

Nationwide effort aimed at reforming workers' comp

Employers could opt out of state plans, create own

By Lee Dryden

A move toward employers opting out of state-regulated workers' compensation — in favor of their own plans — isn't imminent in Michigan, but the effort is intended to eventually reach all 50 states.

Texas attorney Bill Minick spearheaded the nationwide push by forming a group called the Association for Responsible Alternatives to Workers' Compensation (ARAWC), which includes officials and board members from major retailers such as Walmart, according to a ProPublica report.

Texas was the first state to allow companies to opt out, followed by Oklahoma, although the Oklahoma law was recently declared unconstitutional by state regulators. Tennessee and South Carolina also are targeted for changes.

The opt-out provision is touted as a means of cutting employers' costs while still providing the same or better outcomes for employees.

But critics say the plan allows companies to set their own rules and provide fewer benefits.

It's a idea that "goes against the 'grand bargain' that workers' compensation is supposed to represent," said Jeffrey E. Kaufman of Michigan Workers Comp Lawyers, Law Offices of Alex Berman PC, who represents injured workers.

"Workers gave up their right to a tort



remedy in exchange for guaranteed but limited benefits," he said. "Opt-out lets employers rewrite the rule book and changes what is paid. Each plan is different from the next with arbitrary restrictions on medical and wage loss. There is limited to no oversight and disputes get decided by adjudicators handpicked by the employer."

Michael J. DePolo, a shareholder at Garan Luow Miller PC who represents employers and insurance carriers, said "the devil is always going to be in the details" but such a plan could benefit workers.

"Assuming these laws can be written in accordance with the state constitution — something Oklahoma apparently has had some trouble with — it is conceivable that a privately based system can provide a much more streamlined access to benefits for those who are injured on the job," he said.

A plus for workers or not?

ARAWC's website lists its membership as "national, regional and state employers, service providers, third party ad-

ministrators, and workers' compensation experts with a strong commitment to advocating for an Option to ensure the safety and care of employees nationwide."

It lists a goal of protecting American workers by "ensuring employees receive a full range of benefits equal to or better than existing workers' compensation, have greater access to quality medical care through a broader network of healthcare professionals, and also have a higher level of accountability through a better understanding of the benefits they are provided."

National Public Radio and ProPublica have reported that the U.S. Department of Labor is investigating whether Texas and Oklahoma opt-out plans violate federal law.

Opponents of opt-out have said the concept marks a return to the era before workers' compensation where injured workers had to pay their own treatment costs or sue their employers.

DePolo said the Workers Disability Compensation Act, when initially adopted in 1912, was designed to accomplish two major goals: decrease employers' cost for negligence suits and verdicts and provide "a fairly summary system of swift and sure benefits to the employee."

"There is no reason why such a balance cannot be struck with an opt-out system if all parties are able to negotiate such a system at arm's length, understanding that there are legitimate interests that both employers and employees should be able to protect," he said.

Kaufman said large corporations in Texas found a way to pay less to injured workers.

"I think the ultimate goal is to get attorneys out of the workers' compensation system," he said. "Limit the recovery and make it so hard to prove a case that it becomes impossible to represent people."

The opt-out system with more direct contact between the employer's represen-

tative and the employee "would tend to take legal representation out of the mix," DePolo said.

"As a lawyer, I have a clear bias in favor of access to the legal system for all concerned," he said. "That said, if the overriding benefit is to reduce costs, I doubt too many stakeholders would bemoan a lower lawyer participation level. The system must balance the need for cost savings with the ability of either side to be represented in cases where there is dissatisfaction with the process or results."

Opt-out in Michigan?

Michigan hasn't been mentioned as a target for changing workers' compensation, but those watching the issue remain on guard.

"I have not heard any specific rumors about opt-out coming to Michigan," Kaufman said. "However, powerful corporate interests such as Walmart, Lowe's, Safeway, Nordstrom, and others have funded a lobbying group (ARAWC) to push the issue in all 50 states."

Kaufman said "it is hard to imagine why opt-out would be necessary in Michigan."

"We have already gone through significant reform," he said. "The pure premium advisory rate has declined 27.7 percent since 2011. This has saved employers an estimated \$327 million. It seems like we are in a race to the bottom and workers are paying the price."

DePolo said the largest push appears to be in the South, likely because of "a significant lack of union resistance."

"I would think that for an opt-out plan to pass the Legislature here, there would have to be much more in the way of documented success before an industrial state such as Michigan could make it work effectively," he said.

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