One of the basic premises of the workers compensation system was the prompt voluntary payment of benefits. States established commissions and boards to regulate employers and with a mandate to make sure workers received medical care and replacement wages.

In the 1980s employers and insurers began an assault. From state to state, benefits were capped and eliminated, workers were forced to prove their illness or injury was caused predominantly or solely by work, and employers won the power to select a doctor for their employees and to require the doctor to seek approval from the employer before performing care. Emboldened by their successes, employers have now mounted a new assault on the public control of disability benefits, seeking to privatize all of the worker’s rights.

Texas was the first state to privatize workers’ compensation. It allowed employers to opt out of the state coverage, substituting a disability insurance policy or accepting exposure to negligence actions. However, Texas also allowed employers to insist that workers waive their right to sue for damages as a condition of employment. Among those employers who have opted out was the West, Texas, fertilizer factory that leveled much of the city of West in an April 2013 industrial explosion.

Approximately one third of all employers in Texas have now opted out of the public justice system. Earlier this year, Oklahoma became the second state to opt out of public oversight of workers’ compensation.

While some of the employers opting out have purchased alternative private disability insurance policies, these policies are poor substitutes for the public system. Many do not compensate for lost wages, often the most devastating effect of occupational injuries. Since these private policies are considered an employee benefit rather than a right, they are covered by the Employee Retirement Income Security Act of 1974 (ERISA), which generally eliminates most public oversight of the plan, denying the worker the right to an independent due process hearing for vindication of his rights.

These opt-out statutes effectively tilt the playing field in the employer’s favor. The employer is no longer subject to reasonable regulation by the state and can run rough shod over the injured worker. The employer can terminate benefits without opportunity for review. The worker cannot seek redress from the civil courts and is largely at the employer’s mercy.

Under the substitute insurance plans, the employer or insurer gets to select the doctor, thus insuring that the doctor will not be an independent advocate for the patient. The doctor is required to seek pre-approval from the employer for treatment, and the worker is generally limited to internal review by the very insurance company that denied the claim to begin with.

Workers, denied their due process and subject to the whims of their employer and the insurance company, are left with policies that provide only a small spectrum of the benefits they would have under the state system, particularly for partial disability. Many workers never receive the medical care and lost income they need.

Private opt-out plans save employers and insurers money, but impose tremendous costs on society. They shift the costs of work-related injuries to other public assistance plans such as Medicare, social security
disability, and food stamps. They extract further costs from the families of workers to enrich company management and shareholders. They not only deny workers the medical care they need, but subject workers and their families to a humiliating and demoralizing process that is often dragged out over months and years. We need to hold government accountable for making sure that workers’ rights are protected. We need to send a clear message: you can’t opt out of justice.

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