



## THE PUBLIC SECTOR

### 'Carve-out': a win-win alternative to a broken workers' comp system

by James R. Libien

On November 1, 2013, Vons and Super A Foods reached an agreement with seven Southern California United Food and Commercial Workers (UFCW) local unions to remove 22,000 workers from the California workers' compensation system. The parties implemented what's called a "carve-out" agreement, a collectively bargained system for adjudicating industrial injuries through alternative dispute resolution (ADR).

Why did labor and management in the grocery industry's often-contentious labor relations environment come together on this creative alternative? Because they recognized that the workers' comp system is broken—it's slow, cumbersome, expensive, and adversarial. The carve-out is a win-win alternative, available by mutual agreement to all unionized California employers with 50 or more employees and \$50,000 in workers' comp premiums that meet the minimum requirements. Labor Code Section 3201.7 authorizes carve-outs in any industry meeting the minimum requirements, and Labor Code Section 3201.5 authorizes them in the construction industry.

#### ***Carve-outs hold promise for the future***

Vons and Super A Foods are only the newest participants in the carve-out alternative. In 2011, carve-outs in all industries covered more than 77 million person hours and \$2.4 billion in payroll. Carve-outs have saved millions of dollars by greatly reducing the need for lawyers and avoiding the customary delays and contentiousness of an adversarial system.

Carve-outs hold the potential to achieve efficiency with respect to an otherwise broken workers' comp system for many unionized employers, including those in the public sector. For employees, they demystify the system for getting back to work and expedite compensation for injuries. And they're good for the employer-union relationship, presenting win-win alternatives that typically reinvest some of the savings for the betterment of employees.

#### ***How it works***

Carve-outs prominently feature ADR practices, with the ombudsman serving as a confidential counselor to employees to help resolve claims and address treatment and compensation issues early on.

Carve-out participants attest that ombudsmen do a good job in demystifying the system. By vigorously assisting applicants and helping coordinate care, they help resolve claims and get workers back to work at the initial informal stage of dispute resolution. That results in less time off work, elimination of the need for replacement workers, and a happier workforce. The few cases not resolved by the ombudsman are almost always resolved through mediation. Cases that aren't resolved through an ombudsman or mediation are handled quickly by arbitration. An appeal to the Workers' Compensation Appeals Board (WCAB) is available in the rare cases that aren't resolved through arbitration.

Lawyers for carve-out applicants also play a role, advising clients, working with the ombudsmen to facilitate discussion, preserving workers' rights, and litigating cases that aren't resolved through arbitration.

#### ***Entering into carve-out agreements***

An eligible union first files a petition with the administrative director of the California Division of Workers' Compensation. If the petition is deemed valid, the union and the employer are advised that they have one year to negotiate a carve-out agreement.

The agreement sets up panels for medical treatment, evaluation, and safety as well as an ADR process. As is the case with traditional workers' comp, carve-outs are funded through self-insurance or insurance and provide employees with all state-mandated benefits. Reduced litigation and the efficiencies of medical treatment, including the lack of a need for independent medical review, reduce administrative costs.

#### ***Bottom line***

The current workers' comp system is expensive, unresponsive, litigious, and frustrating. The historic goal of providing scheduled benefits on a timely basis isn't being met. The legislature has now provided for an alternative that eliminates these problems. Qualifying employers or unions will be looking at that alternative more frequently in the years ahead.



The author can be reached at Renne Sloan Holtzman Sakai LLP in San Francisco, [jlibien@publiclawgroup.com](mailto:jlibien@publiclawgroup.com). ❖