February 1, 2019

Annual Report
on Employer Coverage Compliance

Bureau of Workers' Compensation

TN

The Honorable Paul Bailey, Chairman,
Senate Commerce & Labor Committee
Cordell Hull Bldg.
425 5th Ave N, Suite 736
Nashville, TN 37243
sen.paul.bailey@capitol.tn.gov

The Honorable Clark Boyd, Chairman,
House Consumer & Human Resources Committee
Cordell Hull Bldg.
425 5th Ave N, Suite 672
Nashville, TN 37243
rep.clark.boyd@capitol.tn.gov

Dear Chairman Bailey and Chairman Boyd:

The General Assembly passed legislation in 2010 that established an Employee Misclassification Advisory Task Force and required it to submit a report annually by February of each year. In June 2014, the law establishing the Task Force and the annual report requirement sunsetted. Although the law no longer requires it, the Bureau of Workers' Compensation has continued to provide a report annually that contains information regarding the progress made toward reducing misclassification and failure to provide legally-required workers' compensation insurance.

This report provides insights into the Bureau's progress this year in compliance with laws related to providing coverage to workers. Included in this report are stories of Tennesseans who have been affected by workers' compensation this past year and the results of the Compliance Program's efforts to reduce non-compliance.

The Bureau appreciates the assistance of other state agencies, businesses, insurance companies, members of the Employee Misclassification Advisory Committee, and members of the public who have shown an interest in workers' compensation.

We hope that you find this report informative. If you have questions, we would be happy to answer them.

Sincerely,

Amanda Terry
Bureau of Workers' Compensation
Director of Compliance
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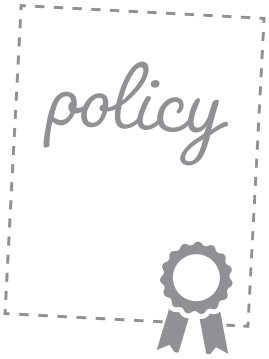
Compliance Program

Tennessee's workers' compensation law requires most employers to maintain insurance for work-related injuries. Generally, non-construction employers with five or more employees must provide workers' compensation coverage to its employees. However, due to the inherent dangers of the industry, construction service providers are treated differently. Construction employers with just a single employee are subject to workers' compensation laws. The failure of employers to follow workers' compensation laws is a serious issue for Tennessee with serious consequences. Injured employees suffer when they do not receive medical treatment or payment for lost wages when an employer avoids the law. Law-abiding businesses suffer when they have to compete with businesses who cut prices by not having workers' compensation insurance coverage.

The Bureau of Workers' Compensation Compliance Program oversees compliance with the coverage requirements of the law.[1] There are two Units of the Compliance Program.



The first is the **Uninsured Employers Fund** (UEF). The UEF investigates employers to determine whether they are covered by the law and then penalizes those employers who fail to provide the required workers' compensation insurance coverage for their employees.

The second Unit is the **Employee Misclassification Education and Enforcement Fund** (EMEEF). This program investigates construction service providers to ensure that their workers are properly classified and penalizes those who:

- Misclassifying employees as independent contractors,
- Misrepresent the type of work they do to reduce their workers' compensation insurance premiums by claiming it is a safer job than what is actually done (e.g. claiming an electrician is a secretary), and/or
- Underreport the total payroll, again to reduce insurance premiums.

1 Tennessee Code Annotated sections 50-6-405, 50-6-411, 50-6-412, and 50-6-902 provide the authority for the Compliance Program's operations.

Our investigations helped

September 2017 - October 2018

1,253

Tennessee employees obtain coverage

Misclassification of workers in the construction industry is a significant problem.

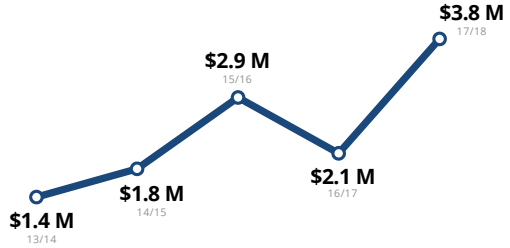
Workers are often **classified as "independent contractors"** even when they are legally "employees" as a way to reduce operating expenses. Workers performing high risk jobs are reported to insurance agents as performing lower risk work, which reduces insurance premiums. **Underreporting actual payroll** figures also lowers insurance premium costs for employers. These illegal practices subject insurance companies to claims for which they did not receive premiums.

The Bureau's Compliance Program has eight Compliance Specialists who use a variety of methods to locate and investigate employers who are not providing the workers' compensation protection the law requires.

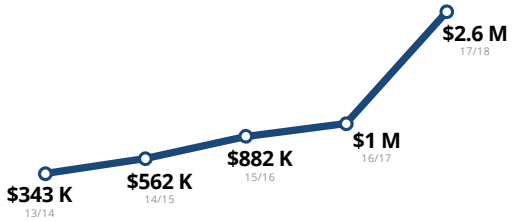
These specialists cover the entire state and are based in Jackson, Nashville, Knoxville, Chattanooga and the Kingsport area.

When an investigator identifies an employer who may be non-compliant, the investigator performs a thorough investigation. When the information obtained by the investigator warrants it, a penalty is issued. The **UEF Unit assessed 234 penalties** against employers for not maintaining workers' compensation insurance from September 2017 through October 2018, for a total assessment amount of $2,730,269.60. During that same time frame, the **EMEEF unit assessed 26 penalties** against employers for misclassifying their employees, for a total assessment amount of $3,029,963.29.

UEF Penalties Assessed



EMEEF Penalties Assessed



Numbers represented on charts reflect assessments from fiscal year 17/18: July 1, 2017 - June 30, 2018.

Combined, these programs assessed penalties in the amount of $5,760,232.80. This is an increase from the previous year of $2.5 million in total penalty assessments. Of note, 161 of the 260 total assessments were not contested and a settlement agreement on the penalty was reached with the Employer. In order for a business to settle with the Compliance Program, the business must obtain workers' compensation coverage. The other penalties were assessed through the Program's litigation process.

Penalizing businesses serves as a way to discourage the employer from breaking the law. However, issuing penalties is not the goal of this program—ensuring all covered employers maintain adequate insurance coverage to protect workers if/when they get injured is the primary goal. The Compliance Program simply wants all employers to comply with insurance coverage provisions and lawfully provide workers' compensation benefits to employees, which will benefit all Tennesseans.

Uninsured Employers Fund

	West TN	Middle TN	East TN	Out-of-State
Penalties Assessed	**$748,609.53**	**$1,395,712.31**	**$1,424,888.97**	**$267,739.77**
Penalties Collected	**$304,035.60**	**$231,269.90**	**$489,083.01**	**$148,150.57**

Employee Misclassification Education and Enforcement Fund

	West TN	Middle TN	East TN	Out-of-State
Penalties Assessed	**$268,911.07**	**$1,012,295.88**	**$82,421.67**	**$1,318,704.56**
Penalties Collected	**$14,000.00**	**$277,523.58**	**$176,904.62**	**$0.00**

Assessments reflect amount of new penalties.
Collections reflect ongoing payments received per payment plans.

Numbers represented reflect collections and assessments from fiscal year 17/18: July 1, 2017 - June 30, 2018.

Who Loses When Employers Don't Follow the Law

An **employee**, who works for an uninsured employer, loses when they are injured in a work-related accident. The employee will not likely receive the necessary and timely medical treatment to which they are entitled. When an injury keeps an employee from being able to return to work immediately, the employee may not receive the benefits to which they are entitled that would allow him/her to maintain daily life needs, such as food and housing. If the employee cannot return to work, the employment relationship is lost and the employee must find another job. If the employee becomes disabled, it is likely that no permanent benefits will be paid. They may face time-consuming and very costly litigation at their own expense to pursue the workers' compensation claim. This can affect the employee's **co-workers**, as well. The co-workers began to worry about their own stability with the uninsured employer.

Compliant employers are also disadvantaged, when their competition chooses to not follow the law. Law abiding employers are unable to competitively bid for work as the non-compliant uninsured employer can offer a lower price for a job because of their non-compliance.

The state's economy loses too. It is estimated that insurance companies lost as much as $296.1 million in 2016 as a result of uncollected workers' compensation premiums.[2] Tennessee loses tax revenue on unpaid workers' compensation premiums.

2 William Canak and Randal Adams, Misclassified Construction Employees in Tennessee, v (January 15, 2010), updated data as of 2016 provided by Chris Acuff.

an estimated
$296.1
million
lost

Meet Those Who Have Been Affected By Employers Who Do Not Follow The Law

The penalties collected by the UEF create a benefit fund to help some of the workers who are injured while working for a non-compliant employer. The following are stories taken from beneficiaries of the Uninsured Employer Fund Benefit (UEF Benefit Fund).

In September 2016, Carlos worked for an employer that cleared lumber in East Tennessee. A tree fell on Carlos during work. This caused serious injuries to his leg and spinal cord. Carlos was transported by helicopter to a local hospital. He had surgery to stabilize his spine. Later, he was transferred to a nursing home for rehabilitative therapy. His injury left him paralyzed from the waist down and he is now confined to a wheelchair. Within the first year after his injury, Carlos accumulated over $160,000.00 in medical bills. His employer did not have workers' compensation insurance. The UEF Benefit Fund provided Carlos with the maximum allowable benefit of $20,000.00 for medical treatment and $20,000.00 for temporary benefits. The amount allowed by the statute does not provide nearly the benefit that workers' compensation insurance would have paid. Unfortunately, the remainder of his medical care and disability benefits have not been paid. Tennessee public hospitals will likely have to suffer the consequences and write off the amount of medical treatment that goes unpaid by the employer.

In a separate incident, a full-time laborer for a home construction employer fell from a roof to the concrete below. The worker injured his wrist, head and spine. The worker had surgery to repair the wrist fracture. The injured worker also participated in physical therapy for the spinal fracture. The injured worker eventually returned to work, but with a different employer. The original employer was uncooperative during the investigation. A penalty was assessed against the uninsured employer, and the file is in collections.

Yet another worker was hurt as a result of her work. The injured worker was employed as a stable hand/trainer. The employee fell from a horse injuring her back, right hip, and right leg. The worker was treated at a hospital, but continued to experience pain. She was later diagnosed with a muscle tear. The employer closed down the business and began the same operation under a new business name. The Uninsured Employers Benefit Fund started payments to the employee. She is currently without employment. The Compliance Program assessed a penalty against the employer and the matter is pending.

UEF Benefit Fund Helps Workers

A work-related injury can be life changing for an injured worker and their family. Even after the physical injury heals, emotional and financial problems remain burdensome. The UEF Benefit Fund provides money to help offset the temporary disability and medical benefits for eligible employees that should be paid by the employer. It is funded by the penalties the Program assesses. The UEF Benefit Fund helps workers move forward and continue to contribute to society.

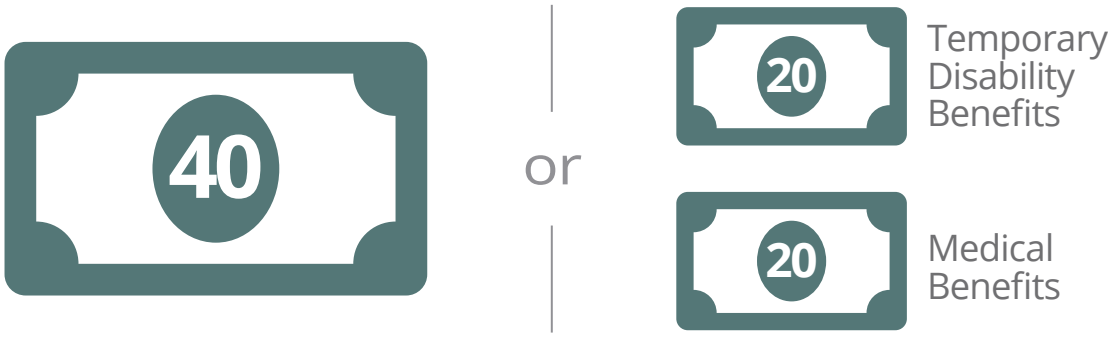
To qualify:

UEF Benefit Criteria

- Injury was **Work-Related**
  The injury must have been work-related.
- Employer had **Lack of Coverage**
  The employee must have been working for an Employer that did not have workers' compensation insurance.
- Injury occured **after July 1, 2015**
  The injury must have occurred after July 1, 2015.
- **Tennessee Resident** when injured
  The employee must have been a resident of Tennessee at the time of injury.
- **Notified us** within 60 days
  The employee had to provide notice of the injury within sixty days of the date of injury.
- Received a **court decision**
  There must be a judgment from the Court of Workers' Compensation Claims.

Award Maximums

for the Uninsured Employers Fund



If an injured employee meets all of the criteria, they can be awarded a maximum benefit of $40,000.00, up to $20,000.00 in temporary disability benefits and up to $20,000.00 in medical benefits.

Common Attempts to Avoid the Law

In the course of investigations, Compliance Specialists discover multiple ways employers violate the law. These are real stories of non-compliance on Tennessee jobsites this year.

A Georgia-based "**labor broker**" was working on a Tennessee job. A labor broker hires day laborers and assigns them to work for another employer, often in the construction industry. The labor broker receives payment from the contractor for the work performed. He or she keeps a portion of the payment, and then pays the laborers from the remainder of the payment. However, the labor brokers do not pay workers' compensation insurance, unemployment tax, or Federal Insurance Contributions Act tax for the worker.

The Georgia-based labor broker had a large number of workers on a Tennessee jobsite. The workers performed drywall work on a multi-million dollar construction project. The labor broker **wrongfully classified the workers as independent contractors**, even though the workers met Tennessee's definition of "employee". The Compliance Program issued a penalty in the amount of $102,013.47.

Sample Penalty Calculation

In another case, a drywall company grossly **underreported their payroll** to their workers' compensation insurance carrier for years. A penalty exceeding $200,000.00 was assessed, due to the employer's misclassification.

What is the Exemption Registry?

The Workers' Compensation Exemption Registry allows the owner of a construction service provider to exempt him or herself from the requirement to carry workers' compensation insurance on him or herself. These owners are still required to maintain coverage for all of their employees, though.

The Registry was originally intended to benefit small business owners in the construction industry by helping small business owners remain competitive by exempting them from workers' compensation requirements. However, some very large employers are taking improper and illegal advantages.

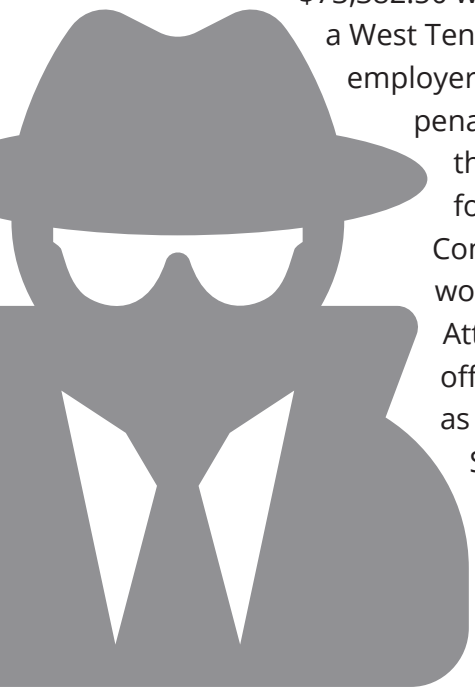
In 2018, the Program identified an employer that enrolled their new employees on the **Exemption Registry** during their new hire orientation and even used a company credit card to pay the associated fees to do so. The business falsely claimed each worker was a sole proprietor, even though the workers were treated as employees. While Tennessee law allows for a maximum of three exempted employees per jobsite for commercial construction projects, more than 20 employees were wrongly exempted by the

business. The Employer avoided the payment of insurance premiums for these employees and they had no insurance coverage.

The employer's insurance premium was $690.00 before the Program's inquiry. As a result of the investigation, the employer obtained appropriate coverage. The correct coverage increased the business' insurance premium to $23,662.00--a difference of $22,972.00 in avoided premium. This also provided workers' compensation coverage for 18 employees, who did not have it before.

Collecting Penalty Assessments

Collection of the assessed penalties continues to be a challenge for the Compliance Program. Unfortunately, non-compliant employers try to avoid paying penalties as much as they avoid following the law. From September 2017 to October 2018, the Compliance Program assessed $5,760,232.80 in penalties, but only $1,958,590.62 was collected. In one example, a penalty in the amount of $73,382.50 was assessed against a West Tennessee trucking employer. After receiving the penalty assessment, the employer filed for bankruptcy. The Compliance Program worked with the Attorney General's office on this case and, as a result, the United States Bankruptcy Court ordered the employer to make payments on the penalty assessment. It also required the employer to continue to carry workers' compensation insurance coverage on its employees.



The Compliance Program has a two-pronged system for collecting penalties assessed against non-compliant employers.

- The internal system consists of mailing multiple notices and making repeated telephone calls.
- If these approaches are unsuccessful, the file is referred to an external system—the state-contracted collections agency if the penalty is under $10,000.00 or the Attorney General's office if it exceeds that amount.

The Compliance Program does not rely solely on penalties to reduce non-compliance. The Compliance Program educates employers on the importance of maintaining workers' compensation insurance and properly classifying workers. With these goals in mind, the Compliance Program meets with the public to educate those interested in workers' compensation.

Education is Important

Community Educational Programs

The Compliance Program is committed to educating all who have an interest in workers' compensation. Several external programs were presented to stakeholders this year. Three presentations were held in the Tri-Cities and Nashville areas. The Association of General Contractors of Tennessee, Global Insurance Group, and Paz Tax Services requested the Compliance Program speak about compliance issues. Afterwards, Mr. Fuad Reveiz, who organized one of the programs, wrote, "Thank you for your message and taking the time to meet with all of us. I have already gotten calls from those that missed the meeting and heard about it."

Another opportunity to educate the public came from an unexpected source. The Compliance Program had contacted an employer about its penalty multiple times. The employer hired an attorney, and the parties finally reached an agreement on the penalty. Afterwards, that attorney asked the Compliance Program to provide an educational outreach to her other clients. The education program was well attended, and the audience had many questions.

Auditor Educational Programs

In addition to reaching out to community groups, the Compliance Program has hosted Insurance Premium Auditor Teleconferences. This program is specifically for workers' compensation insurance stakeholders.

Due to these successes, three educational programs have been scheduled in Nashville and one in Chattanooga. More will be scheduled later in the year.

Recommendations for the Future

The Bureau and its Employee Misclassification Advisory Committee has identified problems where legislation may provide solutions.

Successor-In-Interest

Often when a business owner learns their non-compliance has been identified and they are subject to a penalty, they shut down their businesses. The owner will reopen as a newly formed business entity that is a continuation of the closed business. By reopening under a new name, business owners avoid assessed monetary penalties for non-compliance with workers' compensation laws. This is especially true in the construction industry.

Laws designed to eliminate this practice in Tennessee would benefit all citizens of the state. The Bureau of Workers' Compensation recommends that penalties assessed by the Compliance program for not providing workers' compensation or misclassifying employees remain in effect against the business' successor-in-interest. This means that a successor-in-interest should be responsible for any previously assessed penalty, if the new business meets certain criteria.

Temporary Workers Regulated by Employer Status

Tennessee shares a border with eight states. Businesses from out-of-state frequently perform work in Tennessee. The out-of-state employers claim their work in Tennessee is only temporary in nature.

Current Tennessee law classifies an employee as "temporary" if the employee is primarily employed "for no more than fourteen (14) consecutive days, or no more than twenty-five (25) days total, during a calendar year."[3] Such a classification depends upon the status of each individual employee; not the status of the employer. An out-of-state employer may send different employees to work in Tennessee for short periods of time which do not exceed this statutory limit. This practice allows them to take advantage of a provision of the law that was never intended.

However, the employer may maintain a constant presence in Tennessee, but alternate different workers used on a jobsite to stay within statutory limits for temporary workers. Out-of-state employers should provide benefits to all of their workers. These employers should not be able to use this loophole to conduct business in Tennessee and avoid costs other Tennessee employers must bear. Making "temporary" work by an out-of-state employer be based upon the status of the employer, rather than individual employees, would help reduce or eliminate this problem. It would assist the Bureau in verifying coverage for people performing work in this state and remove ambiguity to when coverage is required for employers. Additionally, it would help maintain a competitive business environment for Tennessee businesses.

This legislation does not mean that the out-of-state contractor could not maintain primary workers' compensation insurance coverage in another state. The primary coverage is listed in 3A of all workers' compensation insurance policies. The policy may cover employees classified as "temporary" while working within the state

3 Tenn. Code Ann. §50-6-115(a).

See Schedule

2. The policy period is from 12:01 a.m. **10/04/2016** to 12:01 a.m. **10/04/2017** at the insured's mailing address.

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

NC & TN

B. Employers Liability Insurance: Part Two of the policy applies to work in each state listed in item 3.A.

The limits of our liability under Part Two are:	Bodily Injury By Accident	$100,000	each accident.
	Bodily Injury By Disease	$500,000	policy limit.
	Bodily Injury By Disease	$100,000	each employee.

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

SEE WC 00-03-26 (A)

D. This policy includes these endorsements and schedules:

NCTermDisd WC320301C WC320415 WC990001A WC990601

Sample Insurance Policy

of Tennessee, although the policy was issued in another state. This is covered by an endorsement listed in section 3C of all workers' compensation insurance policies.

Construction services providers, with any employees working in Tennessee, would have to obtain primary workers' compensation coverage in the state of Tennessee (reflected in section 3A of the insurance policy). This requirement should apply regardless of the employee's state of residence, the employer's location, the duration, or nature of the work performed.

These changes would increase the number of out-of-state employers who provide workers' compensation coverage for employees performing construction work in Tennessee. Other states, including Florida, have already enacted similar laws.

Conclusion

The Bureau of Workers' Compensation Compliance Program seeks to make business fair for everyone in the state. Our primary role in this goal is to identify employers who do not provide workers' compensation coverage required by Tennessee law. This year the Compliance Program's efforts resulted in penalty assessments that increased $2.5 million over last year, and over 1,250 employees gained coverage.

Another goal is to help uninsured workers by providing them with some limited benefits. Twelve injured workers whose employer did not provide what the law required were assisted by this program.

Even with the work of the Compliance Program, non-compliance problem continues to be serious a serious problem in Tennessee. Unfortunately, employees continue to be injured without a way to replace income or pay for needed medical care. If they are disabled, their employers often walk away without assisting them. If an employee dies as the result of their injuries, the family is often left without support. And, law abiding employers continue to be disadvantaged in competition with employers who lower costs fraudulently.

But, the battle against non-compliance continues. The Bureau of Worker's Compensation Compliance Program looks for new ways to help overcome these problems. Our goal continues to work towards a Tennessee where employees and law abiding employers work in a fair and competitive environment in which all employers follow all required laws and all employees receive the workers' compensation benefits required by law.

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