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“Workers' Compensation Alternatives - Opting Out, Non-Subscriber and Constitutional Challenges”

I. Opt Out and Nonsubscriber

Claims management and financing options around workers compensation insurance are evolving. While, for over 100 years now, handling employee injury claims in Texas has been possible (and even common) outside the state's workers compensation statute (if an employer is a qualified nonsubscriber), a variation of this "option" has emerged in Oklahoma (effective February 2014) and is currently being pursued in Tennessee.

Workers compensation is dictated by separate statutes in every state. Only Texas and Oklahoma offer the freedom to "opt out" of the statute, though municipal employees in Tennessee also currently have this option. In each case, the way the option system functions is distinct. In Texas, opting out is known as "nonsubscription" and has been in existence for more than 100 years. Most participant employers have achieved better outcomes and dramatic cost savings for many claims. Over time, nonsubscribers also often experience significant reductions in frequency and length of disability. These and other outcomes are what employers work hard to achieve within a traditional workers compensation system, but their efforts are often impeded by statutory requirements that can bring bureaucracy and controversy to what should otherwise be easily resolvable claims.

In 2013, the state of Oklahoma enacted new workers compensation legislation in SB 1062 (effective February 2014), which allows any employer to exit, or opt out of, the state's statutory system and offers employers the opportunity to manage employee injury claims in a way that is more consistent with its culture and priorities. While not exactly like "nonsubscription" in Texas, this new alternative for responding to and financing injury expenses and related benefits is a significant move forward for Oklahoma employers.

In this free market alternative to statutory workers compensation insurance, the key focus is ensuring injured employees are treated respectfully and compensated fairly in the aftermath of an on-the-job injury. Just as there are significant differences between what Oklahoma has done and what has been in place in Texas for years, there are state-

specific opportunities to improve the claims management and financing processes in many other states. And while this does not radically change the fundamentals or best practices of claims handling, it does improve the chances that they can be successfully implemented and executed.

The Oklahoma statute offers employers which choose to opt out of the statutory system the opportunity to substantially reduce work-injury costs (50 percent cost reductions are common in Texas) and avoid the system's extensive rules and regulations. Two key statistics provide insight regarding why Oklahoma changed its approach to employee injuries:

- 1) Oklahoma employers cited that workers compensation cost was the number 1 reason they were either leaving the state or adding jobs at facilities located in other states such as Texas.
- 2) 2012 National Council on Compensation Insurance statistics showed Oklahoma loss costs to be 225 percent higher than neighboring states.

All states except Texas and Oklahoma mandate workers' compensation insurance or self-insurance, subject to statutory rules, as the sole option for employers to manage employee injuries. Option strategies expand the delivery of better medical outcomes to injured employees by expanding employer choices in other states.

Experience under an alternative employee injury benefit platform has proven to achieve higher employee satisfaction and enhanced state economic development opportunities. Over the past 2 decades, Texas nonsubscribers have achieved better medical outcomes for hundreds of thousands of injured employees and saved billions of dollars on occupational injury costs. While moves in other states are not necessarily mirroring the Texas or Oklahoma models, they are leveraging the 100-plus years of experience in Texas and what is emerging from Oklahoma's new option alternative to drive a strategy for process improvements and lower costs in employee injury systems where impactful changes are often long overdue.

The key core benefits expected from having an opt-out alternative in other states include:

- delivering better medical outcomes and higher process satisfaction for injured employees without the cost and burden of traditional statutory workers compensation and
- driving state economic development through the attraction of employer savings and a more efficient claims management process.

Providing employers with choices for handling and financing injuries can positively impact employees, employers, and other stakeholders. Experience shows that competition with traditional workers compensation insurance has reduced premium rates and improved claims management services. Enabling choice in program design and claim

processes increases employer participation in employee recoveries and allows employers to hold all service providers more accountable for results and outcomes.

In the absence of statutory mandates, responsible employers create high-quality benefit plans for occupational injuries, enabling improved access to better medical talent, leading to higher employee satisfaction and better medical outcomes. Option proponents aspire to refocus state-based mandates in response to growing gaps in quality medical care, efficient risk financing, effective return to work, and other gaps in many current systems. Some of the other expected benefits include:

- improved workplace safety and training supporting injury prevention;
- expanded access to more quality medical providers offering exceptional care;
- opportunity for expanded benefits through custom-designed plans;
- opportunity for reduced waiting periods for wage replacement with greater benefits;
- more expedient medical treatment and more immediate referral to specialized medical care to enhance recovery;
- early identification of potentially complicated medical conditions and securing appropriate medical treatment to aid recovery; and
- improved communications with injured employees to address benefit questions, assist with early return to work, and more fully engage employees in their recovery.

States ripe for improvement in many of these areas around employee injury handling are under review by option proponents, and socialization of this approach is being pursued in several other states. On February 12, 2015, a bill was introduced in the Tennessee legislature. The bill was defeated in the 2015 legislative session. One key argument for the change in Tennessee is that the current average cost of workers compensation insurance is \$1.30 per \$1,000 of payroll compared to the \$0.60 rate achieved over time by the Texas nonsubscription program—a major attraction to many existing and prospective employers in the state.

Several other states are being considered for nonsubscriber legislation initiatives, in particular other Southern States, including South Carolina and Georgia. This type of change does not come overnight. The legislation in Oklahoma took approximately 3 to 4 years. The process for change includes drafting state-specific legislation, securing a highly respected bill sponsor, gaining the endorsement and support of major employer players in targeted states, and beginning the formal process of socializing and educating key stakeholders instrumental to passing new legislation in the targeted states.

II. Constitutional Issues in Florida

The Florida Supreme Court has agreed to review challenges presented regarding the constitutionality of the state's exclusive remedy provision in workers' compensation. The Florida Supreme Court has granted petitions for review in *Bradley Westphal v. City of St. Petersburg*, 122 So.3d 440, review granted, 143 So.3d 924 (Fla. 2013), *Marvin Castellanos v. Next Door Co.*, 124 So.3d 392, review granted, 145 So.3d 822 (Fla. 2014), and *Daniel Stahl v. Hialeah Hospital*, 127 So.3d 1283, 2015 Fla. Lexis 2321, to examine issues regarding the constitutionality of the Florida Workers' Compensation Law. The *Westphal* case challenges the adequacy of the state's 104-week cap on temporary benefits. The *Castellanos* case contends that changes to the attorney fee provision in the Florida workers' compensation laws significantly compromise an injured worker's ability to secure legal representation and pursue available remedies. The *Stahl* case questions whether the 2003 reforms to the Florida workers' compensation statute regarding permanent partial disability benefits are such that state's workers comp system continues to provide adequate remedy for injured workers. The Florida Supreme Court declined a petition for review in *State of Florida v. Florida Workers' Advocates*, 167 So.3d 500, review denied, 2015 Fla. Lexis 2866, deciding that any constitutional issues were removed from the case when the employer dismissed its affirmative defense based the exclusivity provision found in Section 440.11, of the Florida Statute.

III. Constitutional Issues in Oklahoma

Questions and challenges have been raised regarding Oklahoma's Opt Out legislation – the Oklahoma Employee Benefits Act, Oklahoma Statute Title 85, Sections 200 – 213. The Oklahoma Supreme Court decided not to review a constitutional challenge presented in the case of *Pilkington v. State of Oklahoma, ex rel. Doak*, file No. PR-113662 (April 27, 2015).