



# Exclusive remedy and opt-out update

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With the exception of a few states, most employers today do not have an alternative when it comes to the workers' compensation benefits they provide for their employees. This lack of competition in the traditional workers' compensation environment can be detrimental to the employers' ability to provide optimal solutions and impact the benefits injured employees receive. Alternatively, healthy competition can breed innovation and productivity – and ultimately benefit all parties involved.

Texas is a prime example of how two benefit systems can result in competition, innovation and a winning option for consumers. In 2008, 49% of employers that had opted out of the traditional workers' compensation system ("non-subscribers") noted that premiums for workers' compensation were too high as compared to 23% in 2012, according to a study conducted by Texas A&M University. Currently, 33% of the employers in Texas are non-subscribers, as reported by the Texas Department of Insurance. Texas has demonstrated urgency and innovation relating to the traditional workers' compensation system. This approach helps in competing with the non-subscriber program, improving both options for Texas employers.

Some examples include a closed pharmacy formulary and leaving utilization review disputes with medical professionals through the independent medical review process. Looking at workers' compensation costs, Texas moved from being the 17th most expensive state\* in the nation in 2008 to 36th in 2014.

Oklahoma, which is ranked the 6th most expensive state in the nation in workers' compensation costs, has followed suit by proposing and passing a reform package that gives employers the ability to construct an alternative benefits plan. Most Oklahoma employers have opted to stay with the traditional workers' compensation act to see how the 2013 reforms impact their overall cost of risk. However, they will always have the choice to opt out and develop an alternative ERISA-based benefits plan.

Tennessee and South Carolina are considering bills allowing employers to set up a benefits plan that would be an alternative to the traditional workers' compensation system in their state. South Carolina's proposal borrows from the Oklahoma option maintaining exclusive remedy, while the Tennessee proposal builds upon the Texas non-subscription program with no exclusive remedy protections. The Tennessee legislature voted to defer their alternative bill until 2016. A bill was also introduced in California that would exempt agricultural employers from being required to purchase workers' compensation coverage. Instead, employer funds would establish the Care of Agricultural Workers Fund, which would provide medical care for work related and non-work related health needs.

## RECENT COURT DECISIONS

There have been constitutional challenges against Oklahoma's recent legislative effort. The Oklahoma Supreme Court recently refused to hear the cases of Judy Pilkington and Kim Lee. Both were arguing that the new Oklahoma alternative option is unconstitutional, stating it prohibits due process<sup>1</sup>. One Oklahoma District Court Judge recently handed down an order to allow a workplace injury case to be heard in the civil arena. The judge is taking a literal interpretation of the recently passed reform, noting that the definition of injury does not include the word "foreseeable" so any foreseeable injury is not covered under the traditional workers' compensation act. If this Oklahoma employer had selected to pursue an alternative ERISA-based benefits plan, disputes would be handled differently and the District Court would have had a more difficult time allowing the case to be pursued in the civil arena.

In Florida, a trial court judge in the Padgett case<sup>2</sup> noted that the benefit levels in the state have declined so dramatically over the past ten years that injured employees must have an alternative to the traditional workers' compensation system and the ability to sue their employers for negligence in the civil arena. This decision was recently reversed by the Florida 3rd District Court of Appeals due to procedural issues.



## KEEPING YOU INFORMED

Sedgwick's experienced team closely monitors state reforms and continues to keep our clients updated as changes occur that could impact their programs.

\* 2008 Oregon premium ranking study

## ADDITIONAL RESOURCES

### Employer Participation in the Texas Workers' Compensation System

<http://www.tdi.texas.gov/reports/wcreg/documents/nonsub.pdf>

### Texas Association of Responsible Nonsubscribers

<http://www.txans.org/questions.htm>

### South Carolina Legislature

<http://www.scstatehouse.gov/billsearch.php>

### Tennessee General Assembly

<http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0721&GA=109>

### Association for Responsible Alternatives to Workers' Compensation

<http://www.arawc.org>

### <sup>1</sup> Pilkington v. State of Oklahoma,

ex rel. Doak, File No. PR-113662 (Apr. 27, 2015) [File No. PR-113662 (Apr. 27, 2015)]

### <sup>2</sup> Padgett case

[http://www.partnersource.com/media/24503/amicus\\_brief\\_of\\_state\\_chamber\\_\(pilkington\\_lee\\_v.\\_oklahoma\)\\_4.10.15\(final\).pdf](http://www.partnersource.com/media/24503/amicus_brief_of_state_chamber_(pilkington_lee_v._oklahoma)_4.10.15(final).pdf)