

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



Practical Advice for Unions and Employers

prepared for the
California Commission on Health and Safety and Workers' Compensation
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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.

¹⁵ See Labor Code sections 4650 and 5814.

¹⁶ See Labor Code section 4553.

¹⁷ Labor 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 |

