Risk managers identify and manage potential risks, and take the appropriate steps to either eliminate or mitigate the threat of damage and associated loss costs. Risk managers contribute to the success of their organizations by measuring risk and comparing risk with possible rewards. Understanding the potential rewards of implementing a Texas nonsubscription program is one opportunity that can reduce an organization’s overall cost of risk.

Texas Nonsubscription

Texas is a state that allows an option to not purchase workers’ compensation coverage, regardless of the number of employees, company size, or type of business. Workers’ compensation is still “elective” in Texas today. As of 2014, Oklahoma allows a similar option, although in that state the benefit levels are different, and unlike Texas the “exclusive remedy” defense is retained by the employer.

Nonsubscription is the only alternative to the Texas workers’ compensation system. Nonsubscription employers are not the same as a “certified self-insured” employers. Self-insured employers must abide by the requirements of the Texas workers’ compensation rules and regulations.
It is estimated that approximately one-third of all Texas employers are nonsubscribers. The Texas Labor Code prohibits public entities, maritime and FELA employers, and businesses who participate in government construction projects from being nonsubscribers. Nonsubscribers, however, can be found in almost every other segment of our business community.

Employers choose nonsubscription for a variety of reasons:

- High cost of workers’ compensation insurance premiums.
- Escalating medical costs; workers’ compensation lifetime medical benefits.
- More effective medical and disability management of employee injury claims.
- Significantly increased claim closure and liquidation rates.
- Required 24-hour or end-of-shift reporting.
- No collateral requirements.
- Typical savings of 40-70 percent over workers’ compensation overall costs.

The majority of savings under nonsubscription will come from the fact that employers will have greater control over most aspects of the injury process. The ability of employers to direct employees to medical providers that understand nonsubscription reduces the extent of lost time from work, yet provides the employee with the appropriate care and quality medical treatment.

**Legal Liability**

Nonsubscription, however, does have some unique legal characteristics when compared to workers’ compensation. Nonsubscribing employers lose their right to the “exclusive remedy” doctrine. Exclusive remedy provisions of the workers’ compensation statute protect the employer from common law suits by employees to recover for work-related injuries.

Having workers’ compensation does not always protect an employer from legal liability in the event of all accidents including an employee’s death. In such an event, the workers’ compensation subscriber, like the nonsubscriber, can be subject to a variety of alleged damages resulting from lawsuits associated with a death claim: loss of consortium, past and future lost wages, loss of support, and potentially, punitive damages.

The liability investigation is a critical and additional component that must be completed when handling a nonsubscriber claim investigation. Under the analysis of whether employer’s negligence has occurred, Texas courts recognize an employer owes the following duties:

- To provide employees with a reasonably safe place to work.
- To ensure the safety of all employees and establish rules for their safety.
- To select careful and competent fellow workers.
- To furnish an employee with safe and suitable appliances or tools; to do the work with reasonable safety.
An employer has a duty to establish and enforce rules and regulations for the safety of its employees. A “plaintiff” employee must prove that the employer’s negligent acts proximately caused the injury. Proximate cause includes two essential elements: (1) cause in fact and (2) foreseeability.

“Negligence” means the failure to use ordinary care: failing to do what an ordinary, prudent person would have done under the same or similar circumstances.

“Proximate cause” means that cause which, in a natural and continuous sequence, produces an event, and without cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using “ordinary care” would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

To help prevent potential legal liability exposure, a commitment to “workplace safety” by the employers’ corporate and local management team is critical to a nonsubscriber’s success.

Injury Benefit Plans

Most nonsubscription employers provide their employees with an Occupational Injury Benefits Plan with the purpose of providing their employees with similar work-related benefits in the event of an injury—medical and income replacement benefits. The Occupational Injury Benefit plan is a document that specifies the benefits that will be provided to employees under the plan in the event of injury, including any restrictions, conditions, or requirements.

- An Occupational Injury Benefit Plan should be constructed and filed as an ERISA plan, similar to employee Group Benefit and related plans.
- The “ERISA” status provides the employer with significant legal protections. Constructed to comply with the Employee Retirement Income Security Act of 1974 (ERISA); legal counsel would be more competent to explain.
- Qualify the plan for “fiduciary” coverage as an ERISA plan.
- Employees can be required to sign a binding arbitration agreement in exchange for the provision of voluntary benefits under the plan.
- This is effective at least 90-95 percent of the time and prevents an injured employee from filing suit and seeking remedies through the civil court system.
An employee does not have to accept the plan agreement. They can maintain their right to pursue claims in the Civil Court system if they are injured: assuming they can prove that their injury was a result of employer’s negligence.

Most employers who “roll out” a nonsubscription program experience employee “plan acceptance” rates ranging from 80-95 percent.

Most ERISA Plans designed for occupational injury benefits are 80-90 percent boilerplate with many similar and standard provisions. The structure and benefits provided by the plan are created at the discretion of the employer, subject to compliance with the relevant ERISA requirements. There will be an impact on the employer from an “employer tax/contributions” perspective, since wage loss benefits under nonsubscription plans are considered taxable income for both the employee and the employer.

The following table is an example of plan benefit design:

<table>
<thead>
<tr>
<th>Benefits Provided</th>
<th>Under Texas WC</th>
<th>Under Benefit Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Waiting Period</td>
<td>7 Days</td>
<td>0-3 Days</td>
</tr>
</tbody>
</table>
| Wage Loss Benefits                     | 70% if pay is more than $8.50/hr  
75% if pay is less than $8.50/hr       |                 | 85-100%           |
| Maximum Weekly Wage Loss Benefit       | Up to $850 per week until Maximum Medical Improvement or 104 weeks. 
Income, Impairment and Supplement benefits could total up to 401 weeks | $750             | up to maximum 110-120 weeks |
| Medical Benefit                        | Lifetime       | 100% of covered charges for up to 110-120 weeks |
| Maximum Plan Limits                    | Statutory      | $150,000 per person |
It is our recommendation that you engage a consultant or legal counsel to prepare the ERISA Plan document. This firm should also be utilized to file all required state and federal documents associated with adopting an Occupational Injury Benefit Plan under ERISA. The cost of hiring such a firm to aid in the review and structuring of the ERISA plan and implementation of a nonsubscriber program will vary by employer, based on claim volume and complexity of your program. Lockton can assist in providing names of firms to assist in this process.

**Nonsubscriber Insurance**

It is important that your insurance program under nonsubscription is structured in the most economical manner. “Texas Employers Excess Indemnity” or “Employer Legal Liability” insurance policies, which provide excess loss coverage on a per occurrence or per claim basis, above the self-insured retention, must be compatible with the benefit plan so that there are no insurance coverage gaps.

Employers purchase “Texas Employers Excess Indemnity” or “Employer Legal Liability” policies to cover any nonsubscriber benefit and legal liability claims. Nonsubscriber coverage with the appropriate terms may permit attachment to umbrella or excess coverage, in order to achieve higher overall coverage limits, perhaps at no additional cost.

The overall business objective is to provide replacement coverages for employee injuries, typically covered under workers’ compensation. Coverage is most often available under the same per-occurrence deductible or self-insured retention, and provides excess coverage above the existing deductible level. Additionally, our objective is to place insurance at a lower “insurance cost” in terms of premium, service charges and collateral.

We recommend your Lockton account team obtain a number of insurance proposals to evaluate and compare a variety of deductible structures that best suit your company’s needs.
Claim Management

In the past few years, we have seen an increase in the number of Third-Party Administrators (TPAs) capable of handling nonsubscription claims, primarily in order to maintain market share. Given the unique legal characteristics of handling nonsubscriber claims, we often see bifurcated claim files to allow for the benefits and liability component of the claim to be separated by the handling claim adjusters.

The claim costs of handling a nonsubscriber claim are generally lower than the costs associated with a “lost-time” workers’ compensation claim, given faster closure rates. Nonsubscriber per-claim charges are typically 30-40 percent lower than workers’ compensation lost-time claims. However, the costs of handling “medical only” claims are often higher, given the need for a liability investigation. Typically, the costs of nonsubscriber claims are more in line with TPAs’ liability claim handling rates, on a blended basis.

Under the administration of nonsubscription benefits, the employer’s “Payroll Department” will be responsible for issuing all wage loss benefit payments, as determined and directed by the employee advocate or plan administrator. Since lost wages are paid by the employer, we often see employers self-administer the entire claim with much success.
Next Steps

The mechanics of what has to be accomplished to implement a nonsubscriber program will involve many departments of your companies’ organization. The rollout must be completed in a manner that allows employees to view this program as an enhancement to their on-the-job injury benefits. The mechanics of the program and the execution of the rollout are critical.

We recommend a minimum of a 90-120-day timetable for the successful rollout of a nonsubscription program, depending on the size of the origination and number of employees. In our experience, a well-planned and executed implementation strategy results in extremely satisfied employees and an overall successful program with enhanced savings!

Lockton account teams are available to assist clients with identifying the benefits of nonsubscription and completing feasibility studies, so you understand the potential savings and risks. Lockton can provide insight into insurers’ positions on coverage, the types of exposures businesses may face, as well as proactive advice to mitigate losses and manage claims.
Our Mission

To be the worldwide value and service leader in insurance brokerage, employee benefits, and risk management

Our Goal

To be the best place to do business and to work

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