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**Sunset Commission Adopts Formal Report on Division of Workers' Compensation**

The Texas Sunset Commission has adopted its formal recommendations on changes for the agency that oversees the state's workers' compensation system. Included in those changes is a directive to the agency to "closely coordinate with other state agencies to include nonsubscription reporting requirements in their printed and electronic publications."

The nonsubscriber reporting recommendation was one of more than a dozen changes proposed for the Division of Workers' Compensation (DWC) by the Sunset Advisory Commission staff. It was the only recommendation that specifically affects nonsubscribers. The recommendations will be used as the basis of Sunset legislation that will be drafted and filed for consideration by the 82<sup>nd</sup> Texas Legislature when it convenes in January of 2011.

The issue of nonsubscriber reporting has been raised in previous sessions as legislators have expressed concern with the low compliance rate for the filing of forms DWC-5 and DWC-7. During the 2007 and 2009 legislative sessions, a rider requiring DWC to provide a biennial update on compliance information was added to the appropriations bills. In its report to the Commission, the Sunset staff included a specific reference to the low response rate, stating, "Only 10 percent of nonsubscribing employers make required reports to DWC, including information on workplace injuries."

In its response to the Sunset proposal, DWC expressed its agreement with the recommendation and indicated that it had initiated contact with several state agencies to discuss coordination efforts. DWC also cited its ongoing development of an online reporting system that it believes will make the filing process easier and increase compliance. The Alliance had previously expressed its support for such an effort.

Other coordination efforts referenced in the Sunset report include DWC's work with the Texas Comptroller's Office to create a link to the Window on State Government website and the Texas Department of Information

Resources' Texas OnLine Business Portal.

During the public testimony phase of DWC's sunset review, there was an attempt by the AFL-CIO and a group of legislators not on the Sunset Commission to modify the recommendation to require the reporting of additional workplace injury data from subscribers and nonsubscribers. Efforts to require such reporting from nonsubscribers have been the basis of unsuccessful legislative attempts in past session. Working with members of the Sunset Commission and their staffs, the Alliance was effective in presenting information that demonstrated additional reporting requirements were not warranted.

Even though such requirements will not be included in the official Sunset legislation, the Alliance expects separate measures to be filed that will include additional reporting obligations for nonsubscribers. Additionally, the increased focus on workers' compensation and nonsubscriber issues due to the DWC Sunset review also increases the chances that opponents of nonsubscription will attempt to amend such proposals to the Sunset legislation once it begins moving through the legislative process.

The Alliance will continue with its legislative outreach efforts in the months leading up to the 2011 session in an attempt to counter any efforts to place additional reporting requirements on nonsubscribers.

### **Alliance Enters Second Phase of Grassroots Network Development**

During the first phase of development of the organization's grassroots network, company coordinators were identified. The willingness of individuals to volunteer as company coordinators has resulted in the organization's identifying links to 45 of the state's 181 legislators. To continue the momentum this has provided and to expand the reach of the network, the organization has launched the second phase of network development by asking each company coordinator to recruit up to three or more of their co-workers to participate.

Time involvement with the network is expected to be minimal for the additional participants as information and material will be provided. It is not necessary for the additional networkers to have an existing relationship with their elected official.

Company coordinators have been asked to provide their additional recruits to Tim Conger by Friday, August 6, 2010.

With the increased attention on nonsubscription issues during the 2011 session, the development of the network is seen as an essential

component of the organization's legislative strategy.

"Our ability to link Alliance members with their respective legislators during next year's session could be a decisive factor in our efforts to preserve the nonsubscription process as we know it today," said Gary Shope, Alliance Vice Chair.

## **Federal Health Care Reform's Impact on Texas Nonsubscriber Plans**

(Article provided to the Alliance courtesy of PartnerSource)

By way of background:

- The smallest nonsubscribing employers routinely purchase insurance coverage that directly pays medical and indemnity benefits to injured employees and may also pay all of the employer's negligence liability claims and expenses. These are sometimes referred to as "**fully insured**" or "pay on-behalf-of" insurance policies.
- On the other hand, most nonsubscribing employers with over 100 Texas employees purchase a reimbursement form of insurance coverage to protect the company against the liability expense of large injury claims. The employer self-funds (out of its general assets) all medical and indemnity benefit payments to injured employees. The same insurance policy that pays liability claims may (as a secondary purpose) also reimburse the employer for some of these benefit payments. Because the insurance coverage does not pay medical benefits directly to employees but rather reimburses the employer for certain claims, the injury medical benefits are considered a "**self-funded group health plan.**"
- Both fully-insured and self-funded nonsubscriber benefit programs are commonly referred to as "ERISA Plans" because they are subject to the reporting, disclosure, fiduciary and enforcement rules of the Employee Retirement Income Security Act ("ERISA").

In March of this year, Congress passed the "Patient Protection and Affordable Care Act" (PPACA) and its companion bill, the "Health Care and Education Reconciliation Act" (HCERA). **Many requirements of the new health care laws will apply to both fully-insured and self-funded group health plans**, for example, prohibitions on (1) pre-existing condition limitations, (2) maximum dollar and duration coverage limits, and (3) primary care physician designations.

### **NEW LAWS NOT APPLICABLE TO NONSUBSCRIBERS**

The new federal health care law applies to plans that meet its definition of "group health plan." That definition excludes plans that deliver "excepted

benefits” such as:

- Workers’ compensation or “*similar insurance*,”
- **Coverage only for accident** (such as accidental death and dismemberment benefits) or disability income insurance or any combination thereof,
- **Liability insurance**, including general liability and auto liability, and
- **Coverage issued as a supplement to liability insurance** (such as medical benefits that are secondary or supplemental to liability coverage).

**This same definition of a “group health plan” (including the list of “excepted benefits”) is used in the HIPAA medical privacy rules, HITECH (the recent amendment to HIPAA), and the Mental Health Parity Act.** In response to numerous requests, the federal government has previously declined to clarify whether Texas nonsubscriber plans are considered “excepted benefits.” The only governmental guidance provided came in response to an inquiry by the American Bar Association (ABA) in 2004, in which the Department of Health and Human Services stated that it would have to “look at each individual nonsubscriber plan on a case-by-case basis to determine whether it could meet the ‘excepted benefit’ definition.”

With the enactment of HIPAA privacy rules in 2003-2004 and in the absence of any formal guidance, many nonsubscribers chose to attempt **good faith compliance** with HIPAA medical privacy requirements. These nonsubscribers reasoned that it was good public policy to protect employee health information and also wanted to reduce their exposure to government penalties and audits. **More importantly, these compliance actions were taken out of an abundance of caution, with the idea that clarification would soon be forthcoming from the federal government.**

However, since 2004 several factors have changed the “excepted benefit” landscape:

- **No Practical Application of Law and Need to Avoid Employee Confusion.** The federal government continues to dramatically expand its authority over group health plans through new laws and regulations (e.g., HIPAA Portability rules, HIPAA Discrimination rules (GINA), Medicare Reporting Rules, MHPA, COBRA reform and now federal health care reform). Each of these laws (1) was designed for a traditional group health benefit plan, (2) has little or no practical application to a nonsubscriber plan, and (3) would create confusion for employees covered by nonsubscriber plans.
- **Medicare Reporting as a Liability Plan.** In 2009, with respect to

new Medicare Reporting rules, Texas nonsubscribers and their insurance carriers and third party claims administrators have uniformly taken the position that nonsubscriber plans are liability forms of coverage.

- **Case law Affirming Nonsubscription Liability Plan Status.** In the case of *Rentech Steel v. Teel* (2010), the Texas Supreme Court affirmed that (unlike group health plans) Texas nonsubscriber plans are non-fringe benefits - and are plans whose primary purpose is to limit the employer's liability as a nonsubscriber to Texas workers' compensation. Case law on this point dates back to 1987.
- **No Enforcement.** The federal government has conducted no known HIPAA enforcement against any Texas nonsubscriber plan.
- **No Guidance Forthcoming.** Since providing its response to the ABA in 2004, the federal government has stated it will not issue further guidance on whether nonsubscriber plans are excepted benefits.

PartnerSource will continue to support and advocate for the protection of employee health information. But given the developments of the past six years, it is clear now that Texas nonsubscriber plans are considered "excepted benefits" and not subject to any of these new federal health care laws.

### **Physician Group Wants Tighter Controls on "Doctor Shopping" for Pain Medication**

Making prescription drug monitoring programs a priority across the country has been one of the goals of the American Society of Interventional Pain Physicians for more than five years. Recently, more than 100 pain management experts from ASIPP went to Washington, D.C. to lobby Congress directly for the funding necessary to make it a reality. They want Congress to fund a program that helps states collect data on "doctor shopping" and on physicians who overprescribe.

The National All Schedules Prescription Electronic Reporting Act (NASPER) was passed in 2005 but was never funded. ASIPP wants Congress to provide \$55 million over the next five years to fund grants to states that collect prescription drug information and share it with physicians and pharmacists — and law enforcement officials when there's an investigation — while protecting patients' privacy.

"The primary objective of the bill, obviously, is patient safety and what I mean by that is so they won't doctor shop in terms of getting their pain medications," said ASIPP Board Member Dr. John Dombrowski. ASIPP says that 41 states currently have monitoring programs in place;

however, many do not meet NASPER standards — failing, for example, to monitor prescriptions electronically; only covering certain drug categories; or giving pharmacies more than seven days to submit information.

### **Spotlight on Associate Member:**

**1-2-1 Claims, Inc.** – [www.1-2-1claims.com](http://www.1-2-1claims.com)

1-2-1 Claims Inc. is a licensed third party administrator (TPA) specializing in non-subscriber benefit plan administration. 1-2-1 is a Continuing Education Provider certified by TDI to teach “Non Subscriber Program Basics & Excess Policy Understanding,” which it presented in 2009 at Valero Energy.

1-2-1 is new to the Alliance and hopes to continue to help educate new businesses on the benefits of becoming a nonsubscriber by showing them superior claims handling and how that affects the overall non-subscriber benefit program.

1-2-1 founder Michelle Villarreal began her career 20 years ago with CIGNA when HEB was a subscriber and decided to opt out. At that time, workers’ compensation rates were nearing an all time high and opting out was unheard of. She has continued in the field as nonsubscription has grown and matured.

*1-2-1 Claims Mission Statement:*

*1-2-1 Claims is committed to the collection & delivery of concise & complete claim investigation material in a timely manner. This commitment enables us to have a more positive effect on the total outcome of the claim. Our clients receive the best level of customer care available along with the integrity of our firm*

1-2-1’s size allows it the flexibility to gear our services to the needs of its accounts. The 1-2-1 staff is 70 percent bilingual and takes pride in offering services to its clients in English and Spanish. While 1-2-1 is a young company, it has a seasoned adjusting staff averaging more than 20 years of experience per adjuster, most of which is in non-subscriber benefit administration.

### **Law Firms Supporting the Texas Alliance of Nonsubscribers:**

**Adkerson Hauder & Bezney – Dallas**

[www.ahblaw.net](http://www.ahblaw.net)

**Law Offices of Travis Brewer – Austin**

[www.travisbrewerlaw.com](http://www.travisbrewerlaw.com)

**Cox Smith Matthews Incorporated – San Antonio**

[www.coxsmith.com](http://www.coxsmith.com)

**Fisher and Phillips – Houston**

[www.laborlawyers.com](http://www.laborlawyers.com)

**Gibson McClure Wallace & Daniels LLP – Dallas**

[www.gmwd.com](http://www.gmwd.com)

**McCathern Mooty – Dallas**

[www.mccathernmooty.com](http://www.mccathernmooty.com)

**Owen & Fazio, P.C. – Dallas**

[www.owenfazio.com](http://www.owenfazio.com)

### **Federal legislation being monitored by the Alliance**

**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:** 6/21/2010. Subcommittee on Commercial and Administrative Law Discharged.

**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:** 6/21/2010. Subcommittee on Commercial and Administrative Law Discharged.

**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](http://www.nonsubscriberalliance.org)**.

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

- **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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