

Vecchione, Vecchione, Connors & Cano LLP

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WORKERS' COMPENSATION BOARD PROVIDES CLARIFICATION OF THE 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 parties had additional agreements. We previously issued a bulletin regarding this in October 2021. In that bulletin we noted that 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 the workers' compensation carrier.

In our prior bulletin we explained that this change in policy was targeted at general releases and letters of resignation that were often made as a condition to the carrier resolving the claim on a §32 agreement. We provided examples of how to work with the new requirements of the Board to get the agreements containing general releases and/or resignations letters approved. We also explained the [C-32AF](#) form which is the new form to be signed by the person who signed the §32 agreement. The form requires that the person signing the agreement verify that the agreement contains all the terms and conditions and that there are not any separate agreements that are not submitted to the Board for approval. The form has an affirmation if the person signing is an attorney, or an affidavit which requires notarization if the person signing is not an attorney.

The focus of this special bulletin is the clarification issued by the [Workers' Compensation Board on September 30, 2022](#) regarding the new policies surrounding §32 agreements and additional agreements. In the clarification the Board quoted the following two parts of the [October 8, 2021 bulletin](#):

- Moreover, although a provision in a Section 32 Waiver Agreement whereby the claimant provides a general release to all claims against the carrier/self-insured employer in any forum or jurisdiction is not per se invalid, because of the disparity in bargaining power and financial resources between individual claimants and insurance carriers/self-insured employers, such terms will be given significant scrutiny by the Board. And;
- Based on the circumstance of the particular claim, the terms may be found to be unfair, unconscionable, improper as a matter of law, or the result of an intentional misrepresentation of a material fact, resulting in the disapproval of the agreement.

The clarification then addressed three types of additional agreements and clarified how they will now be addressed when contained in an §32 agreement. The Board specified three categories of additional agreements: release of related claims, release of unrelated claims, and agreements to resign/never reapply.

For the **release of related claims**, which the Board defined as claims or potential claims which “arise out of the same nucleus of operative facts”, the Board stated that a release/waiver of such claims, even if outside of the Board’s jurisdiction, was permissible as long as separate consideration was given for the release. This is true even if the release/waiver was not specific as to what those claims are. The Board was clear that §32 agreements would have to specifically delineate the consideration being paid in exchange for the general release of related claims or waiver of related claims, even if arising out of the same nucleus of operative facts. The Board was also clear that if the §32 agreement does not separately delineate the consideration being paid in exchange for the release/waiver of related claims, then the Board will not approve the agreement even if the claims arise out of the same facts. The Board reserved the right to disapprove agreements with

releases/waivers of related claims, even with separately delineated consideration, if the specific factual circumstances of the particular claim lead the Law Judge or the Board to find that the provision is unfair, unconscionable, improper as a matter of law or an intentional misrepresentation of a material fact.

For the **release of unrelated claims**, the Board clarified that it has higher standards for what it takes for such agreements to be approved as part of a §32 settlement. For the release of unrelated claims the Board clarified that there are two separate requirements:

1. that the claims being released/waived must have already been commenced; and
2. the claim must be released/waived in a way that specifically identifies the claim which has already commenced.

General releases of non-specific, unrelated claims will not be approved by the Board regardless of if separate consideration is paid for such a release/waiver. This means that blanket waivers and general releases of any and all claims against the employer, or carrier, or both, will not be approved by the Board regardless of separate consideration and cannot be contained as part of §32 agreements going forward. This also means that claims that have not commenced, even if specifically identified in such release/waiver, cannot be released/waived as part of a §32 agreement. If carriers do want to have claimant's release/waive unrelated claims against the employer and carrier, they must have already commenced and they must be specifically named in the release/waiver. In some situations, this may mean that the carrier or employer would want the claimant to commence the unrelated claim so that the unrelated claim can be released/waived as part of a §32 agreement. Even if the unrelated claim is commenced and specifically identified the §32 agreement must still specifically identify separate consideration that is being paid for the release/waiver of the specifically identified, unrelated, already commenced, claim. The Board reserved the right to disapprove agreements with releases/waivers of unrelated claims, even if such releases/waivers follow the two requirements above and contain separately delineated consideration, if the specific factual circumstances of the particular claim lead the Law Judge or the Board to find that the provision is unfair, unconscionable,

improper as a matter of law or an intentional misrepresentation of a material fact.

For **agreements to resign/never reapply**, the requirements are similar to that for the release of related claims. The §32 agreement containing such an agreement must specifically delineate what additional consideration is being paid to the claimant for such agreement to resign/never reapply. This has to be separate from the consideration being paid as part of the §32 agreement. An §32 agreement that does not separately delineate the consideration being paid for the agreement to resign/never reapply will not be approved by the Board. The Board reserved the right to disapprove §32s with agreements to resign/never reapply even if such agreements contain separately delineated consideration, if the specific factual circumstances of the particular claim lead the Law Judge or the Board to find that the provision is unfair, unconscionable, improper as a matter of law or an intentional misrepresentation of a material fact.

As we mentioned in our prior bulletin, language that states that a claimant will not apply for a job with the employer in the future should be avoided unless absolutely necessary, in either the §32 agreement, a release/wavier of claims, or an agreement to resign, as 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. We also recommend completely avoiding agreements to resign/never reapply if the claimant is no longer an employee. This is because if the claimant is no longer an employee then the issue is already resolved and there would be no reason to add unnecessary extra scrutiny of the §32 agreement by adding an agreement to resign or an agreement to never reapply.

We previously specified that there would be two ways to meet the requirement for separately delineated consideration by either shifting money from the total amount of the §32 agreement that was agreed or by paying additional money for the release on top of the §32 agreement. In the prior bulletin we provided examples of how this would work. We also noted that

the second method, adding money for the release on top of the §32 agreement, would be the one the Board would be more likely to approve as there is a chance that if the first method of shifting money from the total amount of the §32 agreement is used, the Board will find that the amount of money that is actually allocated to the §32 agreement is too low making the agreement unconscionable and disallow the agreement.

If an 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.

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 vvccnews@vecchionelaw.com.

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