Is It Time for Mandatory Workers' Compensation Coverage in Texas?

Two Perspectives On Mandatory Workers' Compensation

Edited By Steve Nichols, Insurance Council of Texas

Editor's Introduction

Texas is now the only state allowing employers the option to opt out of the workers' compensation system. The 2006 non-subscription survey conducted by the Texas Department of Insurance Workers' Compensation Research and Analysis Group revealed that 37 percent of employers are now non-subscribers while the percentage of Texas employees employed by non-subscribers is 23 percent.

Legislation mandating workers' compensation coverage has been filed several times since 1989. Each attempt to pass legislation that makes workers' compensation mandatory has failed.

It is possible that legislation that proposes amending the Texas Labor Code to mandate workers' compensation coverage will be filed during the upcoming legislative session. With that possibility in mind, Bill Minnick, an attorney and proponent of responsible non-subscription as an alternative to mandatory workers' compensation coverage, and Richard S. Geiger, an insurance industry lobbyist and proponent for mandatory workers' compensation, have cooperated in a venture to each write an article that represents their perspective on whether or not legislation should be passed to require all employers to purchase workers' compensation insurance coverage.

The Insurance Council of Texas (ICT) is not a lobby organization and does not have a position on this issue. The opinions about mandatory workers' compensation expressed in the articles represent the opinions of the two authors and not those of ICT.

ICT would like to thank Bill Minnick and Richard S. Geiger for their work on the perspective articles.

Non-subscription – An Alternative that Works

By Bill Minick, J.D., L.L.M., President, PartnerSource, Inc.

Although available since the first Texas workers' compensation law was enacted in 1913, the "non-subscriber option" received little attention prior to 1989. At that time, we saw the beginning of a significant increase in the rate of non-subscription, with up to 44% of all Texas employers non-subscribing by 1993.

Few employers, employees, insurance carriers, claim administrators, attorneys, or other interested parties knew what to make of this trend or what the long-term implications would be for Texas business or injured employees. What we did know was that the playing field looked like this:

- Workers' compensation rates were unaffordable and driving companies out of business (or, at least, out of the state).
- A little known statutory option allowed employers to walk away from the state system and do absolutely nothing for injured workers.
- A statutory "penalty" said employers that opt out of the state system could be sued by injured workers (for simple or gross negligence), stripped of the common law defenses of negligence of a fellow employee, assumption of the risk, and contributory negligence.

Few, if any, employers and advisors whole-heartedly embraced the non-subscriber option in those early days. The only thing clear was that the non-subscriber option would be vital to retaining jobs in Texas, and we needed to see if employers and other market forces could make it work.

Here's what we've found:

Similarities of Workers' Compensation and Non-Subscription

Workers' compensation benefits are (1) pre-determined by statute, (2) provided on a "no fault" basis, (3) in an environment that includes many employee protections.

Most non-subscribers also provide benefits that are (1) pre-determined, in writing, and communicated to employees in accordance with federal law, (2) provided on a "no fault" basis, (3) in an environment that includes many employee protections.

Pre-determined Benefits

Any payment of medical benefits by a non-subscribing employer (regardless of employer size) creates an "employee welfare benefit plan" that must comply with the many employee protections of ERISA (the Employee Retirement Income Security Act, passed by Congress in 1974). Those protections include several "Reporting and Disclosure Requirements", such as:

- The need for a written plan document stating all rules on eligibility, with definitely determinable benefits, and clarity on any exclusions or limitations on benefits.
- An affirmative duty to distribute to employees a Summary Plan Description, written in terms understandable by the average Texas employee.

These are the same federal rules that apply to group health plans and retirement plans, and are enforced by the U.S. Department of Labor.

No Fault Benefits

Like workers' compensation, most non-subscribers pay injury benefits on a "no fault" basis. This feature:

- recognizes "the reality of the workplace" (i.e., good employees sometimes make mistakes),

- reflects the paternalism most employers feel toward their workforce,
- protects the employer's hiring and training investment, and
- represents a good defense litigation strategy.

Employee Protections

In addition to injured worker rights to sue their non-subscribing employer for negligence in causing the injury (stripped of the above common law defenses), ERISA also includes other regulatory protections, such as:

- Penalties up to $110 per day for any employer failure to provide copies of the injury benefit plan or Summary Plan Description documents (referenced above) upon employee request;
- A Form 5500 (Annual Return/Report) must be filed for all non-subscriber injury benefit plans that cover 100 or more employees. Failure to file such disclosures can result in penalties up to $1,100 per day;
- Fiduciary rules, requiring non-subscribers to administer their injury benefit plans in the best interests of covered workers; and
- Civil and Criminal enforcement mechanisms to enforce such fiduciary rules and provide remedies for discrimination in payment or other wrongful denial of benefits.

These regulatory protections have been front page news in recent years in the context of retirement plan asset management and group health plan benefit disputes. Most of those same rules apply to non-subscriber injury benefit plans and are taken very seriously by non-subscribing employers and their advisors. Personal liability can attach to those who violate these ERISA rules.

Note that non-subscribers also must comply with:

- Texas Department of Insurance (TDI) filing requirements, providing timely notice of non-subscriber status and injuries involving lost time, occupational disease, or death…subject to Texas Administrative Code penalties up to $25,000 per day, per violation; and
- Medical Privacy and Security Rules under the Health Insurance Portability and Accountability Act ("HIPAA")…subject to penalties of $100 per violation, per employee; criminal penalties; and potential lawsuits.

Lawsuit Protection and Employer Accountability

The common law remedy of an injured employee suing his or her employer for negligence was inadequate and inequitable for injured workers at the time Texas' workers' compensation statutes were first enacted in 1913. Employers retained their common law rights to defend such lawsuits and few employees received adequate care or compensation for their injuries. Solving that problem has been a key objective and accomplishment of the Texas workers' compensation system and non-subscription.

But unlike workers' compensation, employees of non-subscribers are not forced to accept the state system's (or their employer's) limited benefits. They can sue for more, if needed. And, in

principle, having been stripped of various common law defenses (per the Texas Labor Code), the injured employee must only show 1% fault on the part of the non-subscribing employer and he or she can recover 100% of the damages.

Most attorneys agree that the non-subscribing employer is at a big disadvantage under this scheme. And the fact of the matter is that non-subscribers who have not maintained safe workplaces and appropriately cared for injured workers are being held accountable.

Through research in court records and surveys among defense counsel, insurance carriers, third party administrators and employers, we have identified (to date) thirty-four (34) settlements or judgments against non-subscribing employers of $1 million or more. The largest judgment against a non-subscribing employer for negligence resulting in employee injury was for $22 million. Such settlements and judgments have sent a clear message within the non-subscriber community that employers who do NOT carry Texas workers' compensation insurance coverage and do NOT provide safe work environments and adequate care for injured workers WILL be held accountable.

So any assertion that Texas workers employed by non-subscribers are left "unable to protect themselves" is without merit, and flies in the face of ample state and federal statutory and regulatory requirements that specifically provide employee protections and actual litigation experience to the contrary.

Myths of Non-Subscription

It is true that, in practical terms, Texas is currently the ***only*** state that does not mandate workers' compensation coverage. But the argument that "everyone else has done it, so Texas should too" will never hold water with most Texans. The spirit of Texas is that of an independent mind. Texas has it RIGHT (in offering a two-track, competitive system), and other states have it WRONG (offering only a one-size-fits-all system with fewer free market incentives). And Texans are not followers.

Nevertheless, proponents of a mandatory Texas workers' compensation system continue to propagate various myths about non-subscription in an effort to support their position, such as:

Non-subscription depopulates the workers' compensation system of low risk employers.

Non-subscription is dominated by retail, healthcare, food service, transportation, and manufacturing employers with high occupational injury frequency. These are not white collar industries that simply pay their insurance premiums and rarely file claims. Thus, there is no "adverse selection" against the workers' compensation system. In fact, the Texas system would only be further strained by the return of these employers.

Non-subscribers are unregulated and unaccountable.

As noted above, this ignores a myriad of current TDI and ERISA reporting and disclosure requirements for non-subscribers, Occupational Safety and Health Act (OSHA) requirements, the

ERISA claims regulations, and various other non-subscriber benefits to and protections for employees.

Non-subscription is bad for Texas business.

Non-subscription can be credited with acting as a "safety valve" to the current workers' compensation system, saving tens of thousands of jobs in Texas that would have otherwise been lost to China, India, Mexico and other places.

As noted in a January 14-20, 2005 *Dallas Business Journal* editorial: "Texas is the only state that does not force companies to participate in its workers' compensation system. And because of that, many employers have been able to thrive under alternative, market-driven plans, which have allowed them to spend more on innovation and job creation instead of feeding a one-size-fits-all state bureaucracy."

Numerous employers (headquartered in Texas and around the U.S.) will testify that non-subscription has allowed them to open new business locations, expand existing facilities, and create jobs throughout the state. We anticipate that either academic studies or employer surveys, coupled with further improvements to data mining at TDI, the Texas Workforce Commission and other government agencies will (one day) permit a cross-referencing that objectively proves the substantial economic benefit that the State of Texas and its citizens have enjoyed through job growth, lower injury frequency and severity, better return-to-work rates, and employee satisfaction directly attributable to the non-subscriber option.

Non-subscribers are abusing their injured workers.

As described above in the context of negligence liability settlements and judgments, non-subscribers are HIGHLY MOTIVATED to prevent employee injuries. This myth of employee abuse is debunked by the State of Texas research studies that have found higher satisfaction levels among injured workers employed by non-subscribers in the areas of employer treatment, medical coverage, and income benefits paid during recovery.

Non-subscription really does not save employers money.

Although a full rebuttal of this narrowly-held view is beyond the scope of this article, rest assured that data to defend the reality of employer savings, including actuarially credible analysis, is now readily available.

Non-subscription prevents the workers' compensation system from gaining critical mass to succeed. (i.e., "if we were all just rowing in the same direction….")

With well over 100,000 businesses and millions of employees currently covered by the Texas workers' compensation system, how many are enough? These numbers are significantly higher than most other state workers' compensation systems around the U.S.

Workers' Compensation System Objectives

The modern era of non-subscription addresses key societal objectives. These same objectives stand behind the Texas workers' compensation system and led to enactment of OSHA in 1970.

These objectives include:

- Broad coverage of employees for work-related injuries and diseases;
- Substantial protection against loss of income; and
- Sufficient medical care and rehabilitation services.

TDI research data demonstrates that these first three objectives are being satisfied by the non-subscriber alternative. Consider the following results from studies conducted by the Research and Oversight Council on Workers' Compensation (and its predecessor, the Research Center, and its successor, the TDI Workers' Compensation Research Group):

The 1994 study found:

- 87 percent of both employees of subscribers and employees of non-subscribers reported having had all the medical costs for their on-the-job injuries paid.
- 40 percent of employees of subscribers and 42 percent of employees of non-subscribers reported receiving 100 percent of their lost wages, and 88 percent of employees of subscribers and 94 percent of employees of non-subscribers reported that the coverage for wage replacement extended for the entire period away from work.
- 34 percent of injured employees of subscribers and 44 percent of injured employees of non-subscribers reported being offered assistance in getting back to work.

The 1997 study found:

The vast majority (92 percent) of injured workers employed by non-subscribing firms indicated that their employer/insurance company paid for medical costs related to their on-the-job injury.

Attorney involvement was relatively low among injured workers employed by non-subscribers. Likewise, the propensity of injured workers to file lawsuits against their employers as a result of their on-the-job injury was also low.

The 2002 study also noted that past studies "suggest that satisfaction levels for injured workers employed by non-subscribers are fairly high."

The 2004 study found:

Percentage of non-subscriber workforce covered by occupational injury benefit plans increased from 80% in 2001 to 88% in 2004.

Thus, our state government's own data supports the fact that the vast majority of non-subscribers offer "alternate coverage" for injury benefits, either on an insured or self-insured basis.

It is also important to note that:

- **Non-subscribers Can Settle Claims…Responsibly.** A non-subscribing employer and injured worker can always agree to a settlement of medical, lost wage, and other expense and damage amounts outside of the terms of the "alternative" injury benefit plan through a release of liability. This ability to determine a fair and reasonable settlement of the claim (something the workers' compensation laws prohibit) has been beneficial to both employers and employees and their families. And note that ERISA's fiduciary rules prohibit an employer from withholding benefits and trying to force a settlement if the employee or family prefers to simply receive the promised benefits. Furthermore, the Texas Legislature has enacted laws in 2001 and 2005 that prohibit employee pre-injury waivers of negligence and restrict the ability of non-subscribers to settle claims in a manner that would take advantage of the injured worker.

- **Group Health Plan Exclusions Apply to Subscribers and Non-subscribers Alike.** We all know that group health plans are, by no means, universally offered to Texas employees (by subscribers or non-subscribers to workers' compensation). And, when offered by the employer, such plans commonly (1) are elective by the employee, (2) require some measure of expense payment by the employee, and (3) exclude coverage for injury or illness related to the employee's course and scope of employment. This third item is where workers' compensation coverage or a non-subscriber injury benefit plan is needed. And as reflected in the above data, the vast majority of non-subscribers are providing the needed coverage, in a highly regulated environment that provides numerous employee protections.

Safety in the Workplace

The encouragement of worker safety is also a key component of the federal OSHA standards. It is important to note that non-subscribers are also subject to all OSHA health and safety rules that subscribers to workers' compensation are subject to.

And the non-subscription liability exposure clearly creates a huge economic incentive supporting workplace safety and job training. Death by trial lawyer is the objective of no Texas employer. Employers who approach the effective date of a new non-subscriber program routinely pour thousands and tens of thousands of dollars into new safety, ergonomic, and training programs aimed at both reducing injury frequency and exposure to negligence lawsuits.

Current non-subscribers are also well-known to have a strong focus on safety issues. Consider this: In early November 2006, PartnerSource completed a non-subscriber benchmarking study of 12 Texas retailers (a mix of department, auto parts, convenience, hobby, toy, grocery, and other retailers). We looked at injury data for years 2003 – 2006, valued as of 8/31/06. This analysis considered over 10,000 non-subscriber claims valued at over $14 million on an incurred basis. For all study participants combined in 2006, there are more than 75,000 Texas employees and payroll in excess of $1 billion. Here's one of the findings:

The number of claims per 100 employees is a benchmark of frequency against exposure. The study found that (depending on the particular retail employer) there were 4.0 to 5.0 claims reported per 100 employees. For 2005, the U.S. Bureau of Labor Statistics reported 5.0 recordable cases per 100 retail employees and 6.2 recordable cases per 100 department store employees. This would seem to be some evidence that non-subscribers maintain at least as good (if not materially better) safety programs…perhaps motivated by the negligence liability exposure they face.

Delivery of Benefits

Development of an effective system for delivery of benefits and services to injured workers has been another key objective behind both workers' compensation and non-subscription. As reflected in TDI surveys, the delivery systems for non-subscriber benefits and services are performing well and contribute to a high level of satisfaction among employees of non-subscribers. The 2005 workers' compensation reforms in Texas also hold the promise of strengthening the state's delivery system. We are hopeful the potential for these reforms will be fully realized, to the benefit of both Texas employers and its injured workers.

It is worth noting that the most recent 2006 TDI study of non-subscription shows that employer participation in the Texas workers' compensation system may be increasing and the percentage of covered employees may also be increasing. This is important evidence that the rate of non-subscription among Texas employers has leveled off, and perhaps the 2005 workers' compensation reforms are already having the desired effect of bringing employers back into the system.

In the meantime, the non-subscriber alternative will continue to provide advantages to injured workers, employers, and our state's economy. Non-subscription will maintain financial and other incentives for all workers' compensation insurance carriers, claim administrators, and regulators to compensation and offer an improved workers' compensation product. These incentives have played a positive role in Texas workers' compensation reform efforts during the past three regular legislative sessions, have been objectively proven sufficient, and should never be removed. Within this current framework, Texas businesses are making non-subscription work.

<u>Editor's Note:</u> This article was written by Bill Minnick, the President of PartnerSource, Inc. This article expresses the views and opinion of the author and not those of the Insurance Council of Texas. Minnick is a leading authority on Texas occupational injury benefit and insurance issues, and alternative dispute resolution for employment-related claims.

Minnick is a 1985 graduate of Pepperdine University School of Law located in Malibu, California. In 1989, Minnick earned an L.L.M. in taxation from the Southern Methodist School of Law located in Dallas, Texas. Minnick has eighteen years of legal, human resource, and risk management consulting experience. He is also a frequent speaker and author on employment-related matters.

Minnick is credited with having pioneered the development and communication of two-tiered occupational injury benefit programs for workers' compensation and non-subscription, incorporating managed care components, negligence waivers, and agreements to alternative dispute resolution.

Additional information about Minnick and PartnerSource, Inc. can be found at the following website link: http://www.partnersource.com/content/advantage/.

Universal Workers' Compensation

By Richard S. Geiger*, Thompson Coe Cousins & Irons, LLP

(Author's Note) At a workers' compensation seminar sponsored by the Insurance Council of Texas, I participated in a panel discussion concerning House Bill 7 enacted by the 79th Legislature (2005) and what further changes need to occur to make the workers compensation benefit system in Texas better. At that panel discussion, I asserted that the Legislature should require every employer to provide workers' compensation benefits to all employees. Since that time, I have heard rumblings from some stakeholders critical of my support for this change. I was asked to prepare this paper for inclusion in the Insurance Council of Texas Workers' Compensation newsletter. The views expressed in this paper are mine alone. They do not necessarily represent the viewpoint of the Insurance Council of Texas or any of its member companies.

Why is universal workers' compensation important to Texas?

Despite all of the technological advances that have been seen during the 20th and the first part of the 21st centuries, the U.S. economy remains dependent upon the workers who compose its workforce and the value that labor brings to our economy. Those workers are exposed to varying degrees of risk of bodily injury inherent to the workplace. Work related disabilities may strike workers and create impairments that reduce or end their productivity. The common law regarding compensation for work injuries developed when most employers had few employees. Little thought was given to the value *per se* that a worker's skill and experience brings to the production of goods and services. This is the critical element that labor brings to the employer and is a valued asset of the worker. The simple fact is that the common law, both at the time workers' compensation statutes were enacted, and today, is inadequate and inequitable for injured workers.

Under the common law remedy, the worker, as plaintiff, has to prove the employer's negligence that the employer failed to provide a safe place to work. Even with the removal of the defenses of contributory negligence, the fellow servant doctrine, and assumption of risk, the injured worker is still at a disadvantage under the common law remedy.

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Workers' compensation had its origin in Europe and migrated to the United States in the second decade of the 20th century. Between 1911 and 1920, all but six states passed workers' compensation statutes. Since then, all states have adopted this protection for workers and employers.

Workers' compensation brought with it the concept of no fault liability. That is basic to all workers' compensation benefit systems. Under this arrangement, the employer accepts liability for work place injuries and the employee agrees to limited, but specific damages for work place injuries.

In 1970, Congress passed the "Occupational Safety and Health Act of 1970". As a part of that act, the National Commission on State Workmen's Compensation Laws was established and directed to study and evaluate state compensation laws. Its purpose was to determine if those laws provide an adequate, prompt, and equitable system of compensation. The Act further required that the commission make a detailed statement of its findings and conclusions, "together with such recommendations as it deems advisable".

The Commission identified five major objectives for a modern workers' compensation program. As stated in their report[1]:

The four basic objectives are:

- broad coverage of employees and work-related injuries and diseases;

  Protection should be extended to as many workers as feasible, and all work-related injuries and diseases should be covered.

- substantial protection against interruption of income;

  A high proportion of a disabled worker's lost earnings should be replaced by workmen's compensation benefits.

- provision of sufficient medical care and rehabilitation services; and

  The injured worker's physical condition and earning capacity should be promptly restored.

- encouragement of safety.

  Economic incentives in the program should reduce the number of work-related injuries and diseases.

[1] The Report of National Commission on State Workmen's Compensation Laws, July 1972, p. 35

The achievement of these basic objectives is dependent on an equally important fifth objective:

- An effective system for delivery of the benefits and services.

The basic objectives should be met comprehensively and efficiently.

At the time of its report, barely half of the states mandated employers to provide workers' compensation coverage. Now, Texas is the ***only*** state that does not mandate coverage.

On October 20, 2004, the Texas Department of Insurance Workers' Compensation Research Group issued its report on "Employer Participation in the Texas Workers' Compensation System: 2004 Estimates". This was an extension of similar surveys done in 1993, 1995, 1996 and 2001.

According to those estimates for 2004, 38% of employers are non-subscribers, which is up from a low of 35% in 2001. Previous years were higher. 24% of employees in Texas are employed by non-subscribers, up from a low of 16% in 2001. This is the highest percentage of non-subscriber employment during the period for which estimates have been made.

Highest non-subscription (54%) was in the industry type of arts/entertainment/accomodation/food services". Among Texas employers, the highest non-subscription rate (46%) is among employers of one to four employees. In 1995, the percentage was 55%.

The survey sought the top five primary reasons why subscribing employers said they did purchase and did not purchase workers' compensation coverage. The main reason given for not purchasing (37.9%) was because "workers' compensation insurance premiums were too high". Perhaps more telling than this was that 37% of non-subscriber employers asserted that they would **never** consider purchasing workers' compensation insurance. Unfortunately, such an attitude is fostered by many employer groups in Texas.

The proponents of universal workers' compensation must consider the arguments against it. The current argument by employer groups is "why should we require employers to be in a broken system with its high costs and inefficiencies?" A similar argument is made by the proponents of school vouchers, who assert that the public school system is a failure and parents should be given the alternative of school vouchers and private education.

Both of these arguments, of course, seemingly justify desired alternatives. If the workers' compensation system and the public school system are "broken", then the only appropriate legislative answer is to attack the weaknesses of the systems and make them work as they should.

Proponents for non-subscription also argue that most non-subscribers purchase occupational and accident coverage as a substitute for workers' compensation and that the average costs to employers are 40% less than workers' compensation. This undocumented assertion is probably not true. Most significantly, these plans provide benefits for brief periods of time following an

injury, most typically two years. At that time income replacement and medical cost coverage both come to an end. The proponents of non-subscription lack any reliable data to support the assertion that "most non-subscribers" provide alternative coverage.

The dilemma for the worker is that an insurance program providing wage replacement (disability insurance) and one providing health care coverage both almost without exception contain the workplace injury exclusion. This means that the employee employed by a non-subscriber cannot protect himself or herself if the employer does not provide workers' compensation coverage. Probably no other insuring situation contains such a roadblock.

The employee of a non-subscriber is deprived of the ability to protect himself. The workers of Texas deserve better.
There is also a significant benefit the employer gets from being a subscriber. Workers' compensation is the exclusive remedy of the employee for workplace injuries. Just as the employer is deprived of common law defenses, there is the off-setting benefit of limited liability of the employer which is assumed by the insurer.

Those familiar with the debates on workers' compensation in the Texas Legislature know that universal coverage is favored by workers organizations such as the AFL-CIO and opposed by employer organizations. The discussions of universal coverage have not been in the forefront of any recent legislative initiative that might succeed. Labor has lost some of its political clout, but employers haven't. The issue of universal coverage is unlikely to succeed in the legislature any time soon, but it is one that should.

<u>Editor's Note:</u> This article was written by Richard S. Geiger, an attorney who is of counsel with the Dallas-based law firm of Thompson, Coe, Cousin & Irons, LLP. This article expresses the views and opinion of the author and not those of the Insurance Council of Texas. Geiger is a member of the Insurance Law and Governmental & Legislative Advocacy Groups. His practice focuses on the representation of insurance companies and insurance trade associations before the legislature, the Commissioner of Insurance, the Texas Department of Insurance, as well as generally representing and advising insurance companies, trade associations and other industry organizations.

From 1973 to 1977, Mr. Geiger served in the Texas House of Representatives. During his two terms in the legislature, he served as a delegate to the Texas Constitutional Convention in 1974 and served on the Committees on State Affairs, Transportation, Public Health and Elections.