Why Would Anyone Give Up the Grand Bargain?

Donna Peavler, a former Jones Day attorney, founded PeavlerBriscoe, based in Grapevine, Texas, with a two-pronged mission. “First, we wanted a platform to provide more specialized services than the larger, wider-spectrum firms, with big-firm quality at a reasonable price. And second, we wanted to offer a specialized focus on nonsubscription,” Peavler said. But that’s just the beginning. Her real mission, after having interned for the Chief Justice of the Texas Supreme Court, is to get key cases in front of the Texas Supreme Court and use them to clarify and shape Texas nonsubscriber law. Peavler explained, “I’ve seen first-hand how confused both state and federal courts can get regarding how Texas nonsubscription fits into the hybrid of worker’s compensation and general-liability laws, and how important it is that we develop case law clarifying what duties an employer owes to its employees. We have had some significant success in this area, but there is a lot more work to do.”

One of Peavler’s first encounters with nonsubscription was in a meeting with Kroger, a company that would become one of her biggest clients. “Why would anyone give up the Grand Bargain?” she unadvisedly wondered aloud to the claims manager, not realizing at that time that Kroger was a nonsubsriber. (The Grand Bargain, created over 100 years ago when workplace safety looked very different than it does today, established a deal between employees and employers. Employees wouldn’t sue for workplace injury in return for the right to no-fault, but lower, state-mandated workplace injury benefits.) That prompted Peavler to research nonsubscription, and now she is regarded as one of the foremost experts in the field. *ARAWC Perspectives* visited with Peavler to get her thoughts on her experience with nonsubscription, its current image, a recent decision from the Texas Supreme Court and loose ends left undecided.

ARAWC Perspectives*:* One of your specialties is advising companies that are deciding if they are good candidates for nonsubscription. What do you tell them?

Donna Peavler: The first thing I stress is that they have to have a good safety program in place for nonsubscription to be successful. Nonsubscription is fundamentally about creating a safer workplace and a mentality of safety, and, when there is an accident, helping employees return to work. The second requirement is to have a sufficient number of workers’ compensation claims so that it makes sense economically to set up a program to administer the claims internally. By handling the claims in-house, companies take better ownership of the program and its success, and they tend to address each claim faster and better. Finally, the company needs to be in an industry that does, by law, require traditional workers’ compensation.

AP*:* Are there any misperceptions about nonsubscription that you want to correct?

DP*:* That employers only “opt-out” to save money. The reality is that while it typically—but not always—does save the employer money, it’s also a better alternative for the employees. Not only do the employees have 100% of their medical expenses paid, but also they typically receive higher income replacement benefits under a nonsubscriber plan than they would under workers’ compensation. Also, many of the top doctors are unwilling to provide services under workers’ compensation because of the low pay, but an employer can pay doctors more, thereby giving their employees access to the best the medical profession has to offer. Finally, nonsubscription drives settlement values up for employees. Because an employer cannot allege contributory or comparative negligence like in a general-liability case, the employer typically pays more to settle a nonsubscriber case than they would a traditional general-liability case because the company knows that if it were to lose, it would end up with 100 percent responsibility for the damages. So unlike in a general-liability case where the jury is asked to apportion fault and a finding that the plaintiff was 51 percent or more responsible results in a complete bar to recovery, a nonsubscriber can be only 1 percent responsible and still have to pay 100 percent of the damages.

AP: Is this where the “1% Rule” we hear about comes in?

DP: Exactly. The problem is that plaintiffs' attorneys have misconstrued this rule to argue an employer need only be "1% ***negligent***" to be 100 percent responsible – which makes it seem like a low threshold for a finding of liability. Contrary to plaintiffs' attorneys' nonsubscriber propaganda, whether the employer was negligent is not a percentage question but a "yes" or "no" question. In other words, if a nonsubscriber case were to be tried to a jury, the question the jury would be asked is the same question that would be asked in a general-liability case: "Did the defendant's negligence, if any, proximately cause the plaintiff's injury?" The difference, then, between nonsubscription and general-liability is that there's no second question apportioning fault between the plaintiff and defendant. A simple finding of "yes" means the employer is apportioned 100 percent responsibility, even if the employee were also negligent and perhaps even more negligent than the employer. In a general-liability case, on the other hand, the jury would also be asked whether the plaintiff was negligent, and if it answered "yes," the jury would then be asked to apportion fault between the plaintiff and defendant. The defendant would then only be responsible for its own percentage of fault—unless the plaintiff were 51% or more at fault, in which case the defendant would owe nothing. That apportionment process does not happen in nonsubscriber liability cases.

AP*:* You mentioned a recent case from the Texas Supreme Court with important implications for how nonsubscription fits into Texas law. Can you elaborate?

DP*:* In 2016, the Texas Supreme Court agreed to hear the *Austin v. Kroger* case, where the question presented was whether an employer had a duty to warn or protect an employee about a hazard that the employee knew about and recognized as a risk, but voluntarily encountered despite that knowledge. The Court made a very common-sense ruling that an employer does not have to warn employees of a hazard that is open and obvious or already known to the employee. Then, surprisingly, the Court went one step further and asserted the same rule would apply regardless of whether the person injured was an employee or third-party (like a guest, customer, tenant, etc.). The Court's reasoning was that property owners have a duty to protect others when their knowledge of a risk is superior to an unsuspecting visitor of the property. By contrast, where the property owner and the invitee have the same level of knowledge (the visitor is equipped with the information necessary to make an informed decision about whether to encounter the risk), if the invitee chooses to encounter the hazard despite his knowledge of the risk, then the property owner should not be held responsible.

AP: What was the *Austin* case about, and how did the Court apply this "no-duty" rule?

DP*:* In Austin, the plaintiff-employee was a utility clerk whose job it was to clean the restrooms, keep the store floor clean and clean-up any spills that he notices or that are reported to him. While doing his usual rounds, he discovered a large, greasy spill in the men's restroom that was caused by power-washing that was taking place on the second floor. He recognized that it posed a hazard and therefore put out warning signs, but then he decided to mop-up the mess by starting at the back of the spill and working his way out, meaning he had to repeatedly traverse the water to change out his mop. While walking back and forth across the spill, he fell.

(In case the reader is wondering, the employer had an occupational injury benefit plan, which paid 100 percent of Austin's medical bills and 95 percent of his lost wages while he was out of work.)

The reason this is a common sense and important ruling is that the Court observed that safety is not just the responsibility of the employer, it belongs to everyone who has control over it. Plus, employees must accept responsibility to work in a safe manner, report hazards and, if necessary, refuse the assignment altogether if they do not feel it can be performed safely.

AP: How did that case come out?

DP: The Texas Supreme Court ruled that Austin could not maintain a premises-liability claim, but he still had a viable ordinary-negligence claim based on his contention that Kroger had failed to provide him with a spill absorbency powder called Spill Magic. Austin claimed the store was out that day—in violation of its own safety manual—and that had he been provided the powder, he would not have fallen.

AP: Did the case ever go to trial?

DP: As a matter of fact, we actually just tried the case last week in federal court in Dallas. The jury found no negligence, and returned a unanimous defense verdict in Kroger's favor.

AP*:* What are your feelings on the name "nonsubscription?"

DP: It drives me nuts because of its negative connotation and association with companies who provide no benefits to their employees whatsoever. I'd like to see a name that differentiates between responsible employers who provide benefits to their employees, versus those who opt out and do nothing to protect their employees. Then employees would know simply by the name that they are well protected by a solid nonsubscriber plan in the event they suffer an on-the-job injury.

AP: How does the employee benefit from nonsubscription?

DP: Well first, the employee typically receives better benefits through a nonsubscriber plan (quicker pay, higher wage-replacement benefits, better medical care, a quicker return to work, etc.) than he would under workers' compensation, and second he also retains the right to sue. And yes, I recognize that occasionally there is an atypical case in which an employee would have been better off under the traditional workers' compensation system, but, in my experience, 99 percent of the time the employee is treated better and has a better overall outcome under a good nonsubscriber plan than in the workers' compensation system. And for those one-off cases, the difference is usually made up anyway through the court system or through a settlement that takes into account the unique circumstances of that case.