

ASHCRAFT LAW FIRM

A PROFESSIONAL CORPORATION

REPRESENTING EMPLOYERS IN LABOR, EMPLOYMENT
AND EMPLOYEE INJURY LAW

WILLIAM O. ASHCRAFT

BOARD CERTIFIED, LABOR & EMPLOYMENT LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

WRITER'S DIRECT DIAL/E-MAIL:

(214) 987-0612

woa@ashcraftlawfirm.com

COMPARISON OF NONSUBSCRIPTION AND SUBSCRIPTION UNDER TEXAS WORKERS' COMPENSATION ACT

I. OVERVIEW OF BENEFITS OF NONSUBSCRIPTION

Through formulation and implementation of a well-designed employee benefit plan, a nonsubscribing employer can maximize the payments flowing to injured workers while realizing the following benefits:

- ***Significantly lower costs associated with job-related injuries or illnesses***

Since a nonsubscriber who administers its own employee benefit plan has greater control over how job-related injuries are reviewed and compensated, the nonsubscriber can significantly reduce the costs associated with employee injury claims.

- ***Greater ability to control fraud***

The self-administered employee injury plan provides employers with the ability and incentive to do what many insurance companies have neither the time, the interest, nor the resources to do: control fraud through careful claims investigation.

- ***Greater control over medical treatment***

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 reports are promptly submitted to the employer for treatment verification and planning purposes and, if necessary, for litigation.

II. BENEFITS PAID TO INJURED EMPLOYEES

- A nonsubscriber 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. If the nonsubscriber elects to provide such benefits, the employer has complete control over the determination of the amount of benefits paid to employees

Copyright © 2003

who sustain legitimate injuries and the duration of eligibility for medical and wage replacement benefits.

- A subscriber has no discretion to decide how long benefits are paid to injured employees and in what amounts. The medical and income benefits provided to injured employees are established by law and cannot be changed by the employer.
 - ◆ Under the Act, temporary and impairment income benefits paid to employees with dates of injury from September 1, 1999 through August 31, 2000 are statutorily set at a minimum of \$80.00 per week and a maximum of \$531.00 per week.
 - ◆ The time for which such income benefits are payable varies from claim to claim based on factors such as the date an employee achieves Maximum Medical Improvement and his impairment rating.
 - ◆ There is no specific time limit on eligibility for reasonable and necessary medical benefits. Potentially, such benefits may be payable for an employee's lifetime.

III. ADMINISTRATION OF EMPLOYEE INJURY CLAIMS

- For a nonsubscriber, injury claims are administered by the employer rather than by a disinterested third party insurance company. As a result, the employer is directly responsible for, and in control of, its losses and the cost of its nonsubscription program.
 - ◆ As a nonsubscriber, the employer is actively involved in each claim and remains in constant contact with the injured employee and his medical care providers.
 - ◆ The employer has complete control of the resolution of injury claims. For instance, if sued by an injured employee, the employer has the power to determine whether to settle the claim or go to trial and to decide the amount of settlement, if any.
- In the case of a subscriber, injury claims are administered by the workers' compensation insurance company. Unlike a nonsubscriber, the employer has no appreciable role in the claims handling process.
 - ◆ After an injury is reported, most communication between the insurance company and the employer ceases.
 - ◆ Since the insurance company controls the actions of the injured employee, the employer often has little or no information about the medical status of the employee or his anticipated date of return to work.

IV. CONTROLLING EMPLOYEE INJURIES

- As a nonsubscriber, an employer can control employee injuries by requiring employees to comply with certain conditions in order for benefits to be payable under its Plan. These additional requirements include:
 - ♦ *Requiring the employee to immediately **notify** the employer of the injury and requiring the employee, supervisor and witnesses to promptly **provide information** about how the incident occurred to ensure that the employer is made aware of and gains control of the claim early on and can thoroughly investigate the injury so as to minimize the risk of fraud.*
 - ♦ *Use of **approved medical providers** who are qualified, cooperative and cognizant of the interests of the employer as well as the employee.*
 - ♦ *Regular **reporting and monitoring** of the medical treatment rendered to and the work status of the injured employee to ensure a full recovery and timely return to productivity.*
- A subscriber cannot achieve similar control of employee injuries. Unlike a nonsubscriber, the employer does not have the discretion to impose additional conditions for the receipt of benefits. To be eligible for workers' compensation benefits, the injured employee need only comply with the Act.
 - ♦ An employee has 30 days to report his injury to the employer. Since immediate reporting is not required under the Act, the employer may be unable to investigate and verify the injury in a timely manner.
 - ♦ Employees are not required to complete an employee injury report. However, the employer is required to file a First Report of Injury containing basic information about the incident and injury with the insurance company no later than the 8th day after the employee's first day of absence from work due to injury.
 - ♦ Employees covered by workers' compensation insurance have the right to choose their own doctors. Health care providers selected by employees are often unconcerned with the employee's recovery and return to work, are unwilling to cooperate with (and are sometimes overtly hostile to) the employer, and administer excessive treatment at an unreasonable cost.
 - ♦ An injured employee is not required by the Act to regularly report his medical progress to the employer.

V. RISK OF LITIGATION

- A nonsubscriber loses its immunity from suit through which an employee may recover damages if the employee proves that the company's negligence was the proximate cause of the injury. If 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.

- ◆ The risk of litigation can be minimized by the purchase of an excess employer's indemnity insurance policy that provides for the reimbursement of any loss (including attorneys' fees, medical expenses, lost earnings, earning impairment, pain and suffering, judgments, and punitive damages) sustained by the nonsubscriber above a certain deductible selected by the company. Such policies are competitively priced and underwritten by A-rated insurance companies.
- A subscriber is generally immune from suits by injured employees for personal injuries sustained in the course and scope of employment. The employee's relinquishment of his common law right to sue for negligence is in exchange for the payment to the employee, without regard to fault, of statutorily determined benefits.
 - ◆ However, the Act permits employees of subscribers to elect to retain their common law rights of action to recover damages for personal injuries by notifying the employer that they do not want to be covered under the Act. Written notice must be given to the employer no later than the 5th day after the employee begins employment or, if the employer is a nonsubscriber at the time of employment but later obtains workers' compensation insurance coverage, no later than the 5th day after the employee receives notice from the employer that the employer has obtained coverage.
- Both nonsubscribers and subscribers are subject to the risk of litigation arising from a catastrophic injury such as death. A subscriber is not immune from suits by employees for intentional injuries or for death caused by the employer's gross negligence or intentional acts.
 - ◆ By purchasing a policy of insurance, a nonsubscriber can protect itself from such losses.

VI. COST

- Nonsubscription is a cost effective option to Texas workers' compensation insurance coverage.
 - ◆ According to data collected by the Texas Association of Responsible Nonsubscribers, employers that have implemented a nonsubscription program save approximately 40 to 80 percent of the cost of providing workers' compensation insurance coverage each year, depending on factors such as the size of the company and its claims history.