



**CLM 2017 Worker's Compensation Conference
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Opting Out: Worker's Compensation System Alternatives

1. THE "OPTION" AND ITS FUNDAMENTALS

The Option is an alternative to traditional workers' compensation that can provide equal to or better benefits to employees, while dramatically reducing cost for employers. The Option improves the system by creating a more competitive environment for injured worker benefits, and does not repeal or eliminate a state's traditional workers' compensation statute. Currently, Texas offers a similar alternative with legislation pending in Florida and lobbying in TN and SC active. Their state specific Options are resulting in improved employee outcomes and creating significant employer savings.

Common components of an Option to workers' compensation include:

- Injury prevention through the implementation of quality safety programs and training
- Enhanced benefit plan that describes employer and employee rights and responsibilities
- for injury benefit payments
- Greater employee communication to current employees and new hires, in language they understand and appreciate
- More efficient claims management, including a process for notice of injuries,
- determining compensability, medical management, claims payment, and dispute
- resolution

Benefits to Employees include:

- Full range of benefits similar to workers' comp
- Access to more doctors; expedited medical care; and better outcomes
- Higher percentage of wages replaced; fewer days without pay
- More communication and better understanding of benefits

Benefit to Employers:

- Focused on what is best for employee, not on paperwork and litigation
- Fewer benefit claims disputes, better medical outcomes and higher worker satisfaction
- Greater cost savings and more plan flexibility

Benefit to states:

- Competitive advantage over states without alternatives
- Lowers government costs as claims move into competitive market environment
- Traditional plans and alternatives are complementary with mutually reinforcing objectives
- States require formal employer qualification process for participation in option
- States build in proven claim and appeal process, fiduciary and enforcement rules

Texas Non-subscription

Since the early part of the last century, the Texas constitution has allowed for employers to “nonsubscriber” from the statutory worker’s compensation law. At present, approximately 80,000 employers are non-subscribers in Texas, covering 2,000,000 employees generating approximately 50,000 claims per year. This choice allows employers to do nothing afterwards, and some have. This puts the employer in the position of being exposed to civil liability under tort law, including gross negligence. This unfortunately puts the burden on the injured employee, but when successful, can mean large awards not unlike other civil complaints of proven negligence. However, this is antithetical to the “grand bargain” which was intended to remove this burden from injured employees as it does under all workers’ comp statutes.

Nevertheless, while doing nothing is possible, most “no subscribing” employers in Texas provide alternate benefits under privately written and implemented benefit plans that are under the regulatory authority of ERISA which is administered by the Department of Labor. These plans give more control to the employer but when written well, often provide better treatment and outcomes for employees and less friction with the employer.

Efforts in Tennessee and S Carolina

Beginning in 2013, the groundwork began to be laid for bringing options to statutory workers’ compensation to both Tennessee and S Carolina. Over the last three years, a number of different proposed bills were presented to legislators in both states for consideration and evolved from those conversations. While progress was made in both states, a final bill has not yet been passed and efforts to fashion a bill representing the best of both the Texas and Oklahoma statutes continues to evolve. Such is expected to be presented again in the next legislative sessions of both states. The primary content of these bills looks like the following:

- Mandated Benefits Higher than Workers’ Compensation – Mandate all Option injury benefit plan levels to be equal to or greater than those provided by the state’s statutory Workers’ Compensation Laws, with no dollar or duration caps on medical, and no combined benefit limits.
- All benefits must comply with higher maximum and minimum weekly limits.
- The waiting period for wage replacement is cut in half
- All wage replacement percentages are further increased by 20% if subject to federal

income and employment taxes.

- Permanent Partial Disability benefit multipliers under workers' compensation will not apply because they reward an employee for accepting lower paid work, for not pursuing a high school diploma, and for living in an area with high unemployment.
- No Negligence Liability Exposure – Same as workers' compensation due to Option benefit mandate being higher than statutory workers' compensation.
- Admitted Casualty Insurance Carriers Only – Same as workers' compensation.
 - Workers' compensation and Option insurance carriers compete head-to-head.
 - An insurance company can offer both products (occurs today in Texas).
- P&C Guaranty Fund Applies – Same as workers' compensation.
- Court of Workers' Compensation Claims – The same court hearing workers' compensation claims can also hear Option injury benefit plan disputes.

The Association for Responsible Alternatives to Workers Compensation (ARAWC)

The Association for Responsible Alternatives to Workers' Compensation (ARAWC) is a national organization comprised of employers, workers' compensation providers, and industry experts who support the creation of state Workers' Compensation Option systems which deliver better medical outcomes to employees, while giving employers a choice in how they manage and administer their employee injury programs.

The Option is an Alternative to, Not a Replacement for, Traditional Workers' Compensation (WC)

- It doesn't repeal or eliminate traditional system; rather, it provides a proven alternative to existing approaches
- An Option can improve employee outcomes and can create significant employer savings
- Option plans focus on what is best for employee, not paperwork and litigation

Option Plans Provide:

- Benefits similar to traditional workers' compensation
- Better communication and better understanding by employees of benefits provided
- Better access to quality health care through a broader network of medical professionals
- A higher percentage of wages replaced with fewer days without pay
- An employee focused system that employees like ARAWC Supports State Legislation to Create an Option ARAWC educates state policymakers and the public on the positive benefits of an Option to employees, employers and to the state.

ARAWC supports the adoption of alternative injury benefit plans which are complementary to

traditional plans and which have mutually reinforcing objectives with existing workers' compensation. ARAWC draws on the experience of the Option in Texas and Oklahoma to provide other states with the support necessary to adopt their own plans. ARAWC is currently working with interested parties to enact legislation in South Carolina and Tennessee.

2. HOW BIG LOTS LEVERAGES THE OPTION IN TEXAS

Headquartered in Columbus, Ohio, Big Lots, Inc. is a unique, nontraditional, discount retailer operating 1,445 BIG LOTS stores in 47 states with product assortments in the merchandise categories of Food, Consumables, Furniture, Seasonal, Soft Home, Hard Home, and Electronics & Accessories. We operate 115 stores with just under 4,000 team members in Texas and have been a Non-Subscriber (Option) since 2008. The biggest difference in traditional workers' compensation system compared to an option is that workers compensation has evolved into a financial focused system, while the option is an outcome focused system. Our story of one of remarkable success focused on the wellbeing of our team members.

KEY BENEFITS TO EMPLOYEES

- With an ERISA benefit program every team member is trained about requirements and benefits at time of hiring.
- With options safety is enhanced because of the increase in communication and focus on at risk behavior.
- Integration of improved reporting and medical treatment significantly improves outcomes and return to work.
- Focused physician selection based on outcomes and patient satisfaction and training with a focus on evidence based medicine helps to improve outcomes and return to work.
- Better wage benefits with no waiting period compared to workers' compensation.
- Quick decisions associated with benefits and treatment plans.
- Team members have access to appeal procedures that takes days, not months.
- If a team member is not happy with the outcome, or program they have the option to go to arbitration and/or court.

KEY BENEFITS TO EMPLOYER

- Improved safety program adherence.
- Substantially less lost time and termination because of improved outcomes. Claim open life dropped by 2/3 for us.
- Reduced medical cost, faster medical payments for providers with improved communication.
- Less wage replacement cost due to early return to work.
- Substantially less litigation as there is better communication and understanding of program. We have not had to go to court a single time.
- We have not seen a single instance of permanency.
- We have not seen a single instance of opioid abuse.

- Overall reduction in cost of approximately 75%

RECENT DEPARTMENT OF LABOR ACTIVITY

- Federalization of Workers Compensation.
- Mandated notice requirements

3. OKLAHOMA'S JOURNEY AND WHAT HAPPENED TO THE LAW IN 2016

First state to improve on the Texas law

After experiencing or observing the successes of the Texas system and recognizing that Oklahoma's statutory system was deteriorating from various drivers and producing one of the highest costs systems in the country, a select group of OK employers began a three year process of crafting legislation that ultimately became law in 2014 alongside changes to the WC statute itself. OK's option law allowed employers to opt out of the statutory system but unlike Texas, they required that employers have an alternate benefit plan and have very limited liability in tort, effectively retaining exclusive remedy of the state system. This law generated approximately 60 employer users and operated successfully for nearly three years before in the summer of 2016, the OK Supreme Court ruled the law unconstitutional.

History of the Oklahoma statute

In May 2015 Oklahoma enacted what may be the most inventive workers' compensation legislation of any state since the early decades of the 20th century. The new law, SB 1062, allows any employer to exit, or opt-out of, the state's statutory workers' compensation system.

Before the governor signed the legislation into law on May 6, 2013 (effective February 2014), only Texas allowed employers to opt-out of its statutory workers' compensation system. The differences between the Texas "non-subscriber" system and the Oklahoma law, part of a larger series of changes to the state's workers' compensation system, are substantial.

The law (SB 1062) offered Oklahoma employers that choose to opt-out of the state system the opportunity to substantially reduce work-injury costs and avoid both the statutory system's extensive regulation, bureaucracy and litigation risk.

The law was overturned by the Oklahoma Supreme Court in July 2016, ruling it unconstitutional. Many believe a legislative remedy to the court's finding will enable employers to choose the option again in the future, but for now, all have or are returning to the statutory system.

What the Law Provided

The ability of employers to opt-out of the Oklahoma statutory workers' compensation system was governed by a series of requirements and conditions. The most significant is that employers must continue to pay benefits at least equal to those mandated in the existing statutory system. Employers, however, had extraordinary discretion in designing benefits and managing claims. They retained immunity from virtually all negligence suits based on unsafe conditions or safety issues. All employers in Oklahoma had to continue to provide work-injury benefits, whether through the existing state system or under these new provisions.

Based on the Texas experience, employers expected over time, a 50 percent reduction in workers' compensation costs if they choose to opt-out of the Oklahoma system. Judicial changes to the law, execution slip-ups, insurance pricing and other factors affected actual cost savings. However, studies have shown that some employers achieved up to 40% savings, where the statutory reforms savings were closer to 15%.

Key aspects of the Oklahoma option include:

- Over 60 employers have qualified since reform has been implemented.
- Approximately 22,000 workers were covered by injury benefit plans.
- OK Insurance Department reports a cumulative 37.2% drop in loss cost/rates since enactment of 2013 reforms.
- Initial data shows claims costs for employers have also decreased by over 50% under the Oklahoma Option (on top of above reduction).
- Many workers' comp Laws held unconstitutional
- Workers comp' Commission holds Option unconstitutional
- A legislative fix would have effectively killed the Option
- Supreme Court holds Option unconstitutional in September
- Option plans now terminating and transitioning to workers' comp

How to Opt-Out in Oklahoma

The OK law declared: "Any employer may voluntarily elect to be exempt from the Administrative Workers' Compensation Act and become a qualified employer." To do so, employers had to file a statement with the Oklahoma insurance commissioner and pay an annual \$1,500 fee. Employers had to notify employees of the change and adopt a new, written "benefit plan."

Oklahoma's commissioner of insurance retained the power to disapprove specific employer benefit plans and to induce employers into a financial backup plan (e.g., insurance, letters of credit, and bonds) that could have nullified the cost advantages of leaving the state system. In contrast to the virtual nonexistence of state oversight of the Texas non-subscriber system, SB 1062's long term success was dependent on creative, smart regulation by the commissioner.

The process of "opting out" was typically a six month one. An employer benefit plan was developed and approved (a process left for the commissioner of insurance to define). Some significant changes to the law were expected after the completion of the legal challenges that were quickly filed after passage.

While it was expected to be more complicated than just sticking with the current state system, the benefits to the employer and to the employee were quite substantial.

Differences from Texas Non-Subscription

Exclusive Remedy

By stripping away exclusive remedy, the Texas non-subscription system exposes employers to the full force of safety negligence suits argued before state court juries that can favor employees over employers. Most Texas non-subscribers have removed the sting of this exposure by requiring employees to sign binding arbitration agreements.

Oklahoma employers that had opted-out, on the other hand, retained the protective mantle of exclusive remedy with the exception of intentional acts, which creates a very high hurdle for plaintiff attorneys to surmount. In fact, in its short two and one half years of life, no significant actions in tort were successfully brought.

The 2016 OK Supreme Court Ruling

The Oklahoma Option allowed qualified employers that meet certain injury benefit and financial security requirements to exit the workers' compensation system and sponsor their own injury benefit plan.

First, the Oklahoma Workers' Compensation Commission determined that the opt-out portion of the state's 2013 workers' compensation statute is unconstitutional. Ruling on an appeal under the provisions of the Oklahoma Employee Injury Benefit Act, or Opt-Out Act, the three judge panel found the act to be unconstitutional and "not enforceable." The ruling in *Vasquez v. Dillard's* opened the way for an appeal to the OK state supreme court.

SB 1062 also established the Oklahoma Workers' Compensation Commission to replace the former Oklahoma Workers' Compensation Court.

The restructuring of the state's workers' comp system and the Employee Injury Benefit Act were **held to be** constitutional by the Oklahoma Supreme Court in December 2013 in response to various legal challenges. Thus employers were able to opt out of the Oklahoma workers' compensation system by establishing an Employee Benefit Plan (Plan) under the provisions of Federal law, the Employee Retirement Income Security Act (ERISA).

The Dillard's case revolved around the denial of a work injury claim filed by Dillard's Inc. employee Jonnie Yvonne Vasquez, who injured her shoulder and neck while lifting shoe boxes at her workplace. Dillard's denied her claim saying Vasquez's injury was "a pre-existing condition and not an 'injury' as defined by the Plan," according to the Commission's order.

The Commission noted that the Vasquez case was the first appeal brought before it due to a denial of benefits under the Opt-Out Act.

In investigating Vasquez's appeal, the commission addressed the issue of whether plans under the opt-out law provision provide benefits and protections equal to the benefits provided under the Administrative Workers' Compensation Act. It found the Opt-Out Act wanting on this point.

“Although at first blush it appears that the Opt-Out Act requires that injured workers under an authorized benefit plan must be afforded benefits equal to or better to those under the Administrative Workers’ Compensation Act, this is decidedly not so. A closer look at the statutorily authorized plan requirements reveals that the benefit plans permitted to be used to opt-out establish a dual system under which injured workers are not treated equally,” the order states. The order goes on to state: “The appearance of equal treatment under the dual system is like a water mirage on the highway that disappears upon closer inspection.”

Defendants of the ACT, including ARAWC and the Commission itself recognized that its decision was immediately appealable to the Oklahoma Supreme Court. “[T]hat Court is required to retain the appeal and must consider the case on an expedited basis,” the Commission’s order stated.

The Oklahoma Supreme Court had previously declined to take up a similar case challenging the constitutionality of the Opt-Out Act. That case, *Judy Pilkington et al. v. State of Oklahoma et al*, like *Vasquez*, claimed that the act denies injured workers process of the law. Judy Pilkington also worked for Dillards. Ultimately, however, the OK Supreme Court agreed to hear and then upheld the decision of the OK Worker’s Compensation Commission’s (OWCC) finding of inequity and ruled the Act unconstitutional in July 2016. For now, there is no further court action and no active legislative remedy afoot. As a result, all OK employers how opted out are now moving back into the reformed statutory system.

4. COMMENTS ON THE PATH FORWARD

Opt-out will likely come to more states. Interest in opt-out has spread nationwide, along with disenchantment with the prospects of deep and lasting legislative reforms to the statutory state systems. Florida has already introduced its version of the option and is pending passage. The Texas non-subscriber system has been in place since 1910, but it operates almost totally void of legislative mandates.

The Oklahoma law created both a legislative model and real-life laboratory for the opt-out system’s ideas and significant reforms of workers’ compensation. It is thus a more useful model than Texas for adoption by other states, despite the unique aspects of the OK law that led to the finding of inequity and thus unconstitutionality.

Proponents of opt-out in other states will likely consider matching Oklahoma’s mandate that work-injury benefit plans of opt-out employers offer at least the same level of benefits provided in the statutory system. TN and SC legislators seem to favor this benefit in particular, but also recognize the significant economic development benefits of choice.

Opt-out proponents in other states would do well to plan proactive, rather than reactive, state involvement. And they likely should compare the political feasibility of extending exclusive remedy as done in Oklahoma with the alternative found in Texas, where non-subscribers assume liability but contain it through the use of mandatory arbitration.

The minimum improved benefits that proponents are seeking in other states include but won’t necessarily be limited to:

- Delivering better medical outcomes and higher process satisfaction for injured workers without the cost and burden of traditional workers’ compensation.

- Driving state economic development through the attraction of employer savings.

Providing employers more choice and alternatives in financing and responding to employee injuries can positively impact employees, employers' and health care providers. Experience supports that competition to traditional workers' compensation insurance can reduce premium rates and improve services. Enabling choice of program design increases employers' participation into the process which allows them to hold all service providers accountable for results and outcomes. It also enables employees to access medical providers that do not accept workers' compensation clients because of low fee schedules and paperwork required. In the absence of statutory mandates, responsible employers create high quality benefit plans for occupational injuries, enabling improved access to better medical talent leading to higher employee satisfaction, better medical outcomes, and lower cost claims.

The proponents of choice aspire to refocus state based mandates in response to growing gaps in quality medical care, efficient risk financing, effective return to work and other gaps in many current systems. Some of the other expected benefits of the adoption of the option in other states. Are expected to be:

- Improved workplace safety and training supporting injury prevention
- Expanded access to quality medical providers providing exceptional care
- Opportunity for expanded benefits through custom designed plans
- Opportunity for reduced waiting periods for wage replacement with greater benefits
- More expedient medical treatment and more immediate referral to specialized medical treatment to enhance recovery
- Early identification of potentially complicating medical conditions and securing appropriate medical treatment to aid recovery
- Improved communications with injured workers to address benefit questions and assist early return to work

Ultimately, the option practices with well written benefit plans result in a better experience for the employee and a more effective and efficient system for administering employee injuries.