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Looking beyond Oklahoma opt-out woes

Other states mull plans while lawsuit plays out

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Constitutional challenges to Oklahoma's workers compensation opt out law and a shakeup among the state's

regulators may deter employers from abandoning the workers comp system, but states weighing opt-out legislation will likely forge ahead.

Effective Feb. 1, 2014, the state's Employee Injury Benefit Act, also called the Oklahoma Option, allows employers to opt out of Oklahoma's workers comp system and provide alternative coverage for injured workers.

Attorneys representing injured workers petitioned the Oklahoma Supreme Court earlier this year to declare the law unconstitutional, arguing that it includes no due process protections. On Sept. 30, the state's high court will hear oral arguments in *Damien Smith v. Baze Corp. Investments Inc.*

The case challenges the exclusive use of the AMA Guides to the Evaluation of Permanent Impairment, sixth edition, to evaluate permanent disability and questions whether benefit levels are adequate enough to consider workers comp the exclusive remedy for injured workers, among other things, according to Mr. Smith's attorney, Bob Burke.

Mr. Smith injured his right knee on the job in February 2014, and Baze approved his claim for workers comp benefits, Mr. Burke said. But Mr. Smith's subsequent request for permanent partial disability benefits was disputed.

Despite the challenge in Oklahoma, legislators in South Carolina and Tennessee introduced opt-out bills this year and sources say Georgia could be next.

“There used to be a time when states would tread carefully with a new issue, particularly when it was under constitutional challenge,” said Bruce Wood, Washington-based vice president and associate general counsel at the American Insurance Association. “But not so, here ... (proponents) are committed.”

James Mills, chief of staff and director of workers comp at the Oklahoma Insurance Department, said 55 employers have been approved to opt out of the state's workers compensation system, and the department is seeing renewals of that coverage.

While the number of employers choosing to provide alternative coverage is consistent with expectations, adoption has been relatively slow due to drops in workers compensation cost and “litigation uncertainties,” said Bill Minick, president of Dallas-based Partnersource, an alternative workers comp consultant unit of Arthur J. Gallagher Risk Management Services Inc.

The reform law also moved the state from a court-based adjudication system to an administrative process and established the Oklahoma Workers' Compensation Commission, which has been heavily criticized.

Violations of the state's Open Meeting Act and a lack of funding reportedly led the agency's executive director and two of its three commissioners to resign in recent months.

Former commissioner Troy Wilson said in his resignation letter to Oklahoma Gov. Mary Fallin that he “had no idea how difficult it was going to be to stand up a new agency and that it would involve so many conflicts and difficulties.” He noted that “many mistakes were made including under funding and our acceptance of poor legal advice.”

And former commissioner Denise Engle, who now is a risk management consultant at Arthur J. Gallagher & Co. in Oklahoma City, said in an email to *Business Insurance* that her “primary goals as commissioner were to help set up the new agency and establish permanent rules to guide it. Once those goals were met, it was time for me to return to the private sector.”

However, Ms. Engle told *Business Insurance* in September 2014 that, “as with any new agency, it is hard to determine exactly what funds are needed to begin and, although very thrifty, it seems that we were a bit short in budget allocation.”

Controversy surrounding the Oklahoma Workers' Compensation Commission and “issues they had were largely motivated by political issues and were natural to the formation of a new regulatory entity,” Mr. Minick said. “I haven't heard anyone suggest that the growing pains and exceptionally litigious trial bar in Oklahoma is deterring other states from considering workers compensation reforms or approving options to workers compensation.”

Despite the shakeup at the commission and challenges to the Employee Injury Benefit Act, the National Council on Compensation Insurance Inc. has filed for a 14.8% reduction in workers compensation loss cost rates through the state system, to take effect Jan. 1, 2016. It's the third consecutive rate cut filed by the Boca Raton, Florida-based workers comp ratings organization for Oklahoma, following a 7.8% decrease in 2015 and a 14.6% decrease in 2014.

The decrease “really comes down to the comprehensive reform package,” Mr. Mills said, adding that it likely won't entice employers who've opted out to re-enter the workers comp system.

“I’ve heard employers talk about savings they’ve been able to create (through alternative coverage) while providing equal and better service for their employees who are injured, and the numbers that they’ve provided have been much greater even than this 14.8% decrease,” Mr. Mills said.
