

SUBJECT: Prohibiting waivers by employees not covered by workers' compensation

COMMITTEE: Economic and Small Business Development — committee substitute recommended

VOTE: 6 ayes — J. Davis, Vo, R. Anderson, Murphy, Reynolds, Sheets

0 nays

1 absent — Miles

SENATE VOTE: On final passage, April 7 — 31-0, on Local and Uncontested Calendar

WITNESSES: For — Richard Evans, Texas Alliance of Nonsubscribers; Rick Levy, Texas AFL-CIO; (*Registered, but did not testify*: Kathy Barber, NFIB)

Against — None

On — (*Registered, but did not testify*: S. Tom Morris, Cargill Meat Solutions Corporation)

BACKGROUND: Participation in the Texas workers' compensation system is voluntary for private sector employers. Employees may opt out of their employer's workers' compensation insurance within the first five days of employment.

An employer that opts out of the workers' compensation system— known as a nonsubscriber— may be sued by its employees for damages based on an employer's negligence related to an on-the-job injury. A nonsubscriber may not ask its employees to sign a pre-injury waiver under which the employee relinquishes his or her right to sue the employer over a work-related injury or illness. Some nonsubscribers purchase alternative occupational benefit insurance or establish a self-funded benefits plan to cover work-related injuries.

In *Espinoza v. Cargill*, the Fifth Circuit U.S. Court of Appeals held in 2010 that because a statute prohibiting a waiver of an employee's right to sue (Labor Code, sec. 406.033(e)) applied to an employer who did not

have workers' compensation insurance coverage and did not refer to whether an individual employee was covered by an employer's policy, the prohibition against waivers did not apply.

DIGEST:

CSSB 1714 would provide that in an action against an employer by or on behalf of an employee who was not covered by workers' compensation insurance through a licensed insurance company or through self-insurance, it would not be a defense that the employee was guilty of contributory negligence, that the employee assumed the risk of injury or death, or that the injury or death was caused by the negligence of a fellow employee. Any plaintiff in a workers' compensation suit would have to prove negligence of the employer or of an agent or servant of the employer.

In the case of an employee who chose to opt out of the employer's workers' compensation and retain the right to bring a cause of action against the employer for a work-related injury, the cause of action would be subject to all defenses available under common law and state law unless the employee had waived coverage under an agreement with the employer.

The bill would not apply to a cause of action by an employee if the employee were subject to a valid contract with the employer regarding benefits for occupational injury and the employer, since January 1, 2011 had continuously had workers' compensation insurance and offered its employees a program providing benefits for occupational injury or death.

The bill would take effect September 1, 2011, and would apply only to a cause of action accrued on or after that date.

**SUPPORTERS
SAY:**

CSSB 1714 would close a loophole in the law that prohibits the signing of pre-injury waivers by employees. The bill would shift the focus of the prohibition from whether the employer had a form of workers' compensation coverage to whether an employee was covered by a workers' compensation policy or another benefit plan held by the employer. Under the bill, an employer no longer would be able to request or coerce an employee to sign a pre-injury waiver by citing the recent federal court case holding and claiming that a waiver was permissible because the nonsubscriber employer had a self-funded benefit plan.

**OPPONENTS
SAY:**

No apparent opposition.

NOTES:

The House committee substitute differs from the Senate-passed version by including a provision relating to a cause of action brought by an employee who has waived workers' compensation insurance coverage under an agreement with the employer and including a provision on the bill's applicability to a cause of action by an employee under certain conditions.