



Liability Waivers in the Age of COVID-19

The potential for COVID-19 exposure in the workplace or elsewhere may yield litigation risks for businesses. In response, many businesses are hoping that liability waivers, hold harmless agreements and indemnification provisions will protect them from potential COVID-19 related liability claims. The question everyone wants to know is: are these agreements enforceable? Will they protect my business? As you may have guessed, the answer is - it depends.

Given the unprecedented nature of the COVID-19 pandemic, no courts have yet evaluated liability waivers in this context. This makes it almost impossible to determine with certainty how courts will evaluate these waivers in the future. Nonetheless, a carefully-drafted liability waiver may be considered by all businesses as a matter of caution and a potential layer of added protection from lawsuits. Waivers can be a proactive step for businesses to begin reopening with confidence. However, each business must consider the potential impact that requesting such waivers may have upon its employees and patrons in terms of good will and the willingness to work for or patronize an establishment requesting such an agreement. Depending upon the type of business, the ability to request such waivers may also be difficult.

Generally, liability waivers are a contract between a business (“Releasee”) and a “Releasor” who in some way comes into contact with the business. The Releasor could be a customer, employee, or student. By signing the contract, the Releasor gives up rights – usually the right to sue the Releasee – in exchange for the right to come into contact with the business. The scope of the rights that are waived are determined by the contract.

The most important aspect to drafting a waiver is to ensure that the Releasor understands what rights are being released. This information must be clear and easy to read. In the age of COVID-19, any potential exposure or risk of infection should be expressly recognized in the waiver.

The next step is to ensure that your state will recognize the scope of the waiver (i.e., allow the Releasor to surrender certain rights). This is largely a state by state evaluation. Some states take a broad view based on freedom of contract. However, typically the Releasee cannot waive liability for grossly negligent, reckless, or intentionally inflicted harms.

In terms of the current pandemic, businesses are required to follow certain guidelines in terms of maintaining social distancing, wearing masks, cleaning and disinfecting their premises, etc. Failure to perform these requisite tasks may very well be considered the type of conduct which would render a waiver invalid.

Connecticut courts generally take a narrow view of such waivers, and have held that a liability waiver for a Releasee's negligent conduct is void against public policy in the recreational context. Indeed, any contract that violates public policy is void. Connecticut has also held that, in the employment context, an employee's release of injuries as a result of the employer's negligence is void as against public policy.

State legislatures may step in at some point in the future and render liability waivers unnecessary by passing legislation which would indemnify or provide businesses with immunity for COVID-19 related injuries suffered by employees or customers. There is some national momentum on this issue, too. In Connecticut, the Higher Education Subcommittee recently recommended that the state legislature pass legislation providing immunity for all colleges and boarding schools that reopen in the fall. In New Jersey, Senate Bill 2333 provides immunity for healthcare professionals and hospitals that act in good faith to treat COVID-19 related illness; Governor Lamont has also issued an Executive Order 7U, which provides similar protections in Connecticut. The Public Readiness and Emergency Preparedness ("PREP") Act, also provides liability protections (except for willful misconduct) for those that undertake certain "countermeasures" to combat COVID-19. One of the stated reasons for a government's reluctance to provide blanket immunity for businesses through legislation, however, is the potential that such protection will serve as a disincentive for businesses to comply with hygiene and other reopening requirements.

UKS will continue to monitor state and federal law as issues related to liability waivers and immunity continue to develop.

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