



SECURED ALTERNATE DISPUTE RESOLUTION (CARVE-OUT) BY: SCOTT A. O'MARA

WHAT IS AN ADR (CARVE-OUT)?

The 1993/1994 Senate Bill 853 by Leroy Green opened up the door for a small group of employers and unions/associations to pull themselves out of the established workers' compensation system by usage of a **ADR (CARVE-OUT) PROGRAM**. With this program, the parties, employer, and Union/Associations agree to a list of medical providers, medical reviewers and judicial reviewers to evaluate the need for medical treatment and levels of permanent disability. This agreement may use ombudspersons, mediators and arbitrators. The arbitrator has the role of the judge and in many situations is a retired workers' compensation judge.

IS A SECURED ADR (CARVE-OUT) RIGHT FOR MY ASSOCIATION?

As we are aware, the California workers' compensation system has long been designed to constitutionally provide the availability of medical care to cure or relieve from the effects of a work-related injury. Since that constitutional mandate, there have been several legislative changes such as utilization review which have allowed employers to second-guess the treatment recommendations of the treating physician and thus delay or deny recommended care. And some of the, California injured workers have been severely impacted as a result since an adverse utilization review decision cannot be appealed through a workers' compensation administrative law judge. The **ADR (CARVE-OUT) PROGRAM** could be legislative alternative to this problem. However, the question becomes: **IS AN ADR (CARVE-OUT) RIGHT FOR MY ASSOCIATION?**

This circles back to the concept of an **ADR (CARVE-OUT)**. The participants in the ADR (Carve-Out) are not just the employer and the injured worker, but include medical providers and some ADR (Carve-Out), ombudspersons and arbitrators. The Union/Association considering an ADR (Carve-Out) needs to examine what the current status is of their member's relationship with the employer. In some situations, the employer has implemented a favorable way to provide care and treatment for the injured worker by electing not to participate in a restrictive medical providers network (MPN) or by judiciously limiting utilization review to certain medical procedures which do not fall within the community standard of care. These forward-thinking employers are proactive and allow greater access to medical care without the necessity of an ADR (Carve-Out). In this situation, the ADR (Carve-Out) may not be a beneficial tool for the Union/Association and may actually cause harm for the injured worker.

However, for those Unions/Associations whose employer utilizes an MPN in order to restrict medical providers and/or questions every treatment recommendation and forwards the recommendation through Utilization Review for ultimate delay or denial, an ADR (Carve-Out) could make sense. However, we are recommending a new concept called **SECURED ADR (CARVE-OUT)**. In a Secured ADR (Carve-Out) system, the Union/Association would have full input and information as to the identity of approved medical providers and medical reviewers as well as ombudspersons and judicial arbitrators. Traditionally, these decisions have been made solely by the employer to the detriment of workers. However, employers have a vested interest in establishing an ADR (Carve-Out) (as do Unions/Associations). This reality incentivizes employers to cede some

SECURED ADR (CARVE-OUT) ALTERNATE DISPUTE RESOLUTION (ADR)

control over these critical decisions to Unions/Associations. And, with Union/Association control over the identity of medical providers, medical reviewers, ombudspersons and arbitrators, a Secured ADR (Carve-Out) suddenly becomes a tool for independence of the entire process. This is the central idea behind a **SECURED ADR (CARVE-OUT)**.

With the Secured ADR (Carve-Out), a list of all doctors on the medical provider’s board will be selected and constantly maintained, contractually and reviewed by the Union/Association and the employer. Information will be obtained from workers as the interaction with the selected doctors in order to ensure that these practitioners are willing and able to provide the medical care necessary. Further, regarding ombudspersons and arbitrators/mediators, a similar periodic review of commitment to impartiality will be undertaken. Any medical providers or ombudspersons/arbitrators found to have an unacceptable bias will be challenged through the contractual interactive process.

Unions/Associations may require counsel in order to draft and implement the **SECURED ADR (CARVE-OUT)** agreement. More importantly, counsel must be involved on a case-by-case basis with each injured worker. This occurs from the outset of the case since an attorney-client privilege exists between counsel and injured worker which do not exist with the ombudsperson, mediator or arbitrator. The attorney can provide a broader spectrum as to the case, medical needs and what options are available. These options would include treatment, functional restrictions on work due to the medical problem and whether or not permanent physical incapacity is likely to result in a medical retirement. This kind of legal advice is paramount to the development of each case under a **SECURED ADR (CARVE-OUT)** though sorely lacking in a traditional employer-mandated ADR (Carve-Out).

In summary, Unions/Associations must have a system in place which creates accountability through periodic medical provider and ombudsperson/arbitrator reviews. Moreover, the **SECURED ADR (CARVE-OUT)** prioritizes worker education regarding both short-term treatment goals and long-term impacts on continued employment. For those associations which decide that an ADR (Carve-Out) is a viable alternative for their members, the **SECURED ADR (CARVE-OUT)** concept can provide an educational template and an ongoing internal review system which benefits the Union/Association and its membership. Some employers attempt to have the worker give up very important rights by waiving rights per Labor Code §4605 (*see <https://law1199.com/wp-content/uploads/2023/10/NEWSLETTER-2023-ISSUE-11.pdf>*)



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