# The Winds of Change:

## Oklahoma and Its Option

Presented by:

**Mark Crawshaw, Ph.D., FCAS, MAAA**
Madison Consulting Group, Inc.

CAS RPM Meeting
March 10, 2015
Dallas, Texas

# Antitrust Notice

- The Casualty Actuarial Society is committed to adhering strictly to the letter and spirit of the antitrust laws. Seminars conducted under the auspices of the CAS are designed solely to provide a forum for the expression of various points of view on topics described in the programs or agendas for such meetings.
- Under no circumstances shall CAS seminars be used as a means for competing companies or firms to reach any understanding – expressed or implied – that restricts competition or in any way impairs the ability of members to exercise independent business judgment regarding matters affecting competition.
- It is the responsibility of all seminar participants to be aware of antitrust regulations, to prevent any written or verbal discussions that appear to violate these laws, and to adhere in every respect to the CAS antitrust compliance policy.


OKLAHOMA

# The Oklahoma Option

Law passed in 2013, became effective February 2014. We will address the following:

1. Why did the option for employers to “opt-out” of the Oklahoma workers compensation system come about?

2. What is the Oklahoma Option (Oklahoma Employee Injury Benefit Act)?

3. How does the Oklahoma Option compare to Texas non-subscriber?

4. What are the implications of the Oklahoma Option for the workers compensation systems in Oklahoma and beyond?

# Why the Oklahoma Option Came About

1. High cost of workers compensation in Oklahoma and its effect on employment in the state.

2. Employer perception of the inability of the political and regulatory system to effectively respond to high costs, abuses, etc.

3. A competitive mechanism to force efficiency in the regular workers compensation system.

4. A response to the competitive advantage presented by the Texas system.

# High Costs in Oklahoma

| State | Average Cost Per Claim | Claims Per 100,000 Workers | Cost Per Worker |
|---|---|---|---|
| Arkansas | $ 8,191 | 3,283 | $269 |
| Kansas | $10,993 | 3,978 | $437 |
| Missouri | $12,974 | 3,318 | $430 |
| **Oklahoma** | **$19,373** | **3,980** | **$771** |
| Texas | $10,063 | 2,557 | $257 |

Source: NCCI Annual Statistical Bulletin (2014)
Exhibits 11, 12 (First Report Policy Year 2010-2011)

# Employers in Oklahoma Choose their Workplace Injury Program

1. Regular workers compensation insurance (Administrative Workers Compensation Act).

2. The Oklahoma Option (Oklahoma Employee Injury Benefit Act).

# Employee Benefits Under the Oklahoma Option

1. Employer chooses what the benefits are, subject to minimum requirements.
2. Minimum requirements are the same as the benefits under the regular workers compensation system.
3. Employer chooses how the benefits are administered.
4. While not stated in the law, it is expected that benefit plans will be designed to be "ERISA" plans.

MGC INC

# Exclusive Remedy

- Exclusive remedy is the bargain underlying workers compensation insurance. Employees give up their right to sue in exchange for “no-fault” benefits.

- Exclusive remedy applies similarly to both regular workers compensation insurance and the Oklahoma Option.

- Exclusive remedy does not apply in cases of intentional injury or failure to pay benefits.

# Steps an Employer Takes to Adopt the Oklahoma Option

1. Establish a written benefits plan.

2. Determine how the plan will be funded (insurance/self-insurance/captive).

3. Obtain approval from the Oklahoma Insurance Department to become a “qualified employer”.

4. Notify employees.

5. Pay an annual fee to the Oklahoma Insurance Department ($1,500).

# Regulation of the Oklahoma Option

**Oklahoma Insurance Department**

- Determines qualified employer status.
- Focus is on the substance of the plan and the ability of the employer to fund it via insurance/self-insurance/captive.

**Oklahoma Department of Labor**

- Workplace safety, OSHA, etc.

**Employee Retirement Income Security Act (ERISA)**

- Federal rules and remedies to protect employees and beneficiaries in employee benefit plans. Preempts many state laws and regulations.

# Thinking Behind the Oklahoma Option

Advocates for the Oklahoma Option claim it will result in substantial cost savings to the employer for the following reasons:

**Coordination of Benefits:** The work injury benefit plan will likely be designed as an ERISA plan. This will facilitate coordination with other employee benefits (e.g., health insurance).

**Dispute Resolution:** The workplace injury plan can be designed to provide a dispute resolution process that largely precludes the involvement of state agencies and plaintiff attorneys.

# Thinking Behind the Oklahoma Option, Cont.

**Conditions for Receiving Benefits:** While the benefits are subject to minimum requirements, the employer may set out the conditions for receiving those benefits. For example, continued medical benefits could be conditioned on using the employer's selected provider and on following the recommended treatment.

**Enhanced Claims Management:** The employer may set out conditions for separating occupational and non-occupational conditions, determine what conditions are compensable, direct the choice of medical provider and treatment option, control the types of drugs used, determine when the employee must return to work, etc. The benefit plan may also provide for lump sum settlements.

**Experience in Texas:** The factors above are credited by many as resulting in substantial cost savings for Texas non-subscribers who have opted out of workers compensation and used alternative ERISA benefit plans.

# Interest in the Oklahoma Option (as of January 2015)

- 32 Qualified Employers.
- 5 Insurance Companies filed policy forms.

Source: workcomp.odi.ok.gov

# Caveats

- Actual impact of the Oklahoma Option will depend on how law is interpreted by the Oklahoma Insurance Department and State Courts.
- The Option is controversial. Opponents claim employees will be disadvantaged.

# Texas Opt-Out

- Employer has the option to "non-subscribe" to the workers compensation system.
- Some of the non-subscribers have alternative workplace injury programs.
- Employer loses exclusive remedy protection of Workers Compensation Law.

# A Significant Portion of Texas Employees are Covered by Alternative Workplace Injury Programs

| **TYPE** | **% Employees** |
| --- | --- |
| Non-Subscriber - Alternative Benefit Plan | 15% |
| Non-Subscriber - No Plan | 5% |
| Regular Workers Compensation | 80% |

Source: Based on information for 2014 described in "An Analysis of the Impact of the 2005 Legislative Reforms on Workers Compensation System, 2014 Results" Texas Department of Insurance (December 2014).

# Typical Texas Alternative Workplace Injury Program

1. A package of death and disability benefits – death, medical, dismemberment, wage loss, etc.

2. Often benefits include time limits (e.g., 2 years for wage loss and medical).

3. Sometimes benefits are more generous than under workers compensation.

4. Organized as an ERISA plan. Federal, not State, courts have jurisdiction over the plan.

5. Dispute resolution in plan largely bars lawyer involvement.

# Key Differences Between the Oklahoma Option and Texas Alternative Workplace Injury Programs

| | Texas | Oklahoma |
|---|---|---|
| Exclusive Remedy | No | Yes |
| Minimum Required Benefits | No | Yes |
| State Control of Employer Status | No | Yes |

The Oklahoma Option is in the middle ground between the Texas style "opt-out" and traditional workers compensation.

## Implications for the Insurance System

1. No centralized NCCI style data definition and collection.

2. Workers compensation carriers may need to offer new products to maintain their business.

3. Carriers with expertise writing Texas alternative workplace injury programs have the opportunity to expand into Oklahoma. However, the Oklahoma Option may be much longer tailed than they are accustomed to.

4. Costs inherent in the workers compensation system (administration, second injury fund, etc.) will be subject to competitive pressure from the Oklahoma Option.

5. Pressure for similar reforms in other states.