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THE NONSUBSCRIBER OPTION TO TEXAS WORKERS' COMPENSATION INSURANCE COVERAGE

A. Introduction

Although Texas is one of only two states in which participation in the workers' compensation system is purely voluntary, this feature was, until recent years, neither widely known nor widely used. While reports indicate that the efficiency of the workers' compensation system has improved under the revised Texas Workers' Compensation Act (the "Act") that became effective in 1991, the still significant expense of maintaining traditional workers' compensation insurance and the desire for greater control over administration of employee injuries have prompted many employers to actively explore alternatives to purchasing coverage. One such alternative is for the employer to opt out of the state-sponsored system, thereby becoming a "nonsubscriber", and elect instead to implement and administer its own employee benefit plan which compensates workers who sustain legitimate job-related injuries. This chapter will define nonsubscription, identify the factors to be considered in assessing this alternative, review the legal implications of opting out of the Texas workers' compensation system, and discuss the basic tasks to be performed when implementing a nonsubscription program.

B. What Is Nonsubscription?

When considering nonsubscription, an employer should obtain a clear understanding of exactly what this alternative entails, and, in particular, how it differs from the related concepts of subscription and self-insurance.

1. Subscription

A "subscriber" is a company that elects to participate in the state-administered workers' compensation system. The employer purchases workers' compensation insurance coverage either on the voluntary market or from the Texas Mutual Insurance Company ("Texas Mutual"), paying the requisite premium and surcharges. If an employee of a subscriber sustains a work-related injury or contracts an occupational illness, the employee can file a claim with the Texas Department of Insurance, Division of Workers' Compensation (the "Division of Workers' Compensation"),[1] and may receive statutorily determined lost income and medical benefits from the employer's insurance carrier. In exchange for payment of these benefits without regard to fault, the employee foregoes his or her right to file suit against the employer for negligence or other causes of action related to the incident.

2. Self-Insurance

Prior to passage of the Act, all companies that elected to subscribe to the Texas workers' compensation system were required to purchase insurance coverage either in the voluntary market or through the Texas Workers' Compensation Insurance Facility, the predecessor to the Texas Workers' Compensation Insurance Fund, now known as Texas Mutual. The Legislature recognized, however, that some employers are able to pay claims, usually up to a certain loss level, from their own funds. Therefore, since January 1, 1993, companies with substantial workers' compensation premiums which obtain a certificate of authority to self-insure have been permitted to pay the statutorily mandated benefits directly to employees, as opposed to paying a premium to an insurance company that, in turn, provides the benefits. Under this scheme, the certified self-insurer is still deemed to be a "subscriber" and receives all of the benefits and protection afforded by the Act.

3. Nonsubscription

In contrast to both the subscriber and the self-insurer, the nonsubscriber exercises its right to "opt out" of the Texas workers' compensation system and, consequently, elects not to purchase the related insurance coverage. A nonsubscribing employer is not obligated to pay workers' compensation benefits to employees for personal injuries or illnesses sustained in the course of employment, although the employer may, at its option, provide similar benefits through implementation of its own voluntary benefit program. In exchange for this flexibility, a nonsubscriber loses its immunity from common law causes of action through which an employee may recover damages if it is proven that the company's negligence was the proximate cause of the injury.

C. Assessing the Nonsubscription Alternative

As with any business decision, an employer considering nonsubscription should examine various factors and weigh the potential benefits against the associated risks to determine whether this option is in the best interest of the company and the employees.

1. Potential Benefits

Through formulation and implementation of a well-designed employee benefit plan, nonsubscribers strive to maximize the payments flowing to injured workers while significantly lowering the costs to employers associated with on-the-job injuries or illnesses. Specifically, a nonsubscribing employer can realize the following benefits:

a. Greater Ability to Control Fraud

Since a nonsubscriber administers its own employee benefit plan and, therefore, has greater control over how work-related injuries are reviewed and compensated, the nonsubscriber has the ability to significantly reduce the costs associated with employees who file illegitimate claims. Put simply, self-administered employee injury plans provide employers with the ability and incentive to do what many insurance companies have neither the time, interest, nor the resources to do: control fraud through careful claims investigation.

b. Greater Control Over Medical Treatments

A nonsubscriber can designate the doctor its employees will see for work-related injuries as a condition of providing benefits under its employee injury benefit plan. This enables the employer to consult with the doctor to ensure that medical treatment and absence from work are not unnecessarily extended and that medical records are promptly submitted to the employer for treatment verification and planning purposes and, if necessary, for litigation.

2. Key Factors to Consider

a. Loss History

Nonsubscribing employers are typically those whose workers' compensation premiums are disproportionate to their history of actual losses from employee claims for job-related injuries or illnesses. Therefore, a company that is considering nonsubscription should examine the frequency and/or severity of claims that have been reported over a representative period. If the employer has experienced either a high number of claims or if the claims involve severe injuries, then a significant workers' compensation premium may be justified and nonsubscription may not prove to be economically feasible.

However, nonsubscription may still be a viable option if the employer has a significant number of lost time claims. In that case, the high cost of workers' compensation insurance often results from the employer's lack of control over its employee injury program. By implementing an effective nonsubscription program which gives the employer greater control over fraud and the medical treatment that injured employees receive, the employer may substantially reduce the number of and/or actual losses from lost time employee injury claims.

b. Alternative Insurance Options

A key factor in reducing the risk associated with nonsubscription is the development of alternative insurance arrangements to cover the short- and long-term financial losses that may be occasioned by employee injury claims. Insurance companies have responded to the increase in the number of companies electing to become nonsubscribers by offering policies to cover losses associated (a) with the payment of medical expenses, short-term disability, and death and dismemberment benefits; and (b) with the catastrophic employee injury and any ensuing litigation. Since these policies have various strengths and weaknesses, companies should consult legal counsel and their insurance broker to devise an effective insurance plan.

c. Safety/Loss Control

The success of a nonsubscription program also hinges, to a large extent, on the safety record of the employer. Companies that already have effective safety procedures or loss control programs in place are better suited for nonsubscriber status. If a company considering nonsubscription does not currently have a safety or loss control program, it should assess whether such a program can be implemented, preferably prior to its election to opt out of the workers' compensation system.

d. Employee Relations

Consideration should be given to employee relations issues, such as the presence of a union and the need to collectively bargain over a change in employee benefits, before a final decision regarding nonsubscription is made.

e. Effect on Business Relationships

An employer should also determine whether its conversion to nonsubscriber status will inhibit the opportunity to do business with entities that may require evidence of workers' compensation insurance coverage. While this coverage "requirement" typically arises as a matter of contract, there are also certain statutory restrictions on nonsubscription for companies who do business with the state or its political subdivisions, including municipalities.

D. Legal Implications of Nonsubscription

The primary legal risk associated with Act rejection is the possibility that an injured employee will assert a cause of action for negligence against the employer[2]. Although a nonsubscriber could be sued on other grounds, such as misrepresentation, negligent hiring, and retaliatory discharge, each of these claims can be asserted against subscribers as well.

1. Possible Negligence Actions - Loss of Immunity from Suit and Unavailability of Common Law Defenses

Under the Act, an employee who sustains an on-the-job injury and receives workers' compensation benefits is unable to sue his or her employer for common law negligence. The employee's relinquishment of this legal right is in exchange for the payment to the employee, without regard to fault, of statutorily-determined benefits. The nonsubscriber, in contrast, is not immune from negligence litigation arising out of an employee injury. Moreover, when faced with such claims, the nonsubscriber is prohibited from asserting the traditional common law defenses of contributory negligence, assumption of the risk, last clear chance, and fellow-servant negligence.

2. The Employee's Burden of Proof

Under the Act, in all actions against an employer who does not have workers' compensation insurance the employee, in order to recover, must establish that (a) the injury occurred during the course and scope of employment; and (b) the employer, or some agent or servant of the employer acting within the general scope of employment, was negligent.[3]

a. Course and Scope of Employment

Generally, an act is within the course and scope of employment if it is within the employee's general authority, in furtherance of the employer's business and for accomplishment of the object for which the employee is employed.[4]

b. The Employer's Negligence

"Negligence" is generally defined as a failure to use the degree of care that would be exercised by a person of ordinary prudence under the same or similar circumstances. To recover under this claim, an employee must prove that: (1) the employer owed a duty to the employee; (2) the employer breached this duty; and (3) the breach was the cause in fact and proximate cause of the employee's injury and resulting damages.

(1) Duties Owed to Employees. Employers have been found to have the following non-delegable duties to their employees:

(a) to provide a reasonably safe place to work;

(b) to furnish reasonably safe tools and/or instrumentalities;

(c) to select careful and competent fellow employees;

(d) to properly instruct employees regarding the use of tools or equipment;

(e) to impose and enforce safety rules and regulations;

(f) to safely maintain equipment; and

(g) to reasonably warn of dangers or hazards attendant to their position or employment.[5]

The Texas Supreme Court and appellate court decisions discussed below illustrate the significance of the duty element in negligence actions:

Great Atlantic & Pacific Tea Co. v. Evans - An employee sustained a hernia while carrying 100-pound sacks of potatoes and claimed that his employer was negligent for failing to furnish him with assistance either in the form of other workers or mechanical means to help with the task. Ruling in favor of the employer, the court found that, when the employee was injured, he was merely doing the type of work for which he was hired and which he had been doing unaided for several months. According to the court, the employer had no duty to furnish assistance when the work required was usual and customary of that done by persons in the employee's particular line of business.[6]

Town & Country Mobile Homes, Inc. v. Bilyeu - An employee of a mobile home manufacturer was injured while exiting a mobile home. Although the employer had provided the employee with a stepladder for purposes of ingress and egress, on the date of the incident the stepladder was missing and the employee exited the home using a cable spool turned on its side, a method previously employed by several other workers. In finding in favor of the employee, the court held that, when employees are using an unsafe method to perform a particular task and the employer has knowledge of such usage, the employer has a duty to eliminate the unsafe practice and, consequently, is negligent if it fails to do so.[7]

Western Union Telegraph Co. v. Coker - An experienced carpenter was injured while taking down a partition wall by himself. Although the carpenter had been provided with a helper, the helper was unavailable and the carpenter proceeded to tear down the wall alone, even though he believed doing so was dangerous. Ruling in favor of the employer, the court held that an employer is not liable when it has fulfilled its duty to provide adequate help and the injury results from the act of the employee in voluntarily proceeding to the work without assistance.[8]

Werner v. Colwell - An employee sustained a back injury from lifting meat when her supervisor/co-worker had left the job because he was intoxicated, leaving only the plaintiff and another woman to load meat into customers' trucks. The employee alleged negligence against the supervisor and the company for allowing her and another female co-worker to load the meat without help. In ruling for the employer and the supervisor, the Court held that an employee [the supervisor/ co-worker] does not owe a duty to his fellow employee to remain on the job, and there was no evidence that the two remaining employees constituted an inadequate work force to do the required loading.[9]

Azubuike v. Fiesta Mart, Inc. - A longtime employee who sustained back and leg injuries while working as a front-end manager of a grocery store claimed that his employer was negligent for failing to furnish proper safety equipment such as a weightlifter's belt or other back support, since his job required him to stand, walk, bend, and lift for long hours. Deciding in favor of the employer, the court found that the employer was not negligent because the employee was unable to identify a specific incident that caused his injuries and he had performed the same duties for over ten years. Since the job-related lifting was not unusual and did not pose a threat of injury, the employer had no duty to provide a safety belt to the employee.[10]

Southerland v. Kroger Co. - An experienced grocery store checker injured his back while lifting a box of laundry detergent from a customer's basket and claimed that his employer was negligent for failing to properly train him and to provide him with a safety belt for his back. In ruling for the employer, the court held that since the employee had worked as a checker without mishap for approximately five months prior to the injury, the employer had no duty to require him to participate in a formal safety training program or to furnish a safety belt. Because the employee regularly lifted boxes of detergent and the lifting involved did not increase the employee's risk of injury, the employer was not liable for negligence.[11]

Kroger Co. v. Elwood - A grocery store courtesy clerk was injured when a customer shut her car door on the clerk's hand while he was loading groceries into her car. The clerk had placed one hand on the car's door jamb and one foot on the grocery cart to keep it from rolling down a slope in the parking lot. The clerk contended that his employer was negligent because the store never warned him not to put his hand on the door jamb, failed to adequately train him how to use carts on a sloped surface, and did not provide wheel locks on the carts or a second clerk to assist with loading. In reversing the appellate court's decision and rendering judgment for the employer, the Texas Supreme Court held that although an employer generally has a duty to warn an employee of the hazards of employment and to furnish necessary safety equipment or assistance, the employer owes no duty to warn an employee of hazards that are commonly known or already appreciated by the employee. The Court found that the store was not negligent because the clerk knew prior to his employment that it was dangerous to put his hand on the door jamb and because loading purchases into cars is a task performed regularly in the grocery and retail industries without special training and assistance.[12]

Jack in the Box, Inc. v. Skiles - A tractor-trailer driver who delivered food products to his employer's restaurants injured his knees when he elected to use a ladder to climb over an automatic lift gate that was broken and he jumped into the back of the truck. Company policy required drivers to suspend deliveries until a maintenance person arrived at the restaurant and repaired the lift. The Texas Supreme Court reaffirmed that a nonsubscribing employer does not have a duty to warn employees of dangers that are commonly known and obvious. A take-nothing judgment was entered for the employer because the dangers associated with using a ladder to climb over a lift gate are common and obvious to anyone.[13]

Brookshire Grocery Co. v. Goss - A deli clerk hurt her back while getting items from a walk-in cooler. When the employee entered the cooler, she successfully stepped over a stock cart that was loaded two to three feet high. After the clerk retrieved what she needed, she turned around to leave the cooler and hit her leg on the cart, which caused her to reach for a shelf to prevent herself from falling. The employee claimed that the grocery store negligently failed to warn her of the risks of maneuvering around stock carts. Since stepping over a cart is a risk that is apparent to anyone, the Texas Supreme Court ruled that the store owed no duty to warn its employees of the risks associated with the stock carts or to provide specialized training to avoid the hazard.[14]

(2) Proximate Cause and Foreseeability. The employer's negligence must be the proximate cause of the employee's injury and damages. "Proximate cause" is generally defined as that cause which, in the natural and continuous sequence, produces an event, and without which cause the event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom.

3. Defenses

a. Statutory Defenses

The Act provides two specific defenses to negligence suits which may be used by nonsubscribing employers.

(1) Intoxication. An employer may defend on the ground that the injury was caused while the employee was in a state of intoxication. Intoxication can occur not only from an alcoholic beverage, but also from a controlled substance, dangerous drug, abusable glue, abusable aerosol paint, or any similar substance regulated under state law. Intoxication, however, does not include loss of the normal use of mental or physical faculties resulting from (i) drugs taken in accordance with a prescription written for the employee by a doctor; or (ii) inhalation or absorption incidental to the employee's work.[15]

(2) Intentional Act. The nonsubscriber may also defend against a negligence action on the ground that the employee committed some intentional act in order to bring about the injury.[16] The employee's intention to cause an injury generally requires something more than an employee's negligence and must instead be based upon conduct taken by the employee for the specific purpose of producing an injury or aggravating a pre-existing injury.[17]

b. Common Law Defenses

In addition to the statutory defenses described above, nonsubscribers may also counter claims of negligence by raising, where appropriate, certain other available common law defenses. Liability may be reduced or eliminated under one or more of the following theories:

(1) Sole Proximate Cause. The employee is the one and only cause of his or her injury. Although an employer cannot rely on the defense of contributory negligence (partial employee fault) to reduce its liability, the related defense of sole proximate cause (100% employee fault) may be asserted.

(2) New and Independent Cause. An intervening event or agent sufficiently breached the chain of causal events between the employer's negligence and the employee's injury, and, therefore, the employer should not be held responsible.

(3) Unavoidable Accident. The event occurred without having been proximately caused by the negligence of any party to the lawsuit.

(4) Latent Defect. The injury was caused by a defect which the employer did not know of and which the employer could not have discovered in the exercise of ordinary care.

c. Proportionate Responsibility

The Texas Proportionate Responsibility Act governs the apportionment of responsibility between plaintiffs, defendants, and responsible third parties in negligence and other tort-based causes of action and establishes the method for determining the amount of damages awarded by a jury, judge, or arbitrator that a defendant must pay to a plaintiff.[18] Under the statute, the trier of fact must determine the percentage of responsibility with respect to each person's causing, or contributing to cause, the harm for which the plaintiff seeks damages. Except in cases of joint and several liability for damages, a defendant is generally liable only for the percentage of damages found by the trier of fact equal to the defendant's percentage of responsibility.

In the past, the appellate courts have disagreed regarding whether the defense of proportionate responsibility between an employee and employer was available to nonsubscribers. Even though employers are not allowed to raise the contributory negligence defense, an Amarillo court held that the Proportionate Responsibility Act applied to nonsubscriber employee injury cases.[19] Under proportionate responsibility, a plaintiff may not recover any damages if he or she is more than 50% negligent in causing the injury. If the plaintiff is less than 50% negligent, his or her recovery may be reduced by a percentage equal to the plaintiff's own percentage of responsibility.[20] The court based its decision on the Texas Supreme Court's statement in another case that "an injured employee pursuing the common law remedy must still prove that the employer was negligent and that he or she was not more than 50% negligent."[21] Beaumont and Tyler courts disagreed, however, holding that nonsubscribing employers were not permitted to assert the proportionate responsibility of the employee as a defense.[22]

The issue of the applicability of proportionate responsibility in nonsubscriber employee injury cases has been resolved. The Texas Supreme Court ruled that a nonsubscriber cannot rely

on the defense of proportionate responsibility between the employee and employer to reduce or eliminate its liability to an injured employee.[23] The Court based its decision on Section 406.033(a) of the Act, which precludes a nonsubscribing employer from asserting the employee's contributory negligence as a defense. The Court reasoned that since proportionate responsibility requires a determination of the relative faults of the parties, it necessitates a preliminary finding that the employee was contributorily negligent. Because nonsubscribers are prohibited from raising the defense of contributory negligence, the Court concluded that proportionate responsibility as between an employee and nonsubscribing employer does not apply.

However, in multi-party litigation in which an employee asserts a personal injury negligence claim against a nonsubscriber as well as tort-based claims against other defendants, a nonsubscribing employer should be able to assert the proportionate responsibility of the co-defendants, or responsible third parties, as a defense.

d. ERISA Preemption

Nonsubscribing employers whose voluntary benefit plans comply with the Employee Retirement Income Security Act ("ERISA") hoped to benefit from the preemption of the state law claims provided by this statute. Preemption of such claims may enable the employer to avoid a trial by jury and a full array of remedies that might include exemplary damages and recovery for pain and suffering. Preemption is applicable to claims related to denial of benefits, clarification of rights to benefits and retaliatory discharge related to the employee's claim for benefits under an ERISA plan. However, case law has abrogated ERISA preemption of negligence claims against nonsubscribers.

The Fifth Circuit Court of Appeals has followed the lead of judges in the U.S. District Courts in Texas[24] in holding that an employee's common law negligence suit against a nonsubscribing employer, alleging only that the employer maintained an unsafe workplace, does not relate to an ERISA plan and therefore is not preempted.[25] Furthermore, the presence of a waiver signed by the employee which purported to waive the employee's common law claims against the employer in exchange for benefits under the ERISA plan did not cause the claim to be preempted. However, the Fifth Circuit and Texas federal district courts have also held that when a claim is preempted by ERISA, numerous other state law claims which employees commonly assert along with claims for benefits or retaliatory discharge, such as breach of contract, violation of the Texas Deceptive Trade Practices Act and Texas Insurance Code § 21.21, intentional infliction of emotional distress, fraud, and negligent misrepresentation, are preempted by ERISA.[26]

4. Extent of Liability

An employee who successfully sues a nonsubscriber may, depending on the claims asserted and the circumstances of the incident, recover the following types of damages:

a. Compensatory Damages

These damages can include: (1) the reasonable value of necessary medical expenses incurred by the employee prior to trial and in the future; (2) lost wages and impairment of the employee's future earnings capacity; (3) past and future pain and suffering; (4) past and future

emotional distress or mental anguish; (5) loss of consortium; (6) property damages; and (7) miscellaneous actual expenses.

b. Exemplary Damages

Tort reform legislation enacted in Texas in 2003 changed the standard for imposing exemplary damages for personal injury or death.[27] Under the Texas Civil Practice and Remedies Code, exemplary damages may be awarded only if a jury is unanimous in finding liability for exemplary damages and in its determination of the amount of such damages. A plaintiff can recover exemplary damages against a nonsubscribing employer[28] if the plaintiff proves by clear and convincing evidence that the harm results from malice, fraud, or gross negligence.

Malice is defined by the statute to mean a specific intent by the defendant to cause substantial injury or harm to the plaintiff. Gross negligence means an act or omission (1) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others and (2) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

The amount of exemplary damages may not exceed the greater of:

(1) Two times the amount of economic damages; plus an amount equal to non-economic damages, not to exceed $750,000; or

(2) $200,000.

The term "economic damages" is defined as compensatory damages for actual economic or pecuniary loss and does not include exemplary damages or non-economic damages for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other non-pecuniary losses of any kind other than exemplary damages.

c. Set-Off-Collateral Source Rule

The collateral source rule is an evidentiary rule prohibiting testimony at trial concerning benefits which an injured plaintiff obtained from other sources. It is premised on the theory that an award to an injured employee should not be reduced to reflect certain types of compensation already received from an independent source. With respect to payments made either by nonsubscribing employers or their insurance companies to injured employees or by insurance companies to nonsubscribing employers, it is the nature of the payments, not their source, which determines whether the collateral source rule is applicable and, therefore, whether a set-off will be allowed. Generally, the collateral source rule will not apply to payments if the sole and primary reason for the payment is to protect the employer from liability for job-related injuries. However, if the payment confers any fringe benefit on the employee, the collateral source rule will apply and no set-off will be allowed.[29]

E. Implementation of a Nonsubscriber Program

Discussed below are the basic tasks which should be performed when converting to nonsubscriber status, the relevant notification procedures with which an employer must comply, and a brief description of certain programs that can be implemented to make nonsubscription more effective. Although a broad framework has been provided here, each employer's situation is unique and a nonsubscription program, if elected, must be tailored to the needs and experience of the particular company and implemented with the assistance of legal counsel having expertise in the area.

1. The Basic Tasks to be Performed

a. Allow the existing workers' compensation insurance policy to expire and formally reject coverage under the Act.

b. Seek approval of the Board of Directors regarding: (1) company's status as a nonsubscribing employer, (2) adoption of an ERISA plan, (3) designation of a plan administrator, and (4) designation of a plan year.

c. Submit an "Employer Notice of No Coverage or Termination of Coverage" to the Division of Workers' Compensation at least 30 days in advance of the proposed date of withdrawal.

d. Comply with all other statutory notice requirements.

e. Voluntarily establish an employee benefit plan under ERISA that provides participating employees with certain income, medical and other benefits for compensable injuries.

f. Obtain an excess indemnity insurance policy that provides coverage for significant losses caused by compensable injuries, and consider obtaining occupational accident insurance.

g. Establish a medical referral program and procedures for paying employees' properly-incurred medical expenses.

h. Establish a safety/risk management program.

i. Consider establishing an alternative dispute resolution program.

j. Establish procedures for reporting and investigating work-related accidents.

k. Establish procedures for payment of lost income benefits to eligible employees.

l. Formulate procedures for informing new employees of the company's nonsubscriber status and the terms and conditions of the voluntary benefit

program.

m. Hold meetings with current employees to explain the company's nonsubscriber status and the terms and conditions of the voluntary benefit program.

2. Electing Nonsubscription - The Notice Requirements

The Act requires employers to inform employees about the protection afforded them by the workers' compensation system. At the time of hiring, each employee must be notified of whether the employer maintains workers' compensation coverage. If, after an employee has commenced employment, such coverage is either obtained or terminated, the employer is obligated under the Act to provide notice to this effect to each worker within 15 days after the date on which the coverage or cancellation becomes effective. An employer that elects not to obtain workers' compensation insurance must file written notice with the Division of Workers' Compensation no later than the earlier of (a) 30 days after hiring an employee who is subject to coverage under the Act or (b) 30 days after the employer receives a request from the Division of Workers' Compensation to file the notice. An employer that does not have workers' compensation insurance must notify the Division of Workers' Compensation each year that it does not maintain such insurance. Notice must be filed with the Division of Workers' Compensation no later than the anniversary date of the original filing of the notice of withdrawal of coverage. An employer is also required to post a sign "at conspicuous locations" in the workplace stating the existence or absence of workers' compensation insurance, and this notice must be updated to reflect changes in the firm's coverage.[30]

3. Making a Nonsubscription Program Work

Nonsubscription involves more than simply canceling insurance coverage and devising a voluntary employee injury benefit plan. To maximize the benefits of Act rejection, a nonsubscriber should do the following:

a. Risk Management or Safety Program

If nonsubscription is to be successful, it is crucial that the employer develop a preventive risk management program. This program could include careful screening of job applicants, use of post-offer physicals, provision of on-the-job training, and development and enforcement of a workplace safety program. A carefully-crafted risk management program that is consistently adhered to will not only reduce the frequency and severity of work-related injuries, but will also serve, in the context of a negligence suit, as evidence of the company's effort to provide a safe workplace.

b. Develop Relationships with Health Care Providers

The employer should develop relationships with competent health care providers who appreciate the need to provide necessary treatment to employees at a reasonable cost. To avoid potential liability for substandard medical care, an alternative arrangement should exist for employees who desire a second opinion. Once preferred providers are selected, the company can

implement specific procedures regarding authorization for treatment and payment of medical expenses.

c. Efficient Claims Administration Procedure

This function can either be performed by the company or it can be contracted out to a third-party administrator. If performed in-house, it will be necessary for the employer to establish forms and procedures for reporting and investigating job-related accidents and for paying benefits authorized by the plan. Prompt investigation of and compensation for legitimate claims may reduce the likelihood of attorney involvement.

d. Monitor Workplace Injuries and Illnesses

Careful monitoring of workplace illnesses and injuries is necessary to ensure the effectiveness of the employer's safety/risk management procedures and of the overall voluntary benefit program.

e. Establish Alternative Dispute Resolution Program

The employer should consider establishing a program to resolve employment disputes using alternative methods such as mediation and arbitration. A carefully designed program will reduce the risks of litigation and control costs.

f. Develop Relationship with Legal Counsel

Since the possibility of litigation exists, nonsubscribers should develop a relationship with legal counsel who will defend the company against any negligence or other claims asserted by injured employees. Preferably, the attorney retained should be familiar with the nonsubscribing employer's benefit plan, risk management program, and claims administration procedure, all of which may be useful in defending against employee lawsuits.

F. Special Issues

1. Taxation of Lost Income and Medical Benefits

Although an extensive discussion of the tax consequences of non- subscription is beyond the scope of this chapter, as a general rule, benefits representing lost income should be included in the employee's gross income for the taxable year and are subject to the requirements imposed under federal withholding, Social Security, and unemployment tax laws. Benefits representing direct or indirect reimbursement for medical expenses, however, are excludable from gross income and are not subject to withholding or taxation under various statutes.

2. Waiver of Common Law Rights

In the past, some nonsubscribing employers who adopted voluntary benefit plans attempted to reduce their potential liability by requiring employees to waive their common law rights of action, including negligence, in exchange for participation in the plan. Waiver provisions such as these enabled an employer to avoid the full array of damages available in a

negligence suit, such as exemplary damages and recovery for pain and suffering, and, instead, have the damage claim confined to recovery of benefits under the plan.

The issue of whether waiver provisions such as these are enforceable was previously the subject of debate among the courts.[31] However, this issue was resolved by the Texas Supreme Court which enforced a waiver executed by an employee prior to his injury relinquishing his common law rights in exchange for the right to receive benefits under his employer's benefit plan. In upholding the waiver, the Court reasoned that the Act neither clearly prohibited nor allowed such waivers. Based on the lack of clear legislative intent to prohibit such agreements, the Court refused to declare pre-injury waivers void as against public policy. However, the Court stated that whether such elections should be held void on the theory that they contravene the general statutory scheme of the Act and therefore violate public policy was a decision better left to the Legislature.[32]

After the decision by the Texas Supreme Court, Section 406.033 of the Act was amended by the Texas Legislature. The amendment, which applies in injuries that occurred on or after June 17, 2001, provides that a cause of action against a nonsubscribing employer may not be waived by an employee prior to his or her injury or death and that any agreement by an employee to waive a cause of action before his or her injury or death is void and unenforceable.[33]

In 2005, the Legislature made another important amendment to Section 406.033, limiting the circumstances under which an employer may obtain post-injury waivers. Effective September 1, 2005, an employee may not waive his or her cause of action for negligence unless (a) the employee voluntarily enters into the waiver with knowledge of the waiver's effect; (b) the waiver is entered into no earlier than the 10th business day after the date of the initial report of injury; (c) the employee, before signing the waiver, has received a medical evaluation from a non-emergency care doctor; (d) the waiver is in a writing under which the true intent of the parties is specifically stated in the document; and (e) the waiver provisions are conspicuous and appear on the face of the agreement in a type larger than the type used in the body of the agreement or in contrasting colors.[34]

3. Retaliatory Discharge Claims Against Nonsubscribing Employers

The Texas Supreme Court has ruled that an employee cannot sue a nonsubscribing employer under the state law which prohibits an employer from terminating or otherwise discriminating against an employee because the employee has (a) filed a workers' compensation claim; (b) hired a lawyer to represent the employee in a claim; (c) instituted or caused to be instituted a claim under the Act; or (d) testified or is about to testify in a proceeding under the Act.[35] However, an employee still retains the right to sue a nonsubscribing employer under the retaliatory discharge provisions of ERISA, which prohibits an employer from terminating or otherwise discriminating against an employee to avoid paying benefits under a benefit plan or because the employee filed a claim for benefits under a benefit plan.[36]

4. Alternative Dispute Resolution

Some nonsubscribing employers attempt to reduce the risks of litigation and control costs by using arbitration policies or agreements which require that employment disputes be resolved by a neutral arbitrator chosen or agreed to by the parties rather than resolved by the courts.

Although the law regarding the arbitration of employment disputes is still developing, federal and state courts strongly favor arbitration.[37] Under the federal and state arbitration statutes, the courts are required to give effect to arbitration agreements to the same extent that other contracts would be enforced by the courts.[38]

One issue that frequently arises is whether an arbitration provision should be in the form of an agreement signed by the employee or whether an unsigned arbitration policy adopted by the employer is sufficient. When an arbitration policy is implemented by an employer without obtaining signed agreements, an employee may argue that the policy is unenforceable because he or she was either unaware of the policy or did not expressly consent to arbitration. In resolving this issue in favor of enforcing such policies, the courts have inferred the employee's knowledge and consent based on his or her receipt of the policy from the employer and have not required a written acceptance by the employee for the arbitration policy to be binding. If an employee is given written notice of an arbitration policy, the employee's continued employment after the adoption of the policy constitutes his or her consent to the policy.[39] The Texas Supreme Court enforced a mandatory arbitration policy on this basis and further held that since an employer has the general right under Texas law to discharge an at-will employee, the provision was not unconscionable merely because the employee's continued employment was premised on acceptance of the policy.[40] Although arbitration policies or agreements which are contained in employee handbooks or other employment documents may constitute binding contracts to arbitrate,[41] a court held that no agreement to arbitrate existed where the arbitration policy was inserted in an employee handbook which contained a disclaimer specifically providing that the provisions in the manual were not intended to constitute a legal contract.[42]

Texas federal district and state appellate courts have enforced arbitration agreements included in employee injury benefit plans requiring employees to submit to binding arbitration all disputes arising out of an injury. Because the Federal Arbitration Act preempts state laws that attempt to restrict the enforceability of arbitration agreements, courts have held that such arbitration provisions are not rendered invalid by the prohibition under Section 406.033(e) of the Act on pre-injury waivers.[43] As the Texas Supreme Court has explained, an employee's agreement to arbitrate with his nonsubscribing employer is not a waiver of causes of action such as the employee's right to recover personal injury damages from the employer under this Section. An agreement to arbitrate is an agreement that certain claims must be tried in an arbitral forum rather than in the judicial system.[44]

Because the law regarding arbitration is still developing, it is important for employers to obtain the assistance of experienced legal counsel prior to implementing an arbitration policy or entering into arbitration agreements with their employees.

G. Conclusion

The decision to become a nonsubscribing employer should be made only after a thorough analysis of the benefits and risks involved. If an employer carefully plans and executes its conversion and effectively manages its nonsubscriber program, the resulting cost savings can be significant. On the other hand, if the conversion is not handled with care or the program is mismanaged, the employer will subject itself to considerable litigation risk. Before making the decision to become a nonsubscriber, an employer should seek the advice of legal counsel skilled in the area.

Endnotes

[1]Effective September 1, 2005, the Texas Legislature abolished the Texas Workers' Compensation Commission and designated the Texas Department of Insurance as the state agency to oversee the Texas workers' compensation system. The Division of Workers' Compensation was established within the Texas Department of Insurance to administer and operate the workers' compensation system. *See* Tex. Labor Code § 402.001.

[2] *See* Section D 3(c) regarding proportionate responsibility.

[3] Tex. Labor Code § 406.033 (Vernon 2006).

[4] *See, e.g., Riverbend Country Club v. Patterson*, 399 S.W.2d 382 (Tex.Civ.App.--Eastland 1966, writ ref'd n.r.e.); *Dobson v. Don January Roofing Co.*, 392 S.W.2d 153 (Tex.Civ.App.--Tyler 1965, writ ref'd n.r.e.).

[5] *Farley v. M M Cattle Co.*, 529 S.W.2d 751 (Tex. 1975); *Chemical Express Carriers, Inc. v. Pina*, 819 S.W.2d 585 (Tex.App.--El Paso 1991, no writ); *Otis Elevator Co. v. Joseph*, 749 S.W.2d 920, 926 (Tex.App.--Houston [1st Dist.] 1988, no writ); *Harrison v. Harrison*, 597 S.W.2d 477, 482 (Tex.Civ.App.--Tyler 1980, writ ref'd n.r.e.); *J. Weingarten, Inc. v. Sandefer*, 490 S.W.2d 941, 944 (Tex.Civ.App.--Beaumont 1973, writ ref'd n.r.e.); *Holiday Lodge Nursing Home v. Huffnan*, 430 S.W.2d 826, 828-29 (Tex.Civ.App.--Texarkana 1968, no writ).

[6] *Great Atlantic & Pacific Tea Co. v. Evans*, 175 S.W.2d 249 (Tex. 1943).

[7] *Town & Country Mobile Homes, Inc. v. Bilyeu*, 694 S.W.2d 651 (Tex. App.--Fort Worth 1985, no writ).

[8] *Western Union Telegraph Co. v. Coker*, 204 S.W.2d 977 (Tex. 1947).

[9] *Werner v. Colwell*, 909 S.W.2d 866 (Tex. 1995).

[10] *Azubuike v. Fiesta Mart, Inc.*, 970 S.W.2d 60 (Tex.App.--Houston [14th Dist.] 1998, no writ).

[11] *Southerland v. Kroger Co.*, 961 S.W.2d 471 (Tex.App.--Houston [1st Dist.] 1997, no writ).

[12] *Kroger Co. v. Elwood*, 197 S.W.3d 793 (Tex. 2006).

[13] *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566 (Tex. 2007).

[14] *Brookshire Grocery Co. v. Goss*, 262 S.W.3d 793 (Tex. 2008).

[15] Tex. Labor Code §§ 401.013 & 406.033 (Vernon Supp. 1999 & 2002).

[16] Tex. Labor Code § 406.033 (Vernon Supp. 2002).

[17] *Federal Underwriters Exchange v. Popnoe*, 140 S.W.2d 484, 489 (Tex.Civ.App.--El Paso 1940, writ dism'd by agr.).

18 Tex. Civ. Prac. & Rem. Code § 33.001 et. seq. (Vernon 1997).

[19] *Byrd v. Central Freight Lines, Inc.*, 976 S.W.2d 257 (Tex.App.--Amarillo 1998, pet. denied), 992 S.W.2d 447 (Tex. 1999)(in denying review, the Texas Supreme Court stated that it neither approved nor disapproved of the appellate court's dictum that comparative negligence is an element of an employee's action against a nonsubscribing employer). *See Carlos v. White Consolidated Indust., Inc.*, 934 F.Supp. 227 (W.D. Tex. 1996)(noting that the Texas Proportionate Responsibility Act applies to a negligence action against a nonsubscribing employer, the court entered a take-nothing judgment in favor of the employer based on the findings that the employee was 55% negligent and the employer was 45% negligent).

[20] Tex. Civ. Prac. & Rem. Code § 33.001 (Vernon 1997).

[21] *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 521 (Tex. 1995).

[22] *See Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908 (Tex.App.--Beaumont 1999, pet. denied) (comparative negligence does not apply in suits against a nonsubscriber); *Brookshire Bros., Inc. v. Wagnon*, 979 S.W.2d 343 (Tex.App.--Tyler 1998, pet. denied) (because a nonsubscriber employee injury suit is brought under the Act, it is exempt from the Proportionate Responsibility

Act, which is inapplicable to actions to collect workers' compensation benefits).

[23] *Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000); *see also Kroger Co. v. Elwood*, 197 S.W.3d 793 (Tex. 2006) (reaffirming that nonsubscribers are not entitled to jury instruction regarding contributory negligence of employee).

[24] *See, e.g., Woods v. Golden Triangle Convalescent Center*, 22 F.Supp.2d 570 (E.D. Tex. 1998); *Westbrook v. Beverly Enterprises*, 832 F. Supp. 188 (W.D. Tex. 1993*); Gibson v. Wyatt Cafeterias, Inc.*, 782 F. Supp. 331 (E.D. Tex. 1992); *O'Neil v. Pro-Set Press, Inc.*, 1992 WL 207468 (N.D. Tex. December 8, 1992); *Eurine v. Wyatt Cafeterias, Inc.*, 1991 WL 206054 (N.D. Tex. August 21, 1991); *Nunez v. Wyatt Cafeterias, Inc.*, 771 F. Supp. 165 (N.D. Tex. 1991).

[25] *McAteer v. Silverleaf Resorts, Inc.*, 514 F.3d 411 (5th Cir. 2008*); Woods v. Texas Aggregates, L.L.C.*, 459 F.3d 600 (5th Cir. 2006); *Hook v. Morrison Milling Co.*, 38 F.3d 776 (5th Cir. 1994).

[26] *Hook v. Morrison Milling Co.*, 38 F.3d 776 (5th Cir. 1994); *Burks v. Amerada Hess Corp.*, 8 F.3d 301 (5th Cir. 1993); *Perdue v. Burger King Corp.*, 7 F.3d 1251 (5th Cir. 1993); *Christopher v. Mobil Oil Corp.*, 950 F. 2d 1209 (5th Cir. 1992); *Hermann Hospital v. Meba Medical & Benefits Plan*, 959 F. 2d 569 (5th Cir. 1992); *Corcoran v. United Healthcare, Inc.*, 965 F. 2d 1321 (5th Cir. 1992); *Hansen v. Continental Insurance Co.*, 940 F. 2d 971 (5th Cir. 1991); *Degan v. Ford Motor Co.*, 869 F. 2d 889 (5th Cir. 1989); *Erwin v. Texas Health Choice, L.C.*, 187 F.Supp.2d 661 (N.D. Tex. 2002); *Cristantielli v. Kaiser Foundation Health Plan of Texas*, 113 F.Supp.2d 1055 (N.D. Tex. 2000); *McCabe v. Henpil, Inc.*, 889 F.Supp. 983 (E.D. Tex. 1995).

[27] Tex. Civ. Prac. & Rem. Code § 41.001 et seq. (Vernon 1997 & Supp. 2004). These changes apply to lawsuits filed on or after September 1, 2003. Actions filed before that date are governed by the prior law.

[28] Subscribers also face the possibility of exemplary damages in two circumstances. First, in the case of an employee's death due to a work-related injury, a surviving spouse or "heir of the body" of a deceased employee may recover exemplary damages if the employee's death was the result of an intentional act or omission on the part of the employer or if the employer's conduct is found to be grossly negligent. Second, since the Act does not provide a shield against intentional torts, an injured employee of a subscriber may forego receiving statutory benefits and bring a common law cause of action based on intentional tort

[29] *Rentech Steel, L.L.C. v. Teel*, 299 S.W.3d 155 (Tex. App.--Eastland 2009, pet. dism'd); *Castillo v. American Garment Finishers Corp.*, 965 S.W.2d 646 (Tex.App.--El Paso 1998, no pet.); *Tarrant County Waste Disposal, Inc. v. Doss*, 737 S.W.2d 607 (Tex. App.--Fort Worth 1987, writ denied).

[30] Tex. Labor Code §§ 406.004, 406.005 (Vernon 1996); 28 Tex. Admin. Code §§ 110.1, 110.101.

[31] Some Texas state and federal courts were receptive to waiver provisions in voluntary benefit plans implemented by employers, holding that such waivers did not violate public policy and were therefore enforceable. *See Lawrence v. CDB Services, Inc.*, 16 S.W.3d 35 (Tex. App.--Amarillo 2000), aff'd, 44 S.W.3d 544 (Tex. 2001); *Wolfe v. C.S.P.H., Inc.*, 24 S.W.3d 641 (Tex.App.--Dallas 2000, no pet.); *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360 (Tex.App.--Houston [14th Dist.] 2000, orig. proceeding); *Lambert v. Affiliated Foods, Inc.*, 20 S.W.3d 1 (Tex.App.--Amarillo 1999), aff'd, 44 S.W.3d 544 (Tex. 2001); *Brito v. Intex Aviation Services, Inc.*, 879 F. Supp. 650 (N.D. Tex. 1995); *Diaz v. Texas Health Enterprises, Inc.*, 822 F. Supp. 1258 (W.D. Tex. 1993). *See also Martinez v. IBP, Inc.*, 961 S.W.2d 678 (Tex. App.--Amarillo 1998, pet. denied) (waiver executed by an employee subsequent to her injury was not against

public policy and did not violate the anti-waiver provisions of the Act because such provisions only apply to subscribing employers). Other Texas state courts refused to enforce waivers, holding that such provisions are unenforceable based on public policy. *See Reyes v. Storage & Processors, Inc.*, 955 S.W.2d 722 (Tex. App.--San Antonio 1999, pet. denied); *Beneficial Personnel Services of Texas, Inc. v. Porras*, 927 S.W.2d 177 (Tex.App.--El Paso 1996, no writ); *Texas Health Enterprises, Inc. v. Kirkgard*, 882 S.W.2d 630 (Tex. App.--Beaumont 1994, writ denied).

[32] *Lawrence v. CDB Services, Inc.*, 44 S.W.3d 544 (Tex. 2001).

[33] Tex. Labor Code § 406.033(e) (Vernon 2006).

[34] Tex. Labor Code § 406.033(f), (g) (Vernon 2006).

[35] *Texas Mexican Railway Co. v. Bouchet*, 963 S.W.2d 52 (Tex. 1998); Tex. Labor Code § 451.001 (Vernon 1996).

[36] *Hook v. Morrison Milling Co.*, 38 F.3d 776 (5th Cir. 1994); 29 U.S.C. § 1140.

[37] *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001) (arbitration agreements contained in the employment contracts of non-transportation workers are covered by the Federal Arbitration Act which compels judicial enforcement of such agreements); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87 (Tex. 1996); *Prudential Securities, Inc. v. Marshall*, 909 S.W.2d 896 (Tex. 1995) (orig. proceeding).

[38] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); 9 U.S.C. § 2; Tex. Civ. Prac. & Rem. Code §§ 171.001, 171.021 (Vernon 1997).

[39] *In re Dallas Peterbilt, Ltd., L.L.P.*, 196 S.W.3d 161 (Tex. 2006) (orig. proceeding); *In re Dillard Dept. Stores, Inc.*, 198 S.W.3d 778 (Tex. 2006) (orig. proceeding); *In re Alamo Lumber Co.*, 23 S.W.3d 577 (Tex. App.--San Antonio 2000, orig. proceeding); *Circuit City Stores, Inc. v. Curry*, 946 S.W.2d 486 (Tex.App.--Fort Worth 1997, orig. proceeding); *Burlington & Northern Railroad Co. v. Akpan*, 943 S.W.2d 48 (Tex.App.--Fort Worth 1997, no writ).

[40] *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002) (orig. proceeding).

[41] *In re Tenet Healthcare, Ltd.*, 84 S.W.3d 760 (Tex.App.--Houston [1st Dist.] 2002, orig. proceeding).

[42] *Tenet Healthcare Ltd. v. Cooper*, 960 S.W.2d 386 (Tex.App.--Houston [14th Dist.] 1998, review dism'd w.o.j.).

[43] *Sosa v. PARCO Oilfield Services, Ltd.*, 2006 WL 2821882 (E.D. Tex., September 27, 2006); *In re R & R Personnel Specialists of Tyler, Inc.*, 146 S.W.3d 699 (Tex.App.--Tyler 2004, orig. proceeding).

[44] *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419 (Tex. 2010) (orig. proceeding); *In re Golden Peanut Co., LLC*, 298 S.W.3d 629 (Tex. 2009) (orig. proceeding).