

### Occupational Accident with Employer's Indemnity vs. Workers' Compensation

Benefit	Occupational Accident/PEI	Workers' Compensation
Employer's Liability	Included	Coverage under Part B
Excess Employer's Indemnity	Not Applicable	Not Applicable
Death	10 x salary up to \$500,000	Burial amount, weekly benefit
Incurral Period	Within 52 or 104 weeks of accident	No time limit if work related
Dismemberment	10 X salary up to \$500,000 AD&D schedule may not equal impairment schedule	Impairment schedule includes items, such as loss of use of a digit, not covered by AD&D
Incurral Period	Within 52 or 104 weeks of accident	No Limit
Permanent Partial Disability	No Coverage	Based on schedule in statutes
Permanent Total Disability	No coverage, except as relates to AD&D loss of use schedule	Possible lifetime benefit
Medical	Up to \$1,000,000 limited to Usual, Customary & Reasonable charges	Unlimited lifetime Benefits if related to injury Limited to WC schedule
First Treatment Limit	Within 30 days of accident	None
Benefit Period	Within 52, 104 or 156 weeks of accident	Unlimited
Total Disability	Up to 75% of base wage (excluding overtime) to maximum of \$600 per week	65%-75% set by statute (usually includes overtime) up to state maximum
Must occur	Within 30 days of accident	None
Maximum Period	Up to 52, 104 or 156 weeks	Set by state statute
Occupational Disease or Cumulative trauma or Repetitive Motion or Non-Accidental Injury	Available upon request	Depending on cause and state statutes there may be coverage
Settlement for future expenses	Included under Employer's Indemnity	Possible settlement depending on state statutes
Impairment Rating	See Dismemberment	Depends on cause and state statutes, there may be coverage.
Combined maximum	Up to \$1,000,000  All benefits noted above accrue to this maximum	Limits are set by state statutes

These are the major differences. Depending on the state where the workers' compensation claim is filed, there may be others.

# Providing Workplace Injury Benefits as a Nonsubscriber to Workers' Compensation

*Presented by the Texas Association of Responsible Nonsubscribers (TXANS)*

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Texas businesses have more than one option when it comes to providing benefits for workplace injuries—they can either purchase traditional workers' compensation insurance or elect not to "subscribe" to workers' compensation and provide benefits as a *nonsubscriber*.

Although the option to nonsubscribe has been available in Texas since 1913 there was not much interest in nonsubscription until the mid 1980's when workers' compensation costs in Texas escalated to some of the highest in the nation. During this time, nonsubscription allowed many Texas employers to maintain their workforce, continue to do business in Texas or simply remain in business.

Approximately 44 percent of businesses operated as nonsubscribers during the early 1990's, a figure that dropped to around 35 percent after workers' compensation rates became more affordable. As many are aware, today's workers' compensation premiums are again on the rise prompting a greater percentage of Texas businesses to investigate (or in some cases re-investigate) nonsubscription.

The Texas Association of Responsible Nonsubscribers (TXANS), a non-profit association comprised of businesses that provide occupational injury benefits as nonsubscribers, has prepared this information to answer some more frequently asked questions regarding nonsubscription. Should you have additional questions, contact information is provided at the end of this document and TXANS' staff will be happy to assist you.

## Why do Companies Choose Nonsubscription?

Many employers choose nonsubscription in an effort to reduce costs associated with occupational injuries. Depending on the cost of insurance, a typical nonsubscribing business can implement a comprehensive program to provide occupational injury benefits and reduce their workplace injury benefit costs by more than 30 to 40 percent.

## In addition to Cost Savings, What Benefits do Nonsubscribers Report?

Many nonsubscribing employers recognize improved productivity, enhanced employee morale and reduced frustration. Nonsubscription also provides an incentive for employers to focus on important issues like safer workplaces and work-practices and caring for injured workers.

## How Many and What Type of Businesses Operate as Nonsubscribers?

At the last count approximately 114,000 (or about 35%) of Texas' employers operated as nonsubscribers.

Nonsubscribing businesses can be found in almost every business sector but certain segments have a higher tendency to nonsubscribe than others. Generally, there are comparatively higher percentages of nonsubscribing businesses in retail trade, the service sector and manufacturing. Also, there is a higher likelihood that small to mid-sized companies will choose nonsubscription than very large companies. Although almost half of the

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state's nonsubscribing businesses employ four or fewer employees, the ranks of Texas nonsubscribers also include some of Texas' largest employers as well as several Fortune 500 companies.

### Is Nonsubscription the Same as Self-Insurance?

Self-insurance and nonsubscription are not the same. Extremely large employers can become certified to operate as a self-insured employer in Texas but as such they remain subscribers to Texas' workers' compensation system. Nonsubscribers on the other hand "opt out" of workers' compensation but in many cases utilize insurance coverage and self-funding practices to provide occupational injury benefits.

### Is Nonsubscription an Alternative or Replacement for Workers' Compensation?

Even though companies can elect to provide occupational injury benefits as nonsubscribers, nonsubscription is not an alternative to workers' compensation.

### After Choosing Nonsubscription Can a Company Return to Workers' Compensation?

Yes, in fact many of the companies that became nonsubscribers during the late 1990's returned to the workers' compensation system a decade or so later when rates became more affordable.

### What Liability is Associated with Nonsubscription?

Exclusive remedy is available to subscribing employers but not nonsubscribing employers. In other words, employees of subscribing businesses generally surrender their right to pursue litigation that relates to their work-related injury in exchange for a relatively assured level of workers' compensation benefits. Despite the fact that many nonsubscribers provide occupational injury benefits, a nonsubscribing employer does not have limited liability and is subject to suits relating to occupational injury claims. Nonsubscribing businesses can however take action to mitigate liability including maintaining insurance to address liability. One additional note: only three percent of nonsubscribing businesses report being sued in conjunction with an occupational injury.

### What Actions Help to Mitigate Liability?

First and foremost, injury prevention and workplace safety are paramount to nonsubscriber liability. An employee that files an occupational injury suit must demonstrate how the employer's negligence contributed to or exacerbated his/her injury. A benefit program that provides fair benefits to injured employees can also help to deter litigation relating to claim disputes. Nonsubscribers can also adopt internal and external dispute resolution procedures to help reduce the need for litigation and purchase insurance coverage to address costs associated with disputed occupational injury claims (e.g. legal defense costs, damages, etc.).

### What are the Components of a Nonsubscriber Program?

Nonsubscribing employers can elect to provide occupational injury benefits and some develop comprehensive programs that include benefits for medical care, wage loss and more. Nonsubscriber programs (sometimes

referred to as the nonsubscriber plan) may also outline other elements of the occupational benefit program including: workplace safety, benefit funding, medical care and claims administration.

### Workplace Safety

The most important element of any nonsubscriber program is workplace safety. Since nonsubscribers are not protected against negligence actions stemming from workplace injuries, a much greater emphasis is placed on overall safety and protecting employees from injury.

One very important provision of the Texas Labor Code applies here. Specifically Subsection (b), Section 406.033-Common-Law Defenses; Burden of Proof, which provides: *"In an action described by Subsection (a) against an employer who does not have workers' compensation insurance coverage, the plaintiff must prove negligence of the employer or of an agent or servant of the employer acting within the general scope of the agent's or servant's employment."*

In many cases, nonsubscribers utilize much of the savings gained by their nonsubscriber operations to "beef up" their safety programs and benefit levels.

### Occupational Injury Benefit Plan

Another vital component of a nonsubscriber program is the occupational injury benefit plan, which governs the terms of the benefit program. The plan is a written document that is provided to the employee to help ensure both the employee and the employer have an equal understanding of the terms of the nonsubscriber program (including what benefits are available in the event of an on-the-job injury).

The plan addresses not only the company's responsibilities in the event of any injury but also the employee's rights and requirements. For example, the plan will outline the specific benefits that are available but should also outline any applicable reporting requirements, healthcare guidelines and dispute resolution procedures.

Nonsubscriber occupational injury benefit plans are usually found in two forms: a customized plan that is written by a legal professional specifically for the business that will be utilizing the plan, or a plan that is provided along with the insurance policy.

### Funding

Funding is another element of the nonsubscriber plan. Nonsubscribers utilize a variety of methods (or combinations thereof) to fund their benefit programs and occupational accident insurance is used by a large percentage of nonsubscribers. As with most other types of insurance, factors unique to the business can affect the coverage that may be available to the company as well as other more general considerations such as the insurance market, economy, etc.

Larger nonsubscribing business may opt to obtain a high deductible policy that will provide a high backdrop of benefits but allows the employer to self-fund a percentage of the injury benefits. Smaller nonsubscribers, on the other hand, may purchase an accident policy that will provide coverage for occupational injuries but may have a much smaller deductible. Still other companies may purchase a policy that combines coverage for benefit costs

with liability coverage. These policies not only offset the actual costs associated with the injury but also provide coverage for costs associated with a legal proceeding (i.e. legal defense costs, damages, etc.).

Since it is important to coordinate the benefits offered by nonsubscriber insurance and other funding mechanisms with the offerings outlined in the nonsubscriber plan, in many cases legal professionals interface closely with both the employer and the insurance professional during the development of a nonsubscriber program.

### Medical Care

Another aspect of the overall nonsubscriber program is the provision that relates to medical care for injured employees. Establishing relationships with quality health care providers serves both the employee and the employer however it is also important for the medical provider to understand the unique needs of a nonsubscribing business (primarily that the rules associated with workers' compensation do not apply).

Nonsubscribing businesses interface closely with employees, healthcare professionals, case managers and other claims management professionals on the treatment and payment of an injury claim. For example, the medical fee guidelines established for subscribing employers do not apply to nonsubscribing employers so many nonsubscribers negotiate voluntary payment schedules and payment terms with healthcare professionals. Since in many cases nonsubscribing businesses pay medical costs directly, they also tend to pay more promptly, which pleases many healthcare providers.

### Claims Administration

Claims administration begins for a nonsubscribing employer long before an injury occurs. Subscribing employers must comply with the guidelines set forth by the workers' compensation system but nonsubscribing employers are subject to guidelines of their plan. For example, smaller employers that have a higher tendency to utilize a fully insured plan may submit their medical invoices to a third party (either the insurance company or their assigned claims representative). Large companies, on the other hand, may elect to handle their claims in-house and develop a nonsubscriber department to handle every element of their nonsubscriber program, including management of work-injury claims, payment of benefits, return to work programs and more.

As is the case with other professionals, it is important for the claims representative to have a solid understanding of the differences that relate to nonsubscriber claims as well as a cursory understanding of the terms of the employer's plan.

### What do Employees Think About Responsible Nonsubscriber Programs?

To nonsubscribers, the needs and satisfaction of employees must be a priority. Employees of successful nonsubscribers report a high level of satisfaction with the nonsubscriber benefit plan and in many cases; nonsubscribing employers see a decreased number of injuries and occurrence frequency. Many nonsubscribing employers also reinvest a portion of the savings recognized by their nonsubscriber plan in increased benefits for employees (e.g. healthcare, wages, etc.)

## If We Want to Consider a Nonsubscriber Program – Where Do We Start?

Although there is no single method for exploring nonsubscription, over the years companies have generally considered the following:

### *Step 1: Is Nonsubscription Really an Option?*

First decide if the company can elect to nonsubscribe to determine if the company is truly a candidate for nonsubscription. Although thousands of companies have succeeded as responsible nonsubscribers the option isn't necessarily a good fit for everyone. For example, if management isn't fully committed to safety, safe work-practices, training and providing quality benefits on a fair and equitable basis; the company should not nonsubscribe. Also, companies that work on government contracts (including certain state or city contracts) may be required to carry workers' compensation.

### *Step 2: Independent Background Information*

Collect information and visit with other employers that operate as nonsubscribers. A good way to meet representatives of nonsubscribing businesses is at one of TXANS many events. For example, TXANS' Nonsubscriber Conference will feature a panel of nonsubscribing employers that will share their experiences as nonsubscribers. It is also helpful to focus on businesses that operate in your industry.

### *Step 3: Cost Estimates*

Obtain cost estimates and depending on the size and needs of the particular company, these may include: insurance, plan design, claims administration (internal or external), safety services, training materials and medical care. Current providers may be able to assist with this information but if not, please contact TXANS.

### *Step 4. Cost Benefit Analyses*

Frequently companies perform some form of cost benefit analysis comparing the total costs associated with workers' compensation to the costs associated with nonsubscription (remembering to include both direct and indirect costs). Smaller companies that experience a sudden increase in workers' compensation costs may not place the same emphasis on this process as larger employers. In some cases, larger employers conduct a feasibility analysis or seek professional assistance with estimating costs.

### *Step 5. Making the Decision*

After an accurate cost analysis is complete, the company should consider the potential savings alongside the increased liability. It may also be helpful to consult an attorney that specializes in nonsubscriber defense or discuss actual experiences with the employer contacts gained at the onset of the investigation.

### *Step 6: Timing the Decision*

Communications with employees and insurance coverage could be a factor in the timing of implementation of a nonsubscriber program. State regulatory requirements should also be considered.

### How Can I Help to Ensure a Future for Nonsubscription?

Texas is the only state in the nation where the majority of the state's businesses can elect not to subscribe. And in order to preserve our unique status and maintain this important freedom, all nonsubscribing businesses must strive to exceed when it comes to providing a safe place to work, offering quality occupational injury benefits and ensuring employees receive compassionate care if they become injured on the job.

The measure of success a successful nonsubscriber is not merely the money saved but rather reduced injury rates, increased benefit levels and employee satisfaction.

### What is TXANS?

TXANS is a non-profit association comprised of businesses that support responsible options to compulsory workers' compensation whose mission is to provide programs and services specifically designed to enhance the nonsubscriber programs utilized by its members. Some of these services include: assistance with regulatory compliance, nonsubscriber publications (including TXANS' monthly nonsubscriber newsletter, *TXANS' Update*®), educational seminars, conferences and local meetings, assistance on nonsubscriber-related issues, the ability to network with other responsible nonsubscribing employers and access to a network of nonsubscriber industry professionals.

TXANS works closely with the Texas Legislature on issues that affect nonsubscribing employers including opposition to the installation of mandatory workers' compensation in Texas. TXANS also represents member-interests in other regulatory and rule-making scenarios that relate to nonsubscriber liability, nonsubscriber regulatory issues and more.

Regardless of your company's status as a subscriber or nonsubscriber to workers' compensation we hope you will consider membership in TXANS. Complete membership information and an online application are available at [www.txans.org](http://www.txans.org).

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