

COVID-19 Waivers: Can They Reduce Your Business Risk?

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As states begin to reopen and loosen restrictions on public gatherings and business closures in response to the COVID-19 pandemic, business managers, event coordinators, and property owners are seeking to get back to a semblance of normalcy. However, at least in the near term, it appears that business will not be business-as-usual. Social distancing, personal protective equipment, and enhanced cleaning measures will be the new norm.

There is a dizzying array of local, state, and federal guidance that has been issued on maintaining safe business practices aimed at reducing the transmission of the virus. Businesses will seek to comply with these requirements as they reopen, and in doing so, will be concerned about potential liability issues, especially with regard to claims made by guests for transmission of the novel coronavirus that may be traced to an interaction that occurred while the guest was on the business's premises. While there have been certain legislative liability shields extended to health care-related industries and workers, including in Wisconsin, there have only been preliminary discussions of legislation that would create a liability shield for other businesses during this reopening phase of the pandemic. It is unclear whether such legislation will be passed and, if it passes, whether liability protection will be predicated on businesses meeting certain thresholds for following local, state, and federal health guidelines. COVID-19 waivers are new and have not yet been interpreted by the courts. It is possible that courts will rule that such waivers are against public policy.

Until there is further guidance, businesses may wish to proactively limit potential liability on their own including by requiring guests and potential customers to sign liability waivers (this article does not apply to waivers for employees). While in Wisconsin the actual effectiveness of such liability waivers might be limited, a well-crafted liability waiver that is drafted to include requirements found in Wisconsin case law may increase the likelihood of enforceability.

In general, liability waivers are not favored by Wisconsin courts. Although liability waivers are not automatically unenforceable, Wisconsin courts will closely examine the liability waiver against the public policy considerations and strictly construe it against any businesses looking to rely on it. In particular, there are three specific aspects that the Supreme Court of Wisconsin has noted will be examined when evaluating the enforceability of a lien waiver:

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- Is the waiver too broad or all-inclusive?
- Is the waiver language obvious and does it make clear to the signer the significance of the document being signed?
- Was there any meaningful opportunity for the signer to negotiate the language that provides the liability release?

To satisfy the first factor, a well-drafted liability waiver made in response to the COVID-19 pandemic should be tailored to the liability concern at hand: transmission of the novel coronavirus on the business premises and the potential for the transmission and resulting illness. The waiver used should not be a generic, cookie-cutter form. In order to increase the chance that the waiver will be effective, the waiver language should focus solely and specifically on the risks and dangers associated with COVID-19. Its provisions should hone in on the risk of receiving an infectious disease while on the businesses premises. In this case, less is more. The waiver need not cover other risks of injury or harm as including broader language may actually blunt the clarity, and thus potential force, of the waiver.

It may be advisable to include language, an attachment or website link from the Centers for Disease Control and Prevention or Wisconsin Department of Health Services that highlights the risks of the disease and explains how virus transmission occurs and increases in likelihood when an individual enters a place open to the public. While such information may seem obvious, for purposes of the liability waiver, the higher degree of focus on the specific danger to be waived lessens the chance a court will set the waiver aside as unenforceable.

As part of this first factor, the law is clear that a waiver cannot release a party from liability for its reckless or intentional conduct—as opposed to mere negligent conduct. The liability release provision should avoid general “any and all liability” language that may be interpreted to include the business’s or its employees’ intentional or reckless conduct. The inclusion of broad, ambiguous language that unintentionally covers reckless or intentional conduct jeopardizes the enforceability of the entire waiver.

For the second factor, the waiver should be drafted to make it abundantly clear what the individual is signing. It should be obvious to any guest or patron that the document being signed is a liability waiver relating to the risks and harm associated with the COVID-19 disease. The average reader should immediately understand (and indeed this may be explicitly typed on the document) that the waiver to be signed is an important legal document that affects that signer’s legal right to recourse. The goal is to limit an argument by a potential claimant that he or she either did not know or understand the purpose or significance of the document.

The final factor that will impact enforceability of a liability waiver is perhaps the most problematic: the signer’s opportunity to bargain or negotiate terms. Wisconsin appears to be the only state that examines the actual opportunity by

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the signer to negotiate the waiver, rather than reviewing the relative bargaining power between the parties, when considering the effectiveness of a waiver. For most businesses, particularly retail and restaurants, this will be a difficult factor to meet given the volume of potential customers coming onto the premises.

Finally, apart from the document itself, the circumstances surrounding signing of the waiver will bear on this third enforceability factor. An otherwise effective liability waiver could very well be rendered ineffective if the employee or representative handing out and explaining the waiver makes statements that either diminish the importance of the waiver or dampens the signer's opportunity to ask questions concerning the document. One can be sure that any attorney retained by a signer will certainly explore both the business's instructions given to employees charged with obtaining waiver signatures as well as the actual statements made at the time of signing.

Given the Wisconsin court's position relating to enforceability of liability waivers, there is no guarantee that even the most carefully crafted waiver will be effective to neutralize all risk and liability from claims relating to inadvertent transmission of the virus on a business's premises. Therefore, any business considering using liability waivers in an effort to curb the uncertainties and risk associated with resuming operations during the COVID-19 pandemic must ensure that the waiver meets the general principles of liability waivers established by Wisconsin law.

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