CHALLENGES OF THE CHANGING LEGAL STRUCTURE OF WORKERS' COMPENSATION AND THE CHANGING WORKFORCE

COMMENTARY

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Not much can be added to Emily Spieler's excellent and very thorough symposium article providing a historical and legal overview of developments in state workers' compensation systems.[1] Her historical review and summary of current issues confronting the nation's state systems should be required reading for every workers' compensation practitioner concerned about the current 'death spiral' of the century-old "Grand Bargain."[2] Whether such a system of social insurance survives in the twenty-first century or continues its decline and eventual demise, in substantial part, depends on the adaptability and resilience of the current $89 billion workers' compensation industry that has allegedly evolved.[3] Notwithstanding that the rhetoric often espoused the principle mission of the "industry" as the welfare and best

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1. Emily A. Spieler, *(Re)assessing the Grand Bargain: Work Injury and Compensation in Context, 1900–2017*, 69 RUTGERS U. L. REV. 891 (2017).

2. *See id.*

3. Noted from media coverage of the 2016 National Workers' Compensation Convention & Expo in Las Vegas, Nevada. *See* WORKERS' INJURY LAW & ADVOCACY GRP., THE STATUS OF WORKERS' COMPENSATION IN THE UNITED STATES: REVISITING THE GRAND BARGAIN (2016), http://wisworkcompexperts.gelmanmedia.com/wp-content/uploads/sites/2/2016/02/WILG-Grand-Bargain-Report-1-16.pdf. The "industry" is described as a composition and assortment of medical treatment providers and suppliers, physical and mental therapists, medical utilization review services, employer risk managers and claims adjusting services including TPA's, insurance vendors, medical bill review companies, vocational rehabilitation and medical case management services, investigative and surveillance services, financial management and annuity companies, MSA/CMS assessment services, life-care planners, state and local governmental agencies, attorneys for both defense and claimants along with paralegals, training services, etc. *Id.*

interests of the injured worker, the reality experienced from battles in the trenches over ever-eroding benefits amidst ever-increasing and more onerous administrative and dispute resolution proceedings—when coupled with increasing medical and employer costs in many states—makes a more compelling argument supporting a higher priority for survival and profitability of the "industry" rather than the welfare of injured workers and their families. The fact is that workers' compensation insurance is still the second-most profitable line of insurance next to automobile liability insurance.[4] Neither the insurance market nor the industry is likely to surrender and roll over to eagerly accommodate a cheaper and more efficient scheme of covering liability to employers and employees for work-related injuries and occupational diseases.

From a social and political policy perspective, two fundamental building blocks conceiving worker's compensation via the "Grand Bargain" should still be relevant today: (1) the system, as an alternative to a tort and fault-based system for recovery from work-related injuries, on balance, is more humanitarian and potentially more expeditious, and theoretically, still economically feasible in spreading the risk among employers as a cost of managing employee injuries inherent in any business, with the added incentive of encouraging a safer workplace to mitigate the cost of injuries and workers' compensation; and (2) workers' compensation is essentially private-sector liability, with employers bearing the cost of the system rather than shifting the cost to the public sector.[5]

Unfortunately, both the morality and humanitarian intent of workers' compensation has been evaporated, in part, by a number of factors, including: the insurance industry's persistent and methodical demonization of injured workers that encourages a public perception of injured workers as second-class citizens who embellish their disabilities for unwarranted financial gain; employers who prioritize business profit over employee safety and welfare; and the administrative bureaucracies and political systems that inhibit equal justice and fair dealings by not providing adequate benefit provisions, impartial oversight, or efficient dispute resolution systems. One demonstration of political apathy insensitive to the moral underpinnings of workers' compensation was

4. *Id.*

5. "The American workers' compensation system is distinguishable from public social insurance in its essentially private nature . . . and in its mechanism of unilateral employer liability." 1-1 LARSON'S WORKERS' COMPENSATION, DESK EDITION SCOPE (2017).

the State of Connecticut's rejection of adding post-traumatic stress disorder (PTSD) as a compensable employee injury following the horrific Sandy Hook Elementary School incident.[6] Another example is the West, Texas fertilizer plant fire and explosion that caused fourteen fatalities, ten of whom were first responders.[7] Despite the employee fatalities and destruction of a neighboring community, the non-insured (non-subscriber) fertilizer plant merely surrendered its one-million-dollar liability policy, declared bankruptcy, and slithered away from its liability to those workers killed and injured in the incident.[8]

Notwithstanding the realistic irrelevance of the humanitarian and social justice objectives in today's workers' compensation schemes, the most significant development in policy and practice in the past two-and-a-half decades has been the cost shifting of liability from employers to the public sector.[9] Obviously, the most egregious example of this is in Texas—the only state where workers' compensation is not compulsory for all employers—where forty-four percent, or 119,000, of employers, are so-called "non-subscribers" resulting in nearly 500,000 employees covered neither by workers' compensation nor health insurance for work-related injuries.[10] Texas non-subscriber employers (including Wal-Mart)[11] employ an estimated 1.9 million workers.[12] Furthermore, the significance of the cost-shift issue has been acknowledged by the Occupational Safety and Health Administration (OSHA), which concluded in its March 2015 analysis that today's employers are only covering twenty-one percent of costs for workers' injuries.[13]

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6. Gregory B. Hladky, *Despite Cost Warnings, Panel Passes PTSD Coverage for First Responders*, HARTFORD COURANT (Mar. 1, 2016, 6:32 PM), http://www.courant.com/news/connecticut/hc-ptsd-debate-20160301-story.html.

7. *Fertilizer Plant that Exploded Carried $1M Policy*, CBS NEWS (May 4, 2013, 8:46 PM), https://www.cbsnews.com/news/fertilizer-plant-that-exploded-in-texas-carried-1m-policy/; Hollie O'Connor, *Mental Trauma Persists a Year After West Fertilizer Blast*, WACO TRIBUNE (Apr. 17, 2014, 12:01 AM), http://www.wacotrib.com/news/west/mental-trauma-persists-a-year-after-west-fertilizer-blast/article_82b48b00-b0ec-5157-a9da-9d82b7235808.html.

8. *Fertilizer Plant that Exploded Carried $1M Policy*, *supra* note 7.

9. *See* PROP. CAS. INSURERS ASS'N OF AM., COST SHIFTING FROM WORKERS COMPENSATION OPT-OUT SYSTEMS: LESSONS FROM TEXAS AND OKLAHOMA 1 (2016), https://www.workcompcentral.com/fileupload/uploads/2016-06-09-033942PCI%20REPORT.pdf.

10. *Id.* at 3; TEX. DEP'T OF INS., A STUDY OF NONSUBSCRIPTION TO THE TEXAS WORKERS' COMPENSATION SYSTEM (2014)(on file with publication).

11. *See* 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.

12. PROP. CAS. INSURERS ASS'N OF AM., *supra* note 9, at 3.

13. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, ADDING

Despite the twenty-six-year-old, non-subscriber cost-shift model in Texas, the state has not been deterred by significant tort judgments against employers, nor has it been influenced by estimates that the cost shift of medical expenses alone is nearly $400 to $600 million annually.[14] Further evidence that Texas is entrenched in its non-subscriber, cost-shift model is the recent decision by the Texas Supreme Court in *Austin v. Kroger Texas, L.P.*, holding that a defense similar to assumption of risk, where employers have no duty to warn of "open and obvious" dangers at work, is valid in cases of non-subscriber tort liability.[15] Thus, contrary to Emily Spieler's admonition that "[a]s long as tort immunity is strong, the Grand Bargain is alive and well,"[16] Texas employers have not been restrained by the risk of injured employee liability that results from embracing a fault-based system.[17] This is especially true for large employers like Wal-Mart,[18] who have apparently assessed the financial risks of tort liability against the costs of a workers' compensation benefit system, regardless of the impact those work injuries may have on their employees or the cost shift to Texas taxpayers.[19]

Recent attempts have been made to replicate the Texas employer cost-shift model in other states. For example, Oklahoma passed its own "Opt-Out Act" in 2013,[20] and "[i]n the three years since . . . lawmakers in Tennessee and South Carolina have taken steps toward drafting similar legislation, and some in Alabama, Georgia, Louisiana and Mississippi have shown interest in allowing these plans as well."[21] To

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INEQUALITY TO INJURY: THE COSTS OF FAILING TO PROTECT WORKERS ON THE JOB 6 (2015).

14. PROP. CAS. INSURERS ASS'N OF AM., *supra* note 9, at 1–2; *see also* Grabell & Berkes, *supra* note 11.

15. Austin v. Kroger Tex., L.P., 465 S.W.3d 193, 211–12 (Tex. 2015).

16. Emily A. Spieler, *Work Injury and Compensation in Context, 1900 to 2016* (Pound Civ. Just. Inst., Draft prepared for Sept. 23, 2016 Symposium, "The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century"), http://poundinstitute.org/sites/default/files/docs/2016%20Symposium/spieler-symposium-draft-9-16-16.pdf. For the final version of this article, see Spieler, *supra* note 1.

17. *See* Grabell & Berkes, *supra* note 11.

18. *See id.* (noting that Wal-Mart was among other large companies in Texas which have opted out of workers' compensation plans and formed private plans; those plans "almost universally have lower benefits, more restrictions and virtually no independent oversight").

19. PROP. CAS. INSURERS ASS'N OF AM., *supra* note 9, at 2 ("[T]he annual cost shifting of medical expenses resulting from the Texas opt-out workers compensation system is a minimum of nearly $400 million; the actual amount is more likely to exceed $600 million due to additional considerations.").

20. Grabell & Berkes, *supra* note 11 ("[T]he Oklahoma plans incorporate many of the rigid rules from Texas.").

21. Joanne Sammer, *Opting Out: Are Alternative Workers' Comp Programs Viable?*,

date, however, all attempts to adopt a modified non-subscriber/opt-out/cost-shift model, while at the same time retaining exclusivity/tort immunity, have been legislatively rejected or ruled unconstitutional primarily on equal protection grounds.[22] The most recent decision was Oklahoma's ruling in *Vasquez v. Dillard's, Inc.*, holding the entire "opt-out" scheme was unconstitutional because it gave employers the ability to provide inequitable treatment for injured workers.[23] However, as a prospect of further legislative response, the concurrence in *Vasquez* did acknowledge,

> '[T]his Court has long recognized that the protection of employees from the hazards of their employment is a proper subject for legislative action . . . .' The Legislature, in exercising such power, is free to eliminate the workers' compensation system entirely, abolish exclusive remedy protections for employers, and leave work-place injury claims to the courts. However, the Legislature is not free to substantially reduce benefits for some injured workers under the guise of an "opt-out" system and force such injured workers to remain within the system through the use of exclusive remedy.[24]

In short, you can't have it both ways.

As we have seen reiterated in recent state supreme court decisions, the constitutional lynchpin of American workers' compensation systems hinges on the fundamental principle of the Grand Bargain that requires significant and reasonable employee benefits in exchange for employer immunity and exclusivity of workers' compensation as the sole remedy for an employer's fault or negligence.[25] That same principle was embraced by the Occupational Safety and Health Act of 1970, which recognized the necessity of "adequate, prompt, and equitable system[s] of workmen's compensation,"[26] while also providing for a federal

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SOC'Y FOR HUM. RESOURCE MGMT. (Sep. 1, 2016), https://www.shrm.org/hr-today/news/hr-magazine/0916/pages/opting-out-are-alternative-workers'-comp-programs-viable.aspx.

22. *Id.*

23. Vasquez v. Dillard's, Inc., 381 P.3d 768, 772, 775 (Okla. 2016).

24. *Id.* at 787 (Gurich, J., concurring specially) (alterations in original) (internal citations omitted).

25. The use of workers' compensation laws, in place of constitutionally guaranteed tort remedies, must provide "significant" benefits and any substitute considerations must provide a "reasonable amount, . . . according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise." N.Y. Cent. R.R. v. White, 243 U.S. 188, 203–04 (1917).

26. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 27(a)(1)(A), 84

initiative to establish minimum state benefit and statutory schemes later articulated in the recommendations of the 1972 President's (Nixon) Commission on State Workers' Compensation Laws.[27]

While the 1972 Commission had short-term success in achieving some relative consensus of benefit levels and administrative statutory schemes in the states, during President Reagan's term just over a decade later, the U.S. Department of Labor was stripped of its capacity to monitor and track state compliance with the Commission's recommendations.[28] Whether by design or coincidental to the absence of federal reporting and oversight, there has been a methodical "corrosion"[29] of state workers' compensation benefits and an assortment of administrative schemes enacted in the states, described as the so-called "race to the bottom" since the mid-1980's.[30]

Now, in addition to replicating benefit reductions and tightening benefit eligibility from state to state, states overwhelmingly handle workers' compensation administration and quasi-judicial dispute resolution under executive branches of state governments. In effect, in many states, such administrative arrangements result in a fox-guarding-the-henhouse scenario, as those charged with assuring judicial and constitutional due process are seen as more likely to exploit those they are charged to protect.[31] As a result, the impartiality and

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Stat. 1590, 1616 (1970). The Occupational Safety and Health Act of 1970 further provided:

> [T]he vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation.

Id.

27. *See* NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972).

28. U.S. DEP'T OF LABOR, DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS? 12 (2016) ("The Department of Labor's monitoring of the adequacy, equity and efficiency of state workers' compensation programs waned considerably after 1980. . . . Some state progress toward National Commission goals was made in the late 1970s and into the 1980s, but by the mid-1980s, the political tide turned.").

29. "Corrosion" is a more appropriate term describing the methodical and intentional depletion of benefits over time, since diminished benefits and constitutional breaches have been caused by unnatural forces, rather than simply "eroded" over time.

30. U.S. DEP'T OF LABOR, *supra* note 29,. at 13, 20, 24.

31. *See, e.g.*, Press Release, N.Y. State Governor's Office, Governor Cuomo Announces Statewide Task Force to Combat Worker Exploitation and Abuse Throughout New York State (July 16, 2015), https://www.governor.ny.gov/news/governor-cuomo-announces-statewide-task-force-combat-worker-exploitation-and-abuse-throughout (discussing the

independence of politically appointed workers' compensation hearing officers and/or commissioners has frequently been questioned.[32] Imposition of executive branch administrative rule-making is often politically motivated, usually to sidestep legislative and judicial oversight, in order to dictate bureaucratic dispute resolution procedures. This is also used to apply arbitrary guidelines related to disability impairment, conservative medical treatment, drug formularies, medical fee schedules, and medical utilization.[33] Moreover, procedural hearing rules of evidence are often inconsistent with requirements of constitutional due process.[34] An injured worker's access to medical providers and attorney involvement are discouraged and inhibited by restraints on choice and unreasonable fees for services. Long-standing principles of "take your victim as you find him" have been mitigated by the enactment of "primary contributing" causation rules that eliminate a work accident's aggravation or exacerbation of pre-existing medical conditions.[35] Further, co-morbidity factors, rather than the work accident itself, are now the prevailing focus explaining an injured worker's continuing disability.[36]

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need to combat worker exploitation).

32. *See, e.g.*, Judy Clabes, *A Closer Look at the Governor's Reorganization of the Workers Compensation Nominating Commission*, N. KY. TRIB. (June 5, 2016), http://www.nkytribune.com/2016/06/a-closer-look-at-the-governors-reorganization-of-the-workers-compensation-nominating-commission/ (criticizing the governor's selection of workers compensation administrative law judges as politically-motivated).

33. *See, e.g.*, Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 835–36, 841 (Pa. 2017) (holding portions of Pennsylvania's workers' compensation statute unconstitutional under state law because of the potential for administrative arbitrariness and failure to account for medical advances in workers' injuries); Susannah Frame, *Senators Demand Investigation of Hanford Worker Comp*, KING 5 (Mar. 9, 2017, 9:34 AM), http://www.king5.com/news/local/hanford/senators-demand-investigation-of-hanford-worker-comp/420966004 (quoting various U.S. Senators: "Multiple accounts of workers' compensation claims being dismissed on arbitrary grounds, tactics bordering on intimidation, and actions taken to discredit claims have been shared with us. These allegations are very troubling and we urge the OIG (Office of the Inspector General) to take immediate action.").

34. *See, e.g.*, Corretjer v. Principal Life Ins. Co., No. A-16-184, 2016 WL 6081438, at *6 (Neb. Ct. App. Oct. 18, 2016) ("The Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure." (citation omitted)).

35. Brian Hardzinski, *Supreme Court Declares 'Oklahoma Option' Workers' Comp Opt-Out Unconstitutional*, KGOU (Sept. 13, 2016), http://kgou.org/post/supreme-court-declares-oklahoma-option-workers-comp-opt-out-unconstitutional (explaining the complainant's plan "did not cover her claim because it was determined to be a pre-existing injury").

36. *See Comorbidity Diagnoses Are on the Rise in Workers' Compensation*, WORKERS' COMPENSATION INST. (June 11, 2013), http://www.wci360.com/news/article/comorbidity-

In short, employee benefit systems are no longer swift, predictable, nor adequate. As a result of developments over the past two decades in the so-called "race to the bottom" of benefit and statutory schemes, some state constitutional challenges have begun to revisit the fundamental intent of workers' compensation and are beginning to define what constitutes "reasonable" and "adequate" as intended and agreed to in the Grand Bargain.[37] Many of these constitutional challenges are discussed in Professor Spieler's symposium article. Some recent cases are of particular note, including *Castellanos v. Next Door Co.*,[38] *Westphal v. City of St. Petersburg*,[39] and *Stahl v. Hialeah Hospital*[40] in Florida[41]; *Injured Workers Association of Utah v. State*[42] in Utah; and *Rodriguez v. Brand West Dairy*[43] in New Mexico.

In Florida, the same fundamental issue of "adequacy" and equal protection raised in *Vasquez*[44] is the essence of the case of *Stahl*.[45] However, *Stahl* goes one step further by challenging the entire constitutionality of Florida's workers' compensation system which, in 1990, had repealed employee "opt-out" options and enacted exclusivity, subsequently methodically cut benefits for two decades, and enacted attorney fee restrictions.[46] Despite originally accepting review of a lower appellate court's rejection of *Stahl's* arguments, the Florida Supreme Court unanimously decided not to review the case.[47] The case was

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diagnoses-are-on-the-rise-in-workers-compensation.

37. *See* Spieler, *supra* note 1, at 934–55.

38. 192 So. 3d 431, 432–33 (Fla. 2016).

39. 194 So. 3d 311, 313 (Fla. 2016).

40. 160 So. 3d 519, 519–20 (Fla. Dist. Ct. App. 2015), *reh'g denied* (Apr. 14, 2015), *review granted*, 182 So. 3d 635 (Fla. 2015), *review dismissed*, 191 So. 3d 883 (Fla. 2016), *cert. denied*, 137 S. Ct. 373 (U.S. 2016).

41. These Florida cases are arguably the progeny of Padgett v. Florida, No. 11-13661 CA 25 (11th Cir. Aug. 13, 2014), in which the Eleventh Circuit found that a challenged affirmative defense under "[section] 440.111 (the exclusive remedy provision of the [Florida W]orkers' [C]ompensation [A]ct)" to be facially unconstitutional as it did "not provide a reasonable alternative remedy to the tort remedy it supplanted" (i.e., permanent partial disability benefits were unavailable to workers). *Padgett*, slip op. at 1–2, 19–20.

42. 374 P.3d 14, 16–17 (Utah 2016).

43. 378 P.3d 13, 18 (N.M. 2016).

44. Vasquez v. Dillard's, Inc., 381 P.3d 768, 770 (Okla. 2016) ("The core provision of the Opt Out Act creates impermissible, unequal, disparate treatment of a select group of injured workers. Therefore, we hold that the Oklahoma Employee Benefit Injury Act is an unconstitutional special law under the Oklahoma Constitution, art. 2, 59." (internal citations omitted)); *see supra* notes 23–24 and accompanying text.

45. 160 So. 3d 519, 519–20 (Fla. Dist. Ct. App. 2015).

46. *See id.*

47. Stahl v. Hialeah Hosp., 191 So. 3d 883 (Fla. 2016).

ultimately petitioned to the U.S. Supreme Court, which denied review.[48]

In *Castellanos*,[49] Florida ruled that the attorney fee schedule passed in 2009 was invalid because it eliminated the right of a claimant to get a reasonable attorney's fee—a right the court said was a "critical feature of the workers' compensation law."[50] In effect, the fee limitation violated due process by installing an "irrebuttable presumption" that whatever fee the schedule comes up with was reasonable and by not providing any way for a claimant to refute the fee.[51] The court added that "in reality, the workers' compensation system has become increasingly complex to the detriment of the claimant, who depends on the assistance of a competent attorney to navigate the thicket."[52] Further, without the right to an attorney who can earn a reasonable fee, the workers' compensation system can no longer assure "the quick and efficient delivery of disability and medical benefits to an injured worker."[53]

The Supreme Court of Utah's constitutional repeal of that state's attorney fee restrictions was not based on a due process argument, but on the separation-of-powers doctrine establishing constitutional powers vested in the judicial branch of government.[54] In Utah, the Supreme Court is vested with exclusive authority and jurisdiction to regulate the practice of law, which includes authority to regulate attorneys' fees.[55] However, rather than establish a reasonable fee schedule, the court opted to allow attorneys and their clients latitude to determine the fee basis, wherein it stated,

> We are persuaded at this time that the absence of a fee schedule will allow injured workers the flexibility to negotiate appropriate fees with their attorneys. . . . Fears about unscrupulous attorneys preying upon unsophisticated injured workers are exaggerated, as attorneys are still constrained by

48. Stahl v. Hialeah Hosp., 137 S. Ct. 373 (2016).

49. Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016).

50. *Id.* at 432–34, 449. Petitioner brought this case because—although he, with his attorney, was successful in recovering workers' compensation benefits due to work-related injuries—he was limited to the attorney's fees he could recover due to the mandatory fee schedule under a Florida statute. *Id.* at 432–33.

51. *Id.* at 434.

52. *Id.*

53. *Id.* (quoting FLA. STAT. § 440.015 (2009)).

54. Injured Workers Ass'n of Utah v. State, 374 P.3d 14, 18, 22 (Utah 2016).

55. *Id.* at 20–22 ("Regulating attorney fees goes to the very heart of the practice of law, inasmuch as it involves assessment of the quality, amount, and value of legal services related to a legal problem.").

rules of professional conduct.[56]

In *Westphal*, the Florida Supreme Court directly addressed the issue of adequacy of benefits.[57] It declared the state's 104–week cap on temporary total disability ("TTD") indemnity, which subsequently restricted permanent partial disability awards until maximum medical improvement was reached, as an unconstitutional "gap" in Florida's workers' compensation act's benefit provisions as "not merely unfair, but . . . fundamentally and manifestly unjust."[58] Based on the principle of constitutional revival of the last constitutionally valid version of the Act in 1991, the court then set a new max TTD of 260 weeks.[59]

Another recent state constitutional ruling affecting benefit limits and exemptions may be noted in *Rodriguez*. In *Rodriguez*, the New Mexico Supreme Court held that the century-old employee exemptions for the class of farm laborers and dairy farmers were unconstitutional on equal protection and due process grounds.[60] This case may have implications for other states with similar benefit restrictions or provisions.

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56. *Id.* at 23.

57. Westphal v. City of St. Petersburg, 194 So. 3d 311 (Fla. 2016). This case arose when an employee's temporary total disability benefits expired and he was denied "further temporary disability or permanent total disability" benefits despite being unable to work. *Id.* at 315–16. He fell into a "statutory gap" of eligibility. *Id.* at 316. Although on appeal, the First District originally found that "the 104–week limitation on temporary total disability benefits was an inadequate remedy", in an en banc decision, it provided "a new interpretation of the statute" that "'permanent impairment' . . . signif[ied] that the worker has attained maximum medial improvement." *Id.* at 316–17. The Florida Supreme Court granted review. *Id.* at 318.

58. *Id.* at 326–27.

59. *Id.* at 327.

60. Rodriguez v. Brand W. Dairy, 378 P.3d 13, 18 (N.M. 2016). In this consolidated case on appeal, employees were challenging the exclusion of farm and ranch laborers under the New Mexico Workers' Compensation Act, which had provided employers with affirmative defenses in response to workers' seeking compensation for such things as "temporary total disability, permanent partial disability, medical benefits, and attorney fees." *Id.* at 17–19. The Supreme Court of New Mexico found this exclusion to arbitrarily discriminate against these workers and "violate[d] the rights of those workers under the Equal Protection Clause." *Id.* at 17–18. The court did note, however, that "[t]he Legislature is at liberty to offer economic advantages to the agricultural industry, but it may not do so at the sole expense of the farm and ranch laborer while protecting all other agricultural workers." *Id.* at 18.

REASONABLE ALTERNATIVES TO WORKERS' COMPENSATION

Whether the Grand Bargain and state workers' compensation systems have fulfilled their purpose and objectives may be moot as we adapt to twenty-first century employer and employee needs. Alternative benefit programs and new alternative insurance options neither envisioned nor available a century ago could be modified to accommodate a new system of benefits. The principles of a system providing for "social justice" at the sole cost of employers may no longer be economically feasible, desired by either business or labor, nor essential to the economic well-being of the public at large. For example, one current proposal in Colorado providing for a constitutional amendment (Proposition 69) would install a system of universal health care, thus negating disparity between work and non-work medical care needs or separate systems of health care to accommodate work accidents and occupational diseases.[61] Perhaps such a 24-7 occupational health care plan is feasible as a replacement to our current workers' compensation model, especially if coupled with an employer financed short-term disability/long-term disability indemnity wage replacement benefit plan, which would remain in force as necessary, even after termination of employment. However, the questions of who and how such a system would be financed, and whether such a system would displace a citizen's constitutional right of redress for an employer's fault for work injuries and damages, remains unclear.

61. *See Colorado Creation of ColoradoCare System, Amendment 69*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Creation_of_ColoradoCare_System,_Amendment_69_(2016) (last visited Nov. 18, 2017). Amendment 69 was overwhelming rejected by voters in November 2016 elections. *Id.*