WHAT ARE THE PUBLIC POLICY IMPLICATIONS FOR ALTERNATIVE OR NON-MANDATORY WORK INJURY COMPENSATION ARRANGEMENTS?

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For much of the past century, workplace injury compensation has been governed by workers' compensation laws enacted in all states. Employees injured in workplace accidents receive medical treatment at no cost to the worker and benefits in place of lost wages, as guaranteed by their state's workers' compensation law. Survivors and dependents of workers dying from work injuries receive compensation, for spouses, typically until re-marriage or life and for children, until majority. Workers' compensation programs are premised on statutorily guaranteed uniform benefits, regardless of occupation or employer, and without regard to fault. Workers give up their right to sue their employer in exchange for the promise of guaranteed benefits; and employers receive in exchange immunity from tort liability and greater certainty of workplace injury cost.

Texas has for many years been the only state, where workers' compensation coverage is not mandatory. Employers are required to opt-in – to subscribe – in order to participate, and a non-participating (non-subscribing) employer is not obligated to obtain an alternative work injury compensation benefit plan. More recently, long-held support for uniformity of workers' compensation benefits has been questioned, with interest among some employers in legislation permitting them to opt-out of the workers' compensation system, so long as the employer provides alternative benefits as prescribed by the opt-out statute. However, those benefits differ from benefits guaranteed under workers' compensation law. Alternative plans can vary among employers, and resolution of disputes is subject initially to the employer's dispute resolution process, with appeal to federal courts.

The narrative surrounding support for a "free market" approach to workplace injury compensation plans argues:

- ✓ "It's time for the workers' compensation industry to abandon its monopolistic approach and to recognize innovative solutions"

- ✓ "This type of attack on free markets is nothing new . . . Texas' alternative to workers' compensation is simply one of many in a long line of

successful efforts to reduce government interference in markets that have been repeatedly assailed by federal government and special interests." And,

- ✓ "Texas has become the nation's economic engine in large part by allowing competition to thrive in markets, even in such unlikely activities as providing benefits for injured workers."

In considering the relative merit of either non-subscription or of opt-out, it should be incumbent on policymakers to carefully evaluate the policy implications of a non-mandatory, uniform system of work injury compensation. Workers' compensation is not merely a product, with its merit judged by cost alone. It is a system of social insurance governing relationships between and among employers, employees and political institutions, which has governed work injury compensation for over the past century. Those wishing to fundamentally alter these rules bear the onus of making a case for a better system. Charges that workers' compensation is "too expensive," or "bureaucratic" or "fraudulent" are not policy arguments for an alternative system. Neither can an argument rest merely on preference for a "free market," which is not responsive to these policy arguments.

An employer that goes "bare" or obtains a policy of alternative benefits that does not mirror the comprehensive coverage mandated by workers' compensation, exists outside of a policy framework designed to promote a safe workplace, internalizing costs of prospective loss, divorced from data-reporting protocols critical to understanding system performance, shifts costs to other private payers or public programs, such as Social Security Disability Insurance and Medicare. In brief, a non-mandatory system creates an unlevel playing field between subscribers and non-subscribers, and it robs policymakers of the information necessary to measure system performance. Do policymakers not have a legitimate interest in understanding how and to what extent workers injured on the job are being compensated? Whether medical treatment is being delivered in a manner consistent with best practices and at what cost? How the system may be promoting or discouraging return to work? In sum, do policymakers not have a legitimate interest in understanding how work-related disability is being managed?

Some argue the unfairness of the workers' compensation system. The irony is that the workers' compensation system is designed to promote equity among employers, so as to fairly allocate the prospective risk of loss reflected in rates:

- ✓ Rating plans adopted in all states, to which any insurer writing workers' compensation insurance is subject, mandate the collection of loss and financial data, the allocation of loss data through a uniform classification system, and a further allocation of prospective loss among individual employers through experience rating.

- ✓ Without the benefit of experience rating, what is the social cost of an injury compensation system that does not promote workplace safety as well as accountability among employers, to their employees for the costs of injuries and fatalities caused by work?

- ✓ Without full medical coverage, what is the social cost of a system of work injury compensation that fails to provide any, let alone full, medical treatment, resulting in cost-shifting to an employer's or employee's individual health insurance, or to other payers generally through federal and state hospital uncompensated care mandates, or to Medicare or Medicaid? Should Texas taxpayers be on the hook for covering these costs incurred by non-subscribing employers? Is this an equitable result of a "free market" approach to work injury compensation?

- ✓ What is the social cost of a system of work injury compensation that effectively rewards employers for refusing to assume the costs of protecting its workers, including survivors, from the financial travails of work injury or death, by permitting them a cost advantage over their competitor subscribers to the workers' compensation system? Is this a defensible result of the free market?

- ✓ What is the social cost of a system of work injury compensation that grants to a non-subscribing employer with a plan of alternative benefits the sole right to design a benefit plan excluding coverage for certain injuries, of exempting itself from a system of uniform dispute adjudication, that reposes in the employer full, non-reviewable authority over any settlement, a settlement for which an employee wishes to obtain requires him signing away his right to bring a tort action against the employer? Is this approach reposing in an employer such broad, absolute authority a defensible reflection of the "free market"?

It is incumbent on those promoting alternative systems to explain how their approaches are compatible with embedded principles governing work injury compensation or to reject their merit outright. So, what are the fundamental principles underlying the nation's workers' compensation system and is an alternative benefit system compatible with these principles? What are essential elements of a sound work-injury compensation program?

Uniformity: To protect workers and employers, recompense for a work-related injury should be uniform, regardless of employer. Compensation should not vary depending on what plan an employer chooses to provide, and from one year to the next, and whether the employer is part of the workers' compensation system. Otherwise, employers and employees alike face an unlevel playing field. If weaker worker protections and less generous benefits in opt-out plans make them less costly than workers' compensation, they will confer a competitive advantage that many employers

will find nearly irresistible. And workers as a practical matter will have no choice but to accept what the employer offers.

Our present workers' compensation system reflects a policy consensus that competition among employers should not determine the level of benefits and the procedures governing recovery for workers injured on the job, workers should not be at risk of differing terms of compensation from one employer to the next, and employers should not be placed in a position wherein job injury compensation becomes another factor in a competitive marketplace. This same consensus does not exist for other employer-funded benefits, such as pensions and health insurance.

Work Injury Costs Should Be Internalized; No Cost-Shifting to Other Benefit Programs or to Public Benefit Programs (and Taxpayers): A key workers' compensation principle is that workplace injury costs should be internalized: Employers, not taxpayers, should bear the cost of workplace injuries to their employees. By not covering all injuries and diseases and not guaranteeing unlimited medical treatment, opt-out work injury compensation plans are inconsistent with these principles. As a result, there is a likelihood of cost-shifting to other benefit programs and publicly funded programs, such as Social Security Disability Insurance (SSDI), Medicare and Medicaid. An analysis published last year estimates the annual shift in medical costs alone in the Texas system to be at least $400 million and likely as much as $600 million.[1]

Single remedy: Work injury benefits paid without regard to fault should the employer's sole liability when employees are injured on the job. Opt-out proponents *say* their plans provide for employer immunity, but this assertion was challenged in Oklahoma (though the Supreme Court's opinion in *Vasquez v. Dillard's* did not explicitly address this) and will assuredly be challenged in any other state adopting opt-out. Workers' compensation requires the employer to provide a statutorily guaranteed (and uniform) benefit in exchange for the employee forfeiting his right to sue. Is it equitable, let alone constitutional, for opt-out plans to provide a less comprehensive benefits scheme, one that can change from year to year? And because alternative coverage plans may vary, will litigation be necessary for workers and employers to find out if *their* plan qualifies?

Uniform adjudication: Dispute resolution should be provided through a fair, efficient and expeditious process. State workers' compensation programs protect worker rights through a mandatory, comprehensive system of state-sponsored adjudication that is uniform as to all employers and employees and protects due process, with appeals through the state's judicial system. Alternative (opt-out) approaches explicitly work outside state workers' compensation adjudication in favor of resolving disputes initially as provided by the alternative plan and subsequently in federal court, as provided by the employer. Is fair that some workers should be required to rely on a dispute resolution process established solely by their employer? Are federal courts more suited to adjudicating disputes than the state's workers' compensation agency and courts?

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[1] *Cost Shifting from Workers' Compensation opt-Out Systems: Lessons from Texas and Oklahoma*; Property Casualty Insurers Association of America; June 6, 2016; ("*PCI Analysis*").

Broad coverage of injuries: Coverage of injuries and diseases should be comprehensive, with no categorical or anatomical exclusions. Over time, courts and state legislatures have expanded workers' compensation coverage for various health conditions determined to be related to work. Opt-out plans are not as comprehensive as workers' compensation and typically exclude coverage for certain injuries and diseases. As a result, opt-out will result in cost-shifting to an employer's group health and/ or non-occupational disability plan, public programs and/or the tort system, with employers assuming the liability cost. Furthermore, workers will be subject to differing tests of work causation depending on whether the injury is covered by workers' compensation or an alternative plan. Is this a defensible policy result?

PCI's analysis of Texas ERISA welfare benefit opt-out plans show that these plans do not cover all workplace injuries, with restrictive definitions of "accident" and "injury;" that medical benefits may be terminated at as little as 156 weeks, even though actuarial analysis shows that fully one-third of a claim's aggregated medical expense occurs after 156 weeks; that plan benefits may cease or be modified once the employee is terminated or leaves the employer's employment; that plan exclusions, and conditions and limitations are used to force settlements for less than actuarial values.[2]

Promotes safety: A work-injury compensation program should incorporate incentives for workplace safety. Workers' compensation incorporates actuarially sound pricing predictive of expected losses among different work classifications and differing injury experience for individual employers within those classifications. In this way, safer employers do not subsidize injury costs generated by less safe employers. State insurance regulation for workers' compensation incorporates an actuarially sound classification system as well as experience rating, appropriately allocating these expected injury costs. For employers opting out or not subscribing, there is no experience rating system. Furthermore, if substantial numbers of employers do not participate, workers' compensation insurance rating will lose actuarial credibility for those employers remaining under it. Finally, by not participating, employers with "bad" workers' compensation claims experience can "dump" their bad experience and avoid the financial consequences of a more hazardous workplace. In Texas, for non-subscribing employers that would be otherwise insured, there is no actuarially determined safety incentive, and no financial incentive to maintain a safe workplace. Is this an acceptable policy result? PCI's analysis, based on OSHA data, concluded that Texas non-subscribers have "poor safety records and account for a disproportionate number of fatalities . . .suggest[ing] that injury frequency and severity among opt-out employers may be higher than among employers . . ." covered by workers' compensation.[3]

Protects solvency/benefit security: The workers' compensation system exists within an extensive framework of solvency and benefit security protections. Insurance rating laws uniformly prohibit rates that are "excessive, inadequate or unfairly

[2] PCI Analysis, p. 5, and notes 14, 15.

[3] PCI Analysis, p. 5, and note 16.

discriminatory." All workers' compensation insurance rates are developed through mandatory comprehensive statistical reporting and must be actuarially supported, subject to the review of state insurance commissioners. The purpose of this insurance regulatory system is to ensure that workers receive benefits owed and the financial integrity of the insurer is protected. Opt-out plans are not subject to defensible regulation for the protection of financial solvency. Will potential losses be actuarially reflected in the product's cost?

If an insurer becomes insolvent, insurance guaranty funds in all states, financed by the insurance industry, promise payment to injured workers of the full amounts owed, unlike other insurance lines. In a number of states, self-insured employers participate in their own self-financed guaranty funds. Because ERISA preempts all state laws "relating to an employee benefit plan," it precludes state enforcement of financial solvency mandates applicable to self-insured employers. Furthermore, because not all employers will opt-out – and perhaps relatively few – there is a question whether industry assessments covering the insurance guaranty fund would be sufficient. In view of this uncertainty, will opt out plans jeopardize the financial security safety net interwoven with the workers' compensation system? In Texas, for non-subscribing employers that otherwise would be insured, who or what is guaranteeing work injury compensation costs?

Conclusion: The premises, implicit and explicit of a non-mandatory system of work injury compensation differ starkly from those embodied in workers' compensation. Proponents of a non-mandatory system have an obligation to address why they are no longer relevant. It is not enough to simply rail against the workers' compensation system without proving an alternative is better.

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G: Opt-out TPPF Remarks Revised