

**THE STATUS OF
WORKERS'
COMPENSATION
IN THE UNITED STATES**

A Special Report

Workers' Injury Law & Advocacy Group

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THE GRAND BARGAIN

In the early part of the twentieth century, the only legal remedy for a worker injured or killed as a result of a work-related accident was to bring a common-law action against his employer to recover economic and non-economic losses. The process caused much delay and employers were armed with common-law defenses such as “contributory negligence,” “assumption of risk,” and the “fellow-servant doctrine.” Even if an employer ultimately won a case, the cost of defending a claim was great.

“The Grand Bargain” was struck to create in each state a statutory workers’ compensation system to provide injured workers scheduled compensation for economic losses associated with work-related injuries and deaths, without regard to fault. In exchange for this no-fault coverage, workers were prohibited from suing their employers, giving employers protection from large judgments for non-economic losses such as pain and suffering or punitive damages. The compromise gave birth to the legal notion that, in most cases, workers’ compensation is an exclusive remedy against an employer.

After the State of New York passed one of the first workers’ compensation statute, the U.S. Supreme Court considered the constitutionality of legislative

replacement of a common law tort for work-related injuries with an exclusive remedy, no-fault system with scheduled benefits for injured workers. The “Grand Bargain” was upheld by the Court in *New York Central Railroad v. White*, 243 US 188, 37 S.Ct. 247, 61 L. Ed 667 (1917).

The landmark case, holding that the use of workers’ compensation laws in place of tort remedies must provide “significant” benefits, was quick to recognize that there was a limit to a state legislature’s authority to provide a statutory remedy that abolished an injured workers’ longstanding right to sue his employer for an array of common law damages. Consideration for the Grand Bargain was a **“reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise...”**

For the most part, the Grand Bargain has been a good deal for both the American worker and business. As long as the system provided quick medical care and quick and reasonable indemnity benefits, it was a win-win for everyone and the national economy.

THE GREAT CHIPPING AWAY

The modern era of workers' compensation began with the 1972 Report of the National Commission on State Worker Compensation Laws. The report contained 19 essential recommendations for states to provide minimum levels of benefits to avoid a threatened federal takeover of the system. In the 1970s and 1980s, the states heeded the call and raised benefits to acceptable levels.

As medical care and indemnity costs rose, employers and insurance companies began clamoring for "reform." In many states, a strong medical community lobby prevented legislatures from materially cutting medical costs. Therefore, the only cost savings was on the backs of the injured worker.

Little by little, the definition of "course and scope of employment" and what constituted a compensable injury was changed, chipping away at the Grand Bargain theory that if an accidental injury occurred in the course and scope of employment, the employer was obligated to provide reasonable benefits. In some states, even the definition of "injury" was changed. For example, in Oklahoma, new reforms require a compensable injury must be "foreseen," a complete departure from the Grand Bargain.

The "carve out" of traditional compensable injuries continued. The concept of "major cause" was introduced in many states. Where the aggravation of a pre-existing condition was universally accepted as a compensable, work-related injury, "major cause" means that more than 50 % of the reason for medical care and other

benefits must be work-related. “Major cause” has resulted in the denial of thousands of claims of workers whose latest work-related injury has cast them aside with no job and in need of medical care.

Drug formularies, medical treatment protocols, and restrictive medical permanent disability guidelines promulgated by the American Medical Association have further limited the ability of workers’ compensation judges and administrators to award reasonable indemnity and medical benefits. In addition, many states now leave the selection of treating physicians in complete control of the employer.

Even in states where legislators have attempted to cut medical costs for injured workers, the result has been devastating. In Illinois and other states, lawmakers enacted changes that places strict caps on payments and doctors through medical fee schedules. Critics say such stringent caps cause some doctors to stop taking workers’ comp patients.

Cuts in disability benefits in Oklahoma in 2013 approached 85% for workers suffering permanent partial disabilities, causing Oklahoma workers to follow the lead of WILG and attorneys in Florida to challenge the constitutionality of the entire benefit scheme as no longer providing a remedy under those two state's constitutions.

In 2014, ProPublica, a group of independent, non-profit investigative journalists based in New York City, and National Public Radio (NPR) set out to investigate the extent of changes to the states' workers' compensation system and the impact upon injured workers and the government. In a March, 2015, comprehensive report, the investigation revealed that 33 states have cut workers' compensation benefits in the past 20 years, created hurdles to get medical care, or made it harder to qualify. ProPublica/NPR said:

The changes have resulted in devastating consequences for some of the hundreds of thousands of workers who suffer serious injuries at work each year.

The investigation also found that big businesses and insurers were driving the cuts in benefits throughout the nation, citing out-of-control costs. Piercing through that allegation, ProPublica/NPR found that businesses are paying the lowest rates for workers' compensation since the late 1970s. **The Grand Bargain Has Been Breached.**

[Note: The most comprehensive national reporting on the dismantling of America's workers' compensation system is found at the following sources:

www.propublica.org:

How Much Is Your Arm Worth? Depends on Where You Work,

March 5, 2015;

The Fallout of Workers' Comp "Reforms," March 24, 2015;

How to Investigate Workers' Comp in Your State, August 24, 2015;

Inside Corporate America's Campaign to Ditch Workers'

Comp, October 14, 2015; and

U.S. Lawmakers Call for More Oversight of Workers' Comp,

October 21, 2015.

Two other nationally-respected websites provide current and balanced information on trends and court challenges—www.workerscompensation.com and www.workcompcentral.com.

SHIFTING THE COST BURDEN and

THE RACE TO THE BOTTOM

The cost-shifting away from the responsible employer and their carriers to injured workers, private health insurance plans, Social Security, Medicaid, and Medicare has reached a crisis point.

At about the same time that ProPublica/NPR reached that conclusion in March, 2015, the Occupational Safety and Health Administration (OSHA) released a scathing report about state legislative changes to workers' compensation statutory systems. OSHA concluded that an employer now pays only about 20 percent of the overall financial cost of workplace injuries and illnesses. Most observers knew the

cost-shifting was happening, but were startled at the extent of the crisis. The impact on federal Medicare and Social Security is alarming.

OSHA Director David Michaels spoke of the critical nature of the problem and its impact on worker safety:

If employers whose workers are being injured had to pay the true cost of these injuries, these employers would have real incentive to prevent the injuries from occurring. Instead, workers, their families and taxpayers are subsidizing these dangerous employers.

It does appear that there is right now a race to the bottom. State workers' compensation systems are competing to lower benefits and make it tougher for workers to get the benefits to which they're entitled.

OSHA's report cited two recent studies in the *American Journal of Industrial Medicine* that noted that more than half of hospital patients with work-related amputations in Massachusetts and one-third of those patients in California did not receive workers' comp benefits. The huge cost in those states and in other states where the rules on compensability of work-related accidents and illnesses have been limited are shifted to the worker, Medicaid and state-run medical assistance programs, and Medicare.

Severe cuts to workers' compensation benefits also affect the issue of income equality. The OSHA report found that even with workers' compensation benefits, studies show that injured workers' incomes are, on average, almost \$31,000 lower over 10 years than if they had not been injured. OSHA strongly

recommended that states eliminate roadblocks that prevent injured workers from getting quick and adequate medical care and adequate wage-replacement payments.

OPT OUT----THE BIGGEST THREAT

There is an immediate and growing threat that American employers will replace traditional workers' compensation insurance policies with stripped-down Opt Out plans. This trend should be of great concern to both workers and employers. Opt Out plans that drastically reduce statutes of limitations, benefits, and rights for workers also contain major pitfalls for employers.

Opt Out has been around for decades in Texas. But Texas is unique. It is the only state that does NOT require an employer to be responsible for reasonable indemnity and medical benefits for injuries to its workers. The other 49 states and the District of Columbia have a mandatory statutory workers' compensation system that provides scheduled benefits.

In 2013, Oklahoma became the second state to pass Opt Out, officially the Oklahoma Employee Injury Benefit Act (OIBA), found in Oklahoma Statutes, Title 85A. The law allows an employee to become a Qualified Employer, develop its own benefit plan, and make all decisions regarding compensability and medical care.

The Opt Out movement is well-funded, supported by some of the nation's largest retail, health care, and food companies. The focus of the effort emanates from the Association for Responsible Alternatives (ARAWC), a coalition led by executives from Walmart, Nordstrom, and Lowe's and pushed by a former Oklahoma Republican state chairman who lobbied for passage of Opt Out in Oklahoma. ARAWC is well-funded and has announced its intention to first take Opt Out to states in the South where pro-business Republican-controlled legislatures are receptive to the idea.

Opt Out comes at a time when there is recognition that Draconian benefits by the states and "broken" workers' compensation systems have fueled the idea that the quid pro quo of the Grand Bargain has been destroyed; that the heart of universal workers' compensation and exclusive remedy for the employer is an ancient myth.

The Opt Out concept in Oklahoma, and in proposed legislation in Tennessee and South Carolina, has serious constitutional and policy flaws, said Bob Burke, Oklahoma City attorney, workers' advocate, and former Oklahoma Secretary of Commerce.

Burke, who has filed several lawsuits challenging the constitutionality of Opt Out, said, "Every one of the benefit plans of the first 60 companies to Opt Out of our traditional workers' compensation system provide substantially lower

benefits, restrict what accidents are covered, and prevent any court or arbiter from considering any evidence other than from the employer-selected doctor.”

“It is shocking how the companies eliminate a bulk of their work-related injuries,” Burke said, “There are serious due process and equal protection of the law questions with Opt Out.”

Most Oklahoma Opt Out plans have a 24-hour statute of limitations, compared to one year under traditional workers’ compensation, but some are even stricter. The plan of Dillard’s, a multi-state department store chain, accepts a claim ONLY if the injured worker reports the accident AND files a written report by the end of the shift on which the injury occurs. If an injury occurs an hour before the end of the shift, the practical statute of limitations is LESS THAN ONE HOUR.

A pending lawsuit in Oklahoma against Res-Care, the nation’s largest home health care agency, involves a worker who was injured in plain sight of her supervisor, filled out a report, was sent to the doctor by the employer, BUT was denied benefits by the home office because she did not call a toll-free number within 24 hours. She fell asleep from the effects of medicine prescribed at the emergency room and did not call the toll-free number until 27 hours after the accident.

Burke said some Oklahoma Opt Out plan limitations are “ludicrous.” One plan does not pay for blood used in blood transfusions for critically injured workers. Another plan does not cover injuries suffered in tornados in Oklahoma, “Tornado Alley,” where the movie, “Twister,” was filmed. Other plans, totally written by the employer without any requirements to report injuries or its actions to any state or federal agency, eliminate compensability for “injuries suffered using a keyboard” and injuries from “altercations and fights.”

“These unbelievable examples are only the tip of the iceberg,” Burke told a recent audience at the WILG annual convention in Chicago, “The appeals rights under Opt Out plans are facially unconstitutional.” Many plans prohibit “de novo review” and “any arbiter or court” from overturning the employer’s decision on compensability and extent of benefits. The employer makes every decision every time and can even force the worker to settle his case, using only the opinions of the employer-selected doctor and employer-selected actuary to determine the value of the case. If the worker does not accept the employer’s proposal to settle, “all further benefits under the plan are terminated.”

Other national commentators have recognized the mounting threat of Opt Out. ProPublica/NPR obtained the benefit plans of more than 100 companies who have opted out in Texas and Oklahoma. The report concluded, “The investigation

found the plans almost universally have lower benefits, more restrictions, and virtually no independent oversight.”

“Plans...allow for a hodgepodge of provisions that are far different from workers’ comp,” the ProPublica/NPR report of October 14, 2015, concluded, “They’re why McDonald’s doesn’t cover carpal tunnel syndrome and why Brookdale Senior Living, the nation’s largest chain of assisted living facilities, doesn’t cover most bacterial infections. Why Taco Bell can accompany injured workers to doctors’ appointments and Sears can deny benefits if workers’ don’t report injuries by the end of their shifts.”

A typical Opt Out plan is a thick document that is forbidding to most employees to read and understand. Not covered are exposure to asbestos, silica dust, or mold, or assaults unless the employee is defending the employer’s property, ProPublica/NPR discovered that Costco’s plan does not cover external hearing aids costing more than \$600—although the cheapest external hearing aid you can buy at Costco retails for \$900.

A major promoter of Opt Out justifies his marketing because he has saved his clients more than billion dollars in Texas in just the last decade. That sounds great, but the opposite side of that coin is that Texas injured workers lost that billion dollars in benefits that would have been provided under the statutory Texas

workers' compensation system. Workers, Medicare, Medicaid, and Social Security primarily bore that billion dollar loss.

The employer's total control of worker injury claims is troubling.

ProPublica/NPR wrote:

The fine print of opt-out plans contains dozens of opportunities for companies to deny benefits. Employers can terminate workers' benefits for being late to doctors' appointments, failing to check in with the company, or even consulting their personal doctors.

The no-fault premise for workers' compensation has been reversed in Opt Out plans written by Home Depot, Pilot Travel Centers, and McDonald's. Those plans exclude injuries caused by safety violations or the failure of a worker to ask for help with a particular task that might injure him.

The American Insurance Association (AIA) has strongly opposed the effort to take Opt Out to Tennessee. AIA said:

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.

Michael Clingman, the former director of workers' compensation systems in two states, is concerned about the lack of safeguards in Opt Out. He wrote:

An injured employee whose employer has "opted-out" has none of the safeguards and protections provided by state comp statutes. Whatever plan the employer concocts and files and whatever protections or rights they choose to give or withhold from workers, these decisions are totally up to the employer. Interpreting how to apply benefits, the duration of benefits, what injuries are covered under the plan, the amount and duration of medical benefits, and many other aspects of the injury are totally under the employer's control, as long as they follow their own adopted plan.

OPT OUT IS BAD FOR EVERYONE

Opt Out is bad for Employers.

(1) *Loss of exclusive remedy.* Even though legislative intends to retain exclusive remedy for employers, the obvious intent is to allow employers to Opt Out of the state workers' compensation system. If an employer Opts Out of the statutory workers' comp scheme, the protection of exclusive of remedy is lost, no matter what an Opt Out law states.

(2) *Opt Out would greatly increase defense costs.* Across the nation, the average defense cost of a workers' compensation claim within a statutory state

system is about \$3,000. However, under Opt Out, if an employer had to defend each workers' compensation claim under ERISA in federal court, the defense cost could easily exceed \$40,000 per case. Federal court litigation is very expensive.

(3) Opt Out will raise workers' comp insurance rates for small and medium-sized business. Only a large employer would risk giving up exclusive remedy and develop its own benefit plan. An overwhelming majority of employers could not afford the cost of Opt Out. Buying a traditional workers' compensation policy is cheaper. If the large employers are removed from the insurance pool, rates would rise for employers left behind.

Opt Out is Bad for Workers:

(1) Benefits for workers would be drastically reduced.

Benefit plans uniformly allow benefits owed by the employer to be reduced by any Social Security payment. Therefore, if a worker is killed, the employer never pays death benefits because of automatic Social Security benefits payable to minor children. If a worker is found to be permanently and totally disabled, any Social Security payment is DEDUCTED from the employer's payment dollar for dollar. If a worker is already drawing Social Security retirement at the time of the compensable injury, his retirement benefit is deducted from any amount owed by the employer.

Benefit plans uniformly cap medical benefits. For example, some plans cap nursing home costs at 60 days. For a severely injured worker, there leaves a great gap of reasonable and necessary medical care. This often expensive treatment would be dumped onto Medicaid and Medicare. Most plans have from 40 to 50 significant reductions in benefits when compared to state law.

Opt Out is Bad for Government:

(1) *Cost-shifting would burden Medicare, Medicaid, and state medical care programs.* If a low paid injured worker of an Opt Out employer is refused medical treatment, the cost of care will fall upon Medicaid or other government charitable funds. If a paraplegic worker is confined to a nursing home or rehabilitation facility longer than what the plan allows, the cost is borne by the taxpayers. If a serious injury is denied under an Opt Out plan, other state benefits, including Food Stamps, would be adversely affected. Denial of permanent total disability benefits will fall squarely upon the shoulders of Social Security, not the employer.

(2) *Loss of premium tax would impact the General Fund of the states.* Most states use taxes or assessments from insurance carriers to raise revenue to operate their statutory workers' compensation system. If large employers are no longer Self-Insured or covered by workers' compensation insurance, premium taxes and other assessments are reduced and the cost of administering the state agency must be supplemented from general appropriations.

SUMMARY

This is a critical time for the future of medical care and compensation for the nation's workers who suffer injury or illness related to their employment.

Intervention by the federal government is immediately needed to study the breach of the Grand Bargain and the Opt Out wave. Protecting the American worker is a worthy goal for all.