Best Insurance for Texas Workers? ‘Don’t Get Injured’
The State Has a Record of High Worker Fatalities and of Weak Benefits

By JAY ROOT
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AUSTIN — Almost anywhere in the vast Lone Star State, one can find evidence of the “Texas miracle” economy that policy makers like Gov. Rick Perry have talked about in their political speeches.

The hot economy, they say, is the result of their zealous opposition to over-regulation, greedy trial lawyers and profligate government spending.

But state leaders have rarely mentioned the grim side of the workplace: Texas has led the nation in worker fatalities for seven of the last 10 years, and when Texans get hurt or killed on the job, they have some of the weakest protections and hardest-to-obtain benefits in the country.
Texas is the only state that does not require private employers to carry workers’ compensation insurance or a private equivalent, so more than 500,000 workers — about 6 percent of the work force — receive no occupational benefits if they are injured on the job. On-the-job injuries can leave them unable to work, and with little recourse.

More than a million Texans are covered by private occupational insurance from their employers. Those plans are not regulated by the state but are often written to sharply limit the benefits, legal rights and medical options of workers. Employers, however, say their workers often get quicker and better care under the private plans.

Most Texas workers, about 81 percent, are covered by a state-regulated compensation system, which provides injured workers with standard benefits, including partial income, medical care and payments to beneficiaries of people who are killed at work.

Critics, though, say the system is stacked against workers. “They throw these workers away like tissue paper. They’re nothing more than a used Kleenex,” said Joe Longley, an Austin employment lawyer who served as chief of the consumer protection division of the attorney general’s office in the 1970s. “We don’t provide for the workers. We provide for the businesses.”

The state workers’ compensation commissioner, Rod Bordelon, has a different view. He calls the state-regulated insurance program a “terrific system,” and points to a series of positive trends: Claims are down; rates for coverage are down; and fewer injuries are being reported. And within the Division of Workers’ Compensation,
enforcement actions against insurers have increased, he said.

“I know I’m selling the miracle here, but it’s true,” said Mr. Bordelon, who recently announced his resignation, effective Aug. 1, before the end of his term. “I think we’re trying to do the right thing.”

Many states have created agencies that police workplace safety, but Texas relies on the federal Occupational Safety and Health Administration, and the state has one of the highest worker-to-inspector ratios in the country.

Texas does have the power to keep track of companies that operate outside the state-regulated system. But according to state reports, more than 90 percent of employers that do not offer workers’ compensation have failed to notify the state about their opt-out status. In addition, companies with five or more employees are required to report lost-time injuries and fatalities, but random audits by the state show that at least 25 percent of such companies are underreporting.

Critics say the reporting failures strip Texans of important information about the coverage their employers offer and the safety of their job sites.

Mr. Bordelon said most employers that had opted out of the system simply did not know they were required to report their status.

Fines for not reporting have been infrequent. Since 2009, the division has issued a little over $80,000 in fines for reporting violations — a tiny percentage of the total penalties charged for a variety of workers’ compensation administrative violations over that period, online reports show.
Employers that fail to report can be charged up to $25,000 a day until they comply, but division officials could not remember an instance of the maximum fine being levied. After issuing warning letters a few years ago, Mr. Bordelon began fining companies in 2012, generally $500 to $1,500.

“A bigger fine would get somebody’s attention,” Mr. Bordelon acknowledged. “We’re going to start hitting them with bigger and bigger penalties, absolutely.”

Like clockwork during biennial legislative sessions, Texans tell lawmakers emotional stories about workplace accidents that occurred while they or their loved ones worked for an uninsured employer. That prompts a predictable round of legislative hand-wringing about the voluntary nature of workplace insurance in Texas.

But opposition from politically powerful companies that do not subscribe to workers’ compensation is so fierce that even modest attempts at reform fail. Three years ago, State Representative Paul Workman, Republican of Austin, offered legislation making workers’ compensation mandatory in the construction industry. The bill went nowhere.

“We live in a state which prides itself on fewer government regulations, and some see mandatory work comp as just another government regulation hampering business,” Mr. Workman said.

Companies that carry workers’ compensation are given immunity from employee negligence lawsuits. While employers offering private compensation insurance are not protected from such lawsuits, many limit their legal exposure through the fine print of private occupational policies that employees accept when they are hired.

“Negligence liability can be contained by mandatory arbitration,” boasts one pro-industry study, conducted by claims processing company Sedgwick.

A 1998 Texas Supreme Court ruling, The Texas Mexican Railway Co. v. Lawrence P. Bouchet, also cleared the way for employers that do not carry workers’ compensation to fire injured workers without fearing a state retaliatory firing lawsuit. The decision was written by Greg Abbott, then a justice on the court and now the Republican attorney general and a candidate for Texas governor.

It is still illegal for employers in the workers’ comp system to retaliate against a worker for pursuing an injury claim, but the Bouchet ruling removed that prohibition for employers that do not carry the state-regulated coverage.

Since the Bouchet ruling, Paul Schorn, a Lockhart, Tex., employment lawyer, said he had quit taking retaliatory firing cases from injured Texans not covered by
workers’ compensation policies.

“You’re allowed to fire those people,” he said. “It’s not right, but it doesn’t break any law.”

Federal lawsuits are sometimes possible, but they are far more difficult to successfully wage, Mr. Schorn said.

Even when an employee does successfully sue because of a workplace injury, recovering damages can be difficult. Santiago Arias, an undocumented immigrant, sued his boss for a 2006 injury in Houston that left him paralyzed, but he recovered less than what doctors say his care would cost each year. And Angel Hurtado’s family, which received no compensation, asked seven lawyers to file a lawsuit after the roofer fell to his death in 2004. But the contractor disappeared after the accident, and no lawyer would take the case, family members said.

People who have tried to navigate the system to receive workers’ compensation insurance have their own horror stories.

In more than 90 percent of injury cases, the parties resolve the issue informally. Mr. Bordelon, a Perry appointee, says that is because the two sides are encouraged to work out their differences. Advocates for injured employees say workers often just give up when insurers deny their claims, which happens routinely.

Over the last five years, insurance companies have denied or disputed in whole or in part about 45 percent of every claim initially filed, according to unpublished data obtained by The Texas Tribune.

When those disputes lead to full-blown hearings — the equivalent of a court trial — employers win less than a third of the particular disputes in those cases, according to data from the Office of Injured Employee Counsel.

Even when claimants win their disputes at an administrative hearing, they sometimes face judicial reviews, meaning the insurer can take them to state district court. Workers can file such challenges, too, but it takes money to engage in a lawsuit.

After Crystal Davis’s husband died in 2012 in a company car near Tyler, Tex. — on the way to what his supervisor said was a work assignment for Burger King — the state awarded her family death benefits. Now, the insurer has sued her and her minor children to take them away.

“It’s such a twisted system to weed through,” she said. “Anybody that does have a job and could be covered under workmen’s comp really needs to think about how
they are covered, and if they are covered, and how much they’re willing to fight for what they think they’re covered by.”

Citing the litigation, Burger King and its insurer, ACE American, both declined to comment on the case.

Dissatisfied claimants have little recourse but to ask the Division of Workers’ Compensation to punish the insurers. Two years ago, the Texas Supreme Court essentially eliminated “bad faith” lawsuits brought against workers’ compensation carriers in a 5-4 decision.

The court argued that the Legislature intended that state bureaucrats, not plaintiffs’ lawyers, punish through fines and administrative actions any insurance companies that behave badly or process claims unfairly.

Former State Senator John Montford, Democrat of Lubbock, said he had inserted a provision into a 1989 workers’ compensation overhaul that allowed for certain bad-faith lawsuits, partly as “fallback” protection for workers in case insurers went too far.

“Had we intended to repeal that provision on bad faith, we would have taken it out,” he said.

Mr. Bordelon, for his part, said he welcomed the enforcement role of the workers’ compensation commissioner. There is no specific administrative violation for “bad faith” actions, but he said the agency had increased its issuance of fines for a variety of misdeeds and now levies more than $1 million a year.

“We’ve stepped up enforcement efforts in the division for all kinds of violations,” he said. “We are penalizing more and more carriers for inappropriate denials.”

Critics say they are not seeing much restraint from insurers. With so much of the workplace unregulated, and a pro-insurer bent in the slice of it that is regulated, they say rank-and-file workers are taking on most of the risk these days in the land of the Texas miracle.

Mr. Schorn, the Lockhart employment attorney, shrugged when asked how Texans could prevent a workplace accident from turning into a legal or medical nightmare.

“Don’t get injured,” he said. “Don’t get anybody mad at you. Don’t let anybody misunderstand you. Don’t be in the wrong place at the wrong time.

“I really can’t think of any way that someone can protect themselves from this any more than you can protect yourself from a lightning strike. It’s just, if you work in...
Texas, it can happen to you.”

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