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Sunset Committee Hears Testimony on Changes to State's Workers' Comp System

The Texas Sunset Commission met on May 25th to hear recommendations and testimony on proposed changes to Division of Workers' Compensation (DWC). The recommendations are part of a periodic review known as the Sunset process that DWC and more than two dozen state agencies will undergo during the 2011 legislative session.

While most of the DWC discussion focused on issues specific to the state's workers' compensation system, one recommendation submitted by the Sunset staff addresses the low compliance level of nonsubscribers in filing forms DWC-5 and DWC-7. A report prepared by the Sunset staff which serves as the basis for the recommendations projected that: "Only 10 percent of nonsubscribing employers make required reports to DWC, including information and workplace injuries."

The staff report states the agency's efforts to identify noncompliant employers has not been effective, but it also points out that many nonsubscribing employers may not be aware of their obligation to file the required forms. As a result, the report concludes that "...the lack of information negatively impacts the Legislature's ability to evaluate the workers' compensation system and monitor the safety of Texas workers." In response, the staff has submitted Recommendation 6.1 that states, "The Division should closely coordinate with other state agencies to include nonsubscriber reporting requirements in their print and electronic publications."

Public testimony offered the AFL-CIO and the Workers' Defense Project urged legislators to go beyond obtaining the statutorily required forms to collecting more information about how nonsubscribers conduct their program and the alternatives for care that they offer.

The Sunset Committee is scheduled to meet again on July 6th to vote on the staff recommendations that will form the legislation on changes to the agency that the full legislature will consider when it meets in January 2011.

Two Dozen Legislators and AFL-CIO Call for Changes to State Workers' Comp System Including Additional Reporting for Nonsubscribers

Twenty-four democratic lawmakers have joined as co-signors in a letter to the Sunset Advisory Commission raising questions about "major problems and reforms needed to improve the workers' compensation system in Texas." The letter was submitted to the Sunset Commission as it prepared for a public hearing to consider recommended changes to the Division of Workers' Compensation (DWC) and other agencies.

The DWC and the Texas Department of Insurance are among the 28 state agencies that are scheduled to be reviewed by the legislature during its 2011 session. The agencies will be reviewed to determine whether they are fulfilling their mission and to determine whether they should be continued, abolished, or reorganized.

Higher benefits within the state system; inadequacy of the state's new certified provider networks; and reversing the Entergy court decision are among the issues lawmakers suggest should be reviewed to improve the state's workers' compensation system.

Additionally, the legislators suggest that because "nearly one-third of all workers in Texas are without the protection of workers' compensation insurance" they believe injured workers are not properly compensated and that "workplace incidents are grossly underreported." The letter requests the Commission consider that legislators need additional data from nonsubscribers on workplace injuries to address this issue.

While the Alliance has voiced its support for efforts to increase compliance among nonsubscribers filing of the DWC 5 and 7 forms, past legislative efforts have sought to compel reporting of additional data, much of which is already available through state and federal reports.

The delivery of the lawmakers' letter coincided with written comments submitted by the AFL-CIO on the Sunset Commission staff recommendations for the DWC.

Providing similar arguments contained in the legislator's letter, the AFL-CIO correspondence expands by citing the "alarming trends in nonsubscription rates." The organization's comments reference what it says are anecdotal reports of the prevalence of injured workers seeking care at public hospitals for injuries, forcing taxpayers to subsidize their treatment as a result of their working for nonsubscribers. It also refers to nonsubscribers' "sophisticated measures such as arbitration and ERISA to deny workers access to courts when they are hurt..."

In response to the letters, Alliance Chair Margaret Greenshield stated, “While the arguments are not new, the coordination with two dozen legislators is not something we have not encountered in past sessions. This likely signals a renewed and more coordinated effort on the part of nonsubscriber opponents to use the upcoming Sunset process to more vigorously attack the right of employers to manage their occupational injury programs.”

Legislators who signed the letter include: Reps. Alma Allen of Houston, Roberto Alonzo of Dallas, Carol Alvarado of Houston, Valinda Bolton of Austin, Lon Burnam of Fort Worth, Garnet Coleman of Houston, Joe Deshotel of Beaumont, Dawnna Dukes of Austin, Jim Dunnam of Waco, Al Edwards of Houston, Kirk England of Grand Prairie, Joe Farias of San Antonio, Jessica Farrar of Houston, Ana Hernandez of Houston, Abel Herrero of Robstown, Carol Kent of Dallas, Barbara Mallory Caraway of Dallas, Robert Miklos of Mesquite, Elliott Naishtat of Austin, Paula Pierson of Arlington, Eddie Rodriguez of Austin, Chris Turner of Arlington, Marc Veasey of Fort Worth, and Armando Walle of Houston.

Division of Workers’ Compensation Exploring Electronic Filing of DWC-5 and 7

An internal workgroup within the state’s Division of Workers’ Compensation is looking into the possibility of providing nonsubscribers the ability to file status and injury forms electronically. The group’s action comes as the Sunset Advisory Commission is considering recommendations for changes to the agency’s operations including suggestions aimed at increasing reporting compliance among nonsubscribers.

In its report to the Commission, the Sunset staff stated that only 10 percent of nonsubscribers are currently filing the statutorily required reports on their workers’ comp insurance status and on workplace injuries. The low compliance rate has been discussed in previous legislation sessions with legislators encouraging the agency to step up its efforts to collect the nonsubscriber information.

Allen McDonald, who heads DWC’s information management services, told WorkCompCentral that the agency is working on a program to allow nonsubscribers to file their required reports electronically. McDonald stated that the status form or DWC-5 form would like come first. Exploring ways to increase reporting compliance was among the topics that the Alliance included in the stakeholder comments it submitted to the Sunset Commission.

“We discussed this option with DWC staff prior to submitting our comments to the Sunset Commission and were encouraged with their receptiveness to the idea. We are pleased that they are moving forward to provide employers this option,” said Margaret Greenshield, Alliance Chair. Greenshield added, “An electronic filing option combined with additional education of the requirement to file would likely have a significant effect on increasing reporting compliance. Such a move will enhance the efficiency of the filing process for both employers and the state by eliminating the need to file the forms by certified mail or in person.”

The agency has not yet determined a date from implementation of electronic filing.

TDI Confirms Certified Network Law Does Not Apply to Nonsubscribers

In 2007 the Texas Legislature adopted HB 473, which allowed worker’s compensation carriers to continue contracting with informal voluntary provider networks until December 31, 2010. For the networks to continue to operate after that date, the legislation requires that they become “certified” workers’ compensation networks as outlined in Chapter 1305 of the Insurance Code. Because the Texas Department of Insurance is responsible for certifying and regulating workers’ compensation networks, a number of recent questions have been directed to the agency regarding the effect of the law on nonsubscriber networks.

The agency has confirmed that the new requirement does not affect nonsubscriber networks and only applies to workers’ compensation networks. For any additional information about the applicability of the law, you may contact Amy Lee, Special Deputy Commissioner for Policy and Research for the Division of Workers’ Compensation. You may reach Ms. Lee by email at Amy.Lee@tdi.state.tx.us or by phone at 512-804-4000.

Flu Season Recap

It’s been just over a year since the first reports of the H1N1 virus, also known as swine flu, hit the airwaves. Since April of 2009, the CDC reported 282 deaths due to the 2009 H1N1 virus, but the number of deaths and hospitalizations due to H1N1 has dropped greatly in the past few months. In the past four weeks, no states have reported widespread cases of regional flu activity. And because cases of the flu are not as common during the summer, the numbers are expected to remain low.

One positive outcome of all the attention paid to the H1N1 is a sharp increase in the numbers of people getting the seasonal flu vaccine. According to a recent report released by the Centers for Disease Control, 40 percent of the eligible population was vaccinated against the seasonal

flu during the 2009-2010 flu season. During the 2008-2009 season, only 33 percent of the eligible population was vaccinated.

According to the report, the number of children getting the vaccination increased too. During the 2009-2010 season, 40 percent of children got the vaccine, up 16 percent from the previous season.

In a statement released by the CDC, Dr. Anne Schuchat, director of the CDC's National Center for Immunization and Respiratory Illnesses, said, "These results are encouraging. It's important that we build on this success next fall and winter. We want people, especially parents, to make getting a flu vaccination each year a regular habit."

The 2010-2011 seasonal flu vaccine will also cover the 2009 H1N1 virus, which means people will only need one shot for the season. For more information on the flu and vaccines, visit www.flu.gov.

Law Firms Supporting the Texas Alliance of Nonsubscribers:

Adkerson Hauder & Bezney – Dallas
www.ahblaw.net

Law Offices of Travis Brewer – Austin
www.travisbrewerlaw.com

Cox Smith Matthews Incorporated – San Antonio
www.coxsmith.com

Gibson McClure Wallace & Daniels LLP – Dallas
www.gmwd.com

McCathern Mooty – Dallas
www.mccathernmooty.com

Owen & Fazio, P.C. – Dallas
www.owenfazio.com

Federal legislation being monitored by the Alliance is listed below:

HR 635 by Rep. Baca (D-CA)

Description: Establishes the National Commission on State Workers' Compensation Laws.

STATUS: Referred to the House Committee on Education and Labor on January 22, 2009.

HR 991 by Rep. Gutierrez (D-IL)

Description: *Consumer Fairness Act of 2009* - Amends the Consumer Credit Protection Act to treat as an unfair and deceptive trade act or practice under federal or state law any written provision in a consumer

transaction or contract that requires binding arbitration to resolve a controversy arising out of or related to the transaction or contract, or the failure to perform any part. Declares such a provision unenforceable. Permits a written agreement to determine an existing controversy by binding arbitration if the parties agree after the controversy has arisen.

STATUS: Referred to the House Committee on Financial Services on February 11, 2009.

HR 1020 by Rep. Johnson (D-GA)

Description: *Arbitration Fairness Act of 2009* - Declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights. Declares, further, that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. Exempts from this Act arbitration agreements in collective bargaining agreements.

STATUS: Referred to the Subcommittee on Commercial and Administrative Law on March 16, 2009.

HR 1237 by Rep. Sanchez (D-CA)

Description: *Fairness in Nursing Home Arbitration Act* - Provides that a pre-dispute arbitration agreement between a long-term care facility and a resident (or anyone acting on the resident's behalf) shall not be valid or specifically enforceable.

STATUS: Referred to the House Committee on Judiciary on February 26, 2009.

Referred to the Subcommittee on Commercial and Administrative Law on March 16, 2009.

Referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law and the Subcommittee on Crime, Terrorism, and Homeland Security on July 23, 2009.

S 512 by Sen. Martinez (R-FL)

Description: *Fairness in Nursing Home Arbitration Act* - Provides that a pre-dispute arbitration agreement between a long-term care facility and a resident (or anyone acting on the resident's behalf) shall not be valid or specifically enforceable.

STATUS: Read twice and referred to the Committee on the Judiciary on March 3, 2009.

Important Compliance Information for Nonsubscribers

State law requires employers in Texas that do not carry workers' compensation insurance to file DWC Form-5 with the Texas Department of Insurance-Division of Workers' Compensation (TDI-DWC). Additional information on DWC Form-5 is available at: <http://www.tdi.state.tx.us/forms/dwc/dwc005nocov.pdf>.

Nonsubscriber employers with four or more employees are also required to use form DWC Form-7 to report each work-related injury resulting in more than one day of lost time, all occupational diseases of which the employer has knowledge (regardless of lost time), and all fatalities occurring during the calendar month. The completed form reporting all such injuries that have occurred during a calendar month must be filled with the TDI-DWC no later than the 7th day of the following month. For more information on DWC Form-7 go to: <http://www.tdi.state.tx.us/forms/dwc/dwc7.pdf>.

Failure to comply with either requirement is an administrative violation and could result in administrative penalties. The Alliance encourages its members and all nonsubscribers to comply with these requirements.

Links to DWC-Forms 5 and 7 are available on the Alliance Web site at: www.nonsubscriberalliance.org.

Future Board Meetings (All calls are 1:00 p.m. CST)

- **July 21, 2010 – Conference call**
- **September 15, 2010 – Conference call**
- **October 20, 2010 – Annual meeting in Dallas**



The Texas Alliance of Nonsubscribers

An employer-driven, nonprofit trade association dedicated to ensuring that nonsubscription interests are better prepared, more cohesive, and strategically proactive in preserving their choice to manage occupational injury claims.

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