

THE TENNESSEE INSUROR

July/August 2015

Vol. 26 No. 4

www.insurors.org

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What Would This Legislation Do to Workers' Comp in Tennessee?

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The Opt-Out Crossroads

What Would This Legislation Do to Workers' Comp in Tennessee?

Earlier this year, legislation (SB0721 Sen. Green-Clarksville) was introduced that would permit Tennessee employers to "Opt-Out" of the workers' compensation system, provided the employer secures alternative benefits to meet the minimum levels prescribed in the bill. This would provide significantly reduced medical coverage and temporary benefits through alternative insurance coverages such as occupational accident (OCC/ACC) coverage.

The bill was voted "against recommendation" in a 6-0 vote by the Tennessee Advisory Council on Workers' Compensation, and was never even brought up for a vote in the House.

We are at a crossroads for the workers' compensation industry in Tennessee. The real question is, why? Is there not enough competition? Currently there are 397 insurance companies that have filed workers' comp rates, with 314 of those writing a policy in Tennessee. Is the court system not handling the cases sufficiently? Under the recent law change, the courts have been taken out of the process, and cases are being resolved faster than ever. Are workers' not receiving benefits? Workers' are being compensated. Are rates skyrocketing? The state has seen over 20% decrease in loss costs in the last two years.

There are many questions, but the answer is consistently, "No." So, if it ain't broke, why fix it? That is the question your

Association is asking as we prepare for the 2015 Legislative Session, when the "Workers' Compensation Alternative Benefit Plan" bill returns to the table. All told, this bill represents a significant shift in public policy that has been in place in Tennessee for over 70 years.

>> How Did We Get Here?

The Opt-Out system has been operating in Texas for many years. As you may already know, Texas is the only state without a law requiring companies to carry work comp, so offering OCC/ACC is a step up for employees who would otherwise have no coverage at all. About 1/3 of the Texas market offers OCC/ACC coverage.

In 2014, a somewhat similar plan was enacted into law in Oklahoma. That state previously had one of the most expensive work comp systems in the country, and was in the middle of its own reforms when opt out legislation was introduced. When both new reforms to work comp and opt-out were passed, employers were slow to jump on the new option. A few have done so however, and we have already seen a few major court cases that have placed the legitimacy of the system into question.

Now the same group that authored the Oklahoma law is bringing it to Tennessee. But what would this plan look like? Take a look at this chart to see the comparison to current law.

>> Comparison of Opt-Out Required Minimum Benefits to Benefits Under TN WC Act (SB0721/HB0997)

BENEFIT	ALTERNATIVE BENEFIT PLAN 'OPT-OUT'	TENNESSEE WORK COMP ACT
Medical Expenses	\$500,000/ 156 weeks; Pays for covered medical expenses. Does not pay for all reasonable and necessary medical expenses. Subject to combined limits below	No limits on amount or duration; Covers all reasonable and necessary medical expenses, incl.; Cannot exclude reasonable and necessary medical services such as pain management
Employee liability for reasonable and necessary medical expenses	Employee liable for (1) all medical expenses not covered by the plan , (2) all medical expenses in excess of \$500,000 (3) all medical expenses incurred more than 156 weeks after injury, and (4) all medical expenses incurred after employer terminates benefits under the conditions and limitations set by employer including combined limits below	No employee liability
Temporary total disability/wage replacement benefits (TTD)	70% - 110% of State Average Weekly Wage (SAWW) for 156 weeks; May be reduced pursuant to the combined limits below and may be reduced by payroll tax deductions	66 2/3% - 110% of SAWW for up to 450 weeks and no payroll tax deductions
TTD for mental injuries (ie PTSD)	None	110% of SAWW for up to 104 weeks
Maximum combined medical and wage replacement benefits	\$1 million per employee under benefit plan; \$1 million per employee and \$5 million per occurrence for litigated claims	Unlimited; No reduction in benefits for catastrophic events in which many employees injured or killed in same occurrence
Death benefit	\$20,000-\$300,000 Beneficiaries must provide waiver; benefit may be reduced by disability benefits paid prior to death	100% of SAWW for up to 450 weeks; No waiver or offset
Permanent Total Disability (ie quadriplegia, hemiplegia, paraplegia, brain injury, blindness)	70% of AWW - 110% of SAWW until employee reaches age for maximum SS benefits (but not less than 260 weeks); May be subject to payroll taxes; Must waive any tort claim	66 2/3% AWW or 100% of SAWW until employee reaches age for maximum Social Security benefits
Permanent Partial Disability (other than dismemberment)	70% of AWW - 110% of SAWW up to 450 weeks; May be subject to payroll tax and must waive any tort claims	66 2/3% AWW or 100% of SAWW up to 450 weeks
Temporary Partial Disability Benefits	70% of difference between AWW and earnings while disabled	100% of SAWW for up to 450 weeks
Setting of all coverages and conditions and limitations on entitlement to covered benefits	Employer sets all coverages and all conditions and limitations which may be changed at any time without notice to employees and which are not subject to state or federal oversight	Set by Tennessee General Assembly; WC coverage cannot exclude terrorism risks
Dispute resolution due process protections	None	Set by Tennessee General Assembly
Data reporting and governmental oversight	No loss cost reporting to state and state oversight limited to approving opt out exemption; US Department of Labor requires minimal ERISA reporting but no benefit plan oversight	Set by Tennessee General Assembly and implemented by TN Department of Commerce and Insurance and TN Division of Workers Compensation
Governmental Oversight	No state oversight	Set by General Assembly; TN law requires employers to mediate in good faith, timely comply with Orders, timely provide appropriate medical treatment

As you can tell from the chart, the opt-out system creates significant changes for Tennessee work comp. Unfortunately, we believe that this bill creates a system of separate but unequal protections for injured workers that will put Tennessee employees and businesses at risk. It leaves employers vulnerable to significant liability in tort, a risk which many will not truly understand having never been faced with this type of system.

We believe that such significant changes will create uncertainty in the market. We also feel that the suggested changes place Tennessee workers at risk as they have no legal mechanism to assure that benefits are delivered timely and correctly.

>> What Needs to Be Changed?

This bill removes State oversight and replaces it with the federal government through the use of Employee Retirement Income Security Act (ERISA) plans for the benefit structure. Federally regulated ERISA requires employers to provide participants with plan information including important information about plan features and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty.

So, in addition to giving over control of benefit plans to the Feds, this opens up the door for businesses to be sued over injury compensation disputes. ERISA plans may also be changed by filing new plans with the Department of Labor. And as long as they are approved, a company could be compliant with the opt-out law no matter what they have filed in their ERISA plan.

Sound a little suspect? It gets worse. Benefits paid out through these plans may be viewed as taxable income by the Federal government. That means even if companies pay out higher benefits than required under State work comp law, the recipients could still end up with less money after taxes.

If ERISA wasn't a big enough issue, the limits on duration of benefits and caps on per occurrence payouts set up potential situations for injured employees to run out of money well before their injuries have been satisfactorily treated and/or they are eligible to return to work. This may then move the burden over to State hospitals and medical facilities, in-turn passing the cost down to taxpayers.

>> What Are We Doing About It?

Insurers plans to fight this bill in Legislature, and we will also be launching a media campaign to make sure Tennessee businesses and the public understand its ramifications. Along with other trade associations such as the American Insurance Association, the Association of General Contractors, Tennessee Bar Association and other industry groups; we will work to make sure the bill does not pass as written in 2016.

There are other groups who have spoken out to the media in favor of the bill, including the PIA of Tennessee, but we feel this bill is bad for business, bad for the industry and bad for workers.

>> What Can You Do to Help?

Insurers will be holding seminars around the State to educate agents on the bill and our position. We hope you will attend one of these events and learn more. Here is the current schedule:

August 19 - Jackson	Jackson Country Club	2-4 pm CST
August 20 - Memphis	Holiday Inn U of M	11:30 am CST
October 12 - Knoxville	Holiday Inn World's Fair	1 pm EST
TBD - Nashville		



In addition, we'll be releasing a white paper with information on the bill and our position. If you have connections with State Legislators or industry personnel you feel could assist us, we would appreciate you contacting us so we may provide you with the information to share with them personally.

And finally, we would encourage you to consider an additional donation to InsurPACTN. We will need as much support as possible from our State Legislators who serve on the key committees this bill must pass through. Any additional support we can generate through our State PAC will allow us to continue to back those that support our position.

We have over 450 member agencies and over 4,000 member employees that makeup the grassroots of Insurers of Tennessee. Let's continue to make sure our voice is heard on this issue and on other issues facing our industry on the The Hill.

Let's defeat Opt-Out together. ♦