

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

Report of the Advisory Council on Workers' Compensation To the Senate Commerce & Labor Committee

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The Advisory Council on Workers' Compensation met on March 23, 2015 to review pending workers' compensation bills, and, pursuant to T.C.A. §50-6-121(j), *"The advisory council on workers' compensation shall, within ten (10) days of each meeting it conducts, provide a summary of the meeting and a report of all actions taken and all actions recommended to be taken to each member of the consumer and human resources committee of the house of representatives and commerce and labor committee of the senate."* This is the report of that Council meeting for your review and information.

SB0721/HB0997 (Green/Durham) proposes a Tennessee Option for financially stable employers with at least 100 employees that would enable them to opt out of Chapter 6 of Title 50, under which the Division of Workers' Compensation has oversight for workers' compensation benefits, and design their own employee injury benefit plan with certain minimum requirements and caps per individual and occurrence. Senator Green presented the Tennessee Option bill to the Advisory Council on March 16, 2015; the Advisory Council at that time elected to defer recommendation on the bill until additional information became available. An amendment to the bill released Friday, March 20 made some revisions, including to benefit levels.

On March 23, 2015, presentation was made to the Advisory Council by Mr. Gary Moore, Mr. Trey Gillespie and Mr. Brian Bivens, and Mr. John Peeler.

Presentation of Gary Moore, TN AFL/CIO

Mr. Gary Moore, president of the TN AFL/CIO, expressed concern about the negative impacts the proposed legislation has on employees with respect to medical expenses, death and dismemberment, permanent partial and total disability benefits since the provisions are all less than that what is provided under the current system. He stated that the bill is detrimental to employees and would take away much needed coverage presently provided under the current system. Custodial care, hearing aids, prosthetic devices for artificial limbs would not be covered

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

under the proposal but are under the current system. There are limits placed on lump sum payments and the employee has no say in their care, but the employer alone determines what is reasonable for that employee. He noted that the trend is moving in a manner that is detrimental to employees and this proposal provides no regulatory authority. The Tennessee Department of Labor and Workforce Development currently monitors the system to make sure the employers are complying. There is no such oversight under the proposal. He questioned the legality of this type of system. Lastly, he pointed out that the Governor brought about a comprehensive Workers' Compensation Reform recently and that there is no data available right now to reflect how the system is working post-reform, so he encouraged waiting to see how the Governor's Workers' Compensation Reform functions.

Presentation of Trey Gillespie, PCI

Mr. Trey Gillespie, Senior Workers' Compensation Director for Property Casualty Insurance Association of America, a national trade association with over 1,000 members nationwide and which writes approximately 38% of the private workers' compensation insurance market, addressed the Council and distributed the attached statement and chart.

He indicated that this bill violates the grand bargain that has been in place for workers' compensation for over 100 years, which identifies an agreement between the legislature, employers, and employees that a no-fault system would be put into place that would provide limited, but certain, benefits in exchange for tort liability protection for the employer.

Mr. Gillespie stated that the bill removes the part of the bargain whereby the legislature sets the benefits and all the conditions and limitations on eligibility to those benefits and decides what is covered by workers' compensation.

Under the proposed amendment, the employer can unilaterally set the level of and conditions and limitations on benefits and the coverages while providing no meaningful dispute resolution system for the injured worker.

Mr. Gillespie stated that the concept of Opt Out was looked at two years ago as part of the evaluation of the workers' compensation system as a whole and was not made part of the Tennessee Workers' Compensation Reforms of 2013. The State hired an independent consultant to look at the advisability of Opt Out and whether it would enhance the workers' compensation system in Tennessee. WorkComp Strategies, LLC (WCS) provided a detailed report in terms of its recommendations for workers' compensation reforms and concluded that there would be an adverse impact on employee benefits. In doing so, WCS was looking largely at the Texas Opt Out system; Mr. Gillespie stated that this bill is based on the Texas Opt Out System, and consequently, the WSC recommendations are relevant as to whether Opt Out is a reasonable alternative to workers' compensation in Tennessee.

Key to the bill are the handling of the medical expenses. The amended bill provides a \$500,000 limit and a 156 week limit, which Mr. Gillespie stated does not pay for all expenses. It only pays for "covered" medical expenses, and the employer can decide what medical expenses it will totally exclude. Consequently, the employee is liable for all medical expenses not covered by the plan and all expenses in excess of the \$500,000 limit, all medical expenses incurred more than 156 weeks after the injury, and all medical expense incurred after the employer terminates medical benefits. A qualified employer can put conditions and limitations into its plan that can potentially terminate benefits long before 156 weeks run. NCCI statistics

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

show that there are over 1,000 open claims with over \$500,000 in medical expenses presently in the Tennessee workers' compensation system right now.

The bill provides that once the employer has been certified as a qualified employer, open claims in the workers' compensation system are removed and put under the benefit plan, which means some of these catastrophic cases can be transferred into an employee benefit plan, and medical benefits terminate at that point in time.

Also according to NCCI statistics, in cases where medical treatment exceeds 156 weeks, 35-40% of all the medical expenses in the case are incurred after the 156 weeks. The amendment is unclear as to the responsible party for payment of these bills under the proposed Tennessee Option. There is no provision for the employer to provide rehabilitation services; there is an indication in the amendment that temporary total disability might be enhanced, but this is subject to payroll taxes, and consequently the net to the injured worker is less than under the current system. The duration of temporary total benefits is limited to the 156 weeks, which it is not so limited under the current system.

Maximum combined limitations do not presently exist under the system. This undercompensates injured workers who are part of a catastrophic event. The employer sets the coverages. Workers' compensation presently cannot exclude terrorist risks. 9-11 benefits were deservedly paid. The employer under the Opt Out could exclude coverage for injuries from terrorist acts.

The death benefit would be less. All forms of permanent disability are basically discretionary benefits. The employee has to meet all the terms and conditions and limitations in order to get them. Mr. Gillespie stated that what the bill sets as minimums are fairly illusory and that Texas employers boast that they never pay for permanent disability. The employer decides who qualifies for permanent benefits. The employer sets all the terms and conditions, and the injured worker has to sign an arbitration agreement to remain employed. Additionally, a person must be an employee to get benefits; if a person is terminated after sustaining an injury, the person may lose employee status and therefore not be entitled to those benefits.

There are no due process protections for dispute resolutions. In Texas, the administrator is given broad discretion as to what to pay and what not to pay. If there is a dispute, it goes to binding arbitration; the employer may be permitted to select the arbitrator, and in some cases, the employee must bear the cost of half of the arbitration; if the employee does not pay the expenses up front, the employee loses the right to arbitration.

Also in Texas, it has been common that the arbitration may take place at a location far away from and inconvenient for the employee (example of Texas employee having arbitration held in Indiana). This discourages the ability to pursue dispute resolution even when there is a bona fide dispute. The employer has full authority and right to change the plan at any time for any reason. Again this violates that part of the Grand Bargain that seeks to provide a degree of certainty to the benefits.

WCS not only considered the damage to the employees' benefits, but also potential damage to employers left in the system. By and large, the Opt Out system will be very attractive to large employers, but the impact of their robust safety plans on workers' compensation rates would be removed. WCS talked about that impact as well on Social Security Benefits, Medicare and TennCare. 156 weeks frequently is enough, but there are numerous cases where the 156

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

lapsed a long time ago. Mr. Gillespie questioned where injured workers go for medical benefits after they are cut off and where they go for wage replacement benefits after the 156 weeks run out. WCS expressed concern that the Opt Out system would undermine the workers' compensation reforms. The workers' compensation reforms should become fully matured so their impact can be evaluated to determine whether and what adjustments are needed.

Mr. Gillespie discussed the effect of ERISA preemption. Section 514 preempts and supersedes any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. This is an employee benefit plan by the express terms of the bill. Once an employer is certified to be a qualified employer and put this into ERISA, there will be no option for regulatory oversight or statutory changes. It is a very dangerous part of this act. Mr. Gillespie stated that most state legislatures "don't have the stomach" for delegating what has been traditionally an area of concern for the state to the federal government, but this bill does that. It primarily mimics what was done in Texas and some of the Oklahoma bill that passed, which is under Constitutional attack.

MR. Gillespie closed by stating that his organization recommends that this bill not be recommended for approval.

Council member Gregg Ramos (Tennessee Bar Association Representative) inquired if the Texas employee satisfaction studies cited by Senator Green in the March 16, 2015 meeting have been received by the Council, to which Ms. Schroeder (Administrator of the Advisory Council) indicated they had not.

Presentation of Brian Bivens, Bivens & Associates, LLC

Mr. Brian Bivens of Bivens & Associates, LLC, a government relations consultant for the Association of Responsible Alternatives to Workers' Compensation, stated that there have been a number of Tennessee employers that have successfully run plans in Texas for years with better medical outcomes, higher employee satisfaction and lower cost. He indicated that the amendment has been a working document for over five years and represents the best collaboration of stakeholders proposed this bill as policy for Tennessee.

Council member Mr. Jerry Mayo (Insurance Representative) expressed his confusion as to how Mr. Bivens can say there will be better medical outcomes when the bill destroys the medical benefits that employees currently have with workers' compensation.

Mr. Bivens indicated that since there is no Tennessee Option yet, statistical data from Texas would have to be considered.

Mr. Mayo indicated that any such statistics had not been provided to the Council.

Mr. Bivens offered to provide it.

Mr. Mayo asked why we are seeking to reduce benefits on employees through this bill.

Mr. Bivens indicated that those questions would be more relevant to the sponsors of the legislation, and that he wanted to state, on behalf of employers, that they would prefer to have an option in the state of Tennessee.

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

Presentation of John Peeler, Esq.

Mr. John Peeler, president and senior workers' compensation attorney for the Tennessee Association of Justice, a trial lawyer and pharmacist, gave an example of one client. The client came out of a military career and became a welding inspector. While working in Memphis, he fell 20 feet and severed his spine, immediately incurring thousands of dollars of medical and surgical bills. The final result was total loss of function in the lower half of his body. His medical bills went over a million dollars, hardware from his first surgery failed in his back and he had to have a second surgery. Unrelenting pain eventually led to additional surgery to cauterize all the nerves in his back leaving him a paraplegic. He could no longer work, his bills approached 2M dollars and he finally reached Maximum Medical Improvement at 6 years. This injured worker would have lost his house, his car, his children would not have been able to go to school if this proposed bill was in effect at the time he was injured. Eventually, he would have found his way to get medical treatment, and Mr. Peeler questioned where that cost would have been transferred. The State of Tennessee would eventually have picked up a portion of that cost. He asked that you not allow this bill to become law.

Advisory Council member Mr. Kerry Dove (Employer representative) stated that he appreciated the comments from the audience today and the energy that has been put into this discussion. He indicated that the Council had to make a recommendation to the legislators whether the Advisory Council this is a viable bill. From a business perspective, he stated he respects the businesses that support this bill. He praised the integrity of and expressed understanding of their position and the experiences that they have had from other states. He also expressed that he understands the experiences of the speakers the administration.

Mr. Dove stated that the Advisory Council asked for information from the other states which has not been received, and that the amendment was circulated late on Friday, March 19. He observed that this is a serious bill, that there was a renovation of the workers' compensation act a few years ago that the Advisory Council was involved in and felt would be successful, and this Opt Out bill is somewhat independent of that in some ways.

Mr. Dove stated that given the fact of the seriousness and gravity of the and not fully understanding the consequences of a decision if the Advisory Council made a recommendation to approve the bill, he believes it is important that to spend more time looking at it - not only the changes but also the consequences of the changes, both administratively and to the citizens and workers of Tennessee.

Mr. Dove stated that he does not think the Advisory Council has enough information right now, and he does not want to make an uninformed decision to move forward. He suggested that the administration, public policy makers and regulatory entities, along with other interested parties, could decide if they would like to engage a respected independent consultant to study this opportunity and come back with data and information that will enable the Advisory Council to make a truly informed decision. He further suggested that such a consultant should consider the Opt Out bill itself, looking at the positive parts of programs from other states and what could be incorporated in an opt out bill, if that is the direction the study recommends, or if there is a possibility of incorporating those improvements into the existing workers' compensation act in order to satisfy the needs of those high performing, high integrity companies that have demonstrated that they are truly qualified to run a responsible program.

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

Discussion from the Council ensued. Mr. Mayo (Insurance Representative) indicated that while he appreciated Mr. Dove's suggestion that he did not think a consultant was necessary to advise that this is not a good bill or to advise that the benefits are reduced. He suggested instead that it should be determined whether the Opt Out idea could mirror the workers' compensation act that is already in place. Additionally, he pointed out that there were still issues on the Guaranty Fund portion of the bill that had not yet been discussed. He stated that there is a lot wrong with the bill that will not be fixed by a consultant.

Council discussion surrounded the need for further information, the study of statistics of other state's options already in place, some public policy decisions, consideration of the small number of well-respected companies looking for cost savings, interests of state regulators, employee and business group all to weigh in on an action deemed by the Council to be complex and significant. One very specific need addressed was for an analysis of how the Opt Out reduced benefits may transfer injured workers' financial needs to Social Security, Medicare and TennCare before the Council can make a properly informed decision about the viability of the Tennessee Option presented in the amendment.

Council member, Mr. Kerry Dove (Employer Representative) moved that the amended bill not be recommended for approval at this time, pending the other recommendations made earlier about information and study. Mr. Paul Shaffer (Employee Representative) seconded the motion.

Council member, Mr. John Garrett (Employee Representative) asked for the Division of Workers' Compensation to comment on the bill.

Council member, Ms. Abbie Hudgens (Administrator of the Division of Workers' Compensation) thanked Senator Green and the sponsors and indicated that she very much appreciate the amendments that they came forward with Friday afternoon in that it was a very large move and the amendments do tend to bring the bill closer to the benefits that are available under the State law. However, those benefits are still not on par with what is provided in state law for employees that are injured. Beyond that, she expressed two large concerns.

The first is that the law divides the current pool of employees into those who are eligible for benefits and protections under state law and one that does not.

The second concern is the fairness of what happens to those people in that second group; the employees of employers who have opted out.

There are no protections or processes available from the state of Tennessee to help these employees get help if their employer is not fair in their dealings. She echoed what Mr. Dove had stated earlier – that the sponsors that are very interested in this bill are responsible employers and the backbone of employment opportunities in Tennessee.

Ms. Hudgens stated that the bill applies to everyone who becomes qualified, and the qualifications have nothing to do with how well an employer may treat its employees. That's a concern because all employees need to be protected, not just those employees of those who decide to stay under the workers' compensation state law.

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

She found it troublesome that the state would only be able to say to the employee who has an unfortunate situation with the employer because the employer is not being honorable or just, is that their only option is to embark on a costly ERISA lawsuit and that is a lawsuit that has very low probability of success or even low probability of being able to find an attorney who would represent the employee. The workers' compensation system needs to balance the interest of employers and employees. With the reforms of 2013, the primary objective was listening to the issues on both sides and taking a path of fairness.

The Reforms of 2013 were in part a reflection of this feeling that benefits had swung too far in one direction and they were interested in a more equitable spot. This bill seems to be moving in the opposite direction. Ms. Hudgens expressed concern that it will do a great deal of harm and stated that the state should in all cases try to do no harm.

Council member Mr. Ramos (Tennessee Bar Association Representative) stated he appreciated all the comments, but the bottom line is a recommendation that this bill not move forward and expressed his agreement with that recommendation.

Unanimous vote not to recommend the bill.

Mr. Pitts (Employer Representative), requested that the PCI handout and Administrator Hudgens' documents be added to the reports to the Committees. He also asked that it be noted again that there has been no assessment of the possible transfer of a legitimate injured worker's financial needs to Social Security disability, Medicare and TennCare. He further noted that it was his understanding that the Tennessee Department of Commerce & Insurance as well as the Tennessee Division of Workers' Compensation still maintain serious concerns about and have this bill flagged.

The Division of Workers' Compensation Chart and the Property Casualty Insurance Association handouts are attached for your review.

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

HB0589/SB1061 with Amendment

Representative Parkinson presented the bill and the amendment which makes the bill applicable only to public employees. He explained that the bill makes provisions for those employees who are outside the drug free workplace act, outside the safety sensitive positions, but who have a drug test come back positive for drugs that were legally prescribed and ingested, were not affecting the present condition of the employee (not under the influence in the workplace), but leave residual amounts in a person's system which show up on a screen.

An inquiry from Council member Mr. Gregg Ramos (Tennessee Bar Association Representative) was whether the statute would only apply to prescribed drugs, not those recreationally used.

Representative Parkinson responded positively, and went on to state that this bill would allow persons who take legally prescribed drugs, to not be subject to adverse action by their employer due to residual amounts left in their system which do not cause the person to be under the influence while performing their job duties.

Mr. Bob Pitts (Employer Representative) inquired of council member, Ms. Abbie Hudgens, (Administrator of the Division of Workers' Compensation), or insurance representatives in the audience whether, from an enforcement point of view, is it of any value.

Representative Parkinson indicated that the bill provides that if an employee uses prescription drugs which show up in a test, but is not showing characteristics of being under the influence, that no adverse employment action should be permitted.

Ms. Hudgens indicated that it would seem to set up a new area of litigation between employee and employer because one would have to argue about whether or not the circumstances of an injury actually could be traced to the presence of a drug or if it was just another factor leading to the injury. There would be a very small window of time, and it is hard to see that this bill will provide any meaningful relief.

Representative Parkinson expressed his belief that there will be legislation to provide for legal medicinal marijuana passed this year.

Representative Parkinson indicated that this bill refers to any drug that is legally ingested by an employee. If taken the night before and there are still traces of it in the system when the person goes to work the next day, if individuals are not exhibiting signs of being under the influence in the workplace, then a trace amount in a drug test should not result in an adverse employment decision. The bill prevents a person from adverse action from an employer due to traces of prescribed drugs in their system if they are not under the influence on the worksite.

Ms. Hudgens added that one of the components of a drug free workplace, is to provide disincentives to using drugs at all and that's part of the value of a drug free workplace; there should be a culture where the employee does not use drugs at all.

Representative Parkinson agreed and reiterated that this legislation would be for those employers outside of the drug free workplace.

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

Ms. Hudgens agreed that it was a worthy purpose but did not think it was written in a way that would have a meaningful result.

Representative Parkinson reiterated that this bill operates outside the drug free workplace programs.

Council member Gregg Ramos (Tennessee Bar Association): inquired how many public employees there were and why the bill does not go beyond public employees.

Council member Mr. Paul Shaffer (Employee/labor Representative) recommended the bill for approval, but the motion failed for lack of a second.

Council member, Mr. Bob Pitts (Employee representative), expressed that he is sensitive to the issues that have been raised and is comfortable that this is deserving of further consideration. He expressed that he was fearful that as drafted, is the bill moves this contest away from whether there are drugs in the system and into a legal and medical debate as to whether an amount of the drug in the system impaired the injured worker. Mr. Pitts **moved** that the Advisory Council go on record with a **negative recommendation at this time**. **Seconded** by council member, Mr. Gary Selvy (Employer Representative), a roll resulted in a **unanimous vote not to recommend approval**.

Report to the Senate Commerce & Labor Committee from the Advisory Council on Workers' Compensation

SB1328/HB1073 (McKnally/Kane) proposes language that would allow entities that administer pharmacy benefits' programs for Tennessee Workers' Compensation to fall outside the definition of a pharmacy benefit plan or program and therefore be exempt from the requirements of itemized reporting on each individual claim under the Fair Disclosure of State Funded Payments for Pharmacists' Act.

Representative Kane sent a brief summary stating that this bill is to clarify language of last year's HB1787 which went through, and which, as originally drafted, was never meant to cover workers' compensation. The language indicated that anything as a result of accidents would not be included, but it also stated that if you were taking state funds you were subject to the requirements of the Fair Disclosure of State Funded Payments for Pharmacists' Act, therefore this bill is to clarify and reflect that it was not intended to cover workers' compensation.

Advisory Council member Mr. Bob Pitts (Employer Representative) made further explanation that he was informed that if this bill did not pass that it creates a problem for the state in the operation of its workers' compensation activity because of the master contracts they have with pharmacy companies and providing drugs. With that, he **moved** that the Advisory Council make a favorable recommendation on this proposal. **Seconded** by council member, Mr. Bruce Fox (Employee representative), roll resulted in a **unanimous vote to recommend approval**.



Property Casualty Insurers
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SB 721: An Adverse Impact on the Workers Compensation System

Tennessee should maintain a balanced workers compensation law that protects the interests of both employees and employers.

PCI continues to believe that a balanced workers compensation law that takes into account the interests of both employees and employers is the best approach for funding the costs of occupational injuries and diseases.

We believe that the Tennessee Workers Compensation Act continues to be the best mechanism for protecting injured workers from the consequences of workplace injury and disease, encouraging safe and healthy work environments, and assuring employers that the cost of protecting their workforce will be relatively predictable and reflective of their loss experience.

The current workers compensation system fairly balances the interests of injured employees who need medical care and replacement income and employers that seek a predictable and insurable cost structure to accommodate employees' needs.

Workers compensation laws were created to move the financial burden of occupational injuries from injured workers and private and public assistance programs to those consuming the goods and services whose production lead to the injury or disease.

The workers compensation system is the mechanism for allowing the expense of these injuries to be built into the cost of the employer's products or services.

It eliminates employers' exposure to tort actions in return for making employers responsible for occupational injuries without regard to fault. The trade-off for the employee is a system that provides certain, but limited benefits and does not include damages for pain and suffering.

A Tennessee opt-out system would have an adverse impact on workers and employers and undermine the progress of the Workers Compensation Improvement Act of 2013.

In 2013, significant reforms were enacted. The reforms were designed to improve the benefit system for both employees and employers. PCI strongly favors allowing the reforms to be implemented rather than creating a two-tiered workers compensation system.

The Tennessee Alternative described in SB 721/HB 997 borrows heavily from the opt-out plans created under Texas law and to a lesser degree from the statute creating the Oklahoma Option. In 2012, the Tennessee Department of Labor and Workforce Development, Division of Workers Compensation, hired a consultant, WorkComp Strategies, to analyze the impact that the Texas and Oklahoma opt out models would have on Tennessee. The consultants concluded that a Tennessee opt-out system would have an adverse impact on worker injury benefits and appeal rights, employers left in the workers compensation system, Social Security Disability Insurance costs, and TennCare medical costs. The consultants predicted that an opt-out program would be disruptive to the Tennessee workers compensation system and undermine the progress that the Workers Compensation Improvement Act of 2013 was designed to accomplish.¹

¹ "Consultation Services on Workers' Compensation Laws, Processes, and Costs" RFP 33703-02712, Consultants' Final Report August 28, 2012, pages 74-80.

**COMPARISON OF TENNESSEE ALTERNATIVE REQUIRED MINIMUM
BENEFITS TO BENEFITS UNDER TENNESSEE WC ACT [SB 721/ HB 997]**

Benefit	Alternative Benefit Plan	TN WC Act
Medical Expenses	\$500,000/ 156 weeks; Pays for covered medical expenses and does not pay for all reasonable and necessary medical expenses; Maximum is subject to combined limits below	No limits on amount or duration; Covers all reasonable and necessary medical expenses; Cannot exclude reasonable and necessary medical services such as pain management
Employee liability for reasonable and necessary medical expenses	Employee liable for (1) all medical expenses not covered by the plan, (2) all medical expenses in excess of \$500,000 (3) all medical expenses incurred more than 156 weeks after injury, and (4) all medical expenses incurred after employer terminates benefits under the conditions and limitations set by employer including combined limits below	No employee liability
Vocational rehabilitation services	None	Yes
Temporary total disability/ wage replacement benefits	70% of AWW up to 110% of State Average Weekly Wage (SAWW) for 156 weeks (156 x \$932.80 = \$145,516.80); May be reduced pursuant to the combined limits below and reduced by payroll tax deductions	110% of SAWW for up to 450 weeks or more (450 x \$932.80= \$419,760.00) and no payroll tax deductions
Temporary total disability for mental injuries (ie post traumatic stress disorder)	None; No requirement to provide any benefits for mental injuries	110% of SAWW for up to 104 weeks (104 x \$932.80= \$97,011.20)
Maximum combined medical and wage replacement benefits	\$1 million per employee under benefit plan; \$1 million per employee and \$5 million per occurrence for litigated claims	Unlimited; No reduction in benefits for catastrophic events in which many employees injured or killed in same occurrence

Death benefit	\$20,000-\$300,000 conditioned on beneficiaries providing waiver and death benefit may be reduced by the amount of disability benefits paid to deceased prior to death	100% of SAWW for up to 450 weeks (\$848.00 x 450= \$381,600) Depending on the marital status and age of dependents the death benefit would be much higher; No waiver or offset
Funeral benefit	\$7500	\$7500
Permanent Total Disability (ie quadriplegia, hemiplegia, paraplegia, brain injury, blindness)	110% of SAWW until employee reaches age for maximum SS benefits (but not less than 260 weeks); Subject to payroll taxes and may be reduced by combined limits cap	100% of SAWW until employee reaches age for maximum SS benefits (but in no circumstance can the benefit be less than 260 weeks x \$848.00= \$220,480)
Permanent Partial Disability (other than dismemberment)	Discretionary depending on benefit plan terms and waiver	100% of SAWW up to 450 weeks (\$848.00 x 450= \$381,600)
Dismemberment	Discretionary depending on benefit plan "schedule" and waiver	100% of SAWW up to 450 weeks (\$848.00 x 450= \$381,600)
Temporary Partial Disability Benefits	None	100% of SAWW for up to 450 weeks (\$848.00 x 450= \$381,600)
Setting of all coverages and conditions and limitations on entitlement to covered benefits	Employer sets all coverages and all conditions and limitations which may be changed at any time without notice to employees and which are not subject to state or federal oversight	Set by Tennessee General Assembly; WC coverage cannot exclude terrorism risks
Dispute resolution due process protections	None	Set by Tennessee General Assembly
Dispute resolution employee cost protections	None; Employer benefit plan may require employee to pay all or part of the expense of dispute resolution	Set by Tennessee General Assembly; Employees not charged with the expense of dispute resolution
Data reporting and governmental oversight	No loss cost reporting to state and state oversight limited to approving opt out exemption; US Department of Labor requires minimal ERISA reporting but no benefit plan oversight	Set by Tennessee General Assembly and implemented by TN Department of Commerce and Insurance and TN Division of Workers Compensation

DO LEGISLATURES WANT TO DELEGATE OVERSIGHT OF STATE WORKERS COMPENSATION TO FEDERAL DEPARTMENT OF LABOR THROUGH ERISA PREEMPTION?

Tennessee SB721/HB997 expressly allow “qualified employers” to create their own workers compensation system through the creation of a benefit plan that is deemed to be “welfare benefit plan” subject to the reporting and disclosure, fiduciary responsibility, administration, enforcement, and other applicable provisions of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. §1021-1191c).¹

Under this legislation, the state’s role is limited to reviewing and approving applications to become a “qualified employer”. Once the application is approved, the state is preempted from exercising any authority over the design, documentation, implementation, administration, or funding of the benefit plan relating to injuries received by Tennessee citizens in the course and scope of employment with Tennessee qualified employers.

ERISA subjects employee benefit plans to federal regulation. The Act regulates both pension plans and “welfare plans” that provide benefits for contingencies such as illness, accident, disability, death or unemployment. While it provides standards and rules governing reporting, disclosure, and fiduciary responsibilities for pension and welfare plans, ERISA does not mandate that employers provide any particular benefits.

It is critical for state legislatures to consider and understand the consequences of allowing employers to opt-out of the state workers compensation system and substitute an unregulated ERISA welfare benefit plan in its place. Pursuant to Section 514, **ERISA preempts and supersedes, “... any and all state laws insofar as they may now or hereafter relate to any employee benefit plan...”** (emphasis added). This preemption is narrowed in a “saving” clause that provides that ERISA preemption does not apply to the laws of a state regulating insurance, banking, or securities. However, ERISA clarifies that employee benefit plans, including welfare benefit plans, shall not be deemed to be an insurance company or other insurer for purposes of any law of any state purporting to regulate insurance companies. Furthermore, “state laws” subject to ERISA preemption includes “all laws decisions, rules, regulations, or other State action having the effect of law.”² **Under SB721/HB997, once Tennessee approves the “qualified employer” status, it relinquishes any right to govern or regulate any aspect of the welfare benefit plan for on-the-job injuries sustained by Tennessee citizens covered by the plan “now and hereafter.”**

Once there is federal preemption, Tennessee cannot undo the harm to Tennessee workers and its state workers compensation system.³

¹ SB721/HB997 (2015) Section 1 Subsection 50-10-106

² Section 514 of ERISA, 29 U.S.C. §1144

³ See B&S Welding Work Related Injury Plan v. Oliva (Texas Court of Appeals No. 05-13-00394-CV)

Tennessee Workers' Compensation Division
Analysis of "Tennessee Employee Injury Benefit Alternative" Bill After March 20 Amendments

Amendments	Comment
<ul style="list-style-type: none"> Medical benefits are still limited to 156 weeks or \$500,000. 50-10-108(b)(1). 	<ul style="list-style-type: none"> The limitation on medical benefits may result in large financial burdens on the employee or TennCare. An employer is not required to give an employee any choice of medical providers. There is no appeal process for an employee if surgery or other medical treatment is denied. In the current law there is an appeal process to the Division of Workers' Compensation Medical Director.
<ul style="list-style-type: none"> Permanent partial disability benefits (PPD) have been added (50-10-108(b)(3). The benefit is contingent upon the employee waiving rights to a tort action. 	<ul style="list-style-type: none"> This is a lower benefit for the employees whose injuries prevent them from returning to work. In these cases the benefit may be up to 1/3 what an injured employee may receive under the reform law. It is unknown whether the IRS will deem this benefit to be taxable.
<ul style="list-style-type: none"> Permanent total disability benefits (PTD) have been added (50-10-104(b)(4). To receive this benefit the employee must waive rights to a tort action. 	<ul style="list-style-type: none"> It is not known whether this benefit will be taxable.
<ul style="list-style-type: none"> The "up to \$300,000" benefit for dismemberment has been deleted. Death benefits are the lesser of 3 times the employee's average annualized wages or \$300,000 unless the employee leaves no surviving spouse or dependents and then the death benefit may be reduced to no lower than \$20,000. This benefit may be reduced by the amount of any other disability benefits payable to the employee. Provision of benefits is dependent on the survivors waiving rights to a tort action. Funeral expenses in the amount of \$7,500 have been added 	<ul style="list-style-type: none"> The death benefit amount in the amendment is less than the amount in current law for all employees whose annual salary is less than \$100,000. The employer has up to 3 years to pay a death benefit which may cause a hardship for many surviving spouses and dependents.
<ul style="list-style-type: none"> The benefit plan may have a combined single limit for all benefits payable due to an occupational injury, up to \$1M per employee. The \$2M per occurrence limit has been deleted. 	
<ul style="list-style-type: none"> The limit on the SIR for insurance was dropped from \$3M to \$500,000 per occurrence for purposes of the financial safe harbor. 	
<ul style="list-style-type: none"> The per occurrence limit on economic damages in a tort claim remains \$1M per employee. The \$5M per occurrence limit on economic damages has been deleted and a \$5M cap on the sum of all damages recoverable in a tort claim has been added. 	
<ul style="list-style-type: none"> The itemized list of defenses has been deleted. 	

Tennessee Workers' Compensation Division

<ul style="list-style-type: none"> • A provision has been added that requires the department of commerce and insurance to report to the senate commerce and labor committee and the House of Representatives' consumer and human resources committee on the effectiveness of the bill beginning February 1, 2017. • Sections related to the guaranty fund have been changed. A section has been added that makes provision for the Life and Health Insurance Guaranty Association or the Tennessee Insurance Guaranty Association to respond to insolvencies depending on which insurance company is writing the coverage for the qualified employer. 	<ul style="list-style-type: none"> • It is unclear how the department can report on the effectiveness of the bill since generally accepted measures of plan performance will not be reported to the department. This leaves the state without data other than anecdotes or plans' unaudited, self reporting to evaluate whether the "alternative" plan are working fairly and/or effectively.
<p>Issues Not Addressed in Amendments</p> <ul style="list-style-type: none"> • The number of weeks that an employee may receive Temporary Total Benefits is still limited to 156 weeks. 50-10-104(b)(2). • The plan may still deny benefits for "other reasons" including (but limited to) self-inflicted injuries and injuries incurred when the employee was under the influence of drugs or alcohol. • There is no provision that settlements provided to an employee will be reviewed by an unbiased authority. • Employers have the right to determine the provisions of their benefit plans. Examples include, but are not limited to, "causation," notice requirements, bases for denial of a claim, and use of a panel of physicians. • The "alternative" plans will be completely outside of any regulation of the state. • Benefit plans may include procedures for the settlement of claims, including arbitration. • The bill allows an employer to settle a claim on the 11th day after seeing a doctor one time. 50-10-108(e) • There is no protection for the employee against retaliatory discharge 	<p>Comments</p> <ul style="list-style-type: none"> • Under current law an employee may receive TTD benefits until they reach maximum medical improvement (exception for mental injury cases). • Current law contains no open ended "other reasons" category that may be used to deny benefits. This phrase gives employers broad discretion in the matter of denying claims. • Settlements in Tennessee are required to be approved by the Court of Workers' Compensation claims to ensure that an employee received substantially the benefits provided by law. • This ability allows employers to tightly word their plan document to reduce the number of compensable claims. • The role of impartial reviewer/adjudicator is removed from the claims process. • The state will have no authority to intervene if employees are treated unfairly by an employer. The bill will result in lesser rights for employees in an alternative plan • The ability to require binding arbitration puts employees at a disadvantage when there is a disagreement about a claim. • This section allows an employer to settle a claim before an employee who is in an inferior negotiating position has time to understand the scope of the injury, the need for future medical care, or what impairments may result from the injury. • Without protections employers may fire an employee because they filed a claim.