



## TEMPLATE USED BY SOME EMPLOYERS

BY: SCOTT A. O'MARA

The City of Fresno and the Fresno Police Officer Association's agreement for the Workers' Compensation Alternate Dispute Prevention and Resolution Program needs to be reviewed in detail. (This agreement is used as a potential template of a contract with some Employees' Associations).

Approved June 23, 2015 with 18 pages of information.

On page 1, last paragraph, it states the parties are anticipating that the Alternate Dispute Resolution Program (ADR) will generate savings to the City and that the savings derived from the implementation program will be shared with the Fresno Police Officer's Association (FPOA).

On page 2, under Purpose and Intent of the agreement, is that the agreement will allow for prompt and efficient access to all medical workers compensation benefits including quality medical treatment, time and return to work and resolve the worker compensation claims in an efficient manner. It also reflects the parties seek to eliminate and reduce waste, excessive costs and delays in delivering medical care.

Since this agreement was signed on June 23, 2015, a news article was issued on June 16, 2021 that there has been an increase in costs in workers compensation during the past 10 years. The writer of this article is Brianna Calix and the title of the article is "*Are Fresno police officers 'gaming the workers' comp system'? Chief orders investigations for fraud*". Further in the article Brianna Calix reflects Councilmember Esmeralda Soria who stated that since the year 2012, the police department's workers' compensation costs have increased from \$4.96 million to \$11.4 million in the upcoming fiscal year of 2022. Councilmember Soria had called for an audit of the program and Brianna Calix of the news article stated the audit was apparently never done. The article also quoted the assistant city manager, Georgeanne White, that the audit was never completed because it directly conflicted with the intent of the Alternate Dispute Resolution Program.

On page 7, Section 1.7 there are the parameters of the Joint Committee (JC) that the agreement established (which holds the exclusive authority to administer the ADR Program) including but not limited to, the authority to enforce the terms of the agreement, establish policies managing the implementation of the ADR Program, and promulgate and modifying rules of the program. The JC shall be made of three members from the Peace Officers Association and three member selected by the City. It also indicates the city manager or designee shall select the two members, and the chief of police shall select one member.

The next element on page 8 is what the ADR Program will engage in and power of same. It states that the Joint Committee (JC) will establish rules and procedures to guide the internal governess of the JC.

Establishing these rules will require a lot of planning and consideration. Anticipate that the Employees' Association will seek their counsel and further opinions as to establishing the rules. This will require a substantial understanding by the Employees' Association as to the rules and potential impact. It also indicates that the rules established and procedures will guide the internal governments of the Joint Committee. The Joint Committee pursuant to the Fresno agreement shall meet as they deem necessary, but not less than once each month for the first six months, and then quarterly after that. It also indicates the strong statement that the Joint Committee will establish rules and procedures to guide the internal government to the Joint Committee. The document also anticipates disagreement at times between the members of the Joint Committee. Any disputes that arise between members of the Joint Committee where action must be taken shall be submitted to a three member Dispute Resolution Committee.

This committee is comprised of the ADR director, one JC member from (in this case) the Police Officer Association and one from the City. This shows that the Dispute Resolution Committee is established in a manner that substantially benefits the employer. On page 8, under 2.1, it articulates that any disputes involving workers compensation claims that fall within the jurisdiction of the ADR Program including medical disputes shall be subject to the dispute prevention and resolution process. It states on page 9 that the prevention and resolution process involves the ombudsperson, ADR director/mediator, arbitration and appeal by petition of reconsideration to the workers' compensation appeals board.

Of great significance on page 9 under 2.4 the ADR director/mediator shall oversee the work of the ombudsman and other ADR professionals on an ongoing basis. This requires an in depth understanding as to the ADR Program and potential of same. The members from the Employees' Association that are going to be on these committees are going to have to undergo substantial training and anticipate that the people that they are working with that represent the employer have had years of the same training and experience in these areas that are being reviewed.

The time commitment for the Employees' Association committee members and preparation will be demanding.

Page 9, Section 2.5, states the ombudsperson shall consider the interest of the City and the injured members in performing his/her duties. (But again, the ombudsperson is being paid for by the employer). On page 10, the first full sentence is specific in this case that the City shall compensate the ombudsperson and his/her services are free of cost to the injured FPOA member.

Arbitrators are responsible for adjudicating all disputes between the injured employee and the city arising out of the submission of processing workers compensation claims. Again, the level of misstated judicial impartiality is to be established by three arbitrators that are selected and assigned to the arbitrator panel by the JC. On page 11, under the second paragraph, the ombudsperson shall contact each injured employee within the jurisdiction of the program as soon as possible and no later than five days of receipt of the notice of injury. It states conversation with the ombudsperson and the injured member or the ombudsperson and the city or the third party administrator is confidential.

The challenge that exists here is the worker does not have a complete understanding as to the injury or the body parts impacted (*See Newsletter 2022 Issue #11, Balanced Communication with the Doctor*). The discussion with the ombudsperson or other people may be too narrow and do not reflect value of additional subjective complaints. On page 12 it indicates that if the ombudsperson is unable to resolve a dispute this individual may request mediation of the dispute and the ombudsperson at his/her discretion may move the case forward to resolution in the best interest of the program. Then relative to the development of the records on page 12, under 2.12, in the event that any dispute is not resolved in mediation the matter may be set for arbitration at the request of the party. The ombudsperson as soon as practical will appoint an arbitrator from a list of arbitrators that is chosen by the JC. Lack of full development of the records will be the result. The ombudsperson does not represent the injured worker.

A high risk for the worker is that the ombudsperson shall appoint the arbitrator. The ombudsperson again is paid for by the employer. The lack of objectivity of the ombudsperson and the dependency on the ombudsperson regarding the employer is a factor of risk and concern to the injured worker.

The Employees' Association board members that will be participating on the JC will need specialized training and information. The participants selected by the employer may have years of experience and knowledge in these areas. There are some interesting issues that will manifest, and without a greater understanding of these issues harm can occur to the members of the association. These issues and use of particular judges and doctors are major factors in the Carve-Out System.

The Employees' Association must review and maintain information on the:

1. Ombudsperson
2. ADR Director/mediator
3. Arbitrator/Judges
4. Joint Committee members
5. Forensic doctors

This Employees' Association needs to make sure that the recommendations and decisions are not bias or with prejudice.

The injured worker's balanced communication with the doctor is a necessity for them to obtain medical care to cure or relieve the effects of the job injury. This balanced communication removes the employers, at times misplaced, attack of fraud against the employee. (*See Newsletter 2022 Issue #11, Balanced Communication with the Doctor*).



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### THE LAW OFFICES OF SCOTT A. O'MARA

2370 Fifth Ave.  
San Diego, CA 92101  
  
4344 Latham St. – Ste. 250  
Riverside, CA 92501-1766  
  
1-800-LAW-1199  
(1-800-529-1199)  
619-583-1199  
951-276-1199  
[www.law1199.com](http://www.law1199.com)

### BOBBITT, PINCKARD & FIELDS, A.P.C.

8388 Vickers St.  
San Diego, CA 92111  
  
4344 Latham St. – Ste. 250  
Riverside, CA 92501-1766  
  
858-467-1199  
[www.coplaw.org](http://www.coplaw.org)

**NOTICE:** *Making a false or fraudulent Workers' Compensation claim is a felony subject to up to 5 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.*

