

Resignation from Employment and Avoidance of Retaliation Claim in a Workers' Compensation Settlement.

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The issue of whether or not to obtain a resignation of employment in conjunction with resolution of a workers' compensation claim often arises due to an employer's desire to limit future liability and terminate an employee's employment as part of overall claim settlement. The ongoing employment of a claimant after settlement of a workers' compensation claim results in the employer's exposure to potential future claims. Notwithstanding the benefits of a general release and resignation from employment ("general release"), employers and/or insurance carriers are oftentimes reluctant to obtain the same for fear of allegations of retaliation by the claimant.

This Commonwealth has reiterated since the turn of the 20th century that an employer may terminate an employee for any reason, unless restrained by contract¹ or in situations contrary to public policy.²

The Pennsylvania Supreme Court recognized that the exception to the employment at-will rule should be applied in only the narrowest of circumstances.³ However, it was determined that an employer who fires an employee in retaliation for bringing a workers' compensation claim violates the public policy of this Commonwealth and can be liable at common law for wrongful discharge. As a general proposition, there is a strong presumption of at-will employment. Additionally, governmental immunity to a potential retaliatory discharge claim may exist.⁴

To avoid a potential retaliatory discharge claim related to the claimant's resignation as part of a workers' compensation settlement, the intent to include the release of all retaliation claims must be included as part of the general release of the agreement. However, the execution of a general release is not addressed in the statute or regulations with respect to the Pennsylvania Workers' Compensation Act.

In fact, the Pennsylvania Workers' Compensation Act dictates the resolution of a workers' compensation claim and does not grant a Workers' Compensation Judge jurisdiction to render a Decision with respect to or incorporate the general release as part of the Compromise & Release Agreement.⁵ Oftentimes, a Workers' Compensation Judge will refuse to hear testimony with respect to the claimant's resignation from employment or to include the general release/resignation letter as an exhibit identified for purposes of the legal record.

¹ *E.g.*, Henry v. Pittsburgh & Lake Erie Railroad Co., 21 A. 157 (Pa. 1891)

² Clay v. Advanced Computer Applications, Inc., 559 A.2d 917 (Pa. 1989); Paul v. Lankenau Hospital, 569 A.2d 346 (Pa. 1990).

³ Shick v. Shirey, 716 A.2d 1231 (Pa. 1998)

⁴ 42 Pa. C.S. § 8542.

⁵ Section 449, 77 P.S. § 1000.5, 34 Pa. Code § 131.57.

Therefore, to avoid a potential claim for retaliation in Pennsylvania, a general release separate and apart from the workers' compensation settlement should be utilized. The separate retaliatory discharge claim should be specifically addressed through a general release to ensure that the claimant's manifested intent releasing a retaliatory discharge claim is outlined. An employer is not precluded from disposing of retaliatory discharge claims through a general release but the language must be unambiguous.

Additionally, in practical terms the general release should address several issues to avoid future pitfalls with respect to the execution of the document. A properly drafted general release should address the following issues:

- The claimant is voluntarily resigning his/ her employment with the employer and that it is the mutually desire of both parties to settle and terminate any and all disputes.
- The parties, for separate consideration, intend to be legally bound, forever release and discharge the employer, its parent and affiliated corporate entities and its and their officers, directors, employees and agents, its and their successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions.
- The resolution of any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws including the Pennsylvania Human Relations Act; Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act; the Americans with Disabilities Act; and/ or the Employee Retirement Income Security Act of 1974; or for any other claims for discrimination including, but not limited to, those one the basis of race, color, religion, sex, pregnancy, national origin, age, mental/ physical handicap and/ or pension employee benefits, and any and all suits in tort, including but not limited to any claims for misrepresentation, defamation, interference with contract or with prospective economic advantage, intentional and negligent infliction of emotional distress, and/ or negligence, and/ or any and all claims for additional compensation or damages of whatsoever kind arising in connection with claimant's employment at and/ or the separation of employment from the employer.
- The claimant should further agree that the claimant further agrees that neither he/she, nor any person, organization or other entity on her behalf, will file, charge, claim, sue or cause or permit to be filed with any State or Federal court or agency any action or proceeding for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring any time in the past up to the date of the general release or involving any continuing effects or any acts or practices of the employer.
- Separate consideration should be provided to the claimant in exchange for claimant's resignation of employment. This consideration should be an amount separate and apart from the workers' compensation proceeds and should not be paid by the workers'

compensation carrier. A nominal amount, such as \$100.00, is appropriate for purposes of settlement. Likewise, the employer should issue a Form 1099 at the appropriate time reflecting the payment made to the claimant.

- Expressly state that employer does not have and will not have any obligation to provide the claimant at any time in the future with any payments, benefits or considerations other than those recited in the agreement. Of course, one exception is a benefit to which the claimant has a vested right, such as retirement or pension benefits.
- Detail that as of the date of claimant's resignation, the claimant shall provide no services to the employer of any kind and that the claimant agrees not to seek re-employment with the employer or any of its subsidiary, affiliate or related entities. However, if the claimant is already employed by an entity acquired by or newly affiliated with the employer at the time of such acquisition or affiliation, the claimant will not be in violation of this paragraph if she remains employed by such entity.
- Acknowledgement that the general release shall not be construed to be an admission of any violation of any duty owed by the employer to the claimant and that claimant's resignation and the execution of the general release are made voluntarily to provide an amicable conclusion of claimant's employment.
- The claimant should be given a period of at least 21 days within which to consider the general release and the claimant's signature prior to the expiration of 21 days constitutes an irrevocable waiver of that period under the Older Workers Benefit Protection Act.
- The claimant should be given a period of at least 7 days following execution of the general to revoke the agreement.

The detailed drafting of the Compromise & Release Agreement in conjunction the general release also provides a defense against a claimant's potential attempts to set-aside the settlement on the premise of fraud, deception, duress or mistake.⁶

It would appear that similar principles can be followed in jurisdictions other than Pennsylvania to ensure a possible claim for retaliation is avoided.⁷ However, regardless of the jurisdiction, it is recommended in all situations that legal counsel in the respective jurisdictions is consulted to ensure all issues are properly addressed with respect to the claimant's intent to include the release of retaliation claims against the employer.

⁶ N. Penn Sanitation, Inc. v. WCAB (Dillard), 850 A.2d 795 (Pa. Cmwlth. 2004).

⁷ *E.g.*, Bruner v. GC-GW, Inc., d/b/a Jackson Cook, 880 So. 2d 1244 (1st DCA 2004)(Eleventh Circuit case holding the parties must show an intent to include the release of retaliation claims as part of the general language of the agreement in a Florida workers' compensation settlement agreement).