



**American Insurance Association**

# **WORKERS' COMPENSATION OPT-OUT**

## **NATIONAL ACADEMY OF SOCIAL INSURANCE**

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# WHAT IS THE WC LANDSCAPE?

- **STABLE; NO STATE SYSTEM IN CRISIS OR CLOSE TO IT**
- **COSTS PER \$100/PAYROLL IN 2013 \$1.37/\$100 PAYROLL, UP 7 CENTS SINCE 2009**

- **WC BENEFITS/\$100 OF COVERED WAGES DECLINED IN 39 JURISDICTIONS (2009-2013) AND ROSE IN 27 OTHERS [NASI]**
- **LARGEST EXPENSE = MEDICAL; 70% OF BENEFIT DOLLAR IN MANY STATES**

# **OPT-OUT PRESENTS UNIQUE CHALLENGE TO WC SYSTEMS**

- **EXISTENTIAL THREAT**
- **FORCES EXAMINATION OF KEY  
PRINCIPLES OF WORK INJURY  
COMPENSATION**

# WHAT ARE KEY PRINCIPLES EMBODYING CONSENSUS?

## ➤ UNIFORM COVERAGE

- ✓ APPLIES TO ALL EMPLOYERS AND EMPLOYEES EQUALLY; BENEFITS NOT SUBJECT TO “COMPETITION”; LEVEL PLAYING FIELD

- ✓ **NATIONAL COMMISSION CONSIDERED AND REJECTED EMPLOYER OR EMPLOYEE “CHOICE” OF BENEFIT PLAN**
- ✓ **PERMITTING “CHOICE” FAILS TO GUARANTY EMPLOYER’S INJURY COSTS ARE INTERNALIZED = RISK OF COST-SHIFTING = OTHER EMPLOYERS AND TAXPAYERS**

## ➤ **SINGLE REMEDY; NO-FAULT**

- ✓ **IS WC QUID PRO QUO CO-EXTENSIVE WITH OPT-OUT?**
- ✓ **WHAT IS RISK OF LITIGATION OVER EMPLOYERS' OPT-OUT PLANS?**



## ➤ **UNIFORM ADJUDICATION AND ENFORCEMENT**

- ✓ **ALL WORKERS AND EMPLOYERS SUBJECT TO SAME RULES**
- ✓ **DUE PROCESS**
- ✓ **CASE-LAW GUIDANCE**
- ✓ **CONTRAST W/ OPT-OUT: EMPLOYER APPEALS PROCESS AND FEDERAL COURTS (ERISA)**
  - **SHOULD WORK INJURY DISPUTES BE RESOLVED BY FEDERAL COURTS?**
  - **ERISA MAY PRECLUDE STATE AGENCY ENFORCEMENT = PREEMPTS STATE LAWS “RELATING TO EMPLOYEE BENEFIT PLANS”**

## ➤ **BROAD COVERAGE OF INJURIES & DISEASES**

- ✓ **POLICY OF ENCOMPASSING WITHIN THE COMPENSATION SCHEME, SOLIDIFYING EXCLUSIVE REMEDY.**
- ✓ **OPT-OUT NOT AS COMPREHENSIVE**
  - **COST-SHIFTING?**
  - **SHOULD THERE BE DIFFERING TESTS OF WORK CAUSATION FROM ONE PLAN TO ANOTHER?**
  - **EQUAL PROTECTION?**

## ➤ **EQUITABLE BENEFITS**

- ✓ **INDEMNITY BENEFITS REPLACING LOST WAGES AND MEDICAL TREATMENT WITHOUT DURATION LIMITATION**
- ✓ **ARE OPT-OUT PLANS AS COMPREHENSIVE? IF NOT, WHAT ARE POLICY IMPLICATIONS OF COST-SHIFTING TO OTHER PRIVATE OR PUBLIC PROGRAMS? ACCEPTABLE POLICY?**

## ➤ **PROMOTES SAFETY**

- ✓ **ACTUARILY SOUND PRICING PREDICTIVE OF FUTURE LOSS = UNIFORM STATISTICAL PLAN, UNIFORM CLASSIFICATION SYSTEM AND UNIFORM EXPERIENCE RATING PLAN = CORNERSTONES OF WC RATING SYSTEM = EQUITABLY ALLOCATING RISK OF FUTURE LOSS.**
- ✓ **WC OPT-OUT? LESS SAFE EMPLOYERS JETISON THEIR HIGHER EX MODS**
- ✓ **LOSS OF INTERNALIZING COSTS**

## ➤ **PROTECTS SOLVENCY/BENEFIT SECURITY**

- ✓ **WC = EXTENSIVE SOLVENCY FRAMEWORK = INSURANCE RATING LAWS REQUIRE RATES TO BE ACTUARIALLY SOUND**
- ✓ **RATES DEVELOPED ON OCCURRENCE BASIS, NOT CLAIMS-MADE = WC FUTURE LOSSES RELATE BACK TO WHEN POLICY IN EFFECT, NOT NECESSARILY TO POLICY IN EFFECT WHEN LOSS MATERIALIZED.**
- ✓ **OPT-OUT? ERISA PLANS CLAIMS MADE?**

## ➤ **PROTECTS SOLVENCY/BENEFIT SECURITY (CONT'D)**

- ✓ **WC = WITH INSURER INSOLVENCY, STATE GUARANTY FUNDS**
- ✓ **WC = SELF-INSURERS = SECURITY POSTED; GUARANTY FUNDS**
- ✓ **OPT-OUT? OSTENSIBLY, SECURITY POSTED AND GUARANTY FUNDS, BUT**
  - **ERISA PREEMPTS STATE LAWS MANDATING FINANCIAL SECURITY FOR SELF-INSUREDS = STATES PRECLUDED FROM ENFORCING OPT-OUT SECURITY REQUIREMENTS ON SELF-INSUREDS**

## ➤ **PROTECTS SOLVENCY/BENEFIT SECURITY (CONT'D)**

- **ERISA PLANS PRICED ADEQUATELY? NO RATING LAW STRUCTURE; PLANS ARE PRICED AS CLAIMS-MADE, NOT OCCURRENCE- BASED**
- **WILL ASSESSIBLE BASE BE BROAD ENOUGH TO PAY FOR INSOLVENCIES?**
- **BILLS IN TN & SC IMPLICATE WC OR P&C GUARANTY FUNDS RATHER THAN LIFE & HEALTH GUARANTY FUNDS = WC INSURER SURPLUS AT RISK**

## CONCLUSION

- **OPT OUT RAISES FUNDAMENTAL ISSUES OF PUBLIC POLICY POLICYMAKERS HAVE FAILED TO CONSIDER.**
- **OPT-OUT LACKS AN ORGANIZING PRINCIPLE THAT REFLECTS ACCEPTABLE SOCIAL POLICY.**
- **OPT-OUT IS FLAWED AND SHOULD NOT BE ENACTED.**