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The “Carve Out”: A Progressive and Economical Alternative to Traditional Workers’ Compensation

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The **Public Law Group’s®** innovative approach to solving institutional problems is exemplified by its **Carve Out Initiative**, headed by James Libien, Of Counsel to the Firm. As expressly permitted by State law, the **Carve Out Initiative** seeks to bring labor and management together in order to implement a win/win, local alternative to the State’s woefully deficient Workers’ Compensation system.

James R. Libien, Of Counsel

Jim Libien is a certified specialist in workers’ compensation and for 38 years has represented both public and private employers and insurance carriers before the Workers’ Compensation Appeals Board. He was the California State Bar’s 2008 Workers’ Compensation Defense Attorney of the Year, is past president of the California Workers’ Compensation Defense Attorneys Association, and was the fifth recipient of the prestigious Warren L. Hanna Lifetime Achievement Award. He has also served as a pro tem judge at the Workers’ Compensation Appeals Board and as a mediator.

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I. INTRODUCTION

Workers' Compensation was initiated in California in 1913, by passage of the Boynton Act. On June 8, 1976, it was subsequently included in Article XIV Section 4 of the State Constitution. That Article promised a system that would "accomplish substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character." The goal was to institute a no-fault, streamlined administrative process that was oriented towards efficiently and effectively getting injured workers compensated and back to work.

Evidently recognizing that the State system was not working adequately, the Legislature in 1993 enacted the first of a series of bills allowing employers and unions to implement an alternative. The first such bill was implemented through Labor Code Section 3201.5, which permitted employers and employees in the construction industry to engage in collective bargaining for alternative workers' compensation procedures. That provision was followed by the addition of Labor Code 3201.7 to the code in 2002 that first allowed for carve outs in the aerospace and timber industries, and which was followed by an amendment in 2003 to allow carveouts in any unionized industry (public or private).

In 2004, both sections 3201.5 and 3201.7 were amended to allow the employer and the union to negotiate *any* aspect of benefit delivery as long as the employees are eligible for group health and non-occupational disability benefits. In 2012, section 3201.7 was further amended to allow the State of California itself to enter into a carve out.

II. THE PROBLEM

Many practitioners and administrators agree that the state system does not satisfy the constitutional mandate referred to above. Medical costs are out of control. There are more than 59,000 applications pending for independent medical review, and only four percent (4.0%) of those applications have been acted upon. Qualified Medical Examiner panels are seriously delinquent. Workers are not receiving necessary treatment. Litigation is rampant, and is slowing the administrative process. The entire system is needlessly adversarial.

III. THE SOLUTION

If you qualify, a carve out is the answer.

A. WHAT IS A CARVE OUT?

A carve out is a statutorily authorized method for providing workers' compensation benefits by utilizing alternative dispute resolution practices. The statutory benefits of temporary disability/permanent disability and medical treatment for the effects of an injury are unchanged when a carve out is utilized.

Any or all of the following are potential components of a carve out:

- (1) Alternative dispute resolution processes;
- (2) Utilization of an agreed list of providers of medical treatment, who may be the source of all medical treatment;
- (3) Utilization of an agreed list of medical evaluators, who may be the exclusive source of medical evaluations;
- (4) A joint labor-management safety committee;
- (5) A light duty, modified job or return to work program;
- (6) A vocational rehabilitation or retraining program designed by the parties; and/or
- (7) A sharing of the savings.

B. REQUIREMENTS TO PARTICIPATE

Under Labor Code Section 3201.7, to utilize a carve out the union at issue (1) has to be a bona fide labor organization that is the recognized or certified exclusive bargaining representative of the employees of the employer, and actually represents those employees in California as to wages, hours and working conditions; (2) whose officers have been elected by secret ballot, or otherwise in a manner consistent with Federal law; and (3) is free of domination or interference of any employer, and has received no improper assistance or support from any employer.

In industries other than construction, the employer must have an annual workers' compensation premium of at least \$50,000 or the self-insured equivalent in order to utilize a carve out. Groups of employers must have an annual workers' compensation premium of at least \$500,000 or the self-insured equivalent in order to utilize a carveout.

C. ADVANTAGES OF UTILIZING A CARVE OUT

A carve out is considerably less expensive, more efficient, and less adversarial than the traditional workers' compensation program.

As can be seen by the following chart, statistics reported by the State of California's Division of Workers' Compensation in their Alternative Dispute Resolution Carve Out Program Report for the Calendar Years 2004-2011 show that in 2011, 89 percent of carve out claims were resolved in one year or less. Ninety-four percent of the claims were resolved before the mediation stage. This is due to the critical work of an ombudsman who monitors the cases from the time of injury and assists in resolving all of the issues that arise, thereby eliminating the need for litigation.

Because of this high rate of quick resolution, significantly reduced reserves will be recognized. Both applicant's attorneys' and defense attorneys' fees are also much reduced because of early

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resolution of claims by alternative dispute resolution methods, particularly the use of an ombudsman. Further savings occur because there is no need for utilization review, independent medical review or independent bill review.

Number of Claims Resolved By Type 2004-2011

Calendar (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

In the short run employers will notice reduction of costs in all phases of administration of the program with the exception of moneys required to administer the alternative dispute resolution process.

In the long run, with the cooperation of and participation by the union, additional large sums can be saved by reductions in future reserves coupled with a program to attack current reserves.

It is estimated that an employer can save 40 to 50 percent of their workers’ compensation costs by the institution of a carve out program. Unions and employers who have entered into carve-outs typically arrange to share the resulting savings, thus giving unions a strong incentive to buy into the carve-out concept.

In addition to the monetary savings, a carve out is a “win/win” for labor and management for the following reasons:

- (1) Medical treatment and medical evaluations are a lot more predictable and occur much quicker than in the traditional system;
- (2) Safety is enhanced by establishment of a joint labor/management safety committee;

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- (3) There is less lost time;
- (4) There is less need for and therefore less cost for replacement workers;
- (5) The adversarial relationship between labor and management is reduced and replaced with a spirit of cooperation; and
- (6) Once a formula is determined for sharing of savings, those savings can be used for any legitimate business purpose.

IV. CONCLUSION

The state system is engulfed in regulation, inconsistent in result, needlessly expensive, and adversarial to a fault. For qualifying unionized employers, a carve out is a viable alternative that meets the constitutional mandate of accomplishing substantial justice in all cases expeditiously, inexpensively and without encumbrance. This alternative is not only considerably less expensive than the state system, but is more effective and promotes a better labor/management relationship. If an employer and union qualify, they should explore this alternative. Please contact Jim Libien for more information.



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