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October 8, 2021

**MEMORANDUM TO ALL CLIENTS
OF STEWART, GREENBLATT, MANNING & BAEZ**

**WORKERS' COMPENSATION BOARD'S NOTIFICATION THAT
SECTION 32 WAIVER AGREEMENTS MUST INCLUDE ALL
TERMS AND CONDITIONS AGREED UPON BY THE PARTIES
ESPECIALLY GENERAL RELEASE OF LIABILITY AND
RESIGNATION FROM EMPLOYMENT**

The Board has issued an update indicating that it has come to their attention that cases are settling pursuant to Section 32 Waiver Agreements which do not include all terms and conditions agreed upon by the parties. Specifically, the Board references General Releases of liability required as a condition to entering into a Section 32 Waiver Agreement. It is the Board's position that any such separate agreements must be included in the terms of the Section 32 Waiver Agreement.

Pursuant to Section 32(a) of the Workers' Compensation Law, a Waiver Agreement would not be binding on the parties unless it is approved by the Board. Pursuant to Section 32(b) the Board will not approve a Waiver Agreement if it determines that the terms are unfair, unconscionable, improper as a matter of law or was the result of intentional misrepresentation of material fact, or if one of the parties timely withdraws from the agreement.

The Board emphasizes that consistent with the statute, the Board will be unable to determine whether a proposed Section 32 Waiver Agreement is unfair, unconscionable, improper as a matter of law or was the result of intentional misrepresentation of fact, unless all the terms and conditions agreed upon by the parties are contained in the Waiver Agreement.

Accordingly, the Board has indicated that any Section 32 Waiver Agreement submitted for approval which does not contain all the terms agreed upon by the parties will be disapproved.

Additionally, the Board has announced that effective December 6, 2021, it will mandate that all Section 32 Waiver Agreements submitted to the Board for approval must accompany an Affirmation or Affidavit executed by the person who signs the Agreement on behalf of the carrier/self-insured employer, or its designated third-party administrator, affirming under penalty of perjury that the Agreement submitted to the Board for approval contains all the terms and conditions agreed to by and between the claimant and the carrier's/self-insured employer, 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 (Form C-32AF).

Interestingly, the Board Update indicates that a Section 32 Waiver Agreement that contains language releasing all claims against the carrier/self-insured employer in any other forum or jurisdiction will not

be considered per se invalid. However, those terms will be given "significant scrutiny by the Board".

Based upon our review of both the Board Update and Form C-32AF (copies attached), there is little doubt the Board will also consider resignation agreements as falling under this requirement.

Accordingly, going forward, the Workers' Compensation Board will review Section 32 Waiver Agreements and will scrutinize General Releases of Liability/Resignation of Employment provisions to determine whether any of those terms are unfair, unconscionable, improper as a matter of law or was the result of intentional misrepresentation of material fact as provided pursuant to Section 32(b) of the Workers' Compensation Law.

Based upon our review of the Board's Update, this does not change the current practice other than the fact that the terms of the General Release/Resignation from Employment now have to be included in the body of the Section 32 Waiver Agreement and the Board will be scrutinizing those terms in accordance with Section 32(b) of the Workers' Compensation Law.

Accordingly, defense counsel, claimant's attorneys and claimants will have to be prepared for questions by the Board regarding the General Release/Resignation of Employment Terms contained in the Section 32 Waiver Agreement acknowledging their understanding and acceptance of those terms which should not be considered unfair, unconscionable, improper as a matter of law and agreeing that there has been no intentional misrepresentation of fact.

Pursuant to the Board's Update, the Affirmation/Affidavit has to be filed with all Section 32 Waiver Agreements beginning December 6, 2021. However, it is our considered opinion that we should immediately start to incorporate into all Section 32 Waiver Agreements terms including General Release of Liability and Resignation of Employment.

Should you have any questions or should you wish to discuss this matter, please contact the undersigned at your convenience.

Very truly yours,
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Section 32 Waiver Agreements/General Release of Liability

New York State Workers' Compensation Board sent this bulletin at 10/08/2021 09:00 AM EDT



Section 32 Waiver Agreements/General Release of Liability

It has come to the attention of the Workers' Compensation Board (Board) that some carriers/self-insured employers and their representatives have, as a condition of entering into a Section 32 Waiver Agreement, insisted that claimants execute a separate general release of liability, the terms of which are not included in the agreement submitted to the Board for approval.

This practice is at odds with the requirement that all the terms and conditions agreed to by the carrier/self-insured employer and the claimant be included in the Section 32 Waiver Agreement submitted to the Board for approval. A Section 32 Waiver Agreement will not be binding on the parties unless it is approved by the Board (Workers' Compensation Law [WCL] § 32[a]).

The Board will approve a Section 32 Waiver Agreement unless it finds that the agreement is unfair, unconscionable, improper as a matter of law or was the result of an intentional misrepresentation of material fact, or if one of the parties timely withdraws from the agreement (WCL § 32[b]).

For the Board to be able to determine whether a proposed Section 32 Waiver Agreement is unfair, unconscionable, improper as a matter of law or was the result of an intentional misrepresentation of material fact, a proposed agreement submitted to the Board for review must contain all the terms and conditions agreed to between the parties. Therefore, the Board will disapprove a Section 32 Waiver Agreement if it becomes aware that as a condition of entering into the waiver agreement, the parties entered into a separate agreement or contract that contains terms which are not included in the agreement submitted to the Board for approval.

Beginning on December 6, 2021, all Section 32 Waiver Agreements submitted to the Board for approval must be accompanied by an affirmation or affidavit executed by the person who signs the agreement on behalf of the carrier/self-insured employer, or its designated third-party administrator, affirming under penalty of perjury that the agreement submitted to the Board for approval contains all the terms and conditions agreed to by and between the claimant and the carrier/self-insured employer, 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 (*Carrier's / Self Insured Employer's Affirmation (Form C-32AF)*). Until further notice *Form C-32-AF* will be on the list of forms for which the requirement for original handwritten signatures have been suspended during the COVID-19 emergency.

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.

Based on the circumstances 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 material fact, resulting in the disapproval of the agreement.

More information

For more information, visit the updated [Section 32 page on the Board's website](#) or email OfficeofGeneralCounsel@wcb.ny.gov with questions.



Carrier's/Self-Insured Employer's Affirmation

Claimant: _____

WCB Case Number: _____

Carrier/Self-Insured Employer: _____

I, _____, do hereby affirm under penalty of perjury that I have signed the Section 32 Agreement submitted to the Board for approval in the above-referenced claim on behalf of the carrier/self-insured employer, or its designated third-party administrator, and that 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.

Signature: _____ Date: _____

Print Name: _____

The person who signed the Section 32 Agreement on behalf of the carrier/self-insured employer is required to execute this form. The Carrier's/Self-Insured Employer's Affirmation may only be used by a duly licensed attorney. If not an attorney, they are required to execute the Carrier's/Self-Insured Employer's Affidavit on the second page of this form and the Affidavit must be notarized.

Carrier's/Self-Insured Employer's Affidavit

Claimant: _____

WCB Case Number: _____

Carrier/Self-Insured Employer: _____

State of New York: County of _____ :

I, _____, being duly sworn, deposes and says: I have signed the Section 32 Agreement submitted to the Board for approval in the above-referenced claim on behalf of the carrier/self-insured employer, or its designated third-party administrator, and that 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.

Signature: _____ Date: _____

Print Name: _____

Sworn to before me this _____ Day of _____

Signature: _____

Notary Public

Print Name: _____