

## Re-imagining the Grand Bargain Without Exclusive Remedy

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One-quarter of all Texas employers have accepted negligence liability exposure for worker injuries. That's over 80,000 companies that employ 2 million workers – more workers than are covered by almost half of all state workers' compensation systems. The past quarter century of experience, successfully resolving more than 1 million Texas on-the-job claims, demonstrates that negligence liability exposure can be manageable, fully insurable and a powerful force for good. How?

**1. The risk is fully insurable.** Top-rated insurance carriers write approximately \$150 million of annual premium for this coverage. They will insure risks at virtually any self-insured retention and coverage limit, are highly competitive on premium rates, and want more business.

**2. Guaranty fund protection can be provided.** Such insurance coverage and exposure can also be made subject to existing or new state guaranty fund protection. For example, take a look at the Oklahoma Option law and legislative proposals for workers' comp alternatives in Tennessee and South Carolina.

**3. Big advantages for workers.** In Texas, such nonsubscriber liability exposure has

- Increased investments by many employers into robust safety and health programs in the workplace, designed to protect their most valuable assets – employees.
- Motivated insurance companies, TPAs and employers to be much more hesitant to deny benefit payments to an injured employee for fear of a negligence liability claim.
- Encouraged employers to pay higher levels of disability benefits to injured workers, thereby eliminating more of the employee's potential damages and keeping the employee happy and the family well-cared for.

**4. Liability standards, defenses and limits.** When lifting the exclusive remedy on employee-injury claims, a state legislature can choose to tie into or modify the same liability rules currently used for third-party claims against an employer.

**5. Trial lawyers needed as much as ever.** A cottage industry of Texas trial lawyers has emerged over the past quarter century that handle plaintiff and defense work for injuries to workers employed by companies that have not subscribed to the Texas Workers' Compensation Act. The work is profitable for both sides of the docket. The cases will require additional effort but have more upside for claimants' counsel in terms of recovery for pain and suffering, and punitive damages.

**6. Employees have two avenues for recovery and the liability exposure for employers is real.** Injured workers are receiving both injury benefit coverage and negligence liability settlements and awards under Texas nonsubscription every day. Bad actors are held accountable and seriously injured workers are cared for. To date, we have documented 99 settlements or awards of \$1 million or more.

**7. A powerful force for good.** Particularly when coupled with personal liability for any breach of fiduciary duty under ERISA in the management of injury benefit claims, negligence liability exposure is a powerful force for good behavior by employers and insurers, and is supported by proven, logical public policy. With continued innovation, the Grand Bargain will be re-imagined in ways that will deliver better medical outcomes, better disability benefits, safer workplaces and more jobs.

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