



# ADR STRATEGIC PARTNERS, INC.



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## COLLECTIVELY BARGAINED ALTERNATIVE DISPUTE RESOLUTION (ADR) INSURANCE

The New York state legislature has adopted an ADR amendment to the workers compensation law to allow unions to collectively bargain for workers compensation insurance for union members that is less adversarial, more efficient and eliminates most liability labor law cases.

American Global (AG) and ADR Strategic Partners, Inc (ADRSP) have joined forces to offer a proven ADR insurance program to union contractors, owners and developers that participate in a project labor agreement in the Hudson Valley. This turnkey program is now contracted and supported by one of the largest construction insurance companies. It has a proven track record of multi millions in documented savings for union contractors and developers. The Building Trades Councils in Westchester, Putnam and the Hudson Valley have also shared in the savings and benefits. Projects that might have gone non union were successfully bid and successfully built by union contractors as the result of this ADR component.

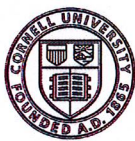
The high cost of construction insurance in New York remains labor law section 240 (i), the infamous "scaffold law". Trial lawyers have abused the workers compensation and general liability laws by directing medical treatment to establish and document damages with the object of scoring a big payout for an injured worker and the trial lawyer.

The AG-ADRSP program controls losses by focusing on the best treatment and care for workplace construction injuries with an emphasis on superior professional medical care for an injured worker with the stated goal of a return to work. Ask any of our union construction workers who suffer a workplace injury, except for a catastrophic or totally debilitating injury, "whether they want to stay out of work to gamble to hit a trial lawyer promised jackpot or whether they want to receive the best treatment and return to work?" What we have found with this Hudson Valley ADR program is it has created a culture wherein our union members choose to return to their good paying union construction jobs and maintain a productive career. In Westchester, Putnam and the Hudson Valley all unions and their members participate in our ADR programs. The proven result is more union construction and lower costs.

In summary, ADR benefits union contractors by lowering the cost of workers compensation and general liability insurance; benefits unions by adding an important benefit to project labor agreements and by sharing in the savings; and by union workers by giving them prompt excellent care so they can return to their union job, better support their families and maintain their benefits and productive careers.

ADR must be collectively bargained by law. Non union contractors cannot take advantage of ADR. Trial lawyers ability to make easy money at the expense of destroying lives by promising a pot of gold by turning productive union construction workers unnecessarily into disabled non productive workers is controlled. Trial lawyers get 1/3 of settlements with very little work because New York labor law does not have a negligence standard. Sacrificing the careers of productive union construction workers is the result.

With ADR our union members maintain their careers, wages, pension, annuity, medical for themselves and their family and other union benefits. Union contractors, owners and developers that participate in a project labor agreement with ADR save money and achieve superior results.



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# Alternative Dispute Resolution [ADR] for Workers Compensation in Collective Bargaining Agreements: An Overview

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# Alternative Dispute Resolution [ADR] for Workers Compensation in Collective Bargaining Agreements: An Overview

## Abstract

This paper addresses the argued benefits for cost savings and efficiency of alternative dispute resolution [ADR] procedures for workers compensation. Particular focus is on legislative “carve-outs” that authorize collectively-bargained ADR procedures for the construction industry in New York and other states.

Given the particular pressure to contain rising workers’ compensation costs—and the burden that these costs represent for the construction industry—ADR procedures are one of the most important advantages of unionized construction and, in particular, Project Labor Agreements [PLAs]. The negotiated alternative procedures, subject to Workers’ Compensation Board [WCB] approval, use an expedited and non-adversarial process that can potentially save considerable project time and costs.

## Keywords

alternative dispute resolution, ADR, workers compensation, construction, costs

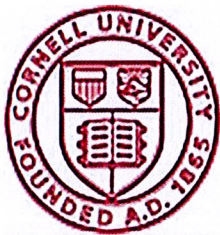
## Comments

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**Alternative Dispute Resolution [ADR] for Workers Compensation  
In Collective Bargaining Agreements:  
An Overview**

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April 2012



# **Alternative Dispute Resolution [ADR] for Workers Compensation In Collective Bargaining Agreements: An Overview**

**Fred B. Kotler, J.D.**

This overview addresses the argued benefits for cost savings and efficiency of alternative dispute resolution [ADR] procedures for workers compensation. Particular focus is on legislative “carve-outs” that authorize collectively-bargained ADR procedures for the construction industry.

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## I. Scope of ADR use and principal approaches

Several states have adopted Alternative Dispute Resolution [ADR] procedures for workers compensation claims. This is a response to several issues impacting the traditional statutory system: rising health care costs, the volume of contested claims, delays in processing those claims, concerns about the accessibility and adequacy of medical care, and the cost of litigation. The legislation seeks to reduce administrative costs and case backlog and to improve administrative efficiency. Three principal ADR approaches are mediation, arbitration, and use of an ombudsman. Various states authorize use of one or more of these approaches.

Mediation: A neutral, third-party mediator is charged with bringing the parties closer, to facilitate a process that may lead to settlement of a dispute. The mediator does not, however, have the power to make a decision that settles the dispute. Seventeen states use mediation to resolve workers compensation issues.<sup>1</sup>

Arbitration: A neutral, third-party arbitrator hears and makes a determination based on evidence presented by the parties. Arbitration is typically less formal than court proceedings or administrative hearings. The arbitrator is usually experienced in workers compensation issues. Under some statutes, the parties can determine whether the arbitrator's decision will be binding. Statutes may also define an appeals process to an appropriate appellate body or the state workers compensation agency. These eight states use arbitration: California; Illinois; Massachusetts; Minnesota; New York; Ohio; Oregon; and Texas.

Ombudsman programs: An ombudsman [or ombudsperson] is charged with providing information, conducting fact-finding, and guiding the injured worker through procedures. The aim is to protect the injured worker's interests, and to help the worker make well-informed and considered choices for handling of a claim. Early and timely intervention by an ombudsman has the likely effect of reducing the number of issues that might otherwise require resolution.<sup>2</sup> Fifteen states<sup>3</sup> use ombudsman programs. Some states may also provide for the ombudsman to serve as a mediator.

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<sup>1</sup> These states are: Colorado, Florida, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oregon, South Dakota, Tennessee, Vermont, and West Virginia.

For a list of state statutes and case law references, see Part 14 PROCEDURAL LAW, Chapter 125 ALTERNATIVE DISPUTE RESOLUTION, 7-125 *Larson's Workers Compensation Law* Section 125.02, LexisNexis.

<sup>2</sup> Part 14 PROCEDURAL LAW, Chapter 125 ALTERNATIVE DISPUTE RESOLUTION, 7-125 *Larson's Workers Compensation Law* Section 125.01, LexisNexis; this section notes the views of administrative officials.

See also Review of *Carve-Outs in Workers' Compensation: An Analysis of the Experience in the California Construction Industry*, by David I. Levine, Frank W. Neuhauser, Richard Reuben, Jeffrey S. Petersen, and Cristian Echeverria. *Industrial & Labor Relations Review*, Vol. 59, No. 1. Available at: <http://digitalcommons.ilr.cornell.edu/ilrreview/vol59/iss1/83>

<sup>3</sup> Alabama, Arizona, Arkansas, California, Florida, Kansas, Kentucky, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas. See Part 14 PROCEDURAL LAW, Chapter 125 ALTERNATIVE DISPUTE RESOLUTION, 7-125 *Larson's Workers Compensation Law* Section 125.02, LexisNexis.



## II. ADR for workers compensation in collective bargaining agreements: “Carve-outs”

Legislation in eleven states authorizes labor and management in the construction industry to establish ADR procedures for workers compensation through collective bargaining. These are the so-called “carve-outs” enabling industry representatives to set-up tailored programs that, in their view, best serves the needs and interests of their workforce and their businesses.

“Carve-out” programs – also called Collective Bargained Workers Compensation [CBWC] programs – are an alternative to, but not independent of, the state supervised insurance program. Statutes commonly impose reporting requirements and authority over appeals and final determination of claims may reside with state officials. The state’s role is primarily to provide oversight of the alternative process – to act more as watchdog than governing body.<sup>4</sup>

The intent is for the parties to realize a range of benefits.<sup>5</sup> These include:

- Realizing substantial cost savings
- Improving the delivery of medical benefits without reducing benefits to injured workers
- Expediting claims processing and promoting administrative efficiency
- Reducing lost-time injury days and enabling the injured worker to return to work earlier
- Significantly reducing litigation
- Fostering a more cooperative and far less adversarial environment
- Providing immediate information and prompt, appropriate care to the injured worker

Flowing from these are additional advantages of ADR over traditional litigation:

### A highly participatory process:

Parties in mediation, for example, can talk directly and informally with each other; issues can more easily be explored and in a way that promotes earlier resolution of a dispute;

### Greater freedom to fashion unique and appropriate remedies:

The court system provides limited remedies for dispute resolution. These include the awarding of monetary damages, specific performance, or an injunction. In mediation, by contrast, the parties are free to shape an appropriate remedy that fits the situation, a practicality that promotes a prompt and sensible resolution.

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<sup>4</sup> See *Construction Industry Service Corporation* at <http://cisco.org/collectively-bargained/>

<sup>55</sup> These states permit collectively bargained “carve-outs”: Maine [1993]; Massachusetts [1992]; New York [1995]; Maryland [1997]; Pennsylvania [1996]; Minnesota [1995]; Kentucky [1994]; Florida [1993]; California [1993]; Hawaii [1995]; Nevada [2009]. William K. Ecklund, COLLECTIVELY BARGAINED WORKERS' COMPENSATION: SMACNA Council of Chapter Representatives, June 2007, available at: [http://www.pinp.org/files/lmcc/CBCW\\_Seminar.pdf](http://www.pinp.org/files/lmcc/CBCW_Seminar.pdf)

Also see: *IMPACT: Ironworker-Management Progressive Action Cooperative Trust*, “Talking Points,” <http://www.ilga.gov/senate/Committees/WorkersCompensationReform/IronworkerManagementProgressiveActionCooperativeTrust-PublicTestimony.pdf>; [www.impact-net.org](http://www.impact-net.org)



Parties have more control over the process:

An example is the selection of the neutral third party.<sup>6</sup>

Participation in the ADR program is voluntary:

Typically it is at the option of the employer – contractor, construction manager or project owner.

### **III. Why collectively-bargained ADR programs are focused on the construction industry**

While some states, most notably California, have extended “carve-out” authority to parties in other industries, the construction industry has been the focus for collectively-bargained ADR. The reasons are straightforward: construction is a particularly dangerous industry and workers compensation rates are correspondingly high. Jobsite fatalities are as high as 1,200 per year, a rate significantly higher than for manufacturing. The risks are inherent in the work and compounded by the presence of multiple contractors and crafts on the site at a given time.<sup>7</sup>

Construction is a highly competitive industry and contractors seek relief from the high costs related to compensation insurance and medical care. The need for prompt medical care, the efficient processing of compensation claims, and the reduction of time lost from injuries is an obvious concern for both contractors and workers.

Workers compensation premiums under the traditional system are based on payroll. Unionized contractors, whose workforce may be both more highly skilled and better paid than nonunion workers, may suffer a competitive disadvantage and pay disproportionately into the state fund. A collectively-bargained alternative program can be based not on payroll but on a more equitable basis of hours worked.<sup>8</sup>

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<sup>6</sup> Jeffrey Schieberl, J.D., “Alternative Dispute Resolution: Using ADR to Resolve Worker’s Compensation Claims,” *Graziadio Business Review / Pepperdine University / Graziadio School of Business and Management*, Volume 9, No. 4 [2006], available at: <http://gbr.pepperdine.edu/2010/08/alternative-dispute-resolution/>

<sup>7</sup> “The fatality rate in construction is “equal to 12.3 fatalities per 100,000 full-time equivalent workers. This compares to a fatality rate of between 2.3 and 3.3 per 100,000 workers in various manufacturing sectors. And while the fatality rate has declined dramatically in most industries, it has remained stubbornly high in construction... the fundamental disorganization of construction sites makes improving safety particularly challenging.” Memorandum, Victoria L. Bor, Sherman, Dunn, Cohen, Leifer & Yellig, P.C. to US Army Corps of Engineers re: *Solicitation of Comments on the Potential Use of Project Labor Agreements [PLAs] for Large Scale Construction Projects Within Orange County, New York*, February 18, 2010.

<sup>8</sup> *Construction Industry Service Corporation*



#### IV. New York State's authorization of collectively-bargained ADR programs

##### A. The 2001 Cornell ILR study

New York State enacted legislation in 1995 authorizing collectively bargained ADR procedures for workers compensation for the unionized sector of the construction industry.<sup>9</sup> Initially a pilot program, the legislation directed the School of Industrial and Labor Relations at Cornell University to conduct a study evaluating the “use, costs, and merits” of ADR.

Cornell ILR professors and associate deans, Ronald Seeber and Robert Smith, assisted by researcher Timothy Schmidle, studied the ADR programs under four collective bargaining agreements and examined claims both for and against ADR. The Cornell team reviewed data on over 6000 injuries, interviewed ADR signatories, and surveyed more than 3000 workers to assess the workers' experiences with the medical, insurance, and procedural elements of the various programs. The Cornell ILR report, *An Evaluation of the New York State Workers' Compensation Pilot Program*, was completed in December 2001 and submitted to the New York State Workers' Compensation Board.

The report articulated several key findings that endorsed the legislative authorization of ADR for workers compensation. The points are quoted here.<sup>10</sup> The full summary is included as Appendix A.

##### Number of disputes

“Injuries that occur under ADR are not more likely, and in some cases are less likely, to lead to a dispute.”

##### Dispute resolution

“Injured workers generally rate the ADR system highly and the ADR system concludes cases more quickly.”<sup>11</sup>

##### Costs

“ADR is associated with lower medical costs, but not lower benefits.”

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<sup>9</sup> Chapter 491 of the Laws of 1995, *NY CLS Work Comp § 25*, Section 2-c. Collective bargaining; alternative dispute resolution

<sup>10</sup> Seeber, R.L., Schmidle, T.P., & Smith, R.S. (2001). *An evaluation of the New York State workers' compensation pilot program for alternative dispute resolution*. Ithaca, NY: Institute on Conflict Resolution, <http://digitalcommons.ilr.cornell.edu/icr/5>, at 7-10.

<sup>11</sup> While the authors note certain limitations on the scope of the data, they clearly state that “the consistency of the findings regarding ADR's impact bolster the conclusion that ADR does lead to faster claims closing.” *Ibid* at 87.

### Medical care

"ADR and Control Group workers were generally satisfied with the medical care they received and there were no significant differences between the groups."

### Support for the programs

"Interviews with ADR signatories and other ADR officials - representatives from unions, management, and insurance organizations - are highly supportive of ADR in workers' compensation.

"On the whole, a high degree of satisfaction was expressed by all parties regarding the experience to date with ADR (even by those signatories who indicated that they were skeptical of ADR at the onset of the program)."

Citing that "the alternative dispute resolution system for the resolution for certain construction industry claims has been successful for employers and workers...", the 1995 legislation was amended in 2010 to make permanent the use of ADR for workers compensation claims.<sup>12</sup>

## **B. Statutory requirements**

New York State statutes articulate the approval and reporting requirements of a collectively bargained ADR program. Workers Compensation Law Section 25, 2-c is the enabling legislation. ADR program requirements are found at both Section 25, 2-c and within Workers Compensation Law Section 314. *[Relevant sections are included infra as Appendix B.]*

Collective bargaining agreements, according to the statutes, are permitted to

- establish dispute resolution procedures including but not limited to mediation and arbitration;
- identify the agreed managed care organization or a list of authorized providers for medical treatment;

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<sup>12</sup> BILL NUMBER:A9898: TITLE OF BILL: *An act to amend chapter 491 of the laws of 1995 amending the workers' compensation law relating to permitting the establishment of an alternative dispute resolution system to resolve workers' compensation claims through collective bargaining agreements, in relation to making such provisions permanent*

*PURPOSE: Makes permanent the alternative dispute resolution system to resolve workers' compensation claims through collective bargaining agreements.*

*SUMMARY OF PROVISIONS: Section one permanently extends the alternative dispute resolution system for certain workers' compensation claims.*

*JUSTIFICATION: The alternative dispute resolution system for the resolution for certain construction industry claims has been successful for employers and workers.*

Available at: <http://open.nysenate.gov/legislation/bill/A9898-2009>



- define benefits for injured workers, dependents, or survivors that supplement benefits provided under the traditional system;
- outline obligations and procedures for
  - a light duty, modified job, or return to work program;
  - a vocational rehabilitation or retraining program; and
  - worker injury and illness prevention programs and procedures.<sup>13</sup>

The ADR programs are subject to approval by the Chair of the New York State Workers Compensation Board. The program's details, incorporated within the collective bargaining agreement, are submitted for review at least 30 days prior to the program's proposed start date.<sup>14</sup> Consistent with the Board's watchdog status, there is a continuing duty to report: employers are obligated to submit a collective bargaining agreement to the Board annually and whenever renegotiated.<sup>15</sup>

Programs must meet or exceed standards established for the state program. The proposed ADR program cannot "in any way diminish or change any benefits to which an employee, or his or her dependents, or survivors may be entitled pursuant to the provisions of this chapter."<sup>16</sup>

The ADR process must follow a series of due process and recording keeping requirements including: adequate and timely notice of proceedings; fair and practical arrangements for mediation and arbitration; maintenance of records for all claims; and reporting of injuries to the Board. The legislation also states that administrative costs, including costs for arbitration, are the responsibility of the employer.<sup>17</sup>

The statutes favor arbitration as the last step for resolving disputes. The collective bargaining agreement may establish the arbitrator's decision as final and binding; the decision is submitted to but not then reviewable by the Workers Compensation Board. An appeal may be filed within 30 days and heard within the state's court system.<sup>18</sup>

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<sup>13</sup> Section 2-c, subsection (c)

<sup>14</sup> WORKERS' COMPENSATION LAW ARTICLE 2. COMPENSATION, *NY CLS Work Comp § 25* (2012) Section 2-c. Collective bargaining; alternative dispute resolution, subsection (f)

See also TITLE 12. DEPARTMENT OF LABOR, CHAPTER V. WORKERS' COMPENSATION, SUBCHAPTER A. GENERAL PROVISIONS, PART 314. ALTERNATIVE DISPUTE RESOLUTION OF CLAIMS, § 314.2. Review process for collective bargaining agreements, subsection (a).

<sup>15</sup> § 314.2 (b) "Subsequent to its original submission, employers must submit to the office of the chair a copy of their collective bargaining agreement annually and whenever it is renegotiated."

<sup>16</sup> Section 2-c, subsection (b)

<sup>17</sup> § 314.2 (e)

<sup>18</sup> § 25, 2-c, subsection (d); § 314.3

### C. Self-insurance and insurance carrier plans

The statutes provide for employers to choose coverage provided either by a self-insurance or an agreed insurance carrier plan.<sup>19</sup> This section provides examples of both types of plans currently in operation in New York State.

#### i. *The Electrical Employers Self Insurance Safety Plan [EESISP]*

The Joint Industry Board of the Electrical Industry in New York City - International Brotherhood of Electrical Workers Local 3 and affiliated contractors – negotiated and received approval to operate a collectively-bargained ADR program in 1996, soon after New York State authorized such legislative “carve outs.”

The operation and administration of the program, the *Electrical Employers Self Insurance Safety Plan [EESISP]*, involves both ADR and managed care and is the largest ADR program in the state, have provided useful experience, information on efficiencies, costs savings, and overall best practices.

EESISP Director Jean L’Allier presented these program efficiencies based on statistics compiled for 2004-2011:

- 1) 99.96% of the 24,507 filed cases were resolved without mediations or arbitrations;
- 2) The 24,507 cases filed generated one appeal from an arbitrator’s decision to the 2<sup>nd</sup> Department and the arbitrator’s decision was upheld;<sup>20</sup>
- 3) Over the period, for every \$1.00 paid in indemnity benefits, EESISP spent .39 cents in medical benefits, a ratio far better than industry averages;

Director L’Allier also cites the 2001 Cornell ILR study that reviewed EESISP data as stating that the “average time from opening to closing a case in the ADR program was *137 days faster than the traditional workers compensation system.*” [Emphasis added]<sup>21</sup>

As an alternative to litigation of workers compensation claims, EESISP administrators note the following ADR best practices:

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<sup>19</sup> § 314.2 (c)

Article 4, Section 50 (3a) and part 317 of Title 12 NYCRR of the Workers’ Compensation Law permits group self-insurance plans, otherwise known as self-insured trusts, self-insured consortiums, association trusts, or group employer plans. For a discussion of self-insurance procedures and risks, see *New York State Insurance Fund* at [http://ww3.nysif.com/Workers\\_Compensation/About\\_Workers\\_Compensation/Risks\\_of\\_Self\\_Insurance.aspx](http://ww3.nysif.com/Workers_Compensation/About_Workers_Compensation/Risks_of_Self_Insurance.aspx)

<sup>20</sup> *Memorandum, 11/14/11, Jean L’Allier, Director, EESISP* Of 24,507 claims filed during this period, there were 872 medication hearings and 83 arbitration hearings.

<sup>21</sup> *Ibid.*



ADR provides a useful administrative model in a system that involves a high volume of cases, with repetitive issues and little controversy

Maximum efficiency results from a limited number of key personnel, authorized, oriented and trained to resolve disputes quickly rather than engage in litigation tactics

Routine cases are best resolved when a single advocate for claimants regularly interacts with claims administrators

ADR combined with managed care “provides the best chance to achieve desirable return to work scenarios... [because] a closed panel of higher quality but more experienced providers leads to better clinical outcomes, better return to work results, and lower total costs...”<sup>22</sup>

The EESISIP managed care program “uses the same network of doctors as our participants have access to in their major medical plans” but at negotiated rates that are lower than are paid within the statutory system.<sup>23</sup>

*ii. Insurance Carrier Plan: Westchester and Hudson Valley [NY] ADR Program: Aon's Report*

The Westchester / Hudson Valley ADR program is an insurance carrier-based plan negotiated between the Construction Industry Council of Westchester and Hudson Valley [New York] and the Building and Construction Trades Council of Westchester and Putnam Counties and in effect since January 2007.

The agreement designates an ADR Program Administrator and a Joint Labor-Management Oversight Committee to oversee the program's operation.

The Program Administrator and Broker, Aon Risk Solutions, is the program's direct contact with the Workers Compensation Board, has operational responsibility for program implementation and serves under the direction of the Joint Labor-Management Oversight Committee. The Oversight Committee, comprised of representatives from participating employers and unions, is the policy and ultimate decision-making authority. The program's key dispute resolution components are Ombudsperson, Mediation, and Arbitration.<sup>24</sup>

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<sup>22</sup> *Characteristics of A Successful Alternative Dispute Resolution Program*, Jean L'Allier, Director, and Vito Mundo, Counsel, EESISIP, 2008.

<sup>23</sup> Memorandum, 1/17/12, Joint Industry Board counsel Vito Mundo.

<sup>24</sup> *A Collectively Bargained Workers' Compensation Alternative Dispute Resolution (ADR) Program, Construction Industry Council of Westchester And Hudson Valley, Inc., et al., and Building and Construction Trades Council of Westchester and Putnam Counties, New York*, executed January 26, 2007.

Aon Global Risk Consulting (Aon) reviewed the performance of the ADR Workers Compensation Insurance Program. Aon's report, *Westchester ADR Program Cost Analysis as of 12/31/11*, issued March 19, 2012, is an analysis of the cost of workers compensation claims and allocated loss adjustments expenses (ALAE). The report is particularly useful because the New York State Workers' Compensation Board, as stated above, does not track ADR data.

Program administrative and claims handling costs are not included. As stated:

The loss costs in this analysis are limited to the cost of claims and ALAE and do not include other costs such as claims handling, administrative costs, or any other costs associated with insurance programs. All losses in this analysis are on an unlimited basis.<sup>25</sup>

Aon examined two ADR carve-out programs that are part of Project Labor Agreements [PLAs: *discussed below*] for two significant public projects in the Hudson Valley region: the New York City Department of Environmental Protection Ultra-Violet Light Disinfection Facility and the New York State Department of Transportation I-287 project.

Aon found "excellent loss results..."

Based upon approximately \$168 million of payroll within these [two] programs, the projected total ultimate loss is expected to be in the range of \$4MM. This result has been compared to an estimated \$18MM industry expected loss costs for traditional WC results over a five year period from 2006 to 2011 for these projects.<sup>26</sup>

For the upcoming Tappan Zee Bridge project, in a letter dated April 5, 2012 from Jack J. Frazier, Senior Vice President – Production, Aon Risk Solutions to Allan M. Paull, Senior Vice President, Tishman Construction Corporation, Aon stated that, assuming similar performance,

... In light of our experience, we can conservatively estimate savings of between 10% and 40% of traditional Expected Loss Factors to be anticipated.<sup>27</sup>

Aon concluded that "PLA ADR Workers Compensation, coupled with a well-run collectively bargained safety program/loss mitigation program, and drug testing (pre-hire, random, and post-accident) will yield substantially lower Workers Compensation costs."<sup>28</sup>

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<sup>25</sup> Aon Risk Solutions, Global Risk Consulting, Actuarial and Analytics, *Westchester ADR Program Cost Analysis as of 12/31/11*, issued March 19, 2012, at 4.

<sup>26</sup> April 5, 2012 letter from Jack J. Frazier, Senior Vice President – Production, Aon Risk Solutions to Allan M. Paull, Senior Vice President, Tishman Construction Corporation

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*



## V. Data from other ADR “carve-out” states: Minnesota and California

Minnesota and California are two of the eleven states<sup>29</sup> that authorize collectively-bargained ADR for workers compensation program. Data on claims and cost comparisons from these two states are included here for illustration and because the New York State Workers Compensation Board does not track data on ADR programs in New York.

### A. Minnesota

Minnesota’s collectively-bargained ADR program, the Union Construction Workers Compensation Program, has been in operation since 1997. A 2009 report from the Minnesota Department of Labor and Industry [DLI] makes these comments echoing the earlier Cornell evaluation of ADR in New York:

The Union Construction Workers Compensation Program was designed to be simpler and less adversarial than the state system... The UCWCP uses a dispute resolution process that is far simpler than the state’s, with a single path and fewer steps. The UCWCP also has slightly lower denial rates and lower costs, and there is no evidence of greater worker dissatisfaction.<sup>30</sup>

An earlier [October 2007] DLI memorandum, *Construction Collective Bargaining Agreement Claims and Cost Comparison*, noted the following:

The effectiveness of the CBA program can be assessed by comparing various workers’ compensation measures with available data about the construction industry...

Overall, construction employers in the CBA program, compared to all construction industry employers, have slightly fewer claims, pay significantly lower benefits per claim, have claims that require vocational rehabilitation less often, and have fewer claims disputes. These results [based on CBA annual data from 2003 and 2004] are consistent with a shorter average duration of indemnity benefits, in which workers are more likely to return to work without requiring additional services. The comparisons...show that:

The indemnity claims rate per \$1 million of payroll is about 18 percent lower among CBA employers;

The overall claims rate per \$1 million of payroll is 5 percent to 10 percent lower among CBA employers;

Total incurred benefit costs per \$100 of payroll are about 40 percent lower among CBA employers;

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<sup>29</sup> See fn 5 above

<sup>30</sup> *Oversight of Workers Compensation*, Report of the Program Evaluation Division, Office of the Legislative Auditor State of Minnesota, February 2009, available at <http://www.auditor.leg.state.mn.us/ped/2009/workcompsum.htm>



Average benefits paid per claim are about 32 percent to 36 percent lower among CBA employers;<sup>31</sup>

## B. California

California enacted its carve-out for the construction industry in 1993 and, following ten successful years of collectively-bargained ADR programs, authorized similar carve-outs for other unionized industries.<sup>32</sup>

The Southern California Contractors Association [SCCA] references a report of the California Workers' Compensation Institute [CWIC]<sup>33</sup> that compared closed claims from 1993-1999 of an insurance company carve-out program with "Standard Industry Results" and found "a 25 percent reduction on average length of claims and a 39.5 percent savings on average total claim costs."<sup>34</sup>

The NECA West ADR program of the National Electrical Contractors Association [NECA] and the International Brotherhood of Electrical Workers [IBEW] claims

...pure loss results that are 23% below the California industry average, and the loss ratio for the NECA program has been at approximately 53% [over a 7 year period]. NECA's recent independent actuarial report indicates that the reduced pure loss and DCCE for NECA are attributable to its successful ADR program.<sup>35</sup>

NECA offers the following data comparing ADR with non-ADR programs on cost savings, frequency of litigation, length of disability, and length of claims:<sup>36</sup>

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<sup>31</sup>

<http://www.ilga.gov/senate/Committees/WorkersCompensationReform/IronworkerManagementProgressiveActionCooperativeTrust-PublicTestimony.pdf> at 8.

<sup>32</sup> 65A Ca Jur Work Injury Compensation § 588; also see [http://www.workerscompensation.com/compnewsnetwork/news/broadspire\\_first\\_alt\\_dr\\_process.html](http://www.workerscompensation.com/compnewsnetwork/news/broadspire_first_alt_dr_process.html); a useful and comprehensive resource guide for the California system is provided by the State of California Department of Industrial Relations, CARVE-OUTS: A GUIDEBOOK FOR UNIONS AND EMPLOYERS IN WORKERS' COMPENSATION [2004], at: <http://www.dir.ca.gov/chswc/CARVEOUTSGuidebook2004.pdf>

<sup>33</sup> California Workers' Compensation Institute: <http://www.cwci.org/> Per the CWCI website: The California Workers' Compensation Institute [CWIC] is a private, non-profit corporation of insurers and public and private self-insured employers that monitors trends and analyzes workers compensation data.

<sup>34</sup> Eugene Zondlo and Gary Hamilton, "What you can do about Workers' Comp rates", Southern California Contractors Association, SCCA's ADR Program, [http://www.sccaweb.org/workers\\_comp.htm](http://www.sccaweb.org/workers_comp.htm)

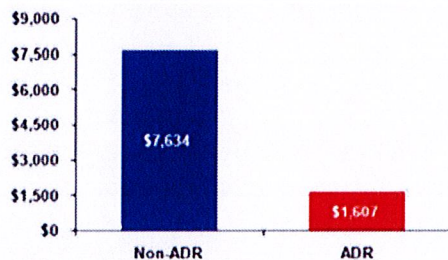
<sup>35</sup> <http://www.necawest.com/whyadr.htm>

<sup>36</sup> *Ibid.*



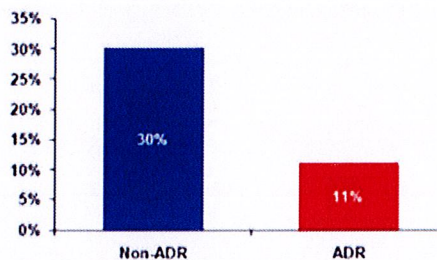
## Benefit to Insurers

Average Paid – Closed Claim Study 2003



Source: PointSure Insurance Services (2003)

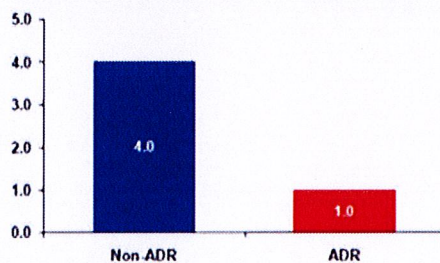
Frequency of Litigation



Source: California Workers' Compensation Institute (March 2003)

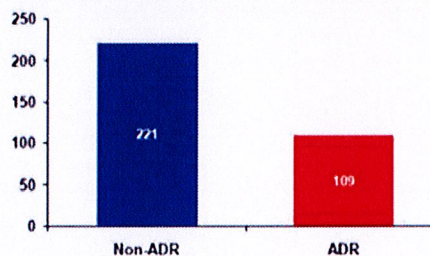
## Benefit to Workers & Employers

Average Temporary Total Disability Weeks



Source: PointSure Insurance Services (2003)

Average Claim Life Span in Days  
(Includes Contested & Non-Contested Claims)



Source: PointSure Insurance Services (2003)



## VI. ADR for Workers Compensation and Project Labor Agreements

Given the particular pressure to contain rising workers compensation costs – and the burden that these costs represent for the construction industry – ADR for workers compensation is one the most important advantages of Project Labor Agreements – or PLAs. *ADR procedures are permitted in New York State only when established through collective bargaining. And a PLA is a particular type of collective bargaining agreement.*<sup>37</sup>

A PLA is a pre-hire, project-specific agreement that standardizes contract terms among various crafts for the duration of the project. It is a valuable construction management tool that is properly viewed as a “job site constitution” for labor relations on the project. It represents a particularly high level of labor-management cooperation and planned approach to the job.

Project planners – contractors, owners, and labor – can together strategize ways to minimize disruption and inconvenience to the public for a range of construction or renovation projects involving highways, police and fire stations, bridges, airports, schools, courthouses, office buildings, and other public and private facilities.

ADR for workers compensation operates within this cooperative framework. PLAs ban strikes and lockouts and necessarily include dispute resolution provisions to deal with contract and jurisdictional issues. Joint labor-management committees monitor safety and provide an avenue for ongoing communication to promptly respond to problems that arise during the project.

PLAs assure that contractors will have access to a highly-trained, skilled labor pool through union referral. And there is a close connection between worker training and worker safety – as much as a 25% lower fatality rate for construction workers has, for example, been shown in states with prevailing wage laws.<sup>38</sup>

PLAs provide cost savings, flexibility and efficiency through standardization of contract terms among various crafts and, typically, through adjustments to hours of work, the number of paid holidays, shift differentials, and apprentice-journeyman ratios.

The cost savings provided by collectively-bargained ADR procedures for workers compensation add value to PLAs for owners and contractors. ADR procedures add to a PLA’s efficiency by more promptly addressing the needs of injured workers and by contributing to a positive and cooperative work environment.

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<sup>37</sup> Kotler, F. B. (2009). *Project labor agreements in New York State: In the public interest* [Electronic version]. Ithaca, NY: Cornell University, School of Industrial and Labor Relations — Extension Division, Construction Industry Program. <http://digitalcommons.ilr.cornell.edu/reports/22/>, at 20.

<sup>38</sup> Kotler, F. B. (2011). *Project labor agreements in New York State II: In the public interest and of proven value* [Electronic version]. Ithaca, NY: Cornell University, School of Industrial and Labor Relations, at 19. Available at: <http://digitalcommons.ilr.cornell.edu/reports/36/>

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