMPENSATION
AND EMPLOYERS LIABILITY POLICY**

by David B. Torrey*

The skilled insurance agent likely has more awareness of the extraterritorial coverage aspect of workers’ compensation laws than does the average lawyer or WCJ. Attorneys and judges only become involved after an injury has occurred, and some issue surrounding the applicability of the Pennsylvania Act arises. In practice, a *bona fide* ambiguity in this realm only occasionally arises and the issue is rarely litigated.

Agents, on the other hand, are always managing their clients’ risks and seeking to ensure that insurance protection is present in the event of a worker’s injury. Indeed, agents must always be sure that their clients have workers’ compensation insurance coverage in all states and countries where their workers are laboring, traveling, or in some cases even *residing*.¹

In this regard, under workers’ compensation statutes, insurance coverage in an employee’s usual work area will likely follow, or travel with him, out of his state, at least for a reasonable period.² Nevertheless, if the worker is injured in a foreign state, he will almost assuredly have rights to compensation under the provision of that state’s compensation laws. Most states are like Pennsylvania – with its broad “intraterritoriality” provision³ – and will apply their laws to any injury suffered by any worker injured within the state.

At least three motives exist for the agent’s careful attention to detail in ensuring broad coverage: (1) ensuring that insurance is indeed in place so that the client’s employees are promptly and fairly compensated; (2) ensuring that the employer is not considered non-compliant with the foreign state’s laws and hence potentially liable for

* Workers’ Compensation Judge, Allegheny County; Adjunct Professor of Law, University of Pittsburgh School of Law.

¹ Mere residence (or domicile) alone is not usually grounds for a state workers’ compensation law to provide for jurisdiction. This is true in Pennsylvania. Thus, for example, a resident of Philadelphia who commutes to New Jersey for work every day, for an employer that has no operations in Pennsylvania, and is injured in New Jersey, will not possess a cognizable Pennsylvania claim. In certain states, however, mere residency in the state may be enough. This was the law, for example, until 2008, under the Iowa Act. *See, e.g., Henricksen v. Younglove Construction*, 540 N.W.2d 254 (Iowa S. Ct. 1995) (discussed in Grimm, *Henricksen v. Younglove Construction: Subject Matter Jurisdiction Based Solely on the Claimant’s Iowa Domicile*, 45 DRAKE LAW REVIEW 859 (1997)).

² For example, under the Pennsylvania Act, a worker whose employment is “principally localized” in Pennsylvania will, in general, have the benefit of Pennsylvania coverage for an extraterritorial injury for up to 12 months. Section 305.2(d)(4), 77 P.S. § 411.2(d)(4).

³ Section 101 of the Act, 77 P.S. § 1.

penalties and fines; and, perhaps most importantly, (3) ensuring that the employer is not exposed to tort liability for failure to insure.

Agents ensure that such coverage is present by accurately communicating to the insurer the identity of the states in which the employer needs protection. The employer's policy must list the state or states where the employer's main operation is conducted, and also list the other states in which coverage is requested.

To effect coverage, the Information Page of the policy (known traditionally as the Declaration Page or "dec sheet") lists the states of the insured's principal operation in Item 3.A and the other states in Item 3.C. (Experts on the insurance policy consistently remind old timers – and others – that there is no longer any "Broad Form All States Endorsement" that accomplishes wide coverage.⁴ The 1992 revision of the policy abolished the All States Endorsement.)

The admonitions with regard to the "Other States" inclusions on the Information Page have their genesis in language of the NCCI Workers Compensation & Employers Liability Policy, as approved by the Pennsylvania Insurance Department. Every policy issued in Pennsylvania possesses the following language:

PART THREE – OTHER STATES INSURANCE

A. How This Insurance Applies

1. This other states insurance applies only if one or more states are shown in item 3.C of the Information Page.
2. If you begin work in any of those states after the effective date of this policy and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in item 3.A of the Information Page.
3. 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.
4. If you have work on the effective date of this policy in any state not listed in Item 3.A of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days.

B. Notice

⁴ M. Gallagher, *Workers' Compensation Extraterritorial Issues* (Monograph), at 3 (available at <http://www.workcompedge.com/cfwiki/files/WCETIssues.pdf>)).

Tell us at once if you begin work in any state listed in item 3.C of the Information Page.

According to one underwriting expert, the best way to avoid risk and provide a “safety net”⁵ is to have Item 3C read as follows: “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 3A of this Information Page.”⁶ Another expert recommends rather similar language for Item 3.C: “Coverage is provided in any state not listed in Item 3.A above or the monopolistic fund states.”⁷

One writer has referred to this as “automatic coverage.”⁸ Another expert, however, perhaps more accurately refers to Item 3.C as “*temporary* automatic coverage.”⁹ He notes, in this regard, that once the insured reports the start up of any operations in an Item 3.C state, the carrier will shift the state into Item 3.A. The same author also notes that “for most businesses, the need for other states coverage arises not so much from new operations or new facilities, but from the potential for ‘incidental’ exposures in other states – exposures that arise from temporary, occasional work in or work-related travel to or through other states.”¹⁰ Listing a state in Item 3.C is thus best conceived of as securing “incidental” coverage.¹¹

⁵ M. Gallagher, *supra*, at 2.

⁶ M. Gallagher, *supra*, at 3.

⁷ L. Utschig, *Workers’ Compensation: Other States Coverage* (monograph), at 3, available at http://findarticles.com/p/articles/mi_qa3615/is_199707/ai_n8775750/?tag=content:coll.

Washington, Wyoming, North Dakota, and Ohio are “Fund” states where the state agency insures all employers and private insurance is not permitted. According to one commentator, “Employers with potential incidental workers compensation exposures in the monopolistic fund jurisdictions ... and all of Canada’s provinces ... may be able to obtain coverage under a manuscript “extended protection endorsement” that provides for reimbursement of benefits required of the insured under the workers compensation law of these jurisdictions.” IRMI’S WORKERS’ COMPENSATION: A COMPLETE GUIDE TO COVERAGE, LAWS, AND COST CONTAINMENT, at V.I.E.5 (IRMI 2009).

⁸ L. Utschig, *supra*, at 3.

A few states do not consider an employer compliant with its law by insuring under Item 3.C for casualties by employees within their jurisdictions. New York is one such state. According to one analyst, “Other States coverage will no longer satisfy the requirements of the New York Workers’ Compensation Law under any circumstances. Technically, an out-of-state employer that sends an employee to attend a seminar or conference in New York will be required to maintain a New York policy.” M. Gallagher, *supra*, at 10. This change in the law was highly controversial when enacted. *See generally* <http://www.wcb.state.ny.us/content/main/Reform/Updates.jsp>.

⁹ IRMI’S WORKERS’ COMPENSATION, *supra*, at V.I.E.2.

¹⁰ IRMI’S WORKERS’ COMPENSATION, *supra*, at V.I.E.2.

¹¹ IRMI’S WORKERS’ COMPENSATION, *supra*, at V.I.E.2.

One expert has noted that some insurance carriers cannot or will not consent to such broad wording. Among the reasons are that (1) the employer is with a state fund that is not authorized to extend coverage outside the state; (2) the employer is insured with a carrier not licensed in all others states; and (3) the employer is insured with a carrier unwilling to accept the risk of providing coverage in an unattractive jurisdiction, that is, one considered “more challenging from a Work Comp standpoint”¹²

Experts also remind insurance professionals that it is the *statute* (and possible administrative or court rulings) of the state where the injury is suffered, or where a claim may be processed, that governs whether the employer will be responsible for workers’ compensation benefits in such state.¹³ The terms of the insurance policy may ultimately limit coverage to an insured employer in a particular case, but the explicit policy terms will not relieve the employer of liability if the state statute provides, or a court rules, that such liability exists under the jurisdiction’s workers’ compensation law.

One writer has set forth an example of *who pays* when liability in another state exists and such state *was not included* in Item 3.C:

Occasionally, a worker will be temporarily working in a state not listed in Item 3.A. While the benefits of the home state go along with the worker, this may not always be adequate.... For example, an Indiana worker was temporarily working in Illinois. Only Indiana was shown in Item 3.A. of the employer’s workers compensation declarations page. However, the worker was injured in Illinois. Indiana benefits were payable per the workers compensation declarations page. However, the Illinois Industrial Commission decided that the worker was entitled to Illinois benefits. As it is set up, the workers compensation policy will pay only Indiana benefits. The worker received Illinois benefits. There is a difference of about 71% between the Indiana and Illinois benefits. This 71% difference in benefits would be paid by the employer.¹⁴

Importantly, the “Employers Liability” portion of the policy (*i.e.*, Part II), does not come into effect when workers’ compensation liability in another, non-listed state, exists: “Nor [in such instances] will the employers liability insurance portion of the

¹² M. Gallagher, *supra*, at 3.

¹³ Analyst Maureen Gallagher has characterized the seemingly straightforward Workers Compensation and Employers Liability policy as actually quite complex, as it adopts by reference all state laws and regulations: “When a state is listed on the ... policy, essentially we have attached hundreds of pages of Work Comp statutes and laws and thousands of pages of case law for that state. Add multiple states and I would argue that, although the basic policy is only about six pages long, the addition of statutes and case law makes the Work Comp policy the largest and most complex policy an employer buys.” M. Gallagher, *supra*, at 6.

¹⁴ L. Utschig, *supra*, at 2-3.

policy respond, since employers liability coverage does not respond to obligations imposed by workers compensation law....”¹⁵

As noted at the outset, a key motivation for broad coverage is to ensure that the employer is not, in the event that one of its employees suffers an injury out of state, found out of compliance with a state law as to carrying insurance. Some jurisdictions will, through reciprocity, respect the home state’s insurance and consider the employer insured, at least for a period of temporary work.¹⁶ Pennsylvania, in contrast, has adopted in full the Council of State Governments’ Model Act “conditional coverage” (author’s term) provision.¹⁷ Under the statute, an employer that has not provided for coverage in

¹⁵ IRMI’S WORKERS’ COMPENSATION, *supra*, at VI.E.1.

¹⁶ See M. Gallagher, *supra*, at 9.

The Oregon workers’ compensation authorities have cataloged the fifty states. See <http://www.cbs.state.or.us/external/wcd/compliance/ecu/etsummary.html>. The California Workers’ Compensation Act maintains the following reciprocity proviso. Labor Code § 3600.5 provides, in pertinent part:

(b) Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workmen’s compensation insurance coverage under the workmen’s compensation insurance or similar laws of a state other than California, so as to cover such employee’s employment while in this state;

[P]rovided, the extraterritorial provisions of this division are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the workmen’s compensation insurance or similar laws of such other state.

[T]he benefits under the Workmen’s Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

A certificate from the duly authorized officer of the appeals board or similar department of another state certifying that the employer of such other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carries such workmen’s compensation insurance.

Id.

¹⁷ Section 305.2(c) of the Act, 77 P.S. § 411.2(c).

The Council of State Governments proposed a model Workers’ Compensation Law in the 1960’s and 1970’s. Thirteen states have adopted the model law’s extraterritorial provision in whole or in part. Pennsylvania is one of only a few states to adopt the entire provision without significant alteration. See the

Pennsylvania, and then becomes liable for a Pennsylvania claim (because of its employee's Pennsylvania-covered work injury) will, upon filing a certificate with the Department of Labor & Industry, be considered insured. This is so whether or not the employer's presence in Pennsylvania was temporary, and coverage is *not* dependent on reciprocity.

The Pennsylvania provision appears to be coordinated with policy provision III.A.3., and makes reference to the existence of an insurer's "contract" that "requires it to pay an amount equivalent to the compensation benefits provided by this act" In the end, however, the employer will be liable for Pennsylvania Act benefits,¹⁸ and if such benefits are in excess of what the carrier has agreed to pay, the employer (not the carrier) will be obligated for the difference.

Employers may also obtain an endorsement that covers workers when they work in foreign countries. This is called the Foreign Workers Compensation and Employers Liability endorsement. Insurance carriers may also offer workers' compensation-type benefits to cover employees who for some reason are not covered by a state's workers' compensation plan and who would hence not be captured by the endorsement described above. The Travelers Insurance Company, for example, advertises the availability of such a product. The company calls this policy "Foreign Voluntary Workers' Compensation." The company's literature on this offering once again points up an important motivation for providing as broad coverage as is possible: avoidance of possible tort or other civil liability.¹⁹

following article in this newsletter, Appendix C, for a list of the others states adopting, in whole in part, the provisions of the Model Act.

¹⁸ This may be inferred from Section 305.2(c)(4), 77 P.S. § 411.2(c)(4).

¹⁹ <http://www.travelers.com/business/globalAccounts/docs/58974.pdf>.