Issue Update
Oklahoma Supreme Court Rules Opt-Out Law Unconstitutional
Background

In 2013, Oklahoma passed reform legislation which allowed “qualified employers” to utilize an alternative mechanism to traditional workers compensation. However, Oklahoma’s alternative mechanism, known as “opt-out,” was different from the Texas system. Oklahoma required employers that chose to opt out of the traditional workers compensation system to be approved by the Commissioner and offer employees a plan with benefits that were similar in form to the state workers compensation system. Employers offering alternative benefit plans also had to pay an annual filing fee and provide proof of financial ability to pay the required compensation. Exclusive remedy would also apply to employers offering alternative plans.

The Oklahoma law became effective February 1, 2014, and approximately 60 employers chose this alternative, or opted out of the system.

Oklahoma Supreme Court Decision

There were several constitutional challenges to the Oklahoma opt-out law. On February 26, 2016, the Oklahoma Workers’ Compensation Commission (Commission) issued an order in the Vasquez v. Dillard’s, Inc. case, which ruled that the Oklahoma opt-out law is unconstitutional. In Vasquez, the Commission ruled that the opt-out law unconstitutionally deprives injured workers of equal protection, deprives injured workers access to the courts, and constitutes an impermissible special law. The Commission determined that the opt-out law “as a whole is not enforceable.”

According to the facts of the case, Dillard’s denied the employee’s claim on the basis that the claimant’s medical condition was preexisting and excluded under Dillard’s alternative benefit plan. According to the Commission, Dillard’s alternative benefit plan defined aggravation of a preexisting condition in a more restrictive way than the Oklahoma Workers’ Compensation Act. The Commission concluded that this dual workers compensation system created unequal, special treatment of a select group of injured workers and was, therefore, unconstitutional.

Dillard’s appealed the Commission’s order to the Oklahoma Supreme Court. On September 13, 2016, the Oklahoma Supreme Court issued its decision in Vasquez v. Dillard’s, Inc., holding that the Oklahoma opt-out law is an unconstitutional special law.

The Court determined that the core provision of the Oklahoma opt-out law (Title 85A, O.S. Section 203)—which allows qualified plan employers to set their own standards for defining covered injuries, medical management, dispute resolution, funding, notices, and penalties—creates impermissible, unequal, and disparate treatment of a select group of injured workers. The Court rejected the Oklahoma Attorney General’s argument to strike Section 203 from the opt-out law and leave the rest of the law in place. It stated there would be no rational reason for employers to opt out if they were required to treat employees exactly as stated under the state workers compensation law.

The Court affirmed the ruling is applicable to all opt-out cases currently pending before the Commission and in the appellate system, and

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1 Texas is the only state in the country where workers compensation insurance coverage is not compulsory. As long as there has been a workers compensation law in Texas, the state has allowed employers to forego participation in the workers compensation system. While there is no requirement for employers to provide workers compensation benefits to employees, employers that do not participate in the Texas system do not have exclusive remedy protection and can be sued for negligence.
prospectively to all future cases. The Court is expected to issue a mandate ruling the law unconstitutional and remanding the case to the Oklahoma Workers’ Compensation Commission for further proceedings. The Commission will then provide guidance to the qualified employers that have opted out of the system, including a time frame for those employers to obtain traditional workers compensation coverage.

State Legislative Activity
There was little legislative activity regarding opt-out in 2016. In 2015, South Carolina and Tennessee introduced legislation that would have allowed certain employers to opt out of the workers compensation system. However, those bills did not advance in 2015 and were not considered in 2016.

Opt-out proponents have indicated that they will continue advocating for opt-out systems.

Legislative activity in 2017 may be impacted by the Oklahoma Supreme Court decision.

Association for Responsible Alternatives to Workers’ Compensation
Despite the Oklahoma Supreme Court decision in Vasquez v. Dillard’s, Inc., and the lack of legislative activity in the states, opt-out proponents have indicated that they will continue advocating for opt-out systems. The Association for Responsible Alternatives to Workers’ Compensation (ARAWC) is a national employers’ organization formed several years ago to lobby for alternative workers compensation mechanisms in the states. Members of ARAWC include large retailers, third party administrators, and service providers. ARAWC’s ultimate goal is for every state to have a free market alternative option to workers compensation, although the
organization is not seeking a one-size-fits-all approach for every state.

Other Activity
Several organizations have studied and discussed opt-out systems over the past year. The International Association of Industrial Accident Boards and Commissions (IAIABC) recently released a study titled "Understanding the Opt-Out Alternative." The study analyzed the opt-out program adopted in Oklahoma and the ones proposed in South Carolina and Tennessee and compared them to traditional workers compensation. The issues compared included indemnity benefits, causation thresholds, dispute resolution processes, and the application of the Employee Retirement Income Security Act (ERISA). The IAIABC study was intended to be objective and did not provide any recommendations for a model opt-out law.

The National Conference of Insurance Legislators (NCOIL) has been discussing opt-out systems and legislation over the past year. However, NCOIL does not appear to be interested in taking any action on the issue; and at this time, opt-out is not expected to be an issue at future NCOIL meetings.

The National Association of Insurance Commissioners (NAIC) is also monitoring the issue but has not taken any action at this time.

There also has been federal activity related to opt-out. On October 20, 2015, 10 US senators and representatives sent a letter to US Department of Labor (USDOL) Secretary Thomas Perez regarding concerns with the state-based systems of workers compensation. The letter raised concerns over state workers compensation opt-out initiatives, requested additional federal oversight of the state-based workers compensation systems, and requested that the Secretary respond on how he will use USDOL authority and expertise to address the concerns. The USDOL indicated that it is investigating opt-out systems.

Conclusion
Following the Oklahoma Supreme Court decision that Oklahoma’s opt-out law is unconstitutional, it remains to be seen whether other states will consider opt-out legislation in the future and whether the organizations discussing opt-out systems will continue to do so.

Laura Kersey, Esq. is the director of National Policy Development in NCCI’s Regulatory Services Division.