



## The opt out alternative to the statutory, state-controlled workers' compensation system has recently been gaining interest. Can the opt out alternative work?

The opt out alternative to the statutory, state-controlled workers' compensation system has recently been gaining interest among businesses and legislators. An opt-out bill was almost passed by the Oklahoma legislature in 2012.

This issue of *Spotlight* discusses the opt out alternative and a recent study sponsored by Sedgwick that examined if employers ability to opt out of the Texas workers' compensation system has produced significant results that could help other states solve long-term problems within the current system.

### Opt Out Alternative

The first workers' compensation laws enacted over 100 years ago provided for only voluntary participation by employers to avoid being constitutionally challenged. Many argued that compulsory workers' compensation denied the property rights of employers in violation of the 14<sup>th</sup> Amendment due process clause of the U.S. Constitution. The United States Supreme Court resolved the issue of due process in 1917 when in *New York Central Railway Co. v. White* it held that an employer's constitutional rights were not affected. After the United State Supreme Court ruling, most states enacted new compulsory workers' compensation laws.

Currently Texas is the only state that has retained voluntary participation in the workers' compensation system, although public employers and employers that enter into a building or construction contract with a governmental entity must provide workers' compensation. Texas employers who opt out of statutory workers' compensation are called non-subscribers.

The [\*Biennial Report of the Texas Department of Insurance to the 83<sup>rd</sup> Legislature\*](#), released December 2012 by the Texas Department of Insurance, reports fewer Texas employers are currently opting to leave the state's workers' compensation system.

According to the report prepared for the Texas legislature, lower workers compensation insurance premiums and an increased availability of workers compensation health care networks have led to fewer employers opting out of the system. "The percentage of Texas employers that are nonsubscribers to the workers compensation system decreased to 33 percent in 2012 — the second-lowest percentage since 1993 (an estimated 113,000 employers in 2012)." In 1993, 44 percent of Texas employers were non-subscribers.

The report also noted a reversal of the trend of larger employers choosing to opt out of the Texas workers' compensation system after 2008. The non-subscription rates among large employers fell from 26 percent in 2008 to 15 percent in 2010 and 17 percent in 2012.

Despite this report, Texas employers that are non-subscribers indicate improved results.

### Sedgwick Sponsors Study on Opt-Out Alternative

A recently released 87-page report sponsored by Sedgwick examined whether or not the ability for employers to opt out of the Texas workers' compensation system has produced significant results that could help other states solve long-term problems within the current system.

The study titled "[Workers' Compensation Opt-Out: Can Privatization Work?](#)" was completed by the New Street Group and primary researcher Peter Rousmaniere, a well-known workers' compensation consultant and columnist.

The report provides an extensive analysis of the claims and medical management process for an opt-out program. It also contains a comprehensive analysis of a major national retailer's opt-out program administered by Sedgwick. Additionally, it describes the unsuccessful effort to adopt an opt-out program in Oklahoma in 2012.

The research showed that employers that choose to become non-subscribers and privatize their workers' compensation see many positive results. Some of the major findings in the study include:

- Employer concerns about fraud and abuse virtually disappear.
- Medical treatment is more focused with increased emphasis on return-to-work programs.
- Disputes are resolved more quickly, in part, due to the alternative dispute resolution process.
- Employers redefine work injury benefits using ERISA and other modern employee benefit tools that are prohibited in statutory workers' compensation systems.
- The lack of tort protection for employers provided under state workers' compensation systems is less of a problem than commonly feared.

A position regarding the merits of the workers' compensation opt-out concept for a particular employer or from a public policy standpoint was not taken in this study. However, the observations and recommendations provided are sure to be useful as the opt out alternative is considered in the future.