

Vecchione, Vecchione, Connors & Cano LLP

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Workers' Compensation Board Announced a New Policy Concerning §32 Agreements

On October 8, 2021 the [Workers' Compensation Board](#) [announced a new policy concerning §32 agreements](#). The policy impacts §32 agreements in which the parties to the agreement had additional agreements. As of December 6, 2021 all §32 agreements will now require the completion of an affirmation or affidavit indicating that there are no side agreements between the claimant the employer and/or workers' compensation carrier.

The affirmation or affidavit that is required to be submitted to the Workers' Compensation Board is form [C-32AF](#). The form is to be signed by the same person who signed the §32 agreement on behalf of the employer and workers' compensation carrier. If the person signing is an attorney, they use the affirmation. A non-attorney must use the affidavit and have it notarized.

The key language in the form is

the Agreement contains all the terms and conditions agreed to by and between the claimant and the carrier, and that no separate agreements or contracts have been entered into by the parties that are not reflected in the agreement submitted to the Board for approval. I further affirm that the carrier/self-insured employer has not, as a condition to the execution of the Section 32 Agreement, required that claimant enter into a

separate agreement, now or in the future, waiving claims or rights that claimant may have in another jurisdiction or forum.

Although this is directed at general releases in which a claimant waives rights in other forums, it is clear that the intent of the new procedure is to also cover letters of resignation, that an employer may want as part of any §32 agreement.

In its announcement the Workers' Compensation Board indicated that the inclusion of a general release signed by a claimant is not *per se* invalid. When properly drafted and included either in the actual §32 agreement or as an addendum to the §32, the inclusion of the general release can still result in an approved §32 settlement to resolve the workers' compensation claim and potentially protect the employer from further litigation in other forums.

From the Workers' Compensation Board's announcement of this new policy, it appears that the Workers' Compensation Board believes that employers and carriers have been taking advantage of claimants by having them sign a general release. The Workers' Compensation Board going forward will be making a judgment if the adding of a general release to a §32 agreement makes the §32 agreement "unfair, unconscionable, improper as a matter of law, or the result of an intentional misrepresentation of material fact." If the Law Judge at the Workers' Compensation Board that the §32 agreement comes before believes any of these factors are present, they will not approve the §32 agreement.

If the agreement is not approved an appeal of the Law Judge's decision can be filed for review by a Board Panel. This option to obtain approval will likely only be effective if an appeal is also filed on behalf of the claimant seeking approval of the §32 agreement. If the claimant does not join in seeking approval on appeal, it is unlikely that a Board Panel would reverse the decision of the Law Judge.

In order to have a §32 agreement approved that contains or has an addendum containing a general release the claimant must be

given fair consideration for signing the general release. This will mean showing that the claimant is receiving something of value in return for signing the general release. This can be accomplished in one of two ways.

The first way would be after reaching an agreement with the claimant on the indemnity value of the §32 agreement to shift money from the §32 agreement and having it reflect consideration in return for the general release. For example, if there is an agreement for a \$100,000.00 §32 agreement, the payments could be shifted to reflect \$80,000.00 for the §32 and \$20,000.00 for the general release. This could possibly make the \$20,000.00 taxable income for the claimant. This would differ from paying the full \$100,000.00 as the §32 which in most circumstances can be drafted so that it is not taxable income. This method could also result in a Law Judge finding that the amount of money for §32 agreement is too low, making the agreement “unconscionable” and having the agreement disallowed. There could also cause push back from the claimant’s bar if they are going to be limited to a fee on the \$80,000.00 as opposed to the \$100,000.00.

The other method would be after reaching the agreement to settle the workers' compensation claim for \$100,000.00, as in the example above, that additional money be paid out to cover the general release. In this scenario the general release in the §32 agreement or as an addendum would indicate that the claimant is being paid an additional sum of money in return for signing the general release. This is probably the safer method to resolve these cases. The offer to the claimant should indicate that there is a specific offer to settle the workers' compensation claim for a certain amount and that the employer and carrier will pay an additional amount over and above that amount in return for the claimant signing a general release.

Employers should be aware that the signing of a general release does not prevent the claimant from filing a claim before agencies such as the Equal Employment Opportunity Commission (EEOC). This is much like the situation with a workers' compensation claim. A claimant can still file a lawsuit against their employer. The question is whether the lawsuit will be successful. If a lawsuit is filed, the answer to the lawsuit can raise workers'

compensation as a defense. In the EEOC setting the general release can be a defense to the claim. However, [the EEOC or court will look at the terms of the general release](#) to see if “the employee’s waiver was knowing and voluntary by looking at the totality of circumstances surrounding its execution.” If the release was signed in a knowing and voluntary fashion the release will be upheld.

As for letters of resignation, in order for a §32 agreement to be approved this is much easier.

The first thing that must be determined is if the claimant is still an employee. If they are no longer an employee, the issue has already resolved and there would be no reason to include any such language. Doing so will only add unnecessary extra scrutiny of the agreement by the Workers' Compensation Board.

It also unlikely that given the new scrutiny that the Workers' Compensation Board will be giving to §32 agreements that it would approve one that includes resignation language. It would be better to include language that states upon approval of the §32 agreement the claimant and employer agree that there is no longer an employer - employee relationship present between the parties. This way the claimant has not resigned in order to receive the §32 settlement and it should not run afoul of the Workers' Compensation Board new policies.

Language that states that a claimant will not apply for a job with the employer in the future should also be avoided in either the §32 agreement or the general release. Such language could be determined to violate Workers' Compensation Law §125 that prohibits discrimination against a person who has previously received benefits under the Workers' Compensation Law. If a Law Judge believes such language to be “improper as a matter of law” the agreement could be disallowed by the Workers' Compensation Board.

As always Vecchione, Vecchione, Connors & Cano, L.L.P. is here for you to consult with you in all stages of a §32 agreement from initial evaluation of a potential §32 settlement, through drafting

of the agreement and up to approval of the §32 agreement by the Workers' Compensation Board.

If you have any questions on these issues, please feel free to contact us at info@vecchionelaw.com.

We welcome your feedback and look forward to providing information on topics that are of interest to you. If you have any questions about the information provided, or if you have a workers' compensation matter that you need assistance with, we are available to speak with you. Please contact us at yvccnews@vecchionelaw.com.

Vecchione, Vecchione, Connors & Cano, LLP

147 Herricks Road, Garden City Park
NY 11040 United States

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