



Barry Moscowitz's name comes up when companies face litigation involving catastrophic injury or wrongful death, employment litigation, products and premises liability, discrimination and a list of other situations, which can threaten a balance sheet and a company's reputation. The Thompson Coe lawyer has a long list of successes including in the nonsubscriber space where he represents many national employers that are nonsubscribers in Texas. In one of those cases, he obtained a verdict for the defense in a wrongful death matter pending in Brownsville, Texas, which was transferred to arbitration when the company successfully enforced its arbitration provision. Barry's philosophy is to "always look for the possibility of a favorable settlement, but if no settlement is possible, vigorously advocate for the client in the courtroom." See his full bio [here](#).

**ARAWC Perspectives:** Given your track record of wins, we thought you would want to focus on what makes a company's defense successful, but you told us that's not what's uppermost in your mind now. Why not?

**Barry Moscowitz:** Because there is so much debate and discussion about the nonsubscriber workers' injury program, I think regulators and the public need a fair understanding of the nonsubscriber company – what kind of company chooses nonsubscription and how they behave. I'm knee deep in this because I've had five or six experiences in the past year where nonsubscriber employers pay for injuries that are clearly not covered by the plan or have paid for medical treatment and/or wage replacement even when the plan maximums have been exceeded.

**AP:** Doesn't that make nonsubscribers akin to workers' comp?

**BM:** On the contrary, workers' comp can be very complex and time consuming and frequently it doesn't serve the employee well. Workers' compensation tends to be a complex bureaucratic process. My experiences with nonsubscribers show that the interactions with employees are much more personal and far less formulaic.

**AP:** Is this an example you are personally familiar with?

**BM:** Yes. An employee was cleaning a filter above a deep fryer. He didn't use a ladder to climb, and stepped in the deep fryer. He sustained significant burns between his knee and ankle. The employer paid all of the medical bills and full wage replacement. About nine months after the accident, the same employee developed a terrible infection to the bottom of his foot from a puncture wound that was clearly sustained outside the workplace. Unfortunately, this employee was diabetic and had peripheral neuropathy and did not know he had cut his foot, which is what led to the infection. The employer saw his foot and was sent to the hospital where eventually, he had to have two toes amputated. Had the employer not sent him to the hospital, he could have lost his entire foot, or worse. The employer paid all the medical bills and treatment related to his foot infection, including the amputation and the follow-up care, despite the fact it had nothing to do with the original workplace accident. The employer paid for all of this case, which was several hundred thousand dollars, because it was the right thing to do, as this employee did not have health insurance. When the emergency room asked, "Who's paying?" my client said, 'We will.'

**AP:** What did that cost?

**BM:** It was over \$200,000.

**AP:** Why would a company take responsibility for something they weren't required to pay for?

**BM:** The primary reason is that they care about their employees. They don't want to leave them in the lurch. I've participated in many of these conversations, and it's very rare for an executive to say 'just cut them off.' Employers pay 99 times out of 100. They want word to get around that they take care of their employees. I tell companies to do the right thing for the right reason, and it makes you more competitive even if there is a cost in the short run.

**AP:** Is the company's role limited to writing a check?

**BM:** No, they bring other resources and make crucial decisions. I'll give you another example.

An employee was driving an ATV across I-35 in Texas. He was not wearing a seat belt and ran a red light. He was T-boned at 45 miles an hour, ejected from the vehicle and had to be resuscitated at the scene. The injuries included head trauma, and he was touch and go for a long time. He had difficulty breathing even on a respirator, and doctors knew it would take a long time to wean him off. And even though the employee had exhausted his employer's nonsubscription plan maximum, leadership at the company decided "we are going to pay and take care of this employee." They also took an active role in talking to doctors. His wife wanted to bring him home when he was out of the woods but still on the ventilator. The doctors advised against it because he needed to be weaned off slowly, even though it would have been cheaper to let him recover at home. More than a week later, he was weaned off and breathing on his own. The company is still paying benefits as it has extended his wage replacement well beyond the maximum.

**AP:** You mentioned that many of these plans have maximum limits. Are they often exceeded?

**BM:** No, just the contrary.

**AP:** Is there anything you would change about nonsubscription?

**BM:** The name of the product, "opt out" and "nonsubscription." Both are confusing to a lay person. It doesn't accurately describe the product. "Opt out" implies "opting out of workers' comp" and leaves a negative impression. My clients all have arbitration clauses and the arbitrator understands the product, but juries and the general public are left with the wrong idea. The jury sees the employer as acting inappropriately for "opting out of workers' comp."

**AP:** You mentioned arbitration. What are your thoughts about arbitration?

**BM:** Ninety percent plus of cases settle well in advance of arbitration or trial. The decision whether or not to have an arbitration requirement has to be thoughtfully made. There are a lot of benefits to arbitration, and the employee really gives up very little, as the even in arbitration, the claimant has the exact same rights and remedies that they have in a lawsuit filed in court. They can typically engage in the same amount of discovery, hire experts, file motions and the like. Typically, employees pay for the arbitration – they pay the administrative fees and the arbitrator's fees. The only thing an employee typically has to pay is an initial filing fee, which is similar to what an employee must file if that employee were to file their case in state or federal court. Again, my experience is overwhelmingly that companies want to do the right thing by their employees. In my experience, arbitrators are fair and give the employees a very fair hearing.

**AP:** Barry, thank you for your time, and for the examples. They really put a human face on the people who are served by "nonsubscriber" – until we find a better name.