WHAT IN THE WILD, WILD WEST IS TEXAS DOING WITH EMPLOYEE INJURY CLAIMS?

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"Don't Mess With Texas" may be the unofficial state motto. If an employer in Texas, maybe the motto should be "Don't Mess With My Employee Injury Claims." Reason being, it is no secret in the lone star state that tens of millions of dollars are being saved by employers, who manage their own employee injury claims. In 2012, the world's largest retailer, Wal-Mart, threw its hat into the ring of this Texas tradition. Texas employers, like Wal-Mart, who manage their own employee injury claims, are called "nonsubscribers." So the question may be, can employers in your state be nonsubscribers and should it be part of the discussion in your state legislature?

As some history, since enacting its first workers' compensation system laws in 1913, the Texas system has always been voluntary for employers.[1] There is no requirement that a Texas employer subscribe to the state workers' compensation system. Until the 1980s, Texas employers typically chose to subscribe. However, when workers' compensation rates astronomically increased, so dawned the age of "nonsubscription."[2] Texas nonsubscription offers employers an option to manage their own employee injury claims. Today, most Texas employers either subscribe to the state workers' compensation system or elect to "opt-out" as nonsubscribers.[3] Although estimates vary, approximately 44% of employers have opted out of the Texas workers' compensation system.[4] Recent data indicates about 114,000 Texas employers operate as nonsubscribers.[5] Texas is the only state in the union where businesses can elect to nonsubscribe.[6] As a result,

Texas employers have more than one option, when it comes to providing benefits to employees for workplace injuries, and are saving millions of dollars in the process.[7]

Who are the nonsubscribers in Texas? The Texas Department of Insurance (TDI) completed an Executive Summary of a study of nonsubscription employers to determine their characteristics.[8] The study found 53% of manufacturers, 49% of wholesalers/retailers, 38% of transportation, 37% of construction and 30% of the health service employers are nonsubscribers.[9] As an interesting comparison, the U.S. Bureau of Labor Statistics (BLS) published a November 2012 "Economic News Release" providing findings from a study showing that 20% of nonfatal occupational injuries and illnesses, requiring days away from work, came from five occupations: laborers, nursing aides/orderlies, janitors/cleaners, truck drivers and police officers.[10] A quick comparison of these TDI and BLS findings may suggest that employers in Texas, whom most often are responding to employee injury claims, are taking the option to nonsubscribe. These employers, choosing such option, are not fly-by-night enterprises. Texas nonsubscribers are a who's who list of Fortune 500 companies, including Wal-Mart, Best Buy, Tyson Foods, Hobby Lobby, Swift Transportation – and the list continues.

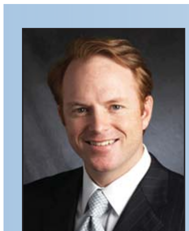
How does an employer nonsubscribe? Texas nonsubscription is not the wild, wild west. There are specific requirements of employers electing to nonsubcribe and substantial case law has developed, which further clarifies such requirements. Generally, an employer must make certain filings with the Texas Department of Insurance, Division of Workers' Compensation, complying with various notice provisions.[11] The Texas Labor Code provides specific monetary penalties for noncompliance.[12] Typically, after a decision is made to nonsubscribe, an employer will simply tender written notice to all employees that traditional workers' compensation is not a provided benefit. Thereafter, any employee injury claim will be managed through a company sponsored employee benefit plan. This plan is presented to the new or current employee for their review and signature. The employee's benefit plan, written in strict compliance with federal employee benefit law, will detail the handling of work-related injury or illness claims. The plan often includes, among other provisions, mandatory employee injury reporting periods, employee treatment management requirements and an arbitration provision. In conjunction with intentions to nonsubscribe, employers will most often obtain supplemental insurance coverage for the fees and indemnity, or settlement payments, associated with resolving the employee injury claims. Most importantly, because nonsubscription employee injury claims costs are better managed, by these employers and not a governmental entity, tens of millions of dollars are being saved by Texas nonsubscribers.

Can employers in your state be nonsubscribers and should nonsubscription be part of the conversation in your state legislature? The short answer is yes, to both questions. We certainly know workers' compensation systems have been used in all states for decades. As with any governmental bureaucracy, these systems are plagued with increasing costs and delay, some of which have been recently overhauled. California is an example of an overhaul, in recent years having passed a comprehensive workers' compensation reform measure. The bigger question is probably whether the reform saves money and improves California's system. Nevertheless, although all states may have workers' compensation systems in place, many of these systems do not maximize the efficiencies available in the nonsubscription model used by Texas employers. This is a fact starting to be recognized by other states. Most recently, in Oklahoma, where workers' compensation reform was only recently enacted, the legislature has now taken up a piece of legislation designed to create an "opt out" provision in the state workers' compensation laws. This provision would allow Oklahoma employers to elect for a system that is, in some ways, similar to Texas nonsubscription. Even though the Oklahoma legislature has not passed the new law, it is part of the conversation. It is also understood a similar measure may be pending before the legislatures of Tennessee, South Carolina, as well as other states.

Should more states be evaluating nonsubscription? Yes, although there are detractors. Some opponents to the nonsubscription system claim employers abuse the option by various self-serving measures. The AFL-CIO and some unions/labor organizations are often on the side of mandatory workers' compensation, and they, along with other interests, allege nonsubscription is often too employer friendly. Such allegations include employer wrong doing by enacting unreasonably short injury notice reporting requirements, often resulting in employee waiver of benefits. Additionally, there are claims of too restrictive medical care/recovery treatment networks/timelines, as well as claim conflict resolution through mandatory arbitration, rather than a "jury of your peers."

Irrespective of these claims, many Texas employers have responsibly and successfully managed nonsubscription programs for over 30 years – and kept long-term, happy employees. Employee surveys of benefits obtained, within the context of nonsubscription programs, have returned positive feedback and good outcomes. The Executive Director of the Texas Association of Responsible Nonsubscribers (TXANS), Steve Bent, recently stated, "We are happy to help those in other states, who contact TXANS, seeking more information about our experiences. We hope that they will build upon our programs to create new and even better solutions to meet the needs of the ever changing work environment."

Whatever your thoughts, after further looking into the Texas nonsubscription system, and seeing the costs these Texas employers are saving, you might just admit that your unofficial state motto needs to be changed too, along with your state's workers' compensation laws. Feel free to send this on to your state legislators.



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1 http://www.txans.org/questions.htm; see also http://www.txans.org/overview.htm
2 Id.
3 http://www.nonsubscriberalliance.org/nonsubscription.php
4 http://www.tdi.texas.gov/reports/wcreg/nonsub93.html
5 http://www.txans.org/questions.htm
6 http://www.compsolutionsnetwork.com/nonsubscriber.htm
7 Id.
8 http://www.tdi.texas.gov/reports/wcreg/nonsub93.html
9 Id.
10 http://www.bls.gov/news.release/osh2.nr0.htm
11 http://www.twc.state.tx.us/news/tbt/tbt0213.pdf; see also http://www.nonsubscriberalliance.org/downloads/DWC57.pdf; see also http://www.txans.org/laws.php
12 Id.