

Is Responsible Nonsubscription a Viable Option for Your Company?

An Overview of Nonsubscription To Workers' Compensation

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Background and History

The Texas workers' compensation system has been elective to employers since its passage into law in 1913 and while Texas employers have been able to not subscribe since that time, nonsubscription didn't really garner much attention until the late 1980's when a slowing economy and skyrocketing workers' comp rates spelled near disaster for Texas' workers' compensation system.

During the late 80's, employers faced premium increases as high as 150 percent amidst unrivaled fraud and abuse but conditions became more favorable after the workers' comp law was re-written in 1989. The changes to the law and record-breaking economic expansion brought about drastic declines in workers' compensation premiums and decreasing numbers of nonsubscribers. But the more favorable conditions may be short-lived because workers' compensation insurance premiums are rising again so too could be the number of nonsubscribing businesses in Texas.

Texas' Elective Workers' Compensation System

The Texas workers' compensation system is a "generally" elective system or a system that allows Texas employers (with a few exceptions) to choose whether or not they will carry workers' compensation insurance.

While Texas is currently the only generally elective state, it is not the only state to maintain provisions that allow segments of the employer population to operate as nonsubscribers. For example, in Alaska entertainers and commercial fishermen are exempt from carrying workers' compensation and in Arkansas relief or charitable organizations can operate as nonsubscribers. A growing number of states are also allowing "carve out" programs in workers' compensation, which allows an employer to establish its own workers' compensation program rather than purchasing workers' compensation insurance through an insurance carrier.

What Law Allows Nonsubscription?

Nonsubscription in Texas is authorized under Section 406.002 of the Texas Labor Code, which reads:

§ 406.002. Coverage Generally Elective

- (a) Except for public employers and as otherwise provided by law, an employer may elect to obtain workers' compensation insurance coverage.
- (b) An employer who elects to obtain coverage is subject to this subtitle.

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As you can see, Texas employers “may elect” to purchase workers’ compensation insurance.

What Types of Employers Operate as Nonsubscribers?

A 2001 study by the Texas Research and Oversight Council in Workers’ Compensation (ROC) indicates that 35% of private employers in Texas operate as nonsubscribers, which equates to approximately 114,000 employers employing approximately 1.4 million employees statewide.

Most Texas nonsubscribers are found in the small business community, with nearly half of the businesses that employ between 1 and 4 employees operating as nonsubscribers while 13 percent of mid-sized employers (100 and 499 employees) operate as nonsubscribers and 14 percent of large employers (500 or more employees) are also nonsubscribers. Nonsubscription is most prevalent in the retail trade industry with 48 percent of retailers operating as nonsubscribers followed by 38 percent of the service industry (excluding providers of educational services), 36 percent of the manufacturing industry and 35 percent of the agricultural employers. Nonsubscription was less prevalent in the transportation and construction industries (29 percent), finance, insurance and real estate (28 percent), wholesale trade (25 percent) and mining (12 percent).

Why Do Companies Elect to Nonsubscribe?

Overall the high costs of workers’ compensation is the primary reason larger companies choose nonsubscription but company size appears to play an important role in the reasons employers choose to nonsubscribe. In the Texas Research and Oversight Council on Workers’ Compensation’s 2001 nonsubscriber study the three most commonly reported reasons large employers choose nonsubscription are: premium quotes too high (87 percent), alternative occupational benefits are a better value than workers’ compensation (80 percent) and a desire to gain greater control over the choice of medical provider (79 percent). Small businesses on the other hand (fewer than 50 employees), reportedly chose nonsubscription because they have too few employees to purchase workers’ compensation insurance (67 percent) or to avoid high costs (61 percent).

Texas Ranks Highest in Medical Cost Drivers

On on-going study of cost drivers in workers’ compensation conducted by the Workers’ Compensation Research Institute (updated in April 2002) showed Texas to have some of the highest medical cost drivers nationwide.

- ? Of the 7 states analyzed (California, Connecticut, Florida, Georgia, Massachusetts, Pennsylvania, Wisconsin & Texas), Texas had the highest average medical payment

per claim at \$2,413, more than double the average reported in Massachusetts, which reported the lowest payment per claim. The average medical payment per claim in Texas surpassed the other states which reported the following average payments per claim: California (\$1,701) Florida (\$1,535) Connecticut (\$1,455) Wisconsin (\$1,391) Pennsylvania (\$1,343) and Georgia (\$1,285).

WCRI Interstate Comparison: Medical Claims and Utilization. 1998 Accident Year with more than 7 days lost time

	CA	CT	FL	GA	MA	PA	TX	WI
Medical Cost per claim	\$5,390	\$4,372	\$5,779	\$6,180	\$2,999	\$5,277	\$7,650	\$5,200
Number of Visits per claim	28.5	16.5	19.5	17.2	17.5	20.4	28.4	17.7
Cost per visit per claim	\$195	\$277	\$282	\$327	\$179	\$248	\$266	\$343
Services per visit	3.3	2.8	3.1	3.3	N/C	3.4	3.6	2.7
Payment per service	\$59	\$99	\$91	\$99	N/C	\$73	\$74	\$127

- ? Chiropractic services are the major medical cost driver in Texas. Injured workers in Texas are more than twice as likely to receive services from a chiropractor provider than the other seven states. In addition, payments to chiropractors in Texas are 43 percent higher and grew substantially in the period studied.
- ? Medical payments per claim rose most significantly over the period in California, Texas and Wisconsin at an average annual rate of almost 7 to 9 percent per year. Medical claim costs rose for Connecticut and Florida as well by nearly 6 percent per year but increases were less significant on an annual average basis during the same period for Georgia, Massachusetts and Pennsylvania. During the same period, medical price inflation not related to workers' compensation was, on average, 3 percent per year.

In an effort to control costs, workers' compensation utilizes a number of price control measures (pre-authorization, medical fee and treatment guidelines, utilization review, etc.) and arguably these measures supplant market incentives that occur naturally in a competitive system where providers are selected on the basis of cost and service.

The self-proclaimed reckless handling of premium revenue is another factor that is affecting insurance costs. During the past few years, strong economic conditions have afforded insurance companies handsome returns on their revenue investments. As investment returns grew, many workers' comp carriers elected to sell coverage at a loss to increase their customer base and corresponding premium revenue (thereby further increasing the total dollars available for investment), which also resulted in an increased focus on investments rather than underwriting. The result was the abandonment of some of the most basic underwriting principals, which led to underestimated losses and higher costs. When combined with a slowing economy and the impact of the tragic events of

9/11, insurance carriers had no choice but to raise rates—a trend that is expected to continue to several years to come.

Who Cannot Nonsubscribe?

Nonsubscription is available to most private employers in Texas but it does restrict certain private employers and excludes most public employers.

Private employers that perform work on state construction contracts are required to carry workers' compensation insurance and certain entities licensed/regulating by the Texas Department of Transportation and the Texas Railroad Commission are required to maintain specific levels of coverage. Section 643.106 of the Texas Transportation Code requires accidental coverage in lieu of workers' compensation insurance, and reads:

§ 643.106. Insurance for Employees

(a) Notwithstanding any provision of any law or regulation, a motor carrier that is required to register under Subchapter B and whose primary business is transportation for compensation or hire between two or more municipalities shall protect its employees by obtaining:

- (1) Workers' compensation insurance coverage as defined under Subtitle A, Title 5, Labor Code; or
- (2) Accidental insurance coverage approved by the department from:
 - (A) A reliable insurance company authorized to write accidental insurance policies in this state; or
 - (B) A surplus lines insurer under Article 1.14–2, Insurance Code.

(b) The department shall determine the amount of insurance coverage under Subsection (a)(2). The amount may not be less than:

- (1) \$300,000 for medical expenses for at least 104 weeks;
- (2) \$100,000 for accidental death and dismemberment;
- (3) 70 percent of an employee's pre-injury income for at least 104 weeks when compensating for loss of income; and
- (4) \$500 for the maximum weekly benefit.

In addition, many commonly owned businesses are required to maintain workers' compensation insurance for all its subsidiaries if one segment of the company chooses to subscribe to workers' compensation. Certain companies (including some municipalities) may also require employers to maintain workers' compensation insurance in order to transact business with them.

Liability and Nonsubscription

Subscribing employers are protected by exclusive remedy, which provides that in most cases employee workplace injury lawsuits are barred if the employer carries a workers' compensation insurance policy.

The Texas Labor Code does not provide nonsubscribing employers similar exclusive remedy protection nor does it allow nonsubscribers to assert (as a legal defense): contributory negligence, assumption of risk and the fellow servant doctrine.

§ 406.033 (a). Common-Law Defenses; Burden of Proof

(a) In an action against an employer who does not have workers' compensation insurance coverage to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that:

- (1) the employee was guilty of contributory negligence;
- (2) the employee assumed the risk of injury or death; or
- (3) the injury or death was caused by the negligence of a fellow employee.

Addressing Nonsubscriber Liability

In the ROC's 2001 nonsubscriber study, 65 percent of nonsubscribing employers reported they were comfortable with the level of risk they assumed as nonsubscribers and only 3 percent reported being sued (in connection with an occupational injury claim) in the past 5 years. Despite the fact that nonsubscribing employers are not entitled to protection under the Exclusive Remedy Doctrine there are a number of other ways nonsubscribing employers can mitigate liability.

Limiting the Occurrence of Workplace Injuries An effective workplace safety program can play an important role in limiting the frequency and scope of workplace injuries.

In a lawsuit for personal injuries (stemming from a work-place injury), Section 406.033(d) of the Texas Labor Code places the burden of proof on the plaintiff so the party bringing the action must prove the employer's negligence. Discovery documents in a nonsubscriber suit might ask:

- ? Did the employer properly supervise the employee?
- ? Did the employer provide a safe place to work?
- ? Did the employer provide the employee with proper tools?
- ? Did the employer train the employee how to do the work in a safe manner?
- ? Did the employer provide adequate and competent fellow employees?
- ? Did the employer warn employees of dangers inherent in the workplace?
- ? Did the employer establish and enforce safety regulations?

- ? Did the employer inspect for safety hazards?
- ? Did the employer maintain tools and equipment

Provide Excellent Care Nonsubscribing employers should treat their employees with respect and fairness and should develop their nonsubscriber program with that in mind. A nonsubscriber program should contain a well documented and well-defined benefit plan and the employer should make certain employees understand the plan and the benefits offered.

Nonsubscribing employers should also utilize quality health care providers and work closely with medical providers to manage claims. Nonsubscribers should stay abreast of injured employees and offer programs to enable injured workers to return to the work because failure to recognize and/or adequately address an employee's dissatisfaction could result in a lawsuit. It is important to remember jurors are human beings and an employer's failure to provide benefits or adequately care for an injured employee can lend strength to their willingness to return a verdict in favor of an injured plaintiff.

Legal Defense Nonsubscribing employers should make themselves aware of their legal defenses before injuries occur and institute effective risk management programs. For example, the employer might consider:

- ? Was the plaintiff's injury the fault of the employer or solely because of the plaintiff's negligence?
- ? Were the plaintiff's acts and/or omissions the primary cause of the injury?
- ? Was the plaintiff's injury the result of an unavoidable act?
- ? Did the plaintiff's injury occur while he/she was intoxicated?
- ? Did the plaintiff's injury occur in the course and scope of employment?
- ? Was the plaintiff's injury self-inflicted?
- ? Did the plaintiff's injury actually occur?
- ? Has the Statute of Limitations expired?

Damage Offsets Nonsubscribing employers also frequently obtain offsets for damages (i.e. medical expenses, wage replacement benefits, etc.) previously paid.

Internal Dispute Resolution Nonsubscribing employers can develop internal dispute resolution programs to address and hopefully resolve disputes involving workplace injury claims. Internal dispute resolution programs help to further minimize the frequency of litigation.

Arbitration & Mediation Work-related injury claims can be referred to arbitration or mediation and some nonsubscribing employers have successfully maintained arbitration provisions as a part of their nonsubscriber benefit plan for more than a decade.

Settlement of Claims After medical and wage replacement benefits are provided to an injured employee, nonsubscribing employers can settle the claim. Employers should be wary of schemes that purport to limit liability.

Insurance Many facets of nonsubscriber liability are insurable. Nonsubscriber insurance is available to cover medical expenses, wage replacement benefits, judgments, damage awards and even legal defense costs.

Determining the Feasibility of Nonsubscription

There is no one single method for deciding whether or not the adoption of a responsible nonsubscriber program is a good option. Every company is different and as such many of the parameters that are used to determine the viability of nonsubscription are relative to the uniqueness of a particular company's operations. Companies that are considering nonsubscription do however typically fall into three distinct categories.

- ? Companies that choose to nonsubscribe somewhat out of necessity. The cost of workers' compensation insurance may be so high for some smaller companies that they choose to institute a nonsubscriber program without a formal study or an extensive decision-making process.
- ? Companies that conduct a limited analysis of nonsubscription. Mid-size to larger companies may opt to conduct an in-house study to decide if the company should remain in workers' compensation or adopt a nonsubscriber program.
- ? Companies that retain the services of a third-party. Many larger employers elect to conduct a formal analysis of nonsubscription and may employ a third-party to conduct the analysis and provide a recommendation regarding nonsubscription. This process is commonly referred to as a feasibility study or analysis.

What to Look For In Claims Data

Claims data can provide valuable information when comparing a subscriber program to a nonsubscriber program. In order to balance the cost savings associated with nonsubscription, employers should first analyze the costs associated with workers' compensation. A good start would be to examine loss runs and claims information including types of injuries, injury patterns, length of claim, medical costs, wage replacement costs, questionable or fraudulent claims, etc.

- ? Loss Forecasting In many cases nonsubscribers do not report a decline in frequency of claims but do experience declines in the severity, durations and overall number of claims being reported.

A report by the Dallas Chapter of RIMS reported that the average cost of a nonsubscriber claim in Texas was \$1,222 during 1997 and \$1,054 in 1998.

A Texas manufacturing company reported a drop in lost time days from approximately 1,200 as subscribers to 17 as nonsubscribers. Another large restaurant group (employing approximately 2,500 employees) reported a 46 percent reduction in the total number of workplace injuries and a 65 percent reduction in lost injury claims after becoming a nonsubscriber. The company also reported returning \$60,000 of the monies it saved to its employees in the form of safety bonuses.

- ? Claim Patterns Unexplained injury patterns or challenging claims that may correlate to certain health care providers may be addressed more effectively in a nonsubscriber program than in workers' compensation. Establishing effective relationships with quality health care providers is essential to a successful nonsubscriber program.
- ? Keep a Watchful Eye on Nonsubscriber Litigation Litigation data can also serve as a valuable resource. Claim and injury data stemming from litigation can be compared statewide or in certain geographic areas. It is not uncommon for a company contemplating nonsubscription to have their claims reviewed by an experienced nonsubscriber defense attorney to gain a helpful prospective of areas that may warrant extra attention.

Comparing Claims Data: Subscriber vs. Nonsubscriber

To follow are a few pointers for comparing subscriber claim data to nonsubscriber claim data.

- ? Ensure the data is relevant. If a trucking company were considering nonsubscription, claims data from another trucking company would have much more relevance than data from businesses in other industries.
- ? Ensure the benefits are comparable. Nonsubscribers provide a wide variety of benefits so it is important to look for similarities in the benefit structure.
- ? Ensure there is an adequate supply of data.
- ? Ensure the data is mature. In order for claims data to be effective, the claim has to have matured to a level that reflects an accurate assessment of costs. When comparing claims data, check to see that the data has similar maturation periods and that the period accurately reflects the actual costs.

- ? Include adequate amounts of data from similar geographic regions. The cost to provide occupational injury benefits can vary considerably from one geographic region to another so it is important to compare data that has been collected from the same or similar geographic regions.

Relying on Data to Decide

After the claims data has been analyzed and other factors like the cost of insurance have been considered, a formula for comparison should be developed. While it may seem oversimplified, you may want to compare: the total estimated cost of workers' compensation to the total estimated cost savings associated with nonsubscription. And, if the savings is adequate further investigation may examine add the total estimated cost to establish a nonsubscriber program.

While many employers give a lot of weight to the cost comparison when evaluating the feasibility of nonsubscription, a number of other factors may play an important role. For example, nonsubscriber programs allow greater control in claims management, which for some may carry a lot of weight. Nonsubscriber programs can also offer many of the benefits that are typically found in workers' compensation (i.e. safety incentives, wage replacement benefits, etc.), which could affect employee morale and therefore also play affect an employer's decision to nonsubscribe.

The Nonsubscriber Program

If nonsubscription is determined to be feasible, the next step is to develop an occupational injury benefit plan (also referred to as a nonsubscriber plan). Nonsubscriber programs rely on a well-designed benefit plan to manage all of the program's elements. A nonsubscriber plan is a document that is provided by a nonsubscribing employer to its employees, detailing the company's work-related injury benefits and any all applicable rules, regulations and/or guidelines. Think of it as a bicycle wheel -- the plan is the hub and each other element is a spoke.

The primary reason role of the plan is to provide answers to virtually every question that may arise regarding the programs and benefits related to occupational injuries. For example:

- ? Are employees responsible for reporting injuries and if so, how, when, to whom, etc.?
- ? What medical benefits are available?
- ? When do benefits begin and/or end?
- ? What is the maximum amount of benefits allowed under the plan?
- ? What wage replacement benefits are offered?
- ? Is drug or alcohol testing required?

- ? What happens when the health care provider releases an employee to work?
- ? Is light duty available and if so, what type?
- ? What expenses are not covered under the plan?
- ? Are there subrogation rights under the plan?
- ? Who interprets the provisions of the plan?
- ? Who makes determinations regarding benefits?
- ? How are claim disputes addressed?
- ? What options are available to employees if their claim is denied?
- ? Can the plan be amended or terminated?
- ? What benefits are not provided under the plan?
- ? Does the plan provide “workers compensation” benefits?

Employee Injury Benefits The nonsubscriber plan will provide occupational injury benefits, so the company must decide the scope of the plan’s benefits and how the benefits will be offered. For example, will the company self-fund and if so, to what level? Will the company purchase insurance and if so, for what limits?

Health Care Providers Another important aspect of a nonsubscriber plan is a health care provider. Before a nonsubscriber program is instituted, the company should establish relationships with local health care professionals because selecting quality health care providers can be one of the most beneficial aspects of a nonsubscriber program.

Claims Administration Nonsubscriber claims are different from subscriber claims and a nonsubscribing company must be prepared to address workplace injury claims (unlike a subscribing employer that hands the claim off to their insurance provider). The same rules and procedures do not apply to nonsubscribers and nonsubscriber liability makes nonsubscriber claims very unique. There are a number of Texas companies that specialize in claims administration for nonsubscribers.

Claim Disputes Claim disputes will arise in any situation, including nonsubscriber programs, so the plan should contain procedures for addressing claim disputes. Many nonsubscribers choose to implement internal dispute resolution procedures or utilize mediation and/or arbitration. A formal plan to address claim disputes should be in place before the company becomes a nonsubscriber.

Insurance/Funding Specially designed insurance products are available to nonsubscribing employers and will provide coverage for occupational injuries as long as the insurance is not represented as a substitute or replacement for workers' compensation. Section 406.052(b) of the Texas Labor Code states: “This section does not prohibit an employer who is not required to have workers' compensation insurance coverage and who has elected not to obtain workers' compensation insurance coverage from obtaining insurance coverage on the employer's employees if the insurance is not represented to any person as providing workers' compensation insurance coverage as authorized under this subtitle.”

While both workers' compensation and nonsubscriber insurance offer benefits for workplace injuries, it is safe to say that the similarities end there. It is important to understand that nonsubscriber products (and the benefits provided by nonsubscriber products) are not workers' compensation and should therefore not be represented as a substitute for workers' compensation. In fact, it is illegal to represent any other type of insurance as workers' compensation or a substitute to workers' compensation and while we rarely see attempts to market illegal substitutes, state law defines a policy as an illegal substitute to workers' compensation if it purports to: *Provide the same benefits for either the employee or the employer as are provided by workers' compensation insurance; or limit such employees to a claim for benefits under such policies as the employee's sole remedy against the employer in the event the employee suffers a job-related injury or disease.*

Workplace Safety

While it may not be included in the nonsubscriber plan, per se, a specially designed workplace safety program is vital to any nonsubscriber program. The National Safety Council reports that on an average day, 14 people are killed and 10,400 are disabled at work making the workplace death toll equivalent to a major airline disaster every two weeks. Job-related diseases cause as many as 60,000 deaths per year and the indirect costs associated with occupational injury claims are 7 to 9 times higher than the actual total paid for medical costs alone.

Because nonsubscribing employers are not protected by exclusive remedy, workplace safety plays a much larger role in controlling costs and many nonsubscribers invest large amounts of time and money to ensure their work environments are safe, staff is properly trained, employees utilize safe work habits, etc. to ward off injuries before they happen.

Fifty-two percent of TXANS' members report having had a safety program while subscribing to workers' compensation but 100% report they maintain safety programs after electing to not subscribe. And when their experiences as nonsubscribers are compared to their practices as subscribers, they also report a 54.58 % overall decline in workplace injuries.

ERISA and Nonsubscription

Nonsubscriber plans exist under the Employee Retirement Income Security Act (ERISA), which is a relatively complex and expansive area of federal law that governs most private sector employee benefit plans. ERISA establishes uniform minimum standards for benefit plans to ensure plans are established and maintained with financial soundness and that benefits are paid as promised. In fact, when Congress was developing the ERISA laws its primary objective was to protect employees.

ERISA does not speak directly to the benefit plans provided by nonsubscribing employers but it does address them indirectly because of its broad definition of employee benefit plans. Under ERISA, employee benefit plans are defined as any benefit, pension or welfare benefit plan. A welfare benefit plan is also partially defined by ERISA as any plan, fund or program that provides, through the purchase of insurance or otherwise, severance pay, medical benefits, benefits in the event of sickness, accident, disability, death or unemployment. A nonsubscriber occupational benefit plan may be considered an ERISA plan regardless of whether the plan's establishment under ERISA was intended or not.

ERISA supercedes most state laws that relate to benefit plans (with limited exception) but it does not preempt state workers' compensation laws and therefore does not govern workers' compensation. ERISA does however apply to nonsubscriber benefit plans because nonsubscriber plans are not workers' compensation plans nor are they offered for the sole purpose of complying with the Workers' Compensation Act. *ERISA does not bar employees from pursuing a work-related injury claim against a nonsubscribing employer and any programs that claims to limit such actions should be reported to the Texas Department of Insurance and/or TXANS immediately.*

“Free” ERISA Plans

Some nonsubscriber insurance products include a “free” ERISA plan and while there is certainly nothing inherently wrong with these programs, employers should be sure they know what they are buying. In some cases, the so-called free ERISA plan will limit the benefits being provided by the nonsubscriber insurance so it may be a good idea to have an attorney review the arrangement.

The following is a list of some of things an employer might consider when evaluating an ERISA program:

- ? Does the plan meet the company's specific needs?
- ? Does this plan conflict other employer plans?
- ? Does the plan modify the insurance benefits and if so, how?
- ? What provisions can or cannot be modified?
- ? Will the plan be updated or amended as needed and if so, at what cost?
- ? What happens to the free ERISA plan if the policy is changed or cancelled?
- ? Is the entity providing the free plan responsible for filings and regulatory requirements?
- ? Who pays for what services (benefits provided by the plan may not necessarily covered by the insurance policy).
- ? Can the employer designate providers or does the plan require the use of certain providers? (*i.e. medical, legal, third party administrators, mediators, etc.*)

- ? What action does the plan require if the insurance carrier fails to honor claims?
Some programs purport to limit/circumvent liability, prevent lawsuits, etc., which may or may not be valid. If you encounter such claims, get assurances in writing.
- ? Does the plan require some form of alternative dispute resolution?

Employee Communication

Another very important part of a nonsubscriber program is ensuring employees understand the parameters of the program. Many nonsubscribing employers utilize regularly scheduled safety meetings to present and discuss nonsubscriber programs.

The State of Texas requires that all employees be notified of the employer's nonsubscriber status both in writing and by posting notices in the workplace.

Regulatory Requirements

Nonsubscribing employers are subject to certain state and federal regulatory requirements. To name a few: all lost time injuries, occupational diseases and work-related fatalities must be reported to the Texas Workers' Compensation Commission. An annual statement regarding the company's status as a nonsubscriber must also be filed with the TWCC. And certain nonsubscribing employers may also be subject to certain filings regarding their nonsubscriber plan with the federal government.

Monitoring a Nonsubscriber Program

Nonsubscribing employers must engage in on-going efforts to monitor their nonsubscriber program. This may include constant reporting and analysis of losses, claims, benefits, etc. either by company personnel or third-party professionals. Nonsubscription is not a static program but rather on going and ever changing, which requires constant monitoring.

The Relative Cost of Risk

Another relevant factor when analyzing the feasibility of nonsubscription is the cost of risk. More specifically, whether or not the less expensive but uncertain cost of risk as a nonsubscriber is a better value than the more expensive but certain cost of risk as a subscriber to workers' compensation. While it is impossible to pinpoint the exact cost of the risk associated with nonsubscription, it would perhaps make the decision to nonsubscribe easier if you could determine which is greater, the cost of risk as a nonsubscriber or the cost savings associated recognized by nonsubscribing employers. It is however possible to purchase insurance to address most of the costs associated with a nonsubscriber program.

Deciding to Nonsubscribe

One of the final issues to consider in a study of the feasibility of nonsubscription is presenting the program to the workforce.

Regulatory requirements govern the timing associated with introducing a new nonsubscriber program, which equates to timing the process so that both the regulatory requirements and the internal roll out are coordinated with one another. After the program is complete the process of introducing it to the workforce should be carefully planned and orchestrated. In many cases, management is presented with the program prior to notifying the general employee population to enable them to address issues that may arise. The employer must file notice of its change to nonsubscriber status with the State of Texas and if the company is dropping a workers' compensation insurance policy, specific requirements regarding carrier notification also apply. Specific posting notice informing employees that the employer has elected to operate as a nonsubscriber must also be posted in the workplace.

Review

As we have shown, the State of Texas maintains a generally elective workers' compensation system meaning that the majority of the state's private employers can elect to purchase workers' compensation insurance or operate as nonsubscribers. Outside of that Texas requires very little from nonsubscribing employers despite the fact that history has shown that certain percentages of nonsubscribing employers voluntarily develop comprehensive nonsubscriber programs, sometimes with the help of the federal law ERISA, to provide and govern the benefits they provide to employees that sustain an occupational injury.

In order to operate successfully as a nonsubscriber, the company must be willing to commit the necessary resources to ensure the success of the program but as history has also shown, anything worth having is also worth working for.

It is the goal of the Texas Association of Responsible Nonsubscribers (TXANS) to work with Texas' nonsubscribing employers to ensure the future includes the freedom to nonsubscribe and help nonsubscribers discover and develop better ways to provide quality programs that offer adequate care for employees that become injured in the workplace.