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# WORKERS' COMPENSATION/ CONSTITUTIONAL LAW—OPT-OUT AND THE FOURTH ERA OF WORKERS' COMPENSATION: HAS INDUSTRY LEFT THE BARGAINING TABLE?

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WORKERS' COMPENSATION/CONSTITUTIONAL  
LAW—OPT-OUT AND THE FOURTH ERA OF WORKERS'  
COMPENSATION: HAS INDUSTRY LEFT THE BARGAINING  
TABLE?*Daniel E. Walker\**

*Over the past decade, state legislatures have been actively exploring politically feasible ways to lower workers' compensation insurance costs on employers. In 2013, Oklahoma made a bold move and adopted the Oklahoma Employee Injury Benefit Act (OEIBA) which enabled employers to "opt-out" of Oklahoma's workers' compensation system if they administered alternative benefit plans governed by the Employee Retirement Income Security Act (ERISA). The plans allowed for the retention of tort immunity for employers. Ultimately, the Oklahoma Supreme Court held the OEIBA unconstitutional for violating the Oklahoma Constitution's ban on "special laws."*

*This article outlines three distinct historical eras of state workers' compensation and argues that we have now entered a fourth era, defined by the pursuit of state workers' compensation alternatives. By evaluating the successful legal challenges to the OEIBA, this article contemplates the feasibility of ERISA-governed alternative benefit plans and whether they can effectively retain workers' compensation tort immunity and divest states from meaningful oversight of injured worker benefits.*

## INTRODUCTION

It is odd to think that after one hundred years of workers' compensation, employers and employees are still fighting over how to pay

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benefits for injured workers. Over the last century, labor and industry have welcomed new parties to the dispute, such as national insurance companies, third-party claim administrators, dedicated workers' compensation managed care organizations (MCOs), independent medical examination companies, and numerous consultants. With fifty states approaching workers' compensation in fifty distinct and complex ways,<sup>1</sup> it is easy to see how even defenders of workers' compensation have described the system as a "waste of time and money, [with] perverse motivations on both sides."<sup>2</sup>

The complexity and cost of workers' compensation has led to renewed scrutiny of the foundational tenants of a tort alternative, no-fault benefit system. While worker advocate groups and claimant attorneys have challenged the constitutionality of eroding worker benefits in state courts on state and federal equal protection and due process grounds, employers have successfully lobbied state legislatures for insurance premium cost cutting measures.<sup>3</sup>

Most recently, the pursuit of deeper savings has led large national employers to band together in search of cost-effective alternatives to state workers' compensation. This Article explores the "opt-out movement" and the rise, fall, and likely return of alternative employee benefit systems.

## I. THE FIRST THREE ERAS OF WORKERS' COMPENSATION

"Opt-out" is a process utilized by employers to remove themselves from the workers' compensation scheme through the implementation of

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1. THOMAS J. KELLEHER ET AL., CONSTRUCTION DISPUTES PRAC. GUIDE WITH FORMS § 10.11 (2d ed. 2018).

2. David B. Torrey, *The Opt-Out of Workers' Compensation Legislation: A Critical Briefing and the Vasquez v. Dillard's Case (2016)*, 52 TORT TRIAL & INS. PRAC. L.J. 39, 68–69 (2016).

3. Compare successful constitutional challenges to workers' compensation statutes by claimants, such as *Castellanos v. Next Door Co.*, 192 So. 3d 431, 444 (Fla. 2016) (holding that the Florida statute mandating a conclusive attorney fee schedule for workers' compensation claims was grossly inadequate and amounted to an unconstitutional violation of due process under both state and federal constitutions); *Rodriguez v. Brand W. Dairy*, 378 P.3d 13, 32–33 (N.M. 2016) (declaring the exclusion of farmworkers from the New Mexico workers' compensation statute unconstitutional); and *Protz v. Workers' Comp. Appeal Bd.*, 161 A.3d 827, 841 (Pa. 2017) (finding the Pennsylvanian workers' compensation statute's designation of the AMA Guides to the Evaluation of Permanent Impairment for determining impairment an unconstitutional delegation of legislative power); with legislative changes to curtail worker benefits, such as 2017 Iowa Legis. Serv. ch. 23 (West) (enabling employers to apportion liability from disability ratings to pre-existing injuries or prior employers); and 2017 N.Y. Sess. Laws ch. 59, pt. NNN, § 15(3)(w) (McKinney).

employer administered “alternative benefit plans.”<sup>4</sup> These plans give employers the freedom to devise their own system in order to deliver and adjudicate injured worker benefits with minimal oversight by state agencies. Companies that build and administer opt-out plans in Texas began to lobby for the introduction of opt-out legislation in states that historically required employers to cover injured workers under state workers’ compensation statutes.<sup>5</sup> The goal of such alternative benefit plans is to provide a cheaper free market alternative to state workers’ compensation insurance and, if possible, retain tort immunity for employers.<sup>6</sup>

It is important to understand the etiology of American workers’ compensation law and the inadequate tort system it replaced to recognize what is at stake in the opt-out debate. Workers’ compensation law has gone through three distinct eras marked by substantial change in the balance of worker benefits. The first era began with the adoption of compulsory state statutory workers’ compensation schemes, followed by a second era of reforms during the Nixon administration and, most recently, a third era defined by rising premium costs and broad statutory claw backs of worker benefits.<sup>7</sup>

As this Article argues, we have embarked on a fourth era of workers’ compensation—one defined by large national employers’ concerted efforts to create parallel benefit plans separate from state workers’ compensation schemes. While the Oklahoma Supreme Court decision in *Vasquez v. Dillard’s, Inc.* exposed a myriad of problems with divorcing injured worker benefits from state workers’ compensation,<sup>8</sup> it is likely that over the next decade, many state legislatures will continue to consider

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4. Michael C. Duff, *Are Workers’ Compensation “Alternative Benefit Plans” Authorized by State Opt-Out Schemes Covered by ERISA?*, 45 BRIEF 22, 29 (2016).

5. Molly Redden, *Walmart, Lowe’s, Safeway, and Nordstrom Are Bankrolling a Nationwide Campaign to Gut Workers’ Comp*, MOTHER JONES (Mar. 26, 2015, 3:47 PM), <https://www.motherjones.com/politics/2015/03/arawc-walmart-campaign-against-workers-compensation> [https://perma.cc/S6ED-YKKY].

6. See Howard Berkes & Michael Grabell, *Opt-Out Plans Let Companies Work Without Workers’ Comp*, NPR: MORNING EDITION (Oct. 14, 2015, 5:01 AM), <https://www.npr.org/2015/10/14/448544926/texas-oklahoma-permit-companies-to-dump-worker-compensation-plans> [https://perma.cc/9PQL-T7SB].

7. See *Alternative Benefit Systems and the Future of Workers’ Compensation*, LEGAL TALK NETWORK: WORKERS COMP MATTERS (Aug. 25, 2016), <https://legaltalknetwork.com/podcasts/workers-comp-matters/2016/08/alternative-benefit-systems-future-workers-compensation/> [https://perma.cc/KS2Z-F5QP] [hereinafter *Alternative Benefit Systems*] (discussing the prior three eras of workers’ compensation).

8. *Vasquez v. Dillard’s, Inc.*, 381 P.3d 768, 768 (Okla. 2016).

business friendly “alternative benefit plans” as a cost-effective solution to rising cost of workers’ compensation premiums.

A. *The Plight of Injured Workers Prior to State-Mandated Workers’ Compensation*

Prior to 1911, an injured worker seeking a remedy for an industrial accident was required to bring grievances in civil court under common-law tort, often negligence. To succeed in their suit, a worker would have to establish that its employer failed to act with “due care” to prevent an injury or death to the worker and this negligence was the proximate cause of the worker’s injury.<sup>9</sup> An employer could evince due care in the workplace by enforcing safety rules, providing safety equipment, warning employees of potential dangers, and hiring “suitable and sufficient” workers.<sup>10</sup> If the fact finder determined the employer did not satisfy this standard of care, the employer could be considered negligent and liable for damages.<sup>11</sup>

Over time, the common-law system began to favor employers through the development of three defenses to employer negligence: fellow servant exception, assumption of the risk, and contributory negligence.<sup>12</sup>

Established in the English common law case of *Butterfield v. Forrester*,<sup>13</sup> and adopted in nineteenth-century America, contributory

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9. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers’ Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 308 (1998).

10. *Id.* at n.4 (citing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85–87 (1987)).

11. *Id.* at 308.

12. John S. Haller, Jr., *Industrial Accidents—Worker Compensation Laws and the Medical Response*, 148 W. J. MED. 341, 342 (1988). When scrutinizing tort law, and any law that motivates behavior, it is important to consider the economic incentives that drive individual or collective choice. From a workplace safety perspective, common-law tort does not incentivize employers to create a safe work place for their employees. Uninformed workers will often take on more risk in their workplace environment than is economically efficient. This allows the employer to shift accident costs to the worker. Therefore, under tort law, employers are incentivized to be as negligent as fiscally reasonable while their employees shoulder the brunt of financial exposure. Furthermore, negligence, unlike no-fault liability, is fraught with caveats that sophisticated parties can mechanize as defenses to liability. See Keith N. Hylton & Steven E. Laymon, *The Internalization Paradox and Workers’ Compensation*, 21 HOFSTRA L. REV. 109, 141 (1992).

13. *Butterfield v. Forrester* (1809) 103 Eng. Rep. 926, 927. The case illustrates the casualness with which the doctrine of contributory negligence entered the common law. See Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 233 (1908).

There is . . . no discussion of general principles, no logical argument applying such principles to the particular facts and showing that they necessitate the result reached by the court. All attempts to ascertain upon what legal principle the

negligence precluded workers from monetary recovery from work place injuries if they were found, in any way, negligently responsible for the injury.<sup>14</sup> Employers were empowered to wield contributory negligence as a defense irrespective of job hazards or the percentage of negligence assigned the worker.<sup>15</sup> Viewed today by most courts as a harsh result, pure contributory negligence has only survived for tort claims in a handful of jurisdictions.<sup>16</sup>

The fellow servant rule discharged an employer from liability for workplace injuries “where the injury occurred as a result of the negligence of a coemployee engaged in the same common or general employment.”<sup>17</sup> Some commentators have ascribed the adoption of the fellow servant rule in America as the judiciary’s attempt to protect industry during the industrial revolution.<sup>18</sup>

Assumption of risk, the third defense doctrine, was utilized in nineteenth-century employment contracts as a waiver of liability for employers.<sup>19</sup> The principle held that, either expressed in writing or implied through actions, workers knowingly assume the risks associated with the employment and therefore waive their rights to sue their

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defense of contributory negligence is based, are therefore efforts *ex post facto*, to explain and account for a result already reached apparently unconsciously.

*Id.*

14. See Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 719 (1978).

15. A booming hazardous industry of the nineteenth century, railroads were notorious for using contributory negligence as a defense to liability. See *Pa. R.R. v. Aspell*, 23 Pa. 147, 149–50 (1854) (“It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties.”).

16. Alabama, Maryland, North Carolina, Virginia, and the District of Columbia still prescribe to pure contributory negligence. See generally, e.g., *John R. Cowley & Bros., Inc. v. Brown*, 569 So.2d 375, 381 (Ala. 1990); *Ala. Power Co. v. Scholz*, 215 So.2d 447, 451 (Ala. 1968); *Wingfield v. Peoples Drug Store*, 379 A.2d 685 (D.C. 1977); *Bd. of Cty. Comm’r v. Bell Atlantic*, 695 A.2d 171, 180 (Md. 1997); *Smith v. Fiber Controls Corp.*, 268 S.E.2d 504, 506 (N.C. 1980); *Baskett v. Banks*, 45 S.E.2d 173, 177 (Va. 1947).

17. BARRY A. LINDAHL, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 43:9 (2d ed.). This rule was first pronounced in the English common law court in *Priestley v. Fowler* (1837) 150 Eng. Rep. 1030, 1032–33, and subsequently used in the United States, in *Murray v. S.C. R.R.*, 26 S.C.L. (1 McMul.) 385, 400 (1841). Monique N. Thoresz, Note, *Cooper v. City of New York: The Fellow Servant Rule—Wanted Dead or Alive*, 15 PACE L. REV. 911, 914 (1995).

18. See Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837–1860*, 132 U. PA. L. REV. 579, 580–81 (1984); Thoresz, *supra* note 17, at 914.

19. Assumption of risk is sometimes colloquially referred to as “the worker’s right to die” or “death contracts.” See Gregory P. Guyton, *A Brief History of Workers’ Compensation*, 19 IOWA ORTHOPEDIC J. 106, 106–07 (1999).

employer for injuries associated with the employment. The wide latitude given to the assumption of risk defense aided expanding industries during the industrial revolution, allowing them to sidestep bearing the business cost of “human overhead.”<sup>20</sup>

B. *The First Era: Reform and the “Grand Bargain”*

By the early twentieth century, the imbalance between employer protections and worker remedies began to pique the attention of activists and media outlets to look towards Germany as a potential model for an American workers’ compensation system.<sup>21</sup>

Unlike Germany, where compulsory insurance for injured workers was created and facilitated by the national government, United States federalism principles fostered a patchwork of competing state laws.<sup>22</sup> Industry as a whole was opposed to state-by-state regulation that would allow competitors in unregulated jurisdictions an economic advantage.<sup>23</sup> In response, in 1910, a conference convened in Chicago between representatives of state labor commissions and industry leaders to address the lack of uniformity in state laws and produce a uniform workmen’s compensation law.<sup>24</sup>

State legislatures responded narrowly at first by creating accident funds for certain occupations, such as for miners in Maryland<sup>25</sup> and Montana,<sup>26</sup> and compulsory insurance coverage for a wide range of dangerous occupations in New York.<sup>27</sup> These legislative attempts were dismantled by their respective state courts on both federal and state constitutional grounds.<sup>28</sup> State judiciaries were specifically worried with the idea of employer liability without fault, which the Court of Appeals of New York described, pursuant to the Fourteenth Amendment, as “taking

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20. *Tiller v. Atl. Coast Line R.R.*, 318 U.S. 54, 59 (1943).

21. LEX K. LARSON & ARTHUR LARSON, *WORKERS’ COMPENSATION LAW: CASES, MATERIALS, AND TEXT* 20–21 (5th ed. 2013); Guyton, *supra* note 19, at 107–08.

22. *See* Haller, *supra* note 12, at 341–43. In one example, phosphorus match manufacturers openly testified before Congress that, irrespective of the widespread poisoning of their workers, they refused to invest in alternative compounds unless every state mandated it. *Id.*

23. *Id.* at 343.

24. *See* JAMES HARRINGTON BOYD, *A TREATISE ON THE LAW OF COMPENSATION FOR INJURIES TO WORKMEN* 17–22 (1913) (providing an account of this conference).

25. Act of Apr. 1, ch. 139, 1902 Md. Laws 218.

26. 1909 Mont. Laws Ch. 67.

27. 1910 N.Y. Laws 1633–37.

28. LARSON & LARSON, *supra* note 21, at 17.

the property of A. and giving it to B., and that cannot be done under our Constitutions.”<sup>29</sup>

Concerned that passing compulsory workers' compensation schemes would raise constitutional concerns under the Takings Clause of the Fourteenth Amendment, states passed voluntary, non-compulsory workers' compensation laws. These statutes did not compel employers to participate in workers' compensation schemes; however, employers who chose not to participate in their state's scheme were left open to civil liability.<sup>30</sup>

This changed in 1917, with the Supreme Court case *New York Central Railroad Co. v. White*.<sup>31</sup> In his opinion, Justice Pitney not only dismantled any Fourteenth Amendment procedural due process concerns surrounding no-fault workers' compensation<sup>32</sup> but also outlined the necessity of a *quid pro quo* arrangement between labor and industry.<sup>33</sup> As discussed in Part III of this Article, the foundation of the Court's opinion and the necessity of the *quid pro quo* arrangement are directly challenged by the opt-out movement.<sup>34</sup>

With the constitutionality of compulsory workers' compensation decided by *New York Central Railroad Co.*, states began rapidly adopting and refining workers' compensation schemes. By the conclusion of 1920, forty-two states had enacted workers' compensation statutes.<sup>35</sup> The last

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29. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 440 (N.Y. 1911).

30. See LARSON & LARSON, *supra* note 21, at 22.

31. See *N.Y. Cent. R.R. v. White*, 243 U.S. 188, 203–05 (1917).

32. *Id.* at 196, 204–05. Justice Pitney explains that employee injury is a “probable and foreseen result” of an employer's business and, therefore, no-fault liability does not implicate the Fifth Amendment. *Id.* at 205.

33. *Id.* at 203–04. Justice Pitney elegantly outlines the *quid pro quo* trade-off of workers' compensation by arguing that it is practical pursuant to natural justice.

[I]t is not unreasonable for the state . . . to require [the employer] to contribute a reasonable amount and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,— [sic] that is, upon the injured employee or his dependents.

*Id.* at 203.

34. See *infra* Part III.

35. Christopher J. Boggs, *Workers' Compensation History: The Great Tradeoff!*, INS. J. (Mar. 19, 2015), <https://www.insurancejournal.com/blogs/academy-journal/2015/03/19/360273.htm> [<https://perma.cc/A7VU-PV74>]. Alaska and Hawaii both enacted workers' compensation statutes prior to 1920 but were not recognized as states until 1959. *Id.*

state to enact a workers' compensation statute was Mississippi, which held out until 1948.<sup>36</sup>

State court systems took a narrow view of what type of injuries should be covered during the early days of workers' compensation.<sup>37</sup> Over time, workers' compensation law evolved to encompass not only accidental injuries but also occupational diseases and stress-related mental disabilities.<sup>38</sup>

### C. *The Second Era: Involvement of the Federal Government*

Whether due to states' concerns for their own citizens or the administrative costs associated with federal preemption, workers' compensation has always been regulated and administered by the states. As such, the procedural process and benefits available to injured workers is not uniform among the states.<sup>39</sup>

After sixty years of workers' compensation, it became apparent that many, if not most, state workers' compensation systems were not delivering statutorily promised benefits in a fair and effective manner as they were designed to do.<sup>40</sup> The federal government, through the National Commission on State Workmen's Compensation Laws ("Commission") submitted a report in 1972 on the state of workers' compensation.<sup>41</sup> The Commission, which was made up of a wide variety of industry, labor, medical and insurance parties, proposed essential elements for all state workers' compensation schemes.<sup>42</sup> The report urged the states to adopt

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36. *Id.*

37. Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 NOTRE DAME L. REV. 879, 883–84 (1986). Early workers' compensation only covered "sudden, unexpected, incidents attributable to a specific time and place." *Id.* at 884–85.

38. *See id.* at 886–89.

39. *See Workers' Compensation Law—State by State Comparison*, NFIB (June 7, 2017) <https://www.nfib.com/content/legal-compliance/legal/workers-compensation-laws-state-by-state-comparison-57181/> [<https://perma.cc/N5BH-YUUP>] (showing the substantive and procedural differences between how the states approach workers' compensation).

40. *Alternative Benefit Systems*, *supra* note 7 ("[W]hen the workers' comp[.] law was first enacted in New York, the Supreme Court said that the workers' comp[.] laws must provide significant benefits to the injured workers. And when we got into the 1960s and early 1970s, many states' benefits were not significant.").

41. *See LARSON & LARSON*, *supra* note 21, at 24. Congress created the Commission through the Occupational Health and Safety Act of 1970 (OSHA). Members of the fifteen-person board were appointed by the president. *Id.*

42. *See generally* REPORT OF THE NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS. NO. 72-600195 5-6 (1972) [hereinafter NAT'L COMM'N]. A total of twenty or so recommendations were submitted in whole. *Id.* Some of these elements included:

the Commission's suggestions and dangled the prospect of federal action if none was taken by 1975.<sup>43</sup>

"State legislators took the Commission's [proposals] seriously" and most of the states retooled their workers' compensation statutes to address the Commission's report.<sup>44</sup> Annexation of workers' compensation into the federal administrative state would effectively eliminate, to some degree, the private insurance market and create a Social Security-like benefit system administered by the federal government. Multiple bills were put to Congress to implement minimum standards for state workers' compensation statutes, some of which were beyond the recommendations of the Commission.<sup>45</sup> None were successful.

The changes adopted by the states as a result of the Commission's report marked what some have called "the most dramatic liberalization [by the states] of state compensation statutes in history."<sup>46</sup> The political pendulum had swung, this time in favor of injured workers.

By the late 1960s, private pension plans had grown in popularity with employers as a "way[] to augment compensation in the face of wage and price controls."<sup>47</sup> Concerned with the mismanagement, financial stability, and oversight of private benefit plans, Congress passed the Employee Retirement Income Security Act (ERISA) of 1974.<sup>48</sup> ERISA brought comprehensive changes for all employee benefit plans provided by private employers or employee organizations by imposing "a uniform set of

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[C]ompulsory coverage in all acts; elimination of all numerical and occupational exemptions to coverage; . . . full coverage of work-related diseases; full medical and physical rehabilitation services without arbitrary limits; a broad extra-territoriality provision; elimination of arbitrary limits on duration of total sum of benefits; and a weekly benefit maximum that rises from an immediate [sixty-six and two-thirds] percent to an ultimate [two hundred] percent of average weekly wage in the state.

LARSON & LARSON, *supra* note 21, at 24.

43. JAMES ROBERT CHELIUS, *WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKERS' COMPENSATION* 49 (1977).

44. See Joan T. A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 *WAKE FOREST L. REV.* 1083, 1087–88 (1999).

45. Scott D. Szymendera, *Workers' Compensation: Overview and Issues*, *CONG. RES. SERV.* 1, 20–21 (2017). "In 1973, S. 2088, introduced by Senators Harrison Williams and Jacob Javits, would have created minimum standards for state workers' compensation systems" which required, among other things, "no duration or monetary limit on total disability benefits paid; [and] no duration or monetary limit on medical or rehabilitation benefits." *Id.* at 24.

46. LARSON & LARSON, *supra* note 21, at 24.

47. Stephen E. Ehlers & David R. Wise, *So What's ERISA All About?: A Concise Guide for Labor and Employment Attorneys*, 77 *N.Y. ST. B. ASS'N J.* 22, 22 (2005).

48. Employee Retirement Income Security Act of 1974, Pub. L. No. 93–406, 88 Stat. 829 (1974).

requirements regarding standards of conduct, responsibility, and obligations under such plans.”<sup>49</sup>

Plans governed by ERISA fall into two categories: pension plans and welfare plans. Pension plans provide retirement income to employees or allow for deferred income,<sup>50</sup> whereas welfare plans include most other employee benefits.<sup>51</sup> Generally, employee benefit plans regulated by ERISA are plans provided by “a single employer, by groups of employers (multiple employer plans) and by unions and employers together (multi-employer plans),” while government and church plans are generally exempt.<sup>52</sup>

ERISA gets its teeth from the act’s far-reaching preemption scheme.<sup>53</sup> If a benefit plan falls within ERISA, there is the potential for a host of state laws that would normally apply to be preempted.<sup>54</sup> ERISA does carve out an exemption for state laws that regulate insurance.<sup>55</sup> Though, self-insured benefit plans are considered outside of state laws that regulate insurance and thus are entitled to ERISA preemption.<sup>56</sup>

At issue in this Article is ERISA’s relationship with workers’ compensation. By the time of ERISA’s adoption in 1974, almost every state required employers to either purchase workers’ compensation plans or self-insure their employees pursuant to state workers’ compensation

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49. KATHRYN J. KENNEDY & PAUL T. SHULTZ III, *EMPLOYEE BENEFITS LAW: QUALIFICATIONS AND ERISA REQUIREMENTS* 1 (2012).

50. 29 U.S.C. § 1002(2)(A) (2018).

51. *Id.* § 1002(1) (including in the welfare plan benefits classes such as medical, sickness, accident, disability, death, unemployment, vacation benefits, apprenticeship, training programs, day care centers, scholarship funds, and prepaid legal services).

52. Ehlers & Wise, *supra* note 47, at 23; *see* 29 U.S.C. § 1002(32)–(33) (providing the definition of “government plan” and “church plan”).

53. Generally, “[f]ederal preemption is the [negation] of state laws that conflict with federal law.” NICOLE HUBERFELD ET AL., *THE LAW OF AMERICAN HEALTH CARE* 177 (2017). The doctrine is based on the Supremacy Clause. *See* U.S. CONST. art. VI, para. 2. Preemption is accomplished in three ways: (1) Congress has used express statutory language to preempt state law, (2) Congress has implied preemption when compliance with both state and federal law would lead to an absurd result, or (3) if Congress has so regulated a specific field the courts may conclude that federal law “occupies the field” and there is no room for state regulation. HUBERFELD, *supra*.

54. 29 U.S.C. § 1144(a) (2018) (“[ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .”); *see also* HUBERFELD, *supra* note 53.

55. 29 U.S.C. § 1144(b)(2)(A) (“[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.”).

56. *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 367 n.2 (1999) (“Self-insured ERISA plans . . . are generally sheltered from state insurance regulation.”).

statutes.<sup>57</sup> Congress explicitly excluded employee benefit plans from ERISA that were “maintained solely for the purpose of complying with applicable workmen’s compensation laws or unemployment compensation or disability insurance laws.”<sup>58</sup> By excluding workers’ compensation from ERISA, states continued to have complete control over the procedures and adjudication of workers’ compensation benefits.

#### D. *The Third Era: Addressing Rising Employer Costs*

Since the codification of workers’ compensation by the states, concerns over the quality and accessibility of worker benefits have often been considered secondary to the cost of workers’ compensation insurance premiums for employers.<sup>59</sup> State legislatures have regularly taken the stance that workers’ compensation is a burden on employers instead of viewing it as a negotiated bargain with workers.<sup>60</sup> Therefore, the cost of workers’ compensation assumed by employers often incites more conversation than benefits forfeited by injured workers.<sup>61</sup>

Prior to the 1970s, workers’ compensation insurance (or the costs associated with being self-insured) was not a high-line item on employer budgets.<sup>62</sup> With the expansion of benefits, the type of workers covered, and ballooning health care costs, state legislatures began feeling pressure

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57. LARSON & LARSON, *supra* note 21, at 23–24 (noting that by 1949 every state in the lower forty-eight had adopted workers’ compensation acts except Mississippi).

58. 29 U.S.C. § 1003(b)(3) (2018).

59. See Martha T. McCluskey, *The Illusion of Efficiency in Workers’ Compensation Reform*, 50 RUTGERS L. REV. 657, 690 (1998) (arguing that states have disproportionately addressed workers’ compensation regarding the “impact of workers’ compensation costs on their state’s ‘business climate’” over the adequacy of injured worker benefits).

60. See Press Release, George A. Amedore, Jr., N.Y. State Senator, Senators Call for Sensible Workers’ Comp Reform in Budget (Mar. 22, 2017) <https://www.nysenate.gov/newsroom/press-releases/george-amedore-jr/senators-call-sensible-workers-comp-reform-budget> [<https://perma.cc/2CGX-NGQJ>]. New York senate assembly member John T. McDonald III has recently stated, “[e]mployers, small and large, continue to struggle with the high cost burden of workers’ compensation cost. It is the number one or two concern in their business.” *Id.*

61. See McCluskey, *supra* note 59, at 681 (1998). “[T]he original workers’ compensation bargain was distorted [during the 1970’s and 1980’s] because of an expansion of workers’ benefits and the increased costs of administering a system with more generous benefits covering a wide range of injuries” which subsequently lead states to implement cost cutting mechanisms. *Id.*

62. See Leslie I. Boden, *Workers’ Compensation in the United States: High Costs, Low Benefits*, 16 ANN. REV. PUB. HEALTH 189, 190 (1995) (describing how many state legislatures began to focus on the adequacy of worker benefits in the 1970s, which resulted in the average worker’s compensation cost to grow from 1.1% to 2.6% of payroll).

to address employer concerns over rising premiums.<sup>63</sup> Some states, such as Oregon, introduced higher legal burdens for workers to establish the compensability of certain injuries.<sup>64</sup> Access to workers' compensation benefits was further curtailed by the introduction of managed care organizations (MCOs) to contain health costs and the passage of statutory measures aimed at reducing attorney involvement in claim litigation.<sup>65</sup>

## II. THE FOURTH ERA AND THE OPT-OUT MOVEMENT

Unlike the past three eras of workers' compensation, when worker benefits and employer costs were negotiated within the confines of state statutes, the fourth era is marked by large employers pushing legislation that exempts participation within such statutes through ERISA preemption. As discussed below in this Part, parties have successfully invoked state constitutional doctrines, such as equal protection and the prohibition against special laws, to protect workers' compensation statutes from ERISA preemption.

### A. *Alternative Benefit Plans in Texas*

The origin of the opt-out movement can be traced to Texas. While Texas does have a workers' compensation statute administered by the Texas Workers' Compensation Commission, it is the only state where workers' compensation is not compulsory under state statute.<sup>66</sup> Texas

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63. See McCluskey, *supra* note 59, at 705–06.

64. In occupational disease claims, the worker must prove the work exposure is the “major contributing cause,” or fifty-one percent or more of the cause, of the condition. If at any time an injury combines with a qualified preexisting condition the worker must show that the injury was the “major contributing cause” of the “combined condition.” OR. REV. STAT. § 656.005(7)(a) (2018) (“[T]he combined condition is compensable only if . . . the otherwise compensable injury is the major contributing cause of the disability of the combined condition . . .”). Compared with the “material cause” standard in which a condition is compensable if the injury played a “material” role in the condition. The adoption of the “major contributing cause” standard in occupational diseases and combined conditions blocked claims from ever entering the workers' compensation system, effectively leaving workplace injuries that do not meet the burden without a remedy. *Vigor Indus., LLC v. Ayres*, 310 P.3d 674, 676, 681 (Or. Ct. App. 2013) (holding that the major contributing cause of a combined condition was when the injury is a greater cause than the qualified preexisting condition).

65. For example, legislation in Oregon from the 1980s to 1996 reduced the number of claims by twelve to twenty-four percent and benefits by twenty to twenty-five percent. Terry Thomason & John F. Burton, Jr., *The Effects of Changes in the Oregon Workers' Compensation Program on Employees' Benefits and Employers' Costs*, 1 WORKERS' COMPENSATION POL'Y REV. 7, 10 (August 7, 2001), made available at <http://workerscompresources.com/wp-content/uploads/2012/11/JA01.pdf>.

66. TEX. LAB. CODE ANN. § 406.002(a) (West 2017) (“Except for public employers and as otherwise provided by law, an employer may *elect* to obtain workers' compensation

employers may elect to pass on workers' compensation coverage, though they forfeit tort immunity by doing so.<sup>67</sup> Therefore, if a Texas employer runs a cost-benefit analysis and decides that the cost of workers' compensation insurance outweighs exposure to civil litigation costs and tort damages, he may pass on the exclusive remedy of workers' compensation.

Since the 1980s, self-insured plans utilizing ERISA have been available in the Texas market.<sup>68</sup> To utilize these plans, employers would elect against Texas workers' compensation coverage and become non-subscribing employers.<sup>69</sup> Normally, non-subscribing employers under Texas law are exposed to tort liability.<sup>70</sup> In order to minimize this liability, non-subscribing employers conditioned employment on the acceptance of arbitration agreements for common law claims.<sup>71</sup> Texas courts upheld these agreements based on the reasoning in *West Texas Express v. Guerrero*, that an "arbitration agreement . . . did not actually waive [claimant's] right to sue, [and that the claimant] merely agreed to a particular forum for resolution of his cause of action."<sup>72</sup> Commentators have further noted that these arbitration agreements are possible in Texas because the Texas courts have held that "when [what amounts to] a pre-injury waiver of common law claims is included in an arbitration

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insurance coverage.") (emphasis added); Kirk D. Willis, *Why Smart Employers Opt Out from Texas Workers' Compensation Coverage Under V.T.C.A. Labor Code § 406.002(A)*, 38 T. MARSHALL L. REV. 117, 120 (2012) (noting that Texas is the only state that does not require employers to subscribe to workers' compensation).

67. See Willis, *supra* note 66, at 125 (explaining that an employer who chooses against providing workers' compensation coverage for their employees (referred to under Texas law as a "nonsubscriber") "is subject to negligence liability associated with a work[place] injury").

68. PETER ROUSMANIERE & JACK ROBERTS, WORKERS' COMPENSATION OPT-OUT: CAN PRIVATIZATION WORK? 1, 45–46 (2012), <http://lawprofessors.typepad.com/files/wc-opt-out-report-11-2012.pdf> [<https://perma.cc/PME2-WRJF>].

69. TEX. LAB. CODE ANN. § 406.005 (West 2017) (describing the Texas statutory mechanism to become a non-subscribing employer).

70. See *Taff v. Singer Sewing Mach. Co.*, 331 F.2d 405, 406–07 (5th Cir. 1964).

Under Texas law, an employee is allowed to sue [an] employer in tort for injuries caused by the employer's negligence, if the employer while eligible to subscribe to the Texas Workmen's Compensation system has chosen not to do so. In such case, a defendant employer is deprived of the traditional common law defenses of contributory negligence, assumed risk, and follow-servant [sic] rule.

*Id.*; see TEX. LAB. CODE ANN. § 406.033 (West 2017).

71. See Jason Ohana, *Texas Elective Workers' Compensation: A Model of Innovation?*, 2 WM. & MARY BUS. L. REV. 323, 343–44 (2011); Nathan E. Ross, *How Level is the Playing Field? Should Employers Be Able to Circumvent State Workers' Compensation Schemes by Creating Their Own Employee Compensation Plans?*, 2000 J. DISP. RESOL. 439, 439, 442–43 (2000).

72. *W. Tex. Express v. Guerrero*, 511 S.W.3d 106, 117 (Tex. App. 2014).

agreement, the [Texas] statutory prohibition against pre-injury waivers is preempted by the Federal Arbitration Act (FAA)."<sup>73</sup>

Functionally, at will employees who sign employment arbitration agreements are precluded from bringing negligence suits for on-the-job injuries in civil court.<sup>74</sup> Furthermore, since the employers in these scenarios have opted out of workers' compensation coverage, their injured workers are precluded from seeking benefits under the Texas workers' compensation statute. As a result, an injured worker's only path to a remedy is to go through arbitration under the employer's alternative benefit plan.

Unsurprisingly, large employers with the resources to put together self-insured alternative benefit plans found instant savings on insurance premiums or the cost associated with being self-insured under the Texas workers' compensation statute.<sup>75</sup> Alternative benefit plans operate much like other benefit offerings (such as retirement plans, group-term life insurance plans and health plans), and, due to ERISA preemption, the state is unable to effectively regulate the contents of the plan.<sup>76</sup>

#### B. *The Oklahoma Employee Injury Benefit Act*

While some states, such as Oregon, have successfully curbed premiums, many states struggle with rising workers' compensation costs.<sup>77</sup> With an environment ripe for further legislative intervention, the door was open for changes in states that wanted to promote a pro-business environment to attract large employers.

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73. Ohana, *supra* note 71, at 344; *see In re Bison Bldg. Materials, Ltd.*, Nos. 01-07-00003-CV, 01-07-00029-CV, 2008 WL 2548568, at \*10 (Tex. App. June 26, 2008) ("We . . . now hold that the FAA preempts any potential application of the Texas non-waiver provision stated in Labor Code section 406.033(e) to prevent enforcement of the arbitration clause stated in [the Labor Code]."); *In re Border Steel, Inc.*, 229 S.W.3d 825, 832 (Tex. App. 2007) ("[T]he FAA preempts the application of the Texas non-waiver provision to prevent the enforcement of the Arbitration Agreement at issue here.").

74. *See* sources cited *supra* note 73.

75. Torrey, *supra* note 2, at 44; *see* Alison D. Morantz, *Opting Out of Workers' Compensation in Texas: A Survey of Large, Multistate Nonsubscribers*, in *REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* 197, 199–200 (Daniel P. Kessler ed., 2010).

76. *See* Section II.C.

77. *See* CHRIS DAY ET AL., DEP'T. OF CONSUMER & BUS. SERVS., 2016 OREGON WORKERS' COMPENSATION PREMIUM RATE RANKING SUMMARY (2016), <https://www.oregon.gov/dcbs/reports/Documents/general/prem-sum/16-2082.pdf> [<https://perma.cc/S5HD-25Q6>]. California, the state with most expensive index rate at \$3.24 per \$100 of payroll, is at 176 percent of the median compared to North Dakota, the state with the least expensive index rate at \$0.89 per \$100 of payroll, at 48 percent of the mean. Oklahoma's index rate is at \$2.23 per \$100 of payroll and 121 percent of the mean. *Id.*

It is with this backdrop that, in 2011, Oklahoma Governor Mary Fallin appointed a working group to examine and rewrite Oklahoma's Workers' Compensation Act. The working group was tasked with codifying case law that had developed since the 1977's workers' compensation reforms.<sup>78</sup> Through the working group's efforts and without much controversy, Oklahoma Senate Bill 878 was created and eventually passed as the Oklahoma Workers' Compensation Code.<sup>79</sup>

Proponents of Texas-like workers' compensation alternative benefit plans began lobbying for an opt-out alternative in Oklahoma before the full effects of the new Workers' Compensation Code could be felt.<sup>80</sup> In 2013, their efforts proved successful when Oklahoma passed the Oklahoma Employee Injury Benefit Act (OEIBA), also referred to as the Opt-Out Act.<sup>81</sup> The OEIBA allowed employers who were certified as "qualified employers" to remove themselves from Oklahoma's workers' compensation system if they set up written benefit plans to cover work injuries for employees.<sup>82</sup> The requirements for becoming a "qualified employer" included providing a written private benefit plan to the Insurance Commissioner and paying an annual \$1,500 filing fee.<sup>83</sup> Unlike Texas, "qualified employer[s]" retained the same tort immunity held by employers who remained under Oklahoma workers' compensation statute.<sup>84</sup>

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78. Bob Burke, *The Evolution of Workers' Compensation Law in Oklahoma: Is the Grand Bargain Still Alive?*, 41 OKLA. CITY U. L. REV. 337, 392 (2016).

79. 2011 Okla. Sess. Laws 2553 (repealed 2013); see Tish Sommer, *Bill Summary*, OKLA. WORKERS' COMP. CT. OF EXISTING CLAIMS (June 1, 2011), [http://www.owcc.state.ok.us/PDF/LegChanges/SB878\\_Summary%20of%20Enacted\\_FINAL.pdf](http://www.owcc.state.ok.us/PDF/LegChanges/SB878_Summary%20of%20Enacted_FINAL.pdf) [<https://perma.cc/SFH8-NSD6>] (providing a section-by-section explanation of the Workers' Compensation Code). At the time, Sommer was Special Counsel for the Workers' Compensation Court. *Administrative Law Judges*, OKLA. WORKERS COMPENSATION COMM'N, [https://www.ok.gov/wcc/About\\_the\\_Commission/Administrative\\_Law\\_Judge\\_Bios/](https://www.ok.gov/wcc/About_the_Commission/Administrative_Law_Judge_Bios/) [<https://perma.cc/LK6S-5GA8>].

80. See Burke, *supra* note 78, at 413–16 (noting that the legislative changes were driven by many of Oklahoma's largest employers, such as Hobby Lobby, Quick Trip, Sysco, Dollar General, Auto Zone and Best Buy).

81. *Id.* at 414–15.

82. OKLA. STAT. tit. 85A, § 202 (2018), *invalidated by* Vasquez v. Dillard's Inc., 381 P.3d 768 (Okla. 2016).

83. *Id.* § 202(B); see also ROUSMANIERE & ROBERTS, *supra* note 68, at 58.

84. OKLA. STAT. tit. 85A, § 209(B) (2018), *invalidated by* Vasquez v. Dillard's Inc., 381 P.3d 768 (Okla. 2016) (“[A] qualified employer is only subject to liability in any action brought by a covered employee or his or her dependent family members for injury resulting from an occupational injury if the injury is the result of an intentional tort on the part of the qualified employer.”).

### C. *The Allure of Opt-Out*

State workers' compensation schemes are often singled out by pro-business advocates as inefficient, costly, and easily abused by workers.<sup>85</sup> Besides cost savings for employers, opt-out proponents have argued that alternative benefit plans are superior to state workers' compensation systems for the following reasons: management of medical treatment, employee accountability, competition of differing plans, and removal from bureaucratic administrative law proceedings.<sup>86</sup> Yet the true selling point of opt-out plans for large employers is that they provide what effectively functions as employer-controlled arbitration of personal injury tort claims.

The legality and proliferation of workplace arbitration agreements, as noted in Texas, is nothing new.<sup>87</sup> The Supreme Court's 2012 enunciation in *Marmet Health Care Center, Inc. v. Brown* that personal injury suits could be covered by arbitration agreement further opened the door for the opt-out movement.<sup>88</sup> While scholars have noted that "[t]ort values are difficult to square with notions of arbitration contracts"<sup>89</sup> because of the unknown "extent of a subsequently suffered injury,"<sup>90</sup> recent Supreme Court decisions upholding the Federal Arbitration Act in employment contracts suggests arbitration may continue to expand into the tort realm.<sup>91</sup>

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85. ROUSMANIERE & ROBERTS, *supra* note 68, at 6 ("The opt-out concept arises from employers' belief that statutory workers' compensation systems are inherently and excessively costly and burdened with fraud and abuse.").

86. See Torrey, *supra* note 2, at 48–52.

87. See *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 20–22 (2012); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22–23 (1983), for the U.S. Supreme Court's long-held enforcement of arbitration agreements under the Federal Arbitration Act; *supra* Section II.A.

88. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533–34 (2012).

89. Michael C. Duff, *Worse than Pirates or Prussian Chancellors: A State's Authority to Opt-Out of the Quid Pro Quo*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. 123, 127 (2016) [hereinafter *Worse than Pirates*]; see Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253, 273 (2004) (arguing that, taken to an extreme, the enforcement of arbitration clauses diminishes tort policy considerations).

90. *Worse than Pirates*, *supra* note 89, at 127.

91. The Supreme Court's decision in *Circuit City Stores, Inc. v. Adams* held that the Federal Arbitration Act, applied to all workers engaged in interstate commerce with the exception of certain interstate transportation workers, such as railroad employees or seamen. 532 U.S. 105, 112 (2001); see *Worse than Pirates*, *supra* note 89, at 127 ("Even during the peak of industrialism . . . some late nineteenth century courts refused to enforce pre-injury waivers of tort suits."); see also Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN. ST. L. REV. 1081, 1085 (2009) ("Because the

Opt-out plans also offer the solution of effectively stopping claims from getting in the door. For example, opt-out plans try to remove benefit plan claim disputes from oversight by independent state agencies through ERISA preemption. Under the alternative benefit plans, injured workers are required to appeal their denied claims to an arbitration committee through a written appeal, often without the aid of a hearing or counsel.<sup>92</sup> Unlike a neutral agency-employed Administrative Law Judge, who reviews the facts surrounding a workplace injury through evidence and testimony, opt-out plans allow the employer to appoint whomever they want as the initial fact finder. This is problematic because appellate courts often only retain *de novo* review of legal issues in a case and do not make findings of fact. Often, on review in workers' compensation cases, higher courts are bound to a deferential standard of review of the administrative fact finder, which makes the employer's control of fact finding a powerful tool.<sup>93</sup>

Since opt-out plans exist in a free market with firms vying for business, plans are often crafted to be more competitive by limiting benefits, employee rights, and medical care choices. For example, only forty-one percent of Texas opt-out plans include death benefits for the beneficiary of fatal claims.<sup>94</sup> Even more concerning, one approved Oklahoma opt-out plan required injured workers to report their injury to the plan administrator within twenty-four hours or the injured worker

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Court will not do it and the Court has determined that state legislatures cannot do it, any reform of the current system regarding enforceable contracts and procedures governing arbitration must come from Congress . . . .") (emphasis omitted).

92. The Oklahoma Employee Injury Benefit Act states:

The claimant may appeal in writing an initial adverse benefit determination to an appeals committee within one hundred eighty (180) days following his or her receipt of the adverse benefit determination. The appeal shall be heard by a committee consisting of at least three people that were not involved in the original adverse benefit determination. The appeals committee shall not give any deference to the claimant's initial adverse benefit determination in its review.

OKLA. STAT. tit. 85A, § 211(B)(1) (2018), *invalidated by* Vasquez v. Dillard's Inc., 381 P.3d 768 (Okla. 2016).

93. David B. Torrey, *Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 21, 113–22 (2012) (describing how, either through law or practice, appellate courts in multiple jurisdictions defer to the factual findings of state commission charged with originally adjudicating workers' compensation cases).

94. Jay Root, *Behind the Texas Miracle, a Broken System for Broken Workers*, TEX. TRIB. (June 29, 2014), <http://apps.texastribune.org/hurting-for-work/> [<https://perma.cc/FWZ4-E84K>]. Michael Duff points out the irony as Texas is near the top of the national workplace death rates in recent years. *Worse than Pirates*, *supra* note 89, at 137.

would be procedurally barred from bringing the claim.<sup>95</sup> Effectively, injured workers who did not know they were injured, or failed to immediately attribute their injury to work, were barred from benefits under their plan. Further, due to their employer's tort immunity, workers were barred from seeking civil damages.<sup>96</sup>

Opt-out plans were also used to drop some injuries that were covered under Oklahoma's workers' compensation scheme. Under Oklahoma's workers' compensation statute, "compensable injury" is defined as injuries that occur during the course or in the scope of a worker's employment, with some minor exceptions.<sup>97</sup> However, under opt-out plans governed by the OIEBA, cumulative trauma injuries and occupational exposure diseases, which meet the definition of "compensable injury," were allowed to be left off employer plans.<sup>98</sup> For example, an employer who manufactured toxic cleaning chemicals could refuse to cover lung disease under its alternative benefit plan even though chemical exposure to the lung is a foreseeable risk of employment.

Some scholars have argued that workers may fare better under some private plans.<sup>99</sup> For example, Alison Morantz points out that some Texas private plans include "first-day coverage of lost earnings and wage replacement rates that are not capped by the state's [sic] average weekly

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95. Robert Wilson, *The 24 Hour Oklahoma Opt Out Sham*, WORKERS COMPENSATION (Apr. 29, 2015, 5:21 PM), [www.insurors.org/pdf/The-24-Hour-Oklahoma-Opt-Out-Sham.pdf](http://www.insurors.org/pdf/The-24-Hour-Oklahoma-Opt-Out-Sham.pdf) [<https://perma.cc/LH7T-KSX3>].

96. For example, in Oklahoma, Ms. Jenkins, a single mother of four who worked at ResCare, Inc., the nation's largest privately-owned home health care agency, was injured while breaking up an assault between disabled clients. *Id.* The event occurred in full view of Ms. Jenkins's supervisor and she sought medical treatment at the emergency room directly after her shift. *Id.* Ms. Jenkins failed to call the 1-800 number designated under the employer's plan within twenty-four hours of her injury and she was denied "all medical and disability benefits." *Id.* In Robert Wilson's account, Ms. Jenkins did not call the designated number "until the 27th hour, while she was at the company doctors [sic] office." *Id.*

97. OKLA. STAT. tit. 85A, § 9(a-b) (2018).

98. See Burke, *supra* note 78, at 416-17.

99. See NATHAN BACCHUS ET AL., ALTERNATIVES TO TRADITIONAL WORKERS' COMPENSATION SYSTEMS, RISK & INS. MGMT. SOC'Y 3 (2015), [https://www.rims.org/RiskKnowledge/RISKKnowledgeDocs/AlternativesWorkersComp\\_paper\\_1062015\\_92524.pdf](https://www.rims.org/RiskKnowledge/RISKKnowledgeDocs/AlternativesWorkersComp_paper_1062015_92524.pdf) [<https://perma.cc/BV8K-NS77>]; Chris Patterson & John Colyandro, *Workers' Compensation: Making It Work for Texans*, POL'Y PERSP. 1, 7 (Feb. 1, 2005), <http://www.txccri.org/content/2005-02-workers.pdf> [<https://perma.cc/4Q5C-BRSS>]; PETER ROUSMANIERE & JACK ROBERTS, WORKERS' COMPENSATION DEREGULATION ALERT: WHAT EMPLOYERS NEED TO KNOW ABOUT THE NEW OKLAHOMA LAW (2013), [http://riskandinsurance.com/wp-content/uploads/2015/09/Sedgwick\\_Workers'-Compensation-Deregulation-Alert.pdf](http://riskandinsurance.com/wp-content/uploads/2015/09/Sedgwick_Workers'-Compensation-Deregulation-Alert.pdf) [<https://perma.cc/U92Y-K6A7>].

wage” and an overall “decline in severe, traumatic injury claims.”<sup>100</sup> Still, much of the support for opt-out has been geared towards business friendly economic policy and the paring down of bureaucratic control, not injured worker access to fair and appropriate benefits.

### III. *VASQUEZ V. DILLARD'S, INC.*

Due to the unique makeup of each state's workers' compensation statute, few state workers' compensation cases create national attention. Yet the Oklahoma Supreme Court's decision in *Vasquez v. Dillard's, Inc.*<sup>101</sup> has been touted by opt-out opponents and scholars as the most meaningful workers' compensation case in the past twenty years.<sup>102</sup>

In the fall of 2016, the Oklahoma Supreme Court declared the OEIBA unconstitutional, after only three years in existence, pursuant to the Oklahoma Constitution's ban on “special laws.”<sup>103</sup> The court found that the statute created “impermissible, unequal, and disparate treatment of a select group of injured workers.”<sup>104</sup>

The etiology of the litigation stems from neck and shoulder aggravation injuries suffered by Dillard's department store employee, Jonnie Yvonne Vasquez, while working in 2014.<sup>105</sup> Dillard's had been approved as a “qualified employer” under the OEIBA and processed workers' compensation claims under its own alternative benefit plan. The compensability of Ms. Vasquez's claim was denied under Dillard's plan

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100. Alison D. Morantz, *Rejecting the Grand Bargain: What Happens When Large Companies Opt Out of Workers' Compensation?*, 50 (Stan. Inst. for Econ. Res., Working Paper No. 16-007, 2016), made available at <https://siepr.stanford.edu/sites/default/files/publications/16-007.pdf> [<https://perma.cc/C85K-ZA7J>].

101. *Vasquez v. Dillard's, Inc.*, 381 P.3d 768, 787 (Okla. 2016).

102. Alan S. Pierce, *Workers' Comp Matters*, LEGAL TALK NETWORK (Dec. 29, 2017), <https://legaltalknetwork.com/podcasts/workers-comp-matters/2017/12/new-york-workers-compensation-changes-in-2017/> [<https://perma.cc/8C63-GKVG>]. Michael Gruber, the former president of the Workers Injury Law & Advocacy Group (WILG) notes specifically that the *Vasquez* decision served as a “serious damper in the momentum of the Opt-Out threat throughout the southeastern part of the United States.” *Id.*

103. *Vasquez*, 381 P.3d at 775. “The core provision of the Opt Out Act . . . creates impermissible, unequal, disparate treatment of a select group of injured workers.” *Id.* at 770 (footnote omitted); see OKLA. CONST. art. V, § 59.

104. *Vasquez*, 381 P.3d at 775.

105. *Id.* at 770. The Oklahoma Supreme Court did not address the merits of Ms. Vasquez's claim and left the issue to the Oklahoma Workers' Compensation Commission on remand. *Id.* at 776.

and Ms. Vasquez appealed the decision to Oklahoma's Workers' Compensation Commission (WCC).<sup>106</sup>

A. *Oklahoma Workers' Compensation Commission Ruling*

The WCC ruled that the OEIBA (1) deprived injured workers, under alternative benefit plans, equal protection of the law under the Oklahoma constitution; (2) equated to an unconstitutional "special law" under the Oklahoma Constitution; and (3) illicitly limited injured workers' access to a civil remedy.<sup>107</sup> While only the first step in the appeals process, the WCC's decision was noteworthy for the opt-out movement for three salient reasons.

First, the WCC held that Dillard's alternative benefit plan was governed by ERISA.<sup>108</sup> ERISA exempts from its preemption plans "maintained *solely* for the purpose of complying with applicable workmen's compensation laws."<sup>109</sup> The plan under which Ms. Vasquez sought benefits was not "maintain[ed] solely" for workers' compensation because it included "non-occupational death benefits, *in addition to* the benefits required under [the OEIBA]."<sup>110</sup> However, the WCC reasoned that Dillard's ERISA-governed alternative benefit plan was not preempted by ERISA because some of the benefits under its plan were required under the OEIBA.<sup>111</sup> Usually courts reading ERISA hold that any state laws or regulations relating to a plan deemed to be an ERISA plan are

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106. *Id.* at 770. Dillard's originally attempted to remove the case to federal court, arguing that their opt-out plan was governed by ERISA and thereby subject to federal preemption. *Vasquez v. Dillard's, Inc.*, No. CIV-15-0861-F, 2015 WL 9906300, at \*1 (W.D. Okla. Sept. 30, 2015). The federal district court denied removal, noting that the "action ar[ose] under the work[ers'] compensation laws of Oklahoma . . . and the fact that the plan . . . may be . . . an ERISA plan, d[id] not change the[] conclusion[]." *Id.* at \*2.

107. *Vasquez v. Dillard's, Inc.*, No. CM-2014-11060L, ¶¶ 39, 45, 50 (Okla. Workers' Comp. Comm'n, Feb. 26, 2016), <https://www.ok.gov/wcc/documents/Vasquez.pdf> [<https://perma.cc/R23R-U6XL>] [hereinafter Commission Order]; *see also* Torrey, *supra* note 2, at 71.

108. Commission Order, *supra* note 107, ¶ 3.

109. 29 U.S.C. § 1003(b)(3) (2018) (emphasis added); *see also supra* Section II.C.

110. Commission Order, *supra* note 107, ¶ 3. This type of benefit comingling had previously been used by Texas alternative benefit plans to successfully trigger ERISA preemption. *See Hernandez v. Jobe Concrete Prods., Inc.*, 282 F.3d 360, 362 (5th Cir. 2002) (holding that Texas alternative benefit plans were preempted by ERISA because the plans were not "maintained solely for the purpose of complying with Texas workers' compensation law").

111. Commission Order, *supra* note 107, ¶ 3.

preempted.<sup>112</sup> The WCC's holding, in essence, alleged some sort of state administrative oversight of ERISA plans.

Second, the WCC considered itself a "court of competent jurisdiction" to hear Ms. Vasquez's ERISA claim.<sup>113</sup> Under ERISA, a civil action may be brought by a beneficiary of an ERISA plan "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."<sup>114</sup> It is important to note that Section 502(a)(1)(B) of ERISA only contemplates prosecuting an appeal through *civil action* under the terms an ERISA governed plan, not through an administrative procedure like a workers' compensation appeal.<sup>115</sup>

Only two types of courts—state courts of competent jurisdiction and district courts of the United States—have jurisdiction over ERISA claims.<sup>116</sup> In order to be a state court of competent jurisdiction, the WCC opined that the Oklahoma legislature deemed it a court of competent jurisdiction under the OIEBA pursuant to the following language:

Commission shall act as the court of competent jurisdiction under 29 U.S.C.A. Section 1132(e)(1), and shall possess adjudicative authority to render decisions in individual proceedings by claimants to recover benefits due to the claimant under the terms of the claimant's plan, to enforce the claimant's rights under the terms of the plan, or to clarify the claimant's rights to future benefits under the terms of the plan.<sup>117</sup>

The legislature seemingly set up the WCC as a court of competent jurisdiction to hear ERISA claims under alternative benefit plans. The problem with this reading of the OEIBA is that ERISA "supersede[s] any and all State laws insofar as they . . . relate to any employee benefit plan."<sup>118</sup> The "relate to" preemption has been broadly defined by the Supreme Court to include any state laws "specifically designed to affect employee benefit plans."<sup>119</sup> The Court has held that a state law that

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112. See *Hernandez*, 282 F.3d at 361–63; see also *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 947 (2016) (finding Vermont statute, as applied to ERISA plans, invalidated by ERISA's express pre-emption clause).

113. Commission Order, *supra* note 107, ¶ 7; see *Torrey*, *supra* note 2, at 67.

114. 29 U.S.C. § 1132(a)(1)(B) (2018).

115. *Id.* (explicitly stating "[a] civil action may be brought").

116. *Id.* § 1132(e)(1).

117. OKLA. STAT. tit. 85A, § 211(b)(5) (2018), *invalidated by Vasquez v. Dillard's Inc.*, 381 P.3d 768 (Okla. 2016); Commission Order, *supra* note 107, ¶¶ 6–7.

118. 29 U.S.C. § 1144(a) (2018) (emphasis added).

119. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990) ("[S]tate laws which are 'specifically designed to affect employee benefit plans' are pre-empted under

references or has a connection with ERISA will trigger ERISA preemption of the state law.<sup>120</sup> It seems inconsistent with a clear reading of ERISA that the Oklahoma legislature could allow employers to create ERISA plans and also allow state laws, which are preempted by ERISA, to govern those plans.

Third, the WCC held it had authority to determine a constitutional question.<sup>121</sup> It is well recognized that “[t]he threshold issue in any judicial or quasi-judicial proceeding is whether the tribunal has jurisdiction over the subject matter.”<sup>122</sup> Unlike courts of general jurisdiction, the subject matter jurisdiction of state administrative agencies is often narrowly defined by the agency’s enabling statute(s) or the state’s constitution. Most state worker compensation statutes narrowly define the authority of the administrative agency charged with facilitating workers’ compensation benefits to the adjudication of claims.<sup>123</sup>

At the outset of its analysis on jurisdiction of constitutional questions, the WCC noted that administrative agencies “do not have the authority to determine constitutional questions.”<sup>124</sup> The WCC reasoned that since “the Oklahoma legislature . . . established the [WCC] as the court of competent jurisdiction in Section 211” of the OEIBA, in regard to jurisdiction over ERISA claims, the legislature had also conferred it with the authority to determine state constitutional questions.<sup>125</sup>

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§ 514(a).” (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988))).

120. *Shaw v. Delta Airlines, Inc.*, 463 US 85, 96–97 (1983). Furthermore, if a state law directly conflicts with ERISA, the state law is preempted by ERISA. *See also* *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129–30 (1992) (citations omitted) (“Under § 514(a), ERISA pre-empts any state law that refers to or has a connection with covered benefit plans . . . even if the law is not specifically designed to affect such plans, or the effect is only indirect, and even if the law is ‘consistent with ERISA’s substantive requirements.’”).

121. Commission Order, *supra* note 107, ¶¶ 8–9.

122. Geoffrey R. Bonham, *It Depends on the Question: Limits on the Jurisdiction of Administrative Agencies Over Constitutional Disputes*, 13 S.C. LAW. 15, 15 (2001).

123. *E.g.*, OR. REV. STAT. § 656.704(3)(a) (2018) (stating that the authority of Oregon’s Workers’ Compensation Board to conduct hearings is limited to “matters concerning a claim”); WASH. ADMIN. CODE § 263-12-010(1–7) (2018) (enunciating that the Washington Board of Industrial Insurance Appeals has the authority to hear disputes arising under only specific listed statutes).

124. Commission Order, *supra* note 107, ¶ 8. The commission noted the Oklahoma Supreme Court’s decision in *Dow Jones & Co. v. Oklahoma ex rel. Oklahoma Tax Commission* supported the proposition that “[all] statute[s] are] . . . constitutionally valid until a court of competent jurisdiction declares otherwise.” *Id.* (quoting *Dow Jones & Co. v. Okla. ex rel. Okla. Tax Comm’n*, 787 P.2d 843, 845 (Okla. 1990)).

125. *Id.* at ¶¶ 8–9.

Section 211 of the OEIBA states the type of authority given to the Commission under its review of ERISA claims as “adjudicative authority” to determine claimant benefits under “claimant’s plan.”<sup>126</sup> Language such as “individual proceedings” and “enforce . . . rights under the terms of the plan,”<sup>127</sup> likely suggests a narrow focus within the meaning of a “court[] of competent jurisdiction.”<sup>128</sup> Furthermore, the principle that the Oklahoma legislature has the power to convert an administrative agency into a court with the authority to deem a statute unconstitutional raises separation of powers issues.<sup>129</sup> It is, therefore, most likely that Section 211(5) of the OEIBA limits the WCC’s review power to the rights and procedures under the alternative benefit plan.

B. *Oklahoma Supreme Court’s Ruling in Vasquez v. Dillard’s, Inc.*

Some commentators speculated how the Oklahoma Supreme Court would approach the WCC’s jurisdictional rulings.<sup>130</sup> The court, however, barely mentioned WCC’s controversial reading of ERISA implications under the OEIBA or the limits of WCC’s jurisdiction. Instead, the court considered the merits of the case and held the OEIBA unconstitutional pursuant to Oklahoma’s constitutional ban on “special laws.”<sup>131</sup> The Oklahoma Constitution states: “Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.”<sup>132</sup> In the court’s view, the OEIBA “create[d the] impermissible, unequal, [and] disparate treatment of a select group of injured workers,”<sup>133</sup> with alternative benefit plan workers having substantively subordinate rights compared to workers bound under Oklahoma’s Workers’ Compensation Act.<sup>134</sup>

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126. OKLA. STAT. tit. 85A, § 211(B)(5) (2018), *invalidated by Vasquez v. Dillard’s Inc.*, 381 P.3d 768 (Okla. 2016).

127. *Id.*

128. *Id.*

129. See Michael C. Duff, *Workers’ Comp Agency Declares Oklahoma Opt-Out Statute Unconstitutional*, LEXISNEXIS: LEGAL NEWS ROOM (Feb. 29, 2016), <https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/posts/workers-comp-agency-declares-oklahoma-opt-out-statute-unconstitutional> (noting the difficulty of parsing out whether a legislature can delegate executive branch official authority that is normally regulated to the judicial branch).

130. See *id.* (“The WCC’s decision may ultimately have set up a collision between ERISA preemption and the Oklahoma State Constitution.”).

131. *Vasquez v. Dillard’s, Inc.*, 381 P.3d 768, 770 (Okla. 2016).

132. OKLA. CONST. art. V, § 59.

133. *Vasquez*, 381 P.3d at 775.

134. *Id.* at 773.

When determining the constitutionality of a “special law” under the Oklahoma constitution, Oklahoma courts use a three-prong test.<sup>135</sup> First, a court must identify a class implicated by the law in question. If the law regulates all “persons or things” within the presumed class, then the law is a general law, at which point the analysis ends. If the law singles out “persons or things” within the class for different treatment, then it is a “special law.”<sup>136</sup> If it is determined a special law, the court then considers whether it would have been impossible for a general law to accomplish the same function. Finally, the special law must be shown to substantially relate to a valid legislative objective.<sup>137</sup>

Dillard’s argued that the defined class for the court’s special law analysis should be “all employers,” not injured workers. In Dillard’s view, all employers had an equal opportunity to opt-out of the workers’ compensation coverage and, therefore, no “special law” had been created by the OEIBA.<sup>138</sup> The court noted that the Employee Injury Benefit Act’s title “serve[d] as legislative intent” to indicate that the class at issue was “injured employees.”<sup>139</sup>

Dillard’s further contended that, even if the OEIBA were a “special law,” it was constitutionally permissible because the Act was “substantially and reasonably related to a legitimate government objective.”<sup>140</sup> Accordingly, the court will “not accept the invitation of employers to find a discriminatory state statute constitutional by relying on the interests of employers in reducing compensation costs.”<sup>141</sup> The court also noted precedent under Oklahoma’s “special law” provision that the permissibility of a “special law” hinged on a “distinctive characteristic upon which a different treatment may reasonably be founded” between two groups within a class.<sup>142</sup> The court found no distinctive characteristic for different treatment between members of the “injured workers” class.

The court did note that the WCC had “no authority to determine the facial constitutionality of the Opt Out Act as a special law.”<sup>143</sup> As such, the court did not affirm the WCC’s assertion that the OEIBA was, in its entirety, unconstitutional. Somewhat mystifying was that the court still

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135. Reynolds v. Porter, 760 P.2d 816, 822 (Okla. 1988).

136. *Id.*

137. *Id.*

138. Vasquez, 381 P.3d at 772–73.

139. *Id.*

140. *Id.* at 774.

141. *Id.* (citing Torres v. Seaboard Foods, LLC, 373 P.3d 1057, 1079 (Okla. 2016)).

142. *Id.* (quoting Grant v. Goodyear Tire & Rubber Co., 5 P.3d 594, 598 (Okla. 2000)).

143. *Id.* at 771.

considered the constitutional questions in the case even though it acknowledged that the WCC overstepped its authority by determining the OEIBA's constitutionality.<sup>144</sup> The court determined its authority to consider constitutional questions could overcome any argument that the "special law" issue was not properly before it.<sup>145</sup>

As for the ERISA thicket created by the WCC's decision, the court did not address the issue at all. In a footnote, the court stated the issue had been waived by the parties.<sup>146</sup> Preemption of any kind is, of course, a question of subject matter jurisdiction and is not waivable by either party.<sup>147</sup> By not addressing the ERISA issue, the court, in one sense, affirmed the WCC's self-proclaimed authority to review ERISA claims that fall within the workers' compensation scheme.<sup>148</sup>

### C. *Constitutional Challenges Beyond Vasquez v. Dillard's, Inc.*

The workers' compensation industry has been eager to see a supreme court tackle the looming questions surrounding opt-out, and while the *Vasquez* court broached this subject, it passed on many issues that will likely be addressed by future courts. State and federal equal protection arguments, which were thoroughly briefed by the parties, were not addressed in the court's opinion.<sup>149</sup> In fact, the court specifically noted they did "not reach[] other constitutional challenges to the Opt Out Act based on denials of equal protection, due process, and access to courts" on state or federal grounds.<sup>150</sup>

Even if the ERISA quagmire is avoided and state constitutional "special law" provisions are not implicated in future opt-out litigation, courts will likely struggle with an equal protection analysis. Legal scholar Michael Duff notes that this is partially because the right of recovery for an injury is not considered fundamental in the U.S. or states' constitutions,

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144. See Torrey, *supra* note 2, at 67.

145. See *Vasquez*, 381 P.3d at 771.

146. *Id.* n.12.

147. See Torrey, *supra* note 2, at 68.

148. *Vasquez*, 381 P.3d at 783–84 (Gurich, J., concurring) (noting that the opt-out plans were essentially workers' compensation plans and therefore exempt from ERISA preemption); Commission Order, *supra* note 107, ¶¶ 8–9.

149. See Petitioner Dillard's, Inc.'s Brief-in-Chief at 4–6, *Vasquez v. Dillard's, Inc.*, 381 P.3d 768 (Okla. 2016) (No. 114,810), 2016 WL 6277354, at \*4–6 (arguing that opt-out does not violate Oklahoma's equal protection clause); Brief of Amici Curiae Academic Experts in Support of Respondent *Vasquez* at 4, *Vasquez v. Dillard's, Inc.*, 381 P.3d 768 (Okla. 2016) (No. 114,810), 2016 WL 6277355, at \*4 (arguing that the OEIBA "violates the equal protection and due process clauses of the Oklahoma and U.S. Constitutions").

150. *Vasquez*, 381 P.3d at 775.

and because “injured workers . . . do not make up a traditional suspect or quasi-suspect classification.”<sup>151</sup> Therefore, under a typical equal protection analysis, injured workers, as a class, “are subject only to deferential rational basis review.”<sup>152</sup> As the Supreme Court noted in *F.C.C. v. Beach Communications, Inc.*, under rational basis review, social and economic policy “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>153</sup> Under this highly deferential standard, it is possible that the OEIBA, under an equal protection argument, would pass state and federal constitutional muster.

While most states do have a provision regarding “special laws” in their constitutions, they are often viewed as a vestige of the 1800s with very few state courts giving the constitutional provisions teeth.<sup>154</sup> Future constitutional challenges on equal protection grounds to opt-out statutes that resemble OEIBA may have an uphill battle.<sup>155</sup> Further adding to these difficulties is the fact that the *Vasquez* decision offers no persuasive value for other jurisdictions.

In terms of policy, the OEIBA likely leaned too far towards the interests of employers. The *Vasquez* court discussed the Grand Bargain’s *quid pro quo* tort immunity in its opinion and opined that, while the legislature was free to abolish the workers’ compensation system entirely, substantially reducing worker benefits while retaining an exclusive remedy was not appropriate.<sup>156</sup> Perhaps, as the court suggests, repealing the exclusive remedy doctrine is the most assured way to uphold alternative benefit plans for injured workers. As noted in Texas, full tort liability, mitigated through employment arbitration agreements in alternative benefit plans, has precedent to withstand constitutional challenges.<sup>157</sup>

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151. See *Worse than Pirates*, *supra* note 89, at 177.

152. *Id.* at 178.

153. *F.C.C. v. Beach Commc’n, Inc.*, 508 U.S. 307, 313 (1993).

154. See Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 761–64 (2012).

155. It is important to note that some state supreme courts have found that the right to recover for personal injuries is an important substantive right and have subjected it to a more rigorous review than rational basis. *E.g.*, *Carson v. Mauer*, 424 A.2d 825, 830 (N.H. 1980) (“We now conclude, however, that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.”).

156. *Vasquez v. Dillard’s, Inc.*, 381 P.3d 768, 786–87 (Okla. 2016) (Gurich, J., concurring).

157. *Supra* Section II.A.

## IV. THE FOURTH ERA AND THE FUTURE OF OPT-OUT

Prior to the *Vasquez* decision, the opt-out movement had gained momentum by introducing legislation in Tennessee and South Carolina in 2015.<sup>158</sup> Yet, since *Vasquez*, the bills in both Tennessee and South Carolina lost support.<sup>159</sup> Further, Florida and Arkansas, two jurisdictions that appeared ripe for opt-out legislation, saw no substantial momentum for opt-out legislation during 2017.<sup>160</sup>

While the *Vasquez* decision clearly knocked the wind out of the opt-out movement, it is unlikely that the opinion sounded the death knell for alternative benefit plans or other workers' compensation workarounds. If anything, *Vasquez* pointed out the pitfalls of sweeping opt-out reform.

In response to *Vasquez*, the Association for Responsible Alternatives to Workers' Compensation (ARAWC) hired national employment and labor law firm Littler Mendelson P.C. in 2017 to lobby at the federal level for workers' compensation reform.<sup>161</sup> The ARAWC is reportedly funded by large retailers, such as Walmart, Whole Foods, and Macy's, which likely have an economic incentive for national or state opt-out legislation.<sup>162</sup>

Alternatively, other industries seek to disqualify their workers from workers' compensation through exemptions. In 2018, Tennessee passed HB 1978/SB 1967, which defined workers (marketplace contractors) who use a marketplace platform to find handyman type work—such as Handy

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158. S.B. 0721, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015), <http://www.capitol.tn.gov/Bills/109/Bill/SB0721.pdf> [<https://perma.cc/584F-8WJ6>]; H.B. 4197, 121st Gen. Assemb., Reg. Sess. (S.C. 2015), [https://www.scstatehouse.gov/sess121\\_2015-2016/bills/4197.htm](https://www.scstatehouse.gov/sess121_2015-2016/bills/4197.htm) [<https://perma.cc/BN3F-HAHE>].

159. Michael Grabell, *The Corporations Trying to Ditch Workers' Compensation Hit a Snag*, PACIFIC STANDARD (March 8, 2016), <https://psmag.com/economics/the-corporations-trying-to-ditch-workers-compensation-hit-a-snag> [<https://perma.cc/2BT8-HEXH>].

160. Laura Kersey, *Alternative Workers Compensation Mechanisms—What's Happening With Opt-Out?*, NCCI (Dec. 15, 2017), [https://www.ncci.com/Articles/Pages/II\\_Insights\\_Opt-Out.aspx](https://www.ncci.com/Articles/Pages/II_Insights_Opt-Out.aspx) [<https://perma.cc/4N2F-NZY6>] (explaining that Arkansas introduced legislation for opt-out in 2017, but it did not advance, while no bill in Florida was introduced).

161. "In 2017, perhaps in response to the failure of the legislation and the vociferous opposition, ARAWC hired Littler Mendelson to promote opt-out nationally." Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U. L. REV. 891, 952–53 (2017).

162. *Id.*; Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Comp*, PROPUBLICA (Oct. 14, 2015), <https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp> [<https://perma.cc/A5WL-UCBL>] (outlining how large corporations reap monetary incentives from opt-out legislation).

or Takl—as merchant contractors exempt from workers’ compensation.<sup>163</sup> While politically the legislation was specifically targeting handymen, the law broadly defines “marketplace contractor” as any individual that utilizes an app to connect with third-parties for work and compensation.<sup>164</sup> Some have argued that the breadth of the definition could allow “any business providing virtually any service by way of ‘online-enabled application, software, website, or system that enables the provision of services’” to exempt its workers from Tennessee’s workers’ compensation system.<sup>165</sup>

Tennessee, like Oklahoma, has a constitutional ban on special laws that could be used to argue against the disparate treatment of “merchant contractor” injured workers.<sup>166</sup> Yet unlike *Vasquez*, where injured workers subject to alternative benefit plans were precluded from accessing benefits through the workers’ compensation system,<sup>167</sup> the Tennessee law actively reclassifies workers prior to their invitation (or non-invitation) into the workers’ compensation system.<sup>168</sup> If a “special laws” argument were to be brought against the Tennessee law, an injured “merchant contractor” may have to first show that “merchant contractors” are not independent contractors, but rather employees, before a “special laws” claim would be entertained. Broadly reclassifying certain occupational relationships in such a way as to fall outside compulsory workers’ compensation coverage may be an effective opt-out alternative for industries looking to sidestep the courts.

The federal government has also weighed in on the opt-out debate. In 2016, the Department of Labor (D.o.L.) issued a report critical of

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163. TENN. CODE ANN. § 50-8-101 (2018); 2018 Tenn. Pub. Acts 648; see Michael C. Duff, *New Tennessee “Gig” Law: “Handyman Special” or New Flavor of Opt-Out*, L. PROFESSOR BLOG NETWORK (Mar. 20, 2018), <http://lawprofessors.typepad.com/workerscomplaw/2018/03/new-tennessee-gig-law-handyman-special-or-new-flavor-of-opt-out.html> [<https://perma.cc/JR7P-RBE2>] [hereinafter “Gig” Law]. Handy was a corporate sponsor for HB 1978/ SB 1967. Lydia DePillis, *For Gig Economy Workers in These States, Rights Are at Risk*, CNN BUSINESS: CNN MONEY (Mar. 14, 2018 4:54 PM), <https://money.cnn.com/2018/03/14/news/economy/handy-gig-economy-workers/index.html> [<https://perma.cc/U3QZ-M27J>].

164. § 50-8-101.

165. See “Gig” Law, *supra* note 163.

166. The legislature has no power to pass laws “for the benefit of individuals inconsistent with the general laws of the land” or to “pass any law granting to any individual . . . exemptions . . . by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.” TENN. CONST. art. XI, § 8.

167. *Vasquez v. Dillard’s, Inc.*, 381 P.3d 768, 784–86 (Okla. 2016).

168. § 50-8-10. The Tennessee law’s broad definition of “marketplace contractor” could inadvertently create a large class of workers without access to workers compensation benefits.

worker benefits available under most state workers' compensation statutes.<sup>169</sup> The then U.S. D.o.L. Secretary, Thomas Perez, was also on record calling opt-out “a pathway to poverty for people who get injured on the job.”<sup>170</sup> It is possible that the D.o.L. may shift its position on workers' compensation benefits under the Trump administration to more closely align with the economic interests of employers. While it is unlikely that a federal takeover of state workers' compensation will occur in the current climate of government downsizing, it is possible that a shift in the federal attitude on workers' compensation may empower opt-out proponents to pursue future legislation.<sup>171</sup>

As previously noted, the last period of sweeping state legislative reforms that benefitted workers were in response to a proposed federal takeover of state workers' compensation schemes.<sup>172</sup> Perhaps the only way to cogently determine opt-out's viability would be for the Supreme Court to weigh in—the U.S. Supreme Court has not ruled on the constitutionality of the exclusive remedy doctrine of workers' compensation since 1917.<sup>173</sup>

#### CONCLUSION

This new fourth era of workers' compensation is truly unique from prior eras of reform. Whereas access to medical benefits and time loss was the bargained for right of an injured worker, that right is now being repackaged as just another benefit to be comingled among the many benefits that employers may offer.<sup>174</sup>

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169. See U.S. DEP'T OF LABOR, DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS? 19 (2016), <https://www.dol.gov/asp/WorkersCompensationSystem/WorkersCompensationSystemReport.pdf> [https://perma.cc/73DP-9BL5]. “Notably, there have been legislative efforts to restrict benefits and increase employer control over benefits and claim processing, most dramatically exemplified by the opt-out legislation enacted . . .” *Id.* at 2.

170. Howard Berkes, *Labor Secretary Calls Workers' Comp Opt-Out Plans a 'Pathway to Poverty'*, NPR (Mar. 25, 2016, 1:29 PM), <http://www.npr.org/sections/thetwo-way/2016/03/25/471849458/labor-secretary-calls-workerscompoptplans-a-pathway-to-poverty> [https://perma.cc/K6JY-7EK6].

171. See Lisa Rein & Andrew Ba Tran, *How the Trump Era is Changing the Federal Bureaucracy*, WASH. POST (Dec. 30, 2017), [https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725\\_story.html?utm\\_term=.4ff054954241](https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725_story.html?utm_term=.4ff054954241) [https://perma.cc/PS7L-HXDZ] (“The White House is now warning agencies to brace for even deeper cuts in the 2019 budget it will announce early next year, part of an effort to lower the federal deficit to pay for the new tax law . . .”).

172. See *supra* Section I.C.

173. N.Y. Cent. R.R. v. White, 243 U.S. 188, 195–96 (1917); see *supra* Section I.B.

174. See Torrey, *supra* note 2, at 71.

It is far too early to tell whether *Vasquez* was a blip on the radar, or the beginning of a concerted effort by multi-state employers to break away from the traditional century-old workers' compensation model. If opt-out proponents successfully lobby for legislation allowing ERISA to divest state agencies from any meaningful oversight, it will likely end in another state supreme court decision with resounding effect.

It is hard to determine whether opt-out announces a true shift in social consciousness or merely the influence of strong lobbying. However, the use of sponsored legislation by industry to leave the Grand Bargain does leave labor with little negotiating leverage. A hundred years ago, labor and industry were willing to sit down and compromise to ensure both parties had security. Now, it seems industry may want to opt-out of any further discourse.