

How To Create a Workers' Compensation Carve-Out in California



Practical Advice for Unions and Employers

prepared for the
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This booklet describes rights and procedures under California law as of May 2006. To view and download the booklet, go to one of the following websites: www.dir.ca.gov/chswc or www.lohp.org. Many public libraries provide access to the Web.

How To Use This Booklet

This booklet is for labor unions and employers in the California workers' compensation system that would like to "carve out" an alternative system for delivering benefits to injured workers and resolving problems and disputes. Workers' compensation law allows unions and employers to create carve-outs to avoid the delays, excessive costs, and adversarial culture that often characterize the state system.

The booklet discusses important issues for both parties to consider in designing a carve-out and ensuring its success.

Section 1, **Why Create a Carve-Out?**, and Section 2, **Check Eligibility Requirements**, are for unions and employers that are considering whether to create a carve-out. These sections discuss the potential benefits of a carve-out and criteria for determining whether the union and the employer are eligible to negotiate and establish a carve-out.

Section 3, **Identify Your Problems and Goals**, explains how to identify the most serious problems affecting injured workers and the employer, options for addressing those problems, and possible ways to set and prioritize your goals if you decide to create a carve-out. A sample worker survey to aid in identifying major problems and concerns appears in Appendix B.

Section 4, **Design the Carve-Out To Meet Your Goals**, is for unions and employers that have decided to create a carve-out. It discusses procedures for creating a carve-out, features of carve-outs that are required or authorized by law, the roles of ombudsmen and attorneys, and how to preserve injured workers' rights. Labor-management groups that have created carve-outs in California are listed in Appendix C.

Section 5, **Hire the Best People**, describes the ideal training, background, professional conduct, and personal skills and traits that you should look for in selecting and hiring the persons who will work in the alternative dispute resolution system of your carve-out.

Section 6, **Stay Involved**, discusses how ongoing efforts by both labor and management are essential to the success of the carve-out. The parties should fully inform workers and managers about the carve-out, monitor its operation, and track costs and savings.

Further information about many of the issues discussed in this booklet can be found in *Carve-Outs in Workers' Compensation: An Analysis of the Experience in the California Construction Industry*, by David I. Levine and others, published by W.E. Upjohn Institute for Employment Research, 2002. Information about the history and purpose of carve-outs, sample carve-out agreements, and

frequently asked questions can be found in *Carve-Outs: A Guidebook for Unions and Employers in Workers' Compensation*, California Commission on Health and Safety and Workers' Compensation, May 2004 (available online at www.dir.ca.gov/chswc).

Throughout the booklet, the union and the employer creating a carve-out are referred to in the singular. This is only for simplicity. In practice, depending on the type of industry and size of the employer or employers, a carve-out may involve multiple unions working with one employer, multiple employers working with one union, or multiple unions working with multiple employers.

Citations to laws, regulations, and other sources appear in footnotes. Instructions on how to obtain the laws and regulations governing workers' compensation carve-outs are given in Appendix A.

Why Create a Carve-Out?

The California workers' compensation system has become increasingly complicated. Delays, disputes, and costs in the system have been excessive. Legislation enacted in recent years allows labor unions and employers to “carve out” alternative ways to deliver benefits and resolve disputes, rather than utilizing the state system. Carve-outs present an opportunity for unions and employers to alter the adversarial culture of the workers' compensation claims process. This can ultimately speed the process, reduce costs, and improve the experience of injured workers.

What are potential advantages for the injured worker?

From the perspective of the injured worker, a carve-out has the potential to:

- Avoid unnecessary misunderstandings, disputes, and litigation
- Ensure prompt and appropriate medical care
- Facilitate safe and prompt return-to-work and sustained employment
- Support programs to prevent workplace injuries and illnesses
- Reduce delays encountered in the state system
- Increase satisfaction with delivery of workers' compensation benefits
- Improve job satisfaction and overall morale.

What are potential advantages for the employer?

From the perspective of the employer, a carve-out has the potential to:

- Reduce workers' compensation costs resulting from:
 - inappropriate medical care
 - failure to offer suitable work to injured employees
 - unnecessary disputes and litigation
 - preventable injuries.

- Reduce the need to replace injured employees and train replacements
- Improve productivity and morale among all employees
- Increase the health and competitiveness of the business.

Check Eligibility Requirements

This section summarizes the criteria for determining whether the union and the employer are eligible to negotiate and establish a carve-out. Citations to applicable laws and regulations appear in the footnotes. See Appendix A for instructions on how to obtain these laws and regulations.

Is the union eligible to create a carve-out?

In any industry, the union must:¹

- Be a bona fide labor organization that actually represents the employees in California as to wages, hours, and working conditions; *and*
- Be recognized or certified as the exclusive bargaining representative of the employees involved; *and*
- Have officers who have been elected by secret ballot or otherwise in a manner consistent with federal law; *and*
- Be free of domination or interference by any employer and receive no improper assistance or support from any employer.

Is the employer eligible to create a carve-out?

In construction industries, the employer must:²

- Have an annual workers' compensation premium of at least \$250,000 or the self-insured equivalent; *or*
- Be part of a "safety group" of employers that has annual workers' compensation premiums of at least \$2,000,000 or the self-insured equivalent.

¹ Labor Code sections 3201.5(a) and 3201.7(a)(3); California Code of Regulations, title 8, sections 10200(e), 10201(a)(2)(C), and 10202(d)(2)(C).

² Labor Code section 3201.5(c); California Code of Regulations, title 8, section 10201(a)(1)(F).

In all other industries, the employer must:³

- Have an annual workers' compensation premium of at least \$50,000 or the self-insured equivalent; *or*
- Be part of a "safety group" of employers that has annual workers' compensation premiums of at least \$500,000 or the self-insured equivalent.

³ Labor Code section 3201.7(c); California Code of Regulations, title 8, section 10202(d)(1)(E).

Identify Your Problems and Goals

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Before entering into discussions to create a carve-out, both parties should gather information about the kinds of problems that need to be addressed and determine whether those problems can and should be addressed through creation of a carve-out.

What are typical problems in the state system?

Typical problems in workers' compensation include unnecessary delays, disputes, litigation, and excessive costs.

Delays and disputes

Delays, disputes, and litigation can occur at many decision points in a claim. Key decision points include the following:

At the beginning of a claim:

- Does the worker have a legitimate injury?
- Is the worker's injury job-related?

At all stages of a claim:

- What medical treatment is necessary?

While the worker is recovering from the injury:

- Can the worker work in some capacity while recovering?

- What specific job tasks can the worker perform while recovering?
- Will the employer offer appropriate modified or alternative work?
- What is the proper amount of temporary disability (TD) benefits?

After the worker’s condition has become “permanent and stationary” (has stabilized or reached “maximal medical improvement”):

- What is the nature and extent of the worker’s permanent disability?
- Will the employer offer appropriate modified or alternative work on a long-term basis?
- What is the proper amount of permanent disability (PD) benefits?

Excessive costs

Excessive costs are reflected in workers’ compensation insurance premiums, payment of deductibles, direct workers’ compensation costs (if self-insured), decreased productivity, and hiring and training of new employees to replace injured employees. These, in turn, are caused by ineffective or inappropriate medical treatment, excessive absenteeism, low rates of workers returning to sustained employment, unnecessary litigation, reduced morale among employees, and high turnover.

What are your particular problems?

The following sources of information can help you identify and evaluate the most serious delays and disputes and the most important sources of excessive costs in your situation:

Worker survey

A survey can help identify major problems and concerns that injured workers are having with their workers’ compensation claims. The results of the survey can inform your design of a carve-out that is tailored to the workers’ specific needs. Before conducting the survey, you should determine how many workers will be surveyed; how they will be selected; whether you will gather the information in writing from individual workers or in discussions with individuals or with groups; whether you will ask individual workers to identify themselves; and how the results will be compiled, analyzed, and reported back to the workers. A sample survey is shown in Appendix B. You can add, delete, or change questions to make the survey relevant to your situation.

Workers' compensation records

Records of workers' compensation claims maintained by the employer or claims administrator may help identify major types of disputes and litigation and significant causes of work injuries and illnesses.

Injury and illness records

Cal/OSHA requires employers to keep records describing all injuries and illnesses that result in medical treatment beyond first aid, lost time, work restrictions, or loss of consciousness, or that are significant injuries or illnesses diagnosed by a physician or other licensed health care professional.⁴ These records may help identify patterns of injuries and illnesses and their causes:

- Form 300: *Log of Work-Related Injuries and Illnesses*
- Form 300A: *Annual Summary of Work-Related Injuries and Illnesses*
- Form 301: *Injury and Illness Incident Report*

Information on costs

The employer's immediate costs include workers' compensation insurance premiums, or, if the employer is self-insured, direct payment for medical treatment, indemnity benefits, medical-legal fees, and claims administration. Longer-term costs result from reduced productivity, high employee turnover, and training of new employees. Information about both the immediate and longer-term costs may help identify the important sources of excessive costs and areas of possible savings for the employer.

Other union and employer documents

Other records involving workers' compensation or health and safety programs may also be useful. These could include, for example, minutes of safety committee meetings, records of how grievances involving workers' compensation or health and safety problems were resolved, and Cal/OSHA inspection records.

Should you create a carve-out?

After you have identified your most serious problems, you should analyze whether they can be addressed by improving a particular practice or particular aspect of the

⁴ The full recordkeeping requirements are set forth in the California Code of Regulations, title 8, sections 14300 through 14400. These regulations are available online at www.dir.ca.gov/dosh (link to: Title 8 regulations).

employer's programs in workers' compensation or health and safety. If that would not be sufficient, you should determine whether you need to change the employer's entire system of delivering benefits to injured workers and resolving disputes in claims by creating a workers' compensation carve-out.

What will be your goals and priorities in designing a carve-out?

If you have decided that creating a carve-out will be your most effective strategy, the next step will be to prioritize the problem areas that you found. You should rank the kinds of problems that workers and supervisors regard as the most serious, and the problems that affect the greatest numbers of injured workers.



Design the Carve-Out To Meet Your Goals

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This section summarizes the procedures for creating a carve-out, describes required and optional features of carve-outs, discusses the roles of ombudsmen and attorneys, and explains how to preserve the rights of injured workers who have claims that will not be handled in your carve-out. Applicable laws and regulations governing carve-outs are cited in footnotes. See Appendix A for instructions on how to obtain these laws and regulations.

What procedures must you follow to create a carve-out?

Petition to negotiate the carve-out

If you are in an industry other than construction, the union must petition the Administrative Director (AD) of the state Division of Workers' Compensation to determine the parties' eligibility to negotiate a carve-out agreement.⁵ This petition is not required in construction industries.

⁵ Labor Code section 3201.7(d); California Code of Regulations, title 8, section 10202(a).

Negotiate separately from other agreements

If you are in an industry other than construction, you must negotiate the carve-out agreement separately from any collective bargaining agreement covering the same employees.⁶ Construction industry carve-outs do not have this restriction.

Apply to establish the carve-out

After the parties have decided on the provisions of the carve-out and developed the specific language of the carve-out agreement, the parties jointly submit an application with supporting documents to the AD. If the parties are eligible to establish a carve-out, the AD issues a letter of eligibility (construction industries) or a letter of recognition (all other industries). The letter of eligibility or letter of recognition states only that the parties are eligible to establish a carve-out. It is not a determination that the carve-out agreement complies with California law.⁷ Disputes in this area, if any, are to be resolved through appeals of arbitrators' decisions on individual cases in the carve-out. (See the discussion about arbitrators on page 20.)

Which features will you include in the carve-out?

Section 3 of this booklet discusses how you can identify the most serious kinds of delays and disputes and the most important sources of excessive costs faced by your injured workers and the employer. You should consider which features of carve-outs will best address these problems. To learn about practical experiences with these features, you can contact labor-management groups that have already created carve-outs in California. These groups are listed in Appendix C.

While considering different options, you may want to contact workers' compensation insurance brokers, insurers, or third-party administrators to ask about ways to save costs. You may also want to contact workers' compensation attorneys to ensure that the options you are considering will not adversely affect workers' or employers' rights. Finally, you should consult with labor law attorneys to ensure that your carve-out agreement complies with laws governing labor-management agreements generally.

Below are descriptions of features that are required by workers' compensation law to be included in carve-outs (workers' benefit levels) and optional features that are authorized by law (alternative dispute resolution, agreed lists of providers, alternative delivery of benefits, return-to-work programs, and joint safety committees).

How well your carve-out works will depend on how well you design it. As you consider different ways to design the carve-out, make sure that every feature you include is mutually agreed upon by labor and management and is fair to everyone.

⁶ Labor Code section 3201.7(a)(1).

⁷ California Code of Regulations, title 8, sections 10201(e)(1) and 10202(h).

Maintain injured workers' benefit levels (required)

Workers' compensation law requires that injured workers in carve-outs receive full payment of the medical treatment, temporary disability (TD) benefits, permanent disability (PD) benefits, and vocational rehabilitation benefits that they would otherwise receive in the state workers' compensation system.⁸

Note: In the state system, workers injured in 2004 or later are not eligible for vocational rehabilitation benefits, but some of these workers are eligible for supplemental job displacement benefits (vouchers). Your carve-out should ensure that workers injured in 2004 or later receive full payment of the vouchers that they would otherwise receive in the state system.

Create an alternative dispute resolution system

Most or all carve-outs include an alternative dispute resolution (ADR) system to handle questions and concerns promptly and resolve disputes quickly. This usually involves the services of ombudsmen, mediators, and arbitrators. The carve-out can be designed so that these persons are hired either by a labor-management trust or by the employer's claims administrator. They can work as employees or as independent contractors. They may be paid on a salary or hourly basis, or may be paid based on the amount of the employer's insurance premium or size of the covered workforce.

Regardless of how the employment relationships are structured, the carve-out should be designed so that both labor and management are directly involved and have final say in selecting these persons. This will help ensure that the persons you hire understand the needs and perspectives of injured workers, the union, and the employer, and that the ADR services will be fair and unbiased. It is also important that each party, if dissatisfied, ultimately has a right to terminate the services of any of these individuals.

To ensure that the ADR process operates without delay, some carve-outs include deadlines at each step of dispute resolution. Here are some examples from existing carve-outs:

- Ombudsman resolves a dispute in 5 to 10 working days
- Dissatisfied party requests mediation in 30 to 60 days
- Mediator resolves the dispute in 10 to 15 working days
- Dissatisfied party requests arbitration in 30 to 60 days
- Arbitrator holds a hearing in 30 days
- Arbitrator issues a written decision in 10 working days to 30 days

⁸ Labor Code sections 3201.5(b)(1) and 3201.7(b)(1).

The functions of ombudsmen, mediators, and arbitrators in an ADR system are explained below.

Ombudsmen

Probably all carve-outs use the services of one or more ombudsmen. The ombudsman's job is to resolve concerns and misunderstandings, and to speed up decisions that are often delayed in the state system. The ombudsman accomplishes this through informal discussions with the injured worker and others involved in the claim. He or she gives basic information to the worker, answers questions, listens to concerns, investigates complaints, and helps avoid or resolve problems before they become formal disputes.

Specific functions of ombudsmen are discussed on pages 23–25, under “What will be the role of the ombudsman?”

Mediators

Many carve-outs also include mediators. The mediator's job is to engage the parties in further informal discussions if they cannot reach agreement after working with the ombudsman. This can be through a combination of separate and joint sessions, or through joint sessions alone. The mediator tries to help the parties find a solution that is mutually agreeable. He or she can be authorized to obtain additional medical opinions to resolve medical disputes.

Arbitrators

Most or all carve-outs include arbitrators. The arbitrator is like a workers' compensation judge. If the parties cannot reach agreement after working with the ombudsman and mediator, the arbitrator holds a hearing to receive testimony from parties and witnesses, and considers all reports and other facts that are relevant to the dispute. He or she then makes a decision to resolve the dispute.

California workers' compensation law requires that decisions of arbitrators in a carve-out be appealable to the reconsideration unit of the state Workers' Compensation Appeals Board in the same way that decisions of workers' compensation judges are appealable in the state system.⁹ The reconsideration unit is not allowed to reweigh the evidence or consider its credibility. They can only consider whether the arbitrator clearly made a mistake in the decision-making process.

⁹ See Labor Code sections 3201.5(a)(1) and 3201.7(a)(3)(A).

Develop agreed lists of providers

Often the delays and disputes in a workers' compensation claim are caused by disagreement over services provided to the injured worker, particularly medical services. In the state system, claims administrators often disagree with the treatment recommended by physicians who were predesignated or otherwise selected by the worker. Workers often disagree with the treatment recommended by physicians who were selected by the claims administrator.

You can reduce or avoid delays and disputes in these areas by agreeing upon exclusive lists of treating physicians and other individuals and organizations that will provide services to injured workers. Both labor and management should be involved in creating the lists. The kinds of lists you may create are described below.

Treating physicians

As a starting point, consider including the same physicians who are in the workers' employment-based group health plans. Allowing injured workers to see their own physicians will help foster trust and satisfaction.

Work with the employer's claims administrator (either the workers' compensation insurer or third-party administrator) and with local applicants' attorneys to identify physicians who are either known to prescribe unnecessary or excessive treatment or known to reduce or end treatment inappropriately. These doctors may require further oversight, or may ultimately need to be excluded from your list.

To further contain health care costs, work with the claims administrator to explore ways to incorporate principles of managed health care. This can involve training of physicians and other health care providers, tracking of health and return-to-work outcomes, monitoring of costs, and other methods to manage performance.

Medical evaluators

Medical evaluators are physicians who help resolve disputed medical issues. They examine injured workers and write medical-legal reports, as needed. You can agree on an exclusive list of these physicians. They can be selected from among the physicians who are certified as qualified medical evaluators (QMEs) in the state workers' compensation system, but this is not an absolute requirement. As with the list of treating physicians, work with the claims administrator and applicants' attorneys to identify physicians who should not be included on the list of evaluators.

Providers of rehabilitation services

Workers who will never recover completely may be eligible to receive a supplemental job displacement benefit, or voucher, for educational retraining or

skill enhancement (if injured in 2004 or later), or vocational rehabilitation benefits (if injured before 2004). You can agree on exclusive lists of rehabilitation counselors, retraining programs, and other providers of rehabilitation services.

Consider alternative methods of delivering benefits

Legislation enacted in 2004 allows the parties in a carve-out to negotiate any aspect of the delivery of medical benefits and disability compensation to injured workers, provided the workers are eligible for employment-based group health benefits and non-occupational disability benefits.¹⁰

If the costs of workers' compensation medical benefits are a major concern, you are permitted to streamline medical services by coordinating and integrating the services provided under both workers' compensation and group health, subject to applicable legal requirements of both systems. You could, for example, design the carve-out to ensure that the injured workers are treated by the same physicians or same medical groups in both systems, that they receive the same kinds of medical care in both systems, and that the utilization review process is the same in both systems.

It also means that you can combine temporary disability (TD) and permanent disability (PD) benefits with employment-based short-term disability, long-term disability, and salary-continuation benefits. Keep in mind, however, that the carve-out cannot diminish the TD and PD benefits that the worker would otherwise receive in the state workers' compensation system.¹¹

Improve return-to-work programs

If your goal is to help injured workers return to suitable work while recovering and resume full employment in the long term, the carve-out should include a written policy and program to formalize the return-to-work process. Those responsible for the program should be specifically assigned and trained. As part of the program, detailed descriptions of available jobs (including descriptions of working conditions) should be prepared, collected, and given to the injured workers' treating physicians. The physicians should be instructed to be as specific as possible in writing work restrictions that can be used to assign appropriate jobs to the workers. The workers should be encouraged to return as soon as medically appropriate. Where possible, recommended timeframes should be included in the process.

Create or further support joint safety committees

In order to reduce workers' compensation costs related to preventable job injuries, you can design the carve-out to create a joint labor-management safety committee

¹⁰See Labor Code sections 3201.5(b)(2) and 3201.7(b)(2).

¹¹Labor Code sections 3201.5(b)(1) and 3201.7(b)(1).

or further support the work of an existing committee. The committee should review the employer's written Injury and Illness Prevention Program,¹² and identify areas that can or should be improved.

As part of this process, the committee should be authorized to make recommendations to:

- Update and improve health and safety training programs for workers, supervisors, and managers.
- Conduct workplace surveys on a regular basis to identify potential hazards.
- Encourage workers to report unsafe conditions, incidents, and injuries promptly and without fear of reprisal.
- Eliminate incentive programs that discourage reporting injuries.
- Promptly investigate reports of unsafe conditions and take appropriate action to correct the hazards.

What will be the role of the ombudsman?

Ombudsmen can be assigned different roles, depending on how the carve-out is designed. Their roles can differ in when and how they contact injured workers, what other persons they contact to resolve problems in claims, whether or not they advocate on behalf of injured workers, and whether or not they address systemic problems.

Regardless of the ombudsman's specific functions, the carve-out should be designed to allow the ombudsman to meet professional and ethical standards of independence, impartiality, and confidentiality. (The essential characteristics of ombudsmen are described in the American Bar Association's *Standards for the Establishment and Operation of Ombuds Offices*, 2004.)

- **Independence** means that no one who could be the subject of a complaint being investigated by an ombudsman will be able to interfere in the ombudsman's work or retaliate against the ombudsman. You should therefore design the carve-out so that no one who handles or is otherwise involved in claims can interfere with the work of your ombudsman or adversely affect his or her employment.
- **Impartiality** means that the ombudsman conducts investigations free from initial bias or conflict of interest. As discussed earlier, it is essential that both

¹²The requirements governing Injury and Illness Programs are set forth in Labor Code section 6401.7, available online at www.leginfo.ca.gov (link to: California Law); and California Code of Regulations, title 8, section 3203, available online at www.dir.ca.gov/dosh (link to: Title 8 regulations).

labor and management have final say in selecting the ombudsman and deciding whether he or she will be retained, and that both have a right to terminate the ombudsman's services. In addition, the ombudsman should not be responsible for marketing the carve-out to new unions or employers, because this could potentially create an incentive for the ombudsman to alter the way he or she conducts investigations to impress whichever side is more difficult to sign up.

- **Confidentiality** means that the ombudsman will not disclose confidential information without consent. This includes information that the ombudsman might share in subsequent steps of mediation and arbitration.

The ombudsman in your carve-out may be assigned some or all of the responsibilities described below.

Contacting injured workers proactively

In some carve-outs, the ombudsman is simply available upon request of the injured worker, the employer, or anyone else involved in a claim. In other carve-outs, the ombudsman is notified of every injury (or every lost-time injury) and proactively contacts the injured worker. The ombudsman gives information about rights, responsibilities, resources, and what to expect in the claims process. Assigning a proactive role rather than a passive role to the ombudsman can help avoid problems early in a claim.

Working with others to resolve problems with claims

If reducing delays in medical treatment is one of your major goals, the ombudsman should coordinate closely with the injured worker, the treating physician, and the insurer or claims administrator over treatment decisions. The ombudsman may need to arrange for the worker's treating physician to communicate directly with the insurer's "utilization review" physician regarding appropriate treatment.

If you are seeking to improve and expedite the return-to-work process, the ombudsman should work closely with the worker, physician, and employer to identify available jobs that the worker can do safely while recovering.

Advocating on behalf of injured workers

Ombudsmen differ in their responsibilities towards the injured worker, depending on how the carve-out is designed.¹³ Ombudsmen who serve in a neutral capacity are called "organizational ombudsmen." Although organizational ombudsmen often recommend action or changes that would benefit an injured worker, their primary function is to promote fair and just administration of the ADR system, not to advocate on behalf of the worker. Ombudsmen who are authorized to promote the

¹³ Different types of ombudsmen are described in the American Bar Association's *Standards for the Establishment and Operation of Ombuds Offices*, 2004.

interests of the injured worker are called “advocate ombudsmen.” Their job duties include assisting and advocating on behalf of injured workers facing problems in their claims, and recommending systemic improvements to benefit all injured workers in the carve-out.

You should design your ombudsman position based on the kinds of problems encountered by injured workers and the employer. In some carve-outs, the ombudsman is strictly an organizational ombudsman, and in other carve-outs, the ombudsman works as both an organizational ombudsman and an advocate ombudsman. You can create either one of these positions, both kinds of positions, or a hybrid position.

Alternatively, you can employ other people whose functions are similar to an ombudsman. Some carve-outs hire, for example, a “case nurse” or a “nurse case manager” to work as a liaison between the treating physician and the claims administrator. This person advocates on behalf of the injured worker to ensure prompt and appropriate medical treatment.

Recommending improvements to the system

The ombudsman’s duties can include efforts to encourage systemic improvements in the carve-out. This might involve, for example, analyzing patterns in claims and meeting regularly with the union and employer to explore ways to improve claims handling practices, return-to-work procedures, health and safety programs, and other components of the carve-out.

What will be the role of attorneys?

People differ widely in their views about the appropriate role of applicants’ attorneys in assisting and representing injured workers. In the state system, applicants’ attorneys are typically paid based on a percentage of the worker’s permanent disability (PD) award. Some people believe this payment structure creates an incentive for attorneys to discourage full recovery and return-to-work. They recommend that attorneys’ involvement in carve-outs be drastically limited.

Others believe that injured workers in carve-outs need attorneys to fully protect their rights. In some cases, for example, the injured worker is entitled to additional payments because of unreasonable delay by the claims administrator, serious and willful misconduct by the employer, or discriminatory actions. Gathering evidence to support these kinds of claims and advocating on behalf of the injured worker may be outside the duties of the ombudsman and mediator and something only an attorney can do.

Legal representation in carve-outs

In a non-construction industry carve-out, injured workers must be allowed to be represented by an attorney at all stages of the ADR process.¹⁴ In the construction industry, a carve-out may exclude the right of representation at some or all stages of the ADR process, but injured workers are still allowed to seek information and advice from an attorney.

If you are creating a carve-out in the construction industry, you will need to decide whether to retain or exclude the injured worker's right to be represented by an attorney. To inform this decision, you should determine whether the ombudsman will have the authority and skills to fully protect the injured workers' rights at all stages.

Structure attorney's fees to encourage best results

In the state system, attorneys are usually paid 9% to 15% of the injured worker's permanent disability award, regardless of how much time the attorney spends helping the worker. To encourage full recovery and rehabilitation of injured workers in your carve-out, consider offering guidance on alternative ways to determine a reasonable fee. Payment could be based, for example, on the amount of time the attorney spends helping the worker obtain appropriate treatment or suitable job accommodations, or it could be a flat fee for certain services.

One of the major carve-outs in California requires the claims administrator to pay for the time that the injured worker's attorney spends preparing for an arbitration hearing, if the worker prevails at the hearing or at any time subsequent to mediation. Consider alternative payment arrangements that will encourage prompt resolution of disputes in these kinds of situations.

In the state system, all attorneys' fees must be approved by a workers' compensation judge. Depending on your situation, you may want your carve-out agreement to specify that any fee agreement between an attorney and an injured worker must or should be approved by an arbitrator working in the carve-out.

Prepare guidelines for injured workers

Because some injured workers in your carve-out will probably want to interview and hire an attorney, you should prepare guidelines for the ombudsman to give to workers on how to select an attorney:

- Tell them how and where to get names of qualified attorneys.
- Advise them to evaluate how well the attorney and staff communicate, and how well the attorney understands the worker's goals of recovering and returning to work.

¹⁴ Labor Code section 3201.7(b)(1).

- Explain that after hiring an attorney, it is usually difficult to switch to a different one.

How will other rights of injured workers be preserved?

Some injured workers have other potential claims in addition to their claim for the usual workers' compensation benefits. Some of these claims may be handled within carve-outs, while others must be handled outside carve-outs.

Claims that may be handled within a carve-out:

Delays in workers' compensation. Workers' compensation law allows penalties for delay in workers' compensation notices and benefits.¹⁵

Serious and willful misconduct. Workers' compensation law provides additional benefits if serious and willful misconduct by the employer caused the worker's injury.¹⁶

Claims that must be handled in the state workers' compensation system:

Discrimination in workers' compensation. Additional workers' compensation benefits and other compensation are provided if there was discriminatory action by the employer or claims administrator.¹⁷ Courts have held that carve-outs are not allowed to resolve disputes in this area.

Claims outside workers' compensation law that must be handled in other legal systems:

Disability rights. Claims involving discrimination because of a disability, governed by the California Fair Employment and Housing Act (FEHA) and the federal Americans With Disabilities Act (ADA), are handled by other state and federal agencies.

Family and medical leave. Claims involving protected leave, governed by the California Family Rights Act (CFRA) and the federal Family and Medical Leave Act (FMLA), are handled by other state and federal agencies.

Public benefits. Claims for public benefits such as State Disability Insurance (SDI), state unemployment insurance, and Social Security disability benefits are handled by other state and federal agencies.

¹⁵See Labor Code sections 4650 and 5814.

¹⁶See Labor Code section 4553.

¹⁷Labor Code section 132a.

Wrongful termination in violation of public policy. These claims are handled in the state superior court system.

Third-party claims. Claims against parties other than the employer are handled in the state superior court system.

Your carve-out agreement should specify whether the ombudsman and others in the ADR system will handle the first two types of claims listed above (delays in workers' compensation and serious and willful misconduct). For these and all other claims that will not be handled in the carve-out, the agreement should specify whether the ombudsman or someone else in the carve-out will identify these potential claims and advise the injured worker on where to get help.



Hire the Best People

As discussed in Section 4 of this booklet, your carve-out may include an alternative dispute resolution (ADR) system that relies on the services of ombudsmen, mediators, and arbitrators. After the Administrative Director of the state Division of Workers' Compensation certifies that you are eligible to establish a carve-out, you can interview, select, and hire the persons who will provide the ADR services. It is essential that both labor and management be fully involved in the selection process. The performance of the ombudsman is particularly important, since this person plays a key role in helping everyone avoid misunderstandings and other problems early in a claim.

This section discusses qualities to look for in hiring the persons who will work in the ADR system.

What kinds of knowledge, experience, and expertise will you need?

Workers' compensation cases often involve complicated legal, medical, return-to-work, workplace health and safety, and labor-management issues. Your particular problems may fall predominantly in one of these areas. For example, some injured workers may not be given full information about their rights and therefore lose benefits, some may experience protracted delays because of disagreements between the treating physician and the claims administrator over necessary treatment, and some may face difficulties being assigned appropriately modified work while recovering.

If your problems fall within an area of law, medicine, rehabilitation, health and safety, or labor-management relations, you should consider hiring an ombudsman who has training and expertise in that area. The ombudsman should also understand and be familiar with all of the other areas. In addition, he or she should have some training in mediation and dispute resolution.

Mediators and arbitrators hear disputes that could not be avoided or resolved through informal discussions with the help of an ombudsman. These kinds of disputes usually require that the mediator or arbitrator fully understand the parties' legal rights. Therefore, in most carve-outs, mediators and arbitrators should have formal legal training and expertise in workers' compensation law. They can be workers' compensation attorneys or former workers' compensation judges.

Are there standards of professional and ethical conduct?

Professional standards on impartiality and confidentiality are discussed below. These are set forth in the American Bar Association's *Standards for the Establishment and Operation of Ombuds Offices*, 2004; the International Ombuds Association's *Code of Ethics*, 2006, and *Standards of Practice*, 2006; the United States Ombudsman Association's *Governmental Ombudsman Standards*, 2003; and the *Model Standards of Conduct for Mediators* adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution, 2005.

In order for your carve-out to be effective and sustainable, the ombudsmen, mediators, and arbitrators must be credible, fair, and unbiased. Section 4 discusses how to design your carve-out to help ensure that the ombudsman will remain impartial. When you select and hire the ombudsman and other persons who will work in the carve-out, you should consider their other sources of income and whether those sources could create bias in how they perform their jobs in the carve-out.

Ombudsmen and mediators often receive confidential information in private discussions with the injured worker and with supervisors or others in management. They should maintain the parties' expectations of confidentiality and not disclose confidential information in mediation sessions or arbitration hearings. You should select persons who understand and will honor the professional guidelines on confidentiality.

What personal skills and traits should you look for?

Widely differing views about workers' compensation are held by injured workers, supervisors, managers, union stewards and staff, claims administrators, health care providers, medical evaluators, attorneys, and rehabilitation specialists. Their differences contribute to misunderstandings and interpersonal conflicts in claims.

You should select ombudsmen, mediators, and arbitrators who can understand and respect everyone's perspective. They should also show that they will listen to and communicate effectively with all participants, treat everyone fairly, strive to solve problems to everyone's satisfaction, and be committed to doing a good job.

Stay Involved

After creating the carve-out agreement and hiring the persons providing alternative dispute resolution (ADR) services, both labor and management need to stay fully involved in the operation of the carve-out to ensure its success.

How will you inform and educate everyone about the carve-out?

Often workers and supervisors do not know that they are covered by a carve-out agreement. Soon after you know that you will be establishing a carve-out, you should begin to inform and educate everyone about the program. Both labor and management should prepare, post, and distribute written materials, publish articles in bulletins and newsletters, and conduct training sessions. The information should reach all workers covered by the carve-out agreement, supervisors, human resources personnel, others in management, union shop stewards, union staff, and joint health and safety committees. Education and outreach should continue on an ongoing basis.

What can you do to monitor the operation of the carve-out?

To evaluate the effectiveness of the carve-out and decide whether to extend it on a long-term basis, both labor and management should closely monitor its operation. Actively seek information from injured workers about how their workers' compensation claims are being handled. Solicit their feedback through articles in union and employer newsletters and at union meetings. Ask about their level of satisfaction with basic information, medical treatment, ADR services, and return-to-work opportunities. Ask whether they believe the carve-out has led to safer conditions at work and fewer injuries. Obtain similar feedback from persons in management. If there is a problem, obtain enough information to determine whether the problem is related to a specific aspect of the carve-out program, or whether it is due to inherent limitations outside the carve-out.

If you can identify a component of the carve-out that should be improved, take whatever steps you can to make that change. This could involve, for example, instructing the ombudsman to change his or her practices, hiring a different ombudsman, giving additional information to treating physicians about workplace conditions, requiring quicker action in the utilization review process, or changing other aspects of the carve-out.

What costs and savings should you track?

Carve-outs usually involve some start-up costs. Insured employers may be able to offset some of these costs by obtaining up-front discounts on their insurance premiums from the workers' compensation carrier, depending on the particulars of the carve-out agreement. Over time, savings generated by the carve-out should outweigh the costs, compared to overall costs of remaining in the state workers' compensation system:

Insurance savings

In addition to receiving an up-front discount, the employer may pay even lower premiums in the future. If claims become less costly because of the carve-out and the employer is assigned a lower experience modification factor, the insurer may offer a guaranteed-cost policy at a reduced price based on the positive claims experience. Alternatively, under a retrospective-premium policy, the insurer may pay a refund to the employer based on this experience.

Direct savings

Employers that have workers' compensation insurance policies with large deductibles or that are self-insured for workers' compensation may see reductions in their direct costs. This is particularly true for costs arising from formal disputes, such as the costs of medical-legal reports, legal services, depositions, hearings, and administrative overhead to handle and oversee those transactions.

Increased productivity

Beyond workers' compensation costs, carve-outs have the potential to generate savings for the employer due to increased productivity, higher rates of retention, and a reduced need to train new employees.

Establish systems to monitor all of the above costs and track patterns over time. If some costs remain excessive, take steps to identify the causes and determine whether certain components of the carve-out should be modified accordingly.

California Laws and Regulations Governing Carve-Outs

The laws (statutes) governing carve-outs are found in California Labor Code sections 3201.5 through 3201.9. The requirements for creating carve-outs are in the following sections:

3201.5. Construction industries

3201.7. All other industries

The regulations governing carve-outs are found in the California Code of Regulations, title 8, sections 10200 through 10204. The procedures for creating carve-outs are in the following sections:

10200. Definitions

10201. Creating carve-outs in construction industries

10202. Creating carve-outs in all other industries

10202.1. Petition by labor to negotiate a carve-out in industries other than construction

To download these laws and regulations, go to the website of the California Division of Workers' Compensation: www.dir.ca.gov/dwc. Link to "Statutes" and "Regulations."



Sample Worker Survey

The union and the employer are collecting information that will be used to improve the experience of workers who have job-related injuries or illnesses. Try to answer each question as completely as possible. Thank you.

1. Have you ever had an injury or illness related to work? Yes No
If yes, please describe.

2. Have you ever filed a workers' compensation claim? Yes No
If yes:

a. Were you satisfied with how your claim was handled? Yes No
If yes, please comment:

b. Did you experience problems with your claim? Yes No
If yes, please explain:

3. What is the most important improvement needed in the way workers' compensation benefits are provided to you and your co-workers?

4. What is the most important improvement needed to prevent work injuries and illnesses?

5. Please share any additional ideas:

Name/ Department/ Phone number/ E-mail address: _____

Labor-Management Groups Participating in Carve-Outs

If you would like to contact other unions and employers about practical aspects of carve-outs, labor-management groups that have created or are in the process of creating carve-outs in California are listed below. These lists are current as of the dates shown. For the most recent lists, visit the website of the state Division of Workers' Compensation: www.dir.ca.gov/dwc (link to: DWC programs and units).

Non-Construction Industry Carve-Out Participants

Non-construction industry carve-out participants as of September 23, 2005
(Labor Code section 3201.7)

No.	Union	Company	Permission to Negotiate Date/Expires	Application for Recognition of Agreement	Agreement Recognition Letter Date
1.	United Food & Commercial Workers Union Local 324	Super A Foods-2 locations 76 employees	09/01/04-09/01/05		
2.	United Food & Commercial Workers Union Local 1167	Super A Foods – Meat Department 8 employees	09/01/04-09/01/05		
3.	Teamsters Cal. State Council-Cannery & Food Processing Unions, IBT, AFL-CIO	Cal. Processors, Inc. Multi-Employer Bargaining Representative	7-06-04/ 7-05-05		
4.	United Food & Commercial Workers Union Local 770	Super A Foods – 10 locations - ~ 283 members	09/01/04-09/01/05		
5.	United Food & Commercial Workers Union Local 1036	Super A Foods - All employees, except those engaged in janitorial work or covered under a CBA w/Culinary Workers and demonstrators	09/01/04-09/01/05		
6.	Operating Engineers-Loc 3 Non-Construction	Basic Crafts Workers' Compensation Benefits Trust Fund	12/09/04-12/09/05	02/15/05	02/28/05
7.	Laborers - Non-Construction	Basic Crafts Workers' Compensation Benefits Trust Fund	12/09/04-12/09/05	02/15/05	02/28/05
8.	Carpenters- Non-Construction	Basic Crafts Workers' Compensation Benefits Trust Fund	12/09/04-12/09/05	02/15/05	02/28/05
9.	United Food & Commercial Workers Union Local 588	Mainstay Business Solutions	8/11/05-8/11/06	09/02/05	09/12/05

Construction Industry Carve-Out Participants

Construction industry carve-out participants as of May 2, 2006
(Labor Code section 3201.5)

1 = 1 employer, 1 union; 2 = 1 union, multi employer; 3 = project labor agreement

No.	Union	Company	Exp. Date
1. (3)	CA Building & Construction Trades Council	Metropolitan Water Dist. So. Ca-Diamond Valley Lake	11/07/06
2. (2)	Internat'l Brotherhood of Electrical Workers IBEW	NECA--National Electrical Contractors Assoc.	8/14/07
3. (2)	So. Ca. Dist. of Carpenters & 19 local unions	6 multi-employer groups—1000 contractors.	8/14/07
4. (2)	So. Ca. Pipe Trades Council 16	Multi employer—Plumbing & Piping Industry Coun.	8/24/07
5. (1)	Steamfitters Loc. 250	Cherne—two projects completed in 1996	Complete
6. (1)	Intern'l Union of Petroleum & Industrial Wkrs	TIMEC Co., Inc./TIMEC So. CA., Inc.	7/31/07
7. (3)	Contra Costa Bldg & Const. Trades Council	Contra Costa Water District - Los Vaqueros	Complete
8. (2)	So. CA Dist. Council of Laborers	Assoc. Gen'l Cont'rs of CA, Bldg. Industry Assoc. – So. CA., So CA Contrs' Assoc., Eng. Contrs' Assoc.	7/31/08
9. (3)	Ca. Bldg. & Construction Trades Council	Metropolitan Water Dist. So. Ca. Inland Feeder- Parsons	Ended 12/31/02
10. (3)	Bldg. & Construction Trades Council of Alameda County	Parsons Constructors, Inc. National Ignition Facility—Lawrence Livermore	9/23/06
11. (2)	District Council of Painters	Los Angeles Painting & Decorating Contrs Assoc.	10/29/06
12. (1)	Plumbing & Pipefitting Local 342	Cherne Contracting - Chevron Base Oil 2000 project	Complete
13. (3)	LA Bldg & Const. Trades Coun. AFL-CIO	Cherne Contracting —ARCO	Complete
14. (2)	Operating Engineers Loc. 12	So. California Contractors' Assoc.	4/1/08
15. (2)	Sheet Metal International Union	Sheet Metal-A/C Contractors National Assoc	4/1/08
16. (3)	Bldg & Construction Trades Council San Diego	San Diego Cny Water Authority Emer. Storage Project	2/2006
17. (3)	LA County Bldg. & Const.Trades Council	Cherne Contracting – Equilon Refinery – Wilmington	3/1/07
18. (3)	Plumbers & Steamfitters	Cherne Contracting – Chevron Refinery – Richmond	7/1/05
19. (3)	Plumbers & Steamfitters	Cherne Contracting – Tesoro Refinery – Martinez	7/1/05
20. (3)	LA/Orange Counties Bldg. & Const.Trade Coun	Cherne Contracting – Chevron Refinery – El Segundo	7/26/05
21. (2)	District Council of Iron Wkrs- State of CA and Vicinity	California Ironworker Employers Council	2/25/09
22. (2)	Sheet Metal Wkr Intern'l Assoc #105	Sheet Metal & A/C Labor Management Safety Oversight Committee (LMSOC)	4/17/09
23. (2)	United Union of Roofers, Waterproofers and Allied workers, Local 36 and 220	Southern California Union Roofing Contractors Association	07/31/08
24. (2)	United Union of Roofers, Waterproofers and Allied Workers, Locals 40, 81 & 95	Associated Roofing Contractors of the Bay Area Counties	7/31/06
25. (2)	United Assoc.-Journeyman & Apprentices-- Plumbers & Pipefitters, Local #447	No.CA Mechanical Contractors Assoc & Assoc. Plumbing & Mechanical Contractors of Sacto Inc.	11/7/06
26. (2)	Operatives Plasterers and Cement Masons International Association, Local 500 & 600	So. California Contractors Association, Inc.	4/1/05
27.(1)	International Unions of Public & Industrial Workers	Irwin Industries, Inc.	3/23/07
28.(2)	PIPE Trades Dist. Council No. 36	Mechanical Contractors Council of Central CA	4/14/07
29. (2)	No. CA Carpenters Reg'l Council/	Basic Crafts Worker' Compensation Benefits Trust	8/30/07
30. (2)	No. CA District Council of Laborers	Basic Crafts Worker' Compensation Benefits Trust	8/30/07
31.(2)	Operating Engineers Local 3	Basic Crafts Worker' Compensation Benefits Trust	8/30/07
32. (1)	Industrial, Professional & Technical Workers	Irish Construction	12/20/07
33.(3)	Building Trades Council of Los Angeles-Orange County	Los Angeles Community College District Prop A & AA Facilities Project	5/6/08

Non Construction Industry Carveout Participants as of February 28, 2012 - (Labor Code Section 3201.7)

No.	File #/Union	Company	Permission to Negotiate Date/Expires	Application for Recognition of Agreement	Agreement Recognition Letter Date
1.	N 06 Operating Engineers-Local 3 Non-Construction	Basic Crafts Workers' Compensation Benefits Trust Fund	12/9/04-12/9/05	02/15/2005	02/28/2005
2.	N 07 Laborers - Non-Construction	Basic Crafts Workers' Compensation Benefits Trust Fund	12/9/04-12/9/05	02/15/2005	02/28/2005
3.	N 08 Carpenters - Non-Construction	Basic Crafts Workers' Compensation Benefits Trust Fund	12/9/04-12/9/05	02/15/2005	02/28/2005
4.	N 13 Long Beach Peace Officers' Association & Long Beach Firefighters Association Local 372	City of Long Beach	12/11/06-12/11/07	11/02/2007	11/13/2007
5.	N 14 SEIU Local 1877	Diversified Maintenance Services	4/13/07-4/13/08	02/12/2008	02/28/2008
6.	N 15 SEIU Local 721	City of Los Angeles	6/18/07-6/18/08	04/15/2008	05/08/2008
7.	N 20 Kern County Firefighters Union	County of Kern	06/03/10-06/03/12		
8.	N 21 Kern Law Enforcement Association	County of Kern	06/03/10-06/03/12		
9.	N 22 United Food & Commercial Wkrs Loc 8.	Save Mart Supermarkets dba Yosemite Wholesale	08/11/10-08/11/11		
10.	N 23 Teamsters Local 150	Save Mart Supermarkets dba Roseville Distribution Center	09/13/10--09/13/11		
11.	N 27 Automotive Machinists Lodge 1173	Save Mart Supermarkets dba Vacaville Distribution Center	11/30/10--11/30/11		
12.	N 28 SEIU United Service Workers West	No. CA Maintenance Contractors Association	01/12/11--01/12/12	03/03/2011	03/08/2011
13.	N 29 LA County Firefighters Local 1014	LA County Fire Department	03/23/11--03/23/12		
14.	N 30 SEIU Local 87	SF Maintenance Contractors Association	03/28/11-03/28/12	05/31/2011	06/07/2011
15.	N 31 SEIU United Service Workers West.	No. CA Safeway Contractors	04/15/11-04/15/12	05/24/2011	06/03/2011
16.	N 32 SEIU United Service Workers West.	ABM - non-food retail-LA County	06/10/11-06/10/12	06/13/2011	06/15/2011
17.	N 33 SEIU United Service Workers West.	ABM - non-food retail- San Diego & Imperial Counties	06/10/11-06/10/12	06/13/2011	06/15/2011
18.	N 34 SEIU United Service Workers West.	ABM - retail food-all CA Counties	06/10/11-06/10/12	06/13/2011	06/15/2011
19.	N 35 Huntington Beach Police Officers' Assoc.	City of Huntington Beach	07/01/11-07/01/12		
20.	N 38 Huntington Beach Fire Management Assoc.	City of Huntington Beach	07/05/11-07/05/12		
21.	N 37 Huntington Beach Police Management Assoc.	City of Huntington Beach	07/12/11-07/12/12		
22.	N 36 Huntington Beach Firefighter's Assoc.	City of Huntington Beach	07/27/11-07/27/12		
23.	N 39 UFCW - Locs 8-GS,135,324, 770,1167, 1428,1442	Albertson's, Ralph's Von's	10/26/11-10/26/12		
24.	N 40 Orange County Professional Firefighters Assoc.	Orange County Fire Authority	11/30/2011-12/5/12		
25.	N 41 SEIU-USWW & SEIU Local 87	ABLE Services	02/09/12-02-/09/13	2/16/2012	2/23/2012

STATE OF CALIFORNIA
Department of Industrial Relations
Division of Workers' Compensation
Administrative Director
Post Office Box 420603
San Francisco, CA 94142-0603
Telephone: (510) 286-7100

Petition for Permission to Negotiate a Section 3201.7
Labor-Management Agreement

Labor Code § 3201.7; Title 8, California Code of Regulations § 10202

Please submit the following information to the Administrative Director of the Division of Workers' Compensation to obtain a letter advising the below-named union and employer, or group of employers, of their eligibility to enter into negotiations for the purpose of reaching agreement on a labor-management agreement authorized by Section 3201.7 of the California Labor Code.

(Print or Type Name and Addresses)

1. Union Information

Name of Union: _____

Contact Person and Title: _____

Principal Address: _____

2. Employer Information (For group of employers, please use separate pages to list all individual employers.)

Name of Employer: _____

Contact Person and Title: _____

Federal Employers Identification Number (FEIN): _____

Principal Business of Employer: _____

Principal Address: _____

3. Please describe the bargaining unit or units to be covered by the Section 3201.7 labor-management agreement, and provide the approximate number of employees in the unit(s).

4. Please attach proof of the union's status as the exclusive bargaining representative of the employees in the above-described bargaining unit(s).

5. Please attach a copy of the current collective bargaining agreement or agreements in effect between the union and the employer.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED AT _____ (City), CALIFORNIA ON _____ (Date)

BY: _____, TITLE: _____
(Original Signature of Union Representative)

You must attach a proof of service by mail declaration indicating that the petition and all supporting evidence was mailed to the employer, or for a group of employers, all individual employers.



CITY OF LONG BEACH

*Workers Compensation Program
Supplemental Dispute Resolution Pilot Program*

*2008 Year-End Results
Observations and Recommendations*

*Deloitte Consulting LLP
June 3, 2009*



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June 3, 2009

Mr. Michael Alio, M.A., ARM-P
Risk Manager
City of Long Beach
333 West Ocean Boulevard
Long Beach, CA 90802

Dear Mr. Alio:

Deloitte Consulting LLP ("Deloitte Consulting") is pleased to present the attached report on our completed contracted tasks to assess the performance of the City's pilot Workers' Compensation ("WC") Supplemental Dispute Resolution ("SDR") program with the Police and Fire Departments.

As discussed previously, this study leverages our previous work with the City in the establishment of a baseline population and review of "pre-pilot" claims which covered a 35-month period (2/1/2005-12/31/2007). The baseline analysis yielded relevant history of claim costs and process delays in resolving medical disputes for both Police and Fire WC claims. This report measures comparative average costs and critical lag times between the baseline population as defined and those who participated in the SDR Pilot Program in the 2008 calendar year.

We are pleased to report that the SDR Pilot Program has met its initial challenging goals of significantly reducing the time and costs to resolve WC medical disputes in Police and Fire claims. The accompanying report provides appropriate validation should the City, the Long Beach Police Officers' Association and the Long Beach Firefighters Association decide to extend the program and/or should the City consider expanding the program to other employee groups. Deloitte Consulting recommends consideration of both.

As you know, the City of Long Beach was the first in California to implement this carve-out program for alternative dispute resolution. We congratulate the signatory and supporting parties to the SDR agreement for their effective due diligence, collaborative labor-management approach, and attention to program details to ensure its success. We believe significant benefits have accrued to the City and LBPOA and LBFFA members as a result.

We appreciate this opportunity to continue to assist the City in improving its WC program. If you have any questions on the report, please call Rick at (213) 553-1250 or Steve at (860) 725-3043.

Sincerely,

Richard Burt
Principal
Deloitte Consulting LLP

Steve Beigbender
Specialist Leader
Deloitte Consulting LLP

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I. EXECUTIVE SUMMARY

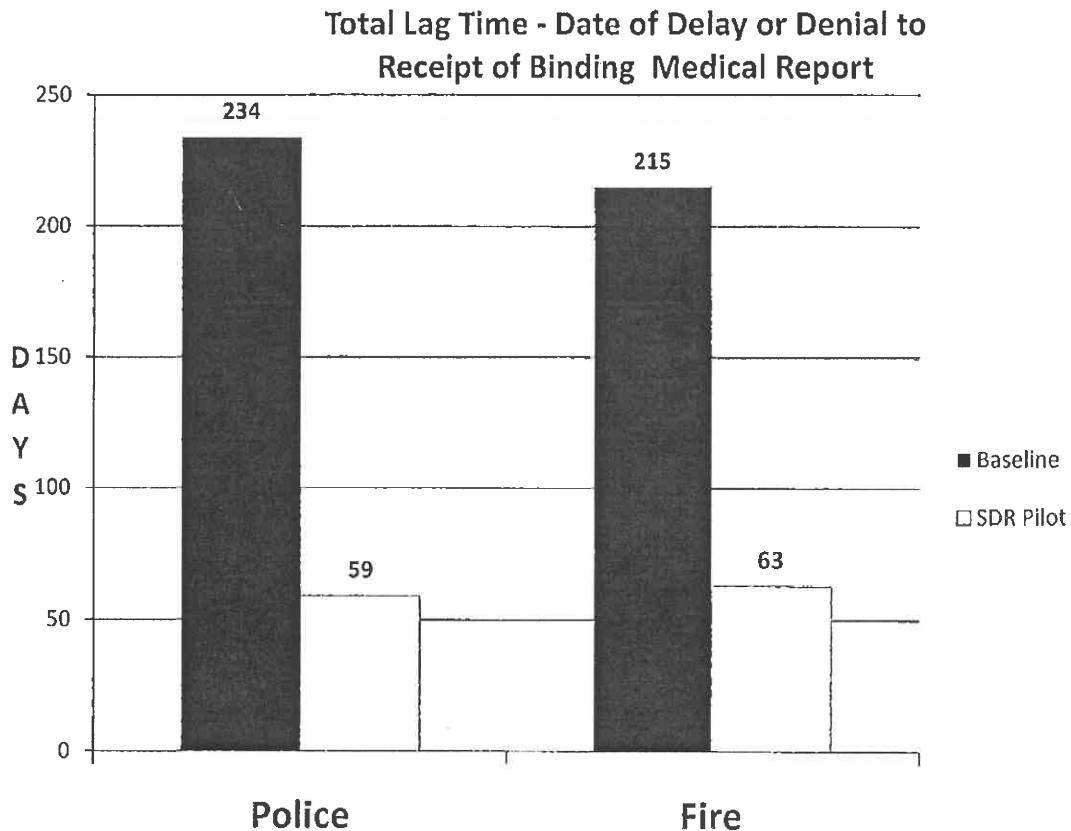
The City of Long Beach ("the City"), the Long Beach Police Officers' Association ("LBPOA") and the Long Beach Firefighters Association ("LBFFA") jointly initiated an innovative, one-year pilot Supplemental Dispute Resolution ("SDR") program, beginning January 1, 2008, to govern how medical disputes in workers' compensation ("WC") are handled and resolved for "sworn" safety personnel in the City's Police and Fire departments. A panel of independent medical examiners ("IME") is in place to replace the state regulated Agreed Medical Exam ("AME") and Qualified Medical Exam ("QME") processes. California Labor Code Section 3201.7 enables public employers to "opt out" of the AME/QME state administered programs through establishment of alternative dispute resolution programs (subject to collective bargaining and other certification requirements). To our knowledge the City of Long Beach was the first major city in California to implement such a program.

Deloitte Consulting has enjoyed a long-term relationship with the City in various projects dedicated to improving WC results, both in terms of cost reduction and improvement of benefit delivery systems to injured workers. The observations contained in this report continue to demonstrate that improving the quality of service to employees and overall cost reductions are not mutually exclusive objectives, and in fact, are synergistic.

The SDR pilot program was designed to significantly expedite resolution of medical-related disputes in Police and Fire WC claims. Baseline measurements of historical experience (2/1/05-12/31/07) with AMEs/QMEs yielded an average lag time between claim delay or recognition of a medical dispute and final resolution was 234 days for Police and 215 days for Fire claims. Such delays have a detrimental effect on outcomes with respect to employee access to timely and appropriate treatment, return-to-work, permanent disability determination and overall confidence in the system. The SDR program was developed to mitigate these problems. The "stretch" goal from the outset of the SDR program was to resolve medical disputes within 60 days.

Deloitte Consulting is pleased to report that the SDR program has met its primary objective of accelerating the medical dispute decision process. Under the SDR program, the average time was 59 days for resolving Police claims, an improvement of 175 days, and 63 days for resolving Fire claims, an improvement of 152 days. We view these results as remarkable

and a strong demonstration of how management and labor have worked cooperatively to ensure that injured workers are treated fairly and examined by appropriate medical specialists and that the process is actively managed to render timely decisions.

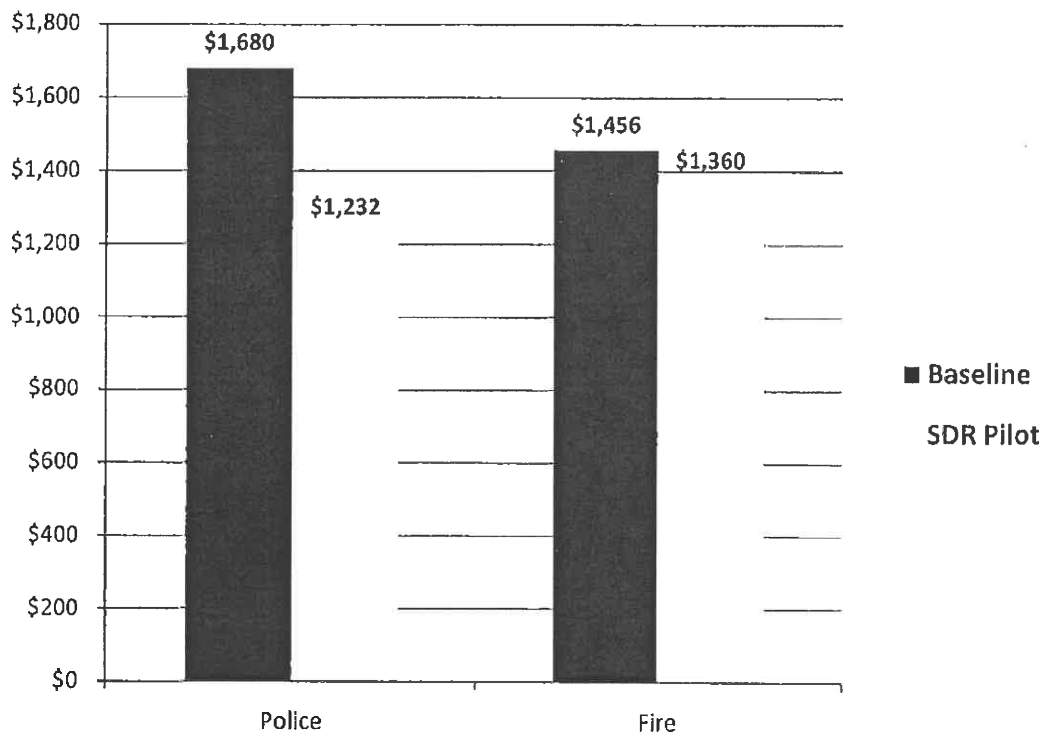


The Cost analysis of exams and related expenses under the SDR program, compared to historical costs of AME/QME exams and related expenses, also show significant improvement, even while providing IMEs in the SDR Program a “premium” cost incentive factor over the state regulated fee schedule.

- The average costs of historical Police claim AMEs/QMEs (including initial and supplemental exams/reports) were \$1,680. Under the SDR Program, Police IMEs averaged \$1,232, an improvement of 27%.
- The average costs of historical Fire claim AMEs/QMEs were \$1,456. Under the SDR Program, Fire IMEs were roughly \$1,360, an improvement of 7%.

This is a positive development, but we caution readers to be aware that the relatively small number of SDR claims and the large variability associated with exam types, number of issues to resolve (e.g. utilization review decisions, work-relatedness of injury/illness, return-to-work capabilities, permanent disability determinations), and whether supplemental exams are required, combine to compromise the ability to assign statistical confidence to this finding. The results of average costs moving forward could be volatile and not statistically relevant until a much larger sample has been accumulated to control for variances noted above.

Avg Cost of Baseline AME/QME vs. SDR IME Exams



A survey of SDR participants from both Police and Fire departments yielded mixed results. Of 33 potential Police and 19 Fire participants in the SDR process, only 8 LBPOA and 8 LBFFA members responded for an overall response rate of 27%. Highlights of completed surveys include:

- Half of the respondents had prior experience with the AME/QME process

- Of those with who participated in prior AMEs/QMEs, 3 rated their experience as "Good," while 4 rated their experience as "Poor"
- Rating of the Timing to Get an IME Appointment under the SDR Program yielded responses of 1 "Great," 7 "Good," 4 "Okay," 1 "Fair," and 1 "Poor"
- 64% of respondents rated the location of the IME as "Okay" or better
- 64% of respondents rated the Time Spent in the Waiting Room as "Okay" or better
- 71% rated a "Great" or "Good" response to the question: Did the Physician give you reasonable advice and treatment recommendations?
- 90% rated IME related staff helpfulness (not physicians) as "Okay" or better
- 77% rated the timeliness and responsiveness of the City's WC Division as "Okay" or better

Overall, the SDR program has worked very well for a previously untested initiative. Process improvement opportunities exist in updating the IME physician panel, IME "report card" development and subsequent communication to providers, and small enhancements to the timing parameters governing IME scheduling. These are all of a "fine-tuning" nature, and none at present have a significant negative impact on the system.

In Deloitte Consulting's estimation, the SDR Pilot Program has met its initial objectives of expediting resolution of medical disputes in WC claims for Police and Fire department sworn members. These are known to be among the most challenging claims given life-threatening exposures, presumptive medical conditions, cumulative trauma considerations, disability retirement provisions, and ongoing challenges of accommodating restricted-duty assignments in both temporary and permanent disability circumstances.

The City is strongly encouraged to extend the current SDR program with LBPOA and LBFFA members and to explore the feasibility of extending the program to other City bargaining units and departments. In addition to hard dollar cost reductions, significant indirect savings are available related to accelerated return-to-work and disability determinations and expedited access to appropriate medical care. This recommendation is made in full awareness of the considerable program development effort needed throughout the "meet and confer" process with bargaining units and the challenges associated with developing a robust network of medical specialists to expedite access to appropriate medical care. We

believe that the to-date efforts of LBPOA, LBFFA and City Attorney's and Manager's offices can be effectively leveraged with other groups to achieve similar positive results.

Details to support these findings and observations are included in the report that follows.

II. PROJECT SCOPE & BACKGROUND

The City has retained Deloitte Consulting to measure performance of a one-year SDR state "Carve Out" Pilot Program with "sworn" Police and Fire WC claimants, to replace the state-administered AME/QME processes with an expedited program of Independent Medical Exams.

This project builds on a prior Deloitte Consulting engagement in the first quarter of calendar year 2008 to establish a set of metrics and to identify baseline claim costs and characteristics for subsequent measurement of results within the SDR pilot program. The pre-Pilot baseline period for measurement spanned a 35-month period (2/1/2005-12/31/2007) and all sworn Police and Fire claims that had an AME or QME were reviewed and results compiled to determine average costs and lag times of critical case milestones. Readers are advised to reference Deloitte Consulting's report of March 5, 2008 for baseline metrics and initial observations.

As with the prior engagement, individual claims were reviewed using remote access to the City's iVOS WC claims management information system to document and validate action dates of:

- Employer knowledge of the injury/illness
- WC Claim Division receipt of claim
- Recognition of Dispute (claim delay or denial)
- WC Claims call to physician office for exam
- Exam appointment
- Completed exam
- Returned physician report
- IME billing and payment

Amounts paid for initial and supplemental IME exams were determined consistently with the pre-pilot baseline population. All LBPOA and LBFFA who participated in the SDR Program were included in the analysis (36 Police claims with 33 exams conducted, 19 Fire claims with 19 exams completed).

Deloitte Consulting spent time on-site at City offices from February 23, 2009 through March 3, 2009 to initiate the claims review and to meet with SDR stakeholders, including representatives from City Risk Management, LBFFA, City Attorney's Office, and the WC Division's Claims Manager, Supervisors and Claim Examiners who handle SDR claims. Interviews yielded positive perceptions of the program by all with some minor suggested improvements. These included allowance for more time to re-schedule exams if appropriate medical records cannot be delivered in time to the IME for review before the exam and better tracking and approval of IME fees to ensure compliance with medical report delivery timelines, i.e. receipt by the City within 30 days of exam completion. We found two instances where IME fees were not reduced to state fee schedule amounts when reports were late.

Deloitte Consulting designed and administered an anonymous participant satisfaction survey for all participants in the SDR pilot program. The survey was administered on-line and was open for the period of 4/7/09 – 5/8/09. Eight members each of LBPOA and LBFFA took part in the survey, a 27% participation rate. Highlights of the participant survey are contained in the Executive Summary section of this report and the complete survey results are found in the Appendix.

III. PROJECT FINDINGS & RESULTS

The SDR Pilot Program has met its primary goal of expediting resolution of medical disputes in Police and Fire WC claims. There are several critical actions and timeliness of specific tasks involved in achieving this accelerated process. Timely claim filing, early recognition of disputes, scheduling of exams with appropriate specialists and retrieval of binding medical decisions from Independent Medical Examiners all present opportunity for delay. The City's WC Division, Risk Management Department, City Attorney's Office and LBPOA and LBFFA leadership have all cooperated in ensuring that the SDR process is appropriately applied. Success in the program is largely a function of effective and timely communication among all these parties.

Following are measurements of specific tasks and timing in the SDR Program related to necessary actions described above.

- The average lag time between employer knowledge of injury/illness and City WC Division receipt of report was 1.6 days for Police and 8.8 days for Fire (average skewed by 3 claims taking 44, 33 and 60 days).
- The average lag time between when a medical dispute was recognized and the time the WC Claims Division called for an IME appointment was 7 days for both Police and Fire. This timeframe allows for effective IME specialist selection and physician rotation (to ensure selected physicians are not favored over others).
- The average lag time between when the first call was made to schedule and IME appointment and establishment of the appointment date and time was 4 days for Police and 3 days for Fire. This validates that IME physicians have been properly oriented to the program and its accelerated timeframes.
- The average lag time from initial call to schedule the IME appointment to the date of the exam was conducted was 24 days for Police and 27 days for Fire, both within the 30 day target range.
- The average lag time from the date of the completed IME to the date the physician's report was received was 30 days for Police and 36 days for Fire. This is a vast

improvement over the historical AME/QME process which took an average of 64 and 56 days for Police and Fire, respectively.

- IME Provider compliance with program timing parameters show significant improvement over the traditional AME/QME process but pose a continuing challenge to full compliance with current SDR requirements.
 - Upon removing delayed exams from the Police SDR population, the remaining claims (24) revealed 3 exams that were conducted beyond the 30-day requirement between the initial call from Claims to schedule the exam and the actual exam date.
 - Upon removing delayed exams from the Fire SDR population, the remaining 15 claims showed 3 exams that were conducted beyond the 30-day timeframe between initial call for scheduling and actual exam date.
- Finally, the overall timing process from the date a dispute is recognized to the date an IME report is received averaged 59 days for Police and 63 days for Fire. This effectively meets the program stretch goal of 60 days.

Exam Scheduling of IMEs can be challenging to meet employees' and physicians' availability and to manage and coordinate the process within SDR program timing requirements.

- The SDR process was initiated with 33 Police claimants. Five abandoned the process before completing the exam. Four of these abandoned claims were denials and one is attending an AME due to linkage of the 2008 injury to a prior condition not covered under the SDR program.

Of the 28 Police claimants who underwent an IME, 3 exams required rescheduling for the following reasons:

- 1 extended by 30 days to accommodate employee's schedule
 - 1 extended by 30 days due to physician surgery conflict
 - 1 extended by 2 weeks to accommodate employee's vacation
- The SDR process was initiated with 19 Fire claimants, all who completed IME exams. Five of these required rescheduling for the following reasons:

- 2 were delayed 2 weeks to accommodate employees' schedules
- 2 claimants forgot or otherwise missed the initial scheduled exam
- 1 claimant's appointment letter was returned for incorrect address

Although the SDR Pilot has met its primary objectives, opportunities for improvement to the program exist. These findings and subsequent recommendations are of a "fine-tuning" nature and do not represent major restructuring to the existing program.

- IME provider performance in the SDR program is ripe for measurement and communication. Those physicians who have not complied with program requirements should be "warned" and dropped if not compliant in subsequent exams.
- The City, LBPOA and LBFFA should consider expansion of the panel of IME physicians. Dermatology specialists were raised by multiple parties as a specific need area. Should the City consider expanding the program to other employee groups, this will be a critical function.
- More flexibility in the program around scheduling exam dates should be considered. We discovered a few instances where necessary medical information was not available to IME physicians by the time of the exam, requiring a supplemental report and sometimes another exam.

IV. RECOMMENDATIONS

As stated above, Deloitte Consulting makes the following recommendations in the context of a fine-tuning initiative. These will likely enhance service delivery, be more responsive to particular medical needs, and provide a roadmap for improving communications within the program.

1. Develop an IME Provider "Report Card." This should include reiteration of SDR program requirements, how many exams the provider conducted, how quickly exams were scheduled after solicitation, how timely exams were conducted, how often supplemental exams and reports were required, and most important: how useful the returned reports were in resolving medical disputes in question.
2. Expand the IME Provider Panel. This is especially important if the City decides to expand the program to other bargaining units and employee groups. Specialists should be targeted in the immediate Long Beach vicinity to accommodate claimant commuting concerns. (Riverside was cited by some to be too far to travel).
3. Allow more flexibility in scheduling of IMEs to ensure that appropriate medical history is available to the IME physician for review before the exam. This will mitigate the issue of supplemental exams and reports.
4. Internal claim audit functions should include more rigorous oversight of IME fees to panel physicians to ensure they "earn" the incentive percentage over state fee schedules for meeting program requirements. Conversely, IME fees should be reduced to state fee schedule limits when timing parameters are not met, and the non-compliant physician should be reminded that subsequent non-compliance could result in removal from the IME panel.

In conclusion, we congratulate the City, LBPOA and LBFFA for design and implementation of a previously untested "carve out" program from the state administered AME/QME process. The program has met or exceeded its initial objectives, and Deloitte Consulting supports the expansion of this program. We recognize the significant level of effort exerted by SDR process constituents in implementing the program and monitoring results on an ongoing basis. The SDR Pilot Program is an innovative initiative that has returned considerable benefits to both claimants and the

City, and it is likely to be benchmarked as a best practice by other California cities and municipalities. We appreciate having had the opportunity to analyze its effects.

V. CAVEATS AND LIMITATIONS

We understand that the City has provided us with all of the relevant information that would materially affect our report. To the extent that new information is provided, we reserve the right to add to our comments or revise them as deemed appropriate.

The comments, suggestions, and recommendations made in this report are based on our understanding of the California workers' compensation regulations as of today. However, if future legislative action materially affects workers' compensation benefits themselves or the delivery of those benefits, then our comments and estimates may no longer apply.

Deloitte Consulting has performed the work consistent with the scope outlined in the engagement contract with the City and in accordance with accepted standards of practice for the intended use as described in the **Distribution & Use** section. In preparing this report, it was assumed that persons competent in the areas addressed would utilize the report. Judgments as to the conclusions drawn should be made only after studying the report in its entirety.

Deloitte Consulting staff members are available to explain and/or amplify any matter presented herein subject to the terms in our engagement contract. It is assumed that an authorized user of this report will seek such explanation and/or amplification as to any matter in question.

In addition, the City acknowledges that Deloitte Consulting's engagement does not constitute an audit made in accordance with generally accepted auditing standards, the object of which is the expression of an opinion on the elements, accounts, or items of a financial statement. Deloitte Consulting's engagement is limited in nature and does not comprehend all matters relating to the City that might be pertinent or necessary. The report cannot be relied on to disclose errors or fraud should they exist.

VI. DISTRIBUTION AND USE

It is understood and agreed that Deloitte Consulting services may include advice and recommendations, but all decisions in connection with the implementation of such advice and recommendations shall be the responsibility of, and made by, the responsible employees or representatives of the City.

The report's conclusions are developed in the accompanying text, exhibits, and tables, which together comprise the report. This report is prepared solely for the internal use of the City of Long Beach and is intended to assist it in measuring the SDR program performance. It is not intended for any other purpose. In addition, because of the specific facts involved, this report should not be provided to, nor relied upon, by third parties. Any other use or distribution of this report must be preceded by our written consent.

This report should be considered in its entirety. If this report is distributed with our consent, it should be distributed in its entirety (with discussions, exhibits, and tables). Deloitte Consulting's project team is available to answer any questions that might arise in reviewing this report.

VII. APPENDIX – SDR PARTICIPANT SURVEY

SDR Pilot Program		
I am a member of:		
Answer Options	Response Frequency	Response Count
LBPOA	50.0%	8
LBFFA	50.0%	8
<i>answered question</i>		16
<i>skipped question</i>		0
Have you ever had a WC claim prior to 2008 while working within your department that involved a claim decision delay or medical dispute?		
Answer Options	Response Frequency	Response Count
YES	46.7%	7
NO	53.3%	8
<i>answered question</i>		15
<i>skipped question</i>		1
If yes, how do you rate your experience in this past, pre-2008 claim?		
Answer Options	Response Frequency	Response Count
Great	0.0%	0
Good	42.9%	3
Okay	0.0%	0
Fair	0.0%	0
Poor	57.1%	4
<i>answered question</i>		7
<i>skipped question</i>		9
If yes, can you estimate the time it took from when you learned of the claim's initial delay or denial, to the time it took to receive a binding medical decision that resolved the dispute?		
Answer Options	Response Frequency	Response Count
< 2 months	62.5%	5
2-3 months	12.5%	1
3-6 months	0.0%	0
6-12 months	0.0%	0
> 1 year	25.0%	2
<i>answered question</i>		8
<i>skipped question</i>		8

Was the dispute settled through the use of an Agreed Medical Examiner ("AME") or Qualified Medical Examiner ("QME")?		
Answer Options	Response Frequency	Response Count
AME	0.0%	0
QME	25.0%	2
Don't Know	75.0%	6
<i>answered question</i>		8
<i>skipped question</i>		8
SDR Pilot Program		
Time span to get an appointment:		
Answer Options	Response Frequency	Response Count
Great	7.1%	1
Good	50.0%	7
Okay	28.6%	4
Fair	7.1%	1
Poor	7.1%	1
<i>answered question</i>		14
<i>skipped question</i>		2
Convenience of the IME's location:		
Answer Options	Response Frequency	Response Count
Great	7.1%	1
Good	35.7%	5
Okay	21.4%	3
Fair	7.1%	1
Poor	28.6%	4
<i>answered question</i>		14
<i>skipped question</i>		2
Time spent in waiting room:		
Answer Options	Response Frequency	Response Count
Great	7.1%	1
Good	35.7%	5
Okay	21.4%	3
Fair	7.1%	1
Poor	28.6%	4
<i>answered question</i>		14
<i>skipped question</i>		2

Time spent in exam room:		
Answer Options	Response Frequency	Response Count
Great	7.1%	1
Good	57.1%	8
Okay	21.4%	3
Fair	0.0%	0
Poor	14.3%	2
answered question		14
skipped question		2
Waiting for tests to be performed:		
Answer Options	Response Frequency	Response Count
Great	7.1%	1
Good	57.1%	8
Okay	21.4%	3
Fair	7.1%	1
Poor	7.1%	1
answered question		14
skipped question		2
Waiting for test results:		
Answer Options	Response Frequency	Response Count
Great	14.3%	2
Good	50.0%	7
Okay	21.4%	3
Fair	0.0%	0
Poor	14.3%	2
answered question		14
skipped question		2
Did the Physician take enough time with you in conducting the exam?		
Answer Options	Response Frequency	Response Count
Great	38.5%	5
Good	38.5%	5
Okay	7.7%	1
Fair	0.0%	0
Poor	15.4%	2
answered question		13
skipped question		3

Did the Physician give you reasonable advice and treatment recommendations?		
Answer Options	Response Frequency	Response Count
Great	35.7%	5
Good	35.7%	5
Okay	7.1%	1
Fair	7.1%	1
Poor	14.3%	2
<i>answered question</i>		14
<i>skipped question</i>		2
Was other staff (nurses, medical assistants, receptionist) friendly and helpful to you?		
Answer Options	Response Frequency	Response Count
Great	28.6%	4
Good	42.9%	6
Okay	21.4%	3
Fair	0.0%	0
Poor	7.1%	1
<i>answered question</i>		14
<i>skipped question</i>		2
Please rate the IME facilities as follows: Neat and clean building		
Answer Options	Response Frequency	Response Count
Great	14.3%	2
Good	57.1%	8
Okay	21.4%	3
Fair	0.0%	0
Poor	7.1%	1
<i>answered question</i>		14
<i>skipped question</i>		2
Ease of finding where to go		
Answer Options	Response Frequency	Response Count
Great	21.4%	3
Good	42.9%	6
Okay	21.4%	3
Fair	7.1%	1
Poor	7.1%	1
<i>answered question</i>		14
<i>skipped question</i>		2

Comfort and Safety while waiting		
Answer Options	Response Frequency	Response Count
Great	7.7%	1
Good	69.2%	9
Okay	15.4%	2
Fair	0.0%	0
Poor	7.7%	1
<i>answered question</i>		13
<i>skipped question</i>		3
Regarding your 2008 claim, was the City's WC Division timely and responsive in their communications?		
Answer Options	Response Frequency	Response Count
Great	46.2%	6
Good	15.4%	2
Okay	15.4%	2
Fair	7.7%	1
Poor	15.4%	2
<i>answered question</i>		13
<i>skipped question</i>		3
If you answered Yes to Question 1, how would you compare your overall claim experience of 2008 under the SDR program to your prior claim experience?		
Answer Options	Response Frequency	Response Count
Great	11.1%	1
Good	11.1%	1
Okay	22.2%	2
Fair	11.1%	1
Poor	44.4%	4
<i>answered question</i>		9
<i>skipped question</i>		7

Do you have any specific suggestions to improve the SDR Program in the future?	
Answer Options	Response Count
	8
<i>answered question</i>	8
<i>skipped question</i>	8
<p>Following are suggestions to improve the SDR Program offered by survey participants who elected to answer the question.</p>	
<p>The claim acceptance procedure was very satisfactory for me. The IME handling the injury was also satisfactory. My concern is with Tri- Star the company overseeing the medical treatment and their interpretation of that treatment. My experience was less than desirable! The company was more concerned for the City of Long Beach well being than mine. Two letters authored from this company cited "rules" rather than alternatives to recommended treatment. It seemed they were more interested in cost savings than the health of the employee.</p>	
<p>I will address this, as I think this is part of the survey and questioning in which you are asking. My injury was immediately recognized as a workers' comp injury. For that I am thankful. The process and delay to get me repaired was questionable. It started with a health dept doctor telling me that my foot issue was merely flat feet. He even went as far as to give me Spenco shoe inserts. I kept them and took some photos. After showing him that the tendon in my ankle could be manipulated, by my fingers, he decided we should get an MRI. The films according to two doctors were poor in quality, but still both diagnosed a ruptured or torn posterior tendon, with surgery necessary. It was denied by workers comp, accompanied by a computer generated letter, written by a doctor I never met stating that the tendon would re-attach itself, thus denying surgery. The tendon retracted and balled up at the ankle for several months causing continual pain and discomfort. While we played the "let's see if it gets better game". This unnecessary delay caused the tendon to scar up under the ankle, making the surgery more complicated than it needed to be. According to my surgeon, the delay caused the tendon to ball up near the ankle, and once re-stretched for attachment left a void for tissue. The void was the reason that I had to be assigned a portable wound vac machine during recovery. I'm very happy to have been released to go back to my position, but have to say that I'm not happy with the process.</p>	
<p>I can't believe worker's comp isn't sued in federal court for incompetence, they are all jerks, and the city will do anything to deny a claim, even to a very good employee and do anything to violate their rights and make sure they are unhappy and stay injured</p>	
<p>I would question the decisions of the TRI-STAR company as they disallowed my Doctors request (actually the W/C Doctor) for certain treatment</p>	
<p>None. All the WC Adjusters have been fair, competent, and pleasant. Thank you.</p>	
<p>I felt the process was very fair and they treated me decently. I have no complaints. I felt fairly treated and so far it seems to have gone pretty smoothly.</p>	
<p>Let the doctors treat us and not get everything approved. The procedure that was denied for me cost \$50.00 and was delayed several months for peer review. The other option was surgery. This process is a waste of time, either the city trusts their doctors or not. Another option would be to approve patient treatment to a certain amount so the Doctors don't have to wait to give you a shot that will provide relief. Your process is too slow at the patients discomfort.</p>	

Allow for a process that enables the employee to go out and pick the best doctor for the situation. Treatment for an injury requires the best in the field. I realize this places a financial burden on the city. However, when an employee is dealing with an injury that has the potential to end their career, the employee deserves the best care possible. This would include allowing the employee to seek multiple opinions prior to consenting for surgery. Thank you.



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A CARVE-OUT PROGRAM THAT SOLVES WORKERS' COMPENSATION WOES

August 31, 2015

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The Problem: A Slow, Confusing and Frustrating System

Sergeant Miller was faced with a dilemma: wait until the TPA authorized his surgery and risk exacerbating his injury and prolonging his recovery time, or follow the advice of the orthopedic surgeon and risk having to pay for the surgery and physical therapy out of pocket. Sergeant Miller injured his right shoulder when a drunk driver swerved his car into Miller's patrol car. Sergeant Miller's injury seemed slight at first, but the pain became more severe as the days passed. Sergeant Miller sought medical treatment and reported to the doctor that he was injured while at work. Due to the "delay" in seeking medical treatment, Sergeant Miller's employer's third party administrator (TPA) rejected his workers' compensation (WC) claim. Sergeant Miller waited roughly 90 days until the TPA changed its position and

accepted Sergeant Miller's WC claim. The TPA directed Sergeant Miller to an industrial doctor for diagnosis and treatment. After five visits, Sergeant Miller had no improvement in his shoulder. Sergeant Miller sought a second opinion from a local orthopedic surgeon, who recommended surgery to repair his damaged shoulder. Sergeant Miller requested approval from the TPA for the surgery, but the TPA refused.

Sergeant Miller sought assistance from his employer, the city's human resources manager and his union, but all said they could do nothing to speed up the TPA's decision. Frustrated, Sergeant Miller hired an attorney to force the TPA to make a decision. Sergeant Miller experienced more delays, yet another examination by an agreed medical examiner, and legal expenses. Still, after several months, he had received no treatment for his injured shoulder.

Sergeant Miller was forced to use his accrued sick and vacation time while he waited for medical treatment. He also incurred enormous medical expenses, paying for his own orthopedic surgeon. Finally, after two years of maneuvering the conventional WC system, the TPA reluctantly approved Sergeant Miller's shoulder surgery. Due to missed work time, his department was forced to pay overtime to cover his shifts.

Everyone involved in Sergeant Miller's work-related injury – the department, his employer, the TPA, the medical providers – felt helpless and unable to move his WC claim toward resolution and return him to work. This case is fictional, in part, yet it demonstrates the inherent problems of California's statutory WC system.

The Solution: A Carve-Out Program

The statutorily authorized WC carve-out programs (WCCPs) enable both employers and union employees to take control

of their WC claims processes by creating and negotiating a WC system unique to their employment setting.

Labor Code Section 3201.7 allows employers and unions in unionized settings to negotiate alternative WC procedures and create WCCPs. The labor code does not limit the **design** or **structure** of WCCPs, so simple or comprehensive WCCPs are acceptable.

Only a few public sector union WCCPs have been implemented, most of which are basic. Perhaps the most widely cited example is the City of Long Beach program, created by the police and fire unions and the City in 2008. For Long Beach, the primary goal was to “expedite resolution of medical-related disputes in WC claims.” To achieve this, Long Beach’s plan called for the development of a medical provider network (MPN) that incentivizes independent medical examiners with slightly higher patient-visit fees to expedite patient visits, diagnoses and treatment for Long Beach employees participating in the WCCP. Utilization of an MPN eliminates the need for statutory examinations that substantially slow down the claim process. Using the MPN-only program, Long Beach was able to achieve its goal. However, MPN-only programs, like the Long Beach plan and others, are fairly basic, rather than **comprehensive** WCCPs, and do not address other aspects of the WC process perceived to be problematic.

The Fresno Police Officers’ Association/RLS Program

After years of watching their members endure the hardships of a broken WC system, the leadership of the Fresno Police Officers’ Association (FPOA) made a decision to address the problems. FPOA studied existing simple WCCPs, but opted to take a more comprehensive and global approach like those used in several private sector WCCPs. The FPOA, along with the assistance of Rains Lucia Stern, PC (RLS), created a unique public agency WCCP that addressed every aspect of

the WC process. The FPOA program exceeds the scope of all existing public agency WCCPs and is the first program of its kind in California. The comprehensive Fresno WCCP uses an MPN, but also creates a claim ombudsperson to communicate with the injured employee, the employer's TPA and the medical provider to resolve complaints promptly. The Fresno WCCP also uses medical-legal case nurse advocates; a joint committee (JC) of labor and management to oversee, manage and modify the WCCP; and a panel of arbitrators and mediators. Significantly, the JC is composed of members from the Association, the Department, the City, the TPA and a professional arbitration director, and it identifies and selects ombudspersons, nurse advocates, mediators and arbitrators. The goals identified by the comprehensive FPOA WCCP include: expedite claims handling, reduce claim costs and ultimate loss development, expedite employee return-to-work time, improve employee morale, reduce overtime costs and avoid the statutory claim dispute process of the WC Appeals Board (WCAB).

Under the simple, MPN-only WCCPs, a party unhappy with treatment decisions is forced to litigate such disputes using the WCAB process. In contrast, the comprehensive FPOA WCCP uses a team approach to resolve disputes early, through the skills of the ombudsperson, nurse advocate and, if necessary, a mediator and arbitrator. This team approach results in substantial savings in time and resources for employees and the employer, and promotes an environment of communication, cooperation and trust between employees and employers not found in traditional WC settings. The comprehensive FPOA WCCP also benefits the City by creating significant savings in time and resources. In turn, those savings are shared with the members of the FPOA.

The FPOA, the City and RLS worked collaboratively over several months to achieve consensus on the details of the design and implementation of the WCCP. Comprehensive

agreements have been negotiated to clearly define the rights of the FPOA, individual members and the City.

Conclusion

If Sergeant Miller had worked for an employer with a comprehensive WCCP, he would have had an ombudsperson and nurse advocate communicating with him, the TPA, and his medical providers within a few days of his injury to ensure that he received prompt medical attention, diagnosis and treatment. Any disputes he encountered along the way would have been addressed and resolved quickly within the framework of his WCCP. In fact, statistics reported by the State of California's Division of Workers' Compensation in its *Alternative Dispute Resolution Carve-Out Program Report* for the calendar years 2004 to 2011 show that in 2011, 89% of carve-out claims were resolved in one year or less, and 94% of the claims were resolved before the mediation stage.

Any association, regardless of size, will likely benefit from a comprehensive WCCP, which is probably the best solution to a slow, confusing and frustrating WC system.

Notice: Making a false or fraudulent workers' compensation claim is a felony subject to up to five years in prison or a fine of up to \$50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.

About the Author

Roger D. Wilson is an attorney with Rains Lucia Stern, PC, who practices in the firm's collective bargaining and legal defense practice groups. He represented FPOA in collectively bargaining its workers' compensation carve-out program.

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(4) Number of Litigated Claims

California Code of Regulations, title 8, section 10203(b)(11) requires carve-outs to submit data on the number of claims resolved before mediation, at or after mediation, at or after arbitration, at or after the Workers' Compensation Appeals Board, and at or after the Court of Appeal (Table 4.1). A resolved claim for the purpose of this report is defined in section 10203(b)(9) as one in which ultimate liability has been determined, even though payments may be made beyond the reporting period.

In 2011, carve-out programs reported resolving 19 claims using litigation. Fourteen claims were resolved at mediation, one at arbitration, four at the WCAB, and none at the Court of Appeals. Of the litigated claims, non-construction programs litigated only four claims at mediation; the rest were litigated by construction carve-outs (See Appendix A: Table 4.1).

Table IV.4.1: Number of Claims Resolved by Type 2004-2011

Calendar Year (Reporting Year)	2004* (4th)	2005* (4th)	2006 (4th)	2007 (4th)	2008 (4th)	2009 (3rd)	2010 (2nd)	2011 (1st)
Reporting Programs (Total) (#)	13	15	18	19	20	23	24	24
Total Claims (#)	1,203	2,334	2,434	2,861	3,832	3,799	2,898	3,100
Resolved (#)	866	1,984	2,161	2,673	3,472	3,527	2,634	2,750
Resolved (%)	72%	85%	89%	93%	91%	93%	91%	89%
Before Mediation (#)	510	934	1,953	2,488	3,351	3,419	2,588	2,731
Total Litigated (Disputed) (#)	32	42	103	185	121	108	46	19
Total Litigated (Disputed) (%)	2.7%	1.8%	4.2%	6.5%	3.2%	2.8%	1.6%	0.6%
At Mediation (#)	20	29	70	152	83	80	39	14
At Arbitration (#)	7	6	26	18	23	14	1	1
At WCAB (#)	5	5	7	15	14	14	6	4
At Court of Appeal (#)	0	2	0	0	1	0	0	0

*The number of claim resolved and the number of claims resolved with litigation were underreported for 2004-2005.

(5) The number of claims resolved prior to arbitration

8 C.C.R. section 10203(b)(11) requires ADR programs to report the number of claims resolved prior to arbitration (Table 5.1). For the purposes of this report, two stages of litigated claims are considered resolved prior to arbitration: (1) the number of claims resolved before mediation, and (2) those resolved at mediation. In 2011, ADR programs resolved 2,745 claims prior to arbitration, which was 89 percent of all claims filed. Prior to arbitration, construction programs resolved 774 claims (99.4 percent) and non-construction programs resolved 1,971 claims (100 percent) (See Appendix A: Table 5.1).

To: City of _____ Labor Groups- Police, Fire and General

RE: **Workers' Compensation-Alternative Dispute Program**

Meeting Date & Location: _____

The City of _____ is exploring with the City's bargaining units to enter into an Alternative Dispute Resolution (ADR) program pursuant to Labor Code Section 3201.7 as part of a Labor-Management Worker's Compensation Agreement.

The goals of this program are to develop a fair and balanced alternative dispute resolution system for worker's compensation cases that will assist in speedy recovery of the injured worker, facilitate the expeditious delivery of benefits, prevent abuse of the workers' compensation system and reduce delays, uncertainty, and protracted litigation.

We have scheduled a meeting and require you and/or your designee to join us on _____ at the _____. The meeting will begin at _____.

This will be an informational meeting to explain the ADR process and how it applies to you and your members and to provide an opportunity to address any concerns or questions you may have regarding the program.

We wish to express our thanks for taking time from your busy schedule to join us at this meeting.

If you have any questions regarding the upcoming meeting, please feel free to contact me at _____ or _____.

We look forward to having this program implemented in the very near future.

Sincerely,