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Large employers push opt-out legislation

North Carolina could be the next state where a group of large employers pushes for legislation that would allow employers to opt out of the workers' compensation system to create a benefits system more to their liking.

Walmart, Best Buy, Lowes, Kohl's, and Nordstrom, among others, are behind efforts to create an alternative comp system in Tennessee and South Carolina, along the lines of what exists in Texas and Oklahoma. The employers are members of the Texas-based Association for Responsible Alternatives to Workers' Compensation (ARAWC), which has said it sees several southeastern states as fertile territory receptive to its opt-out alternative.

ARAWC's campaign did not get very far in Tennessee this year, and in South Carolina legislation was introduced late in the legislative session. To date, only Texas and Oklahoma allow employers the option of not carrying state-mandated workers' compensation coverage. According to reports in the trade press, ARAWC has hired a lobbyist in North Carolina but its website only highlights its efforts in Tennessee and South Carolina.

The group says its goal is not to do away with workers' compensation protections but to give employers an alternative to state-mandated coverage, thereby introducing competition which would bring down costs. Indeed, recent opt-out legislation introduced in Tennessee and South Carolina emphasizes that injured workers would receive benefits "comparable" to what they currently receive under state-mandated coverage.

But as critics have pointed out, such assurances barely cover the tremendous implications of a system expressly set up by employers according to their preferences. **Mother Jones**, the liberal but well-regarded publication, pointed out that although employers are still required to provide some semblance of workers' compensation, they can write their own rules governing when, for how long, and for which reasons an injured employee can receive medical benefits and wages.

In Texas, for instance, Walmart has written a plan that allows the company to select the arbitration company that hears claims disputes. In Oklahoma, Dillard's requires workers to report injuries before the end of their shift to be eligible for workers' comp.

Similarly, the Center for Justice & Democracy at New York Law School also noted the enormous discretion employers enjoy under opt-out plans: An employer can decide whether a worker qualifies for any benefits. It can refuse to approve any treatment. It can completely deny compensation for certain kinds of disability.

"Depending on the law, an employee may retain the right to sue an employer for negligence. However, as a condition of employment, the employer can force the employee to sign a contract so all cases are resolved through an employer-designed, secret arbitration system rather than in court," the center notes.

Opt-out legislation introduced in late spring in South Carolina may be instructive. For one, the bill makes it clear its intention is to set up a separate, independent workers' compensation system that would have little to do with the system in place. A employer who opts out would have considerable discretion in setting up a benefits program, and House bill 4197 specifies "except as otherwise expressly provided, an administrative agency of this state may not promulgate rules or procedures related to design, documentation, implementation, administration, or funding of a qualified employer's benefit plan."

Also, "this act must be strictly construed. A conflict between this act and another law must be resolved in favor of the operation of this act." In addition, an employer may choose when to opt-out of the workers' compensation system and when to opt in, and in any event the insurance department "shall provide the employer a reasonable time after the withdrawal or denial to

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CASE LAW UPDATE: ADAPTIVE HOUSING

By Courtney Britt

Medical costs continue to be a significant concern for employers in North Carolina. Reforms passed in 2011 by the legislature have provided clarification of industry obligations for some treatments, such as attendant care, but other aspects of an employer's responsibility, like adaptive housing, remain unpredictable.

In May 2014 our Court of Appeals undertook a significant review of this issue in *Tinajero v. Balfour Beatty Infrastructure, Inc*. Plaintiff Tinajero was rendered quadriplegic as a result of a compensable injury and required 24 hour attendant care. He was initially treated at a rehabilitative center and was later transferred to an assisted living facility, which he contended was not suitable. Plaintiff requested placement in an apartment with 24 hour attendant care, which defendants declined to provide.

Plaintiff requested a hearing and a Deputy Commissioner declined to award adaptive housing. On appeal, the Full Commission concluded that plaintiff's placement in the assisted living facility was inappropriate and endangered his physical and psychological health. The Full Commission ordered defendants to pay for the full cost of adaptive housing for plaintiff.

On appeal, the Court of Appeals rejected defendants' argument that housing is an ordinary expense of life that should be borne by the employee and determined that the Commission did not abuse its discretion. The Court relied on the fact that plaintiff had no dwelling of his own that could be renovated to provide handicap accessible housing and that defendants had previously paid the full cost of his housing at a skilled nursing home and, later, a long-term care facility, since the date of his accident. It also noted that living in such facilities was not plaintiff's best interest.

The Court of Appeals has reviewed the adaptive housing issue before, notably upholding a different approach by the Full Commission in *Espinosa v. Trade Source, Inc*., in December 2013. Plaintiff Espinosa was rendered a high-level paraplegic when he was shot while working in the course of and scope of his employment. He later filed a request for hearing seeking, among other things, to tax the cost of his adaptive housing to defendants. After review by a Deputy Commissioner, the Full Commission ordered defendants to pay the difference between plaintiff's pre-injury rent and his post-injury rent for a handicap accessible apartment.

Plaintiff appealed, asserting that defendants should be required to pay the total cost of his adaptive housing. However, the Court of Appeals affirmed the Full Commission's ruling regarding adaptive housing and, in doing so, also rejected defendants' argument that plaintiff's housing costs were an ordinary expense of life that were his alone to bear.

The Court noted that the Commission correctly acknowledged that a change in living expenses necessitated by a compensable injury should be compensated for by the employer. The Court also explained that although some previous decisions have awarded employees the total cost of adaptive housing that those decisions represent the outer limits of the Commission's authority and not a bright line rule setting employers' obligations in every case.

Comparing *Tinajero* to *Espinosa* may leave employers wondering what their obligations are in a particular case. The answer, it seems, depends. *Espinosa* is an important reminder that the Commission is not obligated to tax the total costs of adaptive housing to employers.

However, given the breadth of the Commission's authority to award the full cost of adaptive housing, employers should consider housing issues carefully when they arise and work with injured workers and medical providers, when possible, in an effort to reach the most reasonable resolution of housing issues.

Courtney Britt is a partner with Teague Campbell Dennis & Gorham, LLP in its Raleigh office. She has been listed in Best Lawyers in America for Workers' Compensation-Employers since 2013 and was recognized as a "Rising Star" by Super Lawyers from 2011-2014.

President's Note

Employee or contractor? Probably the former

Employers everywhere should heed recent guidance from the U.S. Department of Labor which all but declares workers classified as independent contractors are most likely employees, and entitled to overtime pay, unemployment insurance, worker's compensation, and other benefits that come with employee status.

In a 15-page memo released in mid-July, the administrator of the labor department's Wage and Hour Division said a worker does not become an independent contractor just because the employer issued a 1099 or because the two agreed among themselves that the worker would be considered an independent contractor.

"The ultimate inquiry under the FLSA (Fair Labor Standards Act) is whether the worker is economically dependent on the employer or truly in business for him or herself. If the worker is economically dependent on the employer, then the worker is an employee," says administrator Dr. Robert Weil.

Thus, economic realities, not contractual labels, determine employment status and "most workers are employees under the FLSA's broad definitions," he added. "The guidance is going to make it harder to classify workers as independent contractors," Beth Milito, senior executive counsel of the National Federation of Independent Business, commented to the ***Wall Street Journal***.

Misclassification of employees as independent contractors has been a primary concern for the labor department as companies are not required to pay unemployment insurance taxes, workers' compensation premiums, or the employer's portion of Social Security and Medicare taxes for such workers. In addition, independent contractors are not protected by most employment laws and, hence, are not eligible for overtime wages and protections from unlawful discrimination.

In recent years, employers have increasingly contracted out or otherwise shed activities to be performed by other entities through, for example, the use of subcontractors, temporary agencies, labor brokers, and franchising, licensing, and third-party management. Most recently, California Labor Commissioner's Office ruled that a driver for Uber should be classified as an employee, not an independent contractor.

The ruling ordered Uber to reimburse the driver nearly $4,200 in expenses and other costs for the roughly eight weeks she worked as an Uber driver last year.

With very best wishes,
Jay Norris

ICD-10: It's on

The North Carolina Industrial Commission has put healthcare providers on notice all medical services provided on or after October 1, 2015, must be billed with ICD-10 diagnosis and procedure codes.

Medical services provided before October 1, 2015 must continue to be billed with ICD-9 codes. The commission adds healthcare providers should follow CMS's guidelines for billing claims that overlap the ICD-10 implementation date.

There is and there has been considerable drama associated with the conversion to the new coding system. The original deadline of October 2011 has been moved three times because of protests from healthcare providers, particularly the American Medical Association, that the conversion would be too expensive, too massive, and too disruptive.

But this time around CMS is hanging tough and even the AMA has accepted the inevitable, no doubt helped along by recent concessions from CMS. The agency says for the first year at least claims will not be denied solely based on the specificity of the diagnosis codes as long as they are from the appropriate family of ICD-10 codes. CMS has also assured the AMA payments to physicians won't be disrupted if there are glitches in implementation of ICD-10.

There remains considerable uncertainty how it will all unfold on October 1. Given the massive nature of the conversion, some hospitals in the country have been preparing by logging inpatient and clinic cases in both ICD-9 and ICD-10 codes, reports **Hospitals & Health Networks**. While dual-coding is thorough, it does gum up the works, say consultants familiar with the process.

In April, **Modern Healthcare** reported surveys by the Healthcare Billing & Management Association and the Workgroup for Electronic Data Interchange suggest not everyone is prepared for the transition. The consensus is while the bigger players will be ready from day one, smaller facilities and small physician-practices may have a tough time initially.

The publication quoted Robert Tennant, senior policy adviser to the Medical Group Management Association and a frequent critic, as saying all indications are "we're going into Oct. 1 flying blind."

coming up

October 14 – October 16, 2015

20th Annual N.C. Workers' Compensation Educational Conference. **Raleigh Convention Center**

Mar. 30 – Apr.1, 2016

Annual Conference, NC Association of Self-Insurers. **Holiday Inn Resort, Wrightsville Beach**

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The employers' voice in workers' comp

Industrial Commission News

- The NC Industrial Commission recently reported it had collected nearly $1 million in civil penalties from businesses that were operating without workers' compensation coverage. This is nearly triple the amount collected in fiscal year 2013-2014, and a five-fold increase from fiscal year 2012-2013 collections. The Commission collected an additional $311,630 in non-fraud penalties in fiscal year 2014-2015.

- A new Medical Fee Schedule went into effect July 1, 2015 regarding professional services. This fee schedule change is in addition to the prior Fee Schedule change on April 1, 2015 involving institutional services.

- There are no fees for filing a Form 21, 26 or 26A effective July 1, 2015.

- Thomas Perlungher has been appointed to a Deputy Commissioner and to serve out the remaining term of former Deputy Commissioner Stephenson.

- Chief Deputy Commissioner Christopher Loutit has been nominated by Gov. McCrory to become a Commissioner on the Industrial Commission. However, the nomination is subject to approval by the North Carolina Gen. Assembly.

Many gubernatorial appointments, including chief Deputy Commissioner Loutit's, have been delayed due to the pending lawsuit between Gov. McCrory and the General Assembly regarding the legislature's authority to appoint members to various government boards. The North Carolina Supreme Court recently heard oral arguments in the lawsuit and a decision is upcoming.

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secure workers' compensation insurance coverage."

The bill does not address how employees would be protected if they are injured during the period their employer is without comp coverage or in between the two systems. Indeed, it may well be practically every substantive element of the new system would have to be litigated before it is clear how its provisions and regulations would apply to workplace injuries.