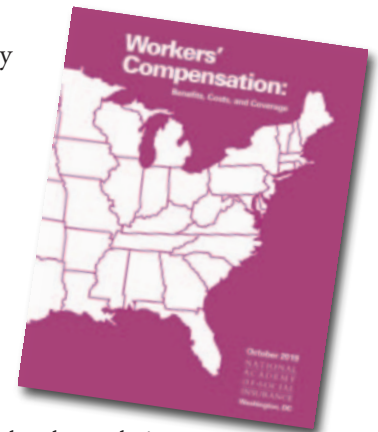


## WYOMING

### Non-mandatory Coverage Reduces Benefits for Workers

For the past century in which workers' compensation has been the law there (its first WC law was enacted in 1913), Wyoming has treated the program somewhat differently from other states. Texas is the only state in which employers can choose whether to cover their workers (Oklahoma briefly had an opt-out law in place, from 2012 to 2014). However, Wyoming looks more like Texas than might appear at first glance.

When states first enacted Workers' Compensation laws in the 1910s, most restricted coverage to jobs that were classified as "extra-hazardous" but subsequently rescinded that limitation. Wyoming, in contrast, retained the term and classified a growing number of jobs as such. As a result, today the majority of workers in Wyoming are covered by workers' compensation because their occupations are classified as "extra-hazardous." Employees who do not work in such jobs, however, are not required to be covered. In recent years, several large private employers, have carved out exceptions that keep their employees outside the system.



Walmart is one of several such employers excluded from coverage because it is a "supercenter,"<sup>1</sup> which is not explicitly denoted as "extra-hazardous" under W.S. 27-14-108(a). The Wyoming Supreme Court upheld Walmart's denial of state workers' compensation benefits to two injured workers in *Araguez v Wyoming Workers' Safety & Compensation Div.*, 262 P.3d 1263 (Wyo. 2011). In rejecting the workers' cases, the Supreme Court decided that a worker's right to coverage rests not on the nature of the job he or she does, but rather on the company's "primary activity"; since "employer classifications are determined by the employer's activity and not the workers ... "It is of no consequence that individual employees may have been performing extrahazardous activities."<sup>2</sup>

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As a result, only 68% of covered Wyoming workers are protected under mandatory workers' compensation.<sup>3</sup>

Like in Texas, there are significant clusters of workers who are employed by companies that offer "alternative" workers' compensation plans. There is little available documentation of the level or type of coverage these plans offer, but two indications suggest how limited it might be. First, Timothy Araguz and James Elder (plaintiffs in the 2011 Supreme Court case) sued the state after receiving the benefits Walmart's plan provided, suggesting coverage was

1 As defined by the NAICS (North American Industry Classification System) in section 452311.

2 Robert Cenicerros, "Injured Walmart Workers Not Eligible for State Benefits: Wyo. High Court," *Business Insurance*. Nov. 1, 2011.

3 According to the Wyoming Department of Workforce Services, of the state's 22,629 employers in 2018, 16,322 of them, or approximately 72%, are registered with Workers' Compensation as policyholders, and of those, 11,027 (68%) have required coverage, while 5,295 (32%) have optional coverage. [http://www.wyomingworkforce.org/\\_docs/resources/publications/2018-annual-impact-report.pdf](http://www.wyomingworkforce.org/_docs/resources/publications/2018-annual-impact-report.pdf).

less than would have been provided under a state plan. Second, in Texas, where companies have the option of using either private plans or the state's, Allison Morantz has noted: *"Although there is little scholarship on the opt-out phenomenon, the few empirical studies that use Texas data suggest that for most large firms, offering private insurance plans in lieu of workers' compensation can result in dramatic drops in claim frequency and costs."*<sup>4</sup>

Firms that operate an ERISA-covered alternative benefit plan are also generally immune from tort suits.<sup>5</sup> In other words, a substantial share of Wyoming workers who are not mandatorily covered under workers' compensation and whose employers have not opted in are subject to dual-denial: they can neither receive benefits under workers' compensation law nor sue their employers when they become injured or ill on the job and the company denies coverage.

This quirk in the state's system – the ability of many large employers to opt out of it – may or may not be relevant to another unusual trend documented in this year's report. Between 2013 and 2017, the number of workers covered under Wyoming's Workers' Compensation system fell by a higher percentage than in any other state – 3.7 percent. This put the state last among all 51 jurisdictions studied each year by the National Academy of Social Insurance in its annual report of *Workers' Compensation: Benefits, Costs, and Coverage*. Indeed, this year's report, which covers data through 2017, shows that Wyoming is one of only four states in which fewer workers were covered in 2017 than was true five years prior. In almost every state, workers' compensation coverage increased, and in 32 states, the increase was by 5 percent or more. Wyoming was also the only state to see a decrease in covered wages over this period (of 1.3%), with all other states seeing modest-to-substantial increases.

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Wyoming shares the decline in covered workers only with three fellow fossil-fuel heavy states: Alaska, North Dakota, and West Virginia. While we do not have the data to confirm this, the volatility of the oil, gas, and coal industries may have played a role in these states' declines; a 2016 unemployment spike in Wyoming, for example, seems to be attributable in part to the loss of jobs in the state's coal mines.

While we do not fully understand the implications of Wyoming's unique classification system, which has placed a large share of workers outside of mandatory workers' compensation coverage, nor do we know the degree to which that characteristic is related to the decline in coverage in recent years, both render the state an outlier and both merit further exploration.

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4 Alison D. Morantz. "Economic Incentives in Workers' Compensation: A Holistic, International Perspective." *Rutgers University Law Review*. 2017: 69, p.1069.

5 Elaine Weiss correspondence with Michael Duff, September 2019.