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FAQ: WORKERS' COMPENSATION OPT-OUT LAWS

What is workers' compensation?

Until the first half of the 20th century, workers injured on the job often faced job loss with no opportunity for compensation or recourse.¹ Employers benefitted greatly from this system – their employees were all replaceable, so it was of little concern to them if their employees were injured while working. Today, almost every state in America has a state-regulated workers' compensation system. While the details of this system vary by state, the concept is uniform: if an employee suffers from a work-related injury, they are entitled to compensation from their employer for lost wages and medical bills. These systems are meant to be “no-fault.” In exchange for not having to prove fault, employees give up their right to sue the employer for negligence.

What are workers' compensation “opt-out” laws?

Most workers' compensation benefit systems are state-regulated, requiring all employers to obtain workers' compensation insurance and setting minimum standards of coverage. These laws ensure a certain level of benefits for injured workers. However, two states have laws that allow employers to opt out of the state-regulated system: Oklahoma and Texas. Texas has always had this law; Oklahoma recently adopted a variation of it.²

What are some general problems with opt-out laws?

When a state law allows an employer to opt out of a state workers' compensation system, state regulations that ensure minimum benefit levels do not apply. Practically speaking, this gives employers enormous discretion to decide under what circumstances to compensate an injured worker.³ For example, an employer can decide whether a worker qualifies for any benefits. It

¹ Tom Lynch, “Texas Workers' Compensation Opt-Out Report,” *Workers' Comp Insider* (December 13, 2012), <http://www.workerscompinsider.com/research/>.

² Randy Ellis, “Oklahoma Workers' Compensation Opt-Out Provisions Spark Judicial Questions,” *Oklahoman*, December 11, 2013, <http://newsok.com/oklahoma-workers-compensation-opt-out-provisions-spark-judicial-questions/article/3913337>.

³ New Street Group, *Workers' Compensation Opt-Out: Can Privatization Work?* (November 2012), <https://www.sedgwick.com/NewsRelease/WCOpt-OutStudy.pdf>.

can handpick the doctor who examines the worker. It can refuse to approve any treatment. It can completely deny compensation for certain kinds of disability. It can have full discretion to terminate benefits.⁴ Depending on the law, an employee may retain the right to sue an employer for negligence. However, as a condition of employment, the employer can force the employee to sign a contract so all cases are resolved through an employer-designed, secret arbitration system rather than in court.⁵

What does Oklahoma’s “opt-out” law provide?

Under the Oklahoma Employee Injury Benefit Act (“OEIBA”), a “qualified employer” may opt out of the state workers’ compensation system if it provides the state Insurance Commissioner with a written private benefit plan, pays an annual \$1,500 filing fee and shows proof that the employer is financially capable of paying the required compensation.⁶ The benefit plan must offer similar benefits to the state system and comply with the Employee Retirement Income Security Act (ERISA),⁷ a federal law that regulates employer health benefit plans. However, employers are given considerable leeway in deciding which specific types of injuries to cover in their private disability plan and other issues. For example, “compensable injuries” are only those which the employer chooses to cover and for what length of time.⁸ The employer has tremendous discretion to decide the degree of treatment and compensation its employees receive for their injuries.

Can injured workers choose their own doctors in Oklahoma?

No. OEIBA grants qualified employers the power to determine which physician the employee must use when treating their work-related injury.⁹ Qualified employers can impose strict limitations on “the workers’ ability to select or change physicians and...seek care from specialists[.]”¹⁰ This differs from Oklahoma’s state-regulated system, where employers initially choose the physician,¹¹ but injured workers can petition the Workers’ Compensation Commission (“Commission”) directly if they wish to change the physician.¹²

If an employer has opted out and an injured worker believes benefits are inadequate, what can be done?

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Stephen Embry, “Opting Out of Justice,” *Workers’ Comp Hub*, October 22, 2013, <http://workerscomphub.org/updates/10/22/2013/stephen-embry-opting-out-justice>.

⁹ Oklahoma House of Representative, SB 1062 – Bill Summary, Section 50, April 22, 2013, http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20SUPPORT%20DOCUMENTS/BILLSUM/House/SB1062%20CS%20BILLSUM.PDF.

¹⁰ N. Michael Rucka, “Privatized Workers’ Compensation Systems Deny Injured Workers Due Process” (on file with author).

¹¹ Oklahoma House of Representatives, SB 1062 – Bill Summary, Section 56, April 22, 2013, http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20SUPPORT%20DOCUMENTS/BILLSUM/House/SB1062%20CS%20BILLSUM.PDF

¹² *Ibid.*

The only legal remedy available to employees is either to challenge the employer's qualification under the program or file a claim with the qualified employer's private disability insurance company.¹³ Workers then have "minimum appeals rights,"¹⁴ beginning with having to "appeal to a panel of three persons appointed by the employer."¹⁵ This is far less protection for injured workers than provided by the state-regulated system, which provides the right to a hearing before an Administrative Law Judge.¹⁶ This biased remedy for workers of "qualified employers" has raised constitutional due process concerns,¹⁷ although a challenge to the law's constitutionality failed in December 2013.¹⁸ However, dissenting Oklahoma Supreme Court Vice-Chief Justice John F. Reif noted, "[T]he employer and any 'appeals' committee chosen by the employer cannot satisfy the impartiality requirement of due process, because the employer has a direct pecuniary interest in the decision of a claim."¹⁹

What happens if an injured worker is shortchanged by the employer's disability plan?

Taxpayers may have to pick up the tab. Injured workers who cannot obtain enough compensation for their medical bills and lost income may have to turn to taxpayer-funded programs like Medicaid, Social Security or food stamps.²⁰

Why are some in the insurance industry concerned about "opt out" laws?

The insurance industry expressed several concerns about Oklahoma's "opt-out" law. For example, under the state-regulated system, if an insurer becomes insolvent, claims will still be paid by a guarantee fund. However, the same is not true under ERISA-like disability insurance, which "opt-out" employers purchase.²¹ Also, industry consultants in Tennessee, which ultimately rejected a similar "opt out" plan, stated that if an employer adopts a disability plan in conformity with ERISA standards, federal regulations would pre-empt the state's oversight.²² Said the consultants, "In such cases the state would lose practical enforcement control over benefit amount, eligibility or delivery mechanism."²³

¹³ *Id.* at Section 138.

¹⁴ *Id.* at Section 140.

¹⁵ Randy Ellis, "Oklahoma Workers' Compensation Opt-Out Provisions Spark Judicial Questions," *Oklahoman*, December 11, 2013), <http://newsok.com/oklahoma-workers-compensation-opt-out-provisions-spark-judicial-questions/article/3913337>.

¹⁶ Oklahoma House of Representative, SB 1062 – Bill Summary, Section 78, April 22, 2013, http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20SUPPORT%20DOCUMENTS/BILLSUM/House/SB1062%20CS%20BILLSUM.PDF.

¹⁷ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

¹⁸ Randy Ellis, "Oklahoma Supreme Court Upholds New Workers' Compensation Law," *Oklahoman*, December 16, 2013, <http://newsok.com/oklahoma-supreme-court-upholds-new-workers-compensation-law/article/3915151>.

¹⁹ *Ibid.*

²⁰ Stephen Embry, "Opting Out of Justice," *Workers' Comp Hub*, October 22, 2013, <http://workerscomphub.org/updates/10/22/2013/stephen-embry-opting-out-justice>.

²¹ Arthur D. Postal, "Industry Against Opt-Out Provision in Oklahoma Workers' Comp Bill," *Property Casualty 360*, April 8, 2013, <http://www.propertycasualty360.com/2013/04/08/industry-against-opt-out-provision-in-oklahoma-wor>.

²² Arthur D. Postal, "Oklahoma Passes Bill Allowing Employers to Opt Out of Workers' Comp System," *Property Casualty 360*, May 1, 2013, <http://www.propertycasualty360.com/2013/05/01/oklahoma-passes-bill-allowing-employers-to-opt-out>.

²³ *Ibid.*

What does Texas law provide?

Texas has the only law in the country where providing workers' compensation coverage is not mandatory and where employers can "go bare" with no coverage at all.²⁴ As a result, "At least a half-million Texas workers have no occupational insurance coverage."²⁵ According to state Rep. René Oliveira, "That's a lot of Texans out there without any protection, without any help, having to resort to public assistance and all the rest of us supporting them instead of these bad actors.... I think we have to look at this as fraud, as a punishment to honorable businesses that are being outbid."²⁶

Texas has virtually no regulatory oversight.²⁷ Moreover, a review of Texas employer "non-subscribers" found:²⁸

'[M]ost non-subscription plans imposed end-of-shift or 24-hour reporting deadlines; did not cover partial total or permanent total disabilities; limited medical benefits to about two years; capped death and dismemberment benefits; and imposed per-person and/or per-event caps on total benefits. The vast majority of respondents also directed employees' medical care.' ...Half of the responding firms said that their assumption of negligence liability risk was a 'drawback.' About 85 percent of non-subscriber plans channeled disputes to mandatory arbitration.²⁹

Texas law does not prohibit retaliatory discrimination by non-subscribing employers against injured employees.³⁰ Employers can fire employees for reporting work injuries.

The only advantage workers have in Texas is that they do not lose their right to sue an employer for negligence. However, that right is increasingly limited because of the advent of forced arbitration clauses in employment contracts.³¹ And the story of Cristian Hurtado is typical:

[H]is family suffered an economic catastrophe after his father, a roofer, died on the job in 2004. He said his father's employer disappeared the day after the accident and seven lawyers turned the family down when they sought their help in the courtroom. There was no insurance coverage, forcing Hurtado to give up his college savings to help the family make ends meet, he said.³²

²⁴ See, Title 5, Subtitle A, Chapter 406 (Workers' Compensation Insurance Coverage), subchapter A (Coverage Election; Security Procedures), cited in New Street Group, *Workers' Compensation Opt-Out: Can Privatization Work?* (November 2012), <https://www.sedgwick.com/NewsRelease/WCOpt-OutStudy.pdf>.

²⁵ Jay Root, "A Half-Million in Texas Without Workplace Insurance," *The Texas Tribune*, April 22, 2014, <http://www.texastribune.org/2014/04/22/half-million-texas-without-workplace-insurance/>

²⁶ *Ibid.*

²⁷ See, Title 5, Subtitle A, Chapter 406 (Workers' Compensation Insurance Coverage), subchapter A (Coverage Election; Security Procedures), cited in New Street Group, *Workers' Compensation Opt-Out: Can Privatization Work?* (November 2012), <https://www.sedgwick.com/NewsRelease/WCOpt-OutStudy.pdf>.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² Jay Root, "A Half-Million in Texas Without Workplace Insurance," *The Texas Tribune*, April 22, 2014, <http://www.texastribune.org/2014/04/22/half-million-texas-without-workplace-insurance/>