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# THE OPT-OUT OF WORKERS' COMPENSATION LEGISLATION IN THE SOUTHERN STATES

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CONTENTS



## I. Introduction

In late winter, 2015, the organization "ProPublica," in concert with National Public Radio, published a report that addressed the trend, long criticized in academic literature,[1] of legislatures enacting retractive amendments to many state workers' compensation laws.[2] The report featured dismaying accounts of several injured workers who had been ill-served by such restrictive laws.

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[1] *See* Martha McCluskey, *The Illusion of Efficiency in Workers' Compensation Reform*, 50 RUTGERS LAW REVIEW 657 (1998).

[2] Michael Grabell & Howard Berkes, *The Demolition of Workers' Compensation* (Mar. 4, 2015), available at https://www.propublica.org/article/the-demolition-of-workers-compensation (last visited October 24, 2015).

Many in the workers' compensation community thought that the report was over-stated. A veteran observer, Terry Bogyo, responded that sixty U.S. and Canadian systems exist, and that it was unsatisfactory to paint with an overly broad brush.[3] This critique rang true in Pennsylvania, where we have had four rounds of reform over the last twenty years (1993, 1995, 1996, 2006), but where the system is generally viewed as fair.

However, as if to prove that retraction has been dangerously afoot, the *ultimate retraction* of benefits has recently been enacted in Oklahoma. This ultimate retraction has taken the form of so-called "opt-out" legislation, which permits an employer to remove itself from the workers' compensation system entirely if it substitutes an ERISA-governed employee benefit plan for work accidents.[4] When an Oklahoma employer does so, it retains, remarkably, its historic immunity from tort suit – that same immunity which formed the basis of the original workers' compensation compromise or "bargain." The overriding intent of the opt-out legislation is employer cost-cutting, particularly of the medical benefits which form so large a share of work injury costs.[5]

It is notable that the employee does not have the option to pick whether he or she is covered by an opt-out plan or retains the protections of the state workers' compensation law. The "opt-out" choice is under the strict control of the employer.

The opt-out proponents, and defenders of the scheme, portray the work accident plans as innovative cost-savers. They further argue that the ability to opt out should be welcomed by both employers and injured workers alike. It's a dynamic 21st century invention that leaves workers' compensation, its stale bureaucracy, and its incomprehensible "volumes of statutes,"[6] behind.

Opt-out is a dramatic change, and the opt-out proponents make "no pretense of altering the century-long bargain between employers and employees."[7] Indeed, the

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[3] Terry Bogyo, *What can we Take from the ProPublica/NPR Investigative Reports on Workers' Compensation?*, blog posting, Apr. 20, 2015, available at http://workerscompperspectives.blogspot.com/ (last visited October 25, 2015).

[4] 85A Oklahoma Statutes §§ 200-213. The law is called the Oklahoma Employee Injury Benefit Act, and it was effective February 1, 2014.

[5] *See* Nancy Grover, *The Future of Workers' Compensation: Is Opt-Out the Answer?*, WORKERS' COMPENSATION 2013 ISSUES REPORT (2013).

Opt-out is different from what have been known colloquially as "carve-outs." Carve-outs, permitted but not utilized in Pennsylvania, are agreements between employers and unions which are reached as part of collective bargaining agreements. Opt-out is imposed on employees without their say. For an explanation, and a comparison of carve-outs among states, see David B. Torrey, *Workers' Compensation "Carve-Outs": Law, Background, Criticism, and a Twelve-State Table* (2014), available at www.NAWCJ.org.

[6] The website of the opt-out lobby group states that opt-out "eliminates the need for volumes of statutes, regulations, and litigated decisions …." *See* http://www.arawc.org/ (last visited October 24, 2015).

advocacy underlying opt-out rejects not only original intent but the reform calls of the 1972 National Commission on State Workmen's Compensation Laws. The Commission's over-arching recommendation was for "mandatory, universal coverage," with the specific admonition "that coverage by workmen's compensation laws be compulsory and that no waivers be permitted."[8]

As I write, however, this machination has become the subject of another journalistic investigation, with the same ProPublica writers dissecting the opt-out legislation in theory and practice.[9] The report verified a number of items that many have been observing for some time. Among these are:

- that the benefits available under such plans are impecunious, even though in Oklahoma they are supposed to be "of the same forms," as those found in the state's workers' compensation law. For example, one Oklahoma plan reportedly will not cover illness from mold exposure, bacterial infection, or asbestos exposure;

- that technicalities can easily bar serious claims. For example, some Oklahoma plans require that the worker report his or her injury by the end of the shift, or the claim is barred;

- that the state of Oklahoma has failed to effectively regulate these new operations.[10] For example, when the journalists contacted the Oklahoma agency about plans that were obviously not complying with the law, they were told that the agency had no power over such things. An Oklahoma official stated that his job was to "confirm" an opt-out plan, not to "approve" one;[11] and

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[7] *Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System* (Mar. 9, 2015).

[8] NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, p.45 (1972), available at http://workerscompresources.com/?page_id=28 (last visited October 25, 2015).

[9] Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Compensation* (Oct. 14, 2015), available at https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp (last visited October 24, 2015).

[10] In Oklahoma, the "benefit plan shall provide for payment of the same forms of benefits" as available under the state workers' compensation act, but in practice many plans are more restrictive, giving rise to lawsuits against both employers and the regulators. For the statute, see 85A OKLAHOMA STATUTES § 203b. Mr. Bob Burke, in his compendium of materials on the Oklahoma opt-out, has published a side-by-side comparison of benefits, based on actual plans of a national department store and of a nursing home enterprise. They are not equivalent by any measure.

[11] Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Compensation* (Oct. 14, 2015), available at https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp (last visited October 24, 2015).

- that injured Oklahoma employees are required to engage in "mandatory" compromise settlements, despite the fact that state law requires workers' compensation agreements to be voluntary.[12]

Not all opt-out plans are the same. Plans in Oklahoma are (as noted above) supposed to have benefits "of the same forms" as those of the state workers' compensation law, but it is very clear that many do not – and, as noted above, the agency seems to have washed its hands of the matter. (Perhaps it must.)

Opt-out is being advanced in other states, and the Tennessee proposal, after objections were raised, has reportedly had a number of manifestations. A WCJ of that state, in August 2015, characterized the opt-out proposal in Tennessee as always changing and hard to comprehend.

Many of the ambitious claims about opt-out have their genesis in the Texas experience, where workers' compensation has never been mandatory. There, over the last couple decades, more employers have opted out, set up their own plans, and oblige workers to arbitrate disputes.[13] (Some employers do not, and expose themselves to tort liability.[14]) Employers in that state have met with success from a cost-savings point of view,[15] but whether injured workers are treated fairly is unclear to this writer.[16]

## II. Foundations ("Drivers") of Opt-Out

"The three things that drive the success of an option bill," according to proponents, "are medical management control, employee accountability, and

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[12] *Id*.

[13] Nathan E. Ross, *How Level is the Playing Field? Should Employers be Able to Circumvent State Workers' Compensation Schemes by Creating Their Own Employee Compensation Plans?*, 2000 JOURNAL OF DISPUTE RESOLUTION 439 (2000); Jason Ohana, *Texas Elective Workers' Compensation: A Model of Innovation?*, 2 WILLIAM & MARY BUSINESS LAW REVIEW 323 (2011), available at http://scholarship.law.wm.edu/wmblr/vol2/iss2/5/. *See also* Becca Aaronson, *As Large Companies Opt Out, Concerns Grow for Workers' Compensation System*, NEW YORK TIMES (April 7, 2012).

[14] At an ABA meeting, a Texas defense attorney, Jane Stone, remarked that many smaller employers opt-out, proceed to employ undocumented immigrant labor, and then hope that when such workers are injured, "they'll just go back to Mexico."

[15] Alison Morantz, *Opting Out of Workers' Compensation in Texas: A Survey of Large, Multi-state Nonsubscribers*, in Regulation and Litigation: National Bureau of Economic Research (forthcoming 2010). available on-line at: http://ideas.repec.org/h/nbr/nberch/11965.html. The seemingly final version of this study is summarized at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629498, under the title, *Rethinking the Great Compromise: What Happens When Large Companies Opt Out of Workers' Compensation?* (Oct. 15, 2015).

[16] *See, e.g.*, Jim Malewitz, *In Texas, Injured Workers Struggle to be Counted*, THE TEXAS TRIBUNE (Oct. 2, 2015), available at https://www.texastribune.org/2015/10/02/texas-injured-workers-struggle-be-counted/ (last visited Oct. 25, 2015).

competition." This proposition is also found on the website of the opt-out advocacy group, Association for Responsible Alternatives to Workers' Compensation (ARAWC). Some have alleged that the opt-out legislation is radical, and some of its foundations, or "drivers," suggest that this is true.

A. *Work injury recovery – not a right, but just another employee benefit which can be pared off at will.* The proponents of opt-out conceptualize a worker's recovery for injury as the subject of just another employee benefit plan,[17] and one where costs can be reduced via the employer's absolute, complete control over medical care. The principle that a worker's injury recovery possesses an element of justice, one that derives originally from the constitution, the common law, and from social justice concerns, is forgotten.

B. *Worker access, in case of dispute, to an independent fact-finder, abolished.* The complete control tenet of opt-out, meanwhile, is attended by a delivery system that is likewise in the employer's control. In case of dispute, the workers' compensation adjudication system is unavailable and disputes are handled in-house – in a manner said to be similar to those of group health or disability systems. That the employee might have access to such an adjudication system is incompatible with the opt-out premise that the "bureaucracy" of workers' compensation must be avoided. The principle, heretofore enshrined in Anglo-American concepts of due process, that a worker should be able to access some kind of hearing, is jettisoned. The involvement of lawyers (at least on the injured worker's side), and judges, is incompatible with cost cutting.

C. *Barring claims via arbitrary procedural rules.* The opt-out proponents assert that "employee accountability" will bring efficiency and cost savings. This theme is reflected by such demands that a worker provide notice of injury by the end of his shift, lest the claim be barred; and that a worker comply with the opt-out physician's medical treatment regimen, with alleged failure to do so a forfeiture of the claim. Of course, a rule that all injuries be reported by the end of the shift will leverage *knowledgeable* employees to make out reports, but the real motive is to cleverly bar the most difficult workplace injuries – those that do not result from acute, reportable traumas, but from ambiguous situations and insidious exposures. These types of injuries are not only real but are the type that often find their way to disputes in court.

D. *The "Free Market" Premise.* Another foundation of opt-out is the encouragement of competition. Freed of the obligation to comply with state workers' compensation laws, employers can demand that carriers compete with each other to provide the least-cost (and presumably least-benefit) work accident plan. In a defense of opt-out, Mr. Bill Minick details the theory:

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[17] *See* Nancy Grover, *The Future of Workers' Compensation: Is Opt-Out the Answer?*, WORKERS' COMPENSATION 2013 ISSUES REPORT (2013). The author quotes a consultant as saying that employers in Texas that have opted out like the program because "workers comp becomes much more like all the other benefit programs that the employer has."

> Texas workers' compensation [where opting out as always been allowed] is outperforming national averages because Texas employers have a choice. The [opt-out] option creates a greater sense of urgency among regulators and workers' compensation insurance carriers to manage claims better so they can reduce premium rates and compete with the alternative system. The option also makes implementation of workers' compensation reforms more manageable, because they happen across a smaller base of claims.[18]

It is this strategy that has led the opt-out proponents to wrap themselves in the flag of the "Free Market," as they did during the attempt to enact a Tennessee opt-out.

This semantic strategy is intended in part to generate the idea that defenders of the status quo are hopelessly trapped in the past. But in fact the sort of competition that opt-out proponents suggest will only aggravate the already existing "race to the bottom," as accident plan carriers and their employer clients vie with one another to offer the most impecunious plan. And experience suggests that such plans will likely be administered in the most austere fashion possible. In any event, the untrammeled free market is not consistent with the provision of this form of social insurance.

The Dean of American workers' compensation law and economics, John F. Burton, Jr., remarked this year that

> the current threat to the state workers' compensation system is a race to the bottom among states. Unfortunately, I do not think that any of the solutions to this threat I just discussed … [including] … Federal standards … will be enacted. Does this mean the entire state workers' compensation system will eventually collapse into a black hole? Or will the state system survive largely in its current constellation, with some states maintaining adequate benefits, broad coverage of workers, and expansive compensability rules, while other states plunge into the abyss?
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> [O]ne problem is that states that try to maintain decent programs will increasingly find their workers' compensation costs under attack as other states pass them by on the way to the bottom.… In my view, the state workers' compensation system is in its most dire situation in at least the last half-century.[19]

Professor Michael Duff, another workers' compensation scholar, agrees: "[T]he greatest threat facing the workers' compensation system is a race to the bottom.…

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[18] Bill Minick, Debunking Opt-out Myths (Part 4), Aug.10, 2015, available at http://insurancethoughtleadership.com/debunking-opt-out-myths-part-4/ (last visited Oct. 25, 2015).

[19] John F. Burton, Jr., *Keynote Address for the Centennial Celebration of the Pennsylvania Workers' Compensation Program*, Hershey, PA (June 1, 2015), available at http://workerscompresources.com/ (last visited Oct. 25, 2015).

Presently, I think most people in most states would recognize a moral duty for a state to provide some means by which a victim of workplace injury could be compensated. However, now, as in the past, the more competitive pressures exist in an industry the more tempting it is for employers to avoid the responsibility of compensating for injuries sustained in productive activity…. [F]urthermore, it only takes one employer without scruples to initiate a fearsome race to the bottom of the kind reflected in the collapse of the [19th century] enterprise plans, 'to force the moral sentiment pervading any trade down to the level of that which characterizes the worst man who can maintain himself in it.'"[20]

III. Will Opt-out Legislation be Enacted in More Jurisdictions?

The opt-out legislation has its genesis in Texas. There, the majority of employers carry workers' compensation. However, carrying the same has never been mandatory. Many companies, like Wal-Mart, opt-out and in that state expose themselves to tort lawsuits. Does this mean the playing field is even? The answer is no. In this regard, many large companies – like Wal-Mart – set up in-house plans and condition employment on their employees' agreement to arbitrate any dispute. The Texas Supreme Court, meanwhile, has created common law that makes it difficult for workers to prevail in negligence cases.[21]

The Oklahoma scheme, in any event, is a bold extension. As discussed above, employers can opt out, set up an ERISA-governed plan, and be free from *any* tort liability.

Will other states authorize this remarkable extension and abandon mandatory workers' compensation? In a position paper in opposition to the Tennessee opt-out proposal, the American Insurance Association remarks, "One great irony of the interest in opt-out is that it comes during a time of stability in the nation's workers' compensation system." Indeed, in part because of the many retractive reforms discussed at the outset, the system is not viewed as one in a cost crisis, as in the late 1980's and 1990's.

Regardless, ARAWC, the lobby group that writes the opt-out legislation, predicts that opt-out will be proposed throughout the country. The proposed Tennessee opt-out plan (or some other version of it), to date not enacted, is said soon to be "America's Plan"

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[20] Michael C. Duff, *A Hundred Years of Excellence: But is the Past Prologue? The Fall Keynote Address for the Centennial Celebration of the Pennsylvania Workers' Compensation Act* , p.11 (Oct. 7, 2015). The quote here is from Henry Carter Adams, *Relation of the State to Industrial Action* in RELATION OF THE STATE TO INDUSTRIAL ACCIDENT AND ECONOMICS OF JURISPRUDENCE: TWO ESSAYS BY HENRY CARTER ADAMS 57, 89 (Joseph Dorfman ed. 1954).

[21] *See, e.g., Austin v. Kroger Texas, LP*, 465 S.W.3d 193 (Texas 2015) (employee, who fell while mopping slick restroom floor, could not recover against employer, which had opted out – employee could not recover caused by the "premises defect" of which employee was fully aware but that his job duties required him to remedy, as "the employer's duty to maintain a reasonably safe workplace did not obligate the employer to eliminate or warn of dangerous conditions that were open and obvious or otherwise known to the employee.").

and "the U.S. Option."[22] Opt-out legislation will soon be proposed, ARAWC declares, in many states, including South Carolina,[23] Florida, Georgia, Alabama, and North Carolina.[24]

The opt-out movement has to date been one of the southern states. ARAWC has obviously identified business-friendly states where legislators can be found who are willing to propose the legislation.

In contrast, opt-out will not be an easy sell in jurisdictions where labor, trial lawyers, and moderates have a voice in the law-making process. At an August 2015 meeting for example, judges from Washington state and Maine rejected out of hand the idea that such legislation could gain a foothold in those states. In this writer's state (Pennsylvania), opt-out would receive a hearing, but the types of plans that have been promulgated in Oklahoma will never be allowed.

The insurance industry is said to be opposed to opt-out legislation, and the American Insurance Association's position paper in opposition to the Tennessee legislation (attached to this paper), is a *tour de force*. Yet, Sedgwick was a founding member of ARAWC,[25] and an insurance executive in Pennsylvania with links to the Chamber of Business & Industry has remarked to this writer that he is confident that the industry could create profitable insurance products to underwrite an opt-out's risks. Thus, the insurance industry is not unanimous in its opposition to opt-out.

Trial lawyers, meanwhile, are also opposed to opt-out, and Oklahoma attorney Bob Burke has filed a number of lawsuits against both employers and the state in an effort to stop opt-out plans, to challenge their inclusions and omissions, and to have the entire ability to opt-out be declared invalid under the state constitution. Trial lawyers and other defenders of workers' compensation among states will indeed challenge such laws on a variety of constitutional grounds.

Thus, while opt-out proponents have announced that it has "America's Plan" ready for roll-out in the fifty states, question exists with regard to whether such proposed legislation will succeed widely. The social and economic justifications of workers'

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[22] *See* Molly Redden, *Walmart, Lowe's, Safeway, and Nordstrom are Bankrolling a Nationwide Campaign to Gut Workers' Comp*, MOTHER JONES (Mar. 26, 2015), available at http://www.motherjones.com/politics/2015/03/arawc-walmart-campaign-against-workers-compensation (last visited Oct. 25, 2015). The author quotes an opt-out lobbyist stating, "I anticipate [that] if we pass this, the Tennessee option will become the U.S. option."

[23] The ARAWC website, under its "Blog" link, details the nature and progress of the South Carolina legislation. *See* www.arawc.org/ (last visited Oct. 24, 2015).

[24] *See* Molly Redden, *Walmart, Lowe's, Safeway, and Nordstrom are Bankrolling a Nationwide Campaign to Gut Workers' Comp*, MOTHER JONES (Mar. 26, 2015), available at http://www.motherjones.com/politics/2015/03/arawc-walmart-campaign-against-workers-compensation (last visited Oct. 25, 2015).

[25] *See* https://www.sedgwick.com/news/Pages/Sedgwicknews.aspx (last visited Oct. 25, 2015).

compensation are justifiably well-entrenched, and employers that perceive a benefit from the current stable system are unlikely to embrace such new, destabilizing, procedures.

The socio-political reality is that in states where corporate interests that advocate opt-out have dominating political influence, such laws have the potential to succeed. In states where labor and the interests of the working class – and the working poor – are accommodated, such laws should fail.

## IV. Nine Reasons to Oppose Opt-out

The workers' compensation system is far from perfect, and its omissions, dysfunctions, and the perverse motivations it can generate have been talked and written about for almost as long as the system has existed.[26] Still, allowing opt-out is not the answer to these persistent problems.

It is submitted that opt-out legislation is an overreaching pro-business measure which, under the veil of innovative reform, will unconscionably shifts costs of work injuries and deaths from employers to injured workers and others. And a troubling part of this machination is the denial to injured workers of access to the workers' compensation adjudication system, or some true equivalent, so that in case of dispute due process can be afforded.

Opt-out has put-off this writer from the outset. The manner in which opt-out has been promoted resembles television advertising for extreme exercise regimes and miracle diets – the purported "happiness" of injured employees is inevitably stressed, and billions of dollars in saving are promised. The opt-out lobby group website even promises that those "volumes of statutes, regulations, and litigated decisions" will be a thing of the past. The blogger Bob Wilson has characterized all this as "Disneyesque."[27]

The creator of opt-out, meanwhile, now feels that he must respond to the "myths" surrounding opt-out – in a whopping *eight* installments.[28] The public, in this series of broadsides, is encouraged to reject the "lies" of opt-out opponents.

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[26] *See, e.g.*, Karen C. Yotis & Robin E. Kobayashi, *The Adversaries and Frenemies of Workers' Compensation* LexisNexis Legal Newsroom, Workers Compensation Law (Sept. 21, 2015), available at http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2015/09/21/the-adversaries-and-frenemies-of-workers-compensation.aspx (last visited Oct. 25, 2015).

[27] Robert Wilson, *ProPublica and Peter Rousmaniere Give Workers' Comp Opt Out A Very Bad Day* (blog posting), Oct. 14, 2015, available at http://www.workerscompensation.com/compnewsnetwork/from-bobs-cluttered-desk/22540-propublica-and-peter-rousmaniere-give-workers%C3%A2%E2%82%AC%E2%84%A2-comp-opt-out-a-very-bad-day.html (last visited Oct. 25, 2015).

[28] *See, e.g.*, Bill Minick, *Debunking Opt-out Myths (Part 4)*, Aug.10, 2015, available at http://insurancethoughtleadership.com/debunking-opt-out-myths-part-4/ (last visited Oct. 25, 2015).

Opt-out is also said to be inspired by libertarian convictions, but no plan allows a worker the liberty to choose between workers' compensation protections and an opt-out plan. The hypocrisy is glaring.

This spectacle alone should raise eyebrows, but nine substantive reasons justify opposition to the opt-out machination.

1. ***Opt-out is legislation that unfairly affects the working class and the working poor.*** Workers' compensation lawyers and judges are experts at the real constituency of workers' compensation, particularly those workers who have developed issues with their benefit provision and are in need of dispute resolution.

Who makes up this constituency of the litigated workers' compensation cases – that is, those workers who are most likely to be affected by draconian system that limits injuries covered, imposes procedural impediments, and denies access to justice?

The answer is easy: it's the poorly-educated members of the working class and the working poor. In Pennsylvania, a state with a high average weekly wage ($951.00 for 2015), the vast majority of workers' compensation claimants possess only a high school education, many have only a GED or no degree, and their average wages are frequently less than one-half the average.[29] Many such injured workers testify that they have no savings and that they were living paycheck-to-paycheck prior to their disabling injuries. Further, despite the expansion of general healthcare coverage under the Affordable Care Act, many workers still testify that they have no insurance to support medical treatment when the workers' compensation claim has been denied, or when some element of treatment in an accepted case has been contested.

Many of these types of workers, notably, labor for the type of national retailers and nursing homes chains that are said to desire opt-out.

Opt-out, given its disparate impact, is hence a form of unfair class legislation and would hurt these injured workers the most. An Oklahoma-style plan would outright deny many claims and prevent access to an impartial fact-finder in the event of dispute.

Opt-out would also create the unsatisfactory effect of having similarly situated injured workers being treated differently. A "separate but unequal" regime[30] should not be allowed.

2. ***Opt-out discounts the encouragement-of-safety purpose of workers' compensation***. The 19th century reformers who advocated the *pre*-workers' compensation, tort-based

[29] For a profile of workers who typically appear in disputed cases in Pittsburgh, PA, see David B. Torrey, *What do Workers' Compensation Judges do All Day? Full Quarter Case Characteristics of a Pennsylvania WCJ*, PBA WC LAW SECTION NEWSLETTER, Vol. VII, No. 113, p.44 *et seq.* (December 2012).

[30] *See Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System* (Mar. 9, 2015).

"employer liability" laws (which weakened employer defenses), were convinced that enhancing financial burdens on employers would spur them to implement workplace safety precautions. Of course, this approach failed, tort remedies and liabilities were ultimately abolished, and mandatory workers' compensation was substituted in their place.

This development carried forward this "financial incentive" theory. The idea is this: if employers know they will be liable on a no-fault basis for workplace injuries, they will do everything possible to encourage safety. The godfather of the Pennsylvania Act, Francis H. Bohlen, declared, "The object of all compensation acts may be stated to be [among other things,] the prevention of accidents, by supplying the spur of self-interest to secure adequate safety conditions of work."[31]

The first book-length retrospective on the American system, published in 1936, succinctly summarizes this advocacy: "The various state commissions which made investigations and which proposed the enactment of compensation laws in this country regarded accident prevention as one of the most important purposes of such laws."[32] The financial incentive idea has been refined by "experience rating," under which an employer's premium rate is adjusted to reflect the costs of its employees' claims. Employers generating "higher-than-normal claim levels" are penalized with increased premiums, while those reporting few claims receive some sort of premium discount.

This financial incentive, though acknowledged to be imperfect, endures to this day. The National Commission on State Workmen's Compensation Laws emphasized that safety, via experience rating, was a critical purpose of a properly functioning Act.[33] When one visits the Pennsylvania Rating Bureau for instruction on experience rating, he or she will hear the admonition, "Safety is what it's all about."

Opt-out discounts the safety purpose of mandatory, experienced-rated workers' compensation. While its proponents argue, without evidence, that opt-out will leverage employers to safety measures,[34] neither the historical record nor common sense make such an outcome plausible. For accident insurance to leverage employers to safety, benefit levels and associated premium costs must be such as to promote employer investment in safety.

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[31] FRANCIS H. BOHLEN, WORKMEN'S COMPENSATION: AN ADDRESS BEFORE THE LAW ASSOCIATION OF PHILADELPHIA, p.5 (Nov. 12, 1912).

[32] WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, p.697 (The Commonwealth Fund 1936).

[33] REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, pp.94-95 (1972), available at http://workerscompresources.com/?page_id=28 (last visited October 25, 2015).

[34] *See* Kyle W. Morrison, *The Workers' Comp Option: Will More States Start Adopting Workers' Compensation Opt-out Plans*?," SAFETY & HEALTH (Sep. 27, 2015). Here the journalist quotes Mr. Bill Minick stating, "What we found is that employers that pursue options to workers' compensation are more focused on providing a safe work environment …."

This is a fundamental that has been recognized in Pennsylvania from the earliest years of the program. The first actuary of the Pennsylvania system remarked that "compensation laws had everywhere given a notable impetus to the safety movements," but he took for granted that "the higher the benefits, the greater, of course, will be the incentive to prevention."[35] Most observers, I believe, have agreed that the higher benefits of the system, post-National Commission, have been a material factor in engendering the workplace safety culture that evolved in the 1980's and 1990's.[36]

This writer, in any event, has never read or heard of the idea that aggressive *downward* pressure on benefit levels and premiums promotes safety.

A sophisticated analysis of the safety issue is found in the American Insurance Association critique of the proposed Tennessee opt-out:

> [O]pt-out jeopardizes sound disability management by allowing unsafe employers to "wash" bad experience by abandoning the workers' compensation system.
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> [T]he workers' compensation system's experience rating plan requires employers with poorer safety records to bear a higher cost and protects safer employers from subsidizing the losses of less safe ones. The higher relative cost imposed on less safe employers also is an incentive for them to improve the safety of their workplaces, while safe employers enjoy lower insurance costs. Opting out allows unsafe employers to "wash away" their experience, abandoning a system geared to promoting work place safety. It may also dilute the actuarial credibility of the experience rating plan for employers who remain in the workers' compensation system.
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> [I]s this sound public policy?[37]

3. ***Employers should oppose loss of the exclusive remedy***. Under Texas law, and under some opt-out plans (like at least one in Tennessee and South Carolina), employers who opt-out expose themselves to civil liability in tort. They lose the protection of the exclusive remedy. A typical strategy, as discussed above, is to offer a plan and oblige workers to arbitrate in event of dispute.

Still, employers should balk at losing such immunity in the name of the possibility of resort to a cheap opt-out plan. Opt out proponents on occasion defend abandonment of

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[35] *See* E.H. DOWNEY, WORKMEN'S COMPENSATION (MacMillan 1924)

[36] *See generally* RICHARD A. VICTOR & LINDA A. CARRUBBA, EDS., WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? (WCRI 2010).

[37] *Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System* (Mar. 9, 2015).

the workers' compensation system by pointing out that justice can still be achieved by the worker through direct tort lawsuits. Of course, the irony of such a rhetorical position is that we would thereby regress a century to what proved to be a failed and unworkable system. The AIA position paper on the Tennessee proposal captures this irony perfectly: is "suing one's employer … a mark of an enlightened social insurance system?"[38]

Employers that do opt out would be free of litigation in the workers' compensation adjudication system. However, litigation and potential liability under ERISA presents new problems of its own.[39]

As for this writer's state: In Pennsylvania, freedom from tort liability is of untold benefit, as the exclusive remedy is enforced with an iron fist. Even allegations of intentional harm are insufficient to breach immunity. No "intentional tort" exception to immunity exists as found so commonly in other states,[40] and even if an employer intentionally *assaults* his worker over a work-related matter, the civil courts will dismiss the tort suit.[41] Pennsylvania trial lawyers know of these rules, and they don't file lawsuits against employers based on intentional tort allegations.

4. ***Opt-out legislation is inconsistent with constitutional guarantees of rights of access to courts, availability of remedies, and due process.*** As one can discern from the Oklahoma experience, "altering the century-long bargain between employers and employees" will generate constitutional challenges – and rightly so.

A. The first challenge is to the opt-out scheme of restricting an employee to a private plan for work accident recovery, yet at once affording the employer immunity from tort under the exclusive remedy. The constitutions of many states feature an "open courts" proviso that guarantees access to courts. The Pennsylvania Constitution has such a proviso, said to have its genesis in the Magna Carta,[42] as does Oklahoma,[43] and several

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[38] *Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System* (Mar. 9, 2015).

[39] Bob Burke has asserted that an employer's cost of defending a workers' compensation claim would be dwarfed by the costs of defending an ERISA claim in federal court. Bob Burke, Esq., *Analysis of H.4187, Employee Injury Benefit Plan Alternative, South Carolina General Assembly* (Oct. 5, 2015).

[40] Barber v. Pittsburgh Corning Corp., 555 A.2d 766 (Pa. 1989); Poyser v. Newman & Co., 522 A.2d 548 (Pa. 1987).

[41] Vosburg v. Connolly, 591 A.2d 1128 (Pa. Super. 1991) (*held*: employee was covered by the Act when, after having completed his work day, he was physically attacked by his employer (owner of small company) because of an allegation that he had shared a business confidence with a customer; thus, case against employer *qua* employer (and hence its insurance company) was dismissed summarily, though claim against co-employee boss could proceed).

[42] Thomas E. Martin. Jr., Esq., *Citing Magna Carta – The Validity of the Great Charter in Pennsylvania Today*, 86 PENNSYLVANIA BAR ASSOCIATION QUARTERLY 105 (July 2015). The Pennsylvania Constitution, at Article I, Section 11, states, "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay…."

other states. An opt-out feature which abolishes workers' compensation, yet forecloses a tort suit, rounds afoul of such provisions.

This was the Oregon experience in a different context. There, the workers' compensation statute was amended to abolish recovery for injuries where work causation was not the predominate causal factor. Employers argued that when such workers' compensation claims were dismissed by ALJ's as non-cognizable, they still possessed the protection of the exclusive remedy. The Oregon Supreme Court, however, rejected this position. It interpreted the state's open courts proviso so that an employee was to have a right and remedy in one court or another.[44]

This writer has always believed that the Pennsylvania Supreme Court would rule in the same manner.[45] The Pennsylvania Supreme Court, faced with an Oklahoma-style opt-out, and provision of Oklahoma-style benefits, would reject the same as a cognizable remedy and would allow civil suits against Pennsylvania employers.

It is here, in any event, that the opt-out concept of work accident injury recovery as just another employee benefit, to be manipulated and/or pared off at will, collides with constitutional precepts of access to justice.

B. The second challenge, at least in Pennsylvania, is whether a private Oklahoma-style plan that pays minimal benefits reflects "reasonable compensation." In this regard, the Pennsylvania Constitution was amended in 1915 to allow the legislature to enact laws that limit "damages," to the extent a workers' compensation law might be enacted that provided for "reasonable compensation." This proviso, Article III, Section 18,[46] was tested in the late 1930's, in a case where the Supreme Court declared unconstitutional, as unreasonable, the liberal amendments to the law that dramatically raised benefit levels and seemed to foreshadow a significant corresponding increase in

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[43] The Oklahoma Constitution provides: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

[44] Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Oregon 2001).

[45] DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 10:17 (Thomson Reuters/West 3rd ed. 2008).

[46] This proviso of the Pennsylvania Constitution states: "The General Assembly may enact laws requiring the payment of the employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and fixing the basis of ascertaining of such compensation and the maximum and the minimum limits thereof, and providing special or general remedies for the collection thereof …."

premiums.[47] The restrictive Oklahoma and Texas opt-out plan benefits, were they authorized in Pennsylvania, would seemingly run afoul of this constitutional proviso.[48]

C. The third challenge surrounds due process. Critics of opt-out legislation have correctly identified that lack of impartiality is apparent in the manner in which opt-out plans handle disputes. Such plans typically feature disputes being addressed by panels which the employer or plan have themselves established, and the Oklahoma system never allows the worker to speak and be heard – any appeal is in writing. An appeal may eventually be taken to the Commission or its ALJ, and in that forum, "The Commission shall rely on the record established by the internal appeal process and use an objective standard of review that is not arbitrary or capricious. Any award by the administrative law judge or Commission shall be limited to benefits payable under the terms of the benefit plan …."[49]

A major question exists with regard to whether this process constitutes a "hearing" under precepts of state and federal law. Whatever else is true, the abolition of the injured worker's access to dispute resolution in an administrative law court, heretofore thought to be required in the event of dispute resolution, is a marked departure from familiar principles of due process and an individual's access to justice.

The denial of the right to be heard in the face of denial of a property right will be challenged in any state where opt-out is enacted which features such a marked departure. This writer predicts that in Pennsylvania, the denial of an opt-out-governed employee to access the Workers' Compensation Office of Adjudication for an impartial hearing will be declared unconstitutional by Pennsylvania courts. This writer also predicts that no proviso *mandating* that a worker accept a settlement, lest he lose all benefits, will ever be permitted in Pennsylvania.

Advocacy for opt-out is inevitably paired with advice that there will be less litigation.[50] But it is here, too, that the opt-out concept of work accident injury recovery as just another employee benefit collides with constitutional precepts of access to justice.

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[47] This case was Rich Hill Coal Co. v. Bashore, 7 A.2d 302 (Pa. 1939). *See* DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 1:41 (Thomson Reuters/West 3rd ed. 2008).

[48] As constitutional precepts have changed over the decades, however, it is unclear how the Pennsylvania Supreme Court would treat this proviso in the face of a restrictive opt-out. While the Pennsylvania Constitution was amended to allow for a mandatory law, more recent cases have simply said that the legislature has the power to enact a workers' compensation law under the police powers of the state – a much more broad authority.

[49] 85A OKLAHOMA STATUTES § 211(b)(6). The phraseology, "an objective standard of review that is not arbitrary or capricious," is non-standard.

[50] Bill Minick, *Debunking Opt-out Myths (Part 5)*, Oct. 5, 2015, available at http://insurancethoughtleadership.com/debunking-opt-out-myths-part-5/ (last visited Oct. 25, 2015).

The opt-out proponents have in fact *moved beyond* the idea of "rights" and "due process." In an astonishing act of reductionism, the activity of lawyers in the work accident realm, and the proceedings of workers' compensation adjudication, is conceptualized as mere "bureaucracy." A statement on the ARAWC website is telling. Opt-out plans "eliminate the need for volumes of statutes, regulations, and litigated decisions that often focus too little on employee protections and accountability, and too much on the protections of lawyers and a minority of self-interested providers."

5. ***Opt out removes agency regulation of system performance.*** A properly functioning workers' compensation agency has oversight responsibilities with regard to system performance. Agencies monitor employers and carriers, for example, to determine whether claims are accepted or denied on a timely basis, whether they are providing correct information to workers, and whether payments are being made timely. Further, modern workers' compensation agencies monitor employer insurance status and undertake enforcement to ensure that employers are in fact insured and that workers are not misclassified. Many agencies, like that of Pennsylvania, have safety divisions which proactively encourage workplace safety.

An opt-out bill, by design, will remove employers which opt out from this valuable oversight. Opt-out proponents may reject such efforts as mere bureaucracy, but it reflects governmental pro-activity that has been found to be of value for decades. Its rejection is radical.

6. ***Opt-out will increase cost-shifting.*** The advent of the Medicare Set Aside reflects the federal government's reasonable concern that the costs of work injuries are too often shifted away from workers' compensation and onto Medicare. A recent study has also suggested that workers' compensation laws that restrict the concept of injury cause a transfer of work injury disability costs onto the Social Security Disability (SSD) system.[51]

This cost-shifting is discernible on a daily basis in litigated workers' compensation cases. A scenario this writer regularly observes is the lawyers scrambling to compromise-settle in an accepted case where, because of the work injury, the worker has become entitled to SSD but is not yet Medicare eligible. Under this device, the full costs of the work injury disability are shifted, after two or three years, to SSD; and the parties escape the obligation to set aside, in the interests of Medicare, a portion of the lump sum for medical treatment expenses.

Other cost shifting exists as well. Many of the working poor whose claims are denied end up having their medical bills paid by Medicaid. When no coverage at all can

[51] This study is discussed in Lidia DePillis, *We've tried to smooth disabled peoples' path back to work. Why isn't it helping?: An essential safety net program is still a barrier, not a gateway, to employment*, WASHINGTON POST (Oct. 23, 2015), available at http://www.washingtonpost.com/news/wonkblog/wp/2015/10/23/after-years-of-trying-to-make-it-easier-for-disabled-people-to-go-back-to-work-its-as-hard-as-ever/(last visited Oct. 25, 2015).

be found, many physicians and hospitals saddled with unpaid bills, and hence the costs of work injuries are transferred to providers and society at large.

Opt-out will *exacerbate* this unsatisfactory situation. The draconian Oklahoma-type plan that erects technical defenses in order to deny meritorious claims, and which penalizes workers with forfeiture for alleged non-compliance with treatment programs, will throw many workers off the private plan rolls and presumably onto Medicare, SSD, Medicaid, providers, and the taxpayers. Texas-style plans are even worse, as they can and do limit which injuries and diseases are covered. Cost-shifting in such cases follow as if by design.

7. ***Opt-out may threaten state regulation of workers' compensation.*** Workers' compensation has famously remained a system, like many insurance programs, that is regulated by the states. Though a lobby has always existed for federalization or federal standards,[52] the better view is that the states are best equipped and positioned to run workers' compensation. Confident of this view, most states responded in varying disagrees to the 1972 National Commission demands that programs be updated, as to benefits and procedures, so as to bring benefit levels up from poverty levels. In critical part because of this response, the federalization movement was thwarted.

Opt-out, however, is the ultimate *backslide*, and its enactment evidence that a state is not best equipped and positioned to run workers' compensation. To the contrary, the legislature of an opt-out state has intentionally lost its grip on the program, and it has exhibited to Congress proof positive of its lack of fitness to deliver social insurance benefits. It is difficult to imagine a more open invitation for renewed interest in federal control.[53]

By coincidence, as this paper is being prepared, several members of Congress approached the U.S. Labor Department with their concerns about both retractive workers' compensation programs and its ultimate retraction – the opt-out legislation. These legislators, in an October 20, 2015 letter,[54] called for increased federal oversight of state programs.

8. ***Opt-out disregards vocational rehabilitation***. The National Commission viewed vocational rehabilitation of the permanently injured worker to be an employer

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[52] *See* David B. Torrey, *Attempts at Federalization and Federal Standards for Workers' Compensation: A Short History* (ABA 2013), available at www.davetorrey.info.

[53] *See Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System* (Mar. 9, 2015).

[54] *See* http://www.help.senate.gov/imo/media/doc/Letter%20to%20DOL%20re%20workers%20comp%2010-20-15.pdf (last visited Oct. 26, 2015).

responsibility under state workers' compensation laws.[55] As far as this writer can tell, provision of this benefit is not within the contemplation of an opt-out plan. To be sure, vocational rehabilitation is a benefit on the wane among states, but opt-out fails even to give this worthy benefit lip-service.

9. ***Opt-out is inconsistent with First World Standards***. England, France, and Germany all adopted workers' compensation in the decades before the United States. They did so for the same reasons as did U.S. states, and most laws were in fact modeled on that of England.[56] Japan, meanwhile, has always had a workers' compensation system, and a robust one since World War II.[57]

Of course, European countries have broadened their social welfare programs over the decades, but workers' compensation is still mandatory, still based on no-fault, still viewed as a matter of social justice, and still thought to promote safety. Workers' compensation is, in short, a benefit of the First World. To this writer's knowledge, no developed country allows employers to opt out, generate their own plans, and be free of tort liability. A jurisdiction which allows opt out exhibits it unwillingness to abide by First World values.

## V. Conclusion

One journalist, in a column about Maine workers' compensation, complained bitterly that "inertia" and "vested interests" will slow the purported innovation of opt-out legislation.[58] "Inertia," however, implies that some *positive* goal is being thwarted. Opt-out, however, is retractive and a step backwards. And opt-out isn't innovative in any sense. It no doubt saves money for employers who have the ability to opt out, but it robs workers of benefits, access to the courts, and justice on several levels.

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[55] *See* David B. Torrey, *The Common Law of Partial Disability and Vocational Rehabilitation Under the Pennsylvania Workmen's Compensation Act: Kachinski and the Availability of Work Doctrine*, 30 DUQUESNE LAW REVIEW 515, 521-22 (1992). *See generally* Gregory T. Presmanes, *Workers' Compensation, Return to Work, and Use of Light Duty Work Offers: An Overview of Programs Throughout the United States*, 50 TORT TRIAL & INSURANCE PRACTICE LAW JOURNAL 781 (2015).

[56] KEN OLIPHANT & GERHARD WAGNER, EDS., EMPLOYERS' LIABILITY AND WORKERS' COMPENSATION (De Gruyter/European Centre of Tort and Insurance Law 2012). *See* https://books.google.com/books?id=vaGJ-N7pyEUC&printsec=frontcover#v=onepage&q&f=false (last visited Oct. 25, 2015).

[57] David B. Torrey, [*Workers' Compensation in] Japan*, PBA WORKERS' COMPENSATION LAW SECTION NEWSLETTER, Vol. VII, No. 123, pp.27-31 (Oct. 2015).

[58] Peter Rousmaniere, *PFR Maine: Simplest Chance for Major System Redesign?* (Sep. 28, 2015), available at https://www.workcompcentral.com/columns/show/id/91a2c996d0af6f0327fb93ee465e7fbf879461de (last visited Oct. 25, 2015) ("initiatives to radically change the 100-year-old workers' compensation system are growing, despite the daunting state legislative barriers of status quo defenders and inertia.")

As for vested interests, it's true that workers' compensation lobbies have long thwarted positive reform[59] – but in this instance those interests happen to be right in their opposition to opt-out.

So is this writer defending the status quo? Yes. In the present context, it is submitted that the corrective to a workers' compensation system that is believed to be unfair, unreasonably costly, or excessively bureaucratic is not to allow some employers to escape it, but to improve the system for the benefit of all.

[59] *See, e.g.*, CHRISTOPHER HOWARD, THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY (Princeton University Press 2007).

## APPENDIX A

## FULL-TEXT, OKLAHOMA EMPLOYEE INJURY BENEFIT ACT TITLE 85A, OKLAHOMA STATUTES

§ 200. Short title--Oklahoma Employee Injury Benefit Act

Sections 107 through 120 of this act shall be known and may be cited as the "Oklahoma Employee Injury Benefit Act".

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§ 201. Definitions

A. As used in the Oklahoma Employee Injury Benefit Act:

1. "Benefit plan" means a plan established by a qualified employer under the requirements of Section 110 of this act;

2. "Commission" means the Workers' Compensation Commission under the Administrative Workers' Compensation Act;

3. "Commissioner" means the Insurance Commissioner of the State of Oklahoma;

4. "Covered employee" means an employee whose employment with a qualified employer is principally located within the state;

5. "Employee" means any person defined as an employee pursuant to Section 2 of this act;

6. "Employer", except when otherwise expressly stated, means a person, partnership, association, limited liability company, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association, corporation, or limited liability company, department, instrumentality or institution of this state and divisions thereof, counties and divisions thereof and other political subdivisions of this state and public trusts employing a person included within the term employee as defined in this section;

7. "Occupational injury" means an injury, including death, or occupational illness, causing internal or external harm to the body, which arises out of and in the course of employment;

8. "Qualified employer" means an employer otherwise subject to the Administrative Workers' Compensation Act that voluntarily elects to be exempt from such act by satisfying the requirements under this act; and

9. "Surviving spouse" means the employee's spouse by reason of a legal marriage recognized by the State of Oklahoma or under the requirements of a common law marriage in this state.

B. Unless otherwise defined in this section, defined terms in the Administrative Workers' Compensation Act shall have the same meaning in this act.

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§ 202. Voluntary election--Qualified employer status

A. Any employer may voluntarily elect to be exempt from the Administrative Workers' Compensation Act and become a qualified employer if the employer:

1. Is in compliance with the notice requirements in subsections B and H of this section; and

2. Has established a written benefit plan as described in Section 110 of this act.

B. An employer that has elected to become a qualified employer by satisfying the requirements of this section shall notify the Insurance Commissioner in writing of the election and the date that the election is to become effective, which may not be sooner than the date that the qualified employer satisfies the employee notice requirements in this section. Such qualified employer shall pay to the Commissioner an annual nonrefundable fee of One Thousand Five Hundred Dollars ($ 1,500.00) on the date of filing written notice and every year thereafter.

C. The Commissioner shall collect and maintain the information required under this section and shall monitor compliance with the requirements of this section. The Commissioner may also require an employer to confirm its qualified-employer status. Subject to subsection D of this section, the Commissioner shall adopt rules designating the methods and procedures for confirming whether an employer is a qualified employer, notifying an employer of any qualifying deficiencies, and the consequences thereof. The Commissioner shall record the date and time each notice of qualified-employer status is received and the effective date of qualified-employer election. The Commissioner shall maintain a list on its official website accessible by the public of all qualified employers and the date and time such exemption became effective.

D. Except as otherwise expressly provided in this act, neither the Workers' Compensation Commission, the courts of this state, or any state administrative agencies shall promulgate rules or any procedures related to design, documentation, implementation, administration or funding of a qualified employer's benefit plan.

E. The Commissioner may designate an information collection agent, implement an electronic reporting and public information access program, and adopt rules as necessary to implement the information collection requirements of this section.

F. The Commissioner may prescribe rules and forms to be used for the qualified-employer notification and shall require the qualified employer to provide its name, address, contact person and phone number, federal tax identification number, number of persons employed in this state as of a specified date, claim administration contact information, and a listing of all covered business locations in the state. The Commissioner shall notify the Commissioner of Labor of all qualified-employer notifications. The Department of Labor shall provide such notifications to other governmental agencies as it deems necessary.

G. The Commissioner may contract with the Oklahoma Employment Security Commission, the State Treasurer or the Department of Labor for assistance in collecting the notification required under this section or otherwise fulfilling the Commissioner's responsibilities under this act. Such agencies shall cooperate with the Commissioner in enforcing the provisions of this section.

H. A qualified employer shall notify each of its employees in the manner provided in this section that it is a qualified employer, that it does not carry workers' compensation insurance coverage and that such coverage has terminated or been cancelled.

I. The qualified employer shall provide written notification to employees as required by this section at the time the employee is hired or at the time of designation as a qualified employer. The qualified employer shall post the employee notification required by this section at conspicuous locations at the qualified employer's places of business as necessary to provide reasonable notice to all employees. The Commissioner may adopt rules relating to the form, content, and method of delivery of the employee notification required by this section.

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§ 203. Written benefit plan

A. An employer voluntarily electing to become a qualified employer shall adopt a written benefit plan that complies with the requirements of this section. Qualified-employer status is optional for eligible employers. The benefit plan shall not become effective until the date that the qualified employer first satisfies the notice requirements in Section 109 of this act.

B. The benefit plan shall provide for payment of the same forms of benefits included in the Administrative Workers' Compensation Act for temporary total disability, temporary partial disability, permanent partial disability, vocational rehabilitation, permanent total disability, disfigurement, amputation or permanent total loss of use of a scheduled member, death and medical benefits as a result of an occupational injury, on a no-fault basis, with the same statute of limitations, and with dollar, percentage, and duration limits that are at least equal to or greater than the dollar, percentage, and duration limits contained in Sections 45, 46 and 47 of this act. For this purpose, the standards for

determination of average weekly wage, death beneficiaries, and disability under the Administrative Workers' Compensation Act shall apply under the Oklahoma Employee Injury Benefit Act; but no other provision of the Administrative Workers' Compensation Act defining covered injuries, medical management, dispute resolution or other process, funding, notices or penalties shall apply or otherwise be controlling under the Oklahoma Employee Injury Benefit Act, unless expressly incorporated.

C. The benefit plan may provide for lump-sum payouts that are, as reasonably determined by the administrator of such plan appointed by the qualified employer, actuarially equivalent to expected future payments. The benefit plan may also provide for settlement agreements; provided, however, any settlement agreement by a covered employee shall be voluntary, entered into not earlier than the tenth business day after the date of the initial report of injury, and signed after the covered employee has received a medical evaluation from a nonemergency care doctor, with any waiver of rights being conspicuous and on the face of the agreement. The benefit plan shall pay benefits without regard to whether the covered employee, the qualified employer, or a third party caused the occupational injury; and provided further, that the benefit plan shall provide eligibility to participate in and provide the same forms and levels of benefits to all Oklahoma employees of the qualified employer. The Administrative Workers' Compensation Act shall not define, restrict, expand or otherwise apply to a benefit plan.

D. No fee or cost to an employee shall apply to a qualified employer's benefit plan.

E. The qualified employer shall provide to the Commissioner and covered employees notice of the name, title, address, and telephone number for the person to contact for injury benefit claims administration, whether in-house at the qualified employer or a third-party administrator.

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§ 204. Securing compensation

A. A qualified employer may self-fund or insure benefits payable under the benefit plan, employers' liability under this act, and any other insurable risk related to its status as a qualified employer with any insurance carrier authorized to do business in this state.

B. Insurance coverage or surety bond obtained by a qualified employer shall be from an admitted or surplus lines insurer with an AM Best Rating of B+ or better. The Insurance Department has no duty to approve insurance rates charged for this coverage. A qualified employer shall secure compensation to covered employees in one of the following ways:

1. Obtaining accidental insurance coverage in an amount equal to the compensation obligation;

2. Furnishing satisfactory proof to the Commissioner of the employer's financial ability to pay the compensation. The Commissioner, under rules adopted by the Insurance

Department or the Commissioner for an individual self-insured employer, shall require an employer that has:

a. less than one hundred employees or less than One Million Dollars ($ 1,000,000.00) in net assets to:

(1) deposit with the Commissioner securities, an irrevocable letter of credit or a surety bond payable to the state, in an amount determined by the Commissioner which shall be at least an average of the yearly claims for the last three (3) years, or

(2) provide proof of excess coverage with such terms and conditions as is commensurate with their ability to pay the benefits required by the provisions of this act,

b. one hundred or more employees and One Million Dollars ($ 1,000,000.00) or more in net assets to:

(1) secure a surety bond payable to the state, or an irrevocable letter of credit, in an amount determined by the Commissioner which shall be at least an average of the yearly claims for the last three (3) years, or

(2) provide proof of excess coverage with such terms and conditions as is commensurate with their ability to pay the benefits required by the provisions of this act; or

3. Any other security as may be approved by the Commissioner.

C. The Commissioner may waive the requirements of this section in an amount which is commensurate with the ability of the employer to pay the benefits required by the provisions of this act. Irrevocable letters of credit required by this section shall contain such terms as may be prescribed by the Commissioner and shall be issued for the benefit of the state by a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation.

D. An employer who does not fulfill the requirements of this section is not relieved of the obligation for compensation to a covered employee. The security required under this section, including any interest thereon, shall be maintained by the Commissioner as provided in this act until each claim for benefits is paid, settled, or lapses under this act, and costs of administration of such claims are paid.

E. Any bond shall be filed and held by the Commissioner and shall be for the exclusive benefit of any covered employee of a qualified employer.

F. Any security held by the Commissioner may be used to make a payment to or on behalf of a covered employee provided the following requirements are met:

1. The covered employee sustained an occupational injury that is covered by the qualified employer's benefit plan;

2. The covered employee's claim for payment of a specific medical or wage replacement benefit amount has been accepted by the plan administrator of the benefit plan or acknowledged in a final judgment or court order assessing a specific dollar figure for benefits payable under the benefit plan;

3. The covered employee is unable to receive payment from the benefit plan or collect on such judgment or court order because the qualified employer has filed for bankruptcy or the benefit plan has become insolvent; and

4. The covered employee is listed as an unsecured creditor of the qualified employer because of the acceptance of such claim by the plan administrator of the benefit plan or judgment or court order assessing a specific dollar figure for benefits payable under the benefit plan.

G. The Commissioner shall promulgate rules to carry out the provisions of this section including those establishing the procedure by which a covered employee may request and receive payment from the security held by the Commissioner.

H. The benefit plan may provide some level of benefits for sickness, injury or death not due to an occupational injury.

I. A qualified employer shall hold harmless any insurance agent or broker who sold the employer a benefits program compliant with the Oklahoma Employee Injury Benefit Act if the qualified employer is sued in district court for an injury arising in the course and scope of employment.

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§ 205. Oklahoma Option Insured Guaranty Fund--Oklahoma Option Self-insured Guaranty Fund

A. There are established within the Office of the State Treasurer two separate funds:

1. The Oklahoma Option Insured Guaranty Fund; and

2. The Oklahoma Option Self-insured Guaranty Fund.

B. The funds established pursuant to subsection A of this section shall be for the purpose of continuation of benefits under this act for covered claims that are due and unpaid or interrupted due to the inability of the insurer or sponsor of a self-insured plan,

as applicable, to meet its compensation obligations because its financial resources, security deposit, guaranty agreements, surety agreements and excess insurance are either inadequate or not immediately accessible for the payment of benefits. Monies in such funds, including interest, are not subject to appropriation and shall be expended to compensate employees for eligible benefits for a compensable injury under this act, pay outstanding workers' compensation obligations of the impaired insurer, and for all claims for related administrative fees, operating costs, attorney fees, and other costs reasonably incurred by the Oklahoma Property and Casualty Guaranty Association in the performance of its duties under this act. Expenditures from such funds shall be made on warrants issued by the State Treasurer against claims as prescribed by law. Such funds shall be subject to audit the same as state funds and accounts, the cost for which shall be paid for from the funds. A "covered claim" has the meaning given to it pursuant to paragraph 7 of Section 2004 of Title 36 of the Oklahoma Statutes.

C. The funds established under this section shall be administered, disbursed, and invested under the direction of the Oklahoma Property and Casualty Insurance Guaranty Association established by Section 2005 of Title 36 of the Oklahoma Statutes.

D. The funds established under this section shall be funded from the following sources:

1. Insured Guaranty Fund:

Until the Insured Guaranty Fund contains Two Million Dollars ($ 2,000,000.00) or if the amount in the fund falls below One Million Dollars ($ 1,000,000.00), each insurer shall be assessed a fee equal to two percent (2%) of all gross direct premiums written during each quarter of the calendar year for insurance covering a benefit plan under this act after deducting from such gross direct premiums, return premiums, unabsorbed portions of any deposit premiums, policy dividends, safety refunds, savings and other similar returns paid or credited to policyholders. The assessment shall be paid to the Insured Guaranty Fund, care of the Commission, no later than the fifteenth day of the month following the close of each quarter of the calendar year in which the gross direct premium is collected or collectible. No insurer may be assessed in any year an amount greater than two percent (2%) of the net direct written premiums of that insurer or one percent (1%) of that surplus of the insurer as regards policyholders for the calendar year preceding the assessment on the kinds of insurance in the account, whichever is less; and

2. Self-insured Guaranty Fund:

Until the Self-insured Guaranty Fund contains One Million Dollars ($ 1,000,000.00) or if the amount in the fund falls below Seven Hundred Fifty Thousand Dollars ($ 750,000.00), each self-insurer shall be assessed a fee at the rate of one percent (1%) of the total compensation for permanent partial disability awards paid out during each quarter of the calendar year by the employers. The fee shall be paid to the Self-insured Guaranty Fund, care of the Commission, no later than the fifteenth day of the month following the close of each quarter of the calendar year. The fee shall be determined using a rate equal to the proportion that the deficiency in the fund attributable to self-

insurers bears to the actual paid losses of all self-insurers for the preceding calendar year. Each self-insurer shall provide the Commission with the information necessary to determine the amount of the fee to be assessed.

E. The Guaranty Association shall create a separate account for each fund which may not be commingled with any other account managed by the Guaranty Association.

F. On determination by the Commission that a self-insurer has become an impaired insurer, the Commission shall release the security required by paragraph 2 of subsection B of Section 111 of this act and advise the Guaranty Association of the impairment. Claims administration, including processing, investigating and paying valid claims against an impaired self-insurer under this act, may include payment by the surety that issued the surety bond or be under a contract between the Commission and an insurance carrier, appropriate state governmental entity or an approved service organization.

G. The Guaranty Association shall be a party in interest in all proceedings involving any claims for benefits under this act with respect to an impaired insurer and shall have all rights of subrogation of the impaired insurer. In those proceedings, the Guaranty Association may assume and exercise all rights and defenses of the impaired insurer, including, but not limited to, the right to:

1. Appear, defend and appeal claims;

2. Receive notice of, investigate, adjust, compromise, settle and pay claims; and

3. Investigate, handle and contest claims.

H. The Guaranty Association may also:

1. Retain persons necessary to handle claims and perform other duties of the Guaranty Association;

2. Sue or be sued;

3. Negotiate and become a party to such contracts as are necessary to carry out the purposes of this act; and

4. Exercise any other powers necessary to perform its duties under this act.

I. No monies deposited to the funds shall be subject to any deduction, tax, levy or any other type of assessment.

J. An impaired self-insurer shall be exempt from assessments until it is no longer impaired.

K. Unless provided otherwise in this act, all fines and penalties assessed under this act shall be paid to the Commission for deposit into the funds established in this section in equal amounts.

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§ 206. Annual fee--Assessments

A. In addition to the premium or surplus lines taxes collected from carriers, the carriers shall pay annually to the Workers' Compensation Commission a fee, at the rate to be determined as provided in Section 115 of this act but not to exceed three percent (3%), on all written premiums resulting from the writing of insurance under this act on risks within the state.

B. The fee required pursuant to subsection A of this section shall be collected by the Workers' Compensation Commission from the carriers at the same time and in the same manner as insurance premium taxes under Title 36 of the Oklahoma Statutes and deposited into the Oklahoma Option Insured Guaranty Fund.

C. 1. Assessments on which premium taxes are based shall be made on forms prescribed by the Commission and shall be paid to the Commission.

2. Absent a waiver obtained from the Commission for good cause, the failure of the carrier to pay the assessment when due shall be referred to the Commissioner for appropriate administrative action against the Oklahoma certificate of authority of the delinquent insurer.

D. Payments shall be made by check payable to the Commission.

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§ 207. Collection of fee--Penalty

A. It shall be the duty of the Workers' Compensation Commission to collect a fee from every self-insured employer at a rate to be determined as provided by Section 115 of this act but not to exceed three percent (3%) of the written premium which would have to be paid under Section 113 of this act by a carrier if the self-insured employer were insured by a carrier.

B. If the fee provided for under this section is not paid within thirty (30) days of the date provided in Section 115 of this act, there shall be assessed a penalty for each thirty (30) days the amount so assessed remains unpaid which is equal to ten percent (10%) of the unpaid amounts and which shall be collected at the same time as a part of the fee assessed.

§ 208. Workers' Compensation Commission determinations

A. 1. The Workers' Compensation Commission, on or before December 31 of each year, shall determine the surplus, if any, in the Oklahoma Option Insured Guaranty Fund, together with the additional amounts necessary to properly administer this act for the ensuing year.

2. The Commission shall determine the rate of assessment for collections for that year on or before March 1 of the following year.

B. 1. The Commission shall notify each insurance carrier of the rate of assessment applicable to the Oklahoma Option Insured Guaranty Fund for the preceding year, and fees shall be computed and paid under the provisions of subsection B of Section 113 of this act on or before April 1 of the following year.

2. The Commission shall notify each self-insured employer subject to the fee of the rate of assessment applicable to the Oklahoma Option Self-insured Fund for the preceding year, and fees shall be computed by the Commission and paid to the Oklahoma Option Self-insured Guaranty Fund by the self-insurer through payments made directly to the Workers' Compensation Commission on or before April 1 of the following year.

C. The Commission shall have the authority to promulgate rules for administration of the assessment and fee collection process, including, but not limited to, rules applicable to the funds established in Section 112 of this act.

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§ 209. Qualified employer's liability

A. A qualified employer's liability under the benefit plan and otherwise prescribed in this act shall be exclusive and in place of all other liability of the qualified employer and any of its employees at common law or otherwise, for a covered employee's occupational injury or loss of services, to the covered employee, or the spouse, personal representative, parents, or dependents of the covered employee, or any other person. The exclusive remedy protections provided by this subsection shall be as broad as the exclusive remedy protections of Section 5 of this act, and thus preclude a covered employee's claim against a qualified employer, its employees, and insurer for negligence or other causes of action.

B. Except as otherwise provided by its benefit plan, or applicable federal law, a qualified employer is only subject to liability in any action brought by a covered employee or his or her dependent family members for injury resulting from an occupational injury if the injury is the result of an intentional tort on the part of the qualified employer. An intentional tort shall exist only when the covered employee is injured because of willful, deliberate, specific intent of the qualified employer to cause such injury. Allegations or proof that the qualified employer had knowledge that such injury was substantially certain to result from its conduct shall not constitute an

intentional tort. The issue of whether an act is an intentional tort shall be a question of law for the court or the duly appointed arbitrator, as applicable.

C. If an employee tests positive for intoxication, use of an illegal controlled substance, or a legal controlled substance that is used in contravention with a treating physician's orders within twenty-four (24) hours of being injured or reporting an injury, he or she shall not be eligible to receive benefits under a qualified employer's benefit plan. In order to retain exclusive remedy and enjoy immunity from common law negligence claims, an employee shall be entitled to receive benefits under a qualified employer's benefit plan if the employee can prove by a preponderance of the evidence that the acts described by this section were not the major cause of an injury.

D. Any benefits paid under a qualified employer's benefit plan shall offset any other award against such qualified employer under subsection B of this section.

E. Other than an action brought to enforce the provisions of the benefit plan, any action brought by a covered employee or his or her spouse, personal representative, parents, or dependents based on a claim against a qualified employer arising out of any occupational injury shall be filed no later than two (2) years from the date of the injury or death giving rise to such action.

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§ 210. Compliance with federal law--Damages--Attorney fees

A. A qualified employer or its insurers or other payment sources shall be responsible for:

1. Compliance with any applicable federal law regarding the administration of the plan and claims for benefits under such plan;

2. Any damage awarded against the qualified employer for intentional tort under Section 116 of this act, including any pre- and post-judgment interest on the award and reasonable court costs as may be lawfully awarded in the action; and

3. Reasonable attorney fees awarded against a qualified employer under Section 116 of this act; provided, however, that an employee's attorney fees that are contingent on a recovery under the terms of the benefit plan shall be payable by a qualified employer as part of and not in addition to such recovery. An award of attorney fees in favor of a covered employee against a qualified employer on a claim for intentional tort, excluding death, shall be limited to no more than twenty percent (20%) of any lost earnings awarded to the covered employee or his or her spouse, personal representative, parents, or dependents of the covered employee under the benefit plan and such award. Nothing in this paragraph shall be construed to restrict an award of fees and costs made under federal law.

B. An employer who is not a qualified employer shall comply with the provisions of the Administrative Workers' Compensation Act.

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§ 211. Denial of claim--Appeal rights

A. If an employer denies a claimant's claim for benefits under this act, the employer shall notify him or her in writing of the decision or the need for additional information within fifteen (15) days after receipt of the claim. Unless otherwise provided by law, the adverse benefit determination letter shall contain an explanation of why the claim was denied, including the plan provisions that were the basis for the denial, and a detailed description of how to appeal the determination. Additional claim procedures consistent with this section may be specified in the benefit plan.

B. The benefit plan shall provide the following minimum appeal rights:

1. The claimant may appeal in writing an initial adverse benefit determination to an appeals committee within one hundred eighty (180) days following his or her receipt of the adverse benefit determination. The appeal shall be heard by a committee consisting of at least three people that were not involved in the original adverse benefit determination. The appeals committee shall not give any deference to the claimant's initial adverse benefit determination in its review;

2. The committee may request any additional information it deems necessary to make a decision, including having the claimant submit to a medical exam;

3. The committee shall notify the claimant in writing of its decision, including an explanation of the decision and his or her right to judicial review;

4. Subject to the need for a reasonable extension of time due to matters beyond the control of the benefit plan, the committee shall review the determination and issue a decision no later than forty-five (45) days from the date the notice of contest is received. No legal action may be brought by or with respect to a claimant to recover benefits under the benefit plan before the foregoing claim procedures have been exhausted;

5. If any part of an adverse benefit determination is upheld by the committee, the claimant may then file a petition for review with the Commission sitting en banc within one (1) year after the date the claimant receives notice that the adverse benefit determination, or part thereof, was upheld. The Commission en banc shall act as the court of competent jurisdiction under 29 U.S.C.A. Section 1132(e)(1), and shall possess adjudicative authority to render decisions in individual proceedings by claimants to recover benefits due to the claimant under the terms of the claimant's plan, to enforce the claimant's rights under the terms of the plan, or to clarify the claimant's rights to future benefits under the terms of the plan;

6. The Commission shall rely on the record established by the internal appeal process and use an objective standard of review that is not arbitrary or capricious. Any award by the administrative law judge or Commission shall be limited to benefits payable under the terms of the benefit plan and, to the extent provided herein, attorney fees and costs; and

7. If the claimant appeals to the Commission and any part of the adverse benefit determination is upheld, he or she may appeal to the Oklahoma Supreme Court by filing with the Clerk of the Supreme Court a certified copy of the decision of the Commission attached to a petition which shall specify why the decision is contrary to law within twenty (20) days of the decision being issued. The Supreme Court may modify, reverse, remand for rehearing, or set aside the decision only if the decision was contrary to law.

The Supreme Court shall require the claimant to file within forty-five (45) days from the date of the filing of an appeal a transcript of the record of the proceedings before the Commission, or such later time as may be granted by the Supreme Court on application and for good cause shown. The action shall be subject to the law and practice applicable to comparable civil actions cognizable in the Supreme Court.

C. If any of the provisions in paragraphs 5 through 7 of subsection B of this section are determined to be unconstitutional or otherwise unenforceable by the final nonappealable ruling of a court of competent jurisdiction, then the following minimal appeal procedures will go into effect:

1. The appeal shall be heard by a committee consisting of at least three people that were not involved in the original adverse benefit determination. The appeals committee shall not give any deference to the claimant's initial adverse benefit determination in its review;

2. The committee may request any additional information it deems necessary to make a decision, including having the claimant submit to a medical exam;

3. The committee shall notify the claimant in writing of its decision, including an explanation of the decision and his or her right to judicial review;

4. The committee shall review the determination and issue a decision no later than forty-five (45) days from the date the notice of contest is received;

5. If any part of an adverse benefit determination is upheld by the committee, the claimant may then file a petition for review in a proper state district court; and

6. The district court shall rely on the record established by the internal appeal process and use a deferential standard of review.

D. The provisions of this section shall apply to the extent not inconsistent with or preempted by any other applicable law or rule.

E. All intentional tort or other employers' liability claims may proceed through the appropriate state courts of Oklahoma, mediation, arbitration, or any other form of alternative dispute resolution or settlement process available by law.

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§ 212. Liberal construction

This act shall be liberally construed to give the fullest effect of its provisions. Any conflict between this act and any other law shall be resolved in favor of the operation of this act.

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§ 213. Constitutionality of act

A. In any action brought to challenge, in whole or in part, the constitutionality of this act, any party to such action may take a direct appeal from the decision of any lower court to the Supreme Court and the Supreme Court shall retain the appeal. The Supreme Court on an expedited basis shall consider any such appeal.

B. To the extent this act, or any part thereof, is declared to be unconstitutional or unenforceable, it is specifically intended that:

1. For partial invalidity of this act, where any section of this act is ruled to be unconstitutional or invalid, the same shall not affect the validity of this act as a whole, or any part thereof other than the part so decided to be unconstitutional or invalid;

2. Any employer that became a qualified employer under this act shall not be deemed to have failed to secure workers' compensation insurance;

3. The rights and obligations of a qualified employer and its employees shall be subject to the exclusive remedy provisions of Section 5 of this act and an employer that becomes a qualified employer under this act shall be liable for injury to employees only to the extent to which an employer that complied with the provisions of the Administrative Workers' Compensation Act would be liable to employees in compensation for such injuries under the Administrative Workers' Compensation Act; and

4. A qualified employer shall have ninety (90) days from any final decision declaring this act or any part thereof unconstitutional to secure compliance with the Administrative Workers' Compensation Act.

## APPENDIX B

## STATEMENT OF THE AMERICAN INSURANCE ASSOCIATION[:] LEGISLATION PERMITTING EMPLOYER OPT-OUT OF THE TENNESSEE WORKERS' COMPENSATION SYSTEM

March 9, 2015

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Legislation (SB 721; Green) has been introduced permitting Tennessee employers to opt-out of the workers' compensation system, provided the employer secures alternative benefits meeting the minimum levels prescribed in the bill. AIA policy opposes opt-out, and we oppose this bill. Our opposition to SB 721 is not because the workers' compensation insurance industry is unable to develop products to provide coverage for employers that opt out, but because the workers' compensation system remains the optimal means of compensating workers injured in the workplace, and at a cost employers can afford.

Although AIA believes opt-out is a flawed approach and the particulars of S.B. 721 are especially problematic, we are mindful that it will not be in the final analysis up to the insurance industry whether opt-out is adopted. That decision rests with the principals of the workers' compensation system – employers and employees – along with state policymakers – the legislature and executive. We offer these comments in the hope our concerns help in guiding you to a well-informed decision.

SB 721 creates a system of separate but very unequal protections for injured workers that will put Tennessee employees – and businesses -- at risk. It creates incentives for employers to offer benefits that may be weak at best and illusory at worst, while leaving the employer vulnerable to unlimited liability in tort. Compounding the problem, the state of Tennessee may have no legal mechanism to assure that benefits to an injured worker are delivered timely and correctly; because of ERISA's preemption of "state laws relating to an employee benefit plan," should ERISA's preemption be held to apply, all the state can do is revoke the employer's right to opt-out for future claims. Although there are shortcomings in the Tennessee workers' compensation system which make it needlessly complicated for workers and needlessly expensive for employers, they should be addressed so that all Tennessee workers are guaranteed uniform protections if they are injured on the job. SB 721, however, takes the opposite approach and effectively throws the baby out with the bath water. It would give unscrupulous employers a "pass" on meeting their obligations under Tennessee's Workers' Compensation Act, to provide all reasonable and necessary medical treatment and a fair level of income support for lost wages.

The nation's workers' compensation system has been tested over many years, but states have risen to the challenge time and again, in state after state, to rebalance their

system financially and to ensure injured workers receive full, first-dollar medical treatment, without duration limitation, and income benefits to replace lost wages. Surely, every state's workers' compensation system is imperfect, some more so than others, and Tennessee's has faced its own challenges over the years.

Twenty-five years ago, the workers' compensation system faced a national financial crisis. In many states, benefit costs had exploded, beyond the ability or willingness of employers to pay for them. The result was an insurance crisis, as well, with residual markets in many states stressed, with a flight from voluntary markets. Tennessee was not exempt, and reforms critical to a rebalancing of the Tennessee workers' compensation system were enacted in 1994. In all of these system-stressed states, employers and insurers worked together, with legislatures and governors, to do the hard work of controlling costs while preserving protections for injured workers. And, it worked. By the mid-1990s, a renewed stability returned to our nation's workers' compensation system, a stability that has endured these many years.

All of that took hard work. But, through it all, no one suggested abandoning the workers' compensation system. No one threw up his hands and said "let's opt out." One great irony of the interest in opt-out is that it comes during a time of stability in the nation's workers' compensation system. Not that there aren't challenges, but no state is even close to a systemic dysfunction that many were 25 years ago. In Oklahoma, opt-out passed a mere two years after system cost-reduction reforms were enacted in 2011, and accompanied in 2013 by additional system cost-reductions and establishment of an administrative adjudicatory system, arguably the most important reform of all. In Tennessee, opt-out is now advocated a mere three years after comprehensive benefit delivery system reforms that also included establishing an administrative adjudicatory system, reforms that have not yet been fully implemented and the results of which will not be known for several years. In both states, employers are told, now that the hard work has been done to rebalance their workers' compensation systems, they should abandon them. Get out; pay even less. Don't hassle with a bureaucracy.

Yet, there are implications to opt-out involving questions of social policy that its advocates do not appear to have considered, let alone answered. And, they are being implored to toss aside a century-old construct, on the heels of a comprehensive reform of the benefit delivery system, to simply reduce costs – even beyond what is anticipated by the 2013 reforms. That is not just inadvisable. It borders on the reckless.

Our reasons for opposing opt-out mirror our opposition to legislation enacted in Oklahoma in 2013 permitting opt-out in that jurisdiction. We oppose SB 721, not only because it embodies opt-out but because we believe it is an uncommonly bad bill, one that makes no pretense of altering the century-long bargain between employers and employees, in its restructuring of benefits provided for workplace injuries. Oklahoma's opt-out regime requires an employer to provide an ersatz benefit plan ostensibly mirroring benefits available under the Oklahoma Workers' Compensation Act. Not so with SB 721, that eliminates an entire genre of benefits. Indeed, the bill's mandated plan benefits do not provide for any permanency benefits: No permanent partial or permanent

total benefits. It eliminates lifetime medical benefits, capping medical at $300,000, thereby jeopardizing treatment of workers with the most serious injuries. Nor are there funeral benefits, nor for ancillary benefits common in workers' compensation systems -- van and home modification, custodial care, hearing aids, and artificial limbs.

Even if the bill were amended to require benefit plans to reflect the benefits available under the workers' compensation system, there is no way to cure the bill's inherent flaws.

And although SB 721 states that benefits under opt-out plans are not considered taxable income for purposes of federal income tax, the determination of federal income tax exposure is not within the power of the state to decide.

Is an injury at work covered at all? The Workers' Compensation Act and years of case law from Tennessee judicial decisions define what is a compensable injury, what is encompassed within the compensation system. Not S.B. 721 – what is compensable is solely within the discretion of the employer. Coverage of medical expenses? Selecting medical providers? "Ending or continuing benefits, attempting dispute resolution; or other claims procedures, funding rules, notices, or penalties"? "The benefit plan may specify, and insurance carriers shall be permitted to compete on the basis of these and other conditions and limitations on benefits." So, what is covered and ultimately compensated is subject to the marketplace or the employer's whim.

In short, under SB 721 the design of the employee benefit plan is almost entirely within the province of the employer, who is authorized to make lump sum payments in its sole discretion. Nor, by design, is there any administrative oversight, resulting in a system with no checks. In fact, because the plan would be an ERISA plan, Tennessee risks having no legal authority whatsoever to protect Tennessee workers when they have a claim.

Proponents say, no worry, an employee retains the right to sue the employer, as if suing one's employer is a mark of an enlightened social insurance system. But, even this "right" is illusory. The employee must prove negligence, with the traditional defenses apparently available. And, no right to sue exists if the employee "fails to follow instructions and rules" or is injured by "hazards that are commonly known and appreciated" or if the injury is caused by "failure to follow available safe alternatives."

There are few injuries that would not be subject to one of these defenses. So, an employee is subject to a benefit plan drawn up by the employer, the minimum criteria of which fall far short of what is provided under the workers' compensation system, combined with a largely illusory right to assert a tort action against the employer. It is not implausible that a court will view this as an unconstitutional abrogation of an employee's right of redress. It is certain to generate a constitutional challenge.

Furthermore, even in the unlikely circumstance a worker has a valid cause of action, the bill imposes a $1 million liability limit per worker on economic damages and

$5 million per occurrence. These amounts may sound like a lot, but for catastrophic injuries and injuries to multiple workers, that is wholly inadequate.

Proponents of SB 721 claim this bill will reduce their workplace injury costs. Indeed, how could it not? But, even these savings are illusory, because there remains a longer-term exposure in tort that is impossible to predict.

What is at issue in Tennessee is not just the details of a bill but a century-long construct for providing compensation for workplace injuries. If legislators approve this bill, they should know they are breaking new ground, beyond even what Oklahoma has plowed with the first opt-out in the nation, an experiment that is under legal challenge and in which not many employers – among them some of the most ardent proponents – curiously have not chosen to test.

Opt-out proponents have responded to criticism in Oklahoma that earlier drafts of that legislation jeopardized worker benefits, by establishing in the Oklahoma opt-out regime twin guaranty funds – one for self-insured employers and one for insurers. In Tennessee, SB 721 combines into a single account in the Tennessee Insurance Guaranty Association both self-insured and insurer obligations, and with an assessment formula that is not only asymmetric but potentially puts insurers' surplus at risk for self-insurers' financial failures. Not to worry. The bill prohibits inter-account raids, as if a current legislature can bind the actions of a future legislature. We know of no precedent in the nation for a guaranty fund combining the obligations of self-insured employers and insurers.

Furthermore, why are benefits paid pursuant to an employee benefit plan secured through the guaranty fund applicable to property & casualty insurance? They belong, if anywhere, within the guaranty fund covering life and health insurance obligations. There are other serious issues opt-out raises that employers have either not considered or dismissed, inadvisably.

First, as noted above, as an "employee welfare benefit plan," state law governing such plans is subject to the Employee Retirement Income Security Act ("ERISA"). ERISA preempts all state laws "relating to an employee benefit plan," subject to certain exceptions, including a state's "plan maintained solely to comply with a state's workers' compensation law." By its terms, the bill states its employee benefit plans are "employee welfare benefit plans" subject to ERISA. The implications are serious. Because ERISA is broadly preemptive of state laws "relating to employee benefit plans," the state could lose any authority to enforce provisions of state law applicable thereto. Any authority vested in state officials to administer and enforce said laws would be neutered. In S.B. 721, this would include any authority over the opt-out program vested in the Commissioner of Commerce and Insurance. Therefore, after the employer opts out, the state will lose jurisdiction over benefits provided by the ERISA plan, consigning workers and employers to federal court, with the cost and attendant delays that entails. States will have no jurisdiction over a dispute about whether there was an employment relationship or a compensable injury, the existence or extent of disability caused by work, the timeliness

of payment of benefits due, or a myriad of other questions that are normally resolved by an informal process via the state workers' compensation system.

Does Tennessee really want disputes over workplace injuries, heretofore adjudicated before state courts and the new administrative tribunal, subject to the federal court system?

Furthermore, the potential application of ERISA would jeopardize the authority of the state to monitor in any effective way, in real time, the solvency of employers who opt out. That is, assuming the bill envisions the Commissioner of Commerce and Insurance overseeing the solvency of employers opting-out at all. Finally, ERISA plans can self-insure as a matter of federal law without meeting any solvency standards; states can only regulate insurance offer to cover ERISA plans. Therefore, the bill establishes a combined self-insurer and insurer guaranty fund, but self-insured plans under federal law can be written without any state financial requirements.

Second, opt-out jeopardizes sound disability management by allowing unsafe employers to "wash" bad experience by abandoning the workers' compensation system. The workers' compensation system's experience rating plan requires employers with poorer safety records to bear a higher cost and protects safer employers from subsidizing the losses of less safe ones. The higher relative cost imposed on less safe employers also is an incentive for them to improve the safety of their workplaces, while safe employers enjoy lower insurance costs. Opting out allows unsafe employers to "wash away" their experience, abandoning a system geared to promoting work place safety. It may also dilute the actuarial credibility of the experience rating plan for employers who remain in the workers' compensation system. Is this sound public policy? Is this really what Tennessee intends?

In addition, effectively managing disability requires medical treatment of the nature and intensity necessary to expedite recovery and return to work, in order to limit exposure for indemnity benefits. Will medical treatment delivered under an ERISA plan be focused on return to work or be similar to group health benefits, where treatment is not geared to return-to-work? The answer is important, not only for the well-being of injured workers, but may implicate broader agendas nationally. The Clinton healthcare plan ("ClintonCare") of 20 years ago envisioned a combination of group health and workers' compensation medical benefits. Employers and insurers argued vociferously against integrating these benefits because a combined benefit system would rob employers and insurers of the ability to effectively manage disability, one key aspect of which is providing the focus workers' compensation requires on medical treatment necessary for return to work. This has been a key argument over the years in opposition to state proposals to integrate non-occupational medical and workers' compensation medical in so-called 24-hour coverage plans. And, it was an objection employers and insurers, led by the U.S. Chamber of Commerce and AIA, to a benefit integration amendment threatened (but ultimately not offered) by then-Senator Jay Rockefeller (D-WVA) during the Senate's consideration of the Affordable Care Act in 2011.

Yet, an opt-out providing functionally group health-type treatment, devoid of any return-to-work purpose, would bring the same result from a practical standpoint. The next time an integration of group health benefits and workers' compensation medical benefits is proposed, proponents would be able to point to Tennessee and Oklahoma to argue it makes no difference, as employers themselves have proven. Is this really the message Tennessee wishes to send?

Third, opt-out creates uncertainty in pricing risk. Workers' compensation insurance is written on an occurrence basis, which means the insurance policy covers claims that arise long after the policy was written, especially if the disability is from an occupational disease with a long latency period. Group health and disability plans typically are written on a claims-made basis, thus covering only claims that arise while the policy is in effect. Will the state allow alternative insurance plans to be written on a claims-made basis? If so, who will be responsible when claims arise after the policy expires, and how is that risk to be priced?

If an employee manifests a work-related asbestos disease while working for an employer opting out, but the last exposure was years prior while working for another employer, which employer is responsible for benefits? What if the prior employer also opted out? And what happens to a disabled worker who has dual employment with an employer under workers' compensation and one that has an opt-out plan? Is this the uncertainty Tennessee employers wish to create?

Fourth, opt-out eliminates data that is important for agency monitoring of system performance and expedited payment of medical bills. There are workers' compensation data-reporting protocols in which opting-out employers would no longer participate. These include data-reporting formats promulgated over the past 20 years by the International Association of Industrial Accident Boards & Commissions ("IAIABC") for reporting injuries and, more recently, providing for electronic medical billing ("e-billing"). The loss of this data deprives the workers' compensation system in a state of important performance metrics and deprives insurers and providers of the ability to more easily bill and reimburse for medical treatment. Is this the result Tennessee employers intend?

Fifth, what happens in Nashville won't stay in Nashville. Opt-out may send a message elsewhere that neither policymakers nor Tennessee employers intend. State workers' compensation programs recently have been criticized harshly (if not entirely accurately) in national media. Surely, should opt-out be adopted in a number of states, its profile will rise nationally as an alternative universe to the workers' compensation system. Employers and state legislatures have fiercely guarded the independence of our nation's state-based workers' compensation system from federal encroachment; indeed, the independence of that system is a hallmark of the federal system, with power dispersed and states acting as laboratories. A mistake is limited to a state mistake; not a national financial catastrophe. A workers' compensation system established a few decades later might look today more like the Social Security Disability Insurance system, on the brink of insolvency.

Federal interest rises and a federal response is more likely when triggered by widespread dissatisfaction or an event of national significance. Such was legislation throughout the 1970s to establish federal standards for state workers' compensation programs, generated by a highly critical report of the state workers' compensation system issued in 1974 by the National Commission on State Workmen's Compensation Laws. States responded to the threat of federal action and, by the end of the decade, the danger had dissipated. So, too was establishment of the federal Black Lung Benefits program, established in 1969, as Title IV of the Coal Mine Health and Safety Act, in response to a 1968 mining disaster in Farmington, Kentucky, and reports that coal workers' pneumoconiosis ("black lung") generally was not covered under state workers' compensation laws. The Black Lung program was to be temporary, to last only so long as it took for states to amend their laws to cover CWP, which states did over the ensuing few years. The program could have been terminated by the mid-1970s. Over 45 years and multiple billions of dollars later, the program has no end in sight.

For those who minimize the prospects of federal involvement in the current political climate, national policymakers sometimes surprise, and the wheel always turns. For all of these reasons, we urge the Legislature to set this bill aside. Should this or a revised opt-out bill pass, we respectfully request the Governor veto it.

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